

TRANSFORMING THE SYSTEM



ELIMINATE THE

Criminalization of Poverty

Over 46 million people in the United States face economic obstacles that keep them living in poverty.⁴⁵⁸ Instead of increasing opportunities to succeed, our law too often funnels low-income people into the criminal justice system. Debtors' prisons—the jailing of people for nonpayment of court-imposed fines or fees without procedural protections—have emerged around the nation, despite clear Supreme Court precedent holding that such prisons violate constitutional rights to due process and equal protection of the law.⁴⁵⁹

Low-income people are saddled with crippling high fines and fees for minor traffic tickets, civil offenses, and even misdemeanor crimes that are not normally punishable with jail time. When they are unable to pay, they experience devastating consequences, including incarceration, that affect their future employability, family stability, and communities.⁴⁶⁰ People are also criminalized for homelessness through overly broad local vagrancy, loitering, and encampment laws that lead to ticketing, fines, and even arrest.⁴⁶¹

Additionally, people who are sentenced to jail for their crimes are frequently charged fees related to their incarceration and a host of other penalties that lead to the escalation of their fines and fees during their prison terms.⁴⁶² As a result, many released persons, who have already paid their “debt” to society by serving their time in prison, face overwhelming and growing debt burdens. A 2015 Brennan Center report found that 43 out of 50 states have statutes that charge

458 Carmen DeNavas-Walt & Bernadette D. Proctor, *Income and Poverty in the United States: 2014*, U.S. Census Bureau (Sept. 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>.

459 See *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that individuals cannot be incarcerated for the inability to pay fines); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons> (finding “indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage. In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them. These sentences are illegal, create hardships for men and women who already struggle with re-entering society after being released from prison or jail, and waste resources in an often fruitless effort to extract payments from defendants who may be homeless, unemployed, or simply too poor to pay.”).

460 Eisen, *supra* note 25 (“Every aspect of the criminal justice process has become ripe for charging a fee. In fact, an estimated 10 million people owe more than \$50 billion in debt resulting from their involvement in the criminal justice system. In the last few decades, additional fees have proliferated, such as charges for police transport, case filing, felony surcharges, electronic monitoring, drug testing, and sex offender registration. Unlike fines, whose purpose is to punish, and restitution, which is intended to compensate victims of crimes for their loss, user fees are intended to raise revenue.”).

461 *A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, National Coalition for the Homeless, <http://www.nationalhomeless.org/publications/crimreport/allcities.html> (accessed 7 July 2016).

462 Ibid.

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incarcerated individuals “room and board” fees.⁴⁶³ These debts are often sold to debt collection agencies that charge additional fees and interest on unpaid fines and fees, and adopt aggressive collection practices toward individuals who have only recently been released from prison and are struggling to regain their footing in society.⁴⁶⁴

The criminalization of the poor is exacerbated by state and local governments’ use of for-profit probation providers to collect unpaid fines and fees.⁴⁶⁵ When courts fail to afford counsel to people facing jail time for nonpayment, they may also violate constitutional rights.⁴⁶⁶

These practices create a perpetual state of financial servitude for many who have already served their time.

Eliminating the criminalization of poverty

The Supreme Court has held that no person should be jailed for nonpayment of fines they simply cannot afford.⁴⁶⁷ The Constitution requires that people who are charged with nonpayment of fines and fees be provided a hearing on their ability to pay prior to being punished with jail time. It also requires that people are afforded counsel when sentenced to jail or a suspended jail sentence. States and local governments should take steps to comply with this mandate.

To address these issues, the **Department of Justice (DOJ)** should:

- ▶ Provide technical support and resources for courts and support for courts to promote compliance with constitutional standards;⁴⁶⁸

463 See *Ibid.* at 4.

464 See *Ibid.* at 8.

465 The task of determining whether an individual can pay fines has frequently been outsourced to for-profit probation companies that often recommend that individuals be incarcerated for failure to pay fees or fines. Human Rights Watch, *Profiting from Probation: America’s “Offender-*

466 The Sixth Amendment of the U.S. Constitution provides the right to counsel while the Fourteenth Amendment provides the right to due process of the law prior to being deprived of one’s life, liberty, or property.

467 *U.S. v. Salerno*, 481 U.S. 739, 747–51 (1987).

468 See Letter from the Department of Justice to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices, Department of Justice (Mar. 1, 2016), <https://www.justice.gov/crt/file/832461/download>, Department of Justice, *Smart on Crime: Reforming The Criminal Justice System for the 21st Century* (August 2013).

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- ▶ Investigate and bring enforcement actions against debtors' prisons that touch on areas in which the DOJ has authority, e.g. juveniles;⁴⁶⁹
- ▶ "[I]ssue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances [including panhandling ordinances], intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern and practice investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees."⁴⁷⁰

Local and state governments should do the following:

- ▶ Repeal legislation authorizing the imposition of user fees, including public defender fees;
- ▶ Repeal legislation imposing mandatory "assessments" on individuals accused of criminal offenses, traffic offenses, and civil offenses;⁴⁷¹
- ▶ Review municipal and state court procedures and rules to ensure that fine and fee collection comports with constitutional protections for due process and equal protection of the law, so that people are not jailed for nonpayment of civil fines, fees, and/or penalties they cannot afford to pay without prior procedural protections;⁴⁷²
- ▶ Ensure that counsel is appointed at the sentencing and post-sentencing enforcement stage whenever a person faces incarceration for nonpayment of a fine or fee;
- ▶ Eliminate incarceration and jailing for civil penalties and fines;⁴⁷³
- ▶ Establish a state and local taskforce to identify court practices that incarcerate indigent defendants for poverty and make recommendations to address these practices in municipal courts;
- ▶ Eliminate public defender fees;⁴⁷⁴

469 Ibid.

470 Hanssens, et al., *supra* note 291.

471 Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 32 (2010), <https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry>.

472 See note 110 and accompanying text. The ACLU report focuses on debtors' prisons in Louisiana, Michigan, Ohio, Georgia, and Washington.

473 See CPD, *supra* note 90, at 8; Eisen, *supra* note 25, at 8.

474 Bannon et al., *supra* note 471, at 32.

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- ▶ Eliminate payment plan fees, late fees, collection fees, and interest that creates mounting debt for low-income individuals;⁴⁷⁵
- ▶ Eliminate bars on the right to vote, access housing, or access driver's licenses based on the nonpayment of criminal justice debt;⁴⁷⁶
- ▶ Require that judges with a pattern of unconstitutionally punishing defendants for nonpayment of civil fines and/or criminal justice debt are disciplined by ethics committees;⁴⁷⁷
- ▶ Eliminate fees for participation in community service and other alternatives to incarceration and fines/fees;
- ▶ Make alternatives to incarceration and to fines and fees available at sentencing and ensure that they accommodate the needs of people with child care needs, disabilities, limited access to public transportation, and other limitations;
- ▶ "Prohibit 'auto-jail' policies, repeated jail sanctions, and frequent court appearances" associated with criminal justice debt.⁴⁷⁸
- ▶ Permanently eliminate the use of asset forfeiture unless the government can prove that the property in question was connected with a crime by clear and convincing evidence.⁴⁷⁹
- ▶ Permanently eliminate programs that incentivize civil asset forfeiture, including federal-local/state sharing schemes;
- ▶ Require due process judicial hearings prior to the enforcement of civil penalties related to criminal activities, including nuisance abatement of property⁴⁸⁰ and civil confinement (often used for people convicted of sex-related offenses), and require follow-up proceedings to ensure continued compliance with due process requirements.

475 Ibid.

476 Ibid.

477 The Ferguson Report outlined how courts were profiting from poverty.

478 Alexander, *supra* note 15.

479 Adam Bates, *National Police Misconduct Reporting Project: Civil Asset Forfeiture*, Cato Institute <http://www.policemisconduct.net/explainers/civil-asset-forfeiture/> (accessed 7 July 2016). See also Dick M. Carpenter II et al., Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, (2015), <http://ij.org/report/policing-for-profit/>.

480 Sarah Ryley, "The NYPD Is Kicking People Out of Their Homes, Even If They Haven't Committed a Crime: And It's Happening Almost Exclusively in Minority Neighborhoods," ProPublica & *N.Y. Daily News* (February 4, 2016), <https://www.propublica.org/article/nypd-nuisance-abatement-evictions> (describing NYPD practice of using nuisance abatement to effectively evict people from their homes for alleged criminal conduct without proof of this conduct).

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Courts should comply with the guidance provide by the DOJ concerning the treatment of fines and fees, which are provided below:

- ▶ (1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;
- ▶ (2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;
- ▶ (3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;
- ▶ (4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;
- ▶ (5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;
- ▶ (6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release;
- ▶ (7) Courts must safeguard against unconstitutional practices by court staff and private contractors.⁴⁸¹

The **National Taskforce for Fees and Fines**, which was formed by the Conference of Chief Justices, the association of the top judicial leaders, and the Conference of State Court Administrators, the organization of court executives that oversees judicial administration in the state courts, should develop a protocol for disciplining judges who routinely violate constitutional requirements through practices that have the effect of incarcerating low-income individuals for their inability to pay fines or fees.

481 Letter by Vanita Gupta, U.S. Department of Civil Rights, (March 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

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Eliminating the criminalization of aspects of homelessness

No one should face discrimination—and especially prosecution or imprisonment—because they do not have a place to live. Yet, at the same time as access to affordable housing has decreased, there has been an uptick in laws that criminalize homelessness. Local governments have relied upon the police to address homelessness rather than adopting problem-solving strategies that increase access to affordable housing and social services,⁴⁸² for example, investing in programs that adopt a Housing First approach, which “prioritizes providing people experiencing homelessness with permanent housing as quickly as possible—and then providing voluntary supportive services as needed.”⁴⁸³

Furthermore, criminalizing aspects of the consequences of homelessness has the effect of further marginalizing communities that already face marginalization. LGBTQ youth often find themselves without homes after experiencing rejection from their families. When on the streets, they often complain of police profiling and harassment, leading to further marginalization. It is important that governments instead increase access to housing, ensure that there are mental health services available, and adopt measures that eliminate discrimination based on housing status.

To address this issue, the **Department of Justice** should issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances, intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal “pattern and practice” investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees.⁴⁸⁴

The **U.S. Interagency Council on Homelessness** should “publicly oppose specific local criminalization measures, as well as inform local governments of their obligations to respect the rights of homeless individuals.”⁴⁸⁵

482 National Alliance to End Homelessness, *A Plan, Not A Dream: How to End Homelessness in Ten Years* (July 2006), <http://www.endhomelessness.org/library/entry/a-plan-not-a-dream-how-to-end-homelessness-in-ten-years>.

483 *Housing First*, National Alliance to End Homelessness, http://www.endhomelessness.org/pages/housing_first (accessed 7 July 2016)

484 Hanssens, et al., *supra* note 291.

485 National Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2015), https://www.nlchp.org/documents/No_Safe_Place.

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Local and state governments should:

- ▶ Prohibit the profiling of individuals on the basis of perceived housing status;⁴⁸⁶
- ▶ Curtail enforcement of loitering and related offenses;⁴⁸⁷
- ▶ Invest in more comprehensive long-term and short-term housing options, and ensure that placements respect individuals self-identified gender specifications;⁴⁸⁸
- ▶ Eliminate policies and practices that in effect result in the incarceration and increased policing of homelessness;⁴⁸⁹
- ▶ Improve police training on interacting with homeless communities,⁴⁹⁰ including “police training curricula to improve relationships with LGBTQ youth and decrease profiling, harassment, and abuse”;⁴⁹¹
- ▶ Ensure that the impact of homelessness on a person’s financial circumstances and efforts to earn money is considered in an ability-to-pay hearing when a homeless person is charged with nonpayment of fines and fees;
- ▶ Enact an enforceable Homeless Bill of Rights measure that ensures that homelessness is not treated as a crime.⁴⁹²

Adopting fair debt practices for fines and tariffs

Criminal justice fines and fees are a regressive, punitive measure that hits the most marginalized in our society first and hardest. They often create perverse incentives, by which

486 Ibid.

487 Ibid.; *see also* Adopting a Human Rights Approach to Policing .

488 National Law Center on Homelessness & Poverty *supra* note 485.

489 Ibid.

490 Ibid.

491 Meredith Dank et al., *Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex* 70 (Feb. 2015),

492 Homeless Bill of Rights, <http://nationalhomeless.org/campaigns/bill-of-right/>.

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municipalities seek to fund government operations through aggressive policing of modest infractions, often in a discriminatory fashion.⁴⁹³ Moreover, the practice of attempting to collect payment from individuals who may be unemployed, homeless, or simply unable to afford it are often fruitless and lead to wasted resources.⁴⁹⁴ In *Bearden*, the Supreme Court has held that it is “contrary to the fundamental fairness required by the Fourteenth Amendment” to incarcerate individuals for their failure to pay fines and fees.⁴⁹⁵ Yet, courts across the country routinely incarcerate individuals for failure to pay criminal justice debt without regard to the financial circumstances that may make payment impossible.⁴⁹⁶ In general, fines and fees should be avoided. If fines must be included, they should be fair, reasonable, and adjusted to meet the financial resources of the defendant. Debt collection practices should comply with the Fair Debt Collection Practices Act, which prohibits “abusive debt collection practices,”⁴⁹⁷ and there should be explicit prohibitions on predatory debt collection practices.

To facilitate this, **local and federal governments** should adopt policies that do the following:

- ▶ Set caps on criminal justice debt;⁴⁹⁸
- ▶ Ensure that collection practices for criminal justice debts comply with the Fair Debt Collections Act;⁴⁹⁹
- ▶ Provide a clear statutory right that allows indigent individuals to waive fees and fines related to their involvement in the justice system;⁵⁰⁰
- ▶ Create a sliding scale for criminal justice fines;
- ▶ Eliminate the use of probation administered by for-profit probation companies to collect payments toward fines and fees;

493 See United States Dep’t of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 3 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

494 See, e.g., American Civil Liberties Union, *supra* note 459, at 5.

495 *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983), see also, *Tate v. Short*, 401 U.S. 395, 398 (1971).

496 See, e.g., American Civil Liberties Union, *supra* note 459, at 5.

497 15 U.S.C. §§ 1692-1692p.

498 *Ibid.*

499 *Ibid.*

500 *Ibid.*

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- ▶ Eliminate the imposition of interest and additional fees on people who cannot afford to pay in full on sentencing day;
- ▶ Establish debt payment plans for the repayment of criminal justice debts;⁵⁰¹ and
- ▶ Eliminate “pay to stay” policies in which prisons can charge formerly incarcerated individuals for the cost of room, board and medical care.⁵⁰²



For more information on criminal justice debt and the criminalization of poverty, check out:

The Department of Justice’s **Ferguson Report**, which describes how the city of Ferguson leveraged criminal justice debt to fund the municipality.

Equal Justice Under Law, a legal project devoted to ending systemic inequality that has successfully litigated to dismantle local criminal justice policies that discriminate against the poor.

The ACLU’s project to End Modern Day Debtor Prisons and their 2010 report, ***In for a Penny: The Rise of Modern Day Debtors Prisons***, which describes the results of a yearlong investigation into modern-day debtors’ prisons throughout the country, showing that “poor defendants are being jailed at increasingly alarming rates for failing to pay legal debts they can never hope to afford.”

National Law Center on Homelessness and Poverty, an organization dedicated to eliminating the root causes of homelessness and addressing it in the larger context of poverty, which explores the criminalization of homelessness in their 2014 report, ***No Safe Place: The Criminalization of Homelessness in U.S. Cities***.

501 Subramanian et al., *supra* note 202.

502 American Civil Liberties Union, *In for a Penny: The Rise of America’s New Debtors’ Prisons* (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons>