



## Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create

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### Executive Session on Community Corrections

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### Introduction

Formerly incarcerated people face a considerable number of obstacles to successful re-entry. Their ability to graduate from community supervision is complicated by their low and eroding levels of education and skills (Waldfoegel, 1994; Western, Lopoo and McLanahan, 2004; Lopoo and Western, 2005), serious mental and physical health conditions that often go untreated (Travis, 2000; Mallik-Kane and Visser, 2008; Binswanger, Krueger and Steiner, 2009; Rich, Wakeman and Dickman, 2011), and alcohol and drug addictions (Bureau of Justice Statistics, n.d.; Karberg and James, 2005; Mumola and Karberg, 2006), which are issues nurtured in neighborhoods of concentrated disadvantage from which many justice-involved people come. State-sanctioned barriers, including government restrictions on access to public-sector employment and government-related private occupations (Dale, 1976; May, 1995; Olivares, Burton and Cullen, 1996; Petersilia, 2003; Bushway and Sweeten, 2007), restrictions on voting rights (Manza and Uggen, 2006), and limited access to public housing and social welfare programs also hinder

reintegration efforts (Carey, 2004; Thompson, 2004). Despite recent successes<sup>1</sup> in an effort to “ban the box” — the “box” on employment and college applications that asks about criminal history — the social stigma that justice-involved people face further compounds problems with re-entry, including their attempts to find work (Pager, 2003, 2007).

To this lengthy list we add yet another significant state-sanctioned barrier — criminal justice financial obligations (CJFOs), also known as monetary sanctions or legal financial obligations. There are at least five types of CJFOs (Ruback and Bergstrom, 2006; Harris, Evans and Beckett, 2010): *finer* and *forfeiture of property*, which are intended as punishment; *costs* and *fees*, including but not limited to court costs and supervision fees, which reimburse the state for costs associated with the administration of justice; and *restitution*, a financial payout to specific victims or a general fund designated for them, intended to compensate victims for the losses they have suffered.<sup>2</sup> Although some have written about the benefits of incorporating CJFOs as one option among many criminal justice sanctions (Morris and Tonry, 1990; Gordon and Glaser, 1991; Ruback and Bergstrom, 2006), this form of sanction can, if left unchecked, have long-term effects that significantly harm the efforts of formerly incarcerated people to rehabilitate and reintegrate, thus compromising key principles

of fairness in the administration of justice in a democratic society and engendering deep distrust of the criminal justice system among those overburdened by them.

In what follows, we describe trends in the assessment of CJFOs, discuss the historical context within which these trends have unfolded, and reflect on their unintended (but perhaps easily foreseen) consequences. We then treat restitution separately, given the distinct function (in theory at least) that restitution serves. We also raise serious concerns about how restitution tends to be implemented and who benefits from this particular obligation. We end by considering alternative models for the effective and fair deployment of fines, fees and restitution in the criminal justice context.

## Historical and Institutional Context

CJFOs are not new. According to Harris and colleagues (2010: 1758), “monetary sanctions were integral to systems of criminal justice, debt bondage, and racial domination in the American South for decades.” Although their use waned significantly in the first half of the 20th century, CJFOs have proliferated since the 1980s. As a result of statutes and policies at every level — city/municipal, county, state and federal — that mandate various forms of CJFOs, the vast majority of people who come into contact with the criminal justice system and are found guilty (and some who are not) pay for these encounters or are punished for not doing so.

The 1960s and 1970s marked an opening for the resurgence of CJFOs. According to Garland (2001), the rehabilitative approach to crime and punishment had been hegemonic since the 1890s. Under this approach, crime was understood in terms of relative deprivation. Specifically, when deprived of proper education, socialization, opportunities and treatment, individuals were more likely to become involved with the justice system. But with individualized treatment, aid to and supervision of families, institutionalized supports for education, and job creation and training, people would likely abstain from further criminal behavior. Mass protests of the 1960s and 1970s, however, inspired a marked shift in values and approaches to criminal justice. With unrest related to the Vietnam War, women's liberation and various Civil Rights revolutions threatening to fundamentally disrupt the foundation on which well-established racial, gendered and class-based hierarchies had been built, many people raised serious concerns about the rehabilitative approach, arguing that it was ineffective (relative to alternative approaches) at addressing the emerging threats society faced. These critics favored the retributive approach instead. In this approach, criminal behavior was not considered a deviation from the norm but rather a rational choice by self-serving actors who were taking advantage of opportunities in contexts where sufficient controls and disincentives for crime were weak or nonexistent. State efforts at retribution, incapacitation and the management of risk would effectively curtail such self-serving, opportunistic behaviors.<sup>3</sup>

With this shift in values came the implementation of a set of rigid criminal justice policies — determinate sentencing, truth in sentencing, mandatory minimums and three strikes — that not only drove up rates of incarceration but also dramatically increased the numbers of those under supervision outside the nation's jails and prisons (Western, 2006; Wacquant, 2009; Raphael and Stoll, 2013). Between 1925 and 1975, fewer than 100 Americans per 100,000 were in prison. By 2003, even though crime rates had remained relatively stable, this number had quadrupled to more than 400 per 100,000. Further, between 1983 and 2001, incarceration (jail and prison) in the United States increased from 275 inmates per 100,000 to 686 inmates per 100,000, more than five times the rate in Western European countries (Western, 2006). The numbers of people under community supervision also increased dramatically. In 1980, Wacquant (2009) reports that 1.84 million were on probation or parole. By 1990, that figure had increased to 4.35 million and jumped again to 6.47 million by 2000 (Wacquant, 2009).

The proliferation of CJFOs was likely a result, direct and indirect, of this cultural shift to retribution. First, in an era of “just deserts” punishment, the increased use of fines and forfeiture, alone or in combination with other forms of nonmonetary sanctions, signaled to the public that people who committed crimes were being made to account for their actions (Wacquant, 2009). Second, the 1970s cultural shift included increased concern for victims who, it was argued, should be

made whole — through reparations — after experiencing crime-related losses (Office for Victims of Crime, 2013; Garland, 2001).

Third — and perhaps most important — as the criminal justice apparatus swelled to accommodate the oceans of people cycling in and out of the system's courts, jails, prisons, and probation and parole departments, so too have the costs to operate such a system. For instance, Wacquant (2009) shows that, between 1980 and 1997, criminal justice budgets — those devoted to police, justice and corrections — increased from roughly \$35 billion to \$130 billion per year. Growth in criminal justice personnel also skyrocketed, from approximately 1.3 million in 1980 to 2.1 million in 1997. Wacquant (2009) notes that, based on the number of personnel in 1997, American criminal justice was the third largest employer in the country, second only to Manpower, Inc., and Walmart.

However, legislators have been reluctant to pass these dramatically rising costs on to taxpayers. Jurisdictions have instead shifted more of the costs to justice-involved people through CJFOs (Wacquant, 2009), implicating every stage of criminal case processing (Bannon, Nagrecha and Diller, 2010).<sup>4</sup> They have done so in at least three ways — by imposing numerous *new* fines, fees and surcharges; by increasing the amounts associated with CJFOs; and by adopting more proactive strategies to collect debt. In California, for instance, 16 different statutes codify 269 separate court fines, fees, forfeitures, surcharges and penalty assessments that, depending on

the type of offense, may now be assessed (Nieto, 2006). Texas has 15 categories of court costs that are “always assessed” and an additional 18 discretionary CJFOs that include fees for being committed or released from jail (Texas District Court, 2013). In Washington state, a defendant with a single conviction is subjected to 24 fines and fees (Beckett and Harris, 2011).

Jurisdictions have also shifted costs to justice-involved people by increasing the amounts and numbers of fines, fees and surcharges they assess. For instance, since 1996, Florida added more than 20 new categories of CJFOs and recently increased amounts of existing fees and surcharges in two consecutive years (Bannon, Nagrecha and Diller, 2010; Diller, 2010). In New York state — where the laws require 10 mandatory surcharges, 19 fees<sup>5</sup> and six civil penalties ranging from \$5 to \$750 — lawmakers have repeatedly increased the amounts and numbers of fees and surcharges since the early 1990s (Rosenthal and Weissman, 2007). In 2008 alone, two “additional surcharges” were assessed for driving offenses; fees for assistance to victims of misdemeanor crimes and felony crimes were increased by \$5 each; and surcharges for felonies, misdemeanors and violations were increased by \$5 to \$50 (Bannon, Nagrecha and Diller, 2010). In 2009, North Carolina initiated two new fees — a \$25 late fee for debtors making tardy payments and a \$20 surcharge for those wishing to establish a payment plan for their CJFOs. North Carolina also increased fees for defendants who fail to appear in court and increased the costs associated with lab tests (Bannon, Nagrecha and Diller, 2010).

Since 2010, 48 states have increased civil and criminal fees (Shapiro, 2014), a likely response to government coffers emptied by the effects of the Great Recession (Burch, 2011; Government Accountability Office, 2015). It is no wonder, then, that CJFOs have become ubiquitous.<sup>6</sup>

With ubiquity, the odds of justice-involved persons receiving one or more monetary sanctions and the median amounts assessed have increased substantially.<sup>7</sup> For instance, Harris and colleagues (2010) report that 25 percent of federal prison inmates were assessed fines, but that figure rose to 66 percent by 2004 — only 13 years later.<sup>8</sup> Although the prevalence of fines and restitution payments subsided to 32 percent of federal nonimmigration cases in 2015, it is important to note that the overwhelming majority of cases for some federal offenses — robbery, fraud, larceny, arson and burglary, for instance — received a fine or were required to pay restitution (U.S. Sentencing Commission, 2015).

On the state level, 4 percent of persons convicted of felonies who were sentenced to prison in 1986 were also fined; by 2004, that figure was seven times higher (28 percent) (Harris, Evans and Beckett, 2010). On the local level, 12 percent of persons charged with felonies who were sentenced to jail in 1985 (awaiting trial or serving time for less serious felonies) were also fined; by 2004, that figure tripled to 37 percent. In addition, 17 percent of people on probation for felonies in 1986 were also fined; by 2004, that figure more than doubled to 36 percent.

For persons who are incarcerated, the overwhelming majority now accumulate mounds of debt due to numerous fees while behind bars. A 1997 survey of the nation's largest jails revealed that more than three-quarters of people in jail were charged fees for a host of programs and services, most notably medical care, per diem payments, work release programs and telephone use; the latter three produced the greatest revenue by far. By 2005, that figure had risen to 90 percent. In addition, more than 85 percent of people on probation and parole are now required to pay supervision fees, fines, court costs or restitution to victims to remain free from further sanctions (Travis and Petersilia, 2001; Rainville and Reaves, 2003; Siegel and Senna, 2007).

The result of this expansion in the numbers and amounts of CJFOs, deployed at every stage of criminal case processing, is that some 10 million people owe more than \$50 billion from contact with the criminal justice system (National Center for Victims of Crime, 2011; Evans, 2014; Eisen, 2015).<sup>9</sup> To be clear, jurisdictions collect only a fraction of this debt each year; for instance, people owe the federal government more than \$100 billion in criminal debt, and federal judges assessed nearly \$14 billion in monetary penalties in fiscal year 2014, but the federal government collects only \$4 billion each year (U.S. Department of Justice, 2015). Nevertheless, CJFOs still produce significant revenue for federal, state and municipal coffers. According to the Criminal Court of the City of New York (2014), in the New York metropolitan area, fines generate 47 percent of criminal court revenue, which is then split

between New York City and the state. Another report finds that “administrative assessments on citations fund nearly all of the Administrative Office of the Court’s budget in Nevada [and] ... [i]n Texas, probation fees made up 46 percent of the Travis County Probation Department’s \$18.3 million budget in 2006” (McLean and Thompson, 2007: 3). In Ferguson, Missouri — the site of major protests against police brutality inspired by the death of 18-year-old Michael Brown at the hands of a Ferguson police officer — fines, fees and surcharges, which are generously assessed and aggressively collected (particularly during periods of projected *general* revenue shortfalls) covered slightly more than 20 percent of the general revenue fund. In nearby towns, this figure was much higher.

### Unintended Consequences

Four principles have informed an ideal of how justice in the United States should be meted out — (1) the punishment should fit the crime (proportionality); (2) the punishment should not exceed the minimum needed to achieve its legitimate purpose (parsimony); (3) the punishment should not compromise a formerly incarcerated person’s chance to lead a fulfilling and successful life (citizenship); and (4) penal systems should avoid reproducing social inequalities, especially given that formerly incarcerated people disproportionately come from disadvantaged families and communities (National Research Council, 2014). These principles must be a part of any deliberation to establish fair and just penal policies and practices. However, it seems these principles have largely

been ignored in order to recover the costs of a behemoth penal apparatus by increasing the amounts and numbers of CJFOs. As a result, on all levels of government, policymakers’ actions have produced a set of unintended and negative consequences — especially for poor people and people of color — a point we turn to next.

### Law Enforcement or Debt Collection?

During periods of economic downturn, government revenues from various forms of taxes inevitably fall; the temptation is to fund government by adding new fees and surcharges, increasing the size of CJFOs, and deploying law enforcement in ever more aggressive debt collection strategies. This will be too much for some jurisdictions to ignore, especially if the failure to engage in these practices would lead to budget deficits otherwise resolved with job cuts in the system. Indeed, since 2010, several states (including but not limited to Arizona, Louisiana, Ohio and Texas) have implemented new fees and increased already existing surcharges and fees to address 2010 budget shortfalls (Burch, 2011). Given this, we must consider what perverse incentives we create by tying the solvency of major institutions to criminal justice enforcement. Essentially, the basic conflict that emerges when a public institution is both the originator and the beneficiary of financial obligations is that resources are directed away from other critical, but less lucrative, law-enforcing or adjudicating tasks (e.g., clearing backlogs of DNA analysis or testing rape kits).<sup>10</sup>

Perhaps more egregious is that such pressures can foster collusion between government agencies to generate revenue via law enforcement. Indeed, Ferguson provides stark evidence that court officials' use of law enforcement to generate revenue to fund government can lead to corruption and injustice, especially for vulnerable populations. There, the city finance director explicitly urged both the police chief and the city manager to write more tickets in order to fill municipal coffers. In other words, the system in Ferguson sought to extract income for the county and state from some of its most disenfranchised citizens, often through unconstitutional stops and arrests. Also, according to the Department of Justice report on Ferguson, law enforcement practices — driven in part by racial bias — produced and exacerbated racial disparities throughout local policing, court and jail systems.<sup>11</sup> The overwhelming majority of those arrested only because of an outstanding municipal (civil) warrant (96 percent) were African-American (U.S. Department of Justice, 2015). As a result, they bore a disproportionate burden as the primary population targeted to make up for government revenue shortfalls. Adjacent cities and towns were no better, nor is it clear that such practices are specific to Missouri. Evidence from California reveals similar patterns of disproportionate harm of CJFO enforcement on minority communities (e.g., Lawyers' Committee for Civil Rights of the San Francisco Bay Area, 2015). Moreover, because contact with police is the common entry point to the criminal justice system, any role of CJFOs in increasing exposure to police merits careful scrutiny because such

incentives can encourage more aggressive policing and punitive punishments targeted at the poorest and most powerless among us.

The same pressures to produce revenue affect probation and parole officers, who end up facing mutually incompatible demands. As social workers, they are expected to assess the needs of people under supervision and facilitate treatment. As law enforcement agents, they are expected to monitor and surveil formerly incarcerated persons (Rothman, 1980; Travis and Petersilia, 2001; Wodahl and Garland, 2009). As debt collectors, they are expected to monitor payments, set up payment plans, aggressively press people under supervision to pay court-ordered and community corrections-related CJFOs, and penalize them (including revoking probation or parole) for missed payments (Bannon, Nagrecha and Diller, 2010). The first two responsibilities relate to public safety concerns but pit the "officer as advocate" who offers individualized treatment against the "officer as law enforcement agent" who manages risk.<sup>12</sup> The third responsibility, however, does not ensure public safety at all; perhaps with the exception of restitution to victims, it is solely about generating revenue, which is disbursed to a general fund or to criminal justice agencies. But this third responsibility is the one that is likely to be prioritized in a system whose financial health and well-being — indeed, the stability of officers' very own positions — hinge on it. Such efforts, however, distract from officers' responsibilities to ensure public safety and facilitate rehabilitation. Given the incentives inherent in prioritizing

officers' roles as debt collectors, we might have anticipated some of the unfair and unjust practices that have emerged.

### **Punishing the Poor**

CJFOs can be quite daunting. In some states, however, it is difficult to say with any precision exactly how much those who have had contact with the criminal justice system have been assessed because, according to Bannon and colleagues (2010), information about fees, fines, surcharges and restitution cannot be found in any one statutory code, and different types of monetary sanctions are collected at different stages of criminal case processing. Case studies of different jurisdictions have been revealing. Amounts vary by state but, for example, court records from 2005 to 2011 reveal that persons convicted of felonies in Alabama accrued a median of about \$5,000 in CJFOs (Meredith and Morse, 2015). The Texas Office of Court Administration reports that individuals released on parole owe between \$500 and \$2,000 in offense-related debt, a figure that does not include restitution. A recent study examining the hidden costs of incarceration finds that families of the formerly incarcerated incur, on average, \$13,607 for court-related fines and fees (deVunopowell et al., 2015). An analysis of data from Washington state revealed court assessments ranging from a minimum of \$500 (mandatory for all felony convictions) to a maximum of \$256,257; the median amount assessed per person was \$5,254 and the mean was \$11,471 (Harris, Evans and Beckett, 2010). Because the vast majority of formerly incarcerated people are poor or

near poor (Western, 2006), these figures are not inconsequential. In the short or long term, most of them simply could not afford to fulfill these unreasonably high debt burdens.

Further, being indigent rarely exempts a person from CJFOs.<sup>13</sup> Focusing on the 15 states with the largest prison populations, Bannon and colleagues (2010) identified four mechanisms through which the courts' administration of CJFOs have created barriers to re-entry. First, even when courts had the discretion to waive or modify monetary sanctions, few considered whether people had the financial resources to meet these obligations, and few had institutionalized mechanisms to reduce CJFOs contingent on people's financial resources (Bannon, Nagrecha and Diller, 2010). Second, few states provided adequate payment plans to allow formerly incarcerated people who are indigent to pay down their debts over time; among states that did, some required that people pay a fee to apply.<sup>14</sup> Third, for indigent individuals, jurisdictions could replace CJFOs with community service. Some of the 15 states studied, however, did not offer community service as an alternative, and those that did offered limited options that the courts rarely chose. Nor do these states offer exemptions from the consequences associated with inability to pay because of indigence. Unpaid CJFOs are subject not only to unreasonably high interest on court-imposed sanctions but are also routinely subject to late fees, fees for payment plans, and debt collection fees (Bannon, Nagrecha and Diller, 2010).<sup>15</sup> Consequently, formerly incarcerated people and their family



members, who often shoulder the bulk of the legal debt burden (Wacquant, 2009; deVuono-powell et al., 2015; Nagrecha and Katzenstein, 2015), can be saddled with these obligations for decades. Therein lies one of the major problems with CJFOs, as applied in the U.S. For many, there is no end to the resulting debt (Beckett, Harris and Evans, 2008; American Civil Liberties Union, 2010; Harris, Evans and Beckett, 2010; Bannon, Nagrecha and Diller, 2010; Katzenstein and Nagrecha, 2011). The common, significant time lag between assessment and final payment undermines the goal of finality in punishment and poses significant obstacles to achieving stability because even small monthly payments on debt could reduce take-home pay substantially among disadvantaged families and thus make it extremely difficult to meet other needs and obligations (deVuono-powell et al., 2015).

For many, criminal justice debt can also trigger a cascade of debilitating consequences, many of which undermine post-incarceration re-entry goals such as finding stable housing, transportation and employment (Bannon, Nagrecha and Diller, 2010; Beckett and Harris, 2011). For instance, Bannon and colleagues (2010) find that legal debt can be a hindrance to obtaining a driver's license,<sup>16</sup> can restrict voting rights,<sup>17</sup> and can interfere with obtaining credit and making child support payments. Criminal justice debt can also prompt additional warrants, liens, wage garnishment and tax rebate interception. In addition, it can lead to a civil judgment, which is available to credit agencies because this information is made public. With

poorer credit scores, individuals with legal debt also risk being denied employment, and they may be unable to secure credit cards, mortgages, leases or loans. Thus, employment, housing and transportation are all jeopardized. And, to be clear, in each of these areas the impacts are far greater for racial minorities than for whites, not solely because the former are disproportionately represented in the criminal justice system. Not only are they more likely to be targets of aggressive law enforcement practices, once caught in the criminal justice net they are also penalized more harshly (Rosich, 2007; Spohn, 2000; Mitchell and MacKenzie, 2004; Jannetta et al., 2014; Starr and Rehavi, 2012).

For some formerly incarcerated individuals, these liabilities may also have the unintended consequence of reducing commitment to work, increasing reliance on available forms of public assistance (in some cases, CJFOs can make a person ineligible for receiving public assistance), or motivating further criminal involvement. According to Harris and colleagues (2010), 80 percent of the respondents found their legal debt obligations to be "unduly burdensome." Despite the possibility that they might be sanctioned with jail time for nonpayment, some chose not to work, instead engaging in criminal activity or relying on state benefits (where these had not been revoked because of CJFOs) to make ends meet (also see Martin, 2015).

Perhaps the most intolerable penalty that formerly incarcerated people who are indigent face for inability to pay CJFOs is to be re-incarcerated. A

lawsuit<sup>18</sup> against the City of Ferguson, Missouri describes the experience of Ms. Fant, which illustrates this concern:

Ms. Fant was a 37-year-old single mother who worked as a certified nurse’s assistant. Over the course of 20 years, she was arrested more than a dozen times. On the way to taking her children to school one day in 2013, she was arrested and taken to jail because of old traffic tickets. She was initially told that she would only be released after paying \$300, but she was then “released” for free. Being released, however, just meant that the arresting jurisdiction had dropped its demand for money. Because she had unpaid tickets in other nearby places (that paid for a central city to house their jail inmates), “release” meant she was kept in the same jail under the auspices of other jurisdictions. As a result, she was held in a single jail, but transferred to the custody of one jurisdiction to another, totaling five different jurisdictions — each holding her for three to four days and each insisting on hundreds or thousands of dollars to secure her liberty. Eventually, she was told that her release amount was \$1,400, but after it was clear she would not be able to come up with the money, she was released without paying anything. This freedom was temporary. The following year, she was arrested again and told that she would have to pay \$1,400 or be held indefinitely. This time, her family and friends came up with \$1,000 and she was released. She was told to make future cash payments directly to the Police Department.

Despite the Supreme Court ruling in *Bearden v. Georgia* (461 U.S. 660-661, 1983), which found

that inability to pay cannot be the reason to revoke probation or to re-incarcerate,<sup>19</sup> there is ample evidence that inability to pay is indeed associated with expanded custody (American Civil Liberties Union, 2010). Incarceration can follow CJFOs in at least four ways. First, probation and parole can be revoked or not granted for nonpayment of CJFOs. According to Bannon and colleagues (2010), regardless of the fact that none of the 15 states they studied adequately sought to determine individuals’ ability to pay, at least 13 of these states allowed for revocation of probation and parole in cases where formerly incarcerated persons missed payments. Second, criminal and civil offenses can result in incarceration via willful failure to pay CJFOs, an action that is interpreted as civil contempt. Third, in some states (such as Missouri), criminal justice debtors can “pay off” their debt by “choosing” jail — requesting to participate in programs that allow them to pay down court-imposed debt by spending time in jail. Finally, individuals can be arrested and jailed in some states (e.g., Texas) for missing a debt payment or for failing to appear at a court hearing relating to a missed debt payment (e.g., Georgia). In February 2016, for instance, seven armed U.S. Marshals arrested and jailed Paul Aker, a Texas resident, for failure to appear in court to address a 29-year-old delinquent federal student loan; the original loan was \$1,500 (Lobosco, 2016). Roughly one-quarter of the respondents in Harris and colleagues’ 2010 study served time in jail for nonpayment of fees and fines; another study found that 12 percent had been re-incarcerated for missing payments (deVuono-powell et al., 2015). Thus, as assessed

and administered in the U.S., CJFOs can be quite punitive and insufficiently parsimonious. In those instances, their administration challenges even basic notions of citizenship rights and social justice.

### **Distrust and Demoralization**

When people perceive that law enforcement officials have treated them unfairly, they come to distrust the motives of legal authorities and to negatively assess the procedures by which legal authorities engage them. They also come to question the very legitimacy on which law enforcement's authority rests, feeding an unwillingness to consent or to cooperate with law enforcement in general (Tyler and Huo, 2002). Thus, to the extent that CJFOs are administered in unfair and unjust ways, it should come as no surprise that the U.S. system of CJFOs breeds deep distrust of the criminal justice system, especially among the poor and people of color. To illustrate, the Department of Justice (DOJ) report on Ferguson highlighted how the unfair, unlawful, disrespectful and harmful practices of the police and the courts, both in Ferguson and in nearby towns and cities, led Ferguson's black residents to both fear and distrust them, further deteriorating already strained relations between law enforcement and the communities they are tasked to serve as well as contributing to less effective, more difficult, less safe and more discriminatory policing (U.S. Department of Justice, 2015).

CJFOs may also be demoralizing for officers, especially police, probation and parole officers.

When signing on for service, most of them likely imagined that they would help make their communities safer and would positively impact the lives of those at high risk for future criminal involvement. Few, if any, signed up to become debt collectors. But, in many jurisdictions, systemic pressure to produce revenue puts officers in this position, whether or not they like it. In Ferguson, for instance, where community policing efforts had never been more than modest, their efforts had recently declined further to focus more police time and energy on revenue generation. According to the DOJ report (U.S. Department of Justice, 2015: 87):

Officers we spoke with were fairly consistent in their acknowledgment of this, and of the fact that this move away from community policing has been due, at least in part, to an increased focus on code enforcement and revenue generation in recent years. [O]ur investigation found that FPD redeployed officers to 12-hour shifts, in part for revenue reasons ... . While many officers in Ferguson support 12-hour shifts, several told us that the 12-hour shift has undermined community policing. One officer said that "FPD used to have a strong community policing ethic — then we went to a 12-hour day." ... Another officer told us that FPD officers should put less energy into writing tickets and instead "get out of their cars" and get to know community members. One officer told us that officers could spend more time engaging with community members and undertaking problem-solving projects if FPD officers were not so focused on activities

that generate revenue. This officer told us, “everything’s about the courts ... the court’s enforcement priorities are money.”

It is difficult to say how widespread the perception is among officers that debt collection has directed attention away from arguably more important roles that law enforcement officers can play in the communities they serve, but the comments that officers in Ferguson shared suggest that officers’ morale might be a part of the collateral damage from the expansion of a monetary sanctions system that relies heavily on officers’ efforts to collect debts.

### Victims and Restitution

Restitution stands somewhat apart from the other types of CJFOs. It is meant to be assessed when there is both an identifiable victim and quantifiable (i.e., “monetizable”) harm to person or property. The underlying notion is to directly compensate a crime victim for a specific loss stemming from the offense. Therefore, on the federal level at least, restitution is mandatory for several categories of offenses, as stipulated in the Mandatory Victims Restitution Act of 1996.<sup>20</sup> Problems arise, however, when we examine both the practice and the consequences of restitution as it is actually implemented. First, the system of payment and disbursement very often severs the direct link between the person who committed the crime and the victim. A judge may issue either a direct order for restitution, which is related to a victim’s loss, or the person who committed the offense may have to pay to a

general restitution fund. The first case preserves the notion of “restoration” inherent in restitution, but the second case is far less clear. Surely, a victim who cannot collect from the person who actually committed the offense still benefits from compensation from a state restitution fund. Indeed, Vermont (where the average individual restitution order is \$1,100) has a system that allows for victims to be paid immediately upon court order, using capital funded by a 15-percent surcharge on all criminal and civil fines (Vermont Center for Crime Victim Services, 2012). But the flip side of this arrangement is that people convicted of offenses must contribute to compensating victims of crimes in which they played no role (and even when they have inflicted no harm to an identifiable victim or property). How this ultimately weighs in the balance in terms of ethics is beyond the scope of this report; however, the situation merits careful attention when considering the universe of CJFOs and their consequences.

The second problem with restitution is the enormous, intractable and growing gap between the restitution amounts assessed and the amounts actually collected and disbursed. By one estimate, total state restitution debt was nearly \$40 billion in 2007 (Dickman, 2009). At the federal level, there is more than \$100 billion in uncollected criminal debt, of which restitution is a large portion. Collection rates across the country reveal the extent of the problem. In Florida, people convicted of felonies owe \$709 million of restitution debt, of which the state

collects 4.5 percent (Burnett, 2012). In Iowa, judges ordered \$159 million in restitution over a five-year period but collected only \$19 million during the same period (12 percent of the amount owed) (Eckhoff, 2012). In Texas, the parole division collected 5.3 percent of the \$43 million that discharged parolees owed between 2003 and 2008; fewer than 10 percent of parolees paid their restitution in full (Vogel, 2008). Vermont's restitution collection rate of 31.8 percent for 2005 to 2010 is, by comparison, relatively high (National Center for Victims of Crime, 2011). Not only are collection rates generally poor,<sup>21</sup> but the amount of outstanding restitution debt is growing. For instance, the amount of unpaid restitution in Florida grew 51 percent between 2007 and 2012 (Burnett, 2012).

Of course, these low collection rates mean low disbursement rates — very few victims are paid or are paid in full. Pennsylvania, for example, disbursed less than 12 percent of the \$435 million it assessed in restitution for the three years ending in 2012 (Pennsylvania Office of the Victim Advocate and the Center for Schools and Communities, 2013). Minnesota assesses \$25 million in restitution, with an individual average of \$2,100. Of this, only 25 percent is paid, but taking into account restitution that is reduced, adjusted or credited, the amount of restitution that is “satisfied” reaches 49 percent. There is also significant variation by county: outstanding debt ranges from as low as 6 percent of the assessed amount to as high as 83 percent (Minnesota Restitution Working Group, 2015).

Finally, it is essential to remember that — from the perspective of the debtor — restitution is simply part of a formidable amount of criminal justice debt. Importantly, this debt incurs disproportionate harm. An analysis of 80,000 Florida correctional cases found that unpaid restitution rendered almost 40 percent of the debtors ineligible to have their rights restored (Diller, 2010). In sum, although restitution serves a particularly distinct function compared to the other CJFOs, it suffers from pitfalls that render it just as problematic.

## Recommendations

As administered in the U.S. system, CJFOs can be punitive and insufficiently parsimonious. As others have written (Bannon, Nagrecha and Diller, 2010; deVuono-powell et al., 2015), we can and must do better. In what follows, we offer recommendations for reform. Although these recommendations will not reverse the damage done to individuals, their families and the communities they come from, if these or similar reforms are implemented moving forward, millions of people who are enmeshed in the criminal justice system might avoid the same troubling fate.

We propose two sets of reforms. The first regards the use of CJFOs for low-income or poor people and includes six recommendations. First, when setting out to use CJFOs to punish and deter or repair and reimburse victims, we must consider people's ability to pay. In the U.S., statutorily mandated fines, fees, surcharges and restitution are not adjusted to ability to

pay (Justice Management Institute and Vera Institute of Justice, 1996). However, tailoring the sanction to the individual, as is often done in parts of Europe (Kantorowicz, 2014), would avoid many of the deleterious effects found in the American CJFO system. In Europe, “day-fines” (as they are called) are calculated on the basis of a person’s financial situation — typically by calculating a percentage of income — and the severity of the offense (Hillsman and Mahoney, 1988; Vera Institute of Justice, 1988).<sup>22</sup> In addition, because the financial burden on the individual is considered seriously as part of the assessment rationale, European countries that have adopted this approach have been able to generate income without undermining the basic tenets of effective criminal justice policy (Frase, 2001).<sup>23</sup>

Second, additional safeguards need to be implemented so as not to penalize the poor for being poor. The short- and long-term prospects for people who are formerly incarcerated or under supervision are also negatively affected by the interest that accrues on criminal justice debt as well as the fees and penalties for delinquent payments, payment plans and debt collector services. These contribute to poverty entrapment by further increasing the debt burden for these individuals, making it difficult to make ends meet and blocking opportunities for social and economic stability and mobility. As a penalty for tardy or missed payments, or missed court hearings because of delinquent payments, (re)incarceration also penalizes the poor. Very simply, these poverty penalties need to be eliminated — interest should not be allowed

to accrue on the CJFOs that are assessed; the poor, as objectively determined, should not have to pay fees to apply for payment plans, as penalties for late payments, or as part of an aggressive campaign of debt collection; and under no circumstances should individuals be incarcerated for delinquency on financial obligations related to criminal or civil judgments. Importantly, by taking an individual’s financial resources into consideration and eliminating poverty penalties, we also end indeterminate punishment and related debt; individuals will be relieved of criminal justice debt and related incarceration that can extend for decades, if not a lifetime.

Third, alternatives to monetary sanctions should also be considered more seriously than they are, especially where indigent persons are concerned. Financial transactions are not the sole means by which people can be made to account for their actions and make victims whole. As indicated earlier in the report, community service is an available option in most states, although it is used infrequently. When implemented judiciously, however, this would seem to be a reasonable substitute for monetary sanctions.

Fourth, jurisdictions should consider amnesty for those who already hold debt. The evidence provided here shows the questionable value of pursuing debt from people unable to pay. Indeed, when the cost and social harm of enforcing CJFO collections is greater than the benefit of (typically partial) payment, there is a strong argument for amnesty. Accounting for and excusing CJFO debt

not only allows people to exit the destructive cycle of debt, warrants, arrests, court judgments and incarceration, it also helps clear the prodigious administrative backlog that typifies U.S. court systems.

Fifth, if any fees are collected, they should be deposited into a trust account to be invested solely in direct rehabilitation services for the supervised population. This approach is similar to the inmate welfare funds that are mandatory for jails and prisons for fees collected from inmates, which can only be expended on direct programs or services that benefit the inmate's welfare. In a similar vein, we offer a sixth recommendation that connects criminal justice debt to the improved well-being of those who are involved in the justice system. To the extent that they invest in their own education and vocational training, their fees might be significantly reduced or erased. In this way, the government incentivizes behaviors it wishes to see, with the prospect of reduced victimization and improved public safety.

The second set of reforms addresses the criminal justice system's growing reliance on CJFOs for their own operations and maintenance. The criminal justice system is meant to serve the general public. As such, it is logical and just to insist that each of us bears this burden. Instead, however, we increasingly require that people who have had contact with the criminal justice system pay a disproportionate share for its operation; in so doing, we link the financial solvency of the institution to law enforcement practices. This incentivizes law enforcement to redirect efforts away from critical, but less lucrative, law

enforcing toward those activities that, while doing little to promote public safety, would generate significant revenue for government coffers, thus putting revenue, not safety, first.

To rectify this, we first propose that an independent commission should be established in each jurisdiction to determine the causes and consequences of proposed increases to criminal justice fees, fines, surcharges and the like. CJFOs should not be allowed to increase in size and/or number unless studies determine that changes would not unduly burden those subject to them. The institutional health and well-being of criminal justice institutions should not hinge on the amount and number of CJFOs assessed; this is the purpose of general tax revenue.

Our second proposal is that the roles criminal justice officers — probation, parole and police officers — play should be limited to efforts that increase public safety. Law enforcement officers should not be tasked with the responsibility to collect debts. Their roles are already complicated by what some consider to be mutually incompatible demands — being advocate and counselor as well as law enforcement and disciplinarian. To add a debt collection function to their roles forces officers to pit their own jobs and that of the institution that employs them against the efforts of individuals in their charge at rehabilitation and successful re-entry. Not only would this conflict further complicate what is already a difficult balancing act but, in essence, it would also direct attention away from the more important task of facilitating increased public safety.

## Endnotes

1. Boston, San Francisco and Minneapolis were early adopters (Henry and Jacobs, 2007). Currently, more than 100 cities and counties nationwide have implemented “ban the box” policies (Rodriguez and Avery, 2016).

2. In this report we do not consider child support. Although child support often contributes to the debilitating debt that justice-involved people have, it has been treated extensively elsewhere. (See Grall, 2003, and Cammett, 2006, for discussions of child support debt as it relates to justice-system involvement; also see Nagrecha and Katzenstein, 2015; Thoennes, 2002; U.S. Department of Health and Human Services, 2006; and Pearson, 2004.)

3. See Garland (2001) for a full discussion of this cultural shift.

4. User fees are commonly assessed at preconviction; for instance, defendants can be charged booking fees, application fees to obtain a public defender, and jail fees for pretrial detention. At sentencing, fines associated with convictions are typically accompanied by surcharges; the amount of restitution to victims is determined; and fees mount up for court costs, designated funds and reimbursement for public defenders and prosecution. During jail or prison stays, fees are routinely assessed for a variety of programs and services, most commonly for medical services (including prescriptions, physician/nurse visits, dental care and eye care),

participation in work release programs, per diem payments and telephone use. Among the CJFOs added to the tab of probationers and parolees are monthly fees for supervision (including electronic monitoring) and administration fees for the installation of monitoring devices, drug testing, mandatory treatment, therapy and classes. Further, at each stage of criminal case processing, there are interest charges and penalties for tardy payments, application fees for payment plans, and fees for debt collection services — all adding to the heavy weight of accumulated debt placed on justice-involved people, who are already disproportionately at a disadvantage economically and educationally (Bannon, Nagrecha and Diller, 2010).

5. Included are fees for crime victim assistance, incarceration, DNA databanking, parole and probation supervision, sex offender registration, and supplemental payments to sex offender victims.

6. Despite its “growing normativity” (Katzenstein and Nagrecha, 2011), policies and practices related to the assessment, administration and collection of CJFOs are quite diverse. Jurisdictions typically have dozens of statutes mandating fines, fees and surcharges, but every comparison of jurisdictions — federal versus state, between states, between counties within a single state, and even between courthouses — reveals a substantial array of differences.



7. Meredith and Morse (2015) illustrate this well with case studies of Alabama and Tennessee.

8. These data are from the Survey of Inmates in State and Federal Correctional Facilities. The authors make clear that these figures likely underestimate the use of CJFOs because they do not include those assessed by departments of corrections, jails or other noncourt agencies (Harris, Evans and Beckett, 2010).

9. In the federal system, more than \$14 billion in monetary penalties was assessed in fiscal year 2014 for up to 96 percent of cases for some offenses. In a study of CJFOs in 11 states, the average amount of uncollected debt was \$178 million per state (McLean and Thompson, 2007). California alone had \$10.2 billion in outstanding court-ordered debt at the end of 2012 (Taylor, 2014). As of 2010, Iowa and Arizona reported unpaid court-ordered obligations on the order of \$533 million and \$831 million, respectively. Pennsylvania reported unpaid restitution of \$638 million. In Los Angeles County, the fines, forfeitures and assessments related to 8,000 complaints filed each week for failure to appear exceeded \$75 million in a single year. Finally, in just one federal district in New York (southern region), more than \$270 million was owed for criminal debts (U.S. Department of Justice, 2014).

10. Concern about this motivation prompted the Conference of State Court Administrators (n.d.) to assert that “[i]t is axiomatic that the core

functions of our government are supported from basic and general tax revenues. Government exists and operates for the common good based upon a common will to be governed, and the expense thereof is borne by general taxation of the governed.”

11. African-Americans were 68 percent less likely to have their cases dismissed by the court, at least 50 percent more likely to have their cases lead to an arrest warrant, and accounted for 92 percent of cases in which the court issued an arrest warrant (U.S. Department of Justice, 2015).

12. These are in conflict to the extent that officers’ advocacy cannot comfortably coexist with their role as disciplinarians.

13. This is so despite a series of Supreme Court rulings to the contrary: *Bearden v. Georgia*, 461 U.S. 660 (1983); *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972); *Tate v. Short*, 401 U.S. 395 (1971); and *Williams v. Illinois*, 399 U.S. 235 (1970).

14. In Franklin County, Ohio, for instance, the payment plan fee was \$25; in the Orleans district in Louisiana, it was \$100 (Bannon, Nagrecha and Diller, 2010).

15. Economic sanctions had once been criticized because they did not include penalties for nonpayment (Petersilia and Turner, 1993; Langan, 1994; Wheeler et al., 1990).

16. In California, Florida, Louisiana, Michigan, North Carolina, Pennsylvania, Texas and Virginia, driver's licenses are suspended if people fail to make CJFO payments (Bannon, Nagrecha and Diller, 2010).

17. In seven of the 15 states that Bannon and colleagues (2010) studied, CJFOs must be paid off before people regain their right to vote. According to Meredith and Morse (2015), southern states are almost three times more likely than non-southern states to disenfranchise people because of CJFOs (40 percent compared to 14 percent).

18. Case No. 4:15-cv-253, U.S. District Court, Eastern District of Missouri.

19. "If a State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it. *Williams v. Illinois*, 399 U.S. 235; *Tate v. Short*, 401 U.S. 395. If the probationer has willfully refused to pay the fine or restitution when he has the resources to pay or has failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State is justified in using imprisonment as a sanction to enforce collection. But if the probationer has made all reasonable bona fide efforts to pay the fine and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the probationer are available to meet the State's

interest in punishment and deterrence." 461 U.S. 660-661, <http://supreme.justia.com/cases/federal/us/461/660>.

20. The federal statute, 18 U.S. Code § 3663A, "Mandatory restitution to victims of certain crimes," lists the following offenses as requiring mandatory restitution: crimes of violence, property offenses (including offenses committed by fraud or deceit), offenses related to tampering with consumer products, and offenses relating to the theft of medical products. Mandatory restitution bars judges from considering a defendant's ability to pay when determining restitution.

21. Collection rates are hampered by people's inability to pay, difficulty in locating people over time, and age of the debt.

22. See Vera Institute of Justice (1988) for a full explanation of how this works.

23. The U.S. does have some experience with day-fines. During the 1980s and 1990s when some in the criminal justice community sought alternative sanctions to incarceration, several initiatives were launched to explore the viability of proportional fines. The results were largely promising. A RAND study of day-fines in Arizona's Maricopa County focused on people convicted of felonies "with low need for supervision and treatment." It found that day-fines successfully diverted people from standard "supervision probation" and increased payment

without negative consequences in arrests and technical violations (Turner and Greene, 1999). Another study of the efficacy of day-fines in low-level courts in Milwaukee and Staten Island found similarly positive results (Greene and Worzella, 1992). In sum, these valuable experiences, drawn from the European context and in parts of the U.S. as well, provide reasons to be optimistic as they indicate that by taking both offense severity and ability to pay into account, the day-fine model or an equivalent could help to address the most pressing concerns regarding our current system of CJFOs.

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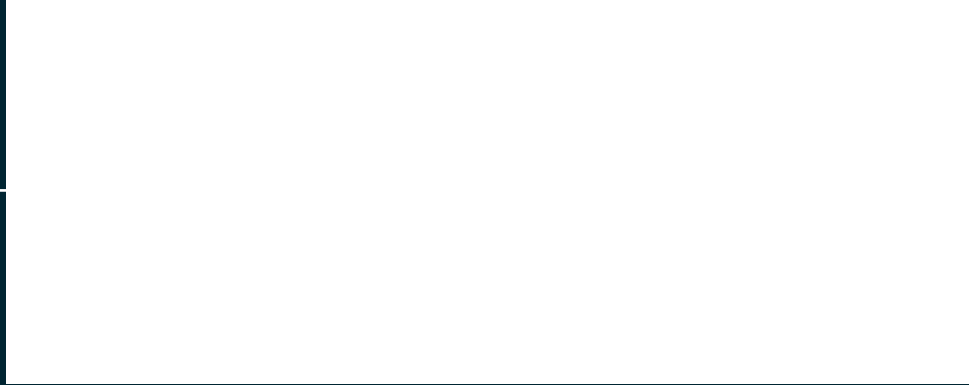
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