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House Judiciary Committee Over-Criminalization Task Force
“Collateral Consequences”
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Chairman Sensenbrenner, Ranking Member Scott, and distinguished members of the House Judiciary Committee Over-Criminalization Taskforce, thank you for the opportunity to address the issue of collateral consequences facing individuals returning from the criminal justice system.

The Brennan Center for Justice is a nonpartisan law and policy institute that seeks to improve the national systems of democracy and justice. The Brennan Center for Justice was created in 1995 by the clerks and family of the late Supreme Court Justice William J. Brennan, Jr. as a living memorial to his belief that the Constitution is the genius of American law and politics, and the test of our institutions is how they treat the most vulnerable among us. Affiliated with New York University School of Law, the Brennan Center has emerged as a national leader on issues of democracy and justice.¹

The Brennan Center is committed to reducing mass incarceration to ensure that the lives of millions of Americans, their families, and their communities are improved. We seek reforms that meet the twin goals of reducing the criminal justice system’s size and severity while improving public safety. We applaud the Committee for holding a hearing to discuss the barriers faced by those returning to our communities. Collateral consequences can deeply affect the ability of the formerly incarcerated to reenter society successfully. This testimony urges the Committee to make changes where appropriate to remove unnecessary barriers in returning to communities as part of an effort to ensure our systems of democracy and justice are working efficiently and effectively.

I. COLLATERAL CONSEQUENCES OF INCARCERATION HAVE AN ECONOMIC, FISCAL AND SOCIAL IMPACT ON SOCIETY

¹ This letter does not represent the opinions of NYU School of Law.

Collateral consequences of incarceration are legal sanctions and restrictions imposed on people because of their criminal record. The United States, as the largest incarcerator in the world, subjects numerous individuals to various collateral consequences every day that limit their ability to participate in society fully. Indeed, the majority of offenders come home, and in 2012 alone almost 650,000 individuals were released from state or federal prison back into our communities.² When individuals returning from prison fail to successfully reintegrate into society there is a cost — a public safety and an economic cost to our communities.

The U.S. currently spends at least \$70 billion each year on corrections, including incarceration, parole and probation, making it the fastest growing budgetary item after Medicaid.³ While this number is staggering, the economic and fiscal costs attributed to the re-entry barriers faced by those leaving the corrections system are likely even higher. Two barriers in particular — restrictive employment and housing practices — illustrate the economic and fiscal costs of collateral consequences on society.

Restrictive employment practices, such as hiring discrimination based on criminal records, bar ex-offenders from obtaining stable employment and lower their economic prospects within the workforce. Studies show that serving time in either prison or jail reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent.⁴ Because a high number of formerly incarcerated are unable to secure work, the Center for Economics and Policy Research (CEPR) estimates that they “lower overall employment rates as much as 0.8 to 0.9 percentage points.”⁵ A 2010 CEPR study determined that this exclusion of individuals from the workforce costs the U.S. economy the “equivalent of 1.5 to 1.7 million workers,”⁶ representing a loss of goods and services that reduced the gross domestic product (GDP) for the U.S. by \$57 to \$65 billion in 2008 alone.⁷

Systemic barriers to employment also impose a large cost on federal, state, and local budgets. For example, in a report prepared by the Economy League of Greater Philadelphia, it is estimated that if “100 currently unemployed formerly incarcerated individuals” obtain employment, their employment “would produce an additional \$1,900,000 in city tax revenue and \$770,000 in sales tax revenue over their post-release lifetimes.”⁸

² See E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

³ N. Y. STATE BAR ASS’N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY 48, 55 (2006), available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26857>; see also NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE 12 (2011), available at

http://naacp.3cdn.net/01d6f368edbe135234_bq0m68x5h.pdf; CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISON: WHAT INCARCERATION COSTS TAXPAYERS 2 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

⁴ THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010), available at http://www.pewtrusts.org/uploadedFiles/Collateral_Costs.pdf.

⁵ JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. AND POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 14 (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

⁶ *Id.* at 2.

⁷ *Id.*

⁸ ECON. LEAGUE GREATER PHILA., ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA, EXECUTIVE SUMMARY 3 (2011), available at http://economyleague.org/files/Ex-Offenders_Exec_Summ_for_web.pdf.

Restrictive housing policies directed at the formerly incarcerated also impose economic and fiscal costs on society at large. Section 8, local public housing and other federally subsidized housing providers, “may — and sometimes must — deny housing to people with a criminal history involving drugs or violence.”⁹ A study by the Urban Institute estimated that at least one-tenth of those leaving prison will end up homeless,¹⁰ an intolerable number considering 637,400 people were released from prison in 2012 alone.¹¹ Just one homeless individual is estimated to cost taxpayers more than \$30,000 annually.¹² As such, the U.S. may have spent as much as \$1.9 billion on housing formerly incarcerated individuals who were excluded from public housing in 2012 alone.

Homelessness also perpetuates the cycle of poverty, criminality and incarceration that sustains mass incarceration in the United States. Homelessness is associated with high rates of recidivism. A study of the formerly incarcerated in New York City revealed that of the 1.4 percent that “experienced a post-release shelter stay,” 32.8 percent returned to prison within two years following their initial release.¹³ Additionally, those who were formerly incarcerated living without housing are “seven times more likely to violate parole.”¹⁴ Exclusionary housing policies for the formerly incarcerated, therefore, can result in many returning to costly correctional systems in a short period.

Reentry programs that provide housing support and placement are associated with lower rates of recidivism. For example, a study of Project Re-Connect, an initiative by the City of St. Louis that provides housing, employment, and substance abuse support, revealed that only 8.2 percent of the program’s 411 participants had committed a new crime since release from prison.¹⁵ Of the 609 non-participants released from prison during the same time period, 34.5 percent committed a new crime¹⁶ — demonstrating a substantial and costly difference.

⁹ NINO RODRIGUEZ & BRENNER BROWN, VERA INST. OF JUSTICE, PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 3 (2003), available at http://www.vera.org/sites/default/files/resources/downloads/IIB_Homelessness.pdf.

¹⁰ CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INST., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY iv (2004), available at http://www.urban.org/UploadedPDF/411096_taking_stock.pdf.

¹¹ CARSON & GOLINELLI, *supra* note 2, at 2.

¹² See, e.g., Kate Santich, *Cost of Homeless in Central Florida? \$31K Per Person*, ORLANDO SENTINEL (May 21, 2014), http://articles.orlandosentinel.com/2014-05-21/news/os-cost-of-homelessness-orlando-20140521_1_homeless-individuals-central-florida-commission-tulsa (finding that homeless individuals in Central Florida costs taxpayers roughly \$31,000 per individual annually); DANIEL FLAMING ET AL., ECON. ROUNDTABLE, WHERE WE SLEEP: COSTS WHEN HOMELESS AND HOUSED IN LOS ANGELES 1 (2009), available at http://www.economicrt.org/pub/Where_We_Sleep_2009/Where_We_Sleep.pdf (finding an average public cost of \$2,897 per month for each homeless person in Los Angeles County).

¹³ STEPHEN METRAUX & DENNIS P. CULHANE, HOMELESS SHELTER USE AND REINCARCERATION FOLLOWING PRISON RELEASE: ASSESSING THE RISK 11 (2002), available at <http://csgjusticecenter.org/nrc/publications/homeless-shelter-use-and-reincarceration-following-prison-release-assessing-the-risk-3/>.

¹⁴ CORP. FOR SUPPORTING HOUSING & NAT’L ALLIANCE TO END HOMELESSNESS, BUILDING ON THE SECOND CHANCE ACT: HOUSING AS THE FOUNDATION FOR SUCCESSFUL RE-ENTRY 1 (2009), available at http://www.metropolisstrategies.org/documents/BuildingonSecondChanceAct_Housing_Concept_Paper5-19-09.pdf.

¹⁵ THE U.S. CONFERENCE OF MAYORS, STATUS OF EX-OFFENDER REENTRY EFFORTS IN CITIES: A 79 CITY SURVEY 22 (2009), available at <http://usmayors.org/pressreleases/uploads/REENTRYREPORT09.pdf>.

¹⁶ *Id.*

There is a clear social cost to collateral consequences as well. These policies cumulate to exclude and isolate formerly incarcerated individuals from the fabric of society and often prevent successful reintegration. There is substantial public support for reentry programs that facilitate successful reintegration. Indeed, a 2011 study revealed that 88.7 percent of participants agreed that “it is a good idea to help people who are coming out of prison readjust to life in society.”¹⁷ Given that support, combined with the economic and fiscal costs discussed above, it is clear that Congress should take action to curb these policies as a measure to improve the effectiveness and fairness of our systems of justice and democracy.

II. CONGRESS CAN ADDRESS VOTE RESTORATION AND CRIMINAL JUSTICE DEBT

While there are various types of collateral consequences facing the formerly incarcerated, there are two types of restrictions and/or legal sanctions particularly relevant to reentry - the voting restrictions and criminal justice debt. We recommend that the Taskforce focus on addressing these consequences as it considers recommendations to address over-incarceration.

A. *Felon Disenfranchisement Prevents Successful Reintegration into Society*

Felon disenfranchisement affects a large portion of the U.S. population. There are nearly 6 million American citizens currently unable to vote because of a past criminal conviction.¹⁸ In fact, 75 percent of disenfranchised voters live in their communities, either under probation or parole supervision or having completed their sentence.¹⁹ These laws also have a disproportionate impact on minorities. Across the country, 13 percent of African-American men have lost their right to vote, which is seven times the national average.²⁰ In three states — Florida (23 percent), Kentucky (22 percent), and Virginia (20 percent) — more than one in five black adults is disenfranchised. In total, 2.2 million black citizens are banned from voting.²¹ Despite serving their sentence and returning to our communities, when asked to become productive, law abiding, tax paying citizens, the formerly incarcerated are systematically denied our country’s most fundamental right — access to the voting booth.

As with the phenomenon of mass incarceration generally, the United States stands alone with its disenfranchisement policies. We are one of few western democratic nations to exclude such large numbers of people from the democratic process. Almost half of European countries preserve the right to vote for all incarcerated persons and a smaller number of countries impose a time limited ban on voting for a few categories of prisoners.²²

¹⁷ Brett Garland et al., *Value Conflict and Public Opinion Toward Prisoner Reentry Initiatives*, 24 CRIM. JUST. POL’Y REV. 27, 37 (2013), available at <http://cjp.sagepub.com/content/24/1/27.full.pdf+html>.

¹⁸ THE SENTENCING PROJECT, FACT SHEET: FELONY DISENFRANCHISEMENT LAWS 1 (2014), available at http://www.sentencingproject.org/doc/publications/fd_Felony_Disenfranchisement_Laws_in_the_US.pdf.

¹⁹ CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 5 (2010), available at http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

²⁰ THE SENTENCING PROJECT, FEDERAL VOTING RIGHTS FOR PEOPLE RETURNING FROM PRISON 1 (2009), available at http://www.sentencingproject.org/doc/publications/fd_bs_peoplereturningfromprison.pdf.

²¹ UGGEN ET AL., *supra* note 22, at 2.

²² AM. CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 4 (2006), available at <http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>.

Currently, individuals with criminal convictions in the United States are subject to a patchwork of state laws governing their right to vote. The scope and severity of these laws varies widely, ranging from the uninterrupted right to vote to lifetime disenfranchisement, despite completion of one's full sentence.²³ Although voting rights restoration is possible in many states, and some recent progress has been made,²⁴ it is frequently a difficult process that varies widely across states.²⁵ More than 20 states have improved these laws, either repealing permanent voting bans or easing the restoration process. Delaware passed a constitutional amendment that undid much of its felony disenfranchisement law, and Virginia's Governor issued an executive order that made it possible for more people to get their voting rights back. Individuals with criminal convictions may lack information about the status of their voting rights or how to restore them. Further, confusion exists among elected officials about how state law contributes to the disenfranchisement of eligible voters.²⁶

There is broad support for curtailing policies that disenfranchise the formerly incarcerated. Public opinion surveys report that eight in ten U.S. residents support voting rights for citizens who have completed their sentence, and nearly two-thirds support voting rights for those on probation or parole.²⁷ The revocation of voting rights compounds the isolation of formerly incarcerated individuals from their communities, and civic participation has been linked with lower recidivism rates. In one study, among individuals who had been arrested previously, 27 percent of nonvoters were rearrested, compared with 12 percent of voters.²⁸ There has been progress on this issue because Americans understand this issue is about fairness, which is why leaders from the full range of sectors and ideologies support felony disenfranchisement. George W. Bush signed legislation to amend Texas's law about 17 years ago. Rick Santorum supported reform of these laws during his presidential run.

²³ Three states, Florida, Iowa, and Kentucky, permanently disenfranchise citizens with felony convictions unless the state approves individual rights restoration; two states, Maine and Vermont, allow all persons with felony convictions to vote, even while incarcerated; all other states fall somewhere in between. *See Map of State Criminal Disenfranchisement Laws*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/map-state-felony-disfranchisement-laws> (last visited June 26, 2014) (contains a map detailing state laws).

²⁴ Recently, bipartisan lawmakers in states with very restrictive laws, like Virginia and Kentucky have made reforms and considered changes. *See* Letter from Governor, Robert F. McDonnell to the Honorable Janet V. Kelly, Secretary of the Commonwealth (May 29, 2013), *available at* <https://commonwealth.virginia.gov/media/1803/2013GovernorLettertoSOC.pdf>; *see also* Press Release, Senator Rand Paul, Sen. Paul Testifies in Support of Restoring Voting Rights; Constitutional Amendment Passes Kentucky Senate (Feb. 19, 2014), *available at* http://www.paul.senate.gov/?p=press_release&id=1109.

²⁵ *See* AM. CIVIL LIBERTIES UNION, THE DEMOCRACY RESTORATION ACT OF 2014: 113TH CONGRESS 2 (2014), *available at* <https://www.aclu.org/racial-justice-voting-rights/aclu-factsheet-democracy-restoration-act-2014>.

²⁶ *See generally* ELECTION PROTECTION, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, OUR BROKEN VOTING SYSTEM AND HOW TO REPAIR IT: THE 2012 ELECTION PROTECTION REPORT (2013), *available at* <http://www.866ourvote.org/newsroom/publications/document/EP-2012-Full-Report.pdf>.

²⁷ *See* Jeff Manza et al., *Public Attitudes Towards Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280 (2004), *available at* [http://sociology.as.nyu.edu/docs/IO/3858/Public Attitudes Towards Felon Disenfranchisement Laws in the US.pdf](http://sociology.as.nyu.edu/docs/IO/3858/Public_Attitudes_Towards_Felon_Disfranchisement_Laws_in_the_US.pdf).

²⁸ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 205 (2004), *available at* http://www.soc.umn.edu/~uggen/Uggen_Manza_04_CHRLR2.pdf.

Congress and the Obama administration have made efforts to address felony disenfranchisement at the federal level. For example, on April 10, 2014 Senator Benjamin Cardin (D-MD) and Congressman John Conyers (D-MI-13th) re-introduced the bi-cameral Democracy Restoration Act (DRA), based on a Brennan Center proposal.²⁹ The DRA would restore the right to vote in federal elections to the previously incarcerated immediately after their incarceration period is complete. Doing so would enable these individuals to resume the right and responsibility inherent in our role as Americans — asserting our voice through the ballot box. Under the legislation, once an individual has completed his or her incarceration period, their right to vote in federal elections will be automatically restored. Individuals will not be limited because of any ancillary issues related to their incarceration such as outstanding fees and fines or the fact that they have been released from prison but remain on probation. Senator Rand Paul (R-KY) has also been vocal about the need to restore voting rights to individuals. On February 19, 2014, before the Kentucky Senate Committee, he testified in support of restoring voting rights to people with past convictions. In addition, Senator Paul recently introduced a bill that would secure the federal voting rights of non-violent persons when released from incarceration (S. 2550). While this bill falls short of the Democracy Restoration Act, by not restoring voting rights to all, having both a Republican voice and a Democratic voice on this issue is a huge step forward. Attorney General Eric Holder additionally made statements in support of the easing of voter restoration requirements in February 2014.³⁰

Although this progress is encouraging, public awareness alone does not go far enough to address the disenfranchisement of millions of Americans following a criminal conviction. Reforms are necessary. Already approximately 40 percent of states have more expansive policies than those proposed by DOJ.³¹ In addition, the Department's proposal that individuals must wait until after probation and parole fuels confusion among election officials and returning citizens, and the requirement to pay fines before voting, we believe, is tantamount to a poll tax.³² We recommend the Taskforce expand and clarify support for automatic restoration of voting rights to citizens upon their release from incarceration for disenfranchising convictions, and oppose restrictions for those on parole or probation or with unpaid fees or fines. Therefore, we strongly recommend support and passage of the Democracy Restoration Act. Taking part in our democracy and having a voice in how our communities are governed is perhaps the most significant way for any American to feel that they have a stake not only in our nation as a whole, but also within the community they live.

B. Criminal Justice Debt is a Collateral Consequence of Incarceration that Prevents Successful Reentry

²⁹ See ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE (2d ed. 2009)

³⁰ In February 2014, Attorney General Holder called upon state leaders and elected officials to pass reforms to restore voting rights. Although the called-for reforms are more limited than those provided in the Democracy Restoration Act, they are welcome statements from the DOJ. Attorney General Eric Holder, Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140211.html>.

³¹ See *Map of State Criminal Disenfranchisement Laws*, *supra* note 23.

³² The DOJ proposal includes restoring the right to vote for all who have served their terms in prison or jail, completed their parole or probation, and paid their fines. Attorney General Eric Holder, Remarks on Criminal Justice Reform, *supra* note 30.

Upon entry into the criminal justice system, offenders incur criminal justice related fees and fines that can prevent successful reintegration into society. Often an unnoticed aspect of the justice systems across the country, these fees and fines are frequently calculated without adequate consideration of an offenders' ability to pay. Excessive fines may add unnecessary pressure to individuals trying to get on their feet after incarceration and can, in some instances, result in re-incarceration.³³ As such, criminal justice debt unchecked contributes to the cycle of poverty, criminality and incarceration that perpetuates mass incarceration.

In 2010, the Brennan Center for Justice published a seminal report, *Criminal Justice Debt: A Barrier to Reentry*, exposing the realities of criminal justice in states across the country.³⁴ Since that time, the issue has captured the attention of numerous policymakers and the media.³⁵ Recently, the Brennan Center for Justice participated in an expose by National Public Radio documenting the struggles of formerly incarcerated individuals to cope with criminal justice related debt.³⁶ Additionally we provided data for a national state-by-state court fees survey NPR conducted.³⁷

1. Learning from the States

Criminal justice debt refers to the compilation of legal financial obligations — including fines, restitution and other “user fees” — that a defendant may accrue while being processed in the criminal justice system.³⁸ These range from fees incurred for use of a public defender to court assessments to restitution to child support payments accrued during incarceration. Frequently,

³³ See, e.g., Brief for Brennan Center for Justice, et al. as Amici Curiae supporting Appellant at 13, *Michigan v. Joseph Bailey*, 2014 WL 310203 (Mich. Ct. App. Jan. 28, 2014) (No. 311682) (unpublished), available at http://www.brennancenter.org/sites/default/files/legal-work/Bailey_Amicus_Brief_082313.pdf (“the investigations of amici have shown that a significant number of Michigan courts jail individuals for nonpayment without ever conducting an assessment of the individual’s indigence or ability to pay”); see also ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 2* (2010), available at http://www.brennancenter.org/sites/default/files/legacy/Fees_and_Fines_FINAL.pdf (“Although ‘debtors’ prison’ is illegal in all states, reincarcerating individuals for failure to pay debt is, in fact, common in some – and in all states new paths back to prison are emerging for those who owe criminal justice debt.”); AM. CIVIL LIBERTIES UNION, *IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS* (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf (chronicling individual experiences of re-incarceration for failure to pay fines and fees in Louisiana, Michigan, Ohio, Georgia and Washington).

³⁴ See generally, BANNON ET AL., *supra* note 33 (chronicling the treatment of criminal justice debt in 15 states); see also ROOPAL PATEL & MEGHAN PHILIP, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION* (2012), available at http://www.brennancenter.org/sites/default/files/legacy/publications/Criminal_Justice_Debt_Background_for_web.pdf.

³⁵ See, e.g., Sarah Stillman, *Get Out of Jail, Inc.*, THE NEW YORKER (June 23, 2014), http://www.newyorker.com/reporting/2014/06/23/140623fa_fact_stillman; Editorial Board, *Pay Up or Go to Jail*, N.Y. TIMES, May 20, 2014, at A28, available at <http://www.nytimes.com/2014/05/21/opinion/pay-up-or-go-to-jail.html>; Stephen Colbert, *The Word: Debt or Prison*, THE COLBERT REPORT (June 11, 2014), available at <http://thecolbertreport.cc.com/videos/m87g43/the-word---debt-or-prison>.

³⁶ Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, Nat’l Public Radio (May 19, 2014), available at <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

³⁷ *State-By-State Court Fees*, Nat’l Public Radio (May 19, 2014), available at <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.

³⁸ The Brennan Center defines “user fees” as “financial obligations imposed not for any traditional criminal justice purpose such as punishment, deterrence, or rehabilitation but rather to fund tight state budgets.” BANNON ET AL., *supra* note 33, at 1.

these fees and fines are imposed on individuals without regard to their ability to pay, and rather than furthering a particular purpose of punishment the fines are used to maintain financially strapped criminal justice systems on the backs of poor defendants. And while the U.S. Constitution prohibits incarceration for failure to pay, the burden of debts can prevent defendants from successfully reentering society due to stress and inability to make ends meet upon release from prison.

The imposition of fees and fines are on the rise as states seek alternative means to impose punishment other than incarceration. The Brennan Center believes that now, more than ever, there is a need to create more adequate ability to pay determinations in the process of imposing criminal justice debt. In order to end mass incarceration, offenders must be able to leave the criminal justice system and stay out. To that end, reforms aimed at addressing criminal justice debt, like other collateral consequences discussed here, are crucial in creating long term solutions that will end mass incarceration.

2. *Federal Criminal Justice Debt*

The federal system is unique in its imposition of fees and fines. Unlike the states, the variety of criminal justice fines that can result in overwhelming criminal justice debt does not exist; nevertheless, the fees and fines can accrue quickly. For example, the court must impose an assessment upon an individual convicted of a crime. That assessment, based upon statute, must be imposed for each count of a crime. This means that an individual who is convicted of nine felonies will be required to pay \$900 in assessments, even if the amount of the crime only amounts to \$75.³⁹ These assessments are mandatory regardless of a defendant's ability to pay. Indeed, the constitutionality of assessments does not come into question until the time of debt collection.⁴⁰

While assessment fees on their own may appear manageable, when combined with mandatory restitution and other court-imposed fines, it becomes quite unmanageable for many impoverished offenders. Under the Mandatory Victim Restitution Act (MVRA), the court must order restitution for certain offenses and may order restitution in all offenses.⁴¹ But when determining the amount of restitution owed, the court may not take the defendant's ability to pay into consideration. Indeed, the defendant's ability to pay is only considered when declining to impose

³⁹ See 18 U.S.C. § 3013(a)(2)(A).

⁴⁰ *United States v. Rivera-Velez*, 839 F.2d 8, 8 (1st Cir. 1988) (“The mere existence during indigency of an outstanding penal liability does not violate a defendant's rights”); see also *United States v. Pagan*, 785 F.2d 378, 381 (2d Cir. 1986) (“the imposition of assessments on an indigent, per se, does not offend the Constitution. Constitutional principles will be implicated here only if the government seeks to enforce collection of the assessments ‘at a time when [Pagan is] unable, through no fault of his own, to comply.’”) (citations removed); *Cooper v. United States*, 856 F.2d 193, 193 (6th Cir. 1988) (“a constitutional issue arises only if the government seeks to enforce collection against indigent defendants”); *United States v. Rising*, 867 F.2d 1255, 1259–1260 (10th Cir. 1989) (“The assessment provided for in § 3013 has been held to be mandatory, and imposition of the assessment on an indigent does not, per se, offend the Constitution. Constitutional principles will be implicated only if enforcement is later sought at a time when the defendant is unable, through no fault of his own, to pay the assessment.”); *United States v. Cooper*, 870 F.2d 586, 586 (11th Cir. 1989) (“Appellant contends . . . that the assessments are unconstitutional as applied to him, because he is indigent. We disagree, adopting the reasoning of the First and Second Circuits . . .”).

⁴¹ See 18 U.S.C. § 3556.

full restitution — at the second phase of analysis and “without consideration of the economic circumstances of the defendant.”⁴² The district court does set a payment schedule taking into consideration “financial resources and other assets . . . projected earnings . . . [and] any financial obligations of the defendant” but this analysis does not require a reasonable subsistence for the individual. Unsurprisingly, numerous defendants have gone to court after their conviction claiming that prisons garnished wages earned to pay court-ordered restitution without prisoner assent and/or enough money for reasonable subsistence. The burden for providing adequate subsistence to the prisoners, in turn, shifts to the families of inmates. In this way, criminal justice debt not only inhibits the lives of the offenders but it affects the lives of their families as well.

3. Preventing Criminal Justice Debt: Standardized Ability to Pay Determinations

The Brennan Center for Justice seeks reforms that will alleviate the onerous and burdensome effects of criminal justice debt that may prevent offenders from successfully disentangling themselves from the criminal justice system. To that end, we encourage ability to pay determinations to be a more prevalent part of the court (and legislators) analysis of fees and fines. We support two alternative measures to improve ability to pay: a) including a reasonable subsistence standard into the analysis of criminal justice debt; and b) allowing ability to pay determinations to cap all fees and fines beyond restitution. These policy solutions will be discussed in a more detail in a forthcoming report.

We encourage the Taskforce to consider these alternatives and the burdens that these fees and fines may pose on different offenders. Particularly given that 90 percent of all federal defendants qualify for court-appointed lawyers, inability to pay fees and fines is a problem that can plague a majority of offenders.⁴³ As the Taskforce considers the interlocking web of collateral consequences facing offenders upon release from incarceration, we encourage you to address the burden of criminal justice debt as well.

III. CONCLUSION

The Brennan Center thanks the Taskforce for holding a hearing to discuss collateral consequences facing individuals returning to our communities. We appreciate the opportunity to submit written testimony on this issue. The Taskforce has a key role to play in helping pass comprehensive and meaningful legislation to address these issues, and we urge you to consider our recommendations as you do so.

⁴² 18 U.S.C. § 3664(f)(1)(A).

⁴³ Richard Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES, Aug. 23, 2014, at A14, available at <http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?pagewanted=all&r=0>.