

# Clearinghouse REVIEW

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# SENTENCED TO A LIFE OF CRIMINAL DEBT

## A Barrier to Reentry and Climbing out of Poverty

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**S**ammy is a 53-year-old African American man living in Philadelphia. He battled a drug problem earlier in life and served time in the mid-1990s. Once released, he kicked his drug habit and has now been clean for many years. But for all his efforts, he has never truly been able to get back on his feet. With his criminal record, he has been unable to find stable employment since being released from prison. However, he is ineligible to apply for a pardon because he faces several thousands of dollars in criminal debt. Without any source of income, he cannot even afford to make modest installment payments toward his debt. Like millions of others in the United States, he may have served his time, but he is far from paying off his debt.<sup>1</sup>

In a disturbing nationwide trend, states are increasingly shifting the onus of revenue generation for their courts and criminal justice systems to those accused or convicted of crimes. Several recent reports surveying this phenomenon have found that, across the board, states are imposing more—and more costly—criminal justice–related debts on individuals arrested or sentenced for crimes and in most cases without regard for individuals’ ability to pay.<sup>2</sup> These debts have the effect of extending criminal sentences long past their intended duration, as well as hobbling ex-offenders’ chances at successful reentry and rehabilitation, and transforming punishment from a temporary experience to a long-term, even lifelong status.<sup>3</sup> Subject to extraordinary collection rules, criminal debts are typically excluded from consumer protections and can stand in the way of criminal-record expungements and pardons, receiving public benefits, housing, employment, and access to credit. In sum, these debts present a significant obstacle to reentry for millions of individuals seeking to move on with their lives. Here we (1) discuss the nature and rise of criminal justice–related debts; (2) discuss their relevance to the civil legal services community, including their numerous and severe collateral consequences; (3) give examples of successful and ongoing advocacy in several states; and (4) encourage collaboration between civil and criminal advocates for further policy improvements.

<sup>1</sup>All individual stories describe clients of Community Legal Services of Philadelphia. Names have been changed to protect privacy and confidentiality.

<sup>2</sup>See Alicia Bannon et al., Brennan Center for Justice at New York University School of Law, *Criminal Justice Debt: A Barrier to Reentry* (2010), [http://bit.ly/brennan\\_Criminal](http://bit.ly/brennan_Criminal); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (Oct. 2010), [http://bit.ly/aclu\\_penny](http://bit.ly/aclu_penny); Alexis Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 *AMERICAN JOURNAL OF SOCIOLOGY* 1753 (2010).

<sup>3</sup>See Bannon et al., *supra* note 2; Harris et al., *supra* note 2.

### The Rise of Criminal Debt

Criminal debt, often called “legal financial obligations” or “monetary sanctions,” refers to the array of court costs, fines, fees, restitution debts, and bail forfeitures that are imposed on individuals accused or convicted of criminal offenses. While these debts can appear modest in isolation—\$25 here, \$40 there—they commonly add up to many hundreds if not tens of thousands of dollars.<sup>4</sup> A report by the Brennan Center profiled a Pennsylvania woman convicted of a drug crime and sentenced to a term of three to twenty-three months of imprisonment, a \$500 fine, and \$325 in restitution.<sup>5</sup> She also incurred twenty-six separate fees totaling \$2,464—three times the amount of her fine and restitution.<sup>6</sup> Florida has added more than twenty new categories of criminal-justice fees and fines since 1996 and has increased existing fees.<sup>7</sup> New York has been increasing the size and number of fees since the 1990s.<sup>8</sup> About a third of U.S. jails now charge jail fees.<sup>9</sup> Riverside County, California, recently instituted a jail fee of up to \$142 per day.<sup>10</sup> Some jurisdictions are also significantly heightening collection efforts. Philadelphia recently began aggressive collections of criminal debts incurred as far back as 1971, despite the court’s long history of notoriously poor record keep-

ing and a population that is largely unable to bear the debt.<sup>11</sup> Some four hundred thousand Philadelphians (more than one in five of the city’s residents) are facing collections for criminal debts.<sup>12</sup>

While these fees may seem a tempting source of revenue for cash-strapped states and localities, they are being levied on a population that is by and large unable to pay. Some 80 percent to 90 percent of U.S. criminal defendants are poor enough to qualify for indigent defense.<sup>13</sup> Among prisoners 65 percent do not have a high school diploma, and 70 percent have extremely low literacy.<sup>14</sup> Among persons leaving prison 15 percent to 27 percent expect to go to a homeless shelter when they are released, and as many as 60 percent remain unemployed a year after release from prison.<sup>15</sup> About 70 percent of Philadelphians facing criminal-debt collection are low-income, elderly, disabled, receiving public assistance, unemployed, or without a source of income.<sup>16</sup> In Florida just 9 percent of fees assessed in felony cases are expected to be collected.<sup>17</sup> A study in Washington State found that formerly incarcerated men owed between 36 percent and 60 percent of their annual incomes in criminal debt and that even if they paid \$100 per month—on average 10 percent to 15 percent of their monthly earnings—they

<sup>4</sup>Bannon et al., *supra* note 2; Harris et al., *supra* note 2.

<sup>5</sup>Bannon et al., *supra* note 2, at 7.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Jail Fees Increase Inmates’ Debt to Society*, BALTIMORESUN.COM, May 23, 2004, [http://bit.ly/baltsun\\_jailfees](http://bit.ly/baltsun_jailfees).

<sup>10</sup>See also Phil Willon, *Riverside County to Make Inmates Pay Jail Costs*, LOS ANGELES TIMES, Nov. 20, 2011, <http://lat.ms/v0R4CP>.

<sup>11</sup>See Supreme Court of Pennsylvania, *The Reform Initiative: First Judicial District Criminal Courts: Commonwealth of Pennsylvania: Interim Report* (July 2011) [http://bit.ly/reform\\_initiative](http://bit.ly/reform_initiative); see also Holly Otterbein, *Court Charges Them with Debt*, PHILLY.COM, Feb. 13, 2012, [http://bit.ly/philly\\_court\\_debt](http://bit.ly/philly_court_debt).

<sup>12</sup>See Supreme Court of Pennsylvania, *supra* note 11; Otterbein, *supra* note 11.

<sup>13</sup>Bannon et al., *supra* note 2, at 4.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Supreme Court of Pennsylvania, *supra* note 11, at 36.

<sup>17</sup>Bannon et al., *supra* note 2, at 13.

would remain significantly indebted ten years later.<sup>18</sup>

The population facing these debts is considerable—and increasing in number. Between 1980 and 2007 in the United States the number of individuals who were incarcerated or on probation or parole skyrocketed from approximately two million to more than seven million.<sup>19</sup> The share of U.S. adults living behind bars is more than one in one hundred—a rate that exceeds that of any other nation.<sup>20</sup> More than ten million individuals emerge from jail or prison each year, and millions more finish terms of probation or parole.<sup>21</sup> The vast majority will face criminal debts. Countless more individuals face criminal-debt burdens even without a conviction. In many states, failure to appear in court can result in forfeiture of an entire bail assessment—a debt in the thousands, if not tens of thousands, of dollars. Many Philadelphians are facing multiple bail forfeitures, resulting in debts of \$50,000 or more in many cases.<sup>22</sup>

Unlike civil debt, criminal debt is unlikely to be discharged in bankruptcy.<sup>23</sup> It is also frequently not subject to statutes of limitation.<sup>24</sup> (Philadelphia's collection initiative, seeking debts from the 1970s and 1980s, is a striking example and is dis-

cussed later.) And while an array of legal protections shield consumers from usury, harassment, and other aggressive collection practices by civil debt collectors and payday lenders, these legal protections frequently do not apply to criminal debt. Many statutes authorizing the imposition and collection of criminal justice-related debts explicitly define them as not “debts,” thereby placing them outside the reach of the Fair Debt Collection Practices Act and other protective laws.<sup>25</sup> Moreover, many statutes governing criminal debt authorize extraordinary collection remedies, such as wage and tax garnishment—in some cases without limit.<sup>26</sup>

Inability to pay can lead to a cycle of indebtedness. Many states tack on “poverty penalties” such as late fees, interest charges, payment plan fees, and steep collection fees upon referral to collection agencies and law firms—irrespective of ability to pay. For example, California imposes a flat \$300 fee for late payment, and Michigan charges an additional 20 percent when debtors fall fifty-six days behind.<sup>27</sup> Florida permits collection agencies to levy up to a 40 percent collection fee over and above the principal owed.<sup>28</sup> Some jurisdictions even charge fees of up to \$100 for establishing payment plans.<sup>29</sup>

<sup>18</sup>Harris et al., *supra* note 2, at 1776, 1786.

<sup>19</sup>*Id.* at 1760.

<sup>20</sup>Bruce Western & Becky Pettit, Pew Center on the States, *Collateral Costs: Incarceration's Effect on Economic Mobility* 5 (2010).

<sup>21</sup>Harris et al., *supra* note 2, at 1760.

<sup>22</sup>Since 2011, through Community Legal Services, Rebecca Vallas has advised or represented about a hundred individuals facing criminal debts before the First Judicial District of Pennsylvania; Otterbein *supra* note 11.

<sup>23</sup>11 U.S.C. §§ 523(a)(19)(B)(iii), *id.* § 1328(a)(3)–(4); see also Harris et al., *supra* note 2, at 1763.

<sup>24</sup>See, e.g., 42 PA. CONS. STAT. § 9728 (2012) (judgments for criminal debts may continue to have full effect even after maximum term of imprisonment to which offender could have been sentenced for crimes for which offender was convicted, but no outer limit on time frame of collections set).

<sup>25</sup>See, e.g., *id.* § 9728(a)(1) (“restitution, reparation, fees, costs, fines, and penalties are part of a criminal action or proceeding and shall not be deemed debts ...”).

<sup>26</sup>Of the fifteen states studied in the Brennan Center report, all fifteen permitted the use of civil collection methods to collect criminal debts, such as garnishment of wages, attachment on bank accounts, and liens on property. Nine of the fifteen authorized interception of tax rebates (Bannon et al., *supra* note 2, at 27–28; see also Harris et al., *supra* note 2, at 1761–62).

<sup>27</sup>Bannon et al., *supra* note 2, at 17; CAL. PENAL CODE § 1214.1A (West 2010); MICH. COMP. LAWS ANN. § 600.4803(1) (West 2010).

<sup>28</sup>FLA. STAT. § 28.246(6) (West 2010); Bannon et al., *supra* note 2, at 17; Harris et al., *supra* note 2, at 1759.

<sup>29</sup>New Orleans charges \$100 to enter a payment plan (Bannon et al., *supra* note 2; at 18; Telephone Conversation with a New Orleans Public Defender (Dec. 2, 2009).

### Modern-Day Debtors' Prison?

Debtors' prisons were a fact of life in England through the nineteenth and twentieth centuries as well as in early America. But for some thirty years the U.S. Supreme Court has held them to be unconstitutional as a mechanism for collecting criminal debts, except from individuals who are able to pay but refuse to do so. In *Williams v. Illinois* the Court holds unconstitutional the extension of a maximum prison term because a person is too poor to pay fines and costs.<sup>30</sup> In *Tate v. Short* the Court holds that conversion of an indigent person's unpaid fines into a jail sentence is unconstitutional.<sup>31</sup> Likewise, in *Bearden v. Georgia*, the Court holds that revocation of probation for failure to pay a fine without an inquiry into the defendant's ability to pay and consideration of adequate alternatives to imprisonment is unconstitutional.<sup>32</sup>

Nevertheless, criminal-debt practices have given rise to a nationwide reemergence of de facto modern-day debtors' prisons.<sup>33</sup> For instance, despite the constitutional requirement that ability to pay be determined prior to incarceration, courts often fail to make such an inquiry before imposing jail time. A recent Brennan Center report describes an Illinois judge who reportedly asked individuals who came before him if they

smoked—those who answered yes but had paid nothing since their last court date were found to have committed willful nonpayment and put in jail without further inquiry as to ability to pay.<sup>34</sup> Similarly a Michigan judge reportedly presumed that individuals with cable television were able to pay.<sup>35</sup>

Revocation of probation or parole for failure to pay criminal debts functions as another path to debtors' prison.<sup>36</sup> In states such as California and Missouri, people are offered the "choice" to spend time in jail as an alternative for paying off criminal debt.<sup>37</sup> Through civil contempt proceedings many states also authorize incarceration for willful failure to pay.<sup>38</sup> In some states, people arrested for nonpayment of criminal debts often wait in jail until ability-to-pay hearings.<sup>39</sup>

Criminal-debt practices may also undermine the right to counsel, eroding the principles underlying *Gideon v. Wainwright*.<sup>40</sup> Effectively discouraging individuals from exercising their right to an attorney, many states levy "public defender fees" as high as thousands of dollars on indigent criminal defendants who choose to exercise their right to counsel.<sup>41</sup> The National Legal Aid and Defender Association found that Michigan's policy of requiring full reimbursement of the cost of criminal defense resulted in indigent

<sup>30</sup>*Williams v. Illinois*, 399 U.S. 235, 240 (1970).

<sup>31</sup>*Tate v. Short*, 401 U.S. 395, 396 (1971).

<sup>32</sup>*Bearden v. Georgia*, 461 U.S. 660, 669 (1983).

<sup>33</sup>See Bannon et al., *supra* note 2; American Civil Liberties Union, *supra* note 2.

<sup>34</sup>Bannon et al., *supra* note 2, at 21; Brennan Center Memorandum from December 1, 2009, to September 15, 2010 (summarizing interviews with public defenders and collection officials) (on file with the Brennan Center).

<sup>35</sup>Bannon et al., *supra* note 2, at 22. Brennan Center Memorandum, *supra* note 34.

<sup>36</sup>Bannon et al., *supra* note 2, at 20. The Brennan Center found that all fifteen of the states studied made payment of at least some types of criminal debt a condition of probation or parole, including for indigent debtors.

<sup>37</sup>*Id.*; CAL. PENAL CODE § 1205(a) (2010); MO. REV. STAT. § 543.270(1) (1979).

<sup>38</sup>See, e.g., Los Angeles Superior Court, General Information, <http://bit.ly/Nm08E1> (in Los Angeles County, "[if] you fail to pay a fine as promised/ordered, the Court may order and issue a warrant for your arrest."). In 2009 the Brennan Center conducted telephone interviews with court officials and public defenders in fifteen states confirming this practice (Bannon et al., *supra* note 2, at 23 n.145).

<sup>39</sup>In 2009 the Brennan Center conducted a series of telephone interviews with court officials and public defenders in fifteen states (Bannon et al., *supra* note 2, at 23 n.145). In all fifteen states people could be arrested for failure to make debt payments or appear at debt-related proceedings. In many cases arrests led to days in jail (*id.* at 23).

<sup>40</sup>*Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>41</sup>Bannon et al., *supra* note 2, at 12.

misdeemeanor defendants waiving their right to counsel up to 95 percent of the time.<sup>42</sup> Exacerbating the problem is that people facing incarceration as a consequence of failure to pay criminal-justice debt may have no right to an attorney in ability-to-pay hearings and other proceedings.<sup>43</sup>

### Collateral Consequences and Community Impact

Jackie, a trained nursing assistant and single mother of three minor children, is unable to find work because of \$800 in criminal debt. Until she pays off her full debt, she will be unable to obtain a pardon. In the meantime her criminal record bars her from holding a certified nursing assistant license and thus finding employment in her field. While \$800 may sound like a modest sum, she is struggling to provide for her family on public assistance and thus is barely able to make even \$5 monthly payments toward her debt. At that rate, she will be making payments toward her criminal-debt burden for the next thirteen years.

Having a criminal history has in effect become a long-term “legal disability” that impedes reentry and prevents millions of Americans from moving on with their

lives.<sup>44</sup> Criminal debts can serve as a barrier to obtaining employment, housing, public assistance, a driver’s license, and good credit, among other components of stability and self-sufficiency.<sup>45</sup>

**Employment.** Aided by technology and the exponential increase in the availability of criminal history data, most U.S. employers now use criminal background checks in hiring.<sup>46</sup> Many states prohibit individuals with certain types of criminal histories from occupational licenses or from working in certain fields or from both.<sup>47</sup> Accordingly, “cleaning up” a criminal record is vital for people seeking gainful employment. Because satisfaction of criminal debts is frequently a prerequisite to eligibility for pardon and expungement, cleaning up one’s criminal record without paying one’s debts in full can prove impossible, leading to long-term and possibly lifelong entanglement with the criminal justice system even without the commission of new offenses.<sup>48</sup>

In the numerous states that convert criminal debts into civil judgments, such debts become public information readily available for credit reporting and even may be affirmatively reported to credit-reporting agencies.<sup>49</sup> As employers increasingly perform credit checks on job applicants,

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 22. Three states’ high courts—Ohio, Florida, and Georgia—hold that there is no right to counsel in civil court proceedings, even when incarceration is at risk (see *Andrews v. Walton*, 428 So. 2d 663, 666 (Fla. 1983); *Adkins v. Adkins*, 248 S.E.2d 646 (Ga. 1978); *In re Calhoun*, 350 N.E.2d 665 (Ohio 1976)). However, some Ohio appellate courts have treated *Calhoun* as possibly no longer good law in light of *Lassiter v. Department of Social Services*, 452 U.S. 18 (2011) (see, e.g., *Garfield Heights v. Stefaniuk*, 712 N.E.2d 808, 809 (Ohio Ct. App. 1998) (“There is a conflict in the appellate decisions concerning whether a contemnor in a civil contempt proceeding is entitled to appointed counsel.”)).

<sup>44</sup>McGregor Smyth, *Cross-Sector Collaboration in Reentry: Building an Infrastructure for Change*, 41 CLEARINGHOUSE REVIEW 245 (July–Aug. 2007), [http://bit.ly/clearinghouse\\_review\\_mcgregor](http://bit.ly/clearinghouse_review_mcgregor).

<sup>45</sup>Criminal debts can have consequences for voting rights, and immigration as well, though not discussed here (see Bannon et al., *supra* note 2, at 27–32).

<sup>46</sup>See Smyth, *supra* note 44; see also Sharon M. Dietrich, *When “Your Permanent Record” Is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REVIEW 139 (July–Aug. 2007), [http://bit.ly/clearinghouse\\_review\\_dietrich](http://bit.ly/clearinghouse_review_dietrich).

<sup>47</sup>See, e.g., AMY E. HIRSCH ET AL., CENTER FOR LAW AND SOCIAL POLICY, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 14–18 (2002), [http://bit.ly/hirsch\\_parents\\_barriers](http://bit.ly/hirsch_parents_barriers) (helpful overview of state prohibitions on employment and licensure for individuals with criminal records).

<sup>48</sup>The bar to expungement can be a practical one rather than a legal prohibition. E.g., in Pennsylvania the courts frequently refuse to perform the final steps of an expungement—the actual removal of the notations from an individual’s criminal history—if there is any money owing on criminal debts, even for other cases than the one for which expungement is being sought (Interview with Sharon Dietrich, Managing Attorney for Employment and Public Benefits, Community Legal Services, Philadelphia, Pennsylvania (March 6, 2012); see also Harris et al., *supra* note 2, at 1788–89).

<sup>49</sup>Bannon et al., *supra* note 2, at 27.

damaged credit has become an obstacle not only to financial stability but also to securing employment.<sup>50</sup> And loss of driving privileges due to criminal debts can make it impossible to take jobs even if offered.<sup>51</sup> Individuals seeking to improve their employment prospects through education can find themselves unable to take out student loans due to damaged credit (and their criminal history).<sup>52</sup> Wage and tax garnishment, increasingly used to collect criminal debts as noted above, can further eat away at income from earnings, while also pushing individuals to the underground economy.<sup>53</sup>

**Housing.** The landscape has long been bleak for individuals who have criminal histories and are seeking housing.<sup>54</sup> Public housing authorities nationwide—and increasingly private landlords as well—utilize criminal-background checks to screen applicants, and even a decades-old criminal history can function as an absolute obstacle for public housing.<sup>55</sup> Many public housing authorities and private landlords now also use credit checks to screen applicants, making damaged credit due to criminal debt yet another obstacle to obtaining housing.<sup>56</sup> New Haven, Connecticut, is an ironic example: its housing authority recently implemented a program that gives pref-

erence to ex-offenders awaiting public housing but makes no exception for poor credit history.<sup>57</sup>

**Public Benefits.** Criminal debts can serve as a barrier to accessing public assistance as well, with the perverse effect of depriving struggling individuals of their only means of making payments toward their criminal-debt obligations. State assistance programs often require compliance with payments toward criminal debts.<sup>58</sup> As discussed earlier, many states require payment of criminal debts as a condition of probation and parole.<sup>59</sup> Nonpayment can thus result in a violation of probation or parole, which can lead not only to reincarceration but also ineligibility for federal public assistance programs such as Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP, formerly the Food Stamp Program), social security disability benefits and Supplemental Security Income (SSI) for the elderly and disabled.<sup>60</sup>

### Models for Reform: Lessons from Local Advocacy

Advocates across the country have sought to improve policies at the state and local level, many with considerable suc-

<sup>50</sup>*Id.* at 27–28. See also Karen K. Harris & Susan Ritacca, *Alternative Credit Data: To Report or Not to Report, That is the Question*, 44 CLEARINGHOUSE REVIEW 391 (Nov.–Dec. 2010).

<sup>51</sup>Bannon et al., *supra* note 2.

<sup>52</sup>*Id.* at 27–28; HIRSCH ET AL., *supra* note 47, at 85–89; see also Harris et al., *supra* note 2, at 1760.

<sup>53</sup>Bannon et al., *supra* note 2, at 27–28. Of the fifteen states studied in the Brennan Center report, all fifteen permitted the use of civil collection methods to collect criminal debts, such as garnishment of wages, attachment on bank accounts, and liens on property. Nine of the fifteen authorized interception of tax rebates. See also Harris et al., *supra* note 2, at 1761–62.

<sup>54</sup>Office of Public and Indian Housing, U.S. Department of Housing and Urban Development, Notice PIH 96-16 (HA), “One Strike and You’re Out” Screening and Eviction Guidelines for Public Housing Authorities (April 12, 1996), [http://bit.ly/HUD\\_one\\_strike](http://bit.ly/HUD_one_strike); see also Hirsch et al., *supra* note 47, at 41–46.

<sup>55</sup>See Hirsch et al., *supra* note 47, at 41–46; see also Bannon et al., *supra* note 2, at 27.

<sup>56</sup>Smyth, *supra* note 44, at 246; Bannon et al., *supra* note 2, at 27.

<sup>57</sup>Bannon et al., *supra* note 2, at 27.

<sup>58</sup>E.g., Pennsylvania’s state welfare program, called General Assistance, as well as its state-funded Medicaid program, requires compliance with a court-approved payment plan as a condition of eligibility (see PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, CASH ASSISTANCE HANDBOOK—CRIMINAL HISTORY DESK GUIDE (2012), <http://bit.ly/KgZo3b>).

<sup>59</sup>See *supra* text accompanying note 35.

<sup>60</sup>Bannon et al., *supra* note 2, at 28. Note, however, that, pursuant to a recent class action settlement, eligibility for social security and Supplemental Security Income (SSI) benefits is now affected only when an applicant or recipient of benefits has been *adjudicated* in violation of parole or probation; the mere existence of a warrant for probation or parole violation is no longer sufficient to affect eligibility for social security and SSI benefits (*Clark v. Astrue*, 602 F.3d 140 (2d Cir. 2010), national class certified in *Clark v. Astrue*, 274 F.R.D. 462 (S.D.N.Y. 2011)).

cess. Their successes illustrate some of the reforms that civil legal aid providers can pursue in their own jurisdictions. A common theme of the stories that follow is coalition building, creating alliances including civil legal aid providers, public defender offices, local bar associations, criminal-justice advocates, organizations of prisoners' families, and other types of groups, all bringing different perspectives, expertise and knowledge, and possibly access to public officials and decision makers.

**Philadelphia: A Multitiered, Coalition-Based Campaign.** Philadelphia recently launched a major effort to collect criminal debts back to 1971, from more than four hundred thousand Philadelphians.<sup>61</sup> Due to a long and well-known history of poor record keeping, a considerable share of the criminal debts is of questionable accuracy.<sup>62</sup> In response, Community Legal Services of Philadelphia has partnered with the Defender Association of Philadelphia, the Pennsylvania American Civil Liberties Union (ACLU), the civil and criminal bar, an array of local social service providers, state legislative offices and the city council, and the Courts in a threefold advocacy campaign: (1) direct representation of individuals facing criminal debts, (2) broad-based systemic advocacy informed by individual representation, and (3) raising public awareness. The campaign aimed both to enable *pro se* individuals to know their rights and to expand access to representation and assistance beyond Community Legal Services of Philadelphia's limited capacity.

Community Legal Services has a long history of advocacy on behalf of people with

criminal records.<sup>63</sup> Now the direct impact of criminal debts on reentry, pardons and expungements, and public benefits eligibility has made advocacy around criminal debts a natural expansion of that work. This advocacy is also driven by demand—low-income Philadelphians facing criminal debts have come through Community Legal Services' doors in droves. Because this issue does not fall neatly into any one civil practice area, learning the relevant law and developing an approach for individual case handling as well as for systemic advocacy has been a cross-cutting, collaborative enterprise even within Community Legal Services, including attorneys from the organization's employment, public benefits, consumer law, aging and disabilities, and intake units.

Community Legal Services has utilized individual representation as an opportunity for impact advocacy. The organization's attorneys have successfully reduced and vacated bail judgments for dozens of clients facing bail forfeitures (often for \$50,000 or more and of questionable accuracy). Simultaneously, individual representation in these cases may achieve systems reform in the event of favorable state appellate court rulings. Even for programs funded by the Legal Services Corporation (LSC), this marriage of individual client representation and systems reform fits quite neatly within the zone of traditional civil legal aid work and can be pursued without running afoul of LSC restrictions governing representation in criminal proceedings and policy advocacy.<sup>64</sup>

Community Legal Services has also interfaced with court administration and

<sup>61</sup>Otterbein, *supra* note 11; Holly Otterbein, *In Pursuing Debts, Sometimes Philadelphia's Court System Is Guilty*, NEWSWORKS (Feb. 13, 2012), [http://bit.ly/newswork\\_pursuingdebts](http://bit.ly/newswork_pursuingdebts).

<sup>62</sup>See Craig R. McCoy, *Controversial Vivian Miller Will Step Down*, PHILLY.COM, March 9, 2010, [http://bit.ly/philly\\_vivianmiller](http://bit.ly/philly_vivianmiller); Craig R. McCoy & Nancy Phillips, *Nutter Moves to Abolish Clerk of Quarter Sessions Office*, PHILLY.COM, April 28, 2010, [http://bit.ly/philly\\_nutter](http://bit.ly/philly_nutter); Craig R. McCoy, *Story: A Remedy for the "Bring-Down Problem,"* PHILLY.COM, Dec. 15, 2009, [http://bit.ly/philly\\_remedy\\_bring-down](http://bit.ly/philly_remedy_bring-down); see also Otterbein, *supra* note 11; Otterbein, *supra* note 61.

<sup>63</sup>For a description of the work by Community Legal Services of Philadelphia in the area of criminal records, see Community Legal Services of Philadelphia, *People with Criminal Records* (n.d.), [http://bit.ly/clspshila\\_crim\\_records](http://bit.ly/clspshila_crim_records).

<sup>64</sup>See Alan W. Houseman & Linda E. Perle, Center for Law and Social Policy, *Representing Individuals with Criminal Records Under the LSC Act and Regulations* (Nov. 4, 2002), [http://bit.ly/houseman\\_indiv\\_crim\\_rec](http://bit.ly/houseman_indiv_crim_rec), for a legal opinion and analysis of the restrictions set forth in 45 C.F.R. §§ 1612, 1613, 1615 (2002) ("[LSC-funded] programs can represent individuals with criminal records who are no longer in prison in civil matters that directly relate to their prior criminal records" as well as "engage in a range of advocacy to change policies regarding the treatment of individuals with criminal records").



the city through negotiations, roundtable discussions, and position papers.<sup>65</sup> Together they have achieved reforms such as enabling public benefits applicants or recipients quickly to obtain affordable monthly payment plans so that they can qualify for benefits, and making payment and bail hearings fairer and more accessible for low-income *pro se* individuals.<sup>66</sup> The organization continues to advocate for the city to exercise broad forgiveness of old, uncollectible debt on the grounds of fairness to individuals as well as being a cost-benefit to the city.

In advocacy circles and within the community, Community Legal Services has sought to raise awareness of individuals' rights. Because of limited resources, the organization is unable to represent every individual seeking help; accordingly the organization conducts training sessions and gives information and technical assistance to other advocates in hopes of expanding access to representation and nonlawyer assistance as well as facilitating *pro se* advocacy.<sup>67</sup> The organization has also garnered media coverage depicting the hardship faced by low-income people with criminal debts and systemic problems within the collections effort—capturing the attention of policymakers at the highest levels of court and city leadership.<sup>68</sup>

**Washington State: Legislative Advocacy for Interest Waivers.** In Washington State interest on criminal debts accrues at the high rate of 12 percent per year even during incarceration.<sup>69</sup> After observing the impact of criminal debts and crushing interest on their formerly incarcerated clients—one entered prison with \$35,000 in debt and upon release found his debt had risen to well over \$100,000—Columbia Legal Services partnered with the ACLU and the Washington Defender Association to advocate successfully legislation to permit waiver of interest accrued during incarceration.<sup>70</sup> As a result of this legislation, upon release formerly incarcerated Washingtonians can now petition for a waiver of the interest accrued on their nonrestitution criminal debts during their period of incarceration.<sup>71</sup> In order to receive a waiver, petitioners must demonstrate that the accrued interest is a financial hardship that will impede their compliance with payment. The legislation received bipartisan support due to its potential for encouraging realistic payments of criminal-justice debt, reducing the costs of collection and reincarceration, and contributing to successful reentry.<sup>72</sup>

**Maryland: Legislative Advocacy on Waiver of Parole Fees.** In 1991 the Maryland legislature instituted a \$40 monthly fee for persons on parole, although the

<sup>65</sup>See, e.g., Sharon Dietrich & Rebecca Vallas, Community Legal Services of Philadelphia First Judicial District's Collection of Legal Financial Obligations Has Caused Suffering and Hardship Among Philadelphia's Poorest Residents, (Nov. 28, 2011), [http://bit.ly/dietrich\\_first\\_judicial\\_district\\_caused\\_suffering](http://bit.ly/dietrich_first_judicial_district_caused_suffering).

<sup>66</sup>First Judicial District of Pennsylvania, Court of Common Pleas of Philadelphia County, Administrative Order No. 01 of 2012, In re: Motions to Vacate or Reduce Bail Forfeitures (Feb. 29, 2012), [http://bit.ly/pa\\_admin\\_order\\_bail](http://bit.ly/pa_admin_order_bail); Amaris Elliot-Engel, *FJD [First Judicial District] Changes Bail Forfeiture Process*, THE LEGAL INTELLIGENCER (March 2, 2012), [http://bit.ly/elliott-engel\\_bail](http://bit.ly/elliott-engel_bail).

<sup>67</sup>See Community Legal Services of Philadelphia, Court Costs and Fines in Philadelphia (n.d.), [http://bit.ly/clsp\\_hilpa\\_court\\_costs](http://bit.ly/clsp_hilpa_court_costs) (up-to-date information).

<sup>68</sup>Otterbein *supra* note 111; Otterbein, *supra* note 61. An advocacy film produced by law students at the University of Pennsylvania Law School (Tom Isler et al., *Pay Up! Criminal Justice Debt in Philadelphia*, YouTube (May 10, 2012), <http://bit.ly/IQHpeL>) was screened on April 18, 2012. The film is in distribution online and in DVD format and is available upon request to author Vallas.

<sup>69</sup>WASH. REV. CODE §§ 10.82.090, 4.56.110(4), 19.52.020 (2011). Most people have little to no earnings while incarcerated; they make between \$0.46 and \$1.60 per hour, if anything, while working in prison industries (see Prison Policy Initiative, Section III: The Prison Economy (n.d.), [http://bit.ly/prison\\_pol\\_init](http://bit.ly/prison_pol_init); see also Washington State Department of Corrections, DOC Policies Search (2012), [http://bit.ly/wash\\_state\\_prison\\_pol](http://bit.ly/wash_state_prison_pol); Telephone Interview with Nick Allen, Equal Justice Fellow, Columbia Legal Services (Nov. 17, 2011).

<sup>70</sup>WASH. REV. CODE § 10.82.090 (2011)

<sup>71</sup>*Id.*

<sup>72</sup>Allen, *supra* note 69.

general assembly predicted at the time that only about 15 percent of the parolee population would be able actually to pay the fee.<sup>73</sup> The legislature also created a number of categorical exemptions from payment, such as students or people who have a disability.<sup>74</sup> In practice, however, many people meeting those categorical qualifications failed to obtain exemptions; for instance, 89 percent of unemployed persons and 75 percent of students were required to pay the parole fee, even though unemployment and student status were grounds for exemption.<sup>75</sup> Advocates from Maryland's Job Opportunities Task Force determined that there were two major barriers to obtaining the statutory exemptions from parole fees: (1) supervisees were unaware of the exemptions, and (2) the mechanism for obtaining exemptions was too complicated for people to navigate.

In partnership with the Brennan Center, the Job Opportunities Task Force advocated legislation to eliminate these barriers. Due to opposition from the Division of Probation and Parole, which maintained that parole agents were already overworked, one bill failed in 2010. After that initial setback, the task force reached out to the Department of Public Safety and Correctional Services for support and activated numerous community partners—both nonprofit service providers and people who had been assessed supervision fees—to testify at legislative hearings. The second bill passed with nearly unanimous support and was signed into law in May 2011.<sup>76</sup> The new law requires the Division of Probation and Parole to inform supervisees, both verbally and in writing, of the existence

of the exemptions, the criteria used to determine exemptions, and the process of applying for an exemption.<sup>77</sup> The task force continues to work with the Department of Public Safety and Correctional Services and the Division of Probation and Parole to ensure effective implementation of the law's requirements—for instance, making certain that written information on exemptions is presented in terms that are easily understood by people with low education and literacy.

**The Clapham Set: An Alternative Workforce Development Model.** The Clapham Set, a pilot program launched in Suffolk County, Massachusetts, in 2008, offers an entirely different model for criminal-debt practices. A voluntary workforce development program tied to criminal-debt forgiveness, the Clapham Set was designed to encourage and support rehabilitation and financial independence.<sup>78</sup> The founder of the program, former prosecutor Robert Constantino, collaborated with the Black Ministerial Alliance of Greater Boston and StreetSafe Boston, two organizations already working with people involved in the criminal justice system and the Roxbury Division of the Boston Municipal Court, to design a curriculum that builds occupational skill development and discourages underground employment for young, court-involved men. The program helped participants develop résumés, complete job training, participate in job interviews, and attend mental-health or substance-abuse counseling.<sup>79</sup>

Participants who completed the program received credit toward their outstanding criminal court costs, fees, and fines.<sup>80</sup>

<sup>73</sup>Fixing Parole Fee Exemption System: Testimony Before the House of Delegates Judiciary Committee (Md. March 1, 2011), [http://bit.ly/diller\\_testimony\\_parole](http://bit.ly/diller_testimony_parole) (statement of Rebekah Diller, Deputy Director, Justice Program, Brennan Center for Justice at New York University School of Law).

<sup>74</sup>Md. CODE ANN., CORR. SERVS. § 7-702 (West 2008).

<sup>75</sup>Rebekah Diller et al, Brennan Center For Justice, Maryland's Parole Supervision Fee: A Barrier to Reentry, 26 (2009), [http://bit.ly/diller\\_parole\\_barrier2009](http://bit.ly/diller_parole_barrier2009).

<sup>76</sup>Md. H.D. Roll Call Vote, 2011 Sess. H.B. 749; MD. CODE ANN., CORR. SERVS. § 7-702.

<sup>77</sup>Md. CODE ANN., CORR. SERVS. § 7-702(j) (West 2010).

<sup>78</sup>Telephone Interview with Robert Constantino, Executive Director, Clapham Set (Nov. 11, 2011); see also Clapham Set, Our Approach (2012), <http://claphamset.org/>.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* No credit was given toward restitution debts.

Through persistent outreach, the program cultivated strong relationships with local businesses as potential employers for program participants.<sup>81</sup> People who obtained employment during the course of the program were exempt from participation during hours that conflicted with their jobs, and they were still eligible for credit toward their criminal-justice debt.<sup>82</sup> In its three-year pilot period, twenty-six men participated in the program; eleven successfully earned credit toward their costs, fines, and fees. Some twenty participants found work during the course of the program, although a smaller number were able to maintain long-term employment. Only five of the twenty-six are known to have reoffended—compared with the more than 50 percent three-year recidivism rate among individuals with prior convictions in Massachusetts.<sup>83</sup>

**Florida: Cancellation of Criminal-Debt Warrants.** From 2008 to 2010 the Brennan Center partnered with local public defender offices in two Florida counties to advocate the cancellation of thousands of arrest warrants issued for nonpayment of criminal debts. Florida law authorizes the issuance of arrest warrants for people who miss payments on criminal debts and fail to appear in court to explain the circumstances of their nonpayment.<sup>84</sup> A Brennan Center cost-benefit analysis of Florida's criminal-debt practices revealed that in a one-year period Leon County spent over \$62,000 attempting to capture and

punish indigent defendants, while only receiving roughly \$80,000 out of a total \$347,084 in assessed criminal debts.<sup>85</sup> To collect at most \$18,000 in net revenue, “the manpower required for record-keeping along with the physical housing and storage of [warrants for arrest placed] a tremendous burden on the Clerk of Court and [interfered] with the efficient administration of justice.”<sup>86</sup> Time used to locate and arrest people for nonpayment of criminal debts exhausted law enforcement resources needed to pursue violent offenders.<sup>87</sup> In response to the Brennan report and collaborative advocacy, Leon County closed its collections court in 2010 and terminated approximately eight thousand outstanding arrest warrants for nonpayment. In a similar success, also in response to Brennan Center and local defender advocacy, Orange County canceled all outstanding writs issued between January 1, 2007, and May 13, 2010 for people deemed “transient.”

**Massachusetts: Impact Analysis.** Massachusetts's recent use of impact analysis prior to instituting a new jail fee demonstrates how a thorough analysis of a proposed criminal fee can benefit both states and the individuals who would face criminal debts. In June 2010 the Massachusetts state legislature created a special bipartisan seven-member commission to study the impact of a proposed jail fee; the commission released its report in 2011.<sup>88</sup> The commission's members, including

<sup>81</sup>Constantino, *supra* note 78; Tina Rosenberg, *Paying for Their Crimes, Again*, *NEW YORK TIMES* (June 6, 2011), [http://nyti.ms/rosenberg\\_paying](http://nyti.ms/rosenberg_paying).

<sup>82</sup>Constantino, *supra* note 78; Rosenberg, *supra* note 81.

<sup>83</sup>Rosenberg, *supra* note 81.

<sup>84</sup>See, e.g., Amended Administrative Order Governing Collection Court, No. 2010-09 (Fla. 9th Jud. Cir. Ct. Osceola Cnty. March 28, 2008) (“If a defendant is not current with the required payments and does not appear at the scheduled Collections Court status hearing, the Judge shall order a Writ of Bodily Attachment for the defendant's arrest”). There are similar administrative orders for other counties in Florida (Rebekah Diller, Brennan Center for Justice, *The Hidden Costs of Florida's Criminal Justice Fees* 15 (2010)).

<sup>85</sup>Diller, *supra* note 84, at 19.

<sup>86</sup>Administrative Order Recalling Certain Active Collection Court Writs Issued between January 1, 2001, and May 13, 2010, No. 2010-09 (Fla. 9th Jud. Cir. Ct. Osceola Cnty. June 28, 2010).

<sup>87</sup>Jessica Silver-Greenberg, *Welcome to Debtors' Prison, 2011 Edition*, *WALL STREET JOURNAL* (March 16, 2011), [http://on.wsj.com/silver-greenberg\\_debtorsprison](http://on.wsj.com/silver-greenberg_debtorsprison).

<sup>88</sup>2010 Mass. Acts ch. 131, § 177; MASSACHUSETTS EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY, *INMATE FEES AS A SOURCE OF REVENUE: REVIEW OF CHALLENGES, REPORT OF THE SPECIAL COMMISSION TO STUDY THE FEASIBILITY OF ESTABLISHING INMATE FEES* (July 1, 2011), [http://1.usa.gov/mass\\_study\\_inmatefees](http://1.usa.gov/mass_study_inmatefees).

representatives from the Department of Public Safety, the Sheriffs' Association, Prisoners' Legal Services, and the Correctional System Union, represented a variety of perspectives.<sup>89</sup> They considered such factors as the revenue expected to be generated from the fees; the cost of administering the fees; the impact of the fees on inmates; methods and sources of collecting the fees; the impact of the fees on prisoner work programs; and waiver of the fees for indigents.<sup>90</sup> The commission conducted a literature review, interviews with representatives from the New York and Pennsylvania Departments of Correction regarding their systems of inmate fees, and two surveys administered in Massachusetts. Recognizing that any reasonable fee system must adjust for indigence, advisors from New York's Department of Correction recommended that the costs of tracking inmate accounts and debts should be calculated when considering implementation of a new jail fee.<sup>91</sup> The commission concluded that establishing additional inmate fees would create a "host of negative and unintended consequences."<sup>92</sup> The commission predicted that additional fees would increase the number of inmates qualifying as indigent, increase the financial burdens on inmates and their families, and jeopardize successful reentry.<sup>93</sup> Ultimately the legislature decided not to impose the fee. This sort of proactive, thoughtful impact analysis is rare among states and localities.<sup>94</sup> Still

it represents a model for states and jurisdictions to assess the consequences of imposing criminal debts.



To the extent that the broader mission of civil legal aid includes poverty reduction, and curbing the cycle of disadvantage that recurs in urban and minority communities, the issue of criminal-justice debt presents itself as a profound obstacle to those goals. Meaningful solutions will come about only through continued and future partnerships between the civil legal aid and public defender communities, as well as creative approaches to collaboration with other stakeholders, including the courts. Until and unless state and local governments move away from seeking to generate revenue through imposition and collection of criminal debts, advocates must speak out for and partner with the populations for whom such disadvantage will only continue to accumulate further. Advocates must do so not just by providing legal representation in an area that might otherwise fall between the cracks but also, through advocacy with policymakers, by raising awareness about the damaging and often hidden impact that criminal-debt practices have on individuals and on communities.<sup>95</sup>

#### **Authors' Acknowledgment**

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<sup>89</sup>MASSACHUSETTS EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY, *supra* note 88, at 5.

<sup>90</sup>*Id.* at 6.

<sup>91</sup>*Id.* at 4.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.*

<sup>94</sup>Bannon et al., *supra* note 2, at 10–12. The Brennan Center report found that none of the fifteen states studied had statewide systems for tracking the impact of fees on criminal debtors and communities; across the board there was little to no recognition of the costs of administering collection systems.

<sup>95</sup>The Brennan Center has just released a new report, in "toolkit" form, for advocates working on criminal justice debt: Roopal Patel & Mehgna Philip, Brennan Center for Justice at New York University Law School, Criminal Justice Debt: A Toolkit for Action (2012), <http://bit.ly/LJc9FU>.



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