

Justice-Involved Individuals and the Consumer Financial Marketplace

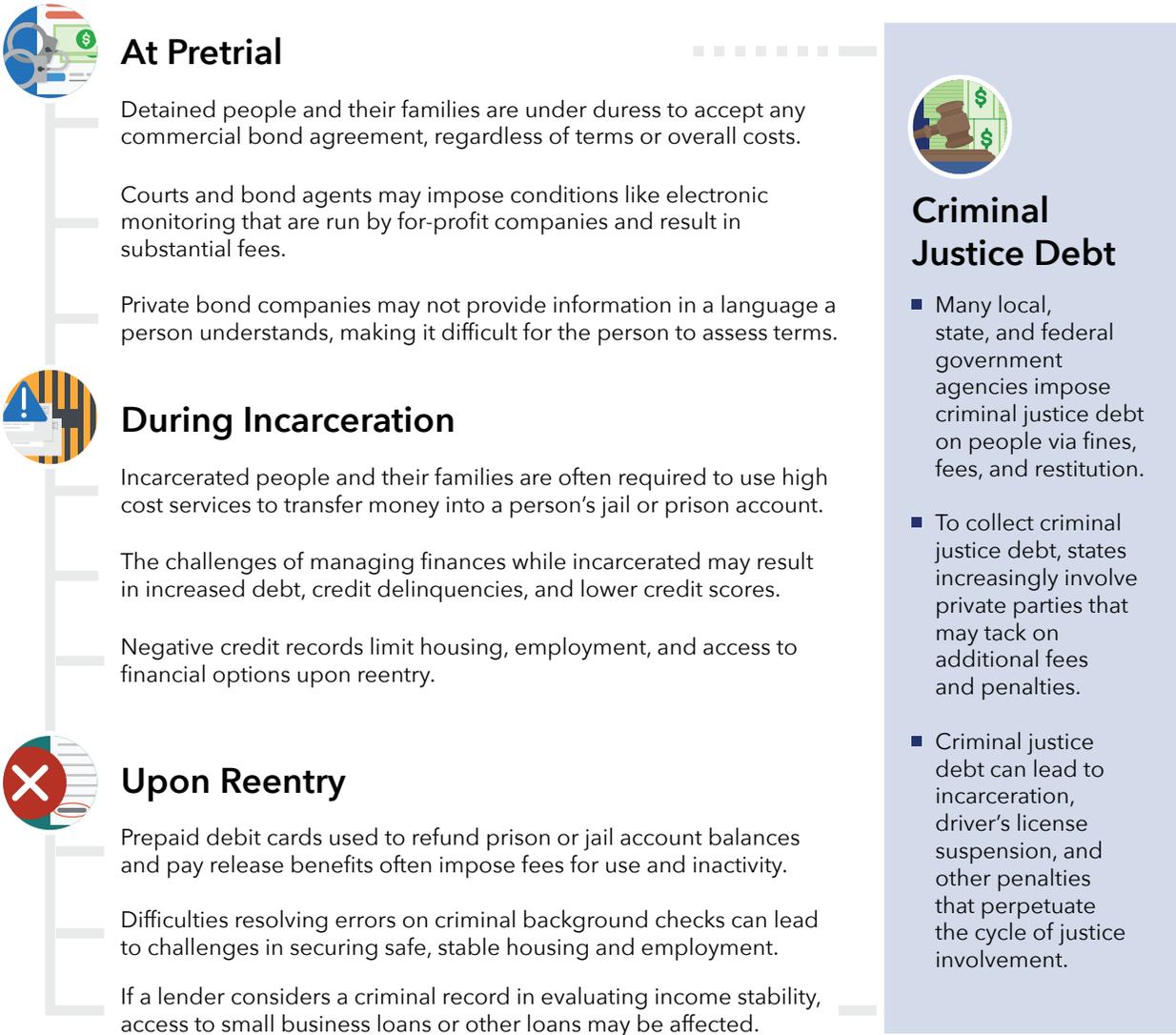
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Executive summary

From arrest to incarceration and reentry, people who come into contact with the justice system are confronted with numerous financial challenges, including financial products and services that too often contain exploitative terms and features, offer little or no consumer choice, and can have long-term negative consequences for the individuals and families affected. This report outlines some of the challenges faced by justice-involved people and their families in navigating their finances at each stage of the criminal justice system. The available information raises serious questions about the transparency, fairness, and availability of consumer choice in markets associated with the justice system, as well as demonstrating the pervasive reach of predatory practices targeted at justice-involved individuals.

FIGURE 1: KEY FINANCIAL CHALLENGES FOR JUSTICE-INVOLVED INDIVIDUALS



1. Introduction

This report examines the financial challenges people face at each stage of the justice system, with an emphasis on the products and services they must use to make their way from arrest and arraignment, to sentencing and incarceration, through reentry to society.¹ In sum, these products and services impose severe costs on, and undermine the economic security of, justice-involved individuals, their families, and communities. The financial burdens fall disproportionately on people of color, women, and people with lower incomes. Furthermore, the cascade of challenges created by these products and services may increase the risk of further contacts with the justice system.

The Consumer Financial Protection Bureau (CFPB) works to promote the economic health and security of all families and households, including those who are underserved by the financial system. Moreover, it is the CFPB's role to promote fair, transparent, and competitive consumer financial markets. These characteristics seldom appear in the markets for products and services that capitalize off the criminal justice system, where firms may enter into exclusive relationships with government actors, rather than competing on the basis of consumer choices. As an initial step in evaluating what further CFPB action may be appropriate with respect to consumer financial products and services in this area, this report assesses the financial ecosystem surrounding justice involvement.

The issues explored in this report affect millions of people. In 2019, 2.1 million adults in the United States were in jail or prison,² and another 4.4 million people were under community supervision (*e.g.*, probation).³ In comparison to white adults, Black adults are over five times more likely to be incarcerated in prison, Hispanic adults are 2.5 times as likely, and American

¹ Although this report focuses primarily on consumer finance challenges that individuals experience within the criminal justice system, it also identifies analogous challenges that individuals experience within the immigration detention system, without providing a comprehensive analysis on that topic. Similarly, many civil infractions or violations can result in consequences for the individual that are the same or similar to those in the criminal justice system and are thus considered in the scope of this report.

² In general, jails are run locally and are used to confine people who have been arrested and are awaiting trial or who have received a sentence typically less than a year. Prisons are state and federal facilities used to confine people who are serving longer sentences, typically for more serious offenses.

³ Todd D. Minton, Lauren G. Beatty, and Zhen Zeng, *Correctional Populations in the United States, 2019 – Statistical Tables*, Bureau of Justice Statistics (July 2021), bjs.ojp.gov/library/publications/correctional-populations-united-states-2019-statistical-tables.

Indian and Alaska Natives are about twice as likely.⁴ Annually, people are booked into jail 10.3 million times.⁵ Ultimately, one in three adults—about 77 million people—has a criminal record.⁶ Even these figures do not account for the family members and friends affected when people become involved in the justice system. Family members and friends often provide financial support to people involved in the justice system. They may also face collateral consequences, such as losing a provider of income, childcare, or other forms of caretaking in addition to social and emotional costs.⁷ There is a strong public interest in ensuring successful reentry into society, for the well-being of a justice-involved person, their family, and the broader community.

Several themes recur throughout the report. *First*, private entities, including for-profit companies, are embedded throughout the system. A small number of entities tend to dominate each product or service area. In some cases, these entities have monetized and shifted costs for essential goods and services to incarcerated individuals that institutions historically provided for free to them. *Second*, people often have little to no choice over which service providers they use. Justice-involved individuals and their loved ones may be left with a choice between paying a private company that has a single-source contract with a jail or prison, or foregoing access to critical goods or services. *Third*, the consequences of failing to pay fines and fees can be severe, forcing consumers to choose between making payments they may struggle to afford and risking arrest, prosecution, detention, or reincarceration. These potential consequences strengthen the position of private entities as they set prices and collect payments. *Finally*, justice involvement creates barriers to access within the broader financial marketplace upon reentry.

The implications go beyond finances to affect people’s personal lives and may impact legal issues they are facing. Failing to pay a court fee while out on bail, for example, may result not just in additional interest or financial penalties, but in being jailed. In turn, incarceration could lead to job loss, housing instability, or other personal consequences. Incarceration prior to trial is also associated with a higher likelihood of pleading guilty and receiving a longer sentence. What starts mainly as a financial issue can grow into a host of additional consequences. These

⁴ E. Ann Carson, *Prisoners in 2019*, Bureau of Justice Statistics (October 2020), bjs.ojp.gov/library/publications/prisoners-2019 (reporting White, Black and Hispanic prison incarceration rates per 100,000 of 214, 1,096, and 525, respectively); Prison Policy Initiative, *Since you asked: What data exists about Native American people in the criminal justice system?* (Apr. 22, 2020), prisonpolicy.org/blog/2020/04/22/native.

⁵ Zhen Zeng, and Todd Minton, *Jail Inmates in 2019*, Bureau of Justice Statistics (Mar. 2021), bjs.ojp.gov/content/pub/pdf/ji19.pdf.

⁶ National Conference of State Legislatures, *Criminal Records and Reentry*, (May 5, 2020), ncsl.org/research/civil-and-criminal-justice/criminal-records-and-reentry.aspx.

⁷ See, e.g., Megan Comfort, Tasseli McKay, Justin Landwehr, Erin Kennedy, Christine Lindquist, and Anupa Bir. *The costs of incarceration for families of prisoners*. International Review of the Red Cross 98, no. 903 (2016): 783-798, international-review.icrc.org/articles/costs-incarceration-families-prisoners.

consequences fall most heavily on people of color, Black Americans in particular, and can continue long after a person is directly involved in the justice system.

2. Pretrial

This section highlights potential financial challenges experienced by people after arrest and prior to adjudication of their case.

- Private companies contracted to run diversion programs may make misleading claims about the legal consequences of failing to participate and use their relationship with prosecutors to threaten people with criminal prosecution for unpaid fees.
- Many people are eligible for pretrial release but cannot afford cash bail. Staying in jail even for a short period of time can have long-term personal and legal consequences.
- Commercial bail and immigration bond agreements—including financing arrangements—can be costly and opaque. Detained people and their families are under great duress to accept any bail bond agreement to obtain release and may have little option but to enter an agreement with disadvantageous terms.
- Courts and commercial bond agents sometimes impose conditions like electronic monitoring that extract substantial fees. Private companies may leverage threats of incarceration to collect aggressively from people struggling to pay.
- Private bond companies may not provide contracts or other important information in a language that people understand, making it difficult or impossible for people to assess terms. These risks are particularly high for immigration bonds.

2.1 Diversion programs

Pretrial diversion programs allow eligible people to avoid criminal charges or full adjudication by paying restitution, participating in rehabilitation programming, or fulfilling other requirements.⁸ Prosecutors largely control eligibility and fees associated with diversion, so programs vary widely across jurisdictions.⁹ One analysis of 2009 felony cases in the nation's 75

⁸ Diversion programs are either pre-charge or post-charge. Under pre-charge diversion, police officers give people a warning or refer them to formal diversion programs rather than arresting and formally charging them. Post-charge diversion programs give people who have been accused of a crime an opportunity to defer prosecution (and if successful avoid it altogether) in exchange for participating. Carolyn Green and Natasha S. Madon, "Pretrial Diversion," in *The Encyclopedia of Criminology and Criminal Justice*, edited by Jay S. Albanese, (2014).

⁹ Shaila Dewan and Andrew W. Lehren, "After a Crime, the Price of a Second Chance," *The New York Times* (Dec. 12, 2016), www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html.

largest counties estimated that 9 percent ended in diversion or deferred adjudication.¹⁰ This 9 percent equates to hundreds of thousands of people per year. Even this figure understates the reach of diversion programming; misdemeanor cases likely result in more diversion opportunities than felonies.¹¹

In order to participate, diversion programs often require people to pay fees, including to any private companies that administer the programs.¹² In a review of public contracts from Illinois, one article found that the typical cost of completing a bad check diversion program included \$125 to \$175 for required classes, \$25 to \$35 in administrative fees, and various other fees for setting up payment plans and rescheduling class dates.¹³ Participants also had to pay the value of the bad checks and any fees owed to the bank or merchants in restitution.¹⁴ The county governments only received a small fraction of the fees charged, with the rest going to the private for-profit companies. A review of 225 diversion programs across 37 states found fees ranging from \$0 to \$5,000 for a single offense, putting some programs out of reach to many people and generating debt for many people who do participate.¹⁵

Diversion programs may seek to impose costs on many more people than would realistically face criminal prosecution. Past reports have documented instances of prosecutors allowing private companies to use the prosecutor's letterhead to threaten people accused of writing bad checks with criminal charges unless they enter the private company's diversion program—and pay the associated fees.¹⁶ In 2015, the CFPB brought a debt-collection enforcement action against a company for using deceptive threats of criminal prosecution and jail time in order to intimidate

¹⁰ Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, Bureau of Justice Statistics (Dec. 2013), bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2009-statistical-tables.

¹¹ Eligibility for diversion programs is often limited to lower-level offenses. For example, see Research Center for Health and Justice at TASC, *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*, (Dec. 2013), www.centerforhealthandjustice.org/tascblog/Images/documents/Publications/CHJ%20Diversion%20Report_web.pdf.

¹² See Dewan and Lehren (2016), *supra* note 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* The review analyzed information, statutes and fee schedules about diversion programs and included interviews of more than 150 people involved in the criminal justice system.

¹⁶ For example, see Colman M. Herman, "Facing questions, DAs suspend outsourcing of bad check cases," *The Boston Globe* (April 14, 2013), www.bostonglobe.com/metro/2013/04/13/das-discontinue-third-party-check-program/BS1msBY6hHTSfBcN2NfyWQ/story.html and David Lazarus, "Orange County D.A.'s office is doing debt collectors' dirty work," *The Los Angeles Times* (Dec. 1, 2014), www.latimes.com/business/la-fi-lazarus-20141202-column.html. Media reports document some prosecutors ceasing this practice, but it is unclear how the use of these practices and similar ones have changed over time.

people into enrolling in a costly financial education program, purportedly to avoid criminal charges.¹⁷ But less than one percent of the people who received the company’s threatening letter met the criteria for criminal prosecution or were ultimately referred to the district attorney’s office to be reviewed for possible criminal prosecution.¹⁸ The CFPB brought another debt-collection enforcement action against a private company operating a bad-check diversion program in 2020.¹⁹

2.2 Securing pretrial release

Following an arrest, some people are released on conditions to await trial at home instead of in jail. In many jurisdictions, cash bail—a payment to the court—can be a condition for pretrial release. While bail can range significantly, the median cash bail is \$10,000 for a felony charge.²⁰ Cash bail is returned to people who make all of their required court appearances or forfeited by those who do not. With cash bail, a person’s ability to afford bail determines whether the person is released pending trial.

All else equal, people with fewer financial resources are less able to afford cash bail, contributing to the disproportionate pretrial detention of people with lower incomes and people of color, along with the resulting legal and personal consequences.²¹ People who are charged with felonies and are unable to afford bail can expect to spend 50 to 200 days in jail, depending on the severity of the charge.²² People who remain in jail before trial are more likely to be convicted, tend to receive longer sentences, and incur more non-bail court debt.²³ Personal

¹⁷ Consumer Financial Protection Bureau, *CFPB Takes Action Against “Bad Check” Debt Collector*, (Mar. 30, 2015), www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-bad-check-debt-collector.

¹⁸ Complaint, Bureau of Consumer Financial Protection v. National Corrective Group, Inc. at para. 19-20, 30 (Mar. 2015), files.consumerfinance.gov/f/201503_cfpb_complaint-national-corrective-group.pdf [Merchants filed bounced check reports directly with the private company, who sent notices threatening prosecution unless a person enrolled in a diversion program without consulting the district attorney.].

¹⁹ Complaint, *Bureau of Consumer Financial Protection v. BounceBack, Inc.* (Dec. 12, 2020), files.consumerfinance.gov/f/documents/cfpb_bounceback-inc_complaint_2020-12.pdf.

²⁰ Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, Bureau of Justice Statistics (Dec. 2013), bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2009-statistical-tables. Comparable data for misdemeanors is unavailable, but the median bail for these less serious offenses is assumed to be lower than the median for felonies.

²¹ Patrick Liu, Ryan Nunn, and Jay Shambaugh, *The Economics of Bail and Pretrial Detention*, The Hamilton Project (Dec. 2018), www.hamiltonproject.org/papers/the_economics_of_bail_and_pretrial_detention.

²² *Id.*

²³ Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, *The Journal of Law, Economics, and Organization*, (Nov. 2018), 34, no. 4: 511-542, academic.oup.com/jeo/article/34/4/511/5100740. The study uses a natural experiment to estimate the causal effects of pretrial detention. A variety of factors may contribute to the results. For example, people held in jail may plead guilty in order to be released sooner.

consequences may include losing custody of one’s children, losing one’s job, housing instability, or vehicle repossession.²⁴ Over two-thirds of people held in local jails— nearly 400,000 people— have not been convicted of a crime.²⁵

Available evidence indicates that a majority of unconvicted people are in jail because they cannot afford bail. In one dataset on felony cases, only 4 percent of people were denied bail altogether; 62 percent were granted pretrial release, and the remaining 34 percent were held on bail.²⁶ Racial bias exists in bail decisions. Judges are more likely to assign cash bail to Black defendants than white defendants, and bail amounts are set at higher amounts for Black individuals.²⁷ In 2012, 16 percent of people held on bail in New Jersey jails could have secured their release for \$500 or less, and another 15 percent needed \$501 to \$2,500 to do so. In total, 12 percent of the state’s entire jail population was made up of people who were held pretrial and needed \$2,500 or less to be released.²⁸

Court-imposed fees, aside from bail, may also keep people in jail. An individual jailed in St. Louis, Mo., successfully had his bail reduced by a judge from \$1,500 to \$500, only to find himself unable to pay an additional \$350 in fees to a private for-profit company for a court-ordered GPS monitoring device.²⁹ People in similar circumstances may find themselves accruing debt or forgoing other expenses in order to pay fees. These outcomes result from a policy choice

²⁴ Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, *American Economic Review*, 108, no. 2, 201–40 (2018); see also Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stanford Law Review*. 711 (2017).

²⁵ Todd D. Minton, Zhen Zeng, and Laura M. Maruschak, *Impact of COVID-19 on the Local Jail Population, January–June 2020*, Bureau of Justice Statistics (Mar. 2021), bjs.ojp.gov/library/publications/impact-covid-19-local-jail-population-january-june-2020. The exact number of people who are in jail because they cannot afford bail is unknown, but available evidence suggests the proportion is significant. Data on New Jersey comes from Luminosity, *Identifying Opportunities to Safely and Responsibly Reduce the Jail Population* (Mar. 2013), drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf. Even in felony cases, few people are denied the possibility of pretrial release altogether [see Thomas H. Cohen and Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts*, Bureau of Justice Statistics (Nov. 2007), bjs.ojp.gov/library/publications/pretrial-release-felony-defendants-state-courts], so the amount of money bail is set at and a person’s ability to pay determine pretrial release in most cases.

²⁶ Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, Bureau of Justice Statistics (Dec. 2013), bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2009-statistical-tables. The report does not break out the type of bail people are held on, but an inability to afford cash bail seems likely to be a bigger barrier to pretrial release than nonfinancial conditions.

²⁷ David Arnold, Will Dobbie, and Crystal S Yang, *Racial Bias in Bail Decisions*, *The Quarterly Journal of Economics*, (Nov. 2018), 133, no. 4: 1885-1932. The study uses the quasi-random assignment of judges to control for other factors that affect bail decisions.

²⁸ Luminosity, *Identifying Opportunities to Safely and Responsibly Reduce the Jail Population*, (Mar. 2013), drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.

²⁹ Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, ProPublica (July 3, 2019), www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt.

to impose monitoring costs on unconvicted people. Alternatively, courts or law enforcement agencies could bear the costs of electronic monitoring and other conditions of pretrial release.³⁰

2.2.1 Commercial bail bonds

People who cannot pay cash bail in full can either remain in jail or seek a commercial bail bond. Commercial bail bonds are available in most states and in the federal court system.³¹ The commercial bail bond industry is made up of about 13,000 firms and has an annual revenue of \$2.3 billion.³² Most bail bond companies operate locally, focusing on a specific county, but some report operations in multiple states.³³ At times, this market has attracted interest from financial firms, but these investments appear to have declined.³⁴

In a typical bail bond transaction, the person who was arrested—or a family member or friend—pays a non-refundable premium to a private bail bond company. Compared to posting cash bail directly with the court, a commercial bail bond requires a lower upfront cost. The bond premium is typically set at 10 percent of the bail amount, though the bail bond company may also require collateral for the full amount of the bond.³⁵ The commercial bail bond agent then posts a bond with the court, guaranteeing the full amount of bail if the person does not appear in court or violates any other requirements. Some jurisdictions allow people to finance bail bond premiums and other associated fees, adding to the costs and complexity of their bond agreements. In many cases, a cosigner—such as a family member or friend—will sign the bond agreement and become liable for payments. Unlike bail posted directly with the court, no money is refunded when somebody who has taken out a commercial bail bond attends all court appearances.

³⁰ See, e.g., David Brand, “Judges can now order electronic monitoring instead of bail in New York City,” *Queens Daily Eagle* (Apr. 24, 2020), [queenseagle.com/all/electronic-monitoring-nyc-judges-criminal-court](https://www.queenseagle.com/all/electronic-monitoring-nyc-judges-criminal-court) [New York City’s reported decision to pay for its electronic monitoring program.].

³¹ National Conference of State Legislatures, *Bail Bond Licensure* (Apr. 23, 2013), www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-licensure.aspx.

³² Kush Patel, *Bail Bond Services Industry in the US - Market Research Report*, IBISWorld (Dec. 2020).

³³ See, e.g., American National Bail Bonding Agency, *Bail Bond Services Offered*, www.americannationalbail.com/bailbondservicesoffered.html (last accessed Dec. 9, 2021).

³⁴ Laura Kusisto, “Criminal-Justice Changes Are Squeezing the Bail-Bond Industry,” *The Wall Street Journal* (Feb. 21, 2020), www.wsj.com/articles/criminal-justice-reforms-are-squeezing-the-bail-bond-industry-11582299332.

³⁵ See Liu, Nunn, and Shambaugh (2018), *supra* note 21. Unlike a bond posted directly with the court, which is refundable if the person meets all the conditions of pretrial release, a commercial bail bond is nonrefundable.

The financial burden of helping family members with bail and other costs of criminal justice involvement falls disproportionately on women, particularly women of color.³⁶ In a complaint submitted to the CFPB, one person who served as a cosigner described being charged interest on a \$790 bail bond that had entered collections:

“I co-signed someone’s bail to prevent their loss of employment. ... I became concerned when I noticed a different amount and creditor on my credit report and disputed the amount. Since the dispute in 2018, the amount has increased to \$1000 and appears to be increasing at a daily rate.”

In addition to the bail bond premium and any finance charges, bail bond agents may also require the detained individual to agree to and pay for conditions separate from any set by the court. For example, a bail bond agent could require an individual to pay for an ankle monitor that the bail bond company uses to monitor their location.³⁷ Given the stress and grave personal, legal, and financial consequences of remaining in jail, a detained individual or their family member may be willing to accept any bail bond agreement to secure their release. Under such duress, people are not well positioned to thoroughly review or negotiate often-complex bail bond agreements. Language barriers only compound these challenges.

Bail bond agents may engage in aggressive collection practices. Bail bond agents are often delegated quasi-governmental powers, beyond those of other debt collectors. In some states, they are authorized to arrest their clients “for any reason – or none at all.”³⁸ In addition, bond agreements may purport to give bail bond agents powers like contacting third parties such as employers or friends or entering private residences at any time.³⁹

In one media report, a mother agreed to pay \$3,275 to a bail bond company to post bail for her son. As the mother fell behind on payments, a bounty hunter repeatedly arrested her son and demanded payment, once even while the son was entering the courthouse for a required

³⁶ Joshua Page, Victoria Piehowski and Joe Soss: *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, The Russell Sage Foundation Journal of the Social Sciences, 5, no. 1, (Feb 2019): 150-172, www.rsjournal.org/content/5/1/150.abstract. Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design (Sept. 2015), whopaysreport.org.

³⁷ Jessica Silver-Greenberg and Shaila Dewan, “When Bail Feels Less Like Freedom, More Like Extortion,” *The New York Times* (Mar. 31, 2018), www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html.

³⁸ *Id.*

³⁹ Ariel Nelson, Brian Highsmith, Alex Kornya, and Stephen Raheer, *Commercialized (In)justice Litigation Guide*, National Consumer Law Center (June 2020), www.nclc.org/images/pdf/criminal-justice/WP_Litigation_Guide.pdf.

appearance.⁴⁰ The mother ultimately paid the bail bond company \$6,000 before running out of money. Her son ended up back in jail only to be released by a judge for \$30 and a signed promise to return to court.⁴¹ Thus, the original bail set by the judge, \$50,000, and the commercial bail bond agreement created a cascade of consequences for the person and his mother, only to be later revised to \$30 and the signed promise.

2.2.2 Immigration bonds

Immigration enforcement also imposes costs on people accused of violating the law, and their families.⁴² In 2019, Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) apprehended over 1 million individuals for alleged immigration-related violations, almost double the number from 2018.⁴³ In fiscal year 2020, an average of 33,724 people were held in ICE custody each day,⁴⁴ and 61,886 individuals were released from ICE detention, with 29,736 having “bonded out” and others released on different types of conditions.⁴⁵ In fiscal year 2021, the median bond set by an immigration judge was \$7,000.⁴⁶ The minimum immigration bond is \$1,500.⁴⁷

Similar to bail bonds in the criminal context, people detained on suspected immigration violations and ordered to post a bond amount may turn to private companies to help them cover the cost. When a person enters an agreement with an immigration bond company, the

⁴⁰ Some commercial bail bond agents hire bounty hunters to help them find clients who have missed their court dates. Michelle A. Cubellis and Bryce E. Peterson, “Bail Bondsmen,” in *The Encyclopedia of Criminology and Criminal Justice*, edited by Jay S. Albanese, (2014).

⁴¹ Aviva Shen, *This is what a for-profit justice system looks like*, ThinkProgress (June 21, 2017), thinkprogress.org/for-profit-justice-system-louisiana-c76f435fb1cf.

⁴² Immigration court hearings are civil administrative proceedings, not criminal cases. See U.S. Department of Justice, *Observing Immigration Court Hearings*, (Jan. 2018), www.justice.gov/eoir/page/file/941991/download.

⁴³ U.S. Department of Homeland Security, *Aliens Apprehended: Fiscal Years 1925 to 2019*, at Table 33 (Oct. 28, 2020), www.dhs.gov/immigration-statistics/yearbook/2019/table33.

⁴⁴ U.S. Immigration and Customs Enforcement, *U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report*, www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf.

⁴⁵ U.S. Immigration and Customs Enforcement, *ICE Detention Statistics*, www.ice.gov/doclib/detention/FY20-detentionstats.xlsx. See “ICE Final Releases by Release Reason and Criminality: EOFY2020” in the Detention EOFY2020 worksheet.

⁴⁶ TRACImmigration, *Immigration Court Bond Hearings and Related Case Decisions*, Syracuse University, trac.syr.edu/phptools/immigration/bond (last accessed Oct. 8, 2021). To replicate the findings on the TRACImmigration website, the Measure must be set to “Median Bond Granted,” the Graph Time Scale to “Fiscal year,” and the Bond Hearing Immigration Court State to “all.”

⁴⁷ U.S. Immigration and Customs Enforcement, *Application for a Stay of Deportation or Removal*, www.ice.gov/doclib/forms/i246.pdf (last accessed Oct. 8, 2021).

agreement typically specifies an initial down payment plus ongoing monthly payments. Along with interest, the payments may include fees for electronic monitoring, even if no government authority has imposed that condition. Like payments on commercial bail bonds, these costs are nonrefundable regardless of whether the individual subsequently appears in court.

People entering into these agreements face significant duress. People in ICE detention may have no means of contacting family or friends and may not be able to read documents provided in English. Friends and family members may be required to co-sign agreements and submit substantial, non-refundable upfront payments while relying on oral representations about contracts provided in a language they cannot read.

The CFPB has brought one lawsuit against a company offering to pay for people's immigration bonds to secure their release from federal detention centers while awaiting adjudication on an immigration matter. The suit alleges that the company operated a scheme through which it engaged in deceptive and abusive practices and collected large upfront fees and hefty monthly payments while misrepresenting its services and their true costs.⁴⁸

⁴⁸ Complaint, *Consumer Financial Protection Bureau v. Nexus Services, Inc.*, No. 5:12-cv-16 (W.D.Va. Feb. 22, 2021), files.consumerfinance.gov/f/documents/cfpb_nexus-services-inc-et-al_complaint_2021-02.pdf.

3. Incarceration

This section highlights a sample of key potential financial challenges and consequences for people who are incarcerated.

- Being in jail or prison is expensive. Incarcerated people and their families often have little to no choice over which money transfer service they use to deposit money in jail or prison accounts. These services can carry high fees.
- Due to communication restrictions, people have limited ability to manage finances while incarcerated, which can result in increased debt, deteriorated credit ratings, and diminished access to credit.
- People in jail or prison cannot keep up the consistent use of credit needed to maintain credit scores. The negative effects of incarceration on a person’s consumer reports can reduce one’s ability to secure housing, find employment, or access credit upon reentry.

3.1 Payments

Increasingly, governments are shifting the cost of incarceration to people who are incarcerated and their families, forcing individuals to pay for even basic needs while in prison or jail.⁴⁹ Incarcerated people often must pay for hygiene items, food, and phone and email access.⁵⁰ People are also charged “pay-to-stay” fees for various expenses related to their custody and care. These vary by state and county but include expenses like room and board, or medical copayments.⁵¹ Often, people who are incarcerated must rely on their families and friends to provide funds to help meet these costs.

While incarcerated people may work for pay, the earnings are too low to cover expenses related to medical care, food, or communicating with their loved ones. The average nominal daily wage

⁴⁹ Daniel Wagner, *Prison Bankers Cash in on Captive Customers*, The Center for Public Integrity (Nov. 11, 2014), publicintegrity.org/inequality-poverty-opportunity/prison-bankers-cash-in-on-captive-customers.

⁵⁰ Stephen Rahe, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018), www.prisonpolicy.org/reports/commissary.html; Kevin Bliss, *Pay-to-Stay Fees Impoverish Prisoners, Increase Recidivism*, Prison Legal News (March 2021), www.prisonlegalnews.org/news/2021/mar/1/pay-stay-fees-impoverish-prisoners-increase-recidivism.

⁵¹ Every state, except for Hawaii, charges pay-to-stay fees with the justification that the money collected is a reimbursement to the state instead of an additional punishment. See Megan Schumann, *States Unfairly Burdening Incarcerated People With “Pay-to-Stay” Fees*, Rutgers Today (Nov. 20, 2020), www.rutgers.edu/news/states-unfairly-burdening-incarcerated-people-pay-stay-fees.

paid to incarcerated workers fell from \$0.93 in 2001 to \$0.86 in 2017.⁵² Prison compensation affords minimal purchasing power; for example, in 2018, it would have taken a woman in a Colorado prison over two weeks to earn enough money for a box of tampons sold at the facility.⁵³ Moreover, institutions often garnish people's funds to cover fines, fees, or restitution.⁵⁴

For all of these reasons, incarcerated people often rely on financial support from family members and friends. The costs of supporting incarcerated family members fall disproportionately on women: the Ella Baker Center's research on the cost of incarceration found that women comprise 83 percent of the people shouldering court-related costs for family members.⁵⁵ The impact on women of color is acute: while nearly one in every four women is related to someone who is incarcerated, for Black women the figure is two out of five.⁵⁶ This puts the financial burden on women, often women of color, to pay for necessary services or items that prisons used to provide for free to incarcerated people.⁵⁷

Firms that provide services to people who are incarcerated and their loved ones often operate under multi-year, single-source contracts with correctional facilities.⁵⁸ This means that, for years-long periods of time, a single firm under contract with a prison will be the only provider of a given product or service to incarcerated people and their families. A single contract may cover a wide range of services. For example, one state's contract with a vendor covered the prison system's money transfer services, email, release debit cards, MP3 players, and digital music

⁵² Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative (Apr. 10, 2017), www.prisonpolicy.org/blog/2017/04/10/wages. Some prisoners in eight states – Alabama, Arkansas, Florida, Georgia, Mississippi, Oklahoma, South Carolina, and Texas – are not paid at all for their labor in government-run facilities. See, e.g., Daniel Moritz-Rabson, 'Prison Slavery': Inmates Are Paid Cents While Manufacturing Products Sold to Government, *Newsweek* (Aug. 28, 2018), www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729.

⁵³ *Id.*

⁵⁴ See, e.g., Collin Owens, *How far does \$120 go when sent to a Virginia prison inmate?*, The Center for Public Integrity (Jan. 2019), publicintegrity.org/wp-content/uploads/2019/01/virginaFinal_5-1024x597.png.

⁵⁵ Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center (Sep. 2015), whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf at 9.

⁵⁶ Hedwig Lee, et al., *Racial Inequalities in Connectedness to Imprisoned Individuals in the United States*, Du Bois Review: Social Science Research on Race 12.2, at 7 (2015).

⁵⁷ Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center (Sep. 2015), whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf at 9.

⁵⁸ Stephen Rahe, *You've got mail: the promise of cyber communication in prisons and the need for regulation*, Prison Policy Initiative (Jan. 21, 2016), www.prisonpolicy.org/messaging/report.html.

files.⁵⁹ Their business model often does not involve charging prisons or jails for the services they provide.⁶⁰ Instead, these firms collect fees from the people who are forced to use their services.⁶¹ In return for receiving the exclusive authority to impose fees on people, some vendors agree to pay “commissions” to the correctional institution. One contract specified that a company would charge \$9.95 for 30-minute video visits and send 4 percent of this revenue to the state.⁶²

The prices for prison phone calls far outstrip the cost of calls on the regular market. Two companies dominate the prison communication services market as of May 2021, holding 5,400 contracts with correctional facilities in North America.⁶³ These companies have fueled their market dominance by acquiring other service providers to prisons and jails.⁶⁴ Nationwide, an average 15-minute phone call from a jail cost \$5.74 in 2018, and in one state the average price was as high as \$24.82.⁶⁵ Various add-on fees, such as a fee to create an account with the telecom provider, make phone calls even more expensive. Though the Federal Communications Commission (FCC) now caps the price of *interstate* and international calls at \$0.12 per minute for prisons and \$0.14 per minute for jails,⁶⁶ a federal Court of Appeals has held that the FCC does not have the authority to regulate *intrastate* calls, which comprise 80 percent of all calls made from jails and prisons.⁶⁷

⁵⁹ Human Rights Defense Center, “RE: Response to JPay’s May 27, 2015 Filing, re: Notice of Proposed Rulemaking to Amend Regulation E – Docket No. CFPB-2014-0031, RIN 3170-AA22,” (Sept. 10, 2015), www.humanrightsdefensecenter.org/media/publications/CFPB%20response%20to%20JPAY%20Ex%20Parte%20comment%20with%20attachments%209-10-15%20FINAL.pdf. See Appendix D.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* See Appendix F.

⁶³ Marie Feyche, *FCC approves plan to lower interstate and international jail and prison phone call rates*, Jurist (May 23, 2021), www.jurist.org/news/2021/05/fcc-approves-plan-to-lower-interstate-and-international-jail-and-prison-phone-call-rates.

⁶⁴ GTL, GTL Acquires Telmate, a Leading Provider of Secure Corrections Solutions and Community Corrections and Probation, Parole Applications (Aug. 1, 2017), www.gtl.net/about-us/press-and-news/gtl-acquires-telmate/; GTL, Banner year highlights included new Chief Executive Officer and expanded education user base (Jan. 15, 2019), www.gtl.net/news/year-of-growth-gtl-celebrates-successful-2018; Securus Technologies, History, securustechnologies.tech/about/history (last accessed Oct. 18, 2021); Securus Technologies, Securus Technologies Inc. Completes Transaction to Acquire JPay Inc., (July 31, 2015), www.prnewswire.com/news-releases/securus-technologies-inc-completes-transaction-to-acquire-jpay-inc-300122095.html.

⁶⁵ Peter Wagner and Alexi Jones, *State of Phone Justice: Local jails, state prisons and private phone providers*, Prison Policy Initiative (Feb 2019), www.prisonpolicy.org/phones/state_of_phone_justice.html.

⁶⁶ Federal Communications Commission (FCC), *FCC Lowers Interstate and International Prison Phone Rates to Help Families Stay Connected*, (May 20, 2021), docs.fcc.gov/public/attachments/DOC-372625A1.pdf.

⁶⁷ *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. 2017).

Families are left with little choice but to pay these costs, as the telephone may be their only way to communicate with their loved ones.⁶⁸ With prisons and jails typically located in more remote areas, the phone is a critical means for maintaining communication. The disproportionate impact again falls on families who are low-income and from communities of color; these families are especially vulnerable to the high costs and fees associated with communicating over the phone. One 2001 survey of family members of incarcerated individuals found that 87 percent of the family members responsible for calls and visitation costs were women, and that, among other costs, the fees associated with maintaining contact could cost up to a third of their yearly income.⁶⁹ In that same survey, 1 in 3 family members reported going into debt in order to cover the cost of staying in touch with an incarcerated loved one.⁷⁰

3.1.1 Money transfers

People may provide financial support to incarcerated family members and friends to help them purchase food, make phone calls, or pay for other basic needs. To do so, they transfer funds to the incarcerated person's "trust fund" or "commissary" account, which is ultimately held by the jail or prison.⁷¹ Commissary accounts function as a person's bank account while incarcerated. The wages people earn from working while in jail or prison are also deposited into these accounts.⁷²

With few exceptions, prison systems or jails contract with private companies to handle money transfers.⁷³ These companies charge senders a fee for each transfer into a commissary account. Fees can vary depending on the transfer method and amount of money transferred. Free person-to-person money transfer services are rarely, if ever, among the options offered to family members and friends of those incarcerated.⁷⁴ Historically, a common way to transfer money to

⁶⁸ Bonita Tenneriello and Elizabeth Matos, "The Telephone Is A Lifeline For Prison Families. And Calls Are Outrageously Expensive," *WBUR* (Jan. 2020), www.wbur.org/cognoscenti/2020/01/27/cost-of-phone-calls-prison-bonita-tenneriello-elizabeth-matos.

⁶⁹ Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center (Sep. 2015), whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf at 30.

⁷⁰ *Id.*

⁷¹ Stephen Raher and Tiana Herring, *Show me the money: Tracking the companies that have a lock on sending funds to incarcerated people*, Prison Policy Initiative (Nov. 9, 2021), www.prisonpolicy.org/blog/2021/11/09/moneytransfers.

⁷² Selena Maranjian, *The Inmate Trust Fund -- Explained*, The Motley Fool (July 5, 2017), www.fool.com/investing/2016/08/03/the-inmate-trust-fund-explained.aspx.

⁷³ Raher and Herring (2021), *supra* note 71. A small number of states manage money transfers "in-house." However, they may still contract out certain functions of their money transfer systems.

⁷⁴ *Id.*

people in prison or jail was mailing a money order through the postal system.⁷⁵ Over time, private companies have taken over transfer processing and imposed greater fees.⁷⁶ In most state prison systems, a single company controls all money transfers.⁷⁷

Incarcerated individuals and their families sometimes may face difficulties resolving issues with a prison or jail's money transfer vendor. One parent complained to the CFPB about a vendor that processed money transfers and provided goods at a prison. The complaint centered on the vendor's lack of response related to a defective device. The person stated,

“My son has been complaining to this company for months and they refuse to even acknowledge his every attempt to correct or resolve the problem. ... I pray that you take a good look at the what this company is doing because they feel the inmates are powerless against them because they can't speak out for help.”

Three companies dominate the correctional money-transfer market.⁷⁸ In most states, prisons pick one company that receives a monopoly on money-transfer services, leaving incarcerated people and their families without choice and with potentially higher costs.⁷⁹ In the 11 states that allow prisons to offer a choice between multiple companies, it can be difficult for an individual to determine the lowest-cost option.⁸⁰ For example, in a recent report on money transfers, one large company was shown to be the least expensive option for transfers of \$20, but the most expensive for transfers of \$50.⁸¹

Fees paid to a prison or jail's money transfer provider can result in significantly higher costs on a percentage basis, particularly for smaller money transfers.⁸² For example, a \$40 online transfer to an individual at Louisiana State Penitentiary incurs a \$6.50 fee (16 percent), while a

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* The analysis found that at least 26 state prison systems have issued monopoly contracts over money transfer services.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Stephanie Clifford and Jessica Silver-Greenberg, “In Prisons, Sky-High Phone Rates and Money Transfer Fees,” *The New York Times* (June 26, 2014), www.nytimes.com/2014/06/27/business/in-prisons-sky-high-phone-rates-and-money-transfer-fees.html.

\$250 online transfer incurs a \$12.50 fee (5 percent).⁸³ In contrast, outside of prison or jail, peer-to-peer apps often allow people to transfer up to several hundred dollars from a bank account or debit card for free.⁸⁴ Because lower-income people may transfer smaller amounts of money at a time, both flat and sliding fee schedules (i.e. charging a lower percentage in fees for larger transactions) may result in people with lower-incomes paying higher fees overall.

Money transfer providers often offer transfers online and over the phone, each of which imposes its own fee schedule. Across states, money orders remain the least costly transfer option—in terms of fees charged by the prison or jail—but they can take significantly more time to reach a person’s account.⁸⁵ Some states outsource the processing of money orders to the same vendor that provides other money transfer services.⁸⁶ These vendors heavily advertise the fast processing of their electronic money transfer services, which are quicker but more expensive than the systems they replace.⁸⁷

Money services contracts are typically set up at no cost to the prison system or jail; a private company may even pay a commission to the correctional institution based on the number of transfers it processes. For example, one contract specified that a company would pay the state \$1 for each of the first 1,000 money transfers it processed, \$1.50 for transfers 1,001 to 4,999, and \$2 for each transfer thereafter.⁸⁸ The company charged people between \$4.95 to \$12.95 for each money transfer, part of which went to the state as a commission.⁸⁹ Thus, the state would receive 8 to 40 percent of each money transfer fee charged by the company.⁹⁰ On top of the transfer fees

⁸³ An example of a flat fee is the \$4.00 Louisiana State Penitentiary charges for all cash deposits into lobby kiosks. A Louisiana handbook for inmates’ family and friends states that such deposits incur “a per transaction fee of \$4.00 for deposits from \$.01 to \$500.00” (the maximum transaction amount). See Louisiana Department of Corrections, *LA Informational Handbook for Friends and Families of People in Prison* (Sep. 2019), s32082.pcdn.co/wp-content/uploads/2019/09/handbook4friends.familiesofinmates_9_11_19.pdf.

⁸⁴ See Raher and Herring (2021), *supra* note 71. Peer-to-peer credit card payments may have a fee, typically a small percentage of the transaction.

⁸⁵ Stephen Raher and Tiana Herring, *Show me the money: Tracking the companies that have a lock on sending funds to incarcerated people*, Prison Policy Initiative (Nov. 9, 2021), www.prisonpolicy.org/blog/2021/11/09/moneytransfers.

⁸⁶ See, e.g., Tennessee Department of Corrections, “Offender Trust Fund Account: How To Deposit Money Into An Offender Trust Fund,” www.tn.gov/correction/sp/offender-trust-fund-account.html.

⁸⁷ Raher and Herring (2021), *supra* note 71. Prior to electronic transfers, often the only option was to send a money order by mail.

⁸⁸ Florida Department of Corrections, *Contract Between The Florida Department of Corrections and JPAY, Inc.*, Contract #C2233 (July 2005), www.prisonlegalnews.org/media/publications/fl_doc_jpay_contract_2012.pdf. See page 4 of 14 of the original contract.

⁸⁹ *Id.* See Attachment A in Amendment #1.

⁹⁰ A \$1 commission on a \$12.95 transfer fee is 8 percent; a \$2 commission on a \$4.95 transfer fee is 40 percent.

charged by private companies, some prison systems and jails charge people directly to deposit money into their commissary accounts.⁹¹

3.1.2 Garnishment

Funds may be garnished from an inmate's trust account. For example, in California, the Department of Corrections and Rehabilitation will garnish half of any money deposited into an account and apply those funds to restitution obligations.⁹² In Oregon, a 2017 law directs the Department of Corrections to deduct 15 percent of all incoming funds to pay any outstanding criminal justice debt.⁹³ These mandatory deductions increase the need for external money transfers and increase the cost of transferring money for people in prison to have the same buying power.⁹⁴ Increased or more frequent deposits via money transfer would also carry higher fees, further burdening the friends and family on whom incarcerated individuals rely.

Garnishment of inmate trust accounts reduced access to Economic Impact Payments (EIPs) intended to mitigate the harm from the COVID-19 pandemic. After the IRS resumed processing incarcerated individuals' requests for EIPs in October 2020,⁹⁵ some correction systems allocated the funds towards criminal justice debt prior to making deposits into commissary accounts.⁹⁶ While several states enacted emergency orders to prevent private debt collectors

⁹¹ For example, the Florida Department of Corrections charges its own fee of \$0.50 cents to deposit money into a person's account. See Florida Department of Corrections, *Frequently Asked Questions Regarding Inmate Funds*, www.dc.state.fl.us/ci/funds.html (last accessed Oct. 8, 2021).

⁹² California Department of Corrections and Rehabilitation, *How does a victim collect on the restitution order from an inmate or a parolee?*, www.cdcr.ca.gov/victim-services/restitution-collections (last accessed Oct. 5, 2021).

⁹³ Or. Rev. Stat. § 423.105.

⁹⁴ Stephen Raheer, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jail*, *Hastings Race and Poverty Law Journal*, at 81 (2020), repository.uchastings.edu/hastings_race_poverty_law_journal/vol17/iss1/3.

⁹⁵ Congressional Research Service, *Scholl v. Mnuchin and Economic Impact Payments* (Mar. 26, 2021), crsreports.congress.gov/product/pdf/LSB/LSB10586.

⁹⁶ Asher Stockler and Daniel Moritz-Rabson, *Prisons are skimming big chunks of CARES Act stimulus checks*, *The Intercept* (Feb. 17, 2021), theintercept.com/2021/02/17/stimulus-checks-cares-prisons-skimming-irs.

from garnishing payments, there were reports in Colorado,⁹⁷ Oregon,⁹⁸ Alabama,⁹⁹ and Ohio¹⁰⁰ of states using EIPs to pay outstanding fines and fees.¹⁰¹ Generally, federal benefits are exempt from garnishment, but there are exceptions for court-ordered victim restitution or child support that can affect incarcerated individuals.¹⁰² People often do not have access to government benefits while incarcerated, but they often face deductions from federal benefits upon release.¹⁰³

3.2 Managing debt and accessing credit

People who incur debt prior to conviction face distinct issues managing those debts once incarcerated. There is little national data on the debt burden of incarcerated individuals, but one study found 32 percent of those convicted in a sample of records from Texas had a credit card account, 25 percent had auto loans, and 13 percent had a mortgage.¹⁰⁴ A separate survey of individuals in Arkansas prisons found slightly less than half of incarcerated people had a credit

⁹⁷ Andy Koen, “Stimulus payments subject to debt collections,” *KOAA* (Mar 19, 2021), www.koaa.com/news/covering-colorado/stimulus-payments-subject-to-debt-collections.

⁹⁸ Tom Banse, *Prisoners eligible for stimulus checks, but getting payout behind bars is complicated*, *OPB* (Mar. 3, 2021), www.opb.org/article/2021/03/03/prison-stimulus-checks-inmate-relief-money-oregon.

⁹⁹ Connor Sheets, “‘I need that money’: Alabama siphoning inmates’ stimulus funds to pay fines, fees, restitution,” *Al.com* (June 5, 2021), www.al.com/news/2021/06/i-need-that-money-alabama-siphoning-inmate-stimulus-funds-to-pay-fines-fees-restitution.html.

¹⁰⁰ Jeremy Pelzer, “Lawsuit: Ohio prison officials wrongly diverted inmates’ COVID-19 stimulus payments to pay fees, fines,” *Cleveland.com* (Apr. 13, 2021), www.cleveland.com/open/2021/04/lawsuit-ohio-prison-officials-wrongly-diverted-inmates-covid-19-stimulus-payments-to-pay-fees-fines.html.

¹⁰¹ See Section 5.2 for further discussion of criminal justice debt collection.

¹⁰² Consumer Financial Protection Bureau, *Can a debt collector garnish my federal benefits?* (Oct. 24, 2017), www.consumerfinance.gov/ask-cfpb/can-a-debt-collector-garnish-my-federal-benefits-en-1441/; 18 United States Code (USC) Section 3613, 18 USC 3663, 18USC3663A, 15 USC 1673.

¹⁰³ People who receive Social Security benefits will have their benefits suspended if they are convicted of a criminal offense and sentenced to jail or prison for more than a month. People who receive Supplemental Security Income (SSI) payments will not receive payments while in prison. See Social Security Administration, *What Prisoners Need To Know* (June 2021), www.ssa.gov/pubs/EN-05-10133.pdf. The VA will pay certain benefits to incarcerated veterans, but the amount may vary. See also Veterans Benefits Administration, *Incarcerated Veterans*, U.S. Department of Veterans Affairs, benefits.va.gov/PERSONA/veteran-incarcerated.asp (last accessed Nov. 17, 2021).

¹⁰⁴ Abhay Aneja and Carlos Avenancio-Leon, *No Credit for Time Served? Incarceration and Credit-Driven Crime Cycles*, at 13 (Working Paper, July 2020), static1.squarespace.com/static/59dcoec564b05fea9d3dfee3/t/5f11d977797b7f4875d36537/1595005305683/IncarcerationAccessToCredit_v07102020.pdf.

card, two-fifths had a car loan, and one-fifth had a mortgage.¹⁰⁵ Additionally, child support orders can pose a major financial obligation for incarcerated individuals.¹⁰⁶

3.2.1 Managing debt

Lack of funds while incarcerated and limited or expensive access to internet, phone, or mail services pose challenges for incarcerated people in managing, servicing, or paying existing consumer debt.¹⁰⁷ These responsibilities then often fall on spouses and relatives, frequently the wives, sisters, and mothers of incarcerated individuals, who may be given power of attorney or access to a joint bank account. If debts incurred prior to conviction go unpaid, they often continue to grow during incarceration due to interest and added fees and may become delinquent. Facing these barriers and for those without a support system, a person could exit prison and find their house foreclosed upon, car repossessed, or credit card debt in collections. These impacts greatly compound the difficulty of successfully reentering society upon release from prison.

Incarcerated individuals who are unable to make payments on their loans may be eligible for programs that defer loans incurred prior to incarceration. For example, student loans not in default are often eligible for income-driven repayment (IDR) plans, which could offer monthly payments as low as \$0.¹⁰⁸ Upon request, some creditors may offer deferrals or programs for consumer debt available to the general public.¹⁰⁹ However, it is unclear whether loan servicers effectively communicate these options to borrowers, or how many people who are incarcerated are aware of and able to enroll successfully in these plans. There is limited data on the uptake of these plans and policies by those in prison.

One person submitted a complaint to the CFPB about the difficulties of accessing student loan deferment while incarcerated:

¹⁰⁵ Timothy Brown and Marc D. Glidden, *Gender and Financial Capability from Behind Bars*, FINRA (July 2020), www.usfinancialcapability.org/downloads/Gender-and-Financial-Capability-from-Behind-Bars.pdf.

¹⁰⁶ NCLC, *Child Support and Incarceration* (Mar. 4, 2019), www.ncsl.org/research/human-services/child-support-and-incarceration.aspx.

¹⁰⁷ Joe Garcia, *Why prisoners like me need internet access*, MIT Technology Review (June 30, 2021), www.technologyreview.com/2021/06/30/1026334/why-prisoners-need-internet-access.

¹⁰⁸ Federal Interagency Reentry Council, *Reentry Myth Buster! On Repaying Federal Student Loans While Incarcerated* (Nov. 2016), www.hud.gov/sites/documents/REENTRY_MYTHBUSTERS.PDF.

¹⁰⁹ See, e.g., Nhu-Han Duong and Damion English, *Worried about making your auto loan payments? Your lender may have options that can help*, Consumer Financial Protection Bureau (Feb. 12, 2020), www.consumerfinance.gov/about-us/blog/worried-about-making-your-auto-loan-payments-your-lender-may-have-options-to-help.

“I was sent to a halfway-house 5 hours away from home. I was only allowed to use the internet once a week at the start of my stay. My first time checking my personal email showed an email from [the student loan servicer] saying I was in danger of default.”

Despite repeated attempts to resolve the problem, the student loan servicer put the loan in default. As the borrower stated,

“The fees keep racking up and I get no answers and no help for going on 4 years now. ... Please help.”

Child support debt imposes significant costs upon people reentering communities from prison, averaging \$20,000 to \$36,000, depending on the state and the data used.¹¹⁰ This is two to three times more than the average support debt of other parents with low incomes and three to four times the average criminal-justice debt of other reentering people.¹¹¹ Debt for an incarcerated parent with a child support order has the potential to double while incarcerated.¹¹² Most incarcerated parents are eligible for modification of their child support order, which would allow them to avoid accruing new child support debt while imprisoned.¹¹³ Some states have begun to experiment with programs to assist parents in navigating complex child support obligations upon reentry. One study found that state-coordinated support programs increased participating parents’ employment rates and wages, the amount and frequency of child support payments, and parental involvement with children.¹¹⁴

For loans in default, collections policies may depend on the length of a borrower’s incarceration. Collection efforts for defaulted loans may pause during incarceration and discharge could be

¹¹⁰ Jennifer Scherer, Ph.D., *Child Support and Reentry*, Dept. of Justice, Office of Justice Prog. National Institute of Justice, at 2 (2021), www.ojp.gov/pdffiles1/nij/300780.pdf.

¹¹¹ *Id.* Many organizations include child support debt as a part of criminal justice debt because it often accrues while individuals are incarcerated and unable to pay.

¹¹² See Duong and English (2020), *supra* note 109.

¹¹³ *Id.*

¹¹⁴ See Scherer (2021), *supra* note 110 at 33.

available.¹¹⁵ However, private debt collectors are often unaware that an individual is in jail or prison because they generally do not maintain systems for identifying this information.

3.2.2 Accessing student loans

Although individuals are usually ineligible to obtain new consumer credit while incarcerated, there have been recent discussions on increasing access to student loans and financial aid for this population.¹¹⁶ Studies have shown that correctional education improves the chances of not returning to prison and obtaining employment after release for incarcerated people. One estimate found that correctional education programs led to a reduction in the risk of recidivating by 13 percentage points.¹¹⁷ The vast majority of people in prison report that they would like to enroll in an academic class or program of study, and of those, 82 percent are interested in some type of postsecondary education.¹¹⁸

Yet, while in prison, individuals with a desire to enroll in post-secondary education face barriers to accessing funding. Students are not eligible for federal student loans while incarcerated in an adult correctional or juvenile justice facility.¹¹⁹ Additionally, more than half of all states have some statutory or policy barrier that prevents incarcerated students from accessing at least one public aid program.¹²⁰ Even in states where there is no explicit barrier to financial aid, incarcerated students may face difficulty meeting residency requirements, completing applications such as the Free Application for Federal Student Aid (FAFSA), and communicating with colleges. These limits on access to federal student aid contribute to additional exposure for incarcerated individuals to the risks associated with private student loans and proprietary loans

¹¹⁵ National Consumer Law Center, *Incarceration*, Student Loan Borrower Assistance, www.studentloanborrowerassistance.org/loan-cancellation/federal-cancellation/incarceration/ (last accessed Oct. 5, 2021).

¹¹⁶ See, e.g., Kathleen Hobson, “Higher education is proven to help people in prison. New Pell grants aim to boost enrollment.” *PBS* (Aug. 25, 2021), www.pbs.org/newshour/nation/higher-education-is-proven-to-help-people-in-prison-new-pell-grants-aim-to-boost-enrollment.

¹¹⁷ Lois Davis, et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND Corporation (2013), www.rand.org/pubs/research_reports/RR266.html.

¹¹⁸ U.S. Department of Education, *Highlights from the U.S. PIAAC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training* (Nov. 2016), nces.ed.gov/pubs2016/2016040.pdf.

¹¹⁹ Kelsey Ramirez, “Biden administration announces student loan forgiveness program overhaul, will impact over 500K borrowers,” *Fox Business* (Oct. 6, 2021), www.foxbusiness.com/personal-finance/biden-administration-overhaul-student-loan-forgiveness-program. See generally, Federal Student Aid, *Federal Student Aid for Students in Adult Correctional and Juvenile Justice Facilities* (Aug. 2021), studentaid.gov/sites/default/files/aid-info-for-incarcerated-individuals.pdf.

¹²⁰ Lauren Hobby, Brian Walsh, and Ruth Delaney, *A Piece of the Puzzle: State Financial Aid for Incarcerated Students*, Vera Institute of Justice (July 2019), www.vera.org/downloads/publications/a-piece-of-the-puzzle.pdf.

operated by for-profit colleges, which pursue targeted recruitment of justice-involved individuals.¹²¹

3.3 Consumer reporting

Struggles managing debt, lack of credit histories, and difficulties monitoring credit reports while in jail or prison can all hurt a justice-involved individual's credit scores. A lower credit score or insufficient credit reports after prolonged imprisonment can make it challenging—or even impossible—for people to reenter the financial mainstream upon release. One study found the average credit score of formerly imprisoned people is 50 points lower than that of non-incarcerated individuals.¹²² The negative effects of incarceration on a person's credit record can reduce one's ability to secure housing, find employment, or generally rebuild a life upon reentering society.

People may be unable to pay consumer debt incurred prior to incarceration while in prison—that debt is then likely to be in default upon their release. Most negative information can stay on a consumer report for seven years, and some types of information remain on longer.¹²³

People incarcerated for many years may leave prison unscorable or credit invisible. People with long sentences could find that their credit reports become “stale” while imprisoned or contain insufficient credit histories in order for the three nationwide credit reporting companies to generate a score.¹²⁴ Over a third of people who are incarcerated are 35 or younger, and may exit prison as “credit invisible” if they had not established a credit record prior to incarceration.¹²⁵ As of 2010, 11 percent of the adult population was credit invisible and 8.3 percent unscored. The share of credit invisible justice-involved individuals is unknown.¹²⁶

¹²¹ Jeffrey Ian Ross, Richard Tewksbury, and Miguel Zaldivar, *Analyzing For-Profit Colleges and Universities that Offer Bachelors, Masters, and Doctorates to Inmates Incarcerated in American Correctional Facilities* (Oct. 2015), dx.doi.org/10.1080/10509674.2015.1087442.

¹²² The same study estimated that each year in carceral confinement led to a 32 point credit score drop, after an immediate drop of 6.5 points; see Aneja and Avenancio-Leon (2020), *supra* note 104, at 12.

¹²³ Consumer Financial Protection Bureau, *Is it possible to remove accurate, negative information from my credit report?* (Apr. 6, 2016), www.consumerfinance.gov/ask-cfpb/is-it-possible-to-remove-accurate-negative-information-from-my-credit-report-en-1249.

¹²⁴ Kenneth Brevoort, Philipp Grimm, and Michelle Kambara, *Data Point: Credit Invisibles*, Consumer Financial Protection Bureau (Mar. 2015), files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

¹²⁵ Federal Bureau of Prisons, *Inmate Age*, www.bop.gov/about/statistics/statistics_inmate_age.jsp (last accessed Oct. 4, 2021).

¹²⁶ *Id.*

People may have challenges monitoring their credit reports for errors while incarcerated.¹²⁷ Inability to meet authentication requirements or other communication restrictions, such as the lack of access to a computer, may make it difficult to obtain a credit report, as well as hard to review and dispute incorrect items on the report. People could request a security freeze of their credit files before entering or while in prison to help limit the risk of identity theft; however, a consumer must submit a request to each of the three major nationwide credit reporting companies separately.¹²⁸

One person submitted a complaint of identity theft, which was discovered after over a decade of imprisonment:

“I had a friend help me with my credit profile so I can begin to build my credit so I can obtain housing after being locked up for so long. She went to pull my credit reports and noticed there was a collections account ... due to nonpayment. According to my credit profile, the card was opened in [date] and placed in collections in [two years later]. I was arrested [eight years before the date the card was opened] and was not released until [seven years after the card was opened] so there is no way I was able to open a credit card in my name especially because in prison we did not have access to the internet.”

Consumer education to reach incarcerated people at scale and help them to understand the importance of taking steps to monitor a credit report can be challenging. To that end, the CFPB’s “Your Money Your Goals” toolkit includes materials designed for incarcerated individuals and has been used extensively by reentry organizations across the country, including the Maryland, New York, and Pennsylvania state departments of corrections, to assist organizations, their staff, and volunteers working with justice-involved individuals.¹²⁹

¹²⁷ Mary Griffin, *Protecting one’s credit while in the criminal justice system*, Consumer Financial Protection Bureau (Apr. 28, 2016), www.consumerfinance.gov/about-us/blog/protecting-ones-credit-while-criminal-justice-system.

¹²⁸ Consumer Financial Protection Bureau, “How to handle identity theft,” *Focus on Reentry: Criminal Justice* (July 2021), files.consumerfinance.gov/f/documents/cfpb_how-to-handle-identity-theft_handout_2021-08.pdf.

¹²⁹ Consumer Financial Protection Bureau, *Focus on Reentry: Criminal Justice*, Your Money, Your Goals (July 2021), files.consumerfinance.gov/f/documents/cfpb_ymyg_reentry_supplement.pdf.

4. Reentry

This section highlights a sample of key potential consumer challenges and consequences for people reentering society as well as the lasting financial impacts of a criminal record.

- Prepaid debit cards that people receive upon release often impose fees for both use and inactivity. Often, correctional institutions do not provide other, less costly options to disburse the balance of prison trust accounts and government benefits.
- People have limited ability to access affordable banking products upon reentry due to the requirements of opening accounts—such as providing photo identification and proof of address and satisfying any credit or background checks completed by the bank.
- People face difficulties resolving errors on criminal background checks and struggle to secure stable housing and employment upon release.
- Restrictions around criminal records limit access to small business loans and business capital through government programs and from private lenders.
- People with criminal records may face reduced access to and higher costs for consumer credit if lenders consider income stability when evaluating ability-to-repay.

4.1 Release cards

When released, people exiting jail receive the money they had when arrested, and prisons disburse the balance of a person’s commissary account, including wages from prison jobs, public benefits, and money sent by friends and family.¹³⁰ Fee-bearing, prepaid debit cards, often referred to as prison or jail release cards, have increasingly replaced cash or checks as the method to return these funds to people reentering society—in fact, they are frequently the only option offered by correctional facilities.¹³¹

While release cards come with a cardholder agreement defining terms between the issuer and the consumer, the cards are provided pursuant to a contract between the card provider and a

¹³⁰ Herb Weisbaum, “Inmates Charged Fee After Leaving Jail,” *NBC News* (Mar. 24, 2015), www.nbcnews.com/business/consumer/inmates-charged-fee-after-leaving-jail-n329151.

¹³¹ See, e.g., Consent Order at 10-12, *In the Matter of: JPay, LLC, 2021-CFPB-0006* (Oct 19, 2021), files.consumerfinance.gov/f/documents/cfpb_jpay-llc_consent-order_2021-10.pdf [“Between May 2011 and June 2017 alone, over 500,000 consumers were forced to receive the funds owed to them at the time of their release on a fee-bearing Debit Release Card.”]; see also Arun Gupta, “The Financial Firm That Cornered the Market on Jails,” *The Nation* (Aug. 1, 2016), www.thenation.com/article/archive/the-financial-firm-that-cornered-the-market-on-jails.

state agency.¹³² The CFPB found that a major release card company believed that entering into contracts with prisons for release cards would help it compete for other contracts for additional services; contract take-up was not driven by consumer demand.¹³³ There is a lack of up-to-date data on the overall adoption of release cards by correctional institutions, but, in 2014, the Federal Bureau of Prisons and at least 17 state prisons systems reported issuing release cards.¹³⁴ Between 2011 and 2021, one major release card issuer provided approximately 1.2 million release cards to people exiting prison.¹³⁵

People exiting jail or prison face frequent fees for the prepaid cards they often have no choice but to receive.¹³⁶ The fees on these cards can be higher than fees assessed on those offered to the general market.¹³⁷ Furthermore, even market-rate fees on a prepaid product would burden this vulnerable class of people relative to receiving cash or checks.¹³⁸ Disclosures for various release cards list various types of fees, including for activation, weekly account maintenance, monthly account maintenance, transactions, ATM withdrawals, ATM declines, cash reloads, transfers, balance inquiries, customer service, replacement cards, foreign transactions, inactivity, and/or

¹³² *Id.* at 10-11.

¹³³ *Id.* at 10-11, para. 20 [“Respondent believed that entering into contracts with DOCs for the Debit Release Card could help it compete for additional DOC contracts pertaining to additional services, including money transfers to commissary or trust accounts. Respondent’s ability to gain additional DOC contracts was not derived from consumers’ demand for the Debit Release Card product.”].

¹³⁴ At the time of this report writing, there are not more recent data on the prevalence of prepaid card use by states—a major data limitation for this market. ASCA Survey, *Detailed Response Analysis*, www.webcitation.org/6WSoQ5hDf. Stephen Rahe, *Re: Proposed Amendments to Regulation E: Curb exploitation of people released from custody* (Mar. 18, 2015), static.prisonpolicy.org/releasecards/CFPB-comment.pdf, citing responses to the (the “Detailed Response Analysis”).

¹³⁵ See Consent order at 8, para. 9, *supra* note 131.

¹³⁶ See Gupta (2016), *supra* note 131. For examples of fee schedules, see Consumer Financial Protection Bureau, *Prepaid product agreements database*, www.consumerfinance.gov/data-research/prepaid-accounts/search-agreements (last accessed Oct. 8, 2021).

¹³⁷ Consumers who are not incarcerated can compare terms for prepaid debit cards and other products and pick an option that may carry lower or no fees; see, e.g. Comerica ValuePay Card, *Long Form Disclosure* (Apr. 1, 2019), www.consumerfinance.gov/data-research/prepaid-accounts/search-agreements/detail/47439; see also JPay New Jersey, *Long Form Disclosure* (Feb. 24, 2021), www.consumerfinance.gov/data-research/prepaid-accounts/search-agreements/detail/46835. See generally CFPB, *Choose the right card for your situation*, www.consumerfinance.gov/consumer-tools/prepaid-cards/choose-the-right-card (last accessed Dec. 9, 2021).

¹³⁸ *Id.*

cancellations.¹³⁹ The unavoidable cost of these cards after issuance, whether due to use or inactivity, can present a substantial financial burden for people reentering society.¹⁴⁰

4.2 Access to banking

Requirements to open checking and savings accounts may pose challenges for people upon release from prison. As many reentering society have had their driver's licenses suspended because of criminal justice debt, some previously-incarcerated individuals may be unable to provide picture identification when applying for a bank account.¹⁴¹ In addition, proof of address is typically required to both renew a license and open a bank account, and people exiting prison may face difficulty providing this before establishing a permanent residence.

Banks may also conduct credit checks on potential customers and may in some instances deny individuals based on the results.¹⁴² For example, banks offering accounts typically request reports from companies such as Early Warning Systems (EWS) and ChexSystems that contain information on, among other things, accounts closed by banks due to unpaid fees or suspected fraud for up to seven years for most negative information.¹⁴³ These issues may be common for people exiting prison after months or years of incarceration. Lastly, some accounts require opening deposits, minimum balances, or monthly fees to maintain an account—conditions that may be difficult for newly reentering individuals to meet. However, more banks are offering free “second chance” checking accounts that provide people an alternative path and can ultimately result in access to bank accounts with fewer restrictions.¹⁴⁴ These accounts are intended to help

¹³⁹ See Prepaid Database for samples of agreements, *supra* note 136.

¹⁴⁰ See Gupta (2014), *supra* note 131. See also Consent Order, *supra* note 131 at 12 [Between May 2011 and June 2017 alone, over 500,000 consumers were forced to receive the funds owed to them at the time of their release on a feebearing Debit Release Card. Those cardholders incurred over \$3 million in fees during that period. After June 2017, additional consumers were forced to receive the funds owed to them at the time of their release on a feebearing Debit Release Card.].

¹⁴¹ See Section 5.2 for more discussion of the fines and fees for justice-involved individuals and the consequences of this debt. See also David Benoit, *Ex-Inmates Struggle in a Banking System Not Made for Them*, *The Wall Street Journal* (Oct. 31, 2020), www.wsj.com/articles/ex-inmates-struggle-in-a-banking-system-not-made-for-them-11604149200.

¹⁴² Consumer Fin. Prot. Bureau, *Helping consumers who have been denied checking accounts* (Feb. 2016), files.consumerfinance.gov/f/201602_cfpb_helping-consumers-who-have-been-denied-checking-accounts.pdf. See also Margarete Burnette, “What to do if a bank rejects you for a checking account,” *Bankrate* (Dec. 25, 2017), www.bankrate.com/banking/checking/bank-denied-you-for-a-checking-account.

¹⁴³ Consumer Financial Protection Bureau, *Helping consumers who have been denied checking accounts* (Feb. 2016), files.consumerfinance.gov/f/201602_cfpb_helping-consumers-who-have-been-denied-checking-accounts.pdf. Some checking account reporting companies disregard information once it's five years old.

¹⁴⁴ Spencer Tierney and Chanelle Bessette, “Second Chance Checking Accounts Across the U.S.,” *NerdWallet* (Aug. 13, 2020), www.nerdwallet.com/article/banking/second-chance-checking.

people rebuild their banking histories but may come with more fees and requirements than standard checking accounts.¹⁴⁵

4.3 Background screening

Background screening reports include many types of information, such as credit, employment, and eviction history, and public record information on arrests and convictions.¹⁴⁶ Survey data find that the majority of employers conduct background screenings,¹⁴⁷ most landlords use background checks on prospective tenants,¹⁴⁸ and two-thirds of renters pay an application fee for background and credit checks.¹⁴⁹ Meanwhile, private equity investment in real estate technology, including tenant screening which can include background reports, appears to have increased in recent years.¹⁵⁰

Errors in criminal records information in background reports include incomplete records, out-of-date information, duplicative reporting, or inaccurately matched information.¹⁵¹ Inconsistent

¹⁴⁵ *Id.*

¹⁴⁶ The Federal Trade Commission (FTC) and the CFPB both enforce the Fair Credit Reporting Act (FCRA), which includes provisions related to the limitations on inclusion and use of criminal record information. The CFPB also has supervisory and rulemaking authority under the FCRA. See 15 U.S.C. § 1681s(e).

¹⁴⁷ For example, a 2021 survey sponsored by the Professional Background Screening Association (PBSA) and HR.com found that background screening is nearly universal among organizations with at least one location in the US at 95 percent. PBSA and HR.com, *Background Screening: Trends in the U.S. and Abroad* (Aug. 2021), pubs.thepbsa.org/pub.cfm?id=FB36B937-C9D5-A941-7720-4047386F38B0. Recently, some large employers have made the choice to skip background screening due to a shortage of workers. Lauren Weber and Chip Cutter, “Help Really Wanted: No Degree, Work Experience or Background Checks,” *The Wall Street Journal* (Nov. 6, 2021), www.wsj.com/articles/help-really-wanted-no-degree-work-experience-or-background-checks-11636196307.

¹⁴⁸ For example, see Transunion SmartMove, *TransUnion Independent Landlord Survey Insights* (Aug. 2017), www.mysmartmove.com/SmartMove/blog/landlord-rental-market-survey-insights-infographic.page; see also Phil Hall, *Zillow Survey Details Disparities in Renters’ Application Fees*, National Mortgage Professional (Feb. 4, 2020), nationalmortgageprofessional.com/news/73712/zillow-survey-details-disparities-renters-application-fees.

¹⁴⁹ While some public housing authorities (PHAs) have transitioned to individual reviews for applicants with criminal records, background checks conducted by tenant screening companies remain prevalent. Richard Webster, *HANO approves new criminal background check policy*, NOLA.com (Mar. 30, 2016), www.nola.com/news/politics/article_eb0dc4f4-9e6c-54d2-97c9-f70df68cda14.html.

¹⁵⁰ Cyrus Farivar, “Tenant screening software faces national reckoning,” *NBC News* (Mar. 14, 2021), www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n1260975.

¹⁵¹ Under the FCRA, an arrest is generally not allowed to be reported when it is older than seven years, or outside the governing statute of limitations, whichever is the longer period. See *Consumer Financial Protection Bureau v. Sterling Infosystems, Inc.* 1:19-cv-10824 at para. 18-20, files.consumerfinance.gov/f/documents/cfpb_sterling-infosystems-inc_complaint_2019-11.pdf. (the Bureau found that Sterling produced consumer reports containing records of arrest antedating the reports by more than seven years). *Cf.*, Consumer Financial Protection Bureau, *In the Matter of General Information Services, Inc. and e-Backgroundchecks.com, Inc. Consent Order 2015-CFPB-0028 Document 1* Filed 10/29/2015, at 8, www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-two-

systems across jurisdictions make it more time-consuming for screening companies to interpret and report complete and accurate records.¹⁵² Though an increasing share of courts now have digitized systems, they vary in their policies and practices regarding data access, records updates, and terminology.¹⁵³ Background screeners collecting records in different formats sometimes fail to report correctly matched accurate, complete information on people’s employment background and tenant screening reports.¹⁵⁴ Additionally, despite the fact that courts do not provide certain types of personally identifiable information from records,¹⁵⁵ some background screening companies still attempt to match information to consumers, resulting in an increase in the number of individuals mistakenly identified as a match.¹⁵⁶ The risk of mismatching may disproportionately impact Hispanic, Black, and Asian people as these groups have a higher incidence of surname clustering.¹⁵⁷ The CFPB recently published an advisory opinion reinforcing that it is not a reasonable procedure for a consumer reporting agency to simply include in a consumer’s report information from sources containing insufficient

[of-the-largest-employment-background-screening-report-providers-for-serious-inaccuracies](#) (the Bureau found that GIS and BGC reported mismatched criminal record information and failed to take measures to prevent non-reportable civil suit and civil judgment information older than seven years from being illegally included in its reports).

¹⁵² Consumer Financial Protection Bureau, *Market Snapshot: Background Screening Reports*, at 9 to 14 (Oct. 2019), files.consumerfinance.gov/f/documents/201909_cfpb_market-snapshot-background-screening_report.pdf.

¹⁵³ Three main challenges faced by criminal justice agencies in ensuring the completeness of criminal history records include prosecutors not reporting final decisions in a case, a lack of official arrest records, and case numbers not transferring accurately among local agencies. See Government Accountability Office, *Criminal History Records*, at 18-30 (Mar. 16, 2015), www.gao.gov/products/gao-15-162.

¹⁵⁴ National Center for State Courts, *Court Records and Background Checks*, www.ncsc.org/Topics/Technology/Records-Document-Management/Background-Checks.aspx (last accessed Oct. 14, 2021).

¹⁵⁵ See, e.g., 204 PA. CODE §§ 213.71 - 213.79 www.pacode.com/secure/data/204/chapter213/subchapCtoc.html; Some court systems, including Idaho, limit information that is often otherwise used to identify the subject of a search, e.g., street addresses, telephone numbers or personal identification number, such as driver’s license numbers, see, e.g., iCourt, *Public Records Search FAQs*, icourt.idaho.gov/public (last accessed Oct. 14, 2021); for federal court records, the Public Access to Court Electronic Records (PACER), www.pacer.gov, is an electronic public access service that allows users to obtain case and docket information online from federal courts. An industry trade group, the National Association of Background Screening Professionals (NAPBS), stated that PACER presents challenges because it does not provide for searches by date of birth. *Letter to The Honorable Wm. Terrell Hodges, Chair, Judicial Conference Committee on Court Administration and Case Management* (Mar. 6, 2018), pubs.napbs.com/pub.cfm?id=oECDA301-BBDD-B24A-B419-3B8F43A71B90.

¹⁵⁶ See generally *Fair Credit Reporting; Name-Only Matching Procedures*, 86 FR 62468 (Nov. 10, 2021) (highlighting that a consumer reporting agency that uses inadequate matching procedures to match information to consumers, including name-only matching, in preparing consumer reports is not using reasonable procedures to assure maximum possible accuracy under 15 U.S.C. 1681e(b)); see also 2 Complaint at 9-17, *U.S. v. InfoTrack Info. Servs., Inc.*, No. 1:14-cv-02054 (N.D. Ill. Mar. 24, 2014), www.ftc.gov/enforcement/cases-proceedings/122-3092/infotrack-information-services-inc-et-al; Complaint at 5-11, *Bureau of Consumer Fin. Prot. v. Sterling Infosys., Inc.*, No. 1:19-cv-10824 (S.D.N.Y. Nov. 22, 2019), www.consumerfinance.gov/enforcement/actions/sterling-infosystems-inc; See also GAO (2015), *supra* note 153 at 38.

¹⁵⁷ Joshua Comenetz, *Hispanic Surnames Rise in Popularity*, U.S. Census Bureau (Aug. 9, 2017), www.census.gov/library/stories/2017/08/what-is-in-a-name.html (“Twenty-six surnames cover a quarter of the Hispanic population and 16 percent of Hispanic people reported one of the top 10 Hispanic names. The pattern is similar for Asians and blacks.”).

identifiers without taking additional steps to match the information to the consumer who is the subject of the report, such as consulting other databases or sources of information that contain additional identifying information.¹⁵⁸

Complaints to the CFPB show that people face difficulties in disputing and obtaining correction of inaccurate employment background and tenant screening reports.¹⁵⁹ People with a criminal record may have derogatory data with more potential for errors than people without criminal records. A report may incorrectly list the same charge multiple times, providing the impression of repeat offenses, or contain information that was later expunged, suppressed, or otherwise removed from public records.

One industry analysis estimated that there were 2,375 background screening companies in 2020, and each may have a different policy for resolving disputes.¹⁶⁰ While employers are required to provide the report and a description of consumer rights before taking any adverse action,¹⁶¹ it may be difficult for an individual to remedy the erroneous information before an employer takes such an action, such as a decision not to hire. For tenant screening, a landlord needs to inform the prospective tenant that there was an adverse action, advise them of their dispute rights, and share the name and contact information of the consumer reporting company used so that the prospective tenant can request a report from that company; the landlord need not provide a copy of the report itself.¹⁶² Additionally, people must often resolve errors with each company individually which can pose a substantial burden.

Two priorities for reentering individuals are finding housing and employment—errors on employment background and tenant screening can negatively impact both. As of 2018, people who were previously incarcerated faced a 27 percent unemployment rate, much higher than that of the public at large.¹⁶³ And research suggests that the use of arrest as proof of criminal activity, long lookback periods for conviction records, and broad categories of criminal activity

¹⁵⁸ See Advisory Opinion at 14, *Fair Credit Reporting; Name-Only Matching Procedures*, 12 CFR Part 1022, CFPB, files.consumerfinance.gov/f/documents/cfpb_name-only-matching_advisory-opinion_2021-11.pdf.

¹⁵⁹ See, e.g., CFPB., *Complaint Bulletin: COVID-19 issues described in consumer complaints* (July 2021), files.consumerfinance.gov/f/documents/cfpb_covid-19-issues-described-consumer-complaints_complaint-bulletin_2021-07.pdf (CFPB Complaint Bulletin, noting that, in their complaints to the Bureau, some consumers have reported being denied applications for housing because information in their tenant screening reports was inaccurate).

¹⁶⁰ Jacqueline Hiner, *Background Check Services*, IBISWorld US Specialized Industry Report OD6058 (Nov. 2020).

¹⁶¹ 15 U.S.C. §1681b(b)(3)(A).

¹⁶² Federal Trade Commission, *Using Consumer Reports: What Landlords Need to Know*, (Oct. 2016), www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-landlords-need-know.

¹⁶³ Lucius Couloute and Daniel Kopf, “Prison Policy Initiative, Out of Prison & Out of Work: Unemployment among formerly incarcerated people” (Jul. 2018), www.prisonpolicy.org/reports/outofwork.html.

contribute to the denial of justice-involved individuals and their families from housing opportunities.¹⁶⁴

4.4 Access to business capital

Due to the challenges of finding employment, many returning individuals instead turn to entrepreneurship. Over 1.1 million small business owners have a criminal history, representing 3.8 percent of businesses with less than 500 employees.¹⁶⁵ Research suggests returning individuals are 50 percent more likely to become entrepreneurs than those who have never been incarcerated.¹⁶⁶

The rollout and implementation of the Paycheck Protection Program (PPP) by the Small Business Administration (SBA)—established through the CARES Act—posed a recent challenge for business owners with criminal records. In the initial rollout of the PPP, the SBA denied individuals with certain criminal histories from applying.¹⁶⁷ The COVID-19 Economic Injury Disaster Loan program also restricted access for justice-involved individuals.¹⁶⁸ When President Biden eliminated several of these restrictions, 201,174 more businesses were likely eligible for vital PPP funding.¹⁶⁹

¹⁶⁴ Tex Pasley et al., *Screened Out: How Tenant Screening Reports Deprive Tenants of Equal Access to Housing*, Shriver Center on Poverty Law (Jan. 2020), www.povertylaw.org/wp-content/uploads/2021/01/tenant-screening-final-report.pdf.

¹⁶⁵ Shawn Bushway, et al., *The prevalence of criminal records among small business owners*, RAND Corporation (June 30, 2021), www.rand.org/pubs/research_briefs/RBA1295-1.html.

¹⁶⁶ Jiwon Hwang and Damon Phillips, *Entrepreneurship as a Response to Labor Market Discrimination for Formerly Incarcerated People*, Academy of Management (July 29, 2020), journals.aom.org/doi/abs/10.5465/AMBPP.2020.205.

¹⁶⁷ ACLU, *Court Rules SBA PPP Loan Application Barring Eligibility From Business Owners With Criminal Records is Unlawful* (June 30, 2020), www.aclu.org/press-releases/court-rules-sba-ppp-loan-application-barring-eligibility-business-owners-criminal; Small Business Administration, *Paycheck Protection Program Loans: Frequently Asked Questions (FAQs)* (June 25, 2020), www.sba.gov/sites/default/files/2020-06/Paycheck-Protection-Program-Frequently-Asked-Questions%20062520-508.pdf.

¹⁶⁸ David Schlusell, *Applying for SBA COVID-19 Relief with a Criminal Record in 2021*, Collateral Consequences Resource Center (Sept. 9, 2021), ccresourcecenter.org/2021/03/08/applying-for-an-sba-loan-with-a-criminal-record-2.

¹⁶⁹ Shawn Bushway, et al., *Small Businesses, Criminal Histories, and the Paycheck Protection Program*, RAND Corporation (June 21, 2021), www.rand.org/pubs/research_reports/RRA1295-1.html; Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to Loan Amount Calculation and Eligibility, 86 Fed. Reg. 13,149, 13,154–55 (Mar. 8, 2021) (to be codified at 13 C.F.R. pt. 120).

More generally, justice-involved people face challenges accessing business capital and are more likely to be denied loans.¹⁷⁰ Among government programs providing small business loans, there is wide variety in criminal history-related restrictions—some appear to be linked to criminal history on its own rather than as an indicator of creditworthiness. There is limited evidence to suggest that criminal history decreases creditworthiness.¹⁷¹ SBA programs also have various restrictions that can bar applicants who are incarcerated, indicted, or on probation for felonies and other certain misdemeanors.¹⁷² U.S. Department of Agriculture (USDA) programs, in contrast, more narrowly demarcate criminal history-related restrictions, focusing on USDA-related fraud or agriculture-related crimes.¹⁷³

The approach largely adopted by government programs contrasts with that of private lenders. Outside of government programs, financial institutions generally do not screen small business credit applicants on the basis of criminal history, basing their underwriting decisions on creditworthiness, as determined by credit history and ability to repay. However, as covered in the sections above, a history of incarceration can negatively impact both an individual's credit scores and lifetime earnings—two major inputs into any underwriting decision.

4.5 Access to consumer credit

Incarceration can affect people's ability to access credit independent of any effects on their credit scores. After controlling for credit score, one study estimated that incarceration leads to a substantial decline in the likelihood of having a mortgage or auto loan.¹⁷⁴ Compared to their non-justice-involved counterparts, justice-involved individuals are more likely to use financial products that carry higher fees and interest such as payday loans, check-cashing services, pawn shops, money order services, and title loans.¹⁷⁵

¹⁷⁰ Kira Lerner, *Banks Won't Even Talk to Us: Business Owners with a Criminal Record Face an Abundance of Collateral Consequences*, Arnold Ventures (Jul. 2021), www.arnoldventures.org/stories/banks-wont-even-talk-to-us-business-owners-with-a-criminal-record-face-an-abundance-of-collateral-consequences.

¹⁷¹ See Aneja and Avenancio-Leon (2020), *supra* note 104; Taja-Nia Y. Henderson, Note, *New Frontiers in Fair Lending: Discrimination Against Ex-Offenders*, 80 N.Y.U. L. Rev. 1237, 1243, 1260 (2005).

¹⁷² David Schulssel and Margaret Love, *Federal policies block loans to small business owners with a record*, Collateral Consequences Resource Center (Aug. 2, 2021), ccresourcecenter.org/2021/08/02/federal-policies-block-support-for-small-business-owners-with-a-record.

¹⁷³ *Id.*

¹⁷⁴ Aneja and Avenancio-Leon (2020), *supra* note 104, at 12.

¹⁷⁵ Spencer Watson, *Economic Wellbeing of U.S. Adults with Experiences with Incarceration & Unpaid Legal Costs*, First Step Alliance, www.firststepalliance.org/post/first-step-alliance-report-economic-health-of-justice-involved-individuals (last accessed Oct. 5, 2021).

A number of factors could contribute to these declines in credit access. Imprisonment leads to a gap in a prospective borrower’s employment history and income that could pose problems when a lender examines an application’s creditworthiness and ability to repay the loan. Further research is needed into the practices and standards banks and credit unions employ when evaluating the applications of people with criminal convictions, especially whether they use criminal records data to assess and manage credit risk, and if so, how.¹⁷⁶

Some information suggests that some lenders might conduct criminal background checks when processing an application, and that they might decrease the availability or increase the cost of consumer credit for previously arrested or convicted people.¹⁷⁷ After an issuer closed a formerly incarcerated person’s credit card upon learning of their criminal history, the person submitted a complaint to the CFPB stating,

“Can they even tell me how my background supposedly makes me less credit worthy? Since I've been released from prison, my credit score has only risen.”

In addition, given the stark racial disparities in arrests and convictions, such practices may raise serious fair lending concerns.

Lack of access to affordable credit directly impacts the lives of previously incarcerated people, their families, and the broader community. Research suggests that reductions in credit availability following incarceration increase recidivism.¹⁷⁸ Difficulty obtaining credit to purchase or lease a vehicle adversely affects access to transportation—often a critical need to meet release requirements—as public transportation is often limited or inconsistent.¹⁷⁹ Owning a home is the largest generator of wealth for families, and challenges in obtaining financing for a home purchase after incarceration can have ripple effects for decades.¹⁸⁰ Additionally, both formerly incarcerated individuals and their families may struggle to finance higher education.¹⁸¹ These

¹⁷⁶ Taja-Nia Henderson, *New Frontiers in Fair Lending: Confronting Discrimination Against Ex-Offenders*, *New York University Law Review* (Oct. 2005), www.nyulawreview.org/issues/volume-80-number-4/new-frontiers-in-fair-lending-confronting-discrimination-against-ex-offenders.

¹⁷⁷ See, e.g., Marianne Hayes, *Do Mortgage Companies Run Background Checks?*, Experian (June 23, 2021), www.experian.com/blogs/ask-experian/do-mortgage-companies-run-background-checks.

¹⁷⁸ Aneja and Avenancio-Leon (2020), *supra* note 104, at 12.

¹⁷⁹ Nancy La Vigne, et. al., *Release Planning for Successful Reentry*, Urban Institute, at 9 (Sep. 2008), www.urban.org/sites/default/files/publication/32056/411767-Release-Planning-for-Successful-Reentry.PDF.

¹⁸⁰ U.S. Department of Housing and Urban Development, “Promoting Homeownership as a Strategy for Housing Affordability” (Sep. 21, 2021), www.huduser.gov/portal/pdredge/pdr-edge-featd-article-092121.html.

¹⁸¹ See *supra* Section 3.2.2.

impediments at reentry, alongside difficulties securing employment or housing, can perpetuate justice involvement and negatively impact people's ability to fully participate in the consumer financial marketplace.

5. Criminal justice debt

This section highlights a sample of key potential consumer consequences of criminal justice debt for people, their families, and communities.

- The consequences of failing to pay criminal justice debt are more severe than for other forms of debt. Failure to pay criminal justice debt may not only result in additional fees and interest, but also rearrest or incarceration, driver’s license suspension, and the denial of the right to vote.
- States increasingly involve private parties such as third-party debt collectors in the collection of criminal justice debt, and those private parties may tack on additional fees in the collection process.
- Due to the immense scope and unique consequences of criminal justice debt, including reincarceration for failure to pay, fines and fees can perpetuate the cycle of incarceration.

5.1 Assessment of fines and fees

Today, most justice-involved individuals accrue new debt as they move through the criminal justice system in the form of monetary punishment (i.e. fines or restitution) or administrative “user” fees (i.e. fees).¹⁸² Over the past several decades, as the number of people incarcerated in federal, state, and local correctional facilities grew, policymakers sought ways to pay for these systems, often imposing fees on the individual charged with a crime.¹⁸³ In doing so, the criminal justice system began to function less like a tax-supported government service and more like a municipal revenue generator.¹⁸⁴ Today, the legal system assesses a wide variety of fines and fees, such as charges related to court operations, a court-appointed public defender, drug testing, prison library use, jail or prison room and board, and probation supervision. At the same time, enforcement of civil violations can lead to quasi-criminal consequences in many jurisdictions, such as being jailed for failing to pay traffic tickets.¹⁸⁵

¹⁸² Restitution, fines, and fees are often referred to in the literature as “legal financial obligations” or “LFOs.” Here we refer to these as “fines and fees” or “criminal justice debt.”

¹⁸³ Office of Justice Programs Diagnostic Center, *Resource Guide: Reforming the Assessment and Enforcement of Fines and Fees*, at 2 (Mar. 2016), www.ojp.gov/sites/g/files/xyckuh241/files/media/document/finesfeesresguide.pdf.

¹⁸⁴ See Conference of State Court Administrators, 2011-2012 Policy Paper, *Courts Are Not Revenue Centers* (2012), cosca.ncsc.org/___data/assets/pdf_file/0019/23446/courtsarenotrevenuecenters-final.pdf.

¹⁸⁵ See, e.g., Ted Alcorn, “Handcuffed and Arrested for Not Paying a Traffic Ticket,” *New York Times* (May 8, 2019), www.nytimes.com/2019/05/08/nyregion/suspending-licenses-minor-offense-money.html.

Many courts fail to consider an individual's ability to pay when assigning fines, fees, or other justice-related charges.¹⁸⁶ Sometimes fines or fees are required by statute. In other circumstances, a judge has discretion to impose a fine or fee as part of the person's criminal sentence.

Criminal justice debt can have significant financial impacts on a justice-involved individual and their household. Estimates of the size of the fine and fee-debt owed by this population range, but up to 10 million people owe a collective \$50 billion in court debt.¹⁸⁷ In one survey of justice-involved individuals, 78 percent of respondents reported owing court debt.¹⁸⁸ The amount a person ends up owing depends on the jurisdiction and circumstances of the person's criminal charges, but the same survey found that approximately 31 percent of individuals owed less than \$1,000, 29 percent owed between \$1,000 and \$5,000, and another 15 percent owed more than \$5,000.¹⁸⁹

Collection of fines and fees from justice-involved individuals is a widespread practice in cities and states across the country. One nationwide study found that 86 percent of over 9,000 cities collected at least some revenue from fines.¹⁹⁰ For more than 730 municipalities, fines and fees account for at least 10 percent of revenue.¹⁹¹ Research suggests this reliance on fines and fees could incentivize certain policing behaviors; for example, one analysis of North Carolina court

¹⁸⁶ Dick Carpenter, Richard Pochkhanawala and Mindy Menjou, *Municipal Fines and Fees: A 50-State Survey of State Laws*, Institute of Justice, [ij.org/report/fines-and-fees-home#findings](https://www.instituteofjustice.org/report/fines-and-fees-home#findings).

¹⁸⁷ Arjun Kaushal, Tanya Ladha, and David Silberman, *Financial Health and Criminal Justice: The Impacts of Involvement*, Financial Health Network and Financial Solutions Lab, at 19 (May 2021), s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2021/05/26150028/FSL_CriminalJustice_Quant_Report_2021.pdf. To put this in perspective, the payday loan market was approximately \$32 billion in 2020. See Allied Market Research, "Payday Loans Market Outlook," www.alliedmarketresearch.com/payday-loans-market-A10012.

¹⁸⁸ The survey data used in the report was collected from a subset of participants of the University of Southern California's "Understanding America Study" (UAS), a nationally representative internet-based panel. Responses were collected from members of the UAS panel who had reported in a prior survey that they or a family member had been involved with the criminal justice system. Roughly one in 10 respondents in the UAS panel indicated that they or a household member spent time in jail or prison. Overall, in the sample, 62 percent of respondents answered with respect to their own experience in jail or prison and 38 percent of respondents answered about the experience of a household member.

¹⁸⁹ Numbers do not add to 100 percent as 25 percent of those surveyed were unsure of how much they owed in court debt. See *Financial Health and Criminal Justice: The Impacts of Involvement* (2021), *supra* note 187 at 20. Another 25 percent of those surveyed were "not sure" how much was owed in fines and fees.

¹⁹⁰ Michael Sances and Hye Young You, *Cities with more African Americans rely more on fines for revenue*, London School of Economics USAPP (May 2, 2018), blogs.lse.ac.uk/usappblog/2018/05/02/cities-with-more-african-americans-rely-more-on-fines-for-revenue.

¹⁹¹ Mike McIntire and Michael Keller, "The Demand for Money Behind Many Police Traffic Stops," *The New York Times* (Oct. 31, 2021), www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html.

data found the issuance of traffic tickets increased when localities faced revenue declines.¹⁹² An investigation by the U.S. Department of Justice in Ferguson, Mo., following the social unrest there in 2015 found that the financial relationship between Ferguson’s municipal courts and its police department resulted in the disproportionate ticketing and jailing of its African American residents.¹⁹³ In general, research has found a positive correlation between the share of African American residents in a city and its per capita revenue from fines and fees.¹⁹⁴

5.2 Debt collection

Many justice-involved individuals and their family members are low-income and struggle to pay criminal justice debt. Additionally, criminal justice debts often are not dischargeable in bankruptcy proceedings, and many people with criminal justice debt report that they expect to make payments for the rest of their lives.¹⁹⁵

Consequences for failing to pay court-ordered debt can be severe. Courts often require justice-involved individuals to complete payment of these fines and fees as a condition of their criminal sentence. Failing to pay fines and fees may result in rearrest or incarceration, driver’s license suspension, denial of the right to vote, and additional fees or interest. While judges at times have no discretion in imposing fines and fees, in some cases they are supposed to assess a person’s ability to pay them when collecting the debts. In reality, however, this rarely occurs.¹⁹⁶

Although the imprisoning of individuals for the inability to pay a debt—historically referred to as “debtors’ prison”—has long been illegal, criminal justice debt can nevertheless be a gateway back into the criminal justice system.¹⁹⁷ Indeed, despite the constitutional prohibition on jailing

¹⁹² Thomas Garrett and Gary Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, Federal Reserve Bank of St. Louis (July 2007), research.stlouisfed.org/wp/more/2006-048.

¹⁹³ See U.S. Dept. of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department*, 6 (2015), www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; see also, U.S. Commission on Civil Rights, *Briefing Report: Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights and Constitutional Implications* (2017), 1, www.usccr.gov/files/pubs/2017/Statutory_Enforcement_Report2017.pdf.

¹⁹⁴ Akheil Singla, Charlotte Kirschner, Samuel B. Stone, *Race, Representation, and Revenue: Reliance on Fines and Forfeitures in City Governments*, (Mar. 27, 2019), doi.org/10.1177/1078087419834632.

¹⁹⁵ See, e.g., Jesse Wegman, “When It Costs \$53,000 to Vote,” *New York Times* (Oct. 7, 2021), www.nytimes.com/2021/10/07/opinion/election-voting-fine-felony-florida.html.

¹⁹⁶ Matthew Menendez, et al., *The Steep Cost of Criminal Justice Fees and Fines*, Brennan Center for Justice (Nov. 21, 2019), www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines.

¹⁹⁷ The United States eliminated the imprisonment of debtors under federal law in 1833. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 *Am. Bankr. Inst. L. Rev.* 5, 16 (1995). In the 1983

individuals for the inability to pay a debt, the practice of jailing individuals for failing to pay continues in many places.¹⁹⁸ Failure to pay fines and fees can result in an extension of a person's sentence or term of probation. Many states explicitly allow incarceration as a tool for enforcing payment of justice-related debt, even as a consequence of not paying civil infractions like parking tickets. Although it is intended to be reserved for people willfully refusing to pay court-ordered debt, the failure of courts and municipal employees to evaluate ability to pay frequently results in people being imprisoned simply for the inability to pay.¹⁹⁹ Additionally, in certain states, individuals can elect to serve a jail sentence instead of paying criminal justice debt.²⁰⁰

Additionally, failure to pay non-criminal debt can also lead to incarceration. Non-custodial parents who fail to pay court-ordered child support can be incarcerated in local jails for civil contempt of court.²⁰¹ Under the Internal Revenue Code, individuals can be incarcerated for willful failure to pay federal taxes owed.²⁰²

Beyond reincarceration, other consequences, such as driver's license suspension, can impede a person's employment opportunities and thereby reduce their ability to pay debt. Despite significant reforms on the state level in the last several years, 23 states continue to use driver's

landmark decision *Bearden v. Georgia*, the Supreme Court confirmed the long-standing principle that “debtors’ prisons” are unconstitutional, holding that an individual cannot be jailed absent evidence that they are somehow responsible for failure to pay or that alternative forms of punishment were inadequate to meet the State’s interest in punishment and deterrence. 461 U.S. 660 (1983).

¹⁹⁸ See, e.g., *Cain et. al. v. White et. al.*, 937 F.3d 446 (5th Cir. 2019) (parish judges' practice of arresting and incarcerating criminal defendants for nonpayment of court-imposed fines and fees without determination of ability to pay violated Due Process Clause, where fines and fees revenue went into judicial expense fund over which judges exercised total control, and fund supported salaries of each judge's staff); *Carter v. City of Montgomery*, 2020 WL 3799690 (M.D.Ala. 2020) (finding that the Municipal Court in Montgomery, Alabama engaged in a systemic practice of jailing traffic offenders for failing to pay fines without inquiring into their ability to pay); *Foster et. al. v. City of Alexander City et. al.*, Complaint, Case No. 3:15-cv-647 (M.D.Ala. 2015) (settled prior to court decision); *Hill et. al. v. City of Valley Brook et. al.*, Complaint Case No. CJ-2021-67 (Dist. Ct. Oklahoma County) (filed Jan. 7, 2021); *Dade et. al. v. City of Sherwood et. al.*, First Amended Complaint, Dkt. 13, Case No. 4:16-cv-602 (E.D.Ark. 2016) (case settled prior to trial).

¹⁹⁹ See, e.g., ACLU of Washington and Columbia Legal Services, *Modern-Day Debtors’ Prisons*, 2014, 9 (“If an individual fails to make the monthly payments, the clerk then negotiates ‘pay or stay’ agreements, where individuals agree to pay a particular amount or serve jail time. Again, these agreements are ‘agreed’ to without the assistance of counsel and are sometimes entered into without court inquiry into an individual’s financial circumstances. They also unfairly contain findings that non-payment is willful. An individual who cannot pay the ordered amount is almost invariably incarcerated.”); see also Brennan Center for Justice, *The Steep Costs of Criminal Justice Fees and Fines*, at 9 (2019), www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [noting that “judges rarely hold ability-to-pay hearings”].

²⁰⁰ Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice, at 23 (Aug. 2019), www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf.

²⁰¹ National Conference of State Legislatures, *Child Support and Incarceration* (Mar. 4, 2019), www.ncsl.org/research/human-services/child-support-and-incarceration.aspx#Incarcerated%20with%20Child%20Support%20Order.

²⁰² 26 U.S.C. Sec. 7202.

license suspensions as a consequence for failing to pay criminal justice debt.²⁰³ In 2015, more than 900,000 people in the state of Virginia—or one in six drivers licensed in the state—had their license suspended for non-payment of court costs.²⁰⁴

Because of the severe consequences that can result from nonpayment of criminal justice debt, many people may forego life necessities or take on new debt to make payments. For example, a survey of individuals in Alabama with court debt found that 83 percent gave up necessities like rent, food, medical bills, car payments and child support in order to pay their court debt.²⁰⁵ Half of those surveyed had been jailed due to failure to pay their debt and 44 percent had used payday loans to cover court debt payments. The direct and opportunity costs of criminal justice debt are borne not only by those carrying the debt but by their families and communities as well. The same survey of individuals paying court debt in Alabama found that those surveyed paying court debts for other people (usually family members) were more likely to be middle-aged Black women than belong to any other demographic group. The report noted, “[w]hile others their age were saving money for retirement, helping their children with college or other expenses, paying down mortgages, or taking vacations, these African American women were disproportionately burdened with paying court debt for their families.”²⁰⁶

As many courts do not allow individuals to negotiate settlements or payment plans, people may rapidly find themselves in default on the debt. Once a debt is in default, it is often placed into collection, which results in contact and collection attempts. Government officials may attempt to collect debts themselves, but private parties are increasingly involved in the collection of criminal justice debt. Some states permit debt collectors to add extra fees and surcharges to the outstanding debt owed to the government.²⁰⁷ For example, Florida permits debt collectors to

²⁰³ Mario Salas and Angela Ciolfi, *Driven by Dollars: A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt*, Legal Aid Justice Center, at 1 (Sep. 2017), www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf; Free to Drive, *Existing Laws for Failure to Pay*, www.freetodrive.org/maps (last accessed Nov. 29, 2021).

²⁰⁴ Legal Aid Justice Center, *Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors*, at 2 (May 2016), www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf.

²⁰⁵ Alabama Appleseed, *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama’s racial wealth divide*, at 4 (2018), www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf.

²⁰⁶ *Id.* at 23. This study analyzed 980 surveys. Participants included 879 justice-involved individuals and 101 non-justice-involved individuals who were helping others pay their debt.

²⁰⁷ Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice, at 1 (Aug. 2019), www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf.

add a 40-percent surcharge to underlying debt.²⁰⁸ Yet evidence from Florida suggests that private agencies often collect only a fraction of outstanding criminal justice debt.²⁰⁹ Other states delegate decision-making powers with regard to the debt, including whether to settle or steps taken to collect the debt, to debt collectors with little government oversight. For example, debt collectors in Iowa may be the final arbiter of default on criminal justice debt.²¹⁰ When debt collectors collect government debt, tying the company's revenue to the amount collected may incentivize harmful collection practices.

The consequences for failing to pay justice-related debt may be more severe than the consequences for failing to pay consumer debts, in part because the Fair Debt Collection Practices Act (FDCPA) often does not apply to the collection of justice-related debt. The FDCPA prohibits covered entities from unfair, deceptive, and abusive practices related to the collection of consumer debts. For example, absent a court order, civil debt collectors have no authority to arrest and imprison individuals for failing to pay a debt; false threats of this type would constitute a false or misleading representation under the FDCPA.²¹¹ However, the FDCPA's definition of "debt collector" does not include "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties."²¹² Moreover, the statute's definition of "debt" may limit FDCPA coverage of certain types of justice-related debt.²¹³ However, court decisions have, in certain factual situations, found the FDCPA to apply to fees assessed in other circumstances, such as parking tickets and unpaid traffic tolls, when the fee arises out of a transaction that is primarily for personal, family, or household purposes.²¹⁴

²⁰⁸ Jesse Wegman, "When It Costs \$53,000 to Vote," *New York Times* (Oct. 7, 2021), available www.nytimes.com/2021/10/07/opinion/election-voting-fine-felony-florida.html.

²⁰⁹ Even after being sent to collections, private agencies collected the equivalent of only 10 percent of outstanding criminal debt and 31 percent of civil traffic debt. See Florida Clerks of Court Operations Corporation, *PIE Committee Meeting*, at 38 (Feb. 5, 2020), perma.cc/JX9X-ET1Q.

²¹⁰ Iowa Code §§ 321.40(9), 321.210B (empowering private debt collection designees to enter and create installment payment agreements with debtors in default and ordering that holds on licensing and vehicle registration be lifted if private designee notifies the county treasurer that a satisfactory agreement has been made).

²¹¹ 15 U.S.C. 1692e(4). See also Consumer Financial Protection Bureau, Bulletin (Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts), at 5 (July 10, 2013), files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf (applicable to those who are covered persons or service providers collecting consumer debt under the Dodd-Frank Act).

²¹² 15 U.S.C. 1692a(6)(C).

²¹³ See, e.g., *Pierre v. Retrieval-Masters Creditors Bureau*, 898 F.3d 351 (3rd Cir. 2018)(discussing case law regarding FDCPA coverage of certain types of government-related debts).

²¹⁴ See, e.g., *Franklin v. Parking Revenue Recovery Servs., Inc.*, 832 F.3d 741 (7th Cir. 2016); *Brown v. Transurban USA, Inc.*, 144 F. Supp. 3d 809, 842 (E.D. Va. 2015).

6. Conclusion

Many people entering the justice system are often already in financially precarious situations. As documented in this review, the financial products and services marketed to the individuals and families entangled in the criminal justice system exacerbate their financial strain and contribute to the destabilization of individuals, families, and communities.

The justice system often requires people to use a prescribed set of products and services. Even when people do have a choice over which product or service to use, the stresses that arise from involvement with the justice system may limit their ability to seek out alternatives. Even then, the available alternatives may not be meaningful. The financial impacts can linger long after a person leaves the justice system, and any criminal history, even an arrest record, can become a barrier to accessing housing, employment, and other necessities for stability and successful re-entry.

This review was the first of its kind done by the CFPB. The CFPB will engage stakeholders to learn more about the challenges facing those involved in the criminal justice system and how the CFPB can use its tools to safeguard families from harm. The CFPB is particularly interested in the market circumstances in which people may be forced to use a prescribed product or service, and in how an individual's criminal history might be used by some actors to restrict economic opportunities—undermining the goal of successful reentry. Entities covered by federal consumer financial laws that target or market to individuals and families involved in the criminal justice system should ensure that their activities are in compliance with law.