



## **NAPD POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS**

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### **Executive Summary**

The collection of costs, fines, and fees in too many criminal courts across the United States are predatory in nature and an economic failure. These predatory practices impact poor people in catastrophic and life altering ways and are disproportionately levied against people of color.

In the criminal justice system, significant fines, fees and court costs are levied upon poor people to fund criminal justice costs, and in some instances a significant part of municipal budgets. Privatization of the criminal justice system function is also increasing, aggravating the impact. Functionally, the status of being poor has been turned into a crime, resulting in the poor being used to enrich the courts and municipalities through a cycle of debt that continually increases. The methods used to collect costs, fines, and fees are so extreme that many, if not all, practices have been outlawed when applied to predatory lenders. These court practices include:

- Usurious interest rates
- Payment plans that are harsh, unrealistic and designed to cause failure
- Hidden costs and additional fees
- Loss of freedom and repetitive arrests over nothing more than a few dollars that is increased each time an arrest is made creating a never ending cycle of debt
- Denial of access to families while in jail

Meanwhile, too many courts are ignoring their constitutional requirement to determine ability to pay before imposing fines, fees, and costs on indigent clients, and many courts are illegally imposing jail time as a punishment for unpaid criminal justice debt.

Public policy weighs strongly against funding government on the backs of poor people. It should end now.

## PRINCIPLES GOVERNING THE COLLECTION OF MONEY IN CRIMINAL CASES

1. Fines are different than court costs and fees and must be separately accounted for and treated differently by courts when attempting to collect money.
2. Court costs are a civil debt and only civil debt collection methods may be used to recoup unpaid court costs in criminal cases; and civil debt collection is the only method to collect fines assessed for ordinance violations or infractions that are not criminal violations.
3. Non-payment of fees should be treated as a civil debt.
4. A court has a constitutional responsibility to find affirmatively that a person has an ability to pay fines before depriving a person of his or her liberty for non-payment.
5. The determination of the ability to pay should be the same as need based assistance in other government programs.
6. Contempt of court is not an appropriate method to collect fines, fees or court costs.
7. Fines may not be made a condition of probation without regard to a person's ability to pay.
8. Indigent defense fees should not be collected by defense agencies.
9. The practice of monetary bond should be eliminated, and never be used as a means to detain or to collect unpaid fines, fees or court costs.
10. Ending excessive costs and fines is good public policy, serves the interests of taxpayers, and fairly treats those who come before our courts.

## NAPD POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS

**Predatory collection of costs, fines, and fees has shifted the expense of essential government services to the poor.** The most dramatic shift happening anywhere in government is in the third branch where the criminal justice system is funding itself through its reliance on predatory costs, fines, and fees. The greatest amounts are borne by those who can least afford it. Worse than creating more debt for the poor and acting worse than companies that prey on this vulnerable sector of our economy with pay day loans, rent-to-own, and title loans, our justice system goes beyond the tactics of these private debt agencies and uses the court system to deprive people of their liberty in the collection of debt. This is debt which was created by the very system that is now jailing them; debt that until recently was always a general revenue cost of guaranteeing our government functioned as our founders intended.

**Criminal justice fines, fees and costs are significant.** Today, anyone encountering our justice system is likely to face fines, fees, and costs for every

aspect of his or her case. There are mandatory fines imposed for tickets, like a dog at large or disturbing the peace for playing a car stereo loudly. There are fees for applying for counsel when you are too poor to hire counsel; fees for supervision while on pretrial release; fees for filing any pleading; fees for requesting a jury, a constitutionally guaranteed right; and fees for vehicle interlocks or impounded vehicle costs, again all before ever having been found guilty of anything. And if there is a conviction, there will be court costs charged, which may include special project fees to build a new courthouse and fees for the processing of paperwork by the clerk's office. In addition, there may be a charge for every visit to probation which is required to maintain freedom, fees for every test the individual is required to take, fees for every program she is required to attend, and even fees to stay in jail.

**Privatization of the criminal justice system function is increasing.** On top of these government imposed fees, the courts have started to privatize many traditionally governmental functions turning clients into profit centers. Courts have contracted probation services to for profit companies. People are not just being charged for probation but they are being charged a surplus so the company can make a profit. Complain about it or fail to make the payments and the probation officer can recommend incarceration in jail. And the families of those who go to America's criminal courts are subject to extortion-like behavior from private vendors as well. Rather than operate their own phone systems, many prisons and jails make money by selling a contract to private vendors who then charge up to a \$1 per minute, with the jail or prison receiving a per minute profit. This means children cannot to talk to their parents, many of whom are jailed prior to trial and are innocent of any crime or who may only be in jail because they have been unable to pay prior costs, fines, and fees. Even staying in jail can cost money. Failing to pay for the daily cost of incarceration can result in more jail time, requiring more money.

**Courts are ignoring the constitutional requirement to determine ability to pay before imposing fines, fees, and costs on indigent clients.** By ignoring an individual's ability to pay assessed fines, fees, and costs, courts routinely assess financial penalties that individuals cannot pay. If a person fails to pay, the penalties escalate with additional fines and fees, court costs, contempt rulings, arrest warrants, and often, time in jail – even though imprisonment for inability to pay (the “debtor's prison”) is unconstitutional. Some jurisdictions offer payment plans, but can have an application fee, and compounding interest. Without regulation or principles, criminal justice expenses are far more predatory and far less transparent than the interest rates on personal credit cards.

**Predatory collection of costs, fines, and fees is an economic failure.** While courts regularly issue annual reports of how much money they collect, these reports suggest this collection is a net gain. The reality is that courts spend far more than they ever collect and there is no improvement in public safety. Courts are part of a justice system and when a court issues a warrant for someone because they owe the court \$100, the court has issued a directive to numerous other justice agencies to spend money. That warrant causes the police to

expend resources to arrest the person and the person is then jailed where more money and resources are expended to book them, house them, feed them, and provide necessary medical care. When the person is brought to court, the clerk has expended resources, the prosecutor has expended resources, and the public defense system has expended resources. So, while the court has collected \$100, the other justice agencies have spent immeasurably more. This type of accounting is disingenuous by placing assets on one set of books and debts on another set of books and then only reporting the assets. Predatory collection is a burden on society that should end. It provides no real increase in revenue and, in fact, costs money, and it wastes valuable limited resources without any accompanying improvement in public safety.

**The impact of predatory collection practices in the criminal justice system is catastrophic on poor people generally and on people of color particularly.** Litigation filings throughout the country tell the stories of people threatened with or actually taken to jail – often for parking and traffic tickets that have almost no impact on public safety – because they struggle to keep up with court-assessed fees that are imposed without any consideration of ability to pay.

In 2009, in St. Louis County, Nicole Bolden was arrested for driving with a suspended license and spent two weeks in jail. Five years later, lawyers at the Arch City Defenders met with her at her kitchen table to discuss her still-outstanding fees. Ms. Bolden is the mother of four children. She has a part-time job and is in the process of studying to be a paralegal. In 2009, failure to pay fines and fees resulted in the suspension of her license, which she needed in order to drive to work so that she could support her family. She was arrested on her way to drop her children at school. After two weeks in jail without income, and the loss of her job, she was farther behind and had new bills to pay associated with her court costs. Each month for the past five years she has struggled to pay her rent and utilities, provide for her children, maintain her transportation and have something left over to contribute to her fines and fees. Some months there is money, some months there is not. On months when the court gets paid, another bill does not. Having already been taken to jail for failure to pay her fines, she knows the consequences can be severe, but she has an absolute inability to pay. Her struggle to extricate herself from fines assessed in 2009 will take years more, creating acute hardships that will dominate the entire childhood of her children, and affect her ability to advance her work opportunities. Her experience is shared by thousands of people throughout the country.

This is the shameful truth of predatory collection practices: many individuals start with a small infraction that becomes a life-changing struggle to satisfy ever-mounting debt to the criminal justice system. Its effect can be generational, and condemns the poorest communities to persistent poverty.

## PRINCIPLES GOVERNING THE COLLECTION OF MONEY IN CRIMINAL CASES

- 1. Fines are different than court costs and fees and must be separately accounted for and treated differently by courts when attempting to collect money.**

The purpose of fines and court costs are different. Fines are part of the punishment levied against the individual for the infraction committed. Court costs are not intended to punish but are intended to defray the operational costs of the court. "Costs are taxed against certain litigants for the purpose of lightening the burden on taxpayers financing the court system . . . Statutory provisions for payment of court costs were not enacted to serve a punitive, retributive or rehabilitative purpose, as are fines." *Strattman v. Studt*, 20 Ohio St. 2d 95, 102 (1969). Because the purposes of fines and costs are different, the methods used to collect them must also differ.

The practice of setting numerous fines and imposing incarceration for failure to pay echoes the worst of American tradition – calling to mind Reconstruction era charges such as vagrancy that were applied predominantly to black men, punished by loss of liberty as well as insurmountably high fines and fees, and subsequently paid back through hard labor for private companies.

- 2. Court costs are a civil debt and only civil debt collection methods may be used to recoup unpaid court costs in criminal cases; civil debt collection is the only method that should be used to collect fines assessed for ordinance violations or infractions that are not criminal violations.**

Not only are the purposes of court costs and fines different in criminal cases, thus mandating different methods of collection, there are constitutional restrictions in most states governing the collection of civil debt. Most state constitutions have a provision forbidding any loss of liberty for civil debt. "Imprisonment for debt.— That no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law." Missouri Const., Article I, Sect. 11. "A person may not be imprisoned for civil debt." Ohio Const., Article 1, Section 15.

Because court costs are a civil debt the collection of this money must be made with constitutional guarantees in mind. Courts may only use civil debt collection methods for court costs - even when assessed in a criminal case. Pursuant to each state's constitution, under no circumstance may a person be imprisoned for failing to pay court costs.

The same is true of fines levied in non-criminal cases. "[V]iolations of municipal ordinances are civil matters but, because of the quasi-criminal nature of an ordinance, are subject to the criminal standard of proof beyond a reasonable doubt." *City of Dexter v. McClain*, 345 S.W.3d 883, 885 (Mo. App. S.D.2011). For example, in Ferguson, Missouri and surrounding St. Louis County, there are 90 municipalities with 81 separate courts that have jurisdiction only over the

ordinances governing their municipality. The practice of jailing the indigent for non-payment of fines levied for infractions is unfortunately all too common. Because these fines are levied in civil matters that are only quasi-criminal because of the burden of proof, the same constitutional protections that bar imprisonment for court costs as civil debt applies to these fines based on infractions, which are a civil debt, as well.

**3. Non-payment of fees should be treated as a civil debt.**

Different than fines, almost all fees are the same as court costs in purpose; they are to pay to defray the costs of operating the justice system. Fees of all types have proliferated in the criminal justice system, including impound fees, filing fees, probation supervision fees, special project fees, jail fees, test fees, and even jury fees. Since the purpose of fees is to assist in the payment of the operating costs of the court they are civil in nature. Thus, the payment of fees is identical to court costs and only civil collection methods may be used. Courts must observe the constitutional restriction disallowing imprisonment for civil debt.

**4. A court has a constitutional responsibility to find affirmatively that a person has an ability to pay fines before depriving a person of his or her liberty for non-payment.**

A court has a constitutional duty to make an affirmative finding that a person has the ability to pay a fine before it may impose incarceration for a person's failure to pay. *Bearden v. Georgia*, 461 U.S. 660, 662-63, 668-69 (1983). The burden of proving an individual's ability to pay is placed upon the state. A court must inquire into a person's ability to actually pay the fine because the choice between paying and going to jail is not really a choice at all for those who cannot pay and results in an equal protection violation. *Id.* This duty to inquire into the person's ability to pay is a continuing duty because a person's ability to pay may change over time. Thus, if a court is considering jail because a person has not paid a previously ordered fine, the court must again inquire whether the person can actually pay at the time the jail sentence is being considered.

**5. The determination of the ability to pay should be the same as need-based assistance in other government programs.**

The *Bearden* Court failed to define the term "ability to pay." As a result, the number of definitions may be as myriad as the number of judges deciding who can pay and who cannot pay every day, millions of times a year in courtrooms across this country. The one finding that makes the most sense and provides consistency and fairness across cases and jurisdictions is to use need based assistance determinations as the standard for the ability to pay. Many jurisdictions use 125% of the federal based poverty guidelines to determine eligibility for basic needs like food assistance, medical assistance, and housing assistance. If this is the level of income at which a person is entitled to assistance with fundamental basic needs like food, housing and medicine, then it would be strange, if not immoral, to have the third branch of government taking from those who are in such need. Thus, at a

minimum, courts should find that persons who meet the need based assistance calculations for other government assistance programs do not have the ability to pay. Certainly, there will still be situations where a person is above 125% of federal poverty guidelines and cannot pay based upon an examination of a person's income, assets, and debts. Courts should not limit the analysis to only those who fall below need based assistance standards.

**6. Contempt of court is not an appropriate method to collect fines, fees or court costs.**

Contempt citations and collections of fines, fees and costs have incompatible purposes. The purpose of contempt is to compel or coerce a person's compliance with a court mandate. However, collection before a hearing ensnares people who cannot comply even when they do not have the ability to pay. Proponents argue a person was ordered to pay and violated the order, which would simply make the entire holding in *Bearden* meaningless. A court cannot bypass constitutional principles, like equal protection, by reframing everything as contempt. It is an axiomatic principle of contempt that a court cannot do indirectly what it cannot do directly. *Bailey v Alabama*, 219 U.S. 219 (1911). If a person's ability to pay a fine is the constitutional threshold before a person may be jailed for not paying, a court may not bypass that threshold by reclassifying an inability to pay as contempt of court. When the money involved is court costs or fees, the state constitutional prohibitions against any jail for a civil debt also protects against an improper use of contempt of court powers.

**7. Fines may not be made a condition of probation without regard to a person's ability to pay.**

Whether a court collects money through its clerk's office or the court makes fines, fees, or court costs conditions of probation, the court must still observe the equal protection requirements granted to citizens and determine if the inability to pay fines are at issue. The court must also maintain the constitutional protection against imprisonment where court costs as a civil debt are concerned. Thus, if a person on probation does not pay the fine and payment of the fine has been made a condition of probation, the condition precedent to any revocation still must be the ability to pay. In the case of court costs and fees, no incarceration can be imposed because of the prohibition on imprisonment for a civil debt, whether made a condition of probation or not.

A number of states have programs that give citizens accused of a crime an opportunity to keep a clean criminal record. These programs are sometimes called diversion where an individual is diverted from a criminal prosecution and consequence. The inability to pay the costs and fees of diversion programs should not preclude participation. Preventing those with an inability to pay suggests that poor people are less deserving of forgiveness and opportunities in the criminal justice system than those with financial means.

## **8. Indigent defense fees should not be collected by defense agencies.**

The constitutional right to counsel must be provided at every stage of a criminal proceeding including any setting of fines, fees, and court costs as well as the determination of an individual's ability to pay. Public policy should be made clear: No fee or cost should be associated with providing counsel to those who meet need based assistance standards. A conflict of interest is created when public defense agencies must collect from individual clients to sustain the agency so more indigent clients can be represented. By charging a fee to the poor to exercise their constitutional right to counsel, it is a barrier to those who can least afford it. State and local governments should end the practice.

## **9. The practice of monetary bond should be eliminated, and never be used as a means to detain or to collect unpaid fines, fees or court costs.**

Our criminal justice system at present includes pretrial release for the wealthy and pretrial incarceration for the poor. There is no empirical evidence to suggest that those released after posting a cash bond are more likely to be present at trial, or are less likely to reoffend while released.<sup>1</sup>

Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violate the Equal Protection Clause of the Fourteenth Amendment. *See Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961). It wholly fails to consider the ability of the defendant to pay fines and undermines the constitutional protections against incarceration for costs and fees which are a civil debt. It is a system that favors the wealthy who can make bail over the poor person who cannot.

A court may not use monetary bond as a savings plan to set aside funds in the event fines, fees or court costs are imposed. Requiring monetary bond to ensure payment of fines and costs later in the case has other consequences when individuals cannot pay. Whether a person can afford bail can be outcome determinative at trial or upon plea bargaining. Defendants who are detained for the entire pretrial period before their case is decided are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point pending trial. (LJAF Research Summary, November, 2013 at [www.arnoldfoundation.org/research/criminaljustice](http://www.arnoldfoundation.org/research/criminaljustice)). It becomes clear that the best outcomes in criminal cases are heavily skewed toward those who have money for bail, even though statistically they may be more at risk to reoffend and not come to court than their poor counterparts who have been unable to post bail.

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<sup>1</sup> A study by VanNostrand, Lowenkamp & Holsinger found that a money-based pretrial release system enables over 50 percent of defendants who are rated a higher risk to fail to appear or reoffend to be released, while those who are rated a lower risk are more regularly detained. (International Association of Chiefs of Police Resolution, adopted at the 121<sup>st</sup> Annual Conference, Orlando, Florida, October, 2014.)



**10. Ending excessive fines and costs is good public policy, serves the interests of taxpayers, and fairly treats those who come before our courts.**

Where fines, fees, and costs are assessed they must be reasonable and payable within a finite amount of time. Criminal Justice debt that places a life altering burden upon an individual is excessive. The amount is excessive if the person cannot reasonably pay it in the foreseeable future or if the amount will require the person to forgo necessities. The court system was not designed nor intended to be funded by users. It certainly was not designed to be funded primarily by the poor. But with fines, fees and court costs increasing to the hundreds, and even thousands of dollars per case, that is exactly what has happened in too many jurisdictions within the third branch of government.

