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Journal

UCLA School of Law Public Law & Legal Theory Series

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Publication Date

2019-04-12

Crimsumerism: Combating Consumer Abuses in the Criminal Legal System

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Increasingly, Americans who have contact with the criminal legal system find themselves deprived not just of their liberty but also of their property. In recent years, advocates have shed light on the court-imposed fines and fees levied on low-income individuals who have contact with the criminal legal system. But less attention has been paid to the charges imposed on these individuals and their families by the private companies that now administer components of the American criminal and immigration legal systems. Much criminal legal debt is now owed not to the state, but rather to the vast network of private companies profiteering from the criminalization of poverty and communities of color. As a result, a person in jail who wants to make bail or to call their family, or a parent who wants to make sure their child has basic necessities while in prison, or a teenager who has just been ordered to attend a rehabilitation program, all face the potential trauma not just of incarceration but also of spiraling indebtedness.

This Article seeks to illuminate the commercial abuses occurring in the shadows of the criminal legal system—to draw attention to the problem of “crimsumerism.” The Article also seeks to ameliorate the problem. In addition to traditional civil rights-focused claims like § 1983, the Article proposes the application to private correctional businesses of a different set of laws entirely: consumer protection statutes. If bail bond companies and private debt collectors are routinely engaged in abusive, predatory behavior with respect to individuals who have contact with our criminal legal system, then those businesses should be held accountable through the same laws that would apply were they operating in any other corner of the marketplace. Holding bail bond agents and debt collectors to account through the Truth-in-Lending Act, the Fair Debt Collection Practices Act, or state Unfair and Deceptive Acts and Practices laws means that some of the most vulnerable consumers in our society will have access to additional protections, while advocates simultaneously work to end mass incarceration and criminalization in the United States. Over the long term, vigorous enforcement of consumer protection laws will reduce the predatory practices that are currently widespread in the modern corrections industry and ultimately, perhaps, help to eliminate exploitation and other abuses from our criminal legal system altogether.

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INTRODUCTION

For years, suffering from undiagnosed schizophrenia, Jerald Barker cycled in and out of juvenile detention facilities in California and, eventually, jail. Because of his mental illness, his family’s poverty, and law enforcement strategies that target young men of color like him, Jerald was punished. But he was not the only one in his family who was punished: his mother, Joceline, was saddled with various financial obligations resulting from her son’s troubles with the law. First came her son’s fines and fees—monetary sanctions, plus user fees to cover the costs of punishment and process. Then, she bore the long-term costs of commercial bail debt. Each time her son was

arrested and placed in a crowded cage, he would begin to hallucinate. Concerned for her son's safety, she bailed him out at least three times. Because she could never have hoped to afford the astronomically high bail amounts set by the court, she relied on commercial bail bond companies each time. These for-profit bail bond companies encouraged her to cosign contracts without a clear understanding of her obligations under them or an opportunity to negotiate the terms, and without the disclosures routinely expected for consumers cosigning contracts and entering credit agreements. Although Jerald was finally diagnosed and referred to mental health court, Ms. Barker is still paying off her son's bail bond debt—years and thousands of dollars in payments later.¹

In New Orleans in June 2016, Ronald Egana was arrested, and did not have the cash to post the \$26,000 bail set by the judge.² With his mother and a friend as guarantors, Mr. Egana entered into a contract with Blair's Bail Bonds: in exchange for Blair's providing a surety to get him out of jail, Mr. Egana would pay the company a premium of twelve percent of the bail amount, to be advanced on loan and paid back in installments.³ Unaware that the contract required them to pay a host of nonrefundable and hidden fees—including daily fees for an ankle monitor required not by any court, but rather by the bail company—Mr. Egana and his loved ones ended up paying over \$6,000, far beyond the \$3,275 bail bond fee the company had said it would charge.⁴ Even then, when Mr. Egana could not make another payment, a bounty hunter intercepted him at work. Although Mr. Egana's mother emptied her savings account to make the required payment, a bounty hunter took him to jail, claiming he had not paid what he owed.⁵

A thousand miles to the north, in Des Moines, Iowa, Valencia Cason awakened at 3 a.m. to pounding on her door.⁶ Standing outside her home with two other men was a bail bondsman named "Texas Jim."⁷ The trio demanded that Ms. Cason, a young single mother, turn over the keys to her vehicle, which she had used as collateral for a bail bond for the father of her child.⁸ Because Ms. Cason had not been able to pay the entire \$1,000 bond premium upfront, Texas Jim had created a handwritten agreement requiring that she pay the balance in installments.⁹ Now, a few days after a missed payment, he had come to collect. Intimidated, Ms. Cason did as he asked,

¹ These individuals were represented by one of the authors of this article; their names have been changed to protect client privacy.

² See Complaint at *1–2, *9, *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210 (E.D. La. June 1, 2018).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Complaint at 2, *Cason v. 1 Bail Bonds*, No. CVCV053198 (Iowa Dist. Ct. for Polk Cty. Mar. 10, 2017).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

losing her only method of transportation in a city where a car is a basic necessity.¹⁰

These stories are not unique. Increasingly, Americans who have contact with the criminal legal system find themselves deprived not just of their liberty but also of their property.¹¹ The criminal legal system has come to depend financially on fines and fees imposed on those who are arrested and imprisoned.¹² As the U.S. Department of Justice's investigation into the Ferguson Police Department¹³ made clear, the "user-funded" or "pay-to-play" model of criminal justice has devolved into a debilitating system of taxation for public services imposed on those least able to afford it.¹⁴ Criminal legal system debt, including obligations related to commercial bail bonds and other products offered by the contemporary corrections industry, today represents a significant source of debt in low-income communities and communities of color. The result is a pernicious cycle of poverty and indebtedness that can deepen exposure to the criminal legal system, impede successful

¹⁰ *Id.*

¹¹ Among other trends, this article will discuss various forms of financial obligations imposed, as a result of people's interactions with the criminal legal system, by public and private actors on families who lack the resources to pay. Previous scholarship on criminal legal debt has focused on fines and fees imposed by (and owed to) courts or other government entities. *See, e.g.,* Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841 (2017); *Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform*, NAT'L CONSUMER L. CTR. & CRIM. JUST. POL'Y PROGRAM AT HARVARD L. SCH. (Sept. 2016), <http://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-1.pdf>, archived at <https://perma.cc/V736-LSG5>.

¹² *See* Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal Justice System*, 57 B.C. L. REV. 1483, 1483 (2016).

¹³ *See Investigation of the Ferguson Police Department*, U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIV. (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf, archived at <https://perma.cc/GBC6-HPCF>.

¹⁴ According to the Bureau of Justice Statistics (BJS), the annual cost of mass incarceration in the United States is \$81 billion. But that figure only captures the cost of operating prisons, jails, probation and parole. In a 2017 report, the Prison Policy Initiative found, after factoring in the costs of policing, court costs, and criminal justice related costs paid by families, that mass incarceration costs state and federal governments and American families \$100 billion more each year than the BJS numbers suggest. This brings the estimated cost of our mass-criminalization crisis to over \$180 billion dollars a year. *See* Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POLICY INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>, archived at <https://perma.cc/3Z7Z-5LUE>. The human costs, furthermore, are particularly acute for low-income people of color, who are far more likely to be subjected, at every step in the criminal legal process, to interactions where these debts are incurred, and also tend to have more limited opportunities to resolve them. *See, e.g.,* AM. CIVIL LIBERTIES UNION, WRITTEN STATEMENT BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS, HEARING ON MUNICIPAL POLICING AND COURTS: A SEARCH FOR JUSTICE OR A QUEST FOR REVENUE 2 (Mar. 18, 2016), available at https://www.aclu.org/sites/default/files/field_document/aclu_statement_usccr_03182016_municipal_courts_and_police_choudhury.pdf, archived at <https://perma.cc/CSN2-XY2M> (describing how practices concerning court debt are "racially-skewed due to the dual impact of racial disparities in the criminal justice system and the racial wealth gap").

reentry, and cause spiraling harms for individuals, their families, and their communities.¹⁵

But the imposition of court-imposed financial penalties is only part of the story.¹⁶ Today, this criminal legal system debt is owed not only to the state, but also to a vast network of private companies profiteering from the criminalization of poverty and communities of color.¹⁷ The debt stems from charges imposed throughout a person's contact with the criminal legal system—from onerous loans advanced by bail bond companies to those who have just been arrested, to heavy fees levied by private probation companies on those who have been fortunate enough to be released. As a result, people in jail who want to call their families, or parents who want to make sure their children have basic necessities while in prison, or teenagers who have just been court-ordered to attend a rehabilitation program, all face the potential trauma not just of incarceration but also of spiraling indebtedness.¹⁸

These individuals, and their loved ones, are all engaging in commercial transactions that transpire in the shadow of criminal law. From supervisory monitoring¹⁹ to prison services²⁰ to court-ordered rehabilitation programs,²¹ the American corrections industry offers—indeed, frequently imposes—a range of high-cost services to low-income consumers facing extreme pres-

¹⁵ See Sobol, *supra* note 11; *Confronting Criminal Justice Debt*, *supra* note 11.

¹⁶ Conceptually, criminal legal debt can be divided into four categories: (1) money charged by, collected by, and paid solely to the government, as with certain court fines and fees; (2) money charged by and paid to the government, but collected by a private contractor that takes a percentage, as with other fines and fees; (3) money charged, collected by and paid to government contractors, such as private probation companies; and (4) money charged, collected by, and paid to non-contracted private companies, such as bail bond companies.

¹⁷ See Brian Highsmith, *Criminal Justice Debt: Consumer Debt Advice from NCLC*, NAT'L CONSUMER L. CTR. (June 29, 2018), <https://library.nclc.org/criminal-justice-debt-consumer-debt-advice-nclc>, archived at <https://perma.cc/Z7EB-FZK8>.

¹⁸ It should be noted that these charges—like the other consequences of incarceration—are not distributed evenly. Just as mass incarceration itself continues to operate as a sorting mechanism to disadvantage people of color and the poor, so too the collateral consequences of incarceration differentially impact those communities. See, e.g., Saneta deVueno-powell et al., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CENTER, FORWARD TOGETHER & RESEARCH ACTION DESIGN (2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf>, archived at <https://perma.cc/UE3E-GSZU>. And those consequences are remarkably numerous and varied. The National Inventory of the Collateral Consequences of Conviction currently contains 46,990 entries of different provisions of the law throughout the country that include some kind of collateral consequence as the result of a conviction. See *National Inventory of the Collateral Consequences of Conviction*, JUST. CTR., THE COUNCIL OF ST. GOV'TS, <https://niccc.csjusticecenter.org/>, archived at <https://perma.cc/329R-EBJM>.

¹⁹ See “Set up to Fail”: *The Impact of Offender-Funded Private Probation on the Poor*, HUMAN RIGHTS WATCH (Feb. 20, 2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor>, archived at <https://perma.cc/JQ7B-ZBCM>.

²⁰ See Drew Kukorowski, et al., *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry*, PRISON POL'Y INITIATIVE 2 (May 8, 2013), https://static.prisonpolicy.org/phones/please_deposit.pdf, archived at <https://perma.cc/N9RL-6MGQ>.

²¹ See Caroline Isaacs, *Community Cages: Profitizing Community Corrections and Alternatives to Incarceration*, AMERICAN FRIENDS SERV. COMM. 3 (August 2016), https://www.priateci.org/reports_files/Profitizing%20community%20corrections%20and%20alternatives%20to%20incarceration.pdf, archived at <https://perma.cc/P2UC-46DG>.

tures and limited choices. Further, states and local governments have increasingly offloaded core functions of their criminal legal systems—traditionally public services—onto private corporations operating to maximize profit for their shareholders.²² The companies offering these “services” have worked with state and local governments to commercialize nearly every segment of our modern punishment continuum. Individuals and families who have contact²³ with the legal system are also, increasingly, unwitting consumers of goods and services, from prison commissary to bail bonds, from telephone and video-calling services to debit release cards. They are involuntary consumers—but consumers nonetheless. This is “crimsomerism”: the coerced consumption of punishment that is increasingly inherent in the American criminal legal system.²⁴

The forced consumption of goods and services by people who have been impacted by the criminal legal system presents a host of issues—including consumer issues—that extend well beyond simply incurring debt. What if, as a condition of enrolling in an ankle monitoring program, an individual is compelled to sign a contract in which he “agrees” to a list of unreasonable fees and to forfeiting privacy rights? What if the food provided by a private food vendor is inadequate, unhealthy, or dangerous? What if phone calls made by incarcerated people keep dropping but the company keeps collecting fees? What if private debt collectors of unpaid court fees harass debtors and their families? What if commercial bail companies discriminate on the basis of race when deciding whom to provide services to and how much to charge? What recourse exists when, as has occurred with the money bail system, the underlying contractual terms common to an entire private

²² See generally *Private Companies Profit from Almost Every Function of America's Criminal Justice System*, IN THE PUBLIC INTEREST (Jan. 20, 2016), <https://www.inthepublicinterest.org/private-companies-profit-from-almost-every>, archived at <https://perma.cc/3Z4P-W8ZB>.

²³ Throughout this Article, the authors use several terms that differ slightly from convention—referring, for example, to people who “have contact” (or “interactions”) with the “criminal legal system.” This phrasing is mainly intended to capture the full range of these systems and interactions, from policing to arrest to incarceration to supervision. It is also intended to recognize the reality that people in and from certain communities are more likely to have such interactions not because of anything they, uniquely, have done—but rather as the result of differential treatment by law enforcement and our legal system. The more inclusive terminology further recognizes that these costs are imposed not just on the people who are themselves arrested or convicted—as typically is the case with fines and fees—but often directly on their loved ones.

²⁴ This term is intended to be subversive and to elicit a call to arms to develop tools at the intersection of consumer protection and criminal law. The desire to develop a term for this intersection is based in the principle that in order for something to die, it must first be named, identified and “birthed.” In proposing the term “crimsomerism,” the authors note the particular usefulness of “cimmigration” to describe the intersection of criminal law and immigration. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* (2015). Additionally, while we think there is power in the naming of this particular intersection and concept, the authors do not support the labeling of individuals as “crimsomers,” just as “cimmigrant” is not used in the realm of cimmigration.

industry are in many cases unconscionable?²⁵ And more broadly, what can be done to mitigate the harmful effects²⁶ of the widespread practice of imposing debt on people with criminal legal system contact—debt that these people simply cannot afford, and that may even increase the likelihood of recidivism?²⁷

The consumer abuses described in this Article all arise in the context of the criminal legal system. To the extent that they have been addressed through litigation, the cases have primarily comprised constitutional, civil rights-focused claims and remedies like § 1983.²⁸ While these abuses—onerous and unaffordable debts, extensions of credit on unfair terms, harmful collection practices, and other deceptive and problematic conduct—are undeniably civil rights issues, they are also *consumer protection* issues. Consumer protection law exists, after all, to ensure justice and fairness in the marketplace, and to help correct vast inequalities in bargaining power, wherever that market may be.

It is difficult to imagine a situation where consumer protections are more important than in the criminal legal context, where the power of the state can be leveraged by private companies to create onerous terms of service that individuals and their desperate families are compelled to accept. In examining these situations, it is crucial to highlight the extreme implications of any criminal legal system contact on individuals' health and safety, on their families' finances, and on the host of collateral consequences that often result from being involved in the legal system. All of these combine to create a perfect storm of desperation, leading individuals who are subject to "crimsumerism" to be willing to sign nearly any agreement put in front of them. Consumers like Ms. Baker, Mr. Egana, and Ms. Cason enter into contracts for bail and other products at what is likely to be one of the most stressful, traumatic, and confusing times of their lives—a dynamic the corrections industry understands well and uses to its advantage.

Part II of this Article will briefly discuss how consumer protection law may be a vital part of the dismantling of the carceral state. Part III will

²⁵ For a discussion of the unconscionability of commercial bail contracts in California, which are similar to contracts commonly found nationally, see Mel Gonzalez, *Consumer Protection for Criminal Defendants: Regulating Commercial Bail in California*, 106 CALIF. L. REV. 1379, 1416 (2018).

²⁶ See generally *Confronting Criminal Justice Debt*, *supra* note 11.

²⁷ See generally Alexandra Shookhoff et al., *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENTENCING REPORTER 62 (2011).

²⁸ See, e.g., *Leatherwood v. Rios*, 705 Fed. Appx. 735, 738 (10th Cir. 2017) (addressing argument that plaintiff's constitutional rights had been violated because he had to pay higher prices for a lesser selection of items, compared to similarly situated inmates); *McGuire v. Ameritech Servs.*, 253 F. Supp. 2d 988, 999 (S.D. Ohio 2003) (discussing claim that telecommunication companies had conspired to create exclusive contracts for inmate telephone service, in violation of plaintiffs' constitutional rights); Complaint at 2, *Edwards v. Red Hills Cmty. Probation LLC*, 1:15-cv-00067-LJA (M.D. Ga. Apr. 10, 2015) (alleging that a private probation company had a longstanding practice of detaining indigent probationers to coerce immediate payment of city court fines and probation supervision fees).

briefly discuss the development of consumer protection law throughout the twentieth century and how that history suggests an expansive application of consumer protection principles to today's landscape of crimsumentism. Finally, Part IV explores creative applications of existing consumer protection law to commercial bail bondsmen, private debt collection contractors collecting criminal legal system debt for the state, discrimination based on protected class or source of income, and government collection of fines and fees.

I. CONSUMER PROTECTION IN THE EFFORT TO END MASS INCARCERATION

The term "mass incarceration" was first used in the study of punishment and society in the 1990s and early 2000s to describe the explosion in the rate of imprisonment that began in the United States in the 1970s.²⁹ The term and concept gained wider attention with Michelle Alexander's book *The New Jim Crow*, which outlines how the U.S. criminal legal system functions as a system of racial control.³⁰ Even 10 years ago, the term mass incarceration was not widely used, but now it is both a well-known fact and a key issue for politicians of both parties.³¹ However, even as the push to end mass incarceration accelerates, private industry has partnered with government to profit from the contemporary carceral state—and now is invested in fighting reform or changing its business model to adapt to a "reformed" criminal legal system in order to continue reaping profits from the same captive market.³²

The scale of private industry's involvement within the contemporary criminal legal system is staggering. A recent report by The Urban Justice Center's Corrections Accountability Project identifies more than 3,100 corporations that directly profit from mass incarceration, most frequently by contracting with government entities at the local, state, and federal levels.³³ But industry investment extends beyond this universe: it also includes numerous private criminal legal system actors who do not directly contract with the government but nevertheless are invested in the status quo of mass human caging and supervision. This broader landscape includes industries like the bail bond industry,³⁴ as well as related services like GPS monitoring

²⁹ JONATHAN SIMON, MASS INCARCERATION ON TRIAL 3 (2014).

³⁰ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

³¹ Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, THE ATLANTIC, Apr. 28, 2016, available at <https://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/>, archived at <https://perma.cc/B7U6-ES8Q>.

³² See Isaacs, *supra* note 21, at 12.

³³ Corrections and Accountability Project, *The Prison Industrial Complex: Mapping Private Sector Players*, CORRECTIONS ACCOUNTABILITY PROJECT AT THE URBAN JUSTICE CTR. 1 (2018), <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/5ade0281f950b7ab293c86a6/1524499083424/The+Prison+Industrial+Complex+-+Mapping+Private+Sector+Players+%28April+2018%29.pdf>, archived at <https://perma.cc/TZL5-SSGH>.

³⁴ A report issued by the ACLU and Color of Change estimates the number of bail bonds agents nationally to be as many as 25,000. *Selling Off Our Freedom: How Insurance Corpora-*

services provided to bail bond sureties by intermediary companies. Even more broadly, it also includes companies that use the threat of criminal sanction to enforce civil debts—from creditors using arrest warrants issued in post-judgment proceedings to coerce payment of consumer debts,³⁵ to rent-to-own companies pursuing theft charges against delinquent borrowers.³⁶

Where reforms threaten these revenue streams, predatory industry actors will not simply disappear—they will devote their resources first to resisting the policy changes, and then (where that fails) adapt their business models to extract wealth within the new system. Prison privatization provides a compelling case study of this dynamic. Researchers have documented that the largest private prison companies both lobbied against state-level sentencing reforms that would reduce prison populations, and then moved to adapt to the shifting penal landscape by aggressively investing in “alternatives to incarceration” like privately-run halfway houses and supervision services.³⁷ Indeed, the commercial bail bond industry has already made moves to expand and transform in light of ongoing reform efforts.³⁸

As an evolving criminal legal system increasingly operates through private commercial actors—whose financial incentives often directly conflict with the policy goals of reducing crime and incarceration—this Article proposes a new focus on a body of rights that has been developed precisely in the context of private commercial transactions: consumer protection law. The Article explores the application of consumer protection law in these new

tions Have Taken over Our Bail System, COLOR OF CHANGE AND THE AM. CIVIL LIBERTIES UNION 9 (2017), <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system>, archived at <https://perma.cc/Y3UV-FL6C>.

³⁵ See generally AM. CIVIL LIBERTIES UNION, *A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT* (2018).

³⁶ For example, a months-long investigation by *The Texas Tribune* and *NerdWallet* found rent-to-own companies have pressed charges against thousands of customers at police departments in Texas and in other states. In a single medium-sized county in central Texas, at least six rent-to-own companies pressed charges against more than 400 customers in the past three and a half years. See Jay Root & Shannon Najmabadi, *How Renting Furniture in Texas Can Land You in Jail*, TEXAS TRIBUNE, Oct. 27, 2017, <https://www.texastribune.org/2017/10/27/texas-missing-payments-rental-furniture-can-land-you-jail/>, archived at <https://perma.cc/9FJ4-TKKH>.

³⁷ See, e.g., Isaacs, *supra* note 21 (noting that large private prison conglomerates responded to sentencing reform by “rebranding and expanding into subcontracted prisoner health care, forensic mental health treatment, and other ‘alternative’ programming”).

³⁸ See, e.g., Gonzalez, *supra* note 25, at 1435 (describing the bail industry’s efforts to expand into adjacent criminal system markets such as electronic supervision, parole, and other forms of conditional supervision for which pretrial bail serves as a model); see also Shadd Maruna et al., *Putting a Price on Prisoner Release: The History of Bail and a Possible Future of Parole*, 14 PUNISHMENT & SOC’Y 315, 325 (2012). Importantly, bail reform litigation has predominantly focused on eliminating standard bail schedules and money bail for low-level, nonviolent offenses, generally by way of substituting risk-assessment tools and supervised pretrial release for cash bail. See generally Wendy Calaway & Jennifer Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795 (2018). These remedies would significantly curtail the use of money bail while also likely substantially increasing the number of individuals under some form of supervision. Though these efforts may eliminate money and debt from the pretrial process, a more wholesale reevaluation of pretrial supervision is necessary to prevent new and expanded interactions with accused individuals.

contexts, with an eye toward ameliorating (among other things) consumer abuses resulting from the ongoing transition toward widespread private provisioning of criminal legal system functions. Early experience demonstrates that this approach can be effective where traditional approaches for protecting individuals within the criminal legal system are unavailable.³⁹ Over the longer term, it may expand public perception of which protections are—or should be—available to begin with.

A consumer protection approach may also serve to supplement other criminal legal system reform strategies—or even as a strategic alternative to pursue, incrementally, when political conditions for the larger changes that true justice requires are inauspicious. Consumer-focused regulation and litigation can help mitigate some of the worst abuses while advocates work to achieve broader-reaching, systemic reform. Further, some of the legislative and court “reforms” that policymakers have recently considered or implemented might actually have the effect of *increasing* the number of individuals under some form of supervision.⁴⁰ As pretrial services become privatized and as states contract with for-profit companies to provide supervision, including even after partial completion of sentences,⁴¹ consumer protection law can provide useful tools for protecting individuals subject to these expanded networks.

On a more basic level, though, consumer protection law opens up a new way of approaching these issues—from a public policy as well as a litigation perspective. In contemporary discourse, positing incarcerated individuals and their families as consumers—worthy of respect and dignity—is itself something of a revolutionary act. From that change of perspective stems the insistence that these consumers merit the protections due all other consumers. Why should the bail bond company that fails to disclose the interest rate

³⁹ It should be noted that some rights traditionally understood within the context of the individual’s relationship to the state have carried through as the criminal legal system has evolved. For example, § 1983 claims seem to be as available in the context of private prisons as within public prisons, perhaps even more so as a result of the Prison Litigation Reform Act and its state level analogues, which have drastically complicated litigation on behalf of incarcerated people in the public prison context. See Alexander Volokh, *Keynote Article: The Modest Effect of Minneci v. Pollard on Inmate Litigants*, Symposium: *Inside America’s Criminal Justice System: The Supreme Court on the Rights of the Accused and the Incarcerated*, 46 AKRON L. REV. 287, 295 (2013). Moreover, state tort law may similarly be more effective for incarcerated people in the private prison context as compared to public prisons, which are generally protected by sovereign immunity. *Id.* at 305. In this way, the evolution of the criminal legal system discussed here may in fact produce additional protections for incarcerated individuals and their families.

⁴⁰ See Wendy Calaway & Jennifer Kinsley, *supra* note 38, at 822–23. The use of risk-assessment, though often framed as a panacea, may be problematic in its use of existing patterns of criminality to predict future behavior. See Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L. J. 490, 557 (2018).

⁴¹ This is referred to as “post-conviction bail,” wherein inmates can put up a bond in exchange for early release, and a bondsman becomes a kind of parole officer. See Max Ehrenfreund, *What’s Wrong with Making People Post Bail After Trial*, WASH. POST, Mar. 16, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/03/16/whats-wrong-with-making-people-post-bail-after-trial/>, archived at <https://perma.cc/VW9V-W66C>.

on its loans not be held responsible for violating the Truth in Lending Act?⁴² Why should the provider of prison phone service that tries to collect debts by calling in the middle of the night not be subject to the terms of the Fair Debt Collection Practices Act? Why should the provider of ankle-bracelet monitoring services that extorts payment by unfairly and deceptively threatening prison not be held accountable under state Unfair and Deceptive Acts and Practices (UDAP) statutes?

The answer, of course, is that these businesses *should* be required to adhere to the same consumer protection laws that govern other aspects of the marketplace. By applying these powerful laws in the context of the criminal legal system, advocates of reform can bring a measure of justice to individuals and families sorely in need of it. They can also advance the cause of reform by holding accountable abusive actors that have so far operated with impunity—and by furthering the urgent idea that people who have contact with the criminal legal system should not be denied their rights against abusive practices.

The idea of applying consumer protections in the criminal legal context dovetails with the growing reform movement that seeks to end the charging of many criminal fines and fees, an effort that could curtail concomitant abuses in collecting those fees.⁴³ Efforts at “fines and fees” reform have been particularly successful in the context of purely administrative user fees, rather than true monetary sanctions intended as punishment. For instance, in 2018, San Francisco became the first jurisdiction to proscribe administrative fees in criminal cases.⁴⁴ Because the government (not private companies) originates these debts, the strategies that have been developed to challenge many fines and fees do not translate directly to the context of debt owed to private companies. Efforts to combat abuses by private industry operating independently to profit from the criminal legal system are more nascent, and require creative thinking by advocates. Although the abuses perpetuated by these private actors clearly demand policy and legislative reforms, this Article’s particular focus is on the creative use of *existing* consumer protection laws to vindicate individuals’ rights, end abusive debt collection practices against particularly vulnerable populations, and disincentivize private industry from further profiting from the mass criminalization of over-policed communities.

Consumer protection law offers a powerful and largely unused set of tools in the effort to end mass incarceration. While criminal justice reform and the effort to end mass incarceration may currently enjoy increasing—even bipartisan—support, private industries currently profiting from mass

⁴² See 15 U.S.C. § 1601(a) (2018) (declaration of purpose of Truth in Lending Act).

⁴³ See, e.g., Sobol, *supra* note 11; *Private Companies Profit*, *supra* note 22.

⁴⁴ Joshua Sabatini, *San Francisco Abolishes Criminal Justice Fees*, S.F. EXAMINER, May 22, 2018, <http://www.sfexaminer.com/sf-abolishes-criminal-justice-fines-fees/>, archived at <https://perma.cc/V52B-SARV>.

incarceration are likely to resist or harmfully redirect efforts at reform.⁴⁵ If they succeed in coopting reform, mass incarceration may morph into more covert forms of restraint that, because they are arguably better than being detained in jail or prison, are less likely to be challenged. Michelle Alexander has observed that “[i]n each generation, new tactics have been used for achieving the same goals” of social control of people of color and other marginalized groups.⁴⁶ More recently, she has written that the contemporary carceral state—comprising the expansive for-profit and debt-creating supervisory networks that she calls “digital prisons”—is to mass incarceration what Jim Crow was to slavery.⁴⁷ Unless advocates act swiftly, low-income communities and communities of color could be further relegated to the margins of society, unable to achieve financial freedom or economic justice as they are forced to consume their own punishment. Consumer protection law offers one effective tool for fighting against that outcome.

II. GROUNDING THE FIGHT AGAINST CRIMSUSERISM IN THE HISTORY OF CONSUMER PROTECTION

Although developed in a different context, consumer protection laws were designed to fix problems that look remarkably similar to problems endemic to the modern corrections industry. Indeed, people with criminal legal system contact are often simultaneously consumers of various goods and services as a result of that contact. This concurrent status is exemplified by the scenario of an individual granted bail who solicits a commercial bail bond company.⁴⁸ The principles underpinning consumer protection law address both identities, engendering new understandings of the rights of individuals subject to newly privatized aspects of the criminal legal system, and in addition suggesting the amelioration of those aspects of the system that remain in the hands of the government.

To understand this dynamic, it is necessary to discuss the history of the consumer protection movement in the United States, to track its underlying principles and resulting legal frameworks, and then to turn to its limitations when applied to the criminal legal system. This discussion may not by itself derive a straightforward and practical way of applying consumer protection principles in the criminal legal system context. Yet by adopting the focus and priorities of the consumer protection movement, we may reframe the

⁴⁵ See, e.g., Gonzalez, *supra* note 25, at 1435 (describing the bail industry’s efforts to expand into adjacent criminal system markets such as electronic supervision, parole, and other forms of conditional supervision for which pretrial bail serves as a model).

⁴⁶ ALEXANDER, *supra* note 30, at 1.

⁴⁷ Michelle Alexander, *Opinion: The Newest Jim Crow*, N.Y. TIMES, Nov. 8, 2018, <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>, archived at <https://perma.cc/5S5K-J6TL>.

⁴⁸ See Gonzalez, *supra* note 25, at 1399 (suggesting the term “defendant-consumer” to refer to the frequently simultaneous position of individuals utilizing commercial bail services as defendants (or arrestees) and consumers).

way in which we understand the rights of individuals interacting with the increasingly privatized criminal legal system, and that alternative model may in turn produce new avenues for protecting individuals who have contact with the criminal legal system. Tracking the evolution of the consumer movement and its limitations also demonstrates the potential limits of the application of consumer law to the criminal legal system, even while pointing to avenues forward.

Federal consumer protection law as we know it originated in Progressive Era statutes like the Federal Trade Commission Act (FTCA), which created the Federal Trade Commission (FTC) in 1914. The FTC was originally concerned with “unfair methods of competition,” but in 1938 its authority was explicitly expanded to encompass “unfair or deceptive acts or practices.”⁴⁹ While Congress originally left the terms “unfair” and “deceptive” intentionally vague, their meanings have evolved through interpretive rules, policy statements, statutory changes and case law to include many common commercial practices.⁵⁰ Covered practices include false advertising, coercive or high pressure sales tactics, theft, withholding material information, promulgating unsubstantiated claims, using insufficient care, and promoting unsafe practices.⁵¹

Nationwide scares arising from mass false advertising schemes and unsafe products in the health and automobile industries in the 1960s and 1970s led to broader federal efforts. These efforts—bolstered by speeches such as President Kennedy’s in 1962 enumerating four basic consumer rights: the right to safety, the right to be informed, the right to choose, and the right to be heard—catalyzed the modern wave of consumer legislation.⁵² Although Kennedy’s Consumer Bill of Rights was not enacted into law, increased interest in consumer protection coincided with the proliferation of state statutes in response to inadequate federal legislation. Unlike the FTCA, many of these state laws authorize private rights of action and fee shifting provisions that incentivize the private bar to take consumer cases.⁵³ Additionally, these statutes tend to avoid burdensome common law tort causation and intent standards, as well as common law contract law privity requirements that

⁴⁹ Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 8 (2005).

⁵⁰ *Id.* at 8–10.

⁵¹ *Id.* at 9–10. An “unfair act” has been codified as one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n) (2018). A “deceptive act” is, per FTC policy, one that is likely to materially mislead the targeted consumer acting reasonably under the circumstances. Schwartz & Silverman, *supra* note 49, at 10.

⁵² Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 388 n.66 (2015).

⁵³ Henry Butler & Joshua Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 165 (2013).

limit the range of potential plaintiffs.⁵⁴ State consumer protection laws also frequently enumerate specific prohibited conduct that constitutes unfair or deceptive acts or practices.⁵⁵

Broadly, both the FTCA and state-level consumer protection legislation were designed to “preserv[e] consumers’ reasonable expectations in transacting while reducing both economic and legal barriers to suit imposed by the common law regime.”⁵⁶ As a consequence, traditional consumer protection regulations are procedural in nature—they generally regulate how commercial transactions occur, but shy away from dictating the terms or the substance of those transactions. Indeed, even the aforementioned unfairness standard has evolved to function as a balancing test, weighing the injuries that a practice may produce against the benefits of that practice to the market, and ascertaining the costs of regulation.⁵⁷ It is thus a consumer’s ability to choose, and not the substance of the choices a consumer makes, that statutes such as the FTCA are designed to regulate.⁵⁸

These traditional procedural consumer protection principles should inform our vision of the application of consumer law to the criminal legal system. For example, transparency with respect to the terms and conditions of various sources of criminal legal system debt—such as money bail, privatized rehabilitation and supervisory programs, and in-prison services like privatized health care and telecommunications—is critical to empowering criminal legal system “consumers” to make informed choices among available alternatives, to prepare adequately for the consequences of those choices, and to be free from predatory practices. Because information asymmetry is widespread within the criminal legal system, consumers of the products and services the system produces are inherently vulnerable to forms of consumer fraud arising from procedurally corrupted transactions.

Further, if the individuals being processed through the criminal legal system are understood as consumers within a consumer protection framework, the rights and protections of such a framework can be expanded to all aspects of the criminal legal system, including those traditionally understood as operated solely by the government, such as criminal proceedings.⁵⁹ The dangers of information asymmetry are well understood in the context of criminal proceedings where, because “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try

⁵⁴ Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 127 YALE L. J. 2216, 2228 (2018).

⁵⁵ Schwartz & Silverman, *supra* note 49, at 15–16.

⁵⁶ Wright, *supra* note 54, at 2229–30.

⁵⁷ See *supra* note 51 and accompanying text.

⁵⁸ Rebecca Schonberg, *Introducing “Abusive”: A New and Improved Standard for Consumer Protection*, 100 CALIF. L. REV. 1401, 1413 (2012).

⁵⁹ Stephanos Bibas makes a similar point within the context of plea bargain agreements. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1159–60 (2011).

defendants accused of crime,”⁶⁰ a right to counsel—arguably an analogue to President Kennedy’s consumer bill of rights—now formally safeguards the right to a fair trial.⁶¹ Within the context of plea bargaining, solutions to information asymmetries, such as Rule 11(b)(1) of the Federal Rules of Criminal Procedure, have similarly been established.⁶² Yet if, as many critics allege, the right to counsel has been substantially neglected within the courthouse,⁶³ and information asymmetries continue to plague, for example, the plea bargaining process,⁶⁴ then integrating the procedural rights and protections that are the hallmark of consumer protection can mitigate the problems that the right to counsel is meant to address.⁶⁵

Alongside these procedural rights, more substantive consumer protections have also been enacted. These substantive rights are attributable to the consumer movements of the last century, and an emerging consensus among consumer advocates beginning in the 1960s that market forces left alone will not result in adequate consumer protection in the face of growing power imbalances between consumers and producers.⁶⁶ Procedural protections such as product transparency and other forms of consumer education have thus increasingly been seen as insufficient.⁶⁷ As Ralph Nader described in a statement that epitomized the consumer movements of the ’60s and ’70s, “You can’t have equal protection of the law when it is you versus Exxon.”⁶⁸ As a consequence, many industries—such as food, drugs, and automobiles⁶⁹—now must meet minimum standards for products, and implied warranties of merchantability were codified in the Uniform Commercial Code, guaranteeing that goods are at minimum “fit for the ordinary purposes for which such goods are used.”⁷⁰

⁶⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁶¹ *Id.*

⁶² Fed. R. Crim. P. 11(b)(1).

⁶³ See generally Thomas Giovanni, *Community-Oriented Defense: Start Now*, BRENNAN CTR. FOR JUSTICE (July 20, 2012), <http://www.brennancenter.org/publication/community-oriented-defense-start-now>, archived at <https://perma.cc/3MEA-R776>.

⁶⁴ *Bibas*, *supra* note 59, at 1152. Bibas goes on make the keen observation that “[i]t is astonishing that a \$100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment.” *Id.* at 1153.

⁶⁵ For example, several recent efforts in California, such as Santa Clara County’s “No Cost Release” campaign, seek to empower accused individuals awaiting bail hearings before the right to counsel attaches by providing necessary information in the form of brochures, posters, and other educational materials. See *County of Santa Clara Launches Campaign to Inform Detainees of Free Alternatives to Paying Bail*, COUNTY OF SANTA CLARA, Dec. 19, 2017, <https://www.sccgov.org/sites/opa/newsroom/Pages/nocostreleaselaunch.aspx>, archived at <https://perma.cc/L8MF-XAE9>.

⁶⁶ Joshua D. Wright & Eric Helland, *The Dramatic Rise of Consumer Protection Law*, in *THE AMERICAN ILLNESS* 361, 365 (F. H. Buckley ed., 2013).

⁶⁷ Herbert Jack Rotfeld, *A Pessimist’s Simplistic Historical Perspective on the Fourth Wave of Consumer Protection*, 44 THE J. OF CONSUMER AFF. 423, 425 (2010).

⁶⁸ *Id.*

⁶⁹ John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT’L & COMP. L. 1, 13 (1998).

⁷⁰ Spencer Weber Waller et al., *Consumer Protection in the United States: An Overview*, EUR. J. CONSUMER L. 1, 23 (May 2011).

More recently, the Dodd-Frank Act significantly expanded the scope of consumer protection regulation within the context of consumer credit.⁷¹ The Act represents a departure from traditional consumer credit regulation that addressed predatory and unfair practices only procedurally,⁷² by focusing on the elimination of information asymmetry and championing disclosure as the primary means of protecting consumers. The Consumer Financial Protection Bureau (CFPB), which the Act established, moved away from the traditional approach of correcting market inefficiencies through the proliferation of procedural requirements. Instead, the CFPB expressed skepticism that market outcomes reflect actual consumer preferences.⁷³ The CFPB therefore intervened more substantively by standardizing the design of consumer products in order to correct market failures that were known to harm consumer welfare.⁷⁴ The Dodd-Frank Act also authorized the CFPB to regulate acts that are “abusive” in addition to those that are unfair or deceptive.⁷⁵ The new standard recognizes imbalances between lenders and borrowers by placing explicit burdens on lenders to consider consumer welfare and the sophistication of their borrowers, and by authorizing the CFPB to take certain products off the market.⁷⁶

The foregoing evolution of consumer protection principles should inform how we conceive consumer protections for an individual subject to the criminal legal system. While it is true that, for example, guaranteeing that individuals understand the procedures of bail, the terms and conditions of money bail contracts, and the collection authority possessed by bail companies will go a long way toward protecting those individuals in those contexts, merely seeking to ameliorate information asymmetry is inadequate to protect individuals inherently disempowered as subjects of the criminal legal system. To retool Nader’s refrain, you can’t have equal protection of the law when it is you versus the criminal legal system—and certainly not when it is you versus large private companies operating in the shadow of the carceral state.

Indeed, it is hard to imagine a field more amenable to a model of consumer protection that prioritizes substantive protection than an increasingly privatized criminal legal system, in which the traditional police powers of the state are leveraged by private companies as they provide services to system-impacted consumers and their families. What are abusive conditions for the formation of a contract if not where one party’s liberty is being threatened?⁷⁷ By this measure, commercial bail contracts, for example, could

⁷¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁷² Ondersma, *supra* note 52, at 387–391.

⁷³ Wright, *supra* note 54, at 2231 (explaining the shift toward behavioral legal scholarship informing these policy decisions).

⁷⁴ *Id.*

⁷⁵ 12 U.S.C. § 5531(a)–(b) (2018).

⁷⁶ Schonberg, *supra* note 58, at 1407.

⁷⁷ See Gonzalez, *supra* note 26, at 1427.

be regarded as generally unconscionable contracts of adhesion entered into under threat of incarceration.⁷⁸ Further, just as concerns about regulatory capture by large private companies catalyzed the consumer movement,⁷⁹ so too the bail bond industry has engaged in comprehensive and successful lobbying efforts to produce industry-beneficial (but consumer-harmful) legislation in jurisdictions around the country.⁸⁰ Thus, minimum standards for the goods and services of the criminal legal system, and a fundamental understanding of the inherent vulnerabilities of its subjects, should be applied to that system via a consumer protection framework.

It is important to note that even this expanded substantive conception of consumer protection is likely insufficient for protecting individuals subject to abuses arising from the criminal legal system.⁸¹ Desperation, poverty, confusion, and power imbalances characterize and shape that system. More importantly, individuals cannot simply choose their way out of precarity or vulnerability—or the exploitation that too often befalls vulnerable consumers. Even more aggressive regulation of the institutions comprising the criminal legal system cannot guarantee the absence of practices that are harmful to its subjects. Yet the underlying principles of the consumer movement and the resulting advocacy strategies that this Article explores may ultimately create new avenues for protecting these most vulnerable individuals.

III. APPLICATION OF CONSUMER PROTECTION LAW TO SPECIFIC ACTORS IN THE CRIMINAL LEGAL SYSTEM

Because many consumer protections are designed to cover specific types of transactions, the tools available to advocates change depending on, among other things, the “originator” of the debt and the methods employed to collect it. Even within the criminal legal system, different industry actors and practices are governed by different consumer protections. Consumer lawyers must work together with public defenders, community organizers, and civil rights advocates—as well as affected communities directly—to understand these different industries and abuses, and then think creatively about which consumer protections might be available. Although a comprehensive accounting of how consumer protection laws might be applied to abuses in the criminal legal system is beyond the scope of this Article, through several case studies this Section seeks to illustrate the promise of this approach.

⁷⁸ See Gonzalez, *supra* note 25, at 1416.

⁷⁹ Butler & Wright, *supra* note 53, at 168.

⁸⁰ See Gonzalez, *supra* note 25, at 1393–94, 1421–24.

⁸¹ To that end, Chrystin Ondersma articulates, within the consumer credit context, the need to understand consumer protection rights as human rights. See generally Ondersma, *supra* note 52.

A. Commercial Bail Bonds

One aspect of the criminal legal system, above all others, has come to occupy the leading edge of cases seeking to apply consumer protection law: the commercial bail bond industry. Motivated by the same concerns that have stimulated recent efforts to do away with cash bail entirely, advocates have begun to assert consumer protection claims against abuses in an industry where such abuses are rife and where the perpetrators have historically been able to act with impunity. There is, in short, good reason for initial attention to be focused on the bail system.

Every year, bail bond agents across the country bring in somewhere in the neighborhood of \$2 billion from bond premiums and fees.⁸² This lucrative industry profits from taking advantage of people at their most vulnerable. In these situations, the consumer is asked to decide between staying in jail, away from loved ones and work, or becoming a consumer in the state-sanctioned market for commercial bail. Of course, this is hardly any choice at all—a dynamic that bond agents well understand, and use to coerce people into abusive contract terms. We need not accept the abuses that arise from this perverse system; indeed, commercial bail is banned in all other countries but one, and in several American states.⁸³

Commercial bail imposes heavy financial costs on low-income communities, especially communities of color.⁸⁴ Although people of means who can post the bail set by the court can expect to receive the full amount of their posted bail back when their cases conclude, fees paid by consumers in the commercial bail market—commonly the family members and friends of individuals facing charges—are kept by bail bond companies and the corporate partners who underwrite the bonds those agents produce. That is true even in cases where the charges are dropped or the individual facing charges is determined to be innocent. As a result of this structure, heavily policed communities find themselves trapped in a cycle of debt and fees related to the cost of commercial bail, often long after the courts have resolved their

⁸² See *Selling Off Our Freedom*, *supra* note 34, at 1; *IBISWorld Industry Market Research: The U.S. Bail Bond Services Industry is Expected to Earn Revenue of \$2.4 billion in 2016*, PRNEWswire (Dec. 7, 2016), <https://www.prnewswire.com/news-releases/ibisworld-industry-market-research-the-us-bail-bond-services-industry-is-expected-to-earn-revenue-of-24-billion-in-2016-300374583.html>, archived at <https://perma.cc/UT3J-WXFT>.

⁸³ Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail Recovery Agents: An Exploratory Study*, 38(2) CRIM. JUST. REV. 190, 193 (2013). The only country other than the United States that is known to the authors to have a commercial bail bond industry is the Philippines. See F.E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES 15 (1991); Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES, Jan. 29, 2008, at A1.

⁸⁴ According to the Prison Policy Initiative, Black women and men ages 23 to 39 held in local jails had median earnings of between \$568 and \$900 respectively, the month prior to their arrest. Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>, archived at <https://perma.cc/2TAF-XGM3>.

charges. The over-incarceration created by excessive pretrial detention strains already-stressed local budgets,⁸⁵ crowding out investments that would otherwise be made in core community functions and perhaps leading many communities to expand the use of onerous fines and fees.

But importantly, vulnerable families cannot escape these costs even when the accused secures release through commercial bail. Because the fees paid to the industry are non-refundable, low-income arrestees and their friends and relatives are frequently left with persistent, lingering debts. Bail contracts often require the signature of an indemnitor—typically a family member or close friend—or necessitate other forms of borrowing within the arrestee's social circle, thus extending the economic costs across entire communities.⁸⁶

These heavy costs on low-income people are the inevitable consequence of any system that allows private profiteering from bail bonding.⁸⁷ Numerous studies and investigative reporting⁸⁸ confirm that the American bail industry is rife with illegal practices that harm low-income consumers and undermine the goals of the criminal legal system—unscrupulous business tactics that reflect a lack of accountability for corporate wrongdoing. Those abusive practices include charging undisclosed or illegal fees or excessive rates of interest;⁸⁹ misleading consumers about the terms of their bail agreements or about their legal options;⁹⁰ engaging in harassing and abusive collection practices, including by making threats to send arrestees back to jail without a legal basis to do so;⁹¹ forcing bail bond cosigners to turn over property that was used as collateral in cases where the arrestee complied with the terms of the bail;⁹² operating without state-required licenses;⁹³ and

⁸⁵ Christian Henrichson et al., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INST. OF JUSTICE (May 2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf, archived at <https://perma.cc/P322-KYYX>.

⁸⁶ deVuono-powell et al., *supra* note 18, at 29–33 (describing the impact of collateral consequences of incarceration on family members of incarcerated people).

⁸⁷ *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial*, JUSTICE POL'Y INST. 3 (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf, archived at <https://perma.cc/NCP5-35JM> (“With the personal liberty of accused people held by a profit-driven private industry, for-profit bail bonding is systemically prone to corruption, criminal collusion, and the use of coercion against bonded people. This phenomenon is not new and has plagued the industry for decades . . .”).

⁸⁸ See, e.g., Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES, Mar. 31, 2018, <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>, archived at <https://perma.cc/M2T3-UJWT>; Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (May/June 2014), <http://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/>, archived at <https://perma.cc/Z3UJ-UT8T>.

⁸⁹ See generally Gonzalez, *supra* note 25, at 1397–99.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

failing to comply with reporting obligations.⁹⁴ These abuses call out for action, but continue to exist in large part because state efforts to regulate the industry are weak or non-existent.⁹⁵

1. Existing Oversight is Insufficient

Commercial bail bonds are, in essence, a specialized form of insurance, replacing cash bail paid directly to the court with a promise to appear backed by a third-party surety. As sureties, commercial bail bond producers and underwriters are generally regulated by state insurance commissions along with most other forms of insurance.⁹⁶ This regulation is often nominal, allowing bail bond industry actors to act without meaningful oversight in most jurisdictions. The experience of New Jersey is instructive. In 2014, the state's Commission of Investigation released the findings of a lengthy inquiry into the state's bail bond system.⁹⁷ Although New Jersey had a licensing and regulatory body in place, the report found that its requirements could "be ignored and circumvented with impunity . . . because scant resources are devoted to oversight [and the state banking and insurance agency's] posture toward bail matters is predominantly reactive."⁹⁸ As a result, industry wrongdoing was widespread.⁹⁹ In Minnesota, a three-year investigation by Commerce Commissioner Mike Rothman similarly found that many bail bond agents were failing to comply with state laws, insurance regulations, and court rules related to the solicitation, sale, and handling of bail bonds, including a "failure to abide by approved rate schedules."¹⁰⁰

⁹⁴ *Id.*

⁹⁵ *Selling Off Our Freedom*, *supra* note 34, at 36. California regulators have expressly stated that state resources to regulate the industry are insufficient. See Press Release, Cal. Dep't of Ins., Update: South Bay Bail Agents Targeted In Law Enforcement Sweep (Sept. 9, 2015), <https://www.insurance.ca.gov/0400-news/0100-press-releases/2015/release083-15.cfm>, archived at <https://perma.cc/3P5R-Y5SE>.

⁹⁶ Citing this form of existing regulation, the commercial bail industry sometimes argues that laws protecting consumers should not apply to their line of work. This is generally incorrect as a legal matter, but—as a policy argument—it also presumes a level of regulatory interest and capacity that, in practice, rarely exists. See generally Gonzalez, *supra* note 25, at 1 ("[T]he current framework regulating the commercial bail industry almost exclusively monitors the relationship between bail companies and the state, but fails to mitigate the wide-ranging variety of harms that bail agents can and often do inflict on their customers.").

⁹⁷ *Inside Out: Questionable and Abusive Practices in New Jersey's Bail-Bond Industry*, STATE OF N.J. COMM'N OF INVESTIGATION 1 (May 2014), <http://www.nj.gov/sci/pdf/BailReportSmall.pdf>, archived at <https://perma.cc/M2Y3-VWMC>. The report further concluded that the state's commercial bail system was "highly prone to subversion by unscrupulous and improper practices that make a mockery of the public trust." *Id.* at 1.

⁹⁸ *Id.* at 43.

⁹⁹ *Id.* at 58 ("[T]his investigation has revealed that questionable and unscrupulous activity is rife within key segments of the commercial bail-bond industry—and has been for some time—and that the current system for policing that industry simply is not up to the task.").

¹⁰⁰ Press Release, Minn. Commerce Dep't, Minnesota Commerce Department Reaches Sweeping Agreement to Reform State's Bail Bond Industry (Jan. 13, 2016), <https://mn.gov/commerce/media/news/?id=17-114183>, archived at <https://perma.cc/4B4D-E88V>.

In reaction to this evidence of misconduct, some states have moved to impose more meaningful regulation on the bail industry. Following the New Jersey report's release, the state overhauled its bail system under the New Jersey Criminal Justice Reform Act, essentially ending the practice of money bail in favor of risk assessments.¹⁰¹ The Minnesota investigation ultimately led to a sweeping 2016 settlement with all 21 insurance companies that provide surety bonds to bail bond agencies operating in the state, which required licensed actors to reform their business practices.¹⁰²

Bail bond companies' blatant disregard for state regulation is only part of the reason public enforcement of bail regulations is so critical. Another reason for stringent regulation is that certain modalities that are essential in other contexts, such as private litigation, are sometimes unavailable in the bail context. For instance, consumer protection laws for bail users may lack a private right of action. In New York, for example, there is no private right of action to challenge violations of the Insurance Law provision that limits the premium companies can charge for bail bonds.¹⁰³ That is the case even though, as explained below, charging consumers for premiums and fees in excess of the rates allowed by law is one of the most common, and most harmful, abuses encountered in the bail system. Even where there is a private right of action, it is typically very difficult for low-income individuals to bring litigation to enforce their rights—a result of limited knowledge of legal rights and the legal system and the overall cost of working with a lawyer to pursue claims.¹⁰⁴

More than in other policy areas, effective consumer protection requires vigorous enforcement. Legal requirements mean little if violations aren't consistently pursued and appropriately punished. Indeed, the erosion of consumer protections in recent decades has far more to do with attacks on the mechanisms of enforcement than with changes to underlying substantive legal frameworks.

2. *Viewing the Structure of Commercial Bail Bonds Through a Consumer Protection Lens*

Understanding the application of consumer protection law to commercial bail bonds requires some familiarity with various elements of how the

¹⁰¹ See *Holland v. Rosen*, 895 F.3d 272, 302 (3d Cir. 2018).

¹⁰² Press Release, Minn. Commerce Dep't, *supra* note 100. Under the settlement, these insurance companies must conduct annual audits of their contracted bail bond agencies (and their appointed agents) to ensure their compliance with state laws, court rules, and the requirements of the consent order.

¹⁰³ See *McKinnon v. Int'l Fid. Ins. Co.*, 704 N.Y.S.2d 774, 776 (Sup. Ct. 1999) (concerning allegations that bail bond agents routinely charged fees in excess of the limits set forth in the Insurance Law, including by improperly designating these fees as "expenses"). *But see* *Stillman v. Goldfarb*, 431 N.W.2d 247 (Mich. Ct. App. 1988) (holding that recovery of excess fees and interest was allowed).

¹⁰⁴ See *Gonzalez*, *supra* note 25, at 1404.

system works. First, the bail bond agents who are the public face of the industry are only the front end of a larger network of actors. In the context of the surety transaction, bond agents act as insurance producers by procuring the accused and guarantors, writing the bond contract, and collecting the non-refundable bond premiums that serve as compensation for the surety.¹⁰⁵ The actual surety is almost never underwritten by the bond agents themselves, but rather by a relatively small number of companies¹⁰⁶ that generally specialize in underwriting bail bond transactions.¹⁰⁷

Operating as a form of surety insurance with respect to the courts, the commercial bail industry is primarily regulated at the state level. All states that allow commercial bond agents regulate the maximum and minimum rates that bond agents are allowed to charge. However, states take differing approaches to rate regulation: the states are roughly equally split between those that set maximum premium rates by statute,¹⁰⁸ and those that operate on the “filed rate” doctrine.¹⁰⁹ Filed rate states require surety companies to submit a proposed maximum rate; subject to the approval of the insurance commissioner, those proposed rates are adopted on a company-by-company basis as binding on the surety.

¹⁰⁵ *But see* Gonzalez, *supra* note 25, at 1408 (asserting that although with respect to the courts it is true that bail bond companies provide surety insurance, with respect to consumers, bail bond companies provide an entirely different service).

¹⁰⁶ Bail bonds are generally underwritten by large corporate insurers who contract with bond agents to receive a share of consumers’ payments. Indeed, bail insurers have actively promoted legislation requiring bond agents to have insurer backing. *See, e.g.*, Cal. Ins. Code § 1802.1 (requiring bond agent applicants to file with the state a notice of appointment, executed by a surety insurer, “authorizing that applicant to execute undertakings of bail and to solicit and negotiate those undertakings” on behalf of the surety insurer). Just a handful of large insurers cover the majority of bail bonds posted by the thousands of bail bond companies that operate throughout the United States. As documented by the ACLU and Color of Change, the insurance industry has received hundreds of millions of dollars in revenue related to bail bond insurance. *See generally Selling Off Our Freedom, supra* note 34. Even though their risk in the transactions is limited and their role is largely hidden from public view, these corporations play a crucial role in the commercial bail system.

¹⁰⁷ While bond agents generally operate under a formalized power of attorney or other document establishing agency, and often have exclusive relationships with one or two surety companies, establishing direct or vicarious liability in the surety company can nevertheless prove difficult. *Compare* Complaint, *Egana v. Blair’s Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210 (E.D. La. June 1, 2018), with *Ramos v. Int’l Fidelity Ins. Co.*, 34 N.E.3d 737 (Mass. Ct. App. 2015) (holding that insurer was vicariously liable for agent’s actions in overcharging premiums). Nevertheless, failure to ensure that surety companies share responsibility for the actions of bail bond producers carries a risk of stymieing systemic reforms.

¹⁰⁸ *See, e.g.*, Ark. Code § 17-19-301(2014); Colo. Rev. Stat. § 10-23-109 (2012), Ga. Code Ann. § 17-6-30 (2010); La. Stat. Ann. § 22:1443 (2011); Mich. Comp. Laws § 750.167b(3) (2006); Miss. Code § 83-39-25 (2013); Nev. Rev. Stat. § 697.300 (2013); N.Y. Insurance Law § 6804 (McKinney 1997); N.C. Gen. Stat. § 58-71-95 (2015); N.D. Cent. Code § 26.1-26.6-08 (2015); S.C. Code § 38-53-170 (2012); Tenn. Code Ann. § 40-11-316 (2010).

¹⁰⁹ In those states with a commercial bond industry, the standard rate is generally 10 percent. This is true across states that set their maximum rates by statute and “filed rate” states. Several states, including Colorado, Georgia, Nevada, North Carolina, and South Carolina, set their maximum rates at 15 percent. *See* Colo. Rev. Stat. § 10-23-109; Ga. Code § 17-6-30; Nev. Rev. Stat. § 697.300; N.C. Gen. Stat. § 58-71-95; S.C. Code § 38-53-170. Others, such as North Dakota, allow as much as 20 percent. *See* N.D. Cent. Code § 26.1-26.6-08.

The documents setting out the approved rates are generally available from state insurance commissions, the majority of which use a public records system called the System for Electronic Rates and Form Filing (SERFF). These databases can be a treasure trove of information for exploring the business practices of bail bond producers and surety companies. However, documentation may be limited, since some states do not require filings predating the advent of SERFF in that jurisdiction to be re-filed in the electronic database.¹¹⁰

The power of the states to regulate the business of insurance is not limited to setting rates. The McCarran-Ferguson Act, which was intended to preserve states' regulatory domain over insurance matters,¹¹¹ can also complicate the applicability of federal statutory claims to bail bond transactions. The Act invalidates the application of federal law to the insurance industry when the federal law conflicts with state regulation of the business of insurance.¹¹² In the context of consumer claims against bail bond companies, the Act has three major ramifications. One is that state law claims may be more feasible in some situations where the conduct at issue clearly constitutes "the business of insurance."¹¹³ Another is that care must be taken to separate matters pertaining to the business of insurance and related but separate transactions—for example, the services of a middleman, or the separate financing of a premium.¹¹⁴ Finally, McCarran-Ferguson can be used to argue that other consumer-unfriendly federal laws, notably the Federal Arbitration Act, should be narrowly construed in disputes involving bail bonds.¹¹⁵

3. *Problematic Practices That May Give Rise to Consumer Protection Solutions*

There are three typical scenarios in which commercial bail bonds create problems for consumers.¹¹⁶ The first is collection of bonds that have been forfeited from an alleged violation of the bond agreement: for example, if the accused does not appear for a required hearing.¹¹⁷ The second involves

¹¹⁰ In Iowa, for example, any rate documents that were filed before 2010 are not included in the SERFF database. Unfortunately, the Insurance Division also destroyed paper filings after the transition to SERFF, which means that in that state the only source of approved rate information is often the surety company itself.

¹¹¹ 15 U.S.C. § 1011.

¹¹² 15 U.S.C. § 1012.

¹¹³ *Id.* By negative inference, state laws would not be subject to the reverse preemption of the McCarran-Ferguson Act.

¹¹⁴ See James O. Pearson, Jr., Annotation, *Financing of Insurance Premiums as Constituting "Business of Insurance" Within § 2 of McCarran-Ferguson Act (15 U.S.C.A. § 1012), Excluding Application of Truth in Lending Act (15 U.S.C.A. § 1601 et seq.) to Such Financing*, 51 A.L.R. FED. 743 (1981); see also *infra*.

¹¹⁵ See *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 856–59 (11th Cir. 2004); *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933–35 (10th Cir. 1992).

¹¹⁶ See generally Gonzalez, *supra* note 25, at 1399–1402.

¹¹⁷ Bail bonds are rarely declared forfeited; when they are, the bond agent retains the primary obligation for paying the forfeiture. Even when this happens, sureties can typically

the financing and collection of premiums. The third issue, often intertwined with one or both of the previous two, involves abusive contract provisions. In these three contexts, the following four broad categories of issues may arise.

a. Conduct During Collection

Because many bail bond agents also act as private law enforcement agents, the line between enforcement of the terms of the bond agreement, such as ensuring the accused's appearance for hearings, and mere debt collection often becomes blurred. Bond agents routinely use tools not available in other debt collection contexts, including physical restraint, orchestrated arrest, and intimidation to encourage the payment of installments for financed premiums.¹¹⁸ In addition, bond agents may engage in illegal and abusive practices in connection with the repossession of collateral or may enter onto private property without clear authority to do so.¹¹⁹ Many bail bond contracts purport to give bond agents the right to contact third parties or to enter into private homes without warning or permission, which happens with regularity—and may sometimes involve violence or weapons.¹²⁰

b. Abusive Contract Provisions and Rate Violations

A review of the bail bond agent and surety contracts generally available on almost any given state's SERFF database reveals a wide array of contractual provisions that may violate a myriad of consumer protection laws. These include preemptive waivers of bankruptcy rights; failure to provide proper disclosures to cosigners; language purporting to give security interests in property acquired in the future; waivers of rights to notice and commercially reasonable sale in regard to repossessed collateral; consent to entry onto private property of the accused and third parties and GPS tracking; illegal attorney fees clauses; and authorizations to obtain judgments by confession.¹²¹

collect from funds previously paid by the agents and held in reserve. *See Selling Off Our Freedom*, *supra* note 34, at 14; *see also* Gonzalez, *supra* note 25, at 1422.

¹¹⁸ Silver-Greenberg & Dewan, *supra* note 88.

¹¹⁹ *See* Complaint at 2, Cason v. 1 Bail Bonds, No. CVCV053198 (Iowa Dist. Ct. for Polk Cnty. Mar. 10, 2017).

¹²⁰ MacKenzie Elmer, *Assault, Drug Dealing: Many Iowa Bail Bondsmen Have Checked Pasts*, DES MOINES REGISTER, April 27, 2017, <https://www.desmoinesregister.com/story/news/2017/04/27/convicted-felons-bail-bonds-jail-prison-bounty-hunter/99411644/>, archived at <https://perma.cc/T6MU-ETHQ>.

¹²¹ A comprehensive overview of such provisions in California based contracts reveals similar patterns. *See The Devil in the Details: Bail Bond Contracts in California*, UCLA SCHOOL OF LAW CRIMINAL JUSTICE REFORM CLINIC 1 (2017), https://static.prisonpolicy.org/scans/UCLA_Devil%20_in_the_Details.pdf, archived at <https://perma.cc/TC49-XT7B>.

c. *Middleman Issues*

In addition to bond agents and the surety companies that underwrite them, other industry players have arisen in recent years to occupy new roles in the commercial bail market. For an additional fee, these companies may operate to procure bonds for accused persons, provide GPS monitoring, or provide other supervision services. For the consumer, these new actors may simply represent a source of yet more unaffordable debt that must be shouldered to secure personal liberty. Typical of this new breed of middlemen is Libre by Nexus, a company that procures immigration detention bonds from third-party surety companies, and also provides GPS monitoring services, while charging substantial additional fees.¹²² Over the course of many months, individuals may end up paying just in recurring fees, a sum greater than the amount of their bond.¹²³

d. *Financing*

“Financed premiums,” “credit bail,” or “credit bonding” refers to the practice of allowing the accused person or a guarantor to pay the bond premium in installments, often in return for financing fees and costs. For example, a person may be arrested and bail set at \$10,000. The accused seeks out a commercial bond agent, who charges the maximum premium amount permitted in that state—say 10 percent, or \$1,000. The accused cannot afford to pay the bond agent’s fee in its entirety upfront, so puts down \$500 and finances the remaining \$500 plus interest and fees to be paid to the bond agent in installments.

Restrictions on the availability and terms of financed premiums vary jurisdictionally. Two prominent examples of the small minority of states that explicitly disallow financed bail bond premiums are Arkansas and Indiana. In Arkansas, the practice was prohibited via judicial rulemaking, surviving a § 1983 challenge by the bail bond industry on immunity and abstention grounds.¹²⁴ In Indiana, it is a felony to fail to collect the entire premium at the time the bond is executed.¹²⁵ Other states, such as Connecticut and Maryland, explicitly allow financed premiums but regulate their terms.¹²⁶ Yet

¹²² Adolfo Flores, *Immigrants Desperate to Get Out of US Detention Can Get Trapped by Debt*, BUZZFEED (July 23, 2016), <https://www.buzzfeednews.com/article/adolfoflores/immigrant-detainees-and-bail-bond-terms>, archived at <https://perma.cc/YY85-KGRQ> (“Libre by Nexus customers sign a contract agreeing to a nonrefundable \$620 initial fee, as well as paying the \$420 monthly rental fee for the tracking bracelet and a nonrefundable one-time 20 percent premium to the bond issuer. If a client pays down 80 percent of the bond and agrees to cover the remaining 20 percent in installments, Libre by Nexus will remove the tracking device.”).

¹²³ *Id.*

¹²⁴ See *John Chism Bail Bonds Inc. v. Pennington*, 656 F. Supp. 2d 929, 938–39 (E.D. Ark. 2009), *aff’d* 411 Fed. Appx. 927 (8th Cir. 2011).

¹²⁵ Ind. Code § 27-10-4-5 (2014); *State v. Bigbee*, 292 N.E.2d 609, 611 (Ind. 1973).

¹²⁶ See Conn. Gen. Stat. § 38a-660c (2018) (mandating a minimum 35 percent down payment, a promissory note that requires all payments to be made within 15 months, and a civil

other states generally prohibit the collection of anything beyond the premium itself, or any sum exceeding a maximum fee set by statute.¹²⁷ However, the practice of offering financed bail bond premiums remains pervasive as a result of mass incarceration, unreasonably high bail, and highly active competition within the bail bond industry.

While permitted throughout most of the nation, the practice of offering financed bail bonds raises additional concerns and opportunities for abusive financing terms and acts of collection, and is controversial even within the industry itself.¹²⁸ Proponents of the practice discuss the difficulty of competing in a market where others use financed premiums, complain of being unfairly singled out when compared to other insurance products, and point out that many other bail bonds are being externally financed via credit cards.¹²⁹ Opponents generally focus on public safety concerns, including release of accused people without sufficient security; some more clear-eyed bond agents point out the potential trouble involved with getting into the “loan shark business.”¹³⁰

Understanding that the financing of the bond premium is a transaction distinct from obtaining the bond is, for two reasons, key to understanding how various consumer protection laws may provide additional safeguards for the accused person and cosigners. The first is that financing of the premium may trigger liability under a variety of consumer protection statutes that regulate lending. The second is that issues related to financing may be distinguishable from issues involving the underlying insurance product, and therefore may be able to escape reverse preemption under the McCarran-Ferguson Act. Either of these approaches, if successful, would allow the application of federal consumer protection statutes to the financing elements of the commercial bail transaction.

action if any payment remains outstanding for more than 60 days); Md. Code Regs. § 31.03.05.09 (requiring the financed premium to be evidenced by a state-generated form, and a good faith effort by the bond agent to collect).

¹²⁷ *Stillman v. Goldfarb*, 431 N.W.2d 247, 252 (Mich. Ct. App. 1988).

¹²⁸ See *From the OBA President's Desk*, THE BONDSMAN (Okla. Bondsman Ass'n, Okla. City, Okla.), Oct. 2010, at 1, http://okbondsman.com/wp-content/uploads/2017/08/OBA_News_letter_2010_Oct.pdf, archived at <https://perma.cc/W9A5-4WT8>; Comments, Michael J. Whitlock, *No Payment Terms for Criminals Some Say*, AMERICAN SURETY COMPANY BLOG (Dec. 11, 2013, 12:00 AM), <http://www.asc-usi.com/blogentry.aspx?id=4138>, archived at <https://perma.cc/X437-JRNL>.

¹²⁹ Whitlock, *supra* note 128.

¹³⁰ *Id.*

4. *Application of Specific Consumer Protection Law Claims to Commercial Bail Bond Transactions*

a. *Fair Debt Collection Practices Act & State Analogues*

Bond agents are notorious for engaging in harassing and abusive practices to collect bail premiums, including placing intimidating phone calls¹³¹ and making threats to send arrestees back to jail without having a legal basis to do so.¹³² Bond agents may try to coerce payment by contacting and even threatening arrestees' friends, families, and employers.¹³³ Agents may even deploy kidnapping and false imprisonment for extortive purposes, holding arrestees in offices until someone pays.¹³⁴

Federal and state fair debt collection laws address precisely this type of conduct, but there are complications in applying these statutes in the bail bond context. The Fair Debt Collection Practices Act (FDCPA), the primary federal statute protecting consumers from abusive behavior by debt collectors, gives consumers the right to dispute alleged debts, and regulates how and when a debt collector may contact debtors.¹³⁵ Yet, for three reasons, the FDCPA may have limited application to commercial bail bonds.

First, creditors who originate a debt are generally excluded from the purview of the FDCPA (under the "original creditor exclusion"), because the Act only regulates the conduct of third-party debt collectors.¹³⁶ In much of the reported case law, objectionable conduct is primarily conducted by bond agents acting to collect their own debts; their conduct in those instances is not covered by the FDCPA.¹³⁷ On the other hand, the original-creditor exclusion often does not exist in state law analogues to the FDCPA;¹³⁸ state laws regulating debt collection are, therefore, a potential avenue for regulation of bail bond agents.

Second, the FDCPA also exempts debts that are "incidental to a bona fide fiduciary obligation."¹³⁹ Those who collect these obligations are not generally considered to be "debt collectors" covered by the FDCPA; therefore guarantors of an obligation are exempted definitionally from the statute

¹³¹ See *Monroe v. Frank*, 936 S.W.2d 654, 657 (Tex. App. 1996).

¹³² See *Investigation of the Ferguson Police Department*, supra note 13, at 22–23.

¹³³ *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914, at *2 (S.D. Tex. Feb. 10, 2014).

¹³⁴ See Complaint at *1, *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210 (E.D. La. June 1, 2018).

¹³⁵ See 15 U.S.C. § 1692 *et seq.*

¹³⁶ 15 U.S.C. § 1692a(6)

¹³⁷ See, e.g., *Buckman v. Am. Banker's Ins. Co. of Fla.*, 924 F. Supp. 1156, 1158 (S.D. Fla. 1996); *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210 (E.D. La. June 1, 2018); *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914 (S.D. Tex. Feb. 10, 2014); *Monroe v. Frank*, 936 S.W.2d 654 (Tex. App. 1996).

¹³⁸ See, e.g., Iowa Code § 537.1301; Mich. Comp. Laws § 445.251; Cal. Civ. Code § 1788 *et seq.*

¹³⁹ 15 U.S.C. § 1692a(6)(F)

because the guarantee establishes a fiduciary relationship.¹⁴⁰ At its core, a bail bond surety is a guarantee by the bond agent to the court that the accused person shall appear, so a forfeiture resulting from a default of an appearance bond agreement may be excluded from the FDCPA under this provision.¹⁴¹ However, bail bond premium financing and other transactions related to bail bonds would not be so excluded, since they do not directly involve a guarantor relationship.

Finally, as noted above, the McCarran-Ferguson Act may prove a further barrier to employing the FDCPA unless it can be successfully argued that the targeted practice is sufficiently removed from the “business of insurance”—for example, by pointing out that acts undertaken exclusively to collect financed premiums are separate from the insurance product represented by the premium itself.¹⁴²

Buckman v. American Banker's Insurance Co. of Florida,¹⁴³ which involved the application of the FDCPA to a bail bond transaction, illustrates the effect of these limitations. The plaintiff in *Buckman* was an indemnitor who had executed a mortgage as collateral for a bail bond on behalf of her daughter.¹⁴⁴ The district court determined the surety's role in the bail bond transaction to be analogous to that of a guarantor, and thus covered under the bona fide fiduciary exclusion to the FDCPA.¹⁴⁵ On appeal, the Eleventh Circuit upheld the district court on a different and simpler rationale—the bond agent was an original creditor, and thus excluded from the FDCPA.¹⁴⁶

The Eleventh Circuit's decision in *Buckman* can be contrasted with the later decision in *Barlow v. Safety National Casualty Corp.*,¹⁴⁷ in which a district court allowed a FDCPA challenge to a bail collection practice. In *Barlow*, which, like *Buckman*, involved collection of a forfeited bond rather than a financed premium, the defendant had purchased the debt from the original creditor after default.¹⁴⁸ The case also named, as a second defendant, a debt collection agency.¹⁴⁹ The court held that *Buckman* was distinguishable, because neither defendant was an original creditor.¹⁵⁰

Additionally, the FDCPA has been used to pursue abusive debt collection practices by Libre by Nexus, the company discussed earlier that pro-

¹⁴⁰ See, e.g. *Buckman v. Am. Banker's Ins. Co. of Fla.*, 924 F. Supp. 1156, 1158 (S.D. Fla. 1996).

¹⁴¹ *Id.*

¹⁴² See Pearson, *supra* note 115.

¹⁴³ 924 F. Supp. 1156, 1158 (S.D. Fla. 1996).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Buckman v. Am. Banker's Ins. Co. of Fla.*, 115 F.3d 892, 894–95 (11th Cir. 1997).

¹⁴⁷ 856 F. Supp. 2d 828, 836–37 (M.D. La. 2012).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ However, the issue of whether the underlying debt was a fiduciary obligation, as the Eleventh Circuit held in *Buckman*, was not addressed by the *Barlow* court. *Id.* at 828–37.

cures immigration detention bonds for those facing deportation.¹⁵¹ In denying a motion to dismiss filed by Libre by Nexus, one district court found that a major part of Libre's business model as a middleman was to collect fees on behalf of third party immigration detention bond companies; therefore, the company came within the scope of the FDCPA.¹⁵²

Further, as noted above, state analogues to the FDCPA may provide relief where the FDCPA cannot.¹⁵³ These laws often do not contain exclusions either for original creditors or for fiduciaries. For example, in *Monroe v. Frank*,¹⁵⁴ a Texas bail bond agent's conduct was found actionable under the state FDCPA analogue, even where the FDCPA did not provide protection, since the state statute lacked an original creditor exclusion and featured a more expansive definition of "debt."¹⁵⁵ In California, too, unfair debt collection practices by bail bond companies are actionable under the state's Rosenthal Fair Debt Collection Practices Act.¹⁵⁶

Moreover, state analogues to the FDCPA are often part of comprehensive state law regulation of consumer transactions rather than just the debt collection covered by the FDCPA. For example, in the context of consumer transactions, many states require that certain disclosures be provided to co-signers or guarantors;¹⁵⁷ prohibit waiver of bankruptcy or other consumer rights;¹⁵⁸ and limit the extent to which attorney fees may be assessed.¹⁵⁹

b. Unfair and Deceptive Acts and Practices Statutes

Unfair and Deceptive Acts and Practices (UDAP) laws provide a privately enforceable civil right of action for consumer fraud.¹⁶⁰ These state laws can be a powerful way of providing consumers a private right of action to address abusive practices by bond agents, and do not rely upon the narrower definition of "debt" that can limit the effect of other consumer protection laws in the bail context.

¹⁵¹ See, e.g., Order On Motion To Compel, Motion To Dismiss, and Motion For Sanctions, Quintanilla Vasquez et al. v. Libre by Nexus, Inc., 4:17-cv-00755-CW (N.D. Cal. Aug. 20, 2018).

¹⁵² *Id.* Another open question for companies such as Libre by Nexus that generate significant income on GPS or other equipment rental fees is whether the Federal Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.*, or its state analogues may impose additional disclosure requirements on their activities.

¹⁵³ See *supra* notes 136–138 and accompanying text.

¹⁵⁴ 936 S.W.2d 654 (Tex. App. 1996).

¹⁵⁵ *Id.* at 660; see also *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914, at *10 (S.D. Tex. Feb. 10, 2014).

¹⁵⁶ See Gonzalez, *supra* note 25, at 1402 n.94.

¹⁵⁷ See, e.g., Iowa Code § 537.3208.

¹⁵⁸ See, e.g., Iowa Code § 537.7103(5)(b).

¹⁵⁹ See, e.g., Iowa Code § 537.2507.

¹⁶⁰ *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NAT'L CONSUMER L. CTR. (Mar. 2018), <https://www.nclc.org/issues/how-well-do-states-protect-consumers.html>, archived at <https://perma.cc/Y7AT-84EC>.

The conduct actionable under UDAP laws is stated broadly as “unfair” or “deceptive,” making it inclusive of a wide range of industries and practices.¹⁶¹ Deceptive or unfair provisions in contracts, such as unenforceable waivers of bankruptcy rights or open-ended provisions collateralizing future property, may also be actionable under UDAP under this definition, although such cases have not yet been brought. UDAP laws allow a creative advocate to connect conduct that may “feel wrong” to a cognizable cause of action, provided that the conduct can be demonstrated to be deceptive or unfair in some way. Perhaps the biggest caveat to the use of UDAP laws in the context of bail bonds is that at least 21 states exempt insurance companies from the reach of their UDAP statutes,¹⁶² which can insulate some practices of bond agents and surety companies. In short, the efficacy of these remedies varies by jurisdiction.¹⁶³

Violations of statutory or regulatory standards can sometimes constitute a “per se” UDAP violation, even where these standards do not themselves provide for a separate right of action,¹⁶⁴ under the theory that acting in violation of the law cannot be argued to be a fair or forthright industry practice. For example, bond agents who illegally orchestrate the arrest of an accused person for failure to pay a premium installment, or who violate rules related to disposition of collateral,¹⁶⁵ or who charge fees in excess of what is allowed by law¹⁶⁶ may also be subject to UDAP claims. On the other hand, some states have rejected a “per se” approach to technical violations of other laws, requiring in addition that the practice be actually unfair or deceptive and that there have been actual damage done to a consumer.¹⁶⁷ For this reason, the National Consumer Law Center rightly cautions that “consumer litigants bringing a case of first impression in a jurisdiction are advised to limit claims of per se UDAP violations to cases based on statutory violations that also involve serious consumer abuses, rather than purely technical viola-

¹⁶¹ *Id.*; see also *supra* note 51 (defining “unfair” conduct).

¹⁶² *Consumer Protection in the States*, *supra* note 160, at 1.

¹⁶³ *Id.* at 9.

¹⁶⁴ See, e.g., *Zivanic v. Wash. Mut. Bank*, No. 10-737 SC, 2010 WL 2354199 at *5 (N.D. Cal. June 9, 2010); *Hangarter v. Paul Revere Life Ins. Co.*, No. C 99-5286 JL (ADR), 2001 U.S. Dist. LEXIS 17975 at *20–21 (N.D. Cal. Sept. 21, 2001); *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002); *Schnall v. Hertz Corp.*, 93 Cal. Rptr. 2d 439, 459 (Cal. Ct. App. 2000); *Stevens v. Superior Court*, 89 Cal. Rptr. 2d 370, 376 (Cal. Ct. App. 1999); *Yale New Haven Hosp., Inc. v. Mitchell*, 662 A.2d 178, 183 (Conn. Super. Ct. 1995).

¹⁶⁵ See *Habicht v. Sullivan*, No. CV040833934, 2006 WL 1644606 at *3 (Conn. Super. Ct. May 25, 2006) (suing for failure to return truck that was collateral for bail surety bond).

¹⁶⁶ See *Ramos v. Int’l Fidelity Ins. Co.*, 34 N.E.3d 737, 741 (Mass. Ct. App. 2015).

¹⁶⁷ See, e.g., *Morales v. Walker Motors Sales, Inc.*, 162 F. Supp. 2d 786, 790 (S.D. Ohio 2000); *Riopta v. Amresco Residential Mort. Corp.*, 101 F. Supp. 2d 1326, 1332 (D. Haw. 1999); *Haw. Cmty. Fed. Credit Union v. Keka*, 11 P.3d 1, 14 (Haw. 2000); *Mid-Am. Nat’l Bank v. First Sav. & Loan Ass’n*, 515 N.E.2d 176, 182 (Ill. App. Ct. 1987) (disclosure violation of National Flood Act not per se UDAP violation); *Coffey v. Peoples Mortgage & Loan*, 408 So. 2d 1153, 1155 (La. Ct. App. 1981) (violation of technical usury requirement is not per se violation); *Griffin v. Allstate Ins. Co.*, 44 Pa. D. & C.4th 261, 264 (Pa. C.P. Phila. Cty. 1999).

tions of other statutes.”¹⁶⁸ Even in states that do not take a per se approach, however, violation of another statute may serve as an evidentiary factor that could be part of a wider case to show a practice to be unfair or deceptive.¹⁶⁹

c. *Truth in Lending Act*

The Truth in Lending Act (TILA)¹⁷⁰ is a federal statute that requires lenders extending credit to provide a detailed and accurate disclosure of the terms of financing to a consumer prior to consummating a credit transaction. The primary disclosures regulated by TILA involve the “finance charge”—that is, how much the extension of credit will ultimately cost the consumer. TILA standardizes the manner in which borrowing costs are calculated and disclosed.¹⁷¹ The statute reflects Congress’s effort to guarantee the accurate and meaningful disclosure of the costs of consumer credit, thereby enabling consumers to make informed choices in the credit marketplace and avoid abusive lending.¹⁷² The law is implemented by Regulation Z, under which a creditor must make a number of specific disclosures in relation to the cost of credit clearly and conspicuously in writing, in a form that the consumer may keep.¹⁷³

The most obvious application of TILA in the context of bail bonds is in the area of financed premiums. To the extent that statutorily adequate disclosures of the cost of this financing are not made to borrowers, TILA may provide at least some relief from unconscionable and onerous financing terms.¹⁷⁴

The two primary barriers to TILA claims in the context of bail bonds are the McCarran-Ferguson Act, and whether the various fees associated with financed premiums meet TILA’s definition of “finance charge.” *Buckman* exemplifies how the McCarran-Ferguson Act may serve as an obstacle to TILA claims in the context of bail bonds.¹⁷⁵ Notably, however, *Buckman* did not involve a financed premium, but rather a forfeiture after an accused

¹⁶⁸ See NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 3.2.7.5 (9th ed. 2016), <https://library.nclc.org/udap>, archived at <https://perma.cc/75QT-JQCJ>.

¹⁶⁹ See, e.g., *Culbreath v. Golding Enters., L.L.C.*, 872 N.E.2d 284, 288 (Ohio 2007); *State ex rel. Stovall v. DVM Enters., Inc.*, 62 P.3d 653, 657 (Kan. 2003); *State ex rel. Stovall v. Confimed.com*, 38 P.3d 707, 712 (Kan. 2002).

¹⁷⁰ 15 U.S.C. §§ 1601–1667f (2012).

¹⁷¹ *Id.*; Truth in Lending (Regulation Z), 12 C.F.R. §§ 226.1–226.59 (2011); see also NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING (9th ed. 2015), available at <https://library.nclc.org/til>, archived at <https://perma.cc/XJ3T-FZDV>.

¹⁷² 15 U.S.C. § 1601(a) (2012) (stating that the statutory purpose is “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him”).

¹⁷³ 12 C.F.R. § 226.17 (2009).

¹⁷⁴ See, e.g., Complaint at *4, *Egana v. Blair’s Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210 (E.D. La. June 1, 2018).

¹⁷⁵ *Buckman v. Am. Bankers Ins. Co. of Fla.*, 924 F. Supp. 1156, 1157–58 (S.D. Fla. 1996).

person's failure to appear. In the district court, the surety company successfully invoked the McCarran-Ferguson Act to dismiss not only the plaintiff's FDCPA claim, as noted *supra*, but his TILA claim as well.¹⁷⁶ The court determined that the underlying obligation was part of "the business of insurance," and TILA was therefore inapplicable under McCarran-Ferguson.¹⁷⁷ The Eleventh Circuit affirmed on different grounds.¹⁷⁸ Rather than ruling on the McCarran-Ferguson preemption argument, the Court of Appeals held that the underlying transaction was not a covered extension of credit under TILA, because there was no underlying financing of the premium upon which the disclosure rights provided for by TILA could attach.

In any event, the McCarran-Ferguson Act does not prevent the federal government from regulating the *financing* of insurance premiums. Financing premiums does not constitute the "business of insurance"—even when the same company that provides insurance also finances the premium.¹⁷⁹ TILA should therefore apply to financed premium transactions; courts have generally distinguished financed premiums from the "business of insurance" for the purposes of TILA claims.¹⁸⁰ Unsurprisingly, this argument has been at least preliminarily successful in the bail bond context in the ongoing *Egana* case.¹⁸¹ The district court in that case pointed out that "[i]t would be anomalous to hold that [an insurance company's] premium financing activities are the 'business of insurance' but that the identical activities of the finance company . . . are not.'" ¹⁸² Therefore, "it does not make sense that Defendants' financing activities should be immune from TILA merely because they are conducted in the context of bail bonding."¹⁸³

d. UCC and State Mortgage Foreclosure Law

Many bail bond transactions are collateralized by automobiles, homes, and other property belonging to accused persons or their indemnitors. This is done not only to protect the bond agent and surety company financially in case a bond is forfeited, but also to enforce full payment of financed premiums. It is common for bond agents to engage in illegal and abusive practices in connection with the repossession of collateral. For example, a bond agent may illegally attempt to force bail bond cosigners to turn over property used as collateral even in cases where the arrestee complied with the terms of

¹⁷⁶ *Id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See* Buckman v. Am. Bankers Ins. Co. of Fla., 115 F.3d 892, 894 (11th Cir. 1997).

¹⁷⁹ *See* Pearson, *supra* note 115.

¹⁸⁰ *See* Cody v. Cmty. Loan Corp. of Richmond Cty., 606 F.2d 499, 502 (5th Cir. 1979) (holding that "premium financing by an insurance company in connection with the sale of an insurance policy is not the 'business of insurance' for McCarran Act purposes, and that [TILA] is thus applicable to such a loan transaction").

¹⁸¹ Complaint at *4, *Egana v. Blair's Bail Bonds, Inc.*, No. 17-5899, 2018 WL 2463210 (E.D. La. June 1, 2018).

¹⁸² *Id.* (quoting Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468, 472 (5th Cir. 1979)).

¹⁸³ *Id.*

bail.¹⁸⁴ A recent report by New York City's comptroller found evidence that "some companies . . . fail[] to return collateral as required under contract."¹⁸⁵ In regulating repossessions and foreclosures related to bail bonds, many states rely entirely on laws of general applicability dealing with these topics, but some have imposed additional bail bond-specific requirements.¹⁸⁶

Laws of general applicability provide a vehicle to regulate repossession of bail bond collateral. For instance, UCC Article 9 generally deals with disposition of collateral other than real property, and regulates the use of self-help to obtain collateral.¹⁸⁷ An advocate should first determine whether there is in fact a valid security interest that can be enforced, without which a repossession is simply theft and conversion. Less sophisticated or experienced bond agents may not always follow the formalities necessary to establish a security interest. Even where the security interest is valid, irregularities in repossession may give rise to actions for damages, such as failure to give proper notices of sale and disposition of collateral.¹⁸⁸ In addition, statutory damages may be available for use of violence or other illegal tactics under the UCC's prohibition on "breach[ing] the peace" during repossession.¹⁸⁹ Breaches of the peace may include violence,¹⁹⁰ breaking into private property or enclosures to take a vehicle,¹⁹¹ or impersonating a police officer,¹⁹² but they are not limited to these instances; indeed, the argument can generally be made any time the person executing the repossession violates another law to accomplish it.¹⁹³ Additionally, violation of UCC provisions or special bail bond collateral provisions that may exist in state law may give rise to a claim under UDAP even where these statutes themselves do not themselves provide a right of action.

To the extent that a bail bond transaction includes collateralization of homes and other real property, forfeitures and financed premium defaults

¹⁸⁴ See, e.g., *London v. Gums*, No. CIV.A. H-12-3011, 2014 WL 546914, at *2 (S.D. Tex. Feb. 10, 2014); see also *Cason v. 1 Bail Bonds*, No. CVCV053198 (Iowa Dist. Ct. for Polk Cty. Mar. 10, 2017).

¹⁸⁵ *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, NEW YORK CITY COMPTROLLER (Jan. 17, 2018), https://comptroller.nyc.gov/wp-content/uploads/documents/The_Public_Cost_of_Private_Bail.pdf, archived at <https://perma.cc/2GK3-9ANS>.

¹⁸⁶ See, e.g., MD. CODE REGS. 31.03.05.13–.14 (2018) (requiring full description of collateral by affidavit, and requiring immediate return of collateral after bond agreement successfully discharged [less costs]); NEV. REV. STAT. ANN. § 697.320 (West 2017) (collateral must be "reasonable in relation to the face amount of the bond"; collateral cannot be transferred to another, or transported outside of the state; collateral must not be mingled with bond agent or surety's assets; owner entitled to any surplus after forfeiture; etc.).

¹⁸⁷ U.C.C. §§ 9-101–709 (AM. LAW INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2017).

¹⁸⁸ *Id.* § 9-611.

¹⁸⁹ *Id.* § 9-609.

¹⁹⁰ See generally Annotation, *Liability for Assault or Trespass in Forcibly Retaking Property Sold Conditionally*, 105 A.L.R. 926 (1936).

¹⁹¹ *Id.*

¹⁹² See, e.g., *Fleming-Dudley v. Legal Investigations, Inc.*, No. 05 C 4648, 2007 WL 952026 at *10–13 (N.D. Ill. Mar. 22, 2007).

¹⁹³ See generally Annotation, *Liability for Assault or Trespass*, *supra* note 190.

may also be enforced by foreclosure. Unlike laws regulating the collateralization of personal property, which are roughly uniform throughout the nation, foreclosure law is a patchwork that will lead to different outcomes depending on jurisdiction, and thus cannot be fully addressed here. Generally speaking, however, these laws provide at least some level of procedural protections to homeowners facing foreclosure.¹⁹⁴

Demands for collateral may also create other legal responsibilities for bond agents. For example, a bail bond agent who takes collateral may have a fiduciary duty arising from the collateralization agreement, which can create additional obligations to make affirmative disclosures to the principal about material terms.¹⁹⁵

B. Private Debt Collection Contractors

The bail bond industry has been the focus for most efforts thus far to apply consumer protection law in the criminal legal context. But commercial bail is far from the only example of private profiteering from the criminal legal system that can give rise to consumer abuses.

One of the most pervasive forms of privatization in the criminal legal system involves the outsourcing of criminal legal system debt collection to private contractors. This outsourcing has created a market for collection contractors with nationwide scope. For example, Linebarger, Goggan, Blair, and Sampson LLP, one of the largest debt-collection firms, boasts of a portfolio of over \$10 billion in public debt¹⁹⁶ and over 2,300 public sector clients.¹⁹⁷ Collection firms are often paid through additional fees added on top of the original balance, to be paid by the debtor. Some of these fees are statutorily mandated, and many can be quite onerous: Florida, for example, provides for a fee of up to 40 percent of the balance owed.¹⁹⁸

The general practice of these companies involves “skip tracing”—that is, using sophisticated techniques to locate and gather other information about debtors; sending collection letters and making phone calls; setting up

¹⁹⁴ See generally NATIONAL CONSUMER LAW CENTER, FORECLOSURE (5th ed. 2014).

¹⁹⁵ See, e.g., CAL. CODE REGS. tit. 10, § 2088 (2018) (establishing that “[a]ny bail licensee who receives collateral in connection with a bail transaction shall receive such collateral in a fiduciary capacity”); see also *Cardenas v. Am. Surety Co.*, No. D041392, 2004 WL 206286, at *7 (Cal. Ct. App. Feb. 4, 2004) (noting in the context of a bail bond, “[t]he failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary’s motives or the principal’s decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud.”); *People v. V.C. Van Pool Bail Bonds*, 246 Cal.App.3d 303, 306 n.2 (Cal. Ct. App. 1988) (stating that failure of a bail bond agent who holds collateral to notify a principal about a bond exoneration hearing may be a breach of fiduciary duty).

¹⁹⁶ *Our Services*, LINEBARGER, GOGGAN, BLAIR, AND SAMPSON LLP (2018), <https://www.lgbs.com/our-services/>, archived at <https://perma.cc/BVC6-VKEP>.

¹⁹⁷ Blake Ellis & Melanie Hicken, *The Secret World of Government Debt Collection*, CNNMONEY (Feb. 17, 2015), <https://money.cnn.com/interactive/pf/debt-collector/government-agencies/index.html>, archived at <https://perma.cc/QW8J-RQ3X>.

¹⁹⁸ FLA. STAT. § 938.35 (2011).

payment plans; engaging in garnishment of wages and bank accounts; and acting as a gatekeeper to reinstatement of driver's licenses and other privileges. Direct threats of incarceration or reincarceration are common, and often lead to onerous and unsustainable payment plans from otherwise collection-proof debtors driven by fear.¹⁹⁹ In some cases, these threats are made in situations where the law of the jurisdiction would not actually provide for incarceration under any theory. Collectors also often claim that bankruptcy law is inapplicable to criminal legal system debt, which is not accurate as a general statement even though it may be true in the context of certain types of criminal legal debts, as discussed below.²⁰⁰

Private debt collection companies fall squarely within the FDCPA's definition of debt collector, provided of course that the underlying obligation falls within the statute's definition of "debt."²⁰¹ Therefore, in the context of criminal legal debt collection by private companies, two threshold definitional questions must be answered to determine whether the FDCPA applies: whether the underlying obligation is a debt covered by the FDCPA, and whether the entity doing the collecting is a covered debt collector.²⁰² Unlike in the context of bail bonds, the original creditor exclusion is not generally a problem because these companies act to collect debt on behalf of another (here, the government).

Generally speaking, a "debt" under the FDCPA may involve an obligation owed to a state actor. However, courts have narrowly applied the definition of debt to include only those obligations arising from an underlying *quid pro quo* transaction where the debtor receives some sort of service.²⁰³ Purely punitive fines and, arguably, victim restitution are, on the other hand, excluded.²⁰⁴ While the application of the FDCPA to criminal legal system debt is still in its infancy, under this logic the advocate may still argue that user fees—as distinguished from punitive fines or victim restitution—such as pay-to-stay incarceration fees, indigent defense reimbursement, collection fees, and supervision fees are all "debts" under the FDCPA. As the criminal legal system has shifted over time to a structure where more and more of the total share of debt arises from "user fees,"²⁰⁵ and given the increasing in-

¹⁹⁹ Ellis & Hicken, *supra* note 197.

²⁰⁰ *Confronting Criminal Justice Debt*, *supra* note 11.

²⁰¹ 15 U.S.C. § 1692a(6)

²⁰² *Id.*

²⁰³ See, e.g., *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 407 (3d Cir. 2000).

²⁰⁴ See, e.g., *Gulley v. Markoff & Krasny*, 664 F.3d 1073, 1074–75 (7th Cir. 2011) (holding that fines do not qualify as debts); *Stubbs v. City of Center Point, Alabama*, 988 F. Supp. 2d 1270, 1276 (N.D. Ala. 2013) ("[A] traffic ticket does not constitute a 'debt' under the FDCPA.").

²⁰⁵ For example, as of June 2018 in Iowa, 32 percent of the \$546.8 million owed in criminal cases is for indigent defense reimbursement (\$172.9 million total). FISCAL SERVICES DIVISION, LEGISLATIVE SERVICES AGENCY, FY 2018 COURT DEBT COLLECTION REPORT (2018), <https://www.legis.iowa.gov/docs/publications/BL/969834.pdf>, archived at <https://perma.cc/2TJ3-ACJB>.

volvement of private actors to collect this debt, the FDCPA and state analogues have gained more regulatory relevance.

In the case of indigent defense reimbursement (i.e., full or partial compensation due to the state for the cost of defense), the case for application of consumer protection statutes such as the FDCPA is strengthened by equal protection principles. In *James v. Strange*,²⁰⁶ the Supreme Court struck down a Kansas statute allowing the state to enter civil judgment against an indigent woman to recoup the cost of her defense.²⁰⁷ The statute also provided that such individuals could not use laws known as “debtor’s exemptions,” which are used to protect property and income from garnishment and other involuntary collection processes.²⁰⁸ The Court invalidated the statute on equal protection grounds, finding that there was no rational basis to treat low-income debtors more harshly than those with greater financial means.²⁰⁹ The rule derived from *James* was that states could not employ collection methods that would treat a debtor owing indigent defense reimbursement to the State more harshly than an ordinary civil judgment debtor.²¹⁰ Later cases extended this rationale to investigator and expert fees,²¹¹ jury fees,²¹² and the costs of interpreters.²¹³ In the context of the subset of criminal legal system debt covered by *James*—although this connection has not yet been tested in court—it would seem that to deny debtors the protection of the FDCPA is to treat them more harshly than ordinary civil judgment debtors and thus may be a denial of equal protection.

In addition to the threshold definitional question of what constitutes a debt for FDCPA purposes, advocates advancing FDCPA claims must answer the question of who is a covered “debt collector.” For example, the FDCPA does not regulate the conduct of “any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt in the performance of [their] official duties.”²¹⁴ However, courts have concluded that this provision of the Act does not apply to private businesses collecting state-issued debt. For instance, in *Gillie v. Law Office of Eric Jones*,²¹⁵ the Sixth Circuit rejected an argument by a debt collection firm, appointed by the Ohio Attorney General to collect state-connected student

²⁰⁶ 407 U.S. 128 (1972).

²⁰⁷ *See id.* at 140–42.

²⁰⁸ *See id.* at 130–31.

²⁰⁹ *See id.* at 141.

²¹⁰ *See id.*

²¹¹ *Martin v. State*, 405 S.W.3d 944, 948 (Tex. App. 2013).

²¹² *State v. Rideau*, 943 So. 2d 559, 571 (La. Ct. App. 2006).

²¹³ *State v. Diaz-Farias*, 362 P.3d 322, 328 (Wash. Ct. App. 2015).

²¹⁴ Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6)(c) (2010).

²¹⁵ 785 F.3d 1091 (6th Cir. 2015), *rev’d on other grounds and remanded sub nom. Sheriff v. Gillie*, 136 S. Ct. 1594 (2016), and *cert. granted, judgment vacated sub nom. Jones v. Gillie*, 136 S. Ct. 2446 (2016).

loans, that it was excluded from the FDCPA as an “officer of the state.”²¹⁶ Although *Gillie* was ultimately overturned by the Supreme Court on other grounds,²¹⁷ this part of the Sixth Circuit ruling remains good law, providing strong support for the argument that the FDCPA covers private debt collection contractors.

The FDCPA prohibits a wide degree of abusive conduct by covered debt collectors. In the criminal legal system debt context, the most relevant of these include false threats of arrest for nonpayment;²¹⁸ communicating with third parties about the debt;²¹⁹ misrepresenting the character, amount, or status of a debt;²²⁰ failure to abide by requests to cease future communications;²²¹ and deceptive or misleading practices generally.

In the context of criminal legal debt, the harshest remedy of all is of course incarceration for failure to pay. One major difference between criminal legal system debt and private sector civil debt is that, while it is generally never permissible to incarcerate a debtor for simply failing to pay the latter, a willful refusal to pay the former may indeed lead to incarceration. But it is well established that ability to pay is an absolute defense to this harsh remedy, because the failure to pay is not willful in its absence.²²² Therefore, in situations where incarceration is a possible sanction for nonpayment, advocates can argue that a collection agency’s failure to explicitly inform the debtor that ability to pay is a defense to incarceration is actionably misleading under the FDCPA.

The test for determining whether a debt collector violated the FDCPA is objective and does not depend on whether the debt collector intended to deceive or mislead the consumer. Instead, courts employ the “least sophisticated consumer” standard so that liability turns on whether a debt collector’s communication would mislead an unsophisticated but reasonable consumer.²²³ The least sophisticated consumer standard “ensure[s] that the FDCPA protects all consumers, the gullible as well as the shrewd . . . the ignorant, the unthinking and the credulous.”²²⁴ Without the critical knowledge that the penalty of incarceration is limited to cases in which debtors fail to pay what they are reasonably able to pay, unsophisticated but reasonable consumers would be very likely to be misled to believe that they would be

²¹⁶ *Law Office of Eric Jones*, 785 F.3d at 1098 (“The FDCPA is a broad remedial statute . . . with limited, clearly defined exceptions. We find no justification for diluting its protection by broadly interpreting the term ‘officer or employee’ to include independent contractors.”)

²¹⁷ *Sheriff v. Gillie*, 136 S. Ct. 1594, 1594 (2016).

²¹⁸ 15 U.S.C. § 1692e(4)–(5).

²¹⁹ 15 U.S.C. § 1692c(b).

²²⁰ 15 U.S.C. § 1692e(2).

²²¹ 15 U.S.C. §§ 1692b(6), 1692c(a)(2).

²²² *Bearden v. Georgia*, 461 U.S. 660, 673 (1983).

²²³ *See, e.g., Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1163 (9th Cir. 2006).

²²⁴ *Clomon v. Jackson*, 988 F.2d 1314, 1318–19 (2d Cir. 1993) (internal quotations and citations omitted).

incarcerated if they did not pay the debt.²²⁵ Being forced to act on a half-statement would persuade consumers to unnecessarily pay money that would otherwise be dedicated to the necessities of life, subjecting them and their families to eviction, foreclosure, hunger and other fundamental deprivations in order to preserve their physical liberty. Conversely, a full explanation of both penalty and defense may instead lead them to the viable alternative of asserting inability to pay in the proper forum. To the extent such a requirement would seem to be more than would be required of debt collectors outside of the criminal legal system context, this may be explained by the fundamental nature of the right at issue: personal liberty.²²⁶

Advocates addressing cases involving criminal legal system debt collection should also consider whether state laws, such as UDAP statutes, might be useful tools for debtors facing criminal legal system debt. One benefit of UDAP laws, as opposed to the FDCPA, is that UDAP laws provide a broad cause of action for unfair and deceptive acts generally, and are not limited to the FDCPA's restrictive definition of "debt."²²⁷ Accordingly, they may have wider coverage for conduct related to collection of all criminal legal system debt, not just those subtypes with a transactional or user fee nature. However, some state UDAP laws specifically exclude collection agencies from coverage,²²⁸ and UDAP plaintiffs do not benefit from the FDCPA's least sophisticated consumer standard, which may make some claims more difficult to assert than under the FDCPA.

C. Criminal Legal Debt, Disparate Impact, and the Equal Credit Opportunity Act

Applying consumer protection laws to bail and to government fines and fees may ameliorate some of the most abusive aspects of the criminal legal system. And since communities of color are disproportionately those who have contact with that system, preventing abuses across the board could disproportionately benefit those same communities. Given, however, that racial disparities have driven both mass incarceration and the explosion of criminal legal system debt, the fundamental interests of justice may best be served by attacking those disparities directly. One possible avenue for such a direct

²²⁵ A similar violation-by-omission was recently found in the Seventh Circuit case of *Pantoja v. Portfolio Recovery Assocs.*, 852 F.3d 679 (7th Cir. 2017), *cert denied*, 138 S. Ct. 736 (2018). In that case, corresponding with debtors without also warning them that certain actions they took could revive a debt otherwise outside of the statute of limitations was held to be a violation of the FDCPA. *Id.* at 687.

²²⁶ See *Bearden*, 461 U.S. 660 at 674.

²²⁷ See *supra* note 204 and accompanying text.

²²⁸ Carolyn Carter, *Consumer Protection In The States: A 50-State Evaluation Of Unfair And Deceptive Practices Laws*, NAT'L CONSUMER LAW CTR. 1, 19 (2018), <https://www.nclc.org/issues/how-well-do-states-protect-consumers.html>, *archived at* <https://perma.cc/3SL3-2FAV>.

attack is the Equal Credit Opportunity Act (ECOA),²²⁹ which provides a vehicle for both disparate treatment and disparate impact²³⁰ claims regarding discriminatory treatment in the provision of credit. Unlike some other consumer protection laws, the ECOA regulates the behavior of both state and private actors,²³¹ provided that the underlying transaction falls within the definition of an extension of “credit” as defined by the Act.²³² At the time of publication, application of the ECOA to criminal legal system debt has yet to be tested but is nevertheless an avenue that shows some promise.

The ECOA generally prohibits creditors from taking adverse actions against prospective applicants on the basis of membership in a protected class, because all or part of the applicant’s income is derived from public assistance, or in retaliation for the exercise of rights under the ECOA itself.²³³ The ECOA can therefore be a vehicle to challenge the structural racism that drives mass incarceration and disparate treatment of people of color in the criminal legal system—even if the challenged practices do not, on their face, reference race. Furthermore, because the ECOA covers every aspect of a credit transaction,²³⁴ it applies to both the initial terms of credit as well as to collection procedures.

In contrast to the more restrictive definitions of debt under the FDCPA or TILA, debt is defined broadly in the ECOA as “the right granted by a creditor to a debtor to defer payment of debt . . . or to purchase property or services and defer payment therefor.”²³⁵ Unlike TILA, no finance charge is required for ECOA coverage, and unlike the FDCPA, the underlying debt need not be transactional in nature. For purposes of the ECOA, an “applicant” includes “any person who applies to a creditor directly for an exten-

²²⁹ Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2010).

²³⁰ In the current regulatory climate, it is with a significant degree of caution that the authors raise the possibility of disparate impact claims under the ECOA. In April 2018, President Trump signed a Senate resolution officially disapproving of CFPB Bulletin 2013-02, which laid out that agency’s interpretation of disparate impact under the ECOA. This act was followed by a public statement by acting CFPB Director Mulvaney that the agency would be reviewing the ECOA based on “a recent Supreme Court decision distinguishing between antidiscrimination statutes that refer to the consequences of actions and those that refer only to the intent of the actor,” strongly implying that the future of disparate impact under the ECOA is in question. See Press Release, Consumer Fin. Prot. Bureau, Statement of the Bureau of Consumer Financial Protection on enactment of S.J. Res. 57 (May 21, 2018), <https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/>, archived at <https://perma.cc/P2MJ-DHLS>.

²³¹ 15 U.S.C. § 1691a(e)–(f).

²³² *Id.*; see also 15 U.S.C. § 1691a(d).

²³³ The ECOA provides, among other things, that “[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant’s income derives from any public assistance program.” 15 U.S.C. § 1691(a). See generally NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION (6th ed. 2013), <https://library.nclc.org/cd>, archived at <https://perma.cc/4AGD-CJST>.

²³⁴ 15 U.S.C. § 1691a.

²³⁵ 15 U.S.C. § 1691a(d).

sion, renewal, or continuation of credit[.]”²³⁶ A “creditor” is “any person who regularly extends, renews, or continues credit . . . or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.”²³⁷

The ECOA specifically prohibits taking “adverse action” based on a prohibited classification. This may include the discouragement of applications,²³⁸ a denial of credit,²³⁹ or offering credit on less favorable terms.²⁴⁰ Any creditor taking adverse action against an applicant, or an existing account holder, must notify the applicant of such action within 30 days.²⁴¹ If a creditor denies credit, the notification must contain either specific reasons for the denial, or a statement that the applicant can request those reasons within 60 days.²⁴²

The ECOA may be a useful tool to challenge discriminatory practices in the collection of criminal legal debt in two ways. The first involves criminal legal debt installment payment plans, administered either by government actors or by private debt collection contractors. For example, depending on the jurisdiction, people who owe criminal legal debt often enter into payment plans with a court, clerk, prosecutor, or any number of private actors in order to avoid license sanctions, garnishment, or incarceration. These plans would appear to fit under the ECOA’s broad definition of “credit” as a deferral of payment of debt.²⁴³ A debtor who directly applies for such a plan should be an “applicant” under the ECOA, and any entity that regularly extends payment plans should be a “creditor.”²⁴⁴ Examples of adverse actions under this scenario may include common problems associated with these installment payment plans: higher down payment requirements, higher installment amounts, disparities in grace periods, denial of mid-plan modifications based on change of circumstances, or refusal to enter into a payment plan in the first instance.

The second potential use of the ECOA in the context of criminal legal debt involves instances of deferred user fees for a service or tangible item received by the criminal legal system debtor. This may include pay-to-stay jail fees, recoupment of “indigent defense,” or any other cost imposed after the service is rendered. Examples of adverse action in this scenario may include less favorable outcomes in ability to pay determinations, as well as the payment plan-related issues mentioned above.

While litigation attacking the racial disparities underlying the explosion of criminal debt is the ultimate purpose of an ECOA-focused approach, this

²³⁶ 15 U.S.C. § 1691a(b).

²³⁷ 15 U.S.C. § 1691a(e).

²³⁸ 12 C.F.R. § 10024(b) (2013).

²³⁹ 15 U.S.C. § 1691a(d)(6).

²⁴⁰ *Id.*

²⁴¹ 15 U.S.C. § 1691a(d)(1).

²⁴² 15 U.S.C. § 1691a(d)(2)(a)–(b).

²⁴³ 15 U.S.C. § 1691a(d).

²⁴⁴ 15 U.S.C. § 1691a(b); 15 U.S.C. § 1691a(e).

application of the ECOA to criminal legal debt remains untested. For that reason, it may be tactically advantageous to first test the waters with a case that does not involve simultaneously proving that the ECOA is applicable and also proving disparate impact. One candidate for such a case may involve a facial violation of the ECOA's source of income provision, which prohibits adverse treatment based on receipt of public assistance.²⁴⁵ To the extent payment plan policies offer less favorable terms for those who receive public assistance benefits like Social Security, SSDI or TANF, they may be actionable under the ECOA.²⁴⁶ For example, if a payment plan provided that those whose sole income came from disability benefits did not qualify for a plan, but wage earners could automatically enter into the same plan, then that might constitute a cause of action under the ECOA.

D. Governmental Collection of Fines and Fees

The intersection of consumer protection law and criminal legal debt is not limited to actions against private parties. As application of the ECOA to criminal legal debt illustrates, focusing solely on private actors may unnecessarily narrow the potential impact of consumer protection law in the criminal legal arena. That potential impact is particularly significant in the context of defensive claims, such as bankruptcy and the assertion of debtor's exemptions—that is, laws that protect certain income and assets from involuntary collection. Advocates may also consider bringing affirmative procedural due process claims concerning a court's failure to accord a person who has been through a criminal legal process meaningful opportunities to assert such defensive claims.²⁴⁷

1. Bankruptcy

Bankruptcy can be a powerful remedy for debtors mired in criminal legal debt. However, like many of the applications of consumer protection law discussed in this Article, the application of bankruptcy law is promising but nuanced, and does not provide full coverage for every type of criminal legal debt.²⁴⁸

²⁴⁵ 15 U.S.C. § 1691(a)(2).

²⁴⁶ See *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 709 (5th Cir. 2017) (finding mortgage applicants plausibly alleged that they applied for mortgage, that mortgage originator refused to consider their Section 8 public assistance income in assessing their creditworthiness, and that, as a result, they received mortgage loans on less favorable terms and in lesser amounts than they would have received had their Section 8 income been considered).

²⁴⁷ For example, systemic denial of defensive consumer protection claims has been the basis of affirmative claims under 42 U.S.C. § 1983. See, e.g., *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969); see also *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980).

²⁴⁸ A more complete exposition on the interaction between criminal justice debt and bankruptcy can be found in *Confronting Criminal Justice Debt: A Guide for Litigation*, NAT'L CONSUMER L. CTR. (Sept. 2016), <http://cjpp.law.harvard.edu/assets/CJD-LitigationGuide.pdf>, archived at <https://perma.cc/SGA8-XXB6>.

The two most important elements of relief in bankruptcy in the context of criminal legal debt are the automatic stay and the discharge. The automatic stay is a global injunction that takes effect immediately after the filing of the bankruptcy petition, and enjoins any action taken to collect a debt listed in a bankruptcy petition without first obtaining leave from the court.²⁴⁹ Anyone violating this injunction is subject to damages and further injunctive and declarative relief.²⁵⁰ In a criminal legal debt context, the application of the automatic stay is generally not effective as a remedy to prevent or interrupt incarceration,²⁵¹ but may be used to prevent offset of tax refunds or public benefits, garnishment, or denial of licenses and other privileges.²⁵²

Discharge is the ultimate relief sought by a debtor, to be granted at the conclusion of her bankruptcy case. Discharged debts are no longer collectible unless reaffirmed in writing,²⁵³ and any action taken to collect a discharged debt subjects the creditor to damages, plus injunctive and declarative relief.²⁵⁴ The general rule is that all debt may be discharged, unless subject to an exception enumerated in the Bankruptcy Code.²⁵⁵ In the context of criminal legal debt, the debt most commonly exempted from discharge concerns a “fine, penalty or forfeitures payable to and for the benefit of a governmental unit[.]”²⁵⁶ While the statute limits the exception so as not to include “compensation for actual pecuniary loss,”²⁵⁷ the Supreme Court’s 1987 decision in *Kelly v. Robinson* ascribed a much broader scope to this exception than implied by the statutory language alone, in effect rewriting the provision.²⁵⁸ In *Kelly*, a debtor attempted to discharge a victim restitution award.²⁵⁹ The debtor argued that this award was “compensation for actual pecuniary loss[.]” and was thus dischargeable in bankruptcy.²⁶⁰ The Court disagreed on two grounds. First, although the award was calculated to cover precisely the State’s pecuniary loss, the Court held that it served both a compensatory and a punitive purpose, and further, that the punitive dimension of restitution invoked the exception for discharging fines.²⁶¹ Second, the Court found principles of federalism persuasive and expressed its “deep conviction that federal bankruptcy courts should not invalidate the results of state crimi-

²⁴⁹ 11 U.S.C. § 362.

²⁵⁰ 11 U.S.C. § 362(k); see NATIONAL CONSUMER LAW CENTER, CONSUMER BANKRUPTCY LAW AND PRACTICE Ch. 9 (11th ed. 2016), available at <https://library.nclc.org/node/99508>, archived at <https://perma.cc/Q8TB-DSNJ> (discussing the automatic stay).

²⁵¹ See *Confronting Criminal Justice Debt: A Guide for Litigation*, *supra* note 248, at 71–74.

²⁵² *Id.*

²⁵³ 11 U.S.C. § 727.

²⁵⁴ 11 U.S.C. § 524.

²⁵⁵ 11 U.S.C. § 523.

²⁵⁶ 11 U.S.C. § 523(a)(7).

²⁵⁷ *Id.*

²⁵⁸ *Kelly*, Conn. Chief State’s Att’y, et al. v. Robinson, 479 U.S. 36 (1986).

²⁵⁹ *Id.* at 39.

²⁶⁰ *Id.* at 43.

²⁶¹ *Id.* at 52.

nal proceedings.”²⁶² Accordingly, the Court held that this exception “preserv[ed] from discharge any condition a state criminal court imposes as part of a criminal sentence.”²⁶³

Based on the Supreme Court’s reasoning in *Kelly*, courts have created a complicated patchwork of discharge exceptions and caveats for criminal legal debt, with considerable variation across jurisdictions. Although exceptions to discharge are to be construed narrowly,²⁶⁴ courts have nevertheless expanded *Kelly* beyond its limited holding concerning victim restitution.²⁶⁵ However, in recent decades, the legal landscape in which *Kelly* was decided has fundamentally changed. The explosion of cost-shifting user fees designed to place the onus of funding the courts largely on low-income people in the criminal system, as well as the crisis in access to reasonable bail, have undermined the decision’s core assumptions.²⁶⁶ In contrast to punitive fines, and the dual compensatory-punitive function of victim restitution, these user fees are imposed on a transactional basis, and primarily serve the function of generating revenue for the state.²⁶⁷ Accordingly, they should be dischargeable in bankruptcy.

The two primary avenues for potential growth in this area involve equal protection challenges to indigent defense reimbursement and incarceration fees. The reasoning of *James v. Strange*, discussed *supra* in Part III.B, suggests that denying bankruptcy relief for unpaid attorney fees owed to the state but not to a private party may be a denial of equal protection. This appears to be a novel argument in the bankruptcy context.²⁶⁸ An advocate may argue that, like the denial of debtor’s exemptions in the statute struck down by *James*, denial of bankruptcy relief in this circumstance would create a two-tiered system of justice where low-income people could not avail themselves of the same consumer protections available to their peers with greater financial means.

As for incarceration fees, until recently most courts had found these fees non-dischargeable in a chapter 7 bankruptcy under a *Kelly* analysis,²⁶⁹ with at least one exception where the fees were imposed outside of the crim-

²⁶² *Id.* at 47.

²⁶³ *Id.* at 50.

²⁶⁴ *Gleason v. Thaw*, 236 U.S. 558 (1915).

²⁶⁵ See generally *Confronting Criminal Justice Debt: A Guide for Litigation*, *supra* note 248, at 74–86 (explaining various instances where criminal justice debt has been found to be subject to or excepted from bankruptcy discharge).

²⁶⁶ See *Confronting Criminal Justice Debt*, *supra* note 11.

²⁶⁷ *Id.*

²⁶⁸ While novel in a bankruptcy context, in a criminal context at least one court has relied on *Strange* to reject a sentencing provision imposing probation revocation for attempting bankruptcy discharge of indigent defense fees. See *State v. Huth*, 334 N.W.2d 485, 490 (S.D. 1983).

²⁶⁹ In re Donohue, 2006 WL 3000100, *2 (Bankr. N.D. Iowa Oct. 16, 2006) (“Since the debtor’s parole was contingent on payment of court costs and such costs are assessed only against convicted criminal defendants, they constitute a part of the criminal sentence.” (quoting In re Thompson, 16 F.3d 576, 581 (4th Cir. 1994))); In re Maxwell, 229 B.R. 400, 402–05 (Bankr. W.D. Ky. 1998) (finding that the costs of incarceration are non-dischargeable under

inal sentence itself.²⁷⁰ Usually costs of incarceration are calculated on a flat periodic rate for room and board, but sometimes costs are assessed on individualized bases—for example, administrative penalties covering costs for an inmate’s failed suicide attempt,²⁷¹ destroyed prison property,²⁷² or attempted escape.²⁷³ Until recently, most courts identified such costs as debt because they are “condition[s] a state criminal court imposes as part of a criminal sentence” under *Kelly*.²⁷⁴

However, in the 2016 case of *In re Milan*, the Eighth Circuit Bankruptcy Appellate Panel signaled what may be the beginning of a retreat from the expansive interpretation previously accorded to *Kelly*.²⁷⁵ According to the court in *Milan*, “*Kelly* and its progeny make clear that a compensatory element does not render an otherwise penal debt dischargeable. Rather, courts considering whether a debt is compensation for actual pecuniary loss may look to the extent that a debt creates a typical creditor-debtor relationship or represents an expenditure in furtherance of a public governmental duty.”²⁷⁶ The court went on to hold that the procedure for recoupment at issue was clearly pecuniary in nature, and thus subject to discharge.²⁷⁷ If this reasoning is adopted beyond the Eighth Circuit, it may signal a return to a narrower reading of 523(a)(7) that more closely reflects the new world of criminal legal system debt that has shifted in character towards revenue-generating user fees.

Advocates may also plausibly argue that pretrial incarceration debt should be dischargeable under equal protection principles, provided that the debt was incurred due to indigence rather than culpability. In circumstances where bail is set at unreasonable levels, low-income people accused of crimes have no choice but either to plead guilty or to remain incarcerated until their cases proceed to trial. In the latter circumstance, jail fees continue to mount as the accused person waits. In contrast, accused people who are able to afford bail do not incur this cost. This imbalance creates a two-tiered system where costs are automatically substantially higher for low-income people who choose to go to trial. To the extent that a corollary exists between pre-trial incarceration fees stemming from indigence, and the similarly invidious discrimination in *James* targeting those who owed attorney fees to the state rather than a private attorney, additional constitutional arguments favoring dischargeability for low-income people might be available.

the *Kelly* framework); *In re Neil*, 131 B.R. 142, 143 (Bankr. W.D. Mo. 1991) (ruling that jail fees are not dischargeable and characterizing them as fines).

²⁷⁰ *In re Miller*, 511 B.R. 621, 627–29 (Bankr. W.D. Mo. 2014).

²⁷¹ *See In re Reimann*, 436 B.R. 564 (Bankr. E.D. Wis. 2010).

²⁷² *See In re Merritt*, 186 B.R. 924 (Bankr. S.D. Ill. 1995).

²⁷³ *See State v. Van Horn (In re Van Horn)*, 2012 WL 2476415 (Bankr. D. Kan. June 26, 2012).

²⁷⁴ *In re Miller*, 511 B.R. at 627.

²⁷⁵ *See In re Milan*, 556 B.R. 922, 925 (8th Cir. B.A.P. 2016).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

2. Debtor's Exemptions

Debtor's exemptions, derived from both state and federal law, can be a powerful protection for debtors facing garnishment, offset of benefits, or other involuntary legal processes.²⁷⁸ By allowing the debtor to retain sufficient income and assets to maintain a basic standard of life, these laws balance a creditor's right to collect against the potentially devastating effects of unchecked collection on the debtor, the debtor's family, and society at large. Depending on the jurisdiction, exempt property can include everything from the tools of one's trade, to a homestead, to personal earnings or public benefits.²⁷⁹

The application of debtor's exemptions to the collection of criminal legal debt has evolved into a highly complex area, given the interplay between civil and criminal law, and between federal, state, and municipal law. By way of example, some states' collection statutes explicitly provide that no exemptions apply to the involuntary collection of criminal legal debt, theoretically allowing collectors to take 100 percent of a debtor's income and assets.²⁸⁰ Other states explicitly segregate criminal legal debt from other types of debt and provide a more limited set of exemptions for criminal debt.²⁸¹ Most commonly, state codes are simply silent on the issue, leaving it up to courts to determine on an *ad hoc* basis.

To the extent that state law purports to limit the application of debtor's exemptions, the U.S. Supreme Court has held that exemptions rooted in federal rather than state law pre-empt such attempts.²⁸² The most common of these federal protections cover wages,²⁸³ public benefits such as Social Security,²⁸⁴ Supplemental Security Income,²⁸⁵ and VA benefits,²⁸⁶ as well as

²⁷⁸ See generally NATIONAL CONSUMER LAW CENTER, COLLECTION ACTIONS Ch. 12, Apps. C, D, E, G (3d ed. 2014), available at www.nclc.org/library, archived at <https://perma.cc/YRY2-ME8P> (providing detailed text and statutory appendices regarding debtor's exemptions generally).

²⁷⁹ See, e.g., ARK. CODE ANN. § 16-66-201 *et seq.*; FLA. STAT. ANN. § 222.01 *et seq.*; IOWA CODE § 627.6; MO. REV. STAT. § 513.425 *et seq.*

²⁸⁰ See, e.g., HAW. REV. STAT. ANN. § 651-122 (West 1982); IOWA CODE ANN. § 909.7 (West 1993) (fines); NEB. REV. STAT. ANN. § 29-2407 (West 2018) (anyone sentenced to less than two years of incarceration has no debtor's exemptions in regard to fines, costs, and forfeited recognizances); N.C. GEN. STAT. ANN. § 1C-1601(e) (West 2013) (exemptions do not apply to appearance bonds, criminal justice debt liens, and restitution); 42 PA. CONS. STAT. § 8127(a)(5) (West 2005); State v. Allen, 71 Ala. 543, 545 (Ala. 1873); Newburn v. RFB Petroleum, Inc., 775 P.2d 93, 95 (Colo. App. 1989) (exemptions do not apply to collection of fines).

²⁸¹ See, e.g., DEL. CODE ANN. tit. 11, § 4104(c) (West 2015) (limiting normal wage exemptions); N.Y. EXECUTIVE LAW § 632-a (McKinney 2011) (Son of Sam Law); N.D. CENT. CODE ANN. § 28-22-01 (West 2009); S.D. CODIFIED LAWS § 43-45-10; TENN. CODE ANN. § 26-2-306 (West 1981).

²⁸² See *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988).

²⁸³ 15 U.S.C. § 1673 (1978).

²⁸⁴ 42 U.S.C. § 407.

²⁸⁵ 42 U.S.C. § 1383(d)(1).

²⁸⁶ 38 U.S.C. § 5301(a)(1).

pensions covered by ERISA²⁸⁷ and federally connected student loan disbursements.²⁸⁸

Perhaps the strongest federal exemption is rooted in the anti-alienation provision applicable to Social Security and Supplemental Security Income, which provides that these benefits shall not “be subject to execution, levy, attachment, garnishment, or *other legal process*[.]”²⁸⁹ In addition to providing a complete defense to garnishment, the residual clause referencing “other legal process” may prevent a common way around exemptions – simply ordering an individual to pay, with the implied threat of incarceration if they fails to do so. This possibility arose directly in the 2016 case of *City of Richland v. Wakefield*.²⁹⁰ In *Wakefield*, the Washington Supreme Court interpreted the residual category of “other legal process” to include a lower court’s order directing Brianna Wakefield to pay criminal legal debt in installments of \$15 per month from SSI, her sole source of income.²⁹¹ The implication of the lower court’s order was that, if she did not make the payments, Ms. Wakefield could be subject to contempt for failure to pay.²⁹² The Washington Supreme Court held that any such order would violate the federal anti-alienation provision, just as if it were a garnishment or levy.²⁹³

Failure to accord debtors the full benefit of exemptions is not only a claim for defensive postures; it may also be a basis for affirmative litigation. The right to a meaningful opportunity to raise debtor’s exemptions through constitutionally sufficient notice and hearing procedures is a bedrock principle, established by the line of cases arising from the seminal 1969 due process case of *Sniadach v. Family Finance Corp. of Bay View*.²⁹⁴ In *Sniadach*, the Court struck down a Wisconsin statute allowing a creditor to garnish a debtor’s wages without any prior notice or hearing as violative of procedural due process:

a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. . . [w]here the taking of one’s property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing[,] this prejudgment garnishment procedure violates the fundamental principles of due process.²⁹⁵

²⁸⁷ 29 U.S.C. § 1056(d)(1) (ERISA covered pensions); 26 U.S.C. § 401(a)(13) (401k plans)

²⁸⁸ 20 U.S.C. § 1095a(d).

²⁸⁹ 42 U.S.C. § 407 (1998) (emphasis added).

²⁹⁰ 380 P.3d 459 (Wash. 2016).

²⁹¹ *Id.* at 465.

²⁹² *Id.* at 462.

²⁹³ *Id.* at 465.

²⁹⁴ 395 U.S. 337, 341–42 (1969).

²⁹⁵ *Id.*; see also *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 608 (1975); *Connecticut v. Doe*, 501 U.S. 1, 4 (1991).

In the years following, defendants have challenged these denials of due process rights under § 1983, specifically invoking the right to a meaningful opportunity to raise debtor's exemptions and to have adequate notice of that right.²⁹⁶ Decided in the context of private sector civil judgments, these cases were instrumental in creating the hard boundaries that today protect consumers from utter destitution by shielding basic income and assets.²⁹⁷

In the context of criminal legal system debt, the rights to notice of and a meaningful opportunity to raise debtor's exemptions are too often circumvented through incarceration or the threat thereof.²⁹⁸ People threatened with loss of liberty will agree to pay an obligation with funds that would otherwise clearly be protected from involuntary process. The due process challenge of our times may indeed focus on dismantling this system which, through fear of incarceration, accomplishes the same ends that the United States Supreme Court rejected almost half a century ago.

CONCLUSION

Understanding the changing landscape of the criminal legal system through the lens of consumer protection law can help identify ways to apply existing laws—even those not often applied in the criminal context—to ameliorate unlawful practices. Effectively applying consumer protection laws in the criminal legal context requires tracing the different ways private corporations (and the government) act in the American criminal legal system: from the moment of arrest, through trial and incarceration, to the conclusion of state supervision. Advocates need to examine how system-impacted consumers are treated at each of these stages: the various costs imposed; the context in which these costs are levied; and any abusive practices that may occur. Keeping in mind consumers' rights with respect to the private companies working in the criminal legal system, advocates must seek to understand how the services offered by these companies are analogous—conceptually as well as legally—to the high-fee services offered by industries operating in other areas of the marketplace.

Effective enforcement of consumer protection laws in the criminal legal context will not only protect individuals from abusive practices by the growing number of predatory private companies working in this sector. We hope it will also challenge the privatization of the criminal legal system overall, at a moment when for-profit and commercial-based substitutes to traditionally government activity are proliferating, diversifying, and becoming entrenched. The more that private businesses can derive profit from the system

²⁹⁶ See, e.g., *Finberg v. Sullivan*, 634 F.2d 50, 62 (3d Cir.1980); *Blik v. Palmer*, 916 F.Supp. 1475, 1489 (N.D. Iowa 1996).

²⁹⁷ *Id.*

²⁹⁸ See, e.g., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf, archived at <https://perma.cc/X7PS-HJDK>.

of punishment and human caging, the harder it will be to end mass incarceration. Indeed, the growth of the private carceral industry belies any claim that the retreat of government institutions in this space signals the shrinking of the criminal legal system or the end of mass incarceration.²⁹⁹ Thus, reckoning with private involvement in the criminal legal system is a key step in the process of reform. It will aid the development of a framework for criminal responsibility that aims to restore those harmed by crime, to humanely hold accountable those who have caused harm or committed transgressions, and to avoid at all stages enhancements to punishment based on indigence rather than culpability. While this discussion concerns how to apply current consumer protection frameworks to combat abuses resulting from privatization of the carceral state, the ultimate goal is a more just system that does not cage humans at the current rate, punish people for being poor, or force incarcerated, low-income individuals further into debt.

As advocates work to identify the actors and associated consumer harms in the present criminal legal system, they must assess which consumer protection laws might be implicated as well as potential defenses and other litigation challenges. Advocacy and research along these lines will advance efforts to empower individuals who have been assessed financial obligations by private actors, and to hold those actors accountable for unlawful conduct. Over the long term, these efforts will strengthen public and private accountability for the unfair and unlawful practices that are now widespread in the modern corrections industry, and—we hope—ultimately move toward eliminating exploitative profiteering and other economic injustices from our criminal system altogether.

²⁹⁹ Under the current federal administration, private prisons in particular have been described as critical for meeting “the future needs of the federal correctional system,” which includes immigration-related detention. And while the Bureau of Prisons anticipates a reduction in staffing levels of 12-14 percent in public prisons, recent directives from the DOJ signal increased reliance on private prisons, even while the DOJ’s own investigation found them to be less safe for incarcerated people. See Memorandum from F. Lara, Assistant Director, Correctional Programs Division, Federal Bureau of Prisons, to Chief Executive Officers (Jan. 24, 2018), https://admin.govexec.com/media/gbc/docs/pdfs_edit/012518privateprisons.pdf, archived at <https://perma.cc/T4CC-AQQP>; see generally Eric Katz, *Leaked Memo: Trump Admin to Boost Use of Private Prisons While Slashing Federal Staff*, THE GOVERNMENT EXECUTIVE (Jan. 25, 2018), <https://www.govexec.com/management/2018/01/trump-administration-looks-boost-use-private-prisons-while-slashing-federal-staff/145496/>, archived at <https://perma.cc/ES3E-LYM7>.