



**Submission of the American Civil Liberties Union (ACLU) to the
United Nations Independent Expert on the Effects of Foreign Debt and Other Related
International Financial Obligations on the Full Enjoyment of Human Rights
July 31, 2019**

The American Civil Liberties Union (ACLU) welcomes this opportunity to submit written information to be considered for the United Nations Independent Expert’s forthcoming thematic report to the Human Rights Council on private debt and human rights. We wish to highlight a recent report by the ACLU, [A Pound of Flesh: The Criminalization of Private Debt](#), which is included as an annex to this submission.¹ It is the first-ever report on the extent and impact of cooperation between courts and the private debt collection industry in the United States.

An estimated 77 million Americans—one in three adults—have a debt that has been turned over to a private collection agency. Thousands of these debtors are arrested and jailed each year because they owe money. Millions more are threatened with jail. The debts owed can be as small as a few dollars, and can involve every kind of consumer debt, from car payments to utility bills to student loans to medical fees. Private debt collectors, empowered by the courts, are using the criminal justice system to punish debtors and terrorize them into paying even when a debt is in dispute or when the debtor has no ability to pay.

The criminalization of private debt happens when judges, at the request of collection agencies, issue arrest warrants for people who failed to appear in court to deal with unpaid civil debt judgments. In at least 33 states, judges, including district court civil judges, small-claims court judges, clerk-magistrates and justices of the peace, are allowed to issue arrest warrants for failure to appear at post-judgment proceedings or for failure to provide information about finances. These warrants, usually called “body attachments” or “*capias* warrants,” are issued on the charge of contempt of court. In at least a handful of states, debtors can also be jailed when they fall behind on payments promised under court-ordered payment plans. If they failed to keep up with the payment plan, they may be arrested for contempt of court.

In the cases we examined, debtors often failed to appear because they did not receive notice of the court date or even the existence of the lawsuit. Most of these debtors could not afford to hire a lawyer and had no idea how to defend themselves in court proceedings. Some were unable to

¹ American Civil Liberties Union, *A Pound of Flesh: The Criminalization of Private Debt*, February 2018, available at https://www.aclu.org/sites/default/files/field_document/022118-debtreport.pdf.

appear in court because of work, child care responsibilities, lack of transportation, physical disability, illness, or dementia. We documented two cases in which the debtors missed court hearings because they were terminally ill; both died shortly after warrants were issued for their arrest.

If a debtor is arrested, he may languish in jail for weeks until he can arrange to pay the bail. Judges usually set the amount of bail that the person must pay in order to be released after arrest, sometimes setting bail at the exact amount of the unpaid judgment in debt collection case. Bail may be even higher than the judgment amount, when courts tack on post-judgment interest, supplemental attorney's fees, and other costs at the debt collectors' request. Once paid, the bail money often is turned over to the debt collector or creditor as payment against the judgment.

There are tens of thousands of these warrants issued annually, but the total number is unknown, because states and local courts do not typically track these orders as a category of arrest warrants. In a review of court records, the ACLU examined more than 1,000 cases in which civil court judges issued arrest warrants for debtors, sometimes to collect amounts as small as \$28. These cases took place in 26 states and the Commonwealths of Puerto Rico and the Northern Mariana Islands.

The ACLU found arrest warrants being issued in nearly every kind of consumer debt or loan – medical bills; federal and private student loans; rent payments and unpaid homeowners' association fees; mortgage foreclosure deficiencies; unpaid heating repair bills, unpaid utilities bills, and balances owed on furniture purchases made on credit; auto loans, car repair bills, auto insurance subrogation claims, and fuel bills; high-interest payday loans and car title loans²; small-business commercial loans and equipment financing; credit card debts; gym fees; revolving debt accounts at retail stores; daycare center fees; online education courses from for-profit colleges, and school textbook fees. Among the medical debts that resulted in arrests were fees owed to radiology offices, surgery centers, women's health care providers, dentists, urgent medical care providers, pediatric clinics, rehabilitation services, pharmacies, addiction service providers, and ambulance services.

The people who are jailed or threatened with jail often are the most vulnerable Americans, living paycheck to paycheck, one emergency away from financial catastrophe. In the more than 1,000 cases reviewed by the ACLU, many were struggling to recover after loss of a job, mounting medical bills, the death of a family member, a divorce, or an illness. They included retirees or people with disabilities who are unable to work. Some were subsisting solely on Social Security,

² Car title loans – sometimes also called car title pawns – are predatory short-term loans issued to cash-strapped borrowers who offer the titles of their vehicles as collateral, and they usually carry high interest rates in the triple digits. When consumers are unable to repay the loans, they lose their cars, often their biggest or sole asset.

unemployment insurance, disability benefits, or veterans' benefits—income that is legally protected from outstanding debt judgments.

The arrest and jailing of debtors is all the more troubling because the underlying debt collection proceedings are deeply unfair. Courts are often complicit in debt collection abuses by operating as default judgment mills that exist only to process garnishments and liens, and seize the property of drowning debtors. Millions of debt collection lawsuits are filed each year in local courts that have effectively become collectors' courts. Debt collectors flood small-claims courts with lawsuits, turning the courts into taxpayer-funded tools of the debt collection industry. Debt proceedings are plagued by substantial due process deficiencies, including failure to serve the defendant with adequate and legal notice of the suit, lack of evidence of the underlying debt, falsified or improper affidavits such as robo-signed affidavits, and suits filed against the wrong person or seeking an incorrect or unlawful amount.

Courts overburdened with cases churn through these collection lawsuits with astonishing speed and minimal scrutiny. The vast majority of them – an estimated 90 percent – conclude in a default judgment against the defendants, in which the debt collector automatically wins because the defendant did not contest the case. Most defendants do not appear in court to defend themselves or do not answer the case against them at all. Once a debt collector gets a court judgment, it gains the power to collect by garnishing wages, seizing property, cleaning out bank accounts, or putting a lien on a home. Four million American workers had wages seized to pay off consumer debts in 2013, and a study by the National Consumer Law Center found that no state provides adequate legal protections to prevent garnishment and property seizures from driving families into poverty.

The impact of predatory debt collection practices tends to fall most heavily on minority communities. Some empirical studies suggest that there are marked racial disparities in debt collection lawsuits. A study by ProPublica found that the rate of court judgments from debt collection lawsuits was twice as high in mostly Black communities as it was in mostly white ones, even controlling for income. A study by the New Economy Project found that the 10 New York state zip codes with the highest concentrations of default judgments in debt collection lawsuits are predominantly non-white neighborhoods, and six of these zip codes bearing the brunt of debt collection lawsuits are middle-income Black communities. Black and Latino communities are also impacted most harshly due to longstanding racial and ethnic gaps in poverty and wealth.

These abusive practices violate state and federal laws as well as international human rights standards that prohibit the jailing of debtors. The abuse of contempt proceedings and the subsequent incarceration of debtors implicate a range of fundamental human rights. Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States

ratified in 1992, recognizes the right to liberty and prohibits arbitrary detention.³ The Human Rights Committee broadly interprets arbitrariness to include elements of “inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”⁴ Without adequate protections for debtors, their incarceration may constitute arbitrary detention in violation of the ICCPR.

Moreover, Article 14 of the ICCPR states that all persons are equal before courts and tribunals, and entitles all individuals to a “fair and public hearing by a competent, independent, and impartial tribunal established by law.”⁵ The systemic deficiencies in state court debt litigation – lack of judicial scrutiny, the proliferation of automatic default judgments, deficient evidence, and the incarceration of debtors as a result of pervasive abuses of the contempt process – all raise significant concerns about the fairness and competency of these court proceedings.

Further, the guarantee of equality before the courts in the civil context requires that “each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”⁶ The Human Rights Committee recognized that legal assistance, which often determines whether an individual can meaningfully participate in the proceedings, remains essential for the right to a fair trial. The Committee encourages states to provide free legal aid in civil cases where individuals are unable to afford it.⁷ Arrest warrants issued against debtors and their subsequent incarceration most often occurs without assistance of counsel, in violation of these standards. Access to legal counsel would provide an important check against the abuse of contempt proceedings and protect debtors from unlawful coercion by creditors and debt collectors.

The United States has signed but not ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and so while it is not fully bound by the treaty, it is required to refrain from acts which would defeat the object and purpose of it.⁸ The ICESCR provides for the right to an adequate standard of living, including adequate food, clothing, housing, medical care, and the continuous improvement of living conditions.⁹ This minimum protection is often violated by creditors and debt collectors who use the threat of incarceration and abuse the justice system to secure arrest warrants to extract payments from debtors. Such behavior uniquely affects indigent defendants, who may be forced to subsist below an adequate standard of living.

³ International Covenant on Civil and Political Rights art. 9, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171. *See also* the Universal Declaration of Human Rights (UDHR), G.A. Res. 217 (III) A, art. 3, Universal Declaration of Human Rights (Dec. 10, 1948).

⁴ Human Rights Committee General Comment 35, U.N. Doc. CCPR/C/GC/35, at ¶ 12 (Dec. 16, 2014).

⁵ ICCPR at art. 14.

⁶ Human Rights Committee General Comment 32, U.N. Doc. CCPR/C/GC/32, at ¶ 13 (Aug. 23, 2007).

⁷ *Id.* at ¶ 10.

⁸ Vienna Convention on the Law of Treaties, art. 18, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

⁹ International Covenant on Economic, Social and Cultural Rights, art. 11, *entry into force* Jan. 3, 1976, 993 U.N.T.S. 3 (“The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living...”); G.A. Res. 217 (III) A, art. 25, Universal Declaration of Human Rights (Dec. 10, 1948). (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family...”).

Lastly, as the annexed ACLU report describes, the incarceration of debtors disproportionately affects communities of color. Many human rights instruments, including the Universal Declaration of Human Rights, ICCPR, ICESCR and ICERD, require that rights be recognized “without distinction of any kind,” including by race.¹⁰ The disparate impact of abusive private debt collection practices on communities of color represents a violation of the international standard of non-discrimination, which explicitly recognizes evidence of disparate impact as indicative of discrimination.

Even though these practices raise grave human rights concerns, they remain largely unchecked because there is minimal government oversight and scant protection for debtors under federal and state laws. But there’s much that can be done by state attorneys general, state courts, legislatures, the Consumer Financial Protection Bureau (CFPB), and Congress to protect consumers against these abusive practices. While a fuller list of recommendations is included in the annexed ACLU report, the ACLU makes the following key recommendations to protect alleged debtors:

- State legislatures should enact laws that prohibit courts from issuing arrest warrants in debt collection proceedings. Until arrest warrants are prohibited, at a minimum, legislators should require that defendants should be released on their own recognizance upon service of the warrant and not taken into custody or required to pay bail.
- State court rules committees should prohibit judges from issuing arrest warrants for contempt, either for failure to pay or for failure to appear, in debt collection litigation. Court rules committees should also amend rules or issue court administrative directives that provide for more robust due process protections for consumers.
- Pursuant to its rulemaking authority under the Dodd-Frank Act, the CFPB should promulgate rules that preclude debt collectors from seeking the arrest or jailing of alleged debtors in pursuit of payments toward civil debts.
- The Conference of Chief Justices and the Conference of State Court Administrators should issue a judicial bench card creating guidelines for judges to prevent the abuse of their contempt of court authority in civil debt collection proceedings.

¹⁰ See ICCPR at art. 2; International Covenant on Economic, Social and Cultural Rights, art. 2, *entry into force* Jan. 3, 1976, 993 U.N.T.S. 3; G.A. Res. 217 (III) A at art. 25; International Convention on the Elimination of All Forms of Racial Discrimination, *entry into force* Jan. 4, 1979, 660 U.N.T.S. 195.