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Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons

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CHARGING THE POOR: CRIMINAL JUSTICE DEBT & MODERN-DAY DEBTORS’ PRISONS

NEIL L. SOBOL*

ABSTRACT

Debtors’ prisons should no longer exist. While imprisonment for debt was common in colonial times in the United States, subsequent constitutional provisions, legislation, and court rulings all called for the abolition of incarcerating individuals to collect debt. Despite these prohibitions, individuals who are unable to pay debts are now regularly incarcerated, and the vast majority of them are indigent. In 2015, at least ten lawsuits were filed against municipalities for incarcerating individuals in modern-day debtors’ prisons.

Criminal justice debt is the primary source for this imprisonment. Criminal justice debt includes fines, restitution charges, court costs, and fees. Monetary charges exist at all stages of the criminal justice system from pre-conviction to parole. They include a wide variety of items, such as fees for electronic monitoring, probation, and room and board. Forty-three states even charge fees for an indigent’s “free” public defender. With expanding incarceration rates and contracting state budgets, monetary sanctions have continued to escalate. Additionally, many states and localities are now outsourcing prison, probation, monitoring, and collection services to private companies, who add additional fees and charges to the criminal justice debt burden of defendants.

The impact of criminal justice debt is especially severe on the poor and minorities as they are frequently assessed “poverty penalties” for interest, late fees, installment plans, and collection.


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Often they have to decide between paying criminal justice debt and buying family necessities. The deaths of Michael Brown in Ferguson, Eric Garner in New York, and Freddie Gray in Baltimore have prompted renewed calls for investigation of the adverse treatment of the poor and minorities in the criminal justice system. The fear of arrest, incarceration, and unfair treatment for those owing criminal justice debt creates distrust in the system.

In February 2015, a class action complaint was filed against the City of Ferguson asserting that the city’s jails had become a “modern debtors’ prison scheme” that had “devastated the City’s poor, trapping them for years in a cycle of increased fees, debts, extortion, and cruel jailings.” 1 Moreover, the Department of Justice’s report on the Ferguson Police Department presents a scathing indictment of a system apparently more concerned with revenue collection than justice. Unfortunately, as illustrated by recent lawsuits and investigations alleging debtors’ prisons in Alabama, Colorado, Georgia, Louisiana, Mississippi, New Hampshire, Ohio, Oklahoma, Tennessee, Texas, and Washington, the abuses are not limited to Ferguson, Missouri.

The same concerns that led to the historical restrictions on debtors’ prisons have risen again with the growth of modern-day debtors’ prisons. Similar to the prisons in London during the eighteenth and nineteenth centuries that were criticized for using a privatized system that charged inmates for all services, including room and board, the current justice system improperly charges the poor. It is now time to revisit these concerns and implement effective restrictions to reduce the incidence of debtors’ prisons. To remedy these concerns, my Article proposes eliminating egregious sanctions, providing courts flexibility to base fines on earning levels, and establishing procedures to enforce restrictions against incarcerating those who are truly unable to pay their criminal justice debt.

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INTRODUCTION

Case 1: A woman is imprisoned along with her sick baby for failure to pay a $12 debt and court costs of $4.63. After more than twenty days in jail, the infant is so sick that authorities remove the child, and the child dies away from her imprisoned mom.

Case 2: A woman is sentenced to jail based on failure to pay fines and fees related to the truancy of her children. She dies her first night in prison.

Both cases are tragic. Both involve imprisonment for failure to pay amounts owed. Both prompted calls for reforms. Case 1 is the story of
Hannah Crispy, which occurred in Boston in 1820. Case 1 and similar cases helped trigger calls to end the use of prisons for the collection of debt. And states responded by passing laws to abolish the practice.

Case 2, however, is the story of Eileen DiNino of Berks County, Pennsylvania, and it occurred nearly 200 years after Crispy’s case. In June 2014, DiNino, a fifty-five-year-old unemployed mother of seven kids, agreed to a jail term of two days because she was unable to pay approximately $2000 in fines, fees, and court costs assessed against her because her children had not attended school. Incarcerating parents for failure to pay truancy fines is not uncommon in Berks County as over 1600 people have been jailed for the offense since 2000. More than sixty-six percent of the jailed parents are women. Typically, truancy fines are relatively small, $75 or less; however, court costs and fees compound the amount due. Costs and fees assessed against DiNino included charges for a “judicial computer project,” constables, and postage. As with Crispy’s tragic case, DiNino’s case has also led to a call for alternatives to debtors’ prisons.

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3. Id. at 35 n.190 (describing Colonel Richard M. Johnson’s use of Hannah Crispy’s story in an 1832 speech to the U.S. Senate calling for the abolition of debtors’ prisons).


6. Id.

7. Id. The Pennsylvania Supreme Court has also ruled that truancy laws may apply to the parents of kindergarteners. Commonwealth v. Kerstetter, 94 A.3d 991, 1005–06 (Pa. 2014).

8. Dale, supra note 5.

9. Id.

10. Id.

The issue of incarcerating indigents for failure to pay fines and fees is not limited to Berks County, Pennsylvania, but is a national phenomenon that has apparently accompanied the growth of mass incarceration in the United States.\(^\text{12}\) America leads the world in incarceration rates.\(^\text{13}\) Nearly one-quarter of the prisoners in the world are in the United States, even though more than ninety-five percent of the world’s population is outside the United States.\(^\text{14}\) Significant racial disparities exist in the prison population, with black males imprisoned at more than six times the rate of white males.\(^\text{15}\) Moreover, racial disparity in prisons is expected to continue, with

\(^{12}\) Katherine Beckett & Alexes Harris, On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 Criminology & Pub. Pol’y 509, 524 (2011) (finding “nonpayment of monetary sanctions leads to a significant number of warrants, arrests, probation revocations, jail stays, and prison admissions in locales across the country”); see also Am. Civil Liberties Union, In For A Penny: The Rise of America’s New Debtors’ Prisons 50 (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf (former county public defender in Ohio estimating that “20 to 25 percent of all local incarcerations statewide are for fines and costs, while about 50 percent of arrests are for fines and costs”). For a story discussing the growth in lawsuits alleging that municipalities are operating debtors’ prisons, see Joseph Shapiro, Lawsuits Target ‘Debtors’ Prisons’ Across the Country, NPR (Oct. 21, 2015), http://www.npr.org/2015/10/21/450546542/lawsuits-target-debtors-prisons-across-the-country (identifying lawsuits filed in September and October 2015 in New Orleans, La.; Rutherford County, Tenn.; Biloxi and Jackson, Miss.; Benton County, Wash.; and Alexander City, Ala.). Additionally, on October 27, 2015, a federal lawsuit was filed against Austin, Texas alleging that the city regularly jails indigent defendants for failure to pay legal financial obligations for misdemeanors, fails to provide them with counsel, and fails to conduct ability-to-pay hearings. Class Action Complaint ¶¶ 1–2, Gonzales v. City of Austin, No. 15-cv-956 (W.D. Tex. Oct. 27, 2015), https://assets.documentcloud.org/documents/2488534/complaint-against-austin.pdf.

\(^{13}\) Marie Gottschalk, The Past, Present, and Future of Mass Incarceration in the United States, 10 Criminology & Pub. Pol’y 483, 483 (2011) (describing the United States as “the world’s warden, incarcerating a larger proportion of its people than any other country”).


\(^{15}\) Chettiari et al., supra note 14, at 9 (citing Pew Research Ctr., King’s Dream Remains an Elusive Goal; Many Americans See Racial Disparities 20 (2013), http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#incarceration-rate); Mae C. Quinn, Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation, 99 Iowa L. Rev. 2185, 2204 (2014) (referring to sources that document how “contemporary criminal courts maintain a de facto caste system that has historically disenfranchised and dehumanized persons of color”). The general issue of disparate treatment of prisoners in the United States is beyond the scope of this Article. For more information, see Jessica Eaglin & Danyelle Solomon, Brennan Ctr. for Justice, Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice (2015),
one-third of black males and one-sixth of Hispanic males born recently predicted to be incarcerated at some point in their lives. In the last ten years, the term “mass incarceration” has been used to describe the prison problem in the United States.

While people are generally aware of the issue of mass incarceration, most also assume that debtors’ prisons no longer exist. They believe that debtors’ prisons are a relic of a past described by Charles Dickens. Federal and state laws both restrict imprisonment for debt. Despite these prohibitions, incarceration for failure to pay continues. While prisons housing only debtors no longer exist, individuals are still being incarcerated when they are unable to pay their debts. The sources for incarceration based on failure to pay vary and include administrative detention, civil contempt, child support orders, and monetary obligations that the criminal justice system imposes.

This Article focuses on criminal justice debt. Criminal justice debt includes a broad range of items, also referred to as legal financial obligations (“LFOs”). The main categories of LFOs are fines, restitution charges, and fees. With increasing incarceration rates and growing budgetary concerns, LFOs have escalated dramatically over the last forty years.
mary charges now exist at all stages of the criminal justice process, including pre-conviction, sentencing, incarceration, probation, and parole. Fees have expanded to include a wide variety of charges purportedly to reimburse the costs of state and local entities. The fees even cover constitutionally required services such as public defenders. The system of using fees has been labeled an “offender-funded” system. Offender funding has grown over the years, and several states now outsource prison, probation, monitoring, and collection services to private companies. These companies may assess and collect fees, using the threat of incarceration for failure to pay.

The growth in incarceration of individuals for failure to pay LFOs has accompanied the increase in criminal justice debt. Indigents are jailed or imprisoned despite statutory and case law prohibitions against incarceration based on their inability to pay their debts.

As may be expected, the impact on the poor and minorities is especially severe. A two-tiered system exists where those who can pay their criminal justice debts can escape the system while those who are unable to pay are trapped and face additional charges for late fees, installment plans, and interest. These extra charges have been referred to as “poverty penal-


27. Shapiro, *supra* note 26. For more details, see infra Part II.A.


31. HUMAN RIGHTS WATCH, *supra* note 30 (describing offender-funded probation systems); Logan & Wright, *supra* note 24, at 1193.


33. Shapiro, *supra* note 26; see infra Part III.B.

34. Bearden v. Georgia, 461 U.S. 660, 671–73 (1983) (holding that the court should assess a convict’s ability to pay before revoking probation for failure to pay fines or restitution); Shapiro, *supra* note 26; see infra Part III.B.

35. Harris, Evans & Beckett, *supra* note 26, at 1756 (finding “that penal institutions are increasingly imposing a particularly burdensome and consequential form of debt on a significant and growing share of the poor”); see infra Part III.C.

36. AM. CIVIL LIBERTIES UNION, *supra* note 12, at 10; Shapiro, *supra* note 26 (describing the practice of charging fees as one “that causes the poor to face harsher treatment than others who commit identical crimes and can afford to pay”).
ties.”37 Ironically, those least able to pay wind up with more LFOs than those who can pay their fines and fees upfront.38 Additionally, the use and threat of incarceration may be financially counterproductive, as the expenditures for arrest and incarceration may be more than the amounts assessed or ever collected from those unable to pay.39

Even in situations where physical incarceration may not occur, the poor and minorities often have LFOs that they are unable to pay and fear that failure to pay may result in arrest and imprisonment.40 The monetary obligations and stigma from failure to pay reduce the likelihood of obtaining employment and force individuals to choose between necessities, including family support, and payment of their LFOs.41 The threat of incarceration for unpaid LFOs may even encourage individuals to commit crimes to obtain funds to avoid incarceration.42

This Article examines the relationship between criminal justice debt and the use of incarceration for failure to pay. Part I provides a brief history of debtors’ prisons explaining how they began and the call for their abolition. Part II defines the sources of criminal justice debt and identifies the general prohibitions designed to prevent the use of debtors’ prisons to recover criminal justice debt. Part III recognizes that, despite these prohibitions, courts are incarcerating indigent defendants for failure to pay criminal justice debt. This Part describes the growth in criminal justice debt as well as the resurgence of debtors’ prisons. It explains how the process has created a two-tiered system that adversely affects the poor and minorities, often placing them in a never-ending cycle of poverty, and creating distrust in the system. Furthermore, this Part identifies the conflicts of interest that exist in the current system of assessing and collecting criminal justice debt.

38. AM. CIVIL LIBERTIES UNION, supra note 12, at 10.
39. Id. at 9 (“incarcerating indigent defendants unable to pay their LFOs often ends up costing much more than states and counties can ever hope to recover”); LAUREN-BROOKE EISEN, BRENNAN CTR. FOR JUSTICE, CHARGING INMATES PERPETUATES MASS INCARCERATION 4–5 (2015), https://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf.
41. Beckett & Harris, supra note 12, at 517–23; see also FOSTER COOK, JEFFERSON COUNTY’S COMMUNITY CORRECTIONS PROGRAM TREATMENT ALTERNATIVES FOR SAFER COMMUNITIES, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 24 (2014), http://media.al.com/opinion/other/The%20Burden%20of%20Criminal%20Justice%20Debt%20in%20Alabama-%20Full%20Report.pdf (reporting results from survey of Alabama residents with criminal justice debt and showing that survey participants forwent necessities such as utilities, groceries, and rent or mortgage payments in order to pay for criminal justice debt).
42. Katzenstein & Nagrecha, supra note 26, at 566.
Part IV proposes a framework for reducing the incidence of debtors’ prisons. This Part examines various proposals and concludes that states should follow a hybrid approach to provide specific guidance to help ensure that the constitutional rights of indigents are not violated. As part of this approach, remedies should be based on the nature of the monetary sanction. If the charge is merely to reimburse the state, the remedies should be limited to civil remedies, and not include arrest or incarceration. For other monetary sanctions, incarceration should only be permitted if a court, after notice and hearing, specifically determines that the inability to pay is not the basis for failure to pay. Defendants should be afforded the right to counsel at this hearing. The determination of ability to pay should depend on whether the monetary sanction would impose undue hardship on the defendant and her dependents. To help with enforcement and understanding of the proposal, this Part also recommends measures that allow for the adjustment of sanctions based on earnings and provide notice, education, transparency, and accountability for all actors (including third-party companies) involved in the assessment and collection of criminal justice debt.

The call to end debtors’ prisons began centuries ago, and while laws have been passed to eliminate them, in practice, debtors’ prisons are now flourishing. Many of the same concerns that initially prompted public outcry against debtors’ prisons exist today. It is time to eliminate modern-day debtors’ prisons and recognize that alternatives to incarceration should be used for those truly unable to pay debts.

I. A SHORT HISTORY OF DEBTORS’ PRISONS

A general understanding of the historical development of debtors’ prisons is helpful in evaluating the issues with modern-day debtors’ prisons because many of the concerns that led to the abolition of these prisons have resurfaced with the recent expansion of the use and threat of incarceration for those who are unable to pay monetary obligations. Accordingly, this Part will briefly discuss the rise and fall of debtors’ prisons prior to their contemporary resurgence.

A. The Rise and Fall of Debtors’ Prisons in Europe

Throughout history, imprisonment for debt has ebbed and flowed.43 Most civilizations have incarcerated debtors for failure to pay their debts.44

The Bible reflects the common use of the practice. In 451 B.C., the Romans, in their first written law, the Twelve Tables, formalized incarceration for those unable to pay their debts. Imprisonment for debt in Rome continued for over 100 years until 326 B.C. In that year, prompted by public calls after a creditor beat the son of a debtor, the Roman Senate prohibited incarceration based on failure to pay debts and ordered the release of all confined debtors.

Unfortunately, the Roman proclamation did not end the use of debtors’ prisons. Instead, the use continued during the Middle Ages, although their use fluctuated. Similarly, despite reports that imprisonment for debt in England ended with the Norman Conquest in 1066, incarceration for debts gained new life with the passage of imprisonment statutes in 1267 and 1285. Under these statutes and subsequent enactments, debtors’ prisons would continue in England for more than five centuries.

Relying on manuscripts and petitions from prisoners, Dr. Philip Woodfine of the University of Huddersfield has written about the conditions of debtors’ prisons in Yorkshire County, England during the eighteenth century. The prisons were run as “semiprivatized” systems operating for profit, in which jailers would assess prisoner fees, “including fees for admission and release,” as well as charges “for rooms, bed linen, beer, and food.” Reports issued in 1729–1730 reflected concerns about “the evil of exorbitant fees” that “arose chiefly from the franchising of prisons, which meant that a marshal or keeper had to return a substantial profit on the jail each year.”

The privatized system, which was typically unregulated by the courts and the legislature, created a conflict of interest for wardens who were de-
ependent on fees from their inmates. As a result, even if fees were thought to be unconscionable, they were not challenged because of “the need to ensure that prison officials would have access to a dependable income.”

Despite these concerns, imprisonment for debt continued in England and virtually all of Europe during the 1800s. Meaningful reform did not occur until 1869 when Parliament enacted acts abolishing imprisonment for debt, releasing incarcerated debtors, and establishing a process for discharge through bankruptcy. Even with the passage of these statutes, reports of instances of incarceration for debt in England continued into the twentieth century.

**B. The Rise and Fall of Debtors’ Prisons in America**

Although initially colonists were sympathetic to debtors, by the beginning of the eighteenth century, imprisonment of debtors was a common practice in America. As in England, some states had separate buildings for the housing of debtors. The list of imprisoned debtors included society’s poorest individuals as well as some of its wealthiest and famous members, such as “Robert Morris, who helped finance the American Revolution and ran the Treasury under the Articles of Confederation.”

Class segregation existed among imprisoned debtors. As in England, inmates in America’s eighteenth-century debtors’ prisons could pay for better services and conditions, assuming they had money or could borrow

54. *Id.* at 6; see Alex Pitofsky, *The Warden’s Court Martial: James Oglethorpe and the Politics of Eighteenth-Century Prison Reform*, 24 EIGHTEENTH-CENTURY LIFE, Winter 2000, at 88, 98–99 (concluding that “[t]he fact that wardens’ offices constituted legally protected private property also militated against most attempts to reform the nation’s penal institutions”).


56. See Baker et al., *supra* note 43, at 217; Ford, *supra* note 43, at 30 (referencing an 1834 British parliamentary commission report “that at the time imprisonment for debt was legal in every country in continental Europe except Portugal”).


61. Fraser, *supra* note 60, at 68–69 (listing famous individuals imprisoned for debt, including army generals, an officer in the Treasury Department, and a state Supreme Court judge).

62. *Id.* at 69.
funds.63 Debtors with large debts and good social connections enjoyed “good food and well-appointed living quarters, as well as books and other amusements, including on occasion manicurists and prostitutes.”64 On the other hand, debtors with petty debts, who comprised the vast majority of debtors in prison, lived in unclean and disease-ridden places and were charged for necessities such as food, water, and heat, which, of course, they could not afford.65

A financial crisis in 1797 causing the incarceration of thousands, including Robert Morris, led to the passage of America’s first federal bankruptcy law in 1800.66 The Bankruptcy Act of 1800, however, was short-lived as it was repealed after only three years.67 Moreover, the Act provided relief only to debtors who were merchants.68 It did not apply to the thousands in prison based on petty debts.69

In 1821, Kentucky, led by the efforts of Senator Richard Johnson, became the first state to abolish debtors’ prisons.70 Senator Johnson also introduced similar legislation in 1822 at the federal level, and in an appendix to his address to the United States Congress, he included the story of Hannah Crispy’s experience in a Boston debtors’ prison.71 Federal law restrict-

63. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 296–98 (2013). Interestingly, in his text, Professor Parrillo describes the transition of public official compensation between 1780 and 1940 from a profit-based system relying on payments received for services or results to a salary system that removed the profit motive. Id. at 1–4.

64. Fraser, supra note 60, at 69. A comparison can be made to the “pay-to-upgrade” systems that currently exist in certain California counties that allow those with sufficient resources to pay for improved accommodations while incarcerated. See EISEN, supra note 39, at 3; Leah A. Plunkett, Captive Markets, 65 HASTINGS L.J. 57, 61 (2013).

65. Fraser, supra note 60, at 70.


67. Id. at 14–15. Robert Morris, however, did receive a discharge. Id. at 15.

68. Id. at 14.

69. See Fraser, supra note 60, at 72. Fraser compares the situation of only providing relief to those with sizable debt to the “too big to fail” institutions of modern times because big debtors were necessary to the operation of credit-based commerce. Id. (stating “[i]t made no sense for those interested in nurturing the growth of a commercial civilization to stop up the arteries of commerce, which after all couldn’t function without instruments of credit and debt, by taking its most successful debtors out of circulation”).


ing incarceration for failure to pay debts was enacted in 1933. Similarly, in the 1830s, significant calls for reform had also begun at the state level with state constitutional and legislative pronouncements declaring an end to imprisonment for debt.

Currently, statutory or constitutional provisions prohibiting imprisonment for debt exist in every state. Additionally, federal imprisonment for debt is not permitted in states that prohibit incarceration for debt.

II. CRIMINAL JUSTICE DEBT AND RESTRICTIONS ON DEBTORS’ PRISONS

Despite the prohibitions in the United States, individuals are currently being imprisoned for failure to pay debts. The “pathways” to prison or jail vary and involve both criminal and civil law. Incarceration may occur in child support cases, administrative detention matters, and post-judgment civil collection matters. Additionally, failure to pay criminal justice debt represents a significant and growing reason for incarceration in today’s debtors’ prisons. This section describes the origins and development of criminal justice debt as well as the restrictions on the use of incarceration as a method of collecting the debt.

A. Defining Criminal Justice Debt

Criminal justice debt is a catchall phrase for the financial charges assessed in the criminal justice process. These charges are also referred to as

72. Jennings, supra note 70.
74. Vogt, supra note 44, at 348. Vogt has also compiled a listing of the relevant statutory and constitutional provisions. Id. at 335 n.9.
77. The discussion of incarceration for failure to pay child support is beyond the scope of this Article. For more detailed information, see Elizabeth G. Patterson, Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison, 18 CORNELL J.L. & PUB. POL’Y 95, 95 (2008) (explaining that “[e]ach day in the United States thousands of persons are jailed on charges arising from failure to pay court-ordered child support”).
80. AM. CIVIL LIBERTIES UNION, supra note 12, at 8.
legal financial obligations or LFOs. Fines, restitution charges, and fees are the primary components of LFOs. An understanding of the origin and purported rationale for these categories is helpful in assessing the use of incarceration as a method of collecting criminal justice debt.

1. Fines

Fines are a widely used method of punishing defendants. If a defendant is unable or unwilling to pay a fine, the defendant will likely face incarceration. Originally, the basis for fines in England was revenue collection. Payment or “mak[ing] fine” to the king was a way that a defendant could settle with the king and avoid incarceration. Over time, the primary rationale for fines became punishment rather than revenue generation.

In the United States, the recent growth in state and local budgetary issues, however, has prompted a return to the use of fines for revenue generation. Concerns now exist regarding the aggressive use of fines for traffic and parking violations to raise money to support local governments. The Department of Justice’s report on the Ferguson Police Department describes a system where “[c]ity, police, and court officials for years have worked in concert to maximize revenue at every stage of the enforcement process, beginning with how fines and fine enforcement processes are established.”

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81. Beckett & Murakawa, supra note 23, at 227; Harris, Evans & Beckett, supra note 26, at 1756; Logan & Wright, supra note 24, at 1177.
83. Levingston & Turetsky, supra note 82, at 188; Ruback, supra note 82, at 570.
84. See Williams v. Illinois, 399 U.S. 235, 239 (1970) (stating that “[t]he custom of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England and has long been practiced in this country”).
86. Id. at 784.
87. Id. at 785; Ruback & Bergstrom, supra note 82, at 249. Interestingly, as the punitive rationale for fines supplanted the settlement rationale, the language regarding fines switched from “mak[ing] fine[s]” to “be[ing] fined.” Westen, supra note 85, at 785–86.
88. Logan & Wright, supra note 24, at 1194.
89. Id.
While fines are often the sole punishment for traffic offenses and some other misdemeanors, for other offenses, fines supplement incarceration and probation. American courts of general jurisdiction impose fines in forty-two percent of cases, while courts of limited jurisdiction assess fines in eighty-six percent of cases. Fines are assessed in thirty-eight percent of all felony convictions in state courts. Judges typically impose fines at the sentencing stage of a criminal case, without consideration of a defendant’s earnings.

2. Restitution

Similarly, judges may also impose restitution charges at a defendant’s sentencing. Traditionally, governmental entities have been the recipients of fines while victims have been the primary beneficiaries of restitution. Initially, the purported rationale for restitution was to financially restore a victim based on the economic damages a defendant’s actions had caused. The rationale for modern-day restitution now includes retribution and punishment. All states permit restitution, and a Department of Justice study found that state courts imposed restitution in eighteen percent of felony cas-
Under federal law, restitution is mandatory for specific crimes if there is an “identifiable victim.” A defendant’s failure to make restitution payments can result in revocation of probation and incarceration.

3. Fees

Fees differ from restitution and fines in many ways, including, when they are assessed, who sets them, what they include, and why they are imposed. While fees imposed on those imprisoned for failure to pay civil debts date back to colonial times, the imposition of fees on inmates charged with crimes in the United States did not begin until 1846, when Michigan authorized counties to collect the costs of medical care from prisoners. Currently, fees on defendants can be imposed at any stage of the criminal justice process, including pre-conviction, sentencing, incarceration, or supervision. Moreover, while a judge typically determines fines and restitution, other actors may be involved in setting fees, including...
prosecutors, police, prison officials, and other criminal justice agencies as well as private companies that are the beneficiaries of outsourcing.

Pre-conviction assessments may include fees for arrest, issuance of warrant, booking, fingerprinting, lab testing, pretrial detention, jury, application for a public defender, bail, deferred prosecution agreement, pretrial abatement, and rental of monitoring devices. Application fees for public defenders exist in the majority of states. The application fees vary by state and may vary based on the offense at issue. The typical range is $25 to $100. Some jurisdictions impose pretrial supervision or conditional bond fees. The assessment of pre-judgment fees is not dependent upon conviction of the defendant.

At sentencing, charges may include fees for pre-sentence and investigatory reports, court administration, designated funds, and reimbursement for the public defender and the prosecutor. Designated funds may finance crime stopper programs, retirement for police officers, courtroom technology, and a myriad of services unrelated to the underlying criminal charges. For example, fees in Allegan County, Michigan help fund the county employees’ fitness facility.

Charges incurred and assessed during incarceration include fees for room and board, health care, haircuts, telephone, and work-release programs. At least forty-three states allow charges for room and board and

106. Levingston & Turetsky, supra note 82, at 189; Logan & Wright, supra note 24, at 1185–96.
107. Logan & Wright, supra note 24, at 1193.
110. Id. at 2052–53.
111. Id. at 2046. Some states allow waiver of these fees “in cases of extreme poverty.” Logan & Wright, supra note 24, at 1189.
112. Human Rights Watch, supra note 30, at 32.
113. Logan & Wright, supra note 24, at 1186 (noting that “[t]he presumption of innocence does not slow the onset of LFOs”); Bridget McCormack, Economic Incarceration, 25 Windsor Y.B. Access to Just. 223, 230 (2007) (noting that fees imposed “as conditions of . . . bond while the case is pending . . . are not refunded to defendants who are acquitted of their underlying charge”); Wright & Logan, supra note 109, at 2054.
114. Levingston & Turetsky, supra note 82, at 189; Logan & Wright, supra note 24, at 1190–91; Shapiro, supra note 26.
115. Levingston & Turetsky, supra note 82, at 189; Logan & Wright, supra note 24, at 1190–91.
117. Subramanian et al., supra note 108, at 15; Levingston & Turetsky, supra note 82, at 189; Logan & Wright, supra note 24, at 1192–93; Shapiro, supra note 26.
thirty-five states permit charges for medical care. Telephone charges have been a “significant moneymaker” with “rates far above the prevailing market—generating millions of dollars annually.”

Charges assessed after release may include fees for probation and parole supervision, drug testing, vehicle interlock devices, electronic monitoring, mandatory treatment, required classes, and expungement. Forty-four states charge defendants for probation and parole services. Probation is a common alternative to incarceration for misdemeanor offenses. All of the states, except for Hawaii, assess defendants for monitoring devices. These devices may track location or alcohol intake of defendants. The sophistication of the technology used and associated costs of these devices range considerably. Monthly charges may range from “$180 to $360.” Additionally, defendants are typically charged a “start-up” fee of up to $80. Similarly, defendants may be assessed mandatory drug testing fees of $1250 per year.

Court costs and fees help reimburse the burgeoning expenses incurred by courts, jails, prisons, and those appointed to supervise, monitor, and even represent defendants. Their purpose is generally recognized as reimbursement as opposed to punishment, victim compensation, rehabilitation, or deterrence. “Offender-funding” has been used to identify the process of making defendants pay for these expenses.

118. EISEN, supra note 39, at 4.
120. HUMAN RIGHTS WATCH, supra note 30, at 37; Levingston & Turetsky, supra note 82, at 189; Shapiro, supra note 26.
121. Shapiro, supra note 26; State-by-State Court Fees, NPR (May 19, 2014), http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees.
122. HUMAN RIGHTS WATCH, supra note 30, at 12.
123. Shapiro, supra note 26; State-by-State Court Fees, supra note 121.
124. HUMAN RIGHTS WATCH, supra note 30, at 33.
125. Id.
126. Id. at 36.
127. Beckett & Murakawa, supra note 23, at 227; Ruback, supra note 82, at 570.
128. See BANNON ET AL., supra note 37, at 4. Some commentators have argued that fees may also serve compensatory and punitive purposes as well as reimbursement purposes. See, e.g., Ruback & Bergstrom, supra note 82, at 249 (arguing that costs and fees “seek reparations for society as a victim . . . and require offenders to pay substantial (and increasing) amounts in an effort to hold them accountable for their actions”). Additionally, Beckett and Harris argue that fees are “de facto penalties” because fees are often included when defining fines, fees are often collected in the same manner as fines, and fees often have the same adverse impact that fines have on defendants. Beckett & Harris, supra note 12, at 510.
129. See, e.g., HUMAN RIGHTS WATCH, supra note 30, at 1.
The fees charged to defendants can surpass the fines or restitution charges assessed.\(^\text{130}\) This is particularly true for low-level offenses where “court costs and other usage fees have proliferated and grown to the point that they can eclipse the fines imposed.”\(^\text{131}\) For example, in California, the fine for failure to show proof of vehicle insurance is $100; however, fee assessments add another $390, and additional fees of $325 are added for failure to appear or pay, resulting in a total citation charge of $815.\(^\text{132}\) As with fines and restitution, failure to pay fees can be grounds for revocation of probation and incarceration.\(^\text{133}\)

### B. Prohibitions Against Debtors’ Prisons for Criminal Justice Debt

Recognizing the concerns that arise from incarcerating individuals based on their inability to pay debt, courts and legislators have sought to establish restrictions to prevent the use of debtors’ prisons for criminal justice debt.

#### 1. Case Law

Concerns about unequal treatment of the poor in the criminal justice system are not a new phenomenon. In *Griffin v. Illinois*,\(^\text{134}\) the United States Supreme Court recognized “Providing equal justice for poor and rich, weak and powerful alike is an age-old problem.”\(^\text{135}\) The Court remanded this case because the appeals court had denied appeals to criminal defendants who had been unable to pay for trial transcripts.\(^\text{136}\) The Court, relying on due process and equal protection concerns, concluded that “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.”\(^\text{137}\) In *Mayer v. City of Chicago*,\(^\text{138}\) the Court extended *Griffin* to defendants charged with misdemeanors where the sentences were limited to fines.\(^\text{139}\) As the Court stated, “The size of the

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130. Logan & Wright, *supra* note 24, at 1177.
133. *Bannor et al., supra* note 37, at 21; Beckett & Harris, *supra* note 12, at 524.
135. *Id.* at 16.
136. *Id.* at 20.
137. *Id.* at 17.
139. *Id.* at 195–97.
defendant’s pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case.”140

In the landmark case, *Gideon v. Wainwright*,141 the Court held that the Sixth Amendment requires states to provide counsel for indigent felony defendants.142 To support its ruling, the Court said, “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”143

In 1970, the Court in *Williams v. Illinois*144 recognized “the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country.”145 The Court held that under the equal protection provisions of the Fourteenth Amendment, the state could not extend the incarceration of an individual who was unable to pay his criminal justice debt beyond the maximum statutory term.146 Williams had received the maximum sentence for a petty theft conviction: one year in prison and a $500 fine.147 He was also assessed $5 in court costs.148 Under Illinois law, at the end of their sentences, defendants were required to remain in jail at a daily rate of $5 to pay off their monetary obligations.149 For Williams, who was unable to pay the $505 in fines and costs, this translated to an additional 101 days in jail.150

Relying on concerns expressed in *Griffin*, the Court found that it would be “impermissible discrimination” to allow imprisonment beyond the maximum statutory term for defendants who were unable to pay criminal justice debt.151 Specifically, the Court found that “once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”152

The following year, the Court applied the reasoning from *Williams* to a situation where the legislature had limited sentencing to fines. In *Tate v. Short*,153 a Texas corporation court convicted the defendant of nine traffic

140. Id. at 196.
142. Id. at 343–44.
143. Id. at 344.
145. Id. at 240.
146. Id. at 240–41.
147. Id. at 236.
148. Id.
149. Id. (citing ILLINOIS CRIMINAL CODE OF 1961 § 1–7(k)).
150. Id. at 236–37.
151. Id. at 240–41.
152. Id. at 241–42.
offenses and assessed fines totaling $425.154 The defendant was indigent and unable to pay the fines.155 The trial court, relying on Texas law that permitted incarceration at a rate of $5 per day to pay off fines, sentenced him to eighty-five days.156 Upon review, the United States Supreme Court found that converting a fine-only restriction to a prison sentence for an indigent unable to pay the fine violated the Equal Protection Clause.157 The Court added that since the legislature had restricted punishment in traffic offenses to fines, imprisonment of an indigent would not “further any penal objective of the State.”158 Moreover, according to the Court, instead of generating revenue, imprisonment would “saddle[] the State with the cost of feeding and housing him for the period of his imprisonment.”159

In Bearden v. Georgia,160 the Court relied on Williams and Tate in holding that a court should assess an individual’s ability to pay before revoking probation and incarcerating him for failure to pay a fine or restitution.161 In 1980, Danny Bearden pleaded guilty to charges of burglary and theft.162 The Georgia trial court, relying on the state’s first offender’s act, deferred his proceedings and sentenced him to three years’ probation.163 The court also assessed a $500 fine and $250 in restitution as a condition of probation.164 Bearden paid $200 upfront and agreed to pay the remaining $550 within four months.165 Approximately one month later, Bearden lost his job, leaving him with no other sources of income.166 Despite his efforts, Bearden, who was illiterate and had not completed high school, was unable to find another job.167 Because he failed to pay, the trial court revoked Bearden’s probation and ordered that he be incarcerated for the remainder of the probationary term.168

In evaluating the revocation, the Court determined that the original probation decision reflected a conclusion “that the State’s penological interests do not require imprisonment.”169 The Court found that “[b]y
sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence." 170 Accordingly, the Court established that before incarcerating an individual, courts should investigate the reasons for non-payment. 171 If it turns out "the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available." 172 Similarly, state courts have also recognized the need to assess individuals’ financial condition before incarcerating them because of their inability to pay criminal justice debt. 173

2. Legislation and Court Rules

In addition to case law, states have also adopted legislation and court rules to codify the protections established by Bearden. For example, the Oklahoma Rules of Criminal Procedure require that district and municipal courts hold a hearing and make a determination of a “defendant’s ability to immediately satisfy the fines and costs." 174 Under New Mexico law, the court may use contempt procedures for failure to make payment on criminal justice debt, and a defendant, as a defense, can assert that he did not willfully refuse to pay or that he made a good-faith effort to pay. 175 Texas law provides that the court shall allow installment payments if it determines that a misdemeanant is unable to pay assessed fines and costs immediately. 176

170. Id. at 674.
171. Id. at 672.
172. Id. at 668–69 (footnote omitted).
173. See, e.g., Massey v. Meadows, 321 S.E.2d 703, 704 (Ga. 1984) (holding “that where payment of a fine is made a condition precedent to probation, a defendant’s probation may not be revoked or withheld because of his failure to pay the fine without a showing of willfulness on his part or inadequacy of alternative punishments”); State v. Monson, 576 So.2d 517, 518 (La. 1991) (citing Bearden and holding that “[a]n indigent person may not be incarcerated because he is unable to pay a fine which is part of his sentence”); State v. Nason, 233 P.3d 848, 853 (Wash. 2010) (en banc) (finding an “auto-jail provision” was void because it “call[ed] for incarceration without a contemporaneous inquiry into the offender’s ability to pay”). But see State v. Nordahl, 2004 ND 106, ¶ 26, 680 N.W.2d 247, 253 (holding that Bearden does not apply when restitution is part of a plea agreement). For a discussion of the applicability of Bearden to plea bargains, see Ann K. Wagner, Comment, The Conflict over Bearden v. Georgia in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors’ Prison, 2010 U. Chi. Legal F. 383.
175. N.M. STAT. ANN. § 31-12-3(C)-(D) (2009).
176. TEX. CODE CRIM. PROC. ANN. art. 42.15(c) (West 2006 & Supp. 2014).
III. CRIMINAL JUSTICE DEBT AND THE RESURGENCE OF DEBTORS’ PRISONS

Despite the statutory and case law restrictions, the growth in criminal justice debt has been associated with a dramatic increase in arrest and incarceration of defendants who are unable to pay legal financial obligations. The same concerns that led to calls for the abolition of debtors’ prisons in Europe have now returned as the current system is increasingly charging defendants for services provided, is unfairly discriminating against the poor, and is creating conflicts of interest in the assessment and collection of criminal justice debt. This Part will address the growth in criminal justice debt, the use of debtors’ prisons, and these renewed concerns.

A. The Growth in Criminal Justice Debt and Offender Funding

Criminal justice debt has increased dramatically during the last forty years. Courts have imposed legal financial obligations on “[sixty-six percent] of felons sentenced to prison, and more than [eighty percent] of other felons and misdemeanants.”177 Additionally, other criminal agencies—including jails, prisons, and public defender offices—charge fees to defendants.178 Commentators estimate “that tens of millions of U.S. residents have been assessed financial penalties by the courts and other criminal agencies.”179

The most common reasons asserted for the growth in monetary sanctions are the expansion in the use of incarceration since 1970 and budgetary pressures at the state and local level.180 As the National Research Council concluded in its 2014 report on incarceration, “The growth in incarceration rates in the United States over the past [forty] years is historically unprecedented and internationally unique.”181 The United States is the undisputed leader in the use of incarceration.182 Nearly one-quarter of the prisoners in the world are in the United States, even though more than ninety-five percent of the world’s population is outside the United States.183 Since the 1970s, the United States has more than quadrupled its rate of incarceration.184

177. Beckett & Harris, supra note 12, at 515.
179. Beckett & Harris, supra note 12, at 516.
182. Id.; Gottschalk, supra note 13, at 483.
183. CHETTIAR ET AL., supra note 14, at 3. The general issue of mass incarceration is beyond the scope of this Article. For more detailed information, see Gottschalk, supra note 13; NAT’L RESEARCH COUNCIL, supra note 14.
184. NAT’L RESEARCH COUNCIL, supra note 14, at 1.
Approximately one percent of adults are incarcerated.\textsuperscript{185} Between 1983 and 2013 annual admissions to jails increased from 6 million to 11.7 million while the average daily number of jail inmates rose from 224,000 to 731,000.\textsuperscript{186} Increases in the number of people on probation and parole have contributed to the growth in incarceration as a result of failures to abide by conditions of parole or probation.\textsuperscript{187} At the end of 2013, more than 4.75 million individuals were on probation or parole.\textsuperscript{188} As a result, approximately one in every thirty-five adults was subject to incarceration, parole, or probation.\textsuperscript{189}

High incarceration rates have created burdens on state and local budgets to fund the expenses of incarceration, parole, and probation.\textsuperscript{190} In response, many states and localities have turned to offender-based funding.\textsuperscript{191} Additionally, some jurisdictions use criminal justice debt to fund expenses outside of the criminal justice system.\textsuperscript{192} For example, the Department of Justice’s report on Ferguson reported that the city’s 2015 budget reflected that collections of fines and fees would account for more than twenty-three percent of the city’s projected general fund revenues.\textsuperscript{193}

While all monetary assessments have increased, the largest percentage increase has been in fines.\textsuperscript{194} A recent NPR survey found that since 2010,
forty-eight states have increased their fees.\textsuperscript{195} A nationwide survey found that the percentage of state and federal felony inmates with court-imposed monetary sanctions increased from 25\% in 1991 to 66\% in 2004.\textsuperscript{196} Between 1991 and 2004, the percentage of felony inmates assessed restitution and fees increased from approximately 10\% to approximately 25\% and 35\%, respectively, while the percentage of felons assessed fees increased from approximately 10\% to over 50\%.\textsuperscript{197} Moreover, this data underestimates the total amount of monetary sanctions, as it only covers court-imposed assessments on felons sentenced to prison.\textsuperscript{198} Additional statistics reflect, “felons sentenced to probation and misdemeanants are more likely than felons sentenced to prison to receive monetary sanctions.”\textsuperscript{199} Non-judicial sources, including prosecutors and prison officials, also assess fees.\textsuperscript{200}

Responding to budgetary concerns, many states and localities have also outsourced traditional public services, such as prison, probation, monitoring, and collection services to private companies.\textsuperscript{201} The growth in privatization of state prisons from 1999 to 2010 has been described as a “seismic shift.”\textsuperscript{202} During this time span, the percentage of prisoners in private state prisons increased by 40\% while the total prison population grew by 18\%.\textsuperscript{203}

Similarly, many jurisdictions now rely on private probation companies to monitor and supervise defendants, and these firms will typically charge

\textsuperscript{195} State-by-State Court Fees, supra note 121. Alaska and North Dakota are the only states to not increase their fees. Id. The District of Columbia has also not increased its fees since 2010. Id. at 1769–70.

\textsuperscript{196} Harris, Evans & Beckett, supra note 26, at 1769.

\textsuperscript{197} Id. at 1770–71. Defendants may be assessed fees by sources other than the court. Beckett & Harris, supra note 12, at 513 (stating that a “broad range of criminal justice agencies” may levy fees including state departments of corrections, jails, and private companies authorized to supervise and board defendants).

\textsuperscript{198} Harris, Evans & Beckett, supra note 26, at 1770.

\textsuperscript{199} Id. at 1769–71; Levingston & Turetsky, supra note 82, at 189; Logan & Wright, supra note 24, at 1185–96.


\textsuperscript{201} Aviram, supra note 201, at 115.

\textsuperscript{202} Id. (citing CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 1 (2012), http:// sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf. Aviram also noted that the growth in the number of federal prisoners in private prisons was even more dramatic as it was over 780\%. Id.
defendants enrollment fees as well as monthly supervisory fees. Privatization of probation services reportedly began in the 1970s when Florida delegated monitoring of misdemeanants on probation to the Salvation Army. Currently, more than 1000 courts located in at least twelve states annually use private probation companies to monitor “[h]undreds of thousands of Americans.” Often, the companies will market their services to local entities as “zero cost solution[s],” claiming that they will fund their operations solely based on funds received from defendants. Under these “offender-funded” probation models, private companies claim that public expenditures are not necessary for their services.

Determining the total amount of supervisory fees that private probation companies collect is difficult because the companies are typically privately held, and states do not require reporting of their collections. Human Rights Watch, an independent international organization, found that $40 million was a conservative estimate of the annual revenue that private probation companies in Georgia collected in 2013. The private probation companies consist of both small and large firms. Judicial Correction Services and Sentinel Offender Services are two of the largest private probation companies. The collection practices of these businesses have been the subject of litigation and criticism. For example, a settlement with

204. EISEN, supra note 39, at 2; Aviram, supra note 201, at 132; Logan & Wright, supra note 24, at 1193.
207. HUMAN RIGHTS WATCH, supra note 30, at 14–15.
208. Id. at 15.
209. Id. at 18.
210. Id. at 18–19. For more information about private probation companies in Georgia, see Sarah Dolisca Bellacicco, Note, Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors’ Prison System, 48 GA. L. REV. 227, 238–46 (2013).
211. HUMAN RIGHTS WATCH, supra note 30, at 19.
212. Id. at 20.
213. Id. For a description of some of the allegations against Judicial Correction Services and Sentinel Offender Services, see Sentinel Offender Svcs. v. Glover, 766 S.E.2d 456, 466 (Ga. 2014) (an appeal involving thirteen individual civil actions); Complaint, Thompson v. Dekalb Cnty., No. 1:15-ma-99999-UNA (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/assets/2015.01.29_file_thompson_complaint.pdf [hereinafter Thompson Complaint] (a federal suit filed by the ACLU on behalf of Kevin Thompson in Atlanta against DeKalb County, the Chief Judge of the DeKalb County’s Recorder Court, and Judicial Correction Services, Inc.); Rappleye & Seville, supra note 205.
Montgomery, Alabama requires a three-year ban on contracts with private probation companies.\footnote{214}

\textit{B. The Rise of Modern-Day Debtors’ Prisons}

Despite the statutory and case law prohibitions, the incarceration of indigents for failure to pay has increased along with the growth of criminal justice debt.\footnote{215} Failure to pay LFOs has resulted in “a significant number of warrants, arrests, probation revocations, jail stays, and prison admissions in locales across the country.”\footnote{216} For example, one estimate is that half the arrests and up to one-quarter of the incarcerations in Ohio in 2010 were for fines and costs.\footnote{217} From July 2004 to July 2013, the percentage of monthly bookings in the Tulsa Jail involving warrants for the failure to pay criminal justice debt for state, non-felony charges increased from eight to twenty-nine percent.\footnote{218} Other examples include reports that fifteen percent of the inmates in one county in Washington were incarcerated for failure to pay criminal justice debt, while seventeen percent of pre-trial commitments in Rhode Island were due to failure to pay court debt.\footnote{219} Moreover, a 2010 study of the fifteen states with the highest prison populations found that all of the states made criminal justice debt a condition of supervision and arrested individuals for failure to pay or appear at hearings related to the failure to pay.\footnote{220} In many cases, defendants were incarcerated for days before any hearing on ability to pay.\footnote{221} Similarly, a study of municipalities in Missouri found that people who could not afford a bond after arrest for a failure to pay, could “spend as much as three weeks in jail waiting to see a judge.”\footnote{222}

\footnote{215. AM. CIVIL LIBERTIES UNION, supra note 12, at 5.}
\footnote{216. Beckett & Harris, supra note 12, at 524.}
\footnote{217. AM. CIVIL LIBERTIES UNION, supra note 12, at 50 (citing the estimate of Glen Dewar, a former Montgomery County Public Defender).}
\footnote{220. BANNON ET AL., supra note 37, at 20.}
\footnote{221. Id.}
\footnote{222. HARVEY ET AL., supra note 192, at 9.
In many cases, courts have ignored or weakened the ability to pay analysis required by legislation and case law. Often courts do not make any determinations of an individual’s ability to pay. A study that focused on the municipal courts in the Missouri cities of Bel-Ridge, Florissant, and Ferguson found that the courts “rarely” inquired into defendants’ ability to pay. The failure to inquire violates Missouri law that courts “shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of an individual.”

In February 2015, Equal Justice Under Law, ArchCity Defenders, and the Saint Louis University School of Law filed federal class action complaints against the Missouri cities of Ferguson and Jennings asserting violations of the constitutional rights of indigents who were imprisoned because they were unable to pay criminal justice debt arising from minor offenses. The offenses included traffic tickets. Describing the municipal jails as “debtors’ prison[s],” the complaints allege that the plaintiffs have been relegated to overcrowded, unsafe, and unsanitary conditions and denied medication and proper nutrition. The complaints describe suicides and suicide attempts by indigent individuals unable to make the necessary payments to be released from confinement. The complaints assert that the cities have violated federal and state law by creating a policy and practice of jailing indigents without determining their ability to pay criminal justice debt or considering alternatives to incarceration.

223. AM. CIVIL LIBERTIES UNION, supra note 12, at 5 (“courts across the United States routinely disregard the protections and principles the Supreme Court established in Bearden v. Georgia”).
224. BANNON ET AL., supra note 37, at 21 (indicating that “defenders in at least five of the [fifteen] surveyed states reported instances where they believed courts had either failed to consider ability to pay altogether or used an unreasonable standard for determining ability to pay”).
227. Ferguson Complaint, supra note 1, ¶ 1; Jennings Complaint, supra note 227, ¶ 1.
228. Ferguson Complaint, supra note 1, ¶ 1; Jennings Complaint, supra note 227, ¶ 1.
229. Ferguson Complaint, supra note 1, ¶ 6; Jennings Complaint, supra note 227, ¶ 7.
230. Ferguson Complaint, supra note 1, ¶ 2; Jennings Complaint, supra note 227, ¶ 2.
231. Ferguson Complaint, supra note 1, ¶¶ 122, 206 n.21 (noting “[a]t least four suicides and suicide attempts by people held because they were too poor to pay for their release have occurred in local municipal jails just in the past five months”); Jennings Complaint, supra note 227, ¶¶ 3, 238 n.21 (same).
232. Ferguson Complaint, supra note 1, ¶¶ 9, 164; Jennings Complaint, supra note 227, ¶¶ 10, 186.
complaints further allege that over the last five years the cities have improperly incarcerated hundreds of indigent individuals for non-payment of criminal justice debt. In addition, the cities allegedly placed thousands of indigents on payment plans for criminal justice debt for minor offenses who are now under threat of arrest and incarceration for failure to pay.233 The complaints also allege that the cities have failed to provide adequate representation to those incarcerated.234 City officials from Ferguson dispute the “accuracy of many of the allegations” and have stated that the city’s policy is to “not to discuss lawsuits that are pending in litigation.”235 Since the February 2015 filings in Ferguson and Jennings, at least seven other lawsuits alleging the operation of debtors’ prisons by municipalities have been filed.236

In instances where courts do have hearings, they often rely on broad definitions of willfulness to justify a finding that non-payment is based on willful failure rather than inability to pay.237 For example, public defenders claim that some judges have failed to conduct hearings properly and have found willful failure because non-paying defendants had admitted to smoking or having cable television.238

Moreover, indigents often do not have counsel at these hearings.239 In some states, non-payment is treated as civil contempt, and defendants may not have a right to counsel.240 In other cases, as a practical matter, defend-

234. Ferguson Complaint, supra note 1, ¶ 215; Jennings Complaint, supra note 227, ¶ 248.
236. See Class Action Complaint, supra note 12, ¶¶ 1–2 (federal lawsuit filed in October 2015 against the City of Austin, Texas alleging incarceration of individuals unable to pay criminal justice debt); Shapiro, supra note 12 (identifying six other lawsuits alleging debtors’ prisons filed against municipalities in September and October 2015).
237. Beckett & Harris, supra note 12, at 526 (stating that “the definition of ‘willful’ nonpayment that is emerging in case law is as broad as the legal definition of discrimination is narrow”).
238. BANNON ET AL., supra note 37, at 21–22; see also Ohio State Bar Ass’n v. Goldie, 119 Ohio St. 3d 428, 2008-Ohio-4606, 894 N.E.2d 1226, at ¶¶ 17–18 (invoking the public reprimand of a judge who failed to follow the state’s requirements for determining ability to pay before incarcerating a defendant for failure to pay a fine).
240. BANNON ET AL., supra note 37, at 22; see also ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 9 (2012), http://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt
pants are not provided counsel or decline counsel because they fear they will be charged additional fees that they cannot afford.241

For example, a 2015 federal lawsuit in Georgia asserts that DeKalb County, the Chief Judge of the DeKalb County’s Recorder Court, and Judicial Correction Services, Inc. (“JCS”) violated Kevin Thompson’s constitutional rights by failing to provide counsel and an indigency hearing before revoking his probation and jailing him when he was unable to pay traffic fines and fees.242 Unable to pay an $810 fine for driving with a suspended license, Thompson was assigned pay-only probation through JCS.243 Thompson, a nineteen-year-old, was no longer able to serve as a tow-truck driver because of the suspension of his license.244 His efforts to replace his lost income by borrowing from relatives and looking for alternative employment were not successful.245 JCS served Thompson with a Petition of Revocation of Probation asserting that he had failed to make required payments of fines and fees and ordering him to appear in court.246 The Petition did not notify him that indigent defendants had a right to free court-appointed counsel at revocation proceedings for failure to pay.247 Purportedly, the JCS officer also misrepresented that he would have to pay a $150 fee for a public defender and failed to disclose his right to seek a waiver of the fee.248 Not understanding that he could seek a waiver of the fee, Thompson waived his right to a public defender because he could not afford the fee.249 At the revocation hearing, Thompson was allegedly not informed of his right to counsel.250 A JCS representative told the court that if Thompson did not pay all of his fees and fines on the date of the hearing,
he should be jailed. The court agreed and sentenced Thompson to nine days.

In jurisdictions that permit exemptions from incarceration based on inability to pay, many individuals fail to apply because “the process . . . is poorly defined or overly complicated.” Some jurisdictions may require the defendant to apply for indigency relief rather than having the court make an affirmative finding of indigency before incarceration. For example, New York law requires the defendant to request resentencing to avoid incarceration for inability to pay a fine. In California, defendants, often unknowingly, waive their rights to ability-to-pay hearings under the state’s vehicle code because courts fail to notify defendants of their rights.

C. The Disparate Impact of Criminal Justice Debt on the Poor and Minorities

Although the growth of criminal justice debt has affected millions of Americans, those least able to afford the sanctions have suffered the most. While fees have become commonplace in modern society as reflected in the charging of fees by such institutions as banks, utilities, and airlines, monetary sanctions imposed by the criminal justice system “carry repercussions of a different order, amplifying as they often do the already severe indebtedness of those who are entrapped within its net.” Those who can afford to pay criminal justice debt can escape this net while those who are unable to pay become enmeshed in what often seems to be a never-ending poverty cycle. The adverse impact of this two-tiered system on the poor and minorities is reflected in disproportionate assessment of fees, additional monetary sanctions, barriers to re-entry, and stress on families.

The shooting death of Michael Brown and subsequent protests in Ferguson, Missouri have prompted renewed calls for investigation into the treatment of minorities and the poor in the criminal justice system. Anecdotal and empirical evidence illustrate how the system adversely affects
Statistics reflect that prisoners are “overwhelmingly poor” and “overwhelmingly, people of color.” Given the “substantially higher rates of incarceration” for the poor and minorities, “the effects of harsh penal policies in the past [forty] years have fallen most heavily on blacks and Hispanics, especially the poorest.” While white males have a 5.9% chance of incarceration during their lifetime, Hispanic males have a 17% chance, and black males have a 32% chance. As of December 31, 2013, approximately 3% of black males were imprisoned, while 0.5% of white males were imprisoned. The disparity is also evident in jails, where blacks and Hispanics represent more than half of the inmates but less than one-third of the general population. Moreover, 59% of jailed inmates “earned less than $1,000 per month before their arrest and . . . 29% . . . were unemployed.”

Similarly, criminal justice debt has a disparate impact on the poor and minorities. For example, forty-three states now impose a fee for an indigent’s “free” public defender. More than 80% of defendants qualify for the right to have appointed counsel. Black defendants are nearly “five times more likely than white defendants to” use appointed counsel, making them particularly susceptible to incurring more criminal justice debt in the form of public defender fees. In addition, black defendants are more likely than white defendants to remain in jail until trial because they are unable to post bail. The discretionary nature of fees and fines makes them “especially vulnerable to ethnic and other disparities.” For example, the Department of Justice’s report on the Ferguson Police Department (“FPD”) reflects the disparate impact on African-Americans where, “[d]espite making up 67% of the population, African Americans accounted for 85% of

258. Laurie L. Levenson & Mary Gordon, The Dirty Little Secrets About Pay-to-Stay, 106 MICH. L. REV. FIRST IMPRESSIONS 67, 67 (2007), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1133&context=mlr_fi (“The dirty little secret is out; people with more money get a better deal in our criminal justice system.”).
259. Levingston & Turetsky, supra note 82, at 187.
260. Id. at 188.
261. NAT’L RESEARCH COUNCIL, supra note 14, at 5.
262. Levenson & Gordon, supra note 258, at 67.
265. Levenson & Gordon, supra note 258, at 67.
266. BANNON ET AL., supra note 37, at 4.
267. Shapiro, supra note 26; State-by-State Court Fees, supra note 121.
268. BANNON ET AL., supra note 37, at 4.
269. Id.
270. SUBRAMANIAN ET AL., supra note 108, at 15.
271. Beckett & Harris, supra note 12, at 522.
FPD’s traffic stops, 90% of FPD’s citations, and 93% of FPD’s arrests from 2012 to 2014.272

Financial sanctions also disproportionately impact those at lower income levels.273 Typically, fines and fees in the United States system are imposed without consideration of the income of defendants.274 As a result, these monetary sanctions represent a larger percentage of the earning power of low-income defendants than of higher income defendants.275

Moreover, the imposition of criminal justice debt makes it harder for already impoverished inmates to ever escape poverty.276 Those unable to pay not only continue to remain in the criminal justice system but also are frequently assessed additional fees, referred to by critics as “poverty penalties,” because such charges only arise for individuals who are unable to pay the original monetary sanctions.277 Poverty penalties, consisting of interest, late charges, and collection fees, can put indigent defendants in an “endless cycle of debt.”278 Payment or installment plans, arguably designed to help those in need, may make matters worse by charging payment fees to participate.279 Fourteen of the fifteen states with the highest prison populations impose poverty penalties.280 The penalties can have a detrimental impact on the poor.281 For example, a study of criminal justice debt in Washington state found that using the median criminal justice debt amount of $7234, a defendant paying $100 per month, representing 15% of his expected monthly earnings, would—based on the accrual of interest charges—still owe nearly $900 after ten years.282

The two-tiered nature of the system is most apparent in situations described as “pay-only” probation where courts impose probation solely because the defendant is unable to pay fines or court costs upfront.283 If the accused had funds to pay the fines, the defendant would not end up on probation and would no longer be in the system. Defendants unable to pay fines upfront are subject to additional fees and remain in the system, even

273. AM. CIVIL LIBERTIES UNION, supra note 12, at 10 (describing the system as one “in which the poorest defendants are punished more harshly than those with means”).
274. Beckett & Harris, supra note 12, at 509.
275. Id. at 516 (explaining that for the “poor and disadvantaged population . . . legal debt is typically large relative to expected earnings”).
276. BANNON ET AL., supra note 37, at 2.
277. Id. at 1, 13.
278. Id. at 1.
279. PATEL & PHILIP, supra note 240, at 17.
280. BANNON ET AL., supra note 37, at 17.
281. Id. at 17–18.
283. HUMAN RIGHTS WATCH, supra note 30, at 25–27.
though they pose no threat to society and their underlying offenses, such as traffic violations, typically do not require incarceration.284

The problems become even more troubling when private probation companies are involved.285 Generally, contracts with private probation companies require courts to assess monthly supervision fees, ranging from $35 to $100.286 As these monthly fees accumulate, they can create substantial burdens for low-income individuals and can even exceed the initial fines assessed.287 Failure to pay these fees can be grounds for revocation of probation, which may result in the probationer’s incarceration.288 When used in the “pay-only” probation context, the monthly supervision fees create a poverty tax on defendants because they could not pay the fines or court costs upfront.289 Moreover, the continuous accrual of monthly fees is discriminatory against low-income individuals, creating a situation where “the poorer you are, the more you ultimately pay.”290

The poverty cycle is often inescapable because criminal justice debt hampers efforts at re-entry into society.291 Criminal justice debt negatively impacts credit scores, which can result in the denial of credit, housing, and employment opportunities.292 Additionally, failure to make criminal debt payments can lead to suspension of driving privileges, affecting the ability to obtain and keep jobs.293 Once a driver’s license is suspended, reinstatement and late fees are added to the original fine, and an individual must pay this debt before she can regain her license.294 California courts have suspended more than four million licenses for failure to pay criminal justice debt.295 Similarly, outstanding criminal justice debt may result in denial of the right to vote.296

284. Id. at 25.
285. For a description of some of the financial hardships private probation companies impose on indigent probationers, see id. at 22–37. The Human Rights Watch report provides anecdotal and statistical evidence to support its claims. Id.
286. Id. at 23–24.
287. Id. at 24.
288. Id. at 26.
289. Id. at 27.
290. Id.
291. BANNON ET AL., supra note 37, at 27; EISEN, supra note 39, at 2.
292. BANNON ET AL., supra note 37, at 27.
293. Id. at 2; BENDER ET AL., supra note 132, at 4; Harris, Evans & Beckett, supra note 26, at 1762. For a more detailed discussion regarding the use of suspension of driving privileges to collect traffic fines, see John B. Mitchell & Kelly Kunsch, Of Driver’s Licenses and Debtor’s Prison, 4 SEATTLE J. FOR SOC. JUST. 439 (2005).
295. BENDER ET AL., supra note 132, at 4.
Failure to pay legal financial obligations is also a condition of probation or parole, and violations of probation or parole can in turn result in denial of federal benefits—including food stamps, social security, and housing assistance.297 Often low-income defendants have to choose between paying criminal justice debt and buying necessities.298 For example, Regina Roberts, a single grandmother, whose sole income was disability payments, had to choose between making criminal justice debt payments and medical debt payments related to her lung disease and bipolar disorder.299 She had been assessed nearly $7000 in LFOs following a welfare fraud conviction due to a caseworker’s error in reporting her income when she sought recertification for her food stamps.300 A probation officer rejected Ms. Roberts’ payments as too small and had the court extend her original two-year probation term for an additional two years.301

The impact of criminal justice debt is not limited to defendants. Collectors may seek recovery from jointly held assets and may even be able to garnish the earnings of a defendant’s spouse.302 Funds that may otherwise be used to support spouses and children are often used to pay criminal justice debt.303 A report based on interviews with defendants about the consequences of criminal justice debt found that families and friends often provide the financial resources to prevent re-incarceration stating, “[e]ven assuming that it is the returning prisoner who has ‘done the crime,’ it is often up to . . . friends and family members to help pay the time.”304

While coping with civil debt issues is difficult for the poor and minorities, criminal justice debt issues often create greater concerns. Unlike civil debt, criminal justice debt is typically not subject to discharge in bankruptcy and carries with it the threat of arrest and incarceration.305 When services are outsourced to private parties, collectors obtain remedies that would not be otherwise permissible in civil collection.306 For example, private probation companies can threaten revocation of probation to collect

297. BANNON ET AL., supra note 37, at 28; Harris, Evans & Beckett, supra note 26, at 1762.
298. COOK, supra note 41, at 24; EISEN, supra note 39, at 2.
299. AM. CIVIL LIBERTIES UNION, supra note 12, at 32.
300. Id.
301. Id.
302. Beckett & Harris, supra note 12, at 523 (stating that in Washington state, clerks can “garnish up to 25% of the earnings of the debtor or his/her spouse and to seize jointly held bank assets, home equity, and tax refunds”).
304. NAGRECHA ET AL., supra note 303, at 3; see EISEN, supra note 39, at 4 (concluding that families adversely impacted by loss of income from incarcerated relatives often pay inmate fees).
306. Beckett & Harris, supra note 12, at 513.
their supervision fees. To put this information into context, Human Rights Watch describes how defendants could be in a better situation by taking out a loan with exorbitant terms:

An offender who requires 24 months on probation to pay off a $1,200 fine, with a $35 monthly supervision fee, would be financially better off taking out a $1,200, 24-month loan with an APR of 50 percent. She would also not have to face the direct threat of incarceration over missed payments, as she would while on probation.

Additionally, non-monetary probation requirements may discriminate against the poor. For example, court-imposed probation required Quentone Moore to wear an electronic monitoring bracelet; however, the monitoring bracelet required a landline telephone. Being homeless, Moore was unable to comply with the landline requirement and wound up spending fifty-two days in jail.

D. Conflicts of Interest and Distrust in the Criminal Justice System

The current system of assessing and collecting criminal justice debt has created distrust and conflict of interest issues similar to the concerns voiced by opponents of debtors’ prisons in the eighteenth and nineteenth centuries. Distrust of the legal system by the poor and minorities is not a new issue. As recognized by the Supreme Court, “Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts.” For many people, their experience with the justice system is based on their interactions with the municipal court. For those who are assessed with criminal justice debt that they are unable to pay and threatened with arrest, their measure of justice becomes characterized by distrust and fear. The fear of arrest for failure to pay criminal justice debt can cause individuals to avoid seeking necessary legal or medi-

308. HUMAN RIGHTS WATCH, supra note 30, at 29.
309. Id. at 35.
310. See supra notes 52–55 and accompanying text.
311. The topic of class and racial discrimination in the criminal justice system is beyond the scope of this Article. For more detailed information, see DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Clyde E. Murphy, Racial Discrimination in the Criminal Justice System, 17 N.C. CENT. L.J. 171, 187–90 (1988).
313. See, e.g., HARVEY ET AL., supra note 192, at 12 (describing experiences in Missouri).
314. HARVEY ET AL., supra note 192, at 12; Westen, supra note 85, at 795.
cal help. The same fear can result in reluctance to show up at their workplace. In certain situations, the imposition of criminal justice debt can encourage individuals to commit crimes to obtain the funds necessary to pay criminal justice debt.

Where racially discriminatory practices exist or appear to exist, distrust can rise to even greater levels. These situations can result in concerns about racial profiling. For example, the Ferguson Police Department has been accused of “us[ing] racially discriminatory practices in targeting minorities for minor offenses and putting them in jail if they can’t pay fines.” The Department of Justice’s report found “substantial evidence of racial bias among police and court staff in Ferguson.”

The dramatic increase in the level of criminal justice debt at a time of budgetary shortfalls has created an impression that criminal justice debts are imposed primarily for collecting revenue rather than serving a penological rationale. Concerns about revenue collection are generally greater in economically depressed counties, putting more pressure on those least likely to afford the burden of criminal justice debt.

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315. Nat’l Research Council, supra note 14, at 305 (identifying Alice Goffman’s ethnographic study describing how probationers and parolees in Philadelphia “and those with outstanding warrants, even for trivial offenses, avoid the police and courts at all costs—even when they are the victims of violent attacks and other serious crimes—out of a justified fear that they will be sent to prison or jail”); see Harris, Evans & Beckett, supra note 26, at 1761 (also relying on Goffman’s study and concluding that “being wanted by the police shapes the lives of the urban poor, often in adverse ways”).

316. Harris, Evans & Beckett, supra note 26, at 1761.

317. Cook, supra note 41, at 11 (reporting that seventeen percent of those surveyed in Alabama admitted to committing crimes to obtain money to pay criminal justice debt and that the number was greater when the interviewer was independent rather than a criminal justice officer); see Bearden v. Georgia, 461 U.S. 660, 670–71 (1983) (revoking probation of someone who does not have the ability to pay “may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation”); Katzenstein & Nagrecha, supra note 26, at 566 (recognizing “[t]o the extent that the excessive burdens of debt direct the poor toward additional crime, the failure to make payments on state monies owed leads to reincarceration, and responsibility as valued behavior simply cannot be learned by overwhelming individuals who are already struggling financially, reason exists on all sides of the aisle to reverse the direction of the growing debt collection regime”); see also Westen, supra note 85, at 795 (referring to the 1968 President’s Commission on Riots and Civil Disorders for the conclusion that “the belief is ‘pervasive’ in ghetto areas that the courts in imposing fines discriminate against the poor, that the judicial system has become an object of distrust, and that this distrust has increased the level of crime”).

318. Harvey et al., supra note 192, at 13 (report of certain municipalities in Missouri claiming that “the current policies adopted by the municipal court system lead to the impression of the courts and municipalities as racist institutions that care much more about collecting money—generally from poor, black residents—than about dispensing justice”).

319. Connolly, supra note 257.

320. U.S. Dep’t of Justice, supra note 90, at 5.

321. Am. Civil Liberties Union, supra note 12, at 8 (recognizing that criminal justice debt represents a “critical revenue stream” for otherwise inadequately funded justice systems).

Imposing criminal justice debt on the poor to fund the court system creates potential conflicts of interests for judges who face conflicting concerns over providing justice and collecting revenue. The practice “can interfere with the judiciary’s independent constitutional role . . . and, in its most extreme form, threaten the impartiality of judges and other court personnel.”

Similarly, for probation and parole officers, the traditional role of supervising and monitoring individuals to protect the public and prevent new offenses is often in conflict with the new role of debt collector.

The problem of conflicts of interest may be even more dramatic with the privatization of services. As more states and localities have turned to privatizing prisons, jails, supervision, and collection, the incentives for these third parties to profit are often in conflict with the goals of the criminal justice system.

For example, private probation companies who typically provide their services at no charge to municipalities, rely solely on fees collected from the persons that they monitor. As a result, for these companies, “every person who successfully completes probation is a lost source of revenue.” Additionally, the private parties may act without ad-

323. BANNON ET AL., supra note 37, at 30.
324. AM. CIVIL LIBERTIES UNION, supra note 12, at 9 (referring to the acknowledgement by the chief judge of the New Orleans criminal court that “it creates an appearance of impropriety when judges must rely in part on collecting LFOs from poor defendants to keep their courts running”).
325. Id. Another concern arises with part-time justices who have non-judicial roles in the system. See, e.g., HARVEY ET AL., supra note 192, at 11 (describing situations in Missouri where part-time municipal judges may also serve as prosecutors in other municipalities).
326. BANNON ET AL., supra note 37, at 31.
327. Logan & Wright, supra note 24, at 1213 (describing how “[r]isk also spikes when private vendors get involved”). But see John Archibald, Alabama’s For-Profit Courts Turn American Dream into Nightmare, AL.COM (Nov. 21, 2014), http://www.al.com/opinion/index.ssf/2014/11/alabamas_for-profit_courts_tur.html (arguing that merely eliminating government use of private probation companies does not eliminate conflicts as government, too, can act for profit rather than justice).
328. See, e.g., Aviram, supra note 201, at 132 (stating that “the emergence of private probation outfits has led to allegations that probationary decision-making has shifted from ostensibly neutral courts to for-profit corporations looking to reap financial gain by using probation as a tool to fine and fee cash-strapped individuals”); Developments in the Law: Policing, supra note 307, at 1729–30.
330. See Balko, supra note 329 (asserting that “if you hire a probation company on a contract that makes probation the sole source of the company’s revenue, that company will have a strong incentive to treat probationers more as cash machines than as human beings”).
equate supervision by the court or local government. The lack of oversight leads to accountability issues and creates the potential for corruption.

IV. A FRAMEWORK FOR REDUCING INCARCERATION OF INDIGENTS WHO FAIL TO PAY CRIMINAL JUSTICE DEBT

Given the return of debtors’ prisons as well as the historical concerns that led to calls for their abolition, it is time to implement more effective alternatives to reduce the incidence of incarceration of individuals who are unable to pay legal financial obligations. This Part evaluates some of the current proposals—namely abolishing monetary sanctions, basing fines on earnings, and enforcing current laws. This Part then recommends a hybrid approach and suggests modifications to broaden the scope and enforceability of the current proposals.

A. Alternatives

1. Abolish Monetary Sanctions

Professors Katherine Beckett and Alexes Harris advocate the abolition of fees and fines as currently used in the United States criminal justice system. Based on their analysis, the cost of these sanctions outweighs the benefits. Their proposal is based on three general concerns: the need for

331. HUMAN RIGHTS WATCH, supra note 30, at 57–61 (describing problems with lack of government or judicial supervision of private probation companies); Developments in the Law: Policing, supra note 307, at 1729–30 (asserting that when using private probation companies “local governments have little control over how fee schemes are structured or which probationers are hounded”); Logan & Wright, supra note 24, at 1213–14. Thompson v. DeKalb County is a recent case involving a county’s and court’s improper delegation of authority and supervision to a private probation company. See Thompson Complaint, supra note 213, ¶ 96.

332. HUMAN RIGHTS WATCH, supra note 30, at 63–67 (discussing accountability and corruption issues under the current private probation system); Logan & Wright, supra note 24, at 1213–14.

333. Beckett & Harris, supra note 12, at 519. Beckett and Harris expressly exclude restitution charges from the sanctions that they claim should be abolished. Id. at 510 (arguing that restitution payments differ from fines and fees in that restitution payments are made to specific victims as opposed to the government). For additional support for the abolition approach, see Katzenstein & Nagrecha, supra note 26, at 556. Professor Ruback contends that the restrictions should be limited to fees and costs. R. Barry Ruback, The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society, 99 MINN. L. REV. 1779, 1820 (2015). Similarly, a recent draft of the Model Penal Code (Second) of Sentencing also proposes that fees and costs be abolished. See Kevin R. Reitz, The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second), 99 MINN. L. REV. 1735, 1757–61 (2015) (citing MODEL PENAL CODE: SENTENCING § 6.04D(2), Alternative § 6.04D(1) (Tentative Draft No. 3, 2014)).

334. Beckett & Harris, supra note 12, at 519.
a “convincing penological rationale,” the unfairness of imposing monetary sanctions, and the conflicts of interests created by the system.335

With respect to the penological justification, they argue that fees and fines, as imposed in the United States, do not serve the traditional penological goals of “incapacitation, rehabilitation, deterrence, and retribution.”336 The discretionary and unpredictable nature of monetary sanctions prevents effective deterrence while their disproportionately punitive nature “approaches vengeance rather than retribution.”337 Moreover, Beckett and Harris argue the sanctions often are counterproductive and create hurdles that prevent re-integration of defendants into society.338

Beckett and Harris point to the inequity in the imposition of monetary sanctions as a reason for abolishing them. In particular, they identify the problems of supplementing prison sentences with monetary sanctions, the inherent class bias in assessing monetary sanctions without adjustments for income, and the use of incarceration for failure to pay criminal justice debt.339 Moreover, as Beckett and Harris note, the sanctions imposed often have deleterious impacts on the families of defendants.340

Finally, Beckett and Harris are concerned about funding the criminal justice system through leveling monetary penalties on defendants.341 Specifically, they are skeptical about whether collections, especially when measured against their substantial indirect costs, result in “a net financial gain.”342 They contend that the use of a system that relies on fees for funding can lead to conflicts of interest for judges and other actors involved in assessing and collecting fees to support the system.343 Given these concerns, Beckett and Harris suggest that fees and fines, as currently used in the United States, should simply be abolished.344

While the abolition proposal has advantages as a bright-line approach, complete abolition seems extreme. As a practical matter, political and financial considerations will likely prevent the complete abolition of monetary sanctions.345 Polls indicate that Americans “overwhelmingly” support

335. Id. at 519–28.
336. Id. at 519.
337. Id. at 520.
338. Id.
339. Id. at 521–25.
340. Id. at 523.
341. Id. at 527–28.
342. Id.; see also Pat O’Malley, Politicizing the Case for Fines, 10 CRIMINOLOGY & PUB. POL’Y 547, 551 (2011) (relying on Harris and Beckett’s findings and noting that “fees probably are at best fiscally neutral because . . . the costs of collection approach the revenue raised, and when factoring in their social costs fees are likely “fiscally counterproductive”).
343. Beckett & Harris, supra note 12, at 528.
344. Id. at 528–29.
345. Traci R. Burch, Fixing the Broken System of Financial Sanctions, 10 CRIMINOLOGY & PUB. POL’Y 539, 539–41 (2011). Professor Reitz explains that while the first choice of the draft-
the idea of offender funding. Moreover, given state budgetary concerns, states are unlikely to release potential revenue sources. To the contrary, the economic considerations have led to increased growth in fees assessed. Additionally, monetary sanctions can be effective for individuals who can pay.

2. Base Fine Amounts on Income Levels

An alternative to abolishing sanctions is to assess sanctions based on a defendant’s income. Sweden and Germany are examples of countries that apply a graduated system known as “day-fines.” In countries using a day-fine system, fines are typically the primary source of punishment. Day-fines are calculated based on the severity of the crime and the defendant’s daily income. The goal of the day-fine system is to create “an equivalent level of economic burden to offenders of differing means who are convicted of similar offenses.” As a result, under the day-fine system defendants convicted of the same offenses would pay the same percentage of their income, meaning that individuals with greater incomes would be assessed larger absolute fines.

The day-fine system has several advantages over the traditional system in America. First, it has a fairness component so that individuals are assessed the same relative sanction, regardless of their income. Additional-
ly, since sanctions are based on a defendant’s ability to pay, collection would presumably be easier.355

Although day-fine systems have been operating in several European countries for years, implementation in the United States may be difficult, especially given the American penchant for use of imprisonment.356 The use of monetary sanctions is substantially different in Europe than in the United States.357 While Europe tends to rely on monetary sanctions as the sole source of punishment, in the United States, monetary sanctions are often a supplement to other forms of punishment, including incarceration and probation.358 In the United States, fines are typically set at the judge’s discretion without consideration of defendant’s earnings, and fines often accompany prison sentences and probation.359 Generally, American judges do not view fines as an adequate alternative to imprisonment or probation.360 Additionally, the day-fine systems in Europe rely on the courts’ access to financial information regarding citizens. Such information, while available in Europe, is generally not available in the United States.361 To implement a similar system in the United States would require that courts have access to defendants’ financial records, such as bank accounts and tax returns. However, such a system would likely be expensive to implement and would raise privacy issues.362

3. Enforce Current Laws

Instead of seeking to abolish monetary sanctions or overhaul the system of setting fines, a third alternative is to develop a more effective system for enforcing existing laws designed to prevent incarceration of indigents. Prompted by American Civil Liberties Union (“ACLU”) concerns of abuse, in 2014 the Ohio Supreme Court and the Colorado legisla-

356. Tonry & Lynch, supra note 91, at 132 (stating that the most difficult obstacle to implementing day fines “is the modern American preoccupation with absolute severity of punishment and the related widespread view that only imprisonment counts”). Although some pilot day-fine programs have been conducted in the United States, they have been in limited areas for limited timespans and for the most part have focused on misdemeanors. See id. at 129–30 (describing test programs that occurred for relatively short time spans in 1988–1994 in Staten Island, New York and counties in Arizona, Connecticut, Iowa, and Oregon).
357. Beckett & Harris, supra note 12, at 514–15; Tonry & Lynch, supra note 91, at 128.
358. Beckett & Harris, supra note 12, at 514–15; Tonry & Lynch, supra note 91, at 128.
359. Beckett & Harris, supra note 12, at 514–15; Tonry & Lynch, supra note 91, at 128.
360. Tonry & Lynch, supra note 91, at 128 (citing a national survey of judicial attitudes).
361. Cole, supra note 352, at 7–8 (reporting the results of a judicial survey reflecting that judges have limited information about income, employment, and assets of defendants); Ruback, supra note 82, at 576–77.
ture established plans designed to enforce existing laws and end the problem of incarcerating indigents for failure to pay criminal justice debt. 363

Ohio’s reforms were prompted by reports from the ACLU in 2010 and the ACLU of Ohio in 2013. 364 A 2010 investigation by the ACLU of five states, including Ohio, found that the subject states had improperly incarcerated individuals who were unable to pay criminal fines. 365 Specifically, the 2010 report found that although Ohio has some of the toughest laws prohibiting the incarceration of individuals for failure to pay fines and fees, Ohio courts were ignoring these restrictions and imprisoning individuals who were unable to pay their criminal justice debt. 366 After the release of the 2010 report, the ACLU of Ohio received notices of abusive practices throughout the state, especially from Huron County. 367 The ACLU’s review of public records, as well as in-person court observation, revealed “egregious evidence of debtors’ prisons practices.” 368 Based on these findings in Huron County, the ACLU of Ohio conducted a statewide investigation of ten other counties finding that “debtors’ prisons practices [were] undoubtedly a statewide phenomenon in Ohio, potentially affecting thousands of individuals.” 369 The 2013 report, based on the a statewide investigation, concluded, “[u]ntil the state Supreme Court takes action, thousands of Ohioans will continue to be relegated to the outskirts of hope, where the crime of poverty sentences them to a vicious cycle of incarceration, burdensome fees, and diminishing optimism for a better


365. AM. CIVIL LIBERTIES UNION, supra note 12, at 44–45.

366. AM. CIVIL LIBERTIES UNION, supra note 12, at 43–44. The restrictions on use of incarceration for debt identified in the report include the constitutional restriction on imprisonment for debt, and the statutory and case law restrictions preventing use of incarceration to collect costs, restitution, and other fees. Id. at nn.129 & 134–36 and accompanying text (citing OHIO CONST. art I, § 15); State v. Self, 2d Dist. Montgomery No. 20370, 2005-Ohio-1120; see also OHIO REV. CODE ANN. §§ 2929.18[D], 2929.28[D] (Supp. 2014).

367. AM. CIVIL LIBERTIES UNION OF OHIO, supra note 364, at 8.

368. Id. at 8–9 (finding that “approximately 22% of the total bookings in the Huron Country Jail were related to failure to pay fines”).

369. Id. at 9.
life.”370 In April 2013, the ACLU of Ohio demanded that the Ohio Supreme Court “promulgate clear rules . . . [to] end debtors’ prisons in Ohio.”371

By February 2014, the Ohio Supreme Court had responded to the call for action and taken the lead in establishing reforms aimed at ending incarceration based on the inability to pay criminal justice debt.372 The Ohio Plan provides trial judges with a laminated “bench card” with “user-friendly encapsulations and graphics” that set forth the restrictions on the use of incarceration for criminal justice debt.373 Specifically, the card distinguishes between fines and court costs.374 The card states that court costs, including fees, are civil debt obligations so that incarceration is not available as a collection method.375

For fines, incarceration is available only after a determination by the court at a hearing that the defendant’s failure to pay is based on a willful refusal to pay as opposed to an inability to pay.376 Defendants are entitled to reasonable notice of the hearing and a right to counsel, including a public defender.377 If a court rules that the defendant can pay, the judgment must include findings of fact regarding defendant’s income, assets, and debts.378

Moreover, as specified in the bench card, courts cannot use their contempt powers to incarcerate someone for failure to pay a fine, and “unpaid fines and/or court costs may neither be a condition of probation, nor grounds for an extension or violation of probation.”379 The card cautions judges that they are subject to “disciplinary violations” if they fail to follow the provisions for the collection of fines.380 In addition to the bench

370. Id. at 20.
371. AM. CIVIL LIBERTIES UNION OF OHIO, supra note 364, at 20.
372. Pelzer, supra note 363 (stating that “[t]he Ohio Supreme Court has likely done more than any other state supreme court to stop the unconstitutional jailing of people who can’t afford to pay fines or court costs”); ‘Debtors’ Prisons’ Struck Down by Ohio Supreme Court, HUFF POST (Feb. 5, 2014), http://www.huffingtonpost.com/2014/02/05/debtors-prisons-ohio_n_4732596.html; Ohio Bans Debtors’ Prisons, A.B.A. J., Oct. 2014, at 61 (commentator remarking on the actions of the Ohio Supreme Court, stated that “[w]ith swiftness almost unknown to any big-state, sprawling judiciary, the chief justice [of the Ohio Supreme Court] set in motion corrective measures that virtually ended the [debtors’ prison] practice within the year”).
374. SUPREME COURT OF OHIO, supra note 373 (citing State v. Swift, 2d Dist. Montgomery No. 20543, 2005-Ohio-1595. 375. Id.
376. OHIO REV. CODE ANN. § 2947.14(A) (LexisNexis 2014); SUPREME COURT OF OHIO, supra note 373.
377. § 2947.14(B); SUPREME COURT OF OHIO, supra note 373.
378. § 2947.14(C); SUPREME COURT OF OHIO supra note 373.
379. SUPREME COURT OF OHIO, supra note 373.
380. Id.
card, the Ohio Supreme Court has established training for judges, probation officers, and court employees.381

Just as an ACLU report prompted judicial action in Ohio, an ACLU investigation led to legislative action in Colorado to deal with debtors’ prisons.382 The Colorado chapter of the ACLU had conducted a two-year study that focused on the use of “pay or serve” warrants by the municipal courts in three large cities in Colorado.383 These warrants required defendants to either pay the full amount of their monetary sanctions or serve jail time to pay off their debt.384 As reported in demand letters sent to the mayors of Westminster, Northglenn, and Wheat Ridge, the ACLU of Colorado found that the municipal courts in these cities incarcerated indigent individuals who failed to pay criminal justice debt without consideration of their ability to pay.385

The ACLU also alleged that the procedure of incarcerating indigents under pay or serve warrants was fiscally unsound as the system had increased the costs of incarceration, and fines were never collected.386 For example, the investigation found that in one jail during a five-month period, the loss to the municipality was $110,000 as about 150 people served about 1000 days in jail resulting in a cost of over $70,000 for incarceration and the cancelation of $40,000 in fees.387 The ACLU letters demanded that the


384. Osher, supra note 383.


387. Id. As described in the demand letters, imprisoning an indigent defendant who is unable to pay a fine results in a “net loss . . . of more than $70 per day.” Letter from Rebecca T. Wallace & Mark Silverstein, ACLU of Colo., to Herb Atchison, Mayor of Westminster 5 (Dec. 16, 2013), http://aclu-co.org/wp-content/uploads/files/2013-12-16%20Atchison-ACLU.pdf; Letter from Rebecca T. Wallace & Mark Silverstein to Joyce Downing, supra note 385, at 5; Letter from Rebecca T. Wallace & Mark Silverstein to Joyce Jay, supra note 385, at 6.
municipalities cease their unconstitutional practice of incarcerating individuals for failure to pay fines without determining their ability to pay.\textsuperscript{388}

Following the ACLU investigation, Colorado enacted legislation designed to reduce the incidence of debtors’ prisons. The ACLU proclaimed the legislation to be “the first of its kind across the country and will serve as a model for other states.”\textsuperscript{389} Specifically, Colorado amended its statute dealing with the due process requirements for monetary payments.\textsuperscript{390} Unlike the Ohio Supreme Court’s distinction between fines and fees, the amended Colorado statute replaces “fine” with the broader term “monetary amount” to reflect that the amendments apply to all court-imposed monetary amounts.\textsuperscript{391} The amendment further requires that if a court imposes a monetary amount on a defendant, that the court instruct the defendant that if she is unable to pay the amount due at any time, she must contact the court or the court’s designated official to explain the inability to pay.\textsuperscript{392} Recognizing the impact of monetary sanctions on the poor and their families, the statute sets forth procedural protections that, among other things, prohibit incarceration “when a defendant is unable to pay a monetary amount due without undue hardship to himself or herself or his or her dependents.”\textsuperscript{393} A court may not revoke probation, find a defendant in contempt of court, or incarcerate a defendant for failure to pay:

unless the court has made findings on the record, after providing notice to the defendant and a hearing, that the defendant has the ability to comply with the court’s order to pay a monetary amount due without undue hardship to the defendant or the defendant’s dependents and that the defendant has not made a good faith effort to comply with the order.\textsuperscript{394}

\begin{footnotes}
\item 388. Letter from Rebecca T. Wallace & Mark Silverstein to Herb Atechison, \textit{supra} note 388, at 5–6; Letter from Rebecca T. Wallace & Mark Silverstein to Joyce Downing, \textit{supra} note 385, at 5–6; Letter from Rebecca T. Wallace & Mark Silverstein to Joyce Jay, \textit{supra} note 385, at 6–7.
\item 390. Act of May 9, 2014, ch. 164, 2014 Colo. ALS 164, (codifies as amended at COLO. REV. STAT. § 18-1.3-702 (2015)).
\item 391. Id. (amending COLO. REV. STAT. § 18-1.3-702(a) (2013)); Recent Legislation, \textit{supra} note 363, at 1315–16 (classifying the change as “a subtle but important fix that captures court costs and fees in addition to fines”).
\item 393. Id. (amending COLO. REV. STAT. § 18-1.3-702(3)(a) (2013)).
\item 394. Id. (amending COLO. REV. STAT. § 18-1.3-702(3)(c) (2013)).
\end{footnotes}
Moreover, the amendment eliminates pay or serve warrants, by providing that courts may only issue warrants for failure to appear.395 A criticism of the Colorado approach is that it fails to define “undue hardship.”396

B. Hybrid Approach

Instead of trying to completely overhaul the system by eliminating monetary sanctions or setting fines as a percentage of income, a more practical and less extreme approach—given budgetary issues and the information currently available to courts—would be to eliminate the most egregious sanctions, provide flexibility to rely on earning levels in setting sanctions, and establish procedures to ensure that courts enforce the restrictions that the Supreme Court established in Bearden.397

As described in Part II, Bearden requires that a court assess an individual’s ability to pay and alternative measures of punishment before revoking probation and incarcerating a defendant for failure to pay a fine or restitution.398 Although the Bearden Court set forth these restrictions more than thirty years ago, courts have not adhered to its mandate.399 To comply with Bearden, states should follow the lead of Ohio and Colorado in establishing practical methods for reducing the incidence of debtors’ prisons. Both plans recognize the due process and equal protection considerations developed in Bearden that people should not be incarcerated simply because they are unable to pay criminal justice debt. This Section proposes a system that uses the Ohio and Colorado plans as models to establish a practical method of enforcing the requirements of Bearden but also incorporates the abolition of certain charges and sets certain fines based on income levels.

1. Determine the True Nature of Charges and Whether Charges Should be Assessed

The first step in deciding whether incarceration should be permitted for the failure to pay a monetary charge is to assess the primary purpose for the charge. In practice, the terms “fines,” “fees,” “costs,” and “restitution,” are often used interchangeably.400 Legislatures and courts should evaluate

395. See id. (striking provision in COLO. REV. STAT. § 18-1.3-702(2) (2013) stating “If the defendant fails to pay a fine as directed, the court may issue a warrant for his or her arrest . . . .”).
397. Ruback, supra note 82, at 574 (“That state courts do not follow the law does not necessarily mean that all economic sanctions should be abolished. Rather, actions should be taken to make the courts follow the law.”).
399. See supra Parts II.B.1 & III.B.
400. See Logan & Wright, supra note 24, at 1203–08 (discussing how the categorization of criminal justice debt impacts its treatment).
monetary charges based on their primary penological rationale and rec

ognize that other reasons for charges may exist. The label “fine” should be

reserved for charges that have a primarily punitive or deterrent purpose,

while “restitution” should be for charges primarily designed to compensate

victims, and “fees” should refer to charges and costs that are primarily

designed to reimburse expenses.

Analyzing the true nature of a charge would provide courts and legisla-
tures the opportunity to determine if the charge is one that should be

imposed. For example, a case could be made that courts should not re-

quire application fees or reimbursement charges for public defenders. Such

charges disproportionately affect indigent clients and may leave them

without representation if they cannot afford to pay. The process could also

be used to help determine whether to eliminate or reduce charges that are

merely used to collect revenue for non-criminal justice matters. For ex-

ample, the Ferguson report stressed the problems that occur when municipali-

ties improperly use the criminal justice system for revenue collection

rather than public safety.

The process should also examine situations where imposition of fees is

fiscally counterproductive. For example, a study in Rhode Island from

2005 to 2007 found that “15% of the incarcerations [for court debt] cost the

state more than the amount owed by the individuals.” Reforms following

impact analysis studies of LFOs in Rhode Island led to reductions in inca-

ceration costs to the state and an increase in criminal justice debt collect-


401. An additional consideration that is beyond the scope of the article is whether a fine vi-

lates the Eighth Amendment’s restriction on “excessive fines.” U.S. CONST. amend. VIII. For

recent discussions regarding renewed calls for the use of the Eighth Amendment to justify re-

strictions on criminal justice sanctions, see Beth A. Colgan, Reviving the Excessive Fines Clause,

102 CAL. L. REV. 277 (2014); Eisen, supra note 39, at 6–7; Eisen, supra note 104; Development

in the Law Policing, supra note 307, at 1742–45.

402. Beckett & Harris, supra note 12, at 526–27. A detailed discussion of whether fees and

charges should be assessed for public defenders is beyond the scope of this Article. For a discus-

sion addressing the application fee issue, see Wright & Logan, supra note 109. For calls to end

the use of public defender charges, see AM. CIVIL LIBERTIES UNION, supra note 12, at 11.

403. Logan & Wright, supra note 24, at 1206–07 (discussing cases, including cases involving

charges for a law library, overhead, and overtime payments where “courts have invalidated vari-

ous costs and fees when the connection between the assessment and its particular use [was] too

attenuated.”); Ruback, supra note 82, at 576 (suggesting elimination of fees especially those at the

county level designed for revenue generation).


405. See, e.g., Patel & Philip, supra note 240, at 11 (suggesting that jurisdictions perform an

“impact analysis of proposed and existing fees” to determine “whether a policy is fiscally sound,

or merely a hypothetical revenue source that will actually cost more to implement than it generates

in revenue”). For more details about the fiscally counterproductive nature of incarcerating indi-

gents, see infra note 39 and accompanying text.

406. RHODE ISLAND FAMILY LIFE CTR., COURT DEBT & RELATED INCARCERATION IN

The reforms in Rhode Island included allowing judges to establish payment plans and waive fees and fines for those unable to pay. Additionally, to prevent unnecessary jail time, judges are required to promptly hear cases involving individuals arrested for failure to appear at payment hearings.

Additionally, courts and legislators could look at standardizing charges to combat allegations about discriminatory treatment in the system. Such an approach could help alleviate concerns that the judicial system is more interested in revenue collection than the administration of justice.

One approach to evaluating fines and fees would be to use independent commissions. Professors Wayne Logan and Ronald Wright advocate the use of such commissions “to assess, monitor, and control the ever-expanding, pell-mell collection of LFOs.” Under their proposal, “[t]he commission should comprehensively review existing LFOs, approve newly proposed LFOs, and collect and publish data relevant to their legal and policy desirability.” Independent commissions with a broad range of interested parties could further reduce conflicts of interest and concerns over excessive reliance on revenue generation. Additionally, independent commissions could create much needed transparency by evaluation and publication of their findings on existing and proposed fines and fees. This would allow for comparison of fines and fees among municipalities and provide for more effective public scrutiny of local practices.

2. Prohibit Incarceration for Failure to Pay Reimbursement Charges

Having established the true nature of a charge, courts should not be permitted to use the threat of imprisonment as a method of collecting funds that will merely reimburse costs or expenses of those involved in the criminal justice system. In such circumstances, the beneficiaries of the

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407. See, e.g., Patel & Philip, supra note 240, at 13 (reporting a reduction of “$190,000 in marginal costs” and an annual increase of over $160,000 in funds collected).
408. Id.
409. Id.
411. Logan & Wright, supra note 24, at 1178.
412. Id. at 1215.
413. Id. at 1215–26.
414. Id. at 1221–26.
415. Id. at 1222.
payments should be limited to the same remedies available to creditors and collectors of civil debts. For example, when a defendant uses a public defender and then fails to pay the fees, the state can threaten incarceration for failure to pay. But when a defendant hires a private attorney and then fails to pay his attorney’s fees, the attorney would not be able to employ the same coercive collection techniques. The state should be limited to the same remedies as the private attorney.416 The Ohio Plan recognizes this difference by stating that while non-payment of fines may result in incarceration, non-payment of fees and costs are civil obligations subject only to civil remedies.417

3. Establish Guidelines and Procedures for Determination of Indigency for Failure to Pay Fines or Restitution

Under the hybrid approach to reforming modern-day debtors’ prisons, individuals should not be imprisoned for the failure to pay fines or restitution if the failure to pay is due to their inability to pay. As part of the process for making the ability-to-pay determination, courts should only allow incarceration after the court has given the defendant notice and had a hearing where specific findings of ability to pay are made on the record.418 Moreover, defendants should be notified of their right to counsel and be provided a court-appointed attorney if they are unable to afford one.419 The ability-to-pay determination should, as outlined under the Colorado plan, take into account the potential undue hardship not only to the defendant but also to the defendant’s dependents.420

417. SUPREME COURT OF OHIO, supra note 373.
418. As discussed, the Ohio plan requires notice of a hearing and specific findings before incarcerating an individual for failure to pay. See infra notes 376 to 378 and accompanying text.
419. AM. CIVIL LIBERTIES UNION, supra note 12, at 11 (recommending the use of court-appointed counsel for criminal justice debt hearings); AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., Modern-Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People for Being Poor 20 (2014), https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor's%20Prison%20Final%20(3).pdf (advocating “assistance of counsel [for individuals] whenever appearing in court or signing an order to be entered with the court for LFO collections”). As a part of a settlement agreement in a federal action, the City of Montgomery, Alabama established procedures for enforcing the indigency hearing requirements of Bearden in its municipal courts. These procedures include the appointment of a public defender in all indigency hearing matters. Montgomery Settlement, supra note 214, ¶ 5.
420. COLO. REV. STAT. § 18-1.3-702(3)(a) (2015). Texas criminal procedure requires that a court consider “the defendant’s employment status, earning ability, and financial resources; and any other special circumstances that may affect the defendant’s ability to pay, including child support obligations and . . . any financial responsibilities owed by the defendant to dependents or restitution payments owed by the defendant to a victim” in assessing whether misdemeanants should be required to reimburse a county for jail time. TEX. CODE CRIM. PROC. ANN. art. 42.038(d)
To help streamline and standardize the process, specific guidelines and forms should be developed to allow courts to address the inability-to-pay issue properly. Although this may seem like a heavy burden, courts routinely make assessments about an individual’s need for a public defender. A similar process should be developed for determining ability to pay. For example, a settlement by the City of Montgomery, Alabama requires that for the next three years its municipal courts will have indigency hearings in failure to pay matters and establishes procedures for the hearings. At these hearings, courts will rely on the federal poverty level in determining indigency and will be able to inquire about information listed in defendants’ affidavits of substantial hardship.

In cases where courts find inability to pay, courts should be authorized to use alternative methods, including a reduction in the amount of the monetary sanction. Allowing courts to reduce fees and fines in cases of indigency has the appeal of the day-fine system in making the penalties proportionate to the defendant’s earning level. Unlike switching to a day-fine system, this process would not require a complete overhaul of the system used to impose monetary sanctions. Instead, it would be limited to cases of indigency and would be just one of the alternative methods available

421. AM. CIVIL LIBERTIES UNION, supra note 12, at 11; AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., supra note 419, at 19 (advocating the use of “clear statewide criteria for determining a person’s ability to pay LFOs”).


423. Montgomery Settlement, supra note 214, at app. 1.


425. The Supreme Court in Bearden identified that courts could consider “the propriety of reducing the fine” as an alternative to incarceration. Bearden v. Georgia, 461 U.S. 600, 674 (1983).
Other alternatives to incarceration include payment plans and community service.

4. Provide Notice, Training, and a Forum for Lodging Complaints

Merely setting up a comprehensive system is not sufficient unless parties are aware of the available protections and safeguards. As in Ohio, bench cards should be distributed to courts explaining the proper procedures to follow. The Ohio Plan also provides training for judges and court personnel. Training should be made available for all parties involved in assessing and collecting charges including judges, court staff, probation officers, collectors, prosecutors, police officers, public defenders, and defendants. While municipalities might balk at the expenses involved with training, they should be reminded that incarceration of those unable to pay is often more costly than the amounts recovered. Moreover, the improper incarceration of indigents for failure to pay may subject municipalities to costly lawsuits and federal investigations.

Pro-bono clinics, legal-aid services, and law students all offer the potential for helping to educate indigent defendants about their rights. Clear notices of procedures and rights should be provided to all defendants, posted in courtrooms, and provided on all citations.
A system should be established for allowing defendants to report abuses in the collection of criminal justice debt. Defendants should have a forum to file complaints. Consumers who have complaints against civil debt collectors have the ability to file complaints with the Consumer Financial Protection Bureau (“CFPB”). The system allows consumers to submit complaints of abuses by debt collectors via the internet, mail, telephone, or fax. The CFPB then, in turn, submits the complaints to the collectors to help resolve disputes. A similar system should be adopted to deal with complaints in the collection of criminal justice debt.

5. Establish Effective Enforcement Mechanisms

Given the track record of courts’ non-compliance with the requirements of Bearden, reporting regarding use of ability-to-pay hearings, monitoring such hearings, and sanctioning violations are necessary. Judicial oversight could be conducted through existing state judicial review and conduct processes. Additionally, the independent commission approach suggested by Professors Logan and Wright could also create a system for monitoring and tracking the use and enforcement of LFOs. Recording court hearings would assist in monitoring courtroom procedures and investigating courtroom complaints.

To evaluate the outsourcing of services to private parties, oversight and reporting are essential. As a condition to performing services for municipalities, private parties should be required to report to municipalities the amounts collected from defendants and how such amounts were allocated (for example, amounts allocated to fees or fines). Such information should be available for public review.
If violations of procedures are found or reported, they should be quickly investigated, especially given the potential for loss of liberty in these cases. To the extent violations are proven, sanctions should be issued and published so that the public is made aware of the parties involved. For example, judges could be disciplined for violations, and contracts with third parties could provide penalties for violations and non-compliance, including loss of future services from the jurisdiction. Publication of sanctions and penalties imposed on actors involved in abuses (including judges and private probation parties) should also act as a deterrent to future violations and should create more accountability for public and private parties. Additionally, making the public aware of the efforts at reform should help quell some of the public distrust issues by allowing the public to understand that the system is addressing the abuses and that relief for abuses is available.

Finally, we need to continually monitor and study our efforts and mechanisms. Given the recent Ohio and Colorado plans, we should accumulate data to assess whether these systems are working. Initial reports from the Ohio System have been favorable, as an Ohio ACLU lawyer has stated “abuses have largely been stamped out.” On the other hand, the ACLU of Colorado has recently alleged that since January 2014, Colorado Springs has violated Colorado’s new legislation by using “pay or serve” sentences to incarcerate hundreds of indigent individuals to pay off their fines at a rate of $50 per day. In three-quarters of these cases, individuals were incarcerated for offenses that were only punishable by fines.
V. Conclusion

Despite the popular notion that modern society has abolished debtors’ prisons, Americans continue to be incarcerated simply because they are unable to pay their debts. The same concerns that prompted calls to end debtors’ prisons in the eighteenth and nineteenth centuries have returned as indigent defendants are unable to pay criminal justice debts. The monetary charges imposed upon defendants are often unrelated to the alleged crimes and unfairly discriminate against the poor and minorities. The need for revenue generation is often in conflict with the goals of the criminal justice process. As a result, the assessment, imposition, and collection of criminal justice debt have created distrust in the system, and indigent defendants and their families have become trapped in what seems like an endless poverty cycle. It is time to restore that trust by adopting measures to end debtors’ prisons. Moreover, once they are abolished, we need to remain vigilant to ensure that debtors’ prisons never return.


447. Letter from Nancy Woodliff-Stanley & Mark Silverstein, ACLU of Colo. to Wynetta Massey, Colorado Springs City Attorney, supra note 446, at 2 (including over 200 cases involving soliciting for charity near streets or highways and over sixty-five cases involving being in city parks after closing time).