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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

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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.

1. Class Action Complaint ¶ 6, Fant v. City of Ferguson, No. 14:15-cv-00253 (E.D. Mo. Feb. 8, 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Ferguson-Debtors-Prison-FILE-STAMPED.pdf [hereinafter Ferguson Complaint].

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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.[2] Case 1 and similar cases helped trigger calls to end the use of prisons for the collection of debt.[3] And states responded by passing laws to abolish the practice.[4]

Case 2, however, is the story of Eileen DiNino of Berks County, Pennsylvania, and it occurred nearly 200 years after Crispy's case.[5] 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.[6] 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.[7] More than sixty-six percent of the jailed parents are women.[8] Typically, truancy fines are relatively small, $75 or less; however, court costs and fees compound the amount due.[9] Costs and fees assessed against DiNino included charges for a "judicial computer project," constables, and postage.[10] As with Crispy's tragic case, DiNino's case has also led to a call for alternatives to debtors' prisons.[11]

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2. Karen Gross, Marie Stefanini Newman & Denise Campbell, *Ladies in Red: Learning from America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1, 35–36 (1996).

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).

4. *See* Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359, 1402 n.232 (1983) (identifying that by the 1840s several states, including New Hampshire, Vermont, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Delaware, North Carolina, and Georgia had prohibited imprisonment for debt). Interestingly, states passed laws that specifically banned debtors' prisons for women before passing similar restrictions for men. *Id.* at 1406–07.

5. Maryclaire Dale, *Woman Sentenced to Two Days for Truancy Fines Dies in Jail; Judge Says It Was His Only Option*, STARTRIBUNE (June 11, 2014), http://www.startribune.com/nation/262737551.html.

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.*

11. *See* Eric Owens, *Mom of Seven Died in This Prison After Judge Jailed Her for Her Kids' Excessive Truancy*, DAILY CALLER (June 14, 2014), http://dailycaller.com/2014/06/14/mom-of-seven-died-in-this-prison-after-judge-jailed-her-for-her-kids-excessive-truancy/; Alan Pyke, *Impoverished Mother Dies in Jail Cell over Unpaid Fines for Her Kids Missing School*, THINKPROGRESS (June 12, 2014), http://thinkprogress.org/economy/2014/06/12/3448105/mother-dies-jail-cell-fines/. Bills calling for the establishment of "Eileen's Law" have been introduced in Pennsylvania's House and Senate, and on February 25, 2015, the House unanimously approved its proposal for Eileen's Law. Dan Kelly, *State House Approves 'Eileen's Law'*, READING EAGLE (Feb. 26, 2015), http://readingeagle.com/news/article/state-house-approves-eileens-law&template=mobileart. Supporters hope that the bill will be presented to the governor before January 2016. Dan Kelly, *Key Senator Says Eileen's Law Should Go to Gov. Tom Wolf by Year's End*, READING EAGLE (June 10, 2015), http://readingeagle.com/news/article/key-senator-says-eileens-law-should-go-to-gov-tom-wolf-by-years-end.

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.[12] America leads the world in incarceration rates.[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.[14] Significant racial disparities exist in the prison population, with black males imprisoned at more than six times the rate of white males.[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").

14. INIMAI CHETTIAR, LAUREN-BROOKE EISEN & NICOLE FORTIER, BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 3 (2013) (citing ROY WALMSLEY, INT'L. CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (9th ed. 2011)), http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf. 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, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes.

15. CHETTIAR 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.[16] In the last ten years, the term "mass incarceration" has been used to describe the prison problem in the United States.[17]

While people are generally aware of the issue of mass incarceration,[18] most also assume that debtors' prisons no longer exist.[19] They believe that debtors' prisons are a relic of a past described by Charles Dickens.[20] Federal and state laws both restrict imprisonment for debt.[21] 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.[22] 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.[23]

This Article focuses on criminal justice debt. Criminal justice debt includes a broad range of items, also referred to as legal financial obligations ("LFOs").[24] The main categories of LFOs are fines, restitution charges, and fees.[25] With increasing incarceration rates and growing budgetary concerns, LFOs have escalated dramatically over the last forty years.[26] Mone-

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https://www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%20062515.pdf; CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

16. Gottschalk, *supra* note 13, at 483.

17. Oliver Roeder, *Just Facts: Quantifying the Incarceration Conversation*, BRENNAN CTR. BLOG (July 16, 2014), http://www.brennancenter.org/blog/just-facts-quantifying-incarceration-conversation (describing the development of the term "mass incarceration").

18. *Id.*

19. Beckett & Harris, *supra* note 12, at 526.

20. Stephen J. Ware, *A 20th Century Debate About Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351, 352–53 (2014); *see e.g.*, CHARLES DICKENS, LITTLE DORRIT 41–42, 57, 383 (Barnes & Noble, Inc. 2009) (1857) (describing the Marshalsea debtors' prison).

21. *See infra* notes 74–75 and accompanying text.

22. Beckett & Harris, *supra* note 12, at 526.

23. Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221, 234 (2012), http://tcr.sagepub.com/content/16/2/221.

24. *Id.* at 227; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1176–77.

25. *See infra* Part II.A.

26. Beckett & Harris, *supra* note 12, at 512–13; Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010) (finding that "monetary sanctions are now imposed by the courts on a substantial majority of the millions of U.S. residents convicted of felony and misdemeanor crimes each year"); Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 556–57 (2011) (observing that "the growth of fines, fees, and other debts accompanied the trend line in the increase of incarceration since the

tary charges now exist at all stages of the criminal justice process, including pre-conviction, sentencing, incarceration, probation, and parole.[27] Fees have expanded to include a wide variety of charges purportedly to reimburse the costs of state and local entities.[28] The fees even cover constitutionally required services such as public defenders.[29] The system of using fees has been labeled an "offender-funded" system.[30] Offender funding has grown over the years, and several states now outsource prison, probation, monitoring, and collection services to private companies.[31] These companies may assess and collect fees, using the threat of incarceration for failure to pay.[32]

The growth in incarceration of individuals for failure to pay LFOs has accompanied the increase in criminal justice debt.[33] Indigents are jailed or imprisoned despite statutory and case law prohibitions against incarceration based on their inability to pay their debts.[34]

As may be expected, the impact on the poor and minorities is especially severe.[35] 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.[36] These extra charges have been referred to as "poverty penal-

early 1970s"); Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor. For example, the percentage of inmates with LFOs grew from twenty-five percent in 1991 to sixty-six percent in 2004. Gerry Myers, *Never Mind What the Constitution Says, Our Prison System Has Run Amok*, HUFFINGTON POST BLOG (June 24, 2014), http://www.huffingtonpost.com/gerry-myers/never-mind-what-the-const_b_5523165.html?view=screen. For more details, see *infra* Part III.A.

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

28. Shapiro, *supra* note 26. For more details, see *infra* Part II.A.3.

29. Shapiro, *supra* note 26.

30. HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 1 (2014), http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

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

32. HUMAN RIGHTS WATCH, *supra* note 30, at 49. Typically, civil debt collectors may not threaten arrest or imprisonment. 15 U.S.C. § 1692e(4) (2012).

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.

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37. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf.

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.

40. Harris, Evans & Beckett, *supra* note 26, at 1761–62.

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]

43. *See* Matthew J. Baker, Metin Cosgel & Thomas J. Miceli, *Debtors' Prisons in America: An Economic Analysis*, 84 J. ECON. BEHAV. & ORG. 216, 217 (2012) (providing an overview of debtors' prisons from the Middle Ages in Europe to the Reconstruction Era in America). A detailed discussion of the history of imprisonment for debt is beyond the scope of this Article. For more detailed information, see Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24 (1927).

The Bible reflects the common use of the practice.[45] In 451 B.C., the Romans, in their first written law, the Twelve Tables, formalized incarceration for those unable to pay their debts.[46] 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.[47]

Unfortunately, the Roman proclamation did not end the use of debtors' prisons. Instead, the use continued during the Middle Ages, although their use fluctuated.[48] 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.[49] Under these statutes and subsequent enactments, debtors' prisons would continue in England for more than five centuries.[50]

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.[51] 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."[52] 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."[53]

The privatized system, which was typically unregulated by the courts and the legislature, created a conflict of interest for wardens who were de-

44. Baker et al., *supra* note 43 at 217; Richard E. James, Note, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 145–49 (2002); Becky A. Vogt, Note, State v. Allison: *Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 338–40 (2001).

45. *See* Baker et al., *supra* note 43, at 217 (citing *Matthew* 18:29–31); James, *supra* note 44, at 146; Vogt, *supra* note 44, at 339.

46. Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 358 (2006); Vogt, *supra* note 44, at 338–39.

47. Vogt, *supra* note 44, at 339.

48. Baker et al., *supra* note 43, at 217; Ford, *supra* note 43, at 25–26.

49. Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 154 (1982) (describing the coverage of the imprisonment statutes of 1267 and 1285); Ford, *supra* note 43, at 27; James, *supra* note 44, at 146; Vogt, *supra* note 44, at 340–42.

50. Baker et al., *supra* note 43, at 217.

51. Philip Woodfine, *Debtors, Prisons, and Petitions in Eighteenth-Century England*, 30 EIGHTEENTH-CENTURY LIFE, Spring 2006, at 1.

52. *Id.* at 5–6.

53. *Id.* at 12–13.

pendent on fees from their inmates.[54] 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."[55]

Despite these concerns, imprisonment for debt continued in England and virtually all of Europe during the 1800s.[56] 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.[57] Even with the passage of these statutes, reports of instances of incarceration for debt in England continued into the twentieth century.[58]

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.[59] As in England, some states had separate buildings for the housing of debtors.[60] 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."[61]

Class segregation existed among imprisoned debtors.[62] 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").

55. Pitofsky, *supra* note 54, at 99.

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").

57. Cohen, *supra* note 49, at 164.

58. BANNON ET AL., *supra* note 37, at 19 (citing Sandor E. Schick, *Globalization, Bankruptcy, and the Myth of the Broken Bench*, 80 AM. BANKR. L.J. 219, 258 & n.202 (2006)); Ware, *supra* note 20, at 376.

59. Baker et al., *supra* note 43, at 217; James, *supra* note 44, at 147; Vogt, *supra* note 44, at 343.

60. Steve Fraser, *Another Day Older and Deeper in Debt*, 33 RARITAN 67, 69 (2013). For example, the Debtors' Prison in Worsham, Virginia, was built in 1787 and remains on the national register of historic places. VA. DEP'T OF HISTORIC RES., NATIONAL REGISTRY OF HISTORIC PLACES NOMINATION FORM: DEBTORS' PRISON (1972), http://www.dhr.virginia.gov/registers/Counties/PrinceEdward/073-0007_Debtor's_Prison_1972_Final_Nomination.pdf.

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.

66. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995).

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").

70. Scott Jennings, *Kentucky's Tradition of Reforming Nation's Prisons*, COURIER-JOURNAL (Aug. 6, 2014), http://www.courier-journal.com/story/opinion/columnists/2014/08/05/kentuckys-tradition-reforming-nations-prisons/13618337. The 1776 and 1790 constitutions of Pennsylvania did "nominally" abolish imprisonment for debt; however, Pennsylvania continued to imprison debtors with an estimated 7000 imprisoned in 1830. Ford, *supra* note 43, at 29 & n.28.

71. Gross, *supra* note 2, at 35 n.190 (citing Col. Richard M. Johnson, *On a Proposition to Abolish Imprisonment for Debt*, (Jan. 14, 1823) app. at 22, http://catalog.hathitrust.org/Record/100187404 (submitted to the U.S. Senate)); Jennings, *supra* note 70.

ing incarceration for failure to pay debts was enacted in 1933.[72] 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.[73]

Currently, statutory or constitutional provisions prohibiting imprisonment for debt exist in every state.[74] Additionally, federal imprisonment for debt is not permitted in states that prohibit incarceration for debt.[75]

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.[76] Incarceration may occur in child support cases,[77] administrative detention matters,[78] and post-judgment civil collection matters.[79] Additionally, failure to pay criminal justice debt represents a significant and growing reason for incarceration in today's debtors' prisons.[80] 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.

73. Ford, *supra* note 43, at 29; Tabb, *supra* note 66, at 16.

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.

75. 28 U.S.C. § 2007 (2012); Vogt, *supra* note 44, at 348.

76. Beckett & Murakawa, *supra* note 23, at 227.

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").

78. Beckett & Murakawa, *supra* note 23, at 225–27.

79. In these matters, typically incarceration is the result of a contempt order based on an alleged debtor's failure to respond to or attend a hearing on post-judgment discovery in a collection matter. *See* Lea Shepard, *Creditors' Contempt*, 2011 B.Y.U. L. REV. 1509 (discussing the use of *in personam* debt collection remedies). National Public Radio has also reported on the problem of incarcerating individuals for failure to pay civil debts. Susie An, *Unpaid Bills Land Some Debtors Behind Bars*, NPR (Dec. 12, 2011), http://www.npr.org/2011/12/12/143274773/unpaid-bills-land-some-debtors-behind-bars; *see* Jessica Silver-Greenberg, *Debtor Arrests Criticized*, WALL ST. J. (NOV. 22, 2011), http://online.wsj.com/news/articles/SB10001424052970203710704577052373900992432 (noting that more than thirty-three percent of states allow incarceration for failure to pay civil debts).

80. AM. CIVIL LIBERTIES UNION, *supra* note 12, at 8.

legal financial obligations or LFOs.[81] Fines, restitution charges, and fees are the primary components of LFOs.[82] 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.[83] If a defendant is unable or unwilling to pay a fine, the defendant will likely face incarceration.[84] Originally, the basis for fines in England was revenue collection.[85] Payment or "mak[ing] fine" to the king was a way that a defendant could settle with the king and avoid incarceration.[86] Over time, the primary rationale for fines became punishment rather than revenue generation.[87]

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.[88] Concerns now exist regarding the aggressive use of fines for traffic and parking violations to raise money to support local governments.[89] 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."[90]

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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.

82. Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison—Prisoners' Accumulation of Debt As a Barrier to Reentry*, 41 CLEARINGHOUSE REV. J. POV. L. & POL'Y 187, 188 (2007) (characterizing the basic categories of "criminal justice-related debts" as "(1) fines and assessments levied with a punitive purpose; (2) penalties levied with a restitution purpose; and (3) assessments levied with a public cost-recovery purpose"); R. Barry Ruback, *The Abolition of Fines and Fees: Not Proven and Not Compelling*, 10 CRIMINOLOGY & PUB. POL'Y 569, 569–70 (2011). This list is not exclusive. *See, e.g.*, R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIM. JUST. & BEHAV. 242, 257–58 (2006) (characterizing forfeitures as government seizures of property).

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").

85. Derek A. Westen, Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CAL. L. REV. 778, 783–84 (1969).

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.*

90. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 10 (2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf.

While fines are often the sole punishment for traffic offenses and some other misdemeanors, for other offenses, fines supplement incarceration and probation.[91] 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.[92] Fines are assessed in thirty-eight percent of all felony convictions in state courts.[93] Judges typically impose fines at the sentencing stage of a criminal case, without consideration of a defendant's earnings.[94]

2. Restitution

Similarly, judges may also impose restitution charges at a defendant's sentencing.[95] Traditionally, governmental entities have been the recipients of fines while victims have been the primary beneficiaries of restitution.[96] Initially, the purported rationale for restitution was to financially restore a victim based on the economic damages a defendant's actions had caused.[97] The rationale for modern-day restitution now includes retribution and punishment.[98] All states permit restitution, and a Department of Justice study found that state courts imposed restitution in eighteen percent of felony cas-

91. Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 127 (1996).

92. Ruback, *supra* note 82, at 570.

93. SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 8 (2009), http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

94. Beckett & Harris, *supra* note 12, at 514–15; *cf.* Tonry & Lynch, *supra* note 91, at 128 (discussing the "day fine" system in Scandinavian countries, which takes the seriousness of the crime and the defendant's income into account when imposing a fine). For a discussion of the "day-fine" system that bases fines on income level, see *infra* Part IV.A.2.

95. Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 101 (2014). A detailed discussion of the historical development of restitution payments is beyond the scope of this Article. For a more detailed discussion, see Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71 (1970); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999). For a collection of discussions regarding restitution, reconciliation, and restorative justice, see CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION (Burt Galaway & Joe Hudson eds., 1990).

96. *See* R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751, 756 (2011) (explaining the purpose of restitution).

97. Lollar, *supra* note 95, at 99–100; Ruback & Clark, *supra* note 96, at 756; *see also* Ruback & Bergstrom, *supra* note 82, at 250 (characterizing the purpose of restitution as "doing justice by having the offender compensate a victim for damages caused by the crime").

98. Lollar, *supra* note 95, at 97–98 (stating that "criminal restitution has evolved from a primarily restorative mechanism to a primarily punitive one" and criticizing courts for not "affording restitution the constitutional checks courts normally provide for punishment"); Ruback & Bergstrom, *supra* note 82, at 249 (stating that restitution also has a punishment aspect as it "embodies . . . the just deserts notion of offense-based penalties").

es.[99] Under federal law, restitution is mandatory for specific crimes if there is an "identifiable victim."[100] A defendant's failure to make restitution payments can result in revocation of probation and incarceration.[101]

3. Fees[102]

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,[103] 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.[104] Currently, fees on defendants can be imposed at any stage of the criminal justice process, including pre-conviction, sentencing, incarceration, or supervision.[105] Moreover, while a judge typically determines fines and restitution, other actors may be involved in setting fees, including

99. ROSENMERKEL ET AL., *supra* note 93, at 8; Ruback & Clark, *supra* note 96, at 756.

100. 18 U.S.C. § 3663A (2012) (mandating restitution in cases involving crimes of violence, offenses against property, "tampering with consumer products," "theft of medical products," and an "identifiable victim"); Lollar, *supra* note 95, at 103 (citing the Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132 (codified as amended in scattered sections of 18 U.S.C.)).

101. Lollar, *supra* note 95, at 124. Under Bearden v. Georgia, 461 U.S. 660, 668 (1983), incarceration for failure to pay must be based on willful failure to pay; however, in practice, this requirement has not been effectively applied. Lollar, *supra* note 95, at 124.

102. Commentators tend to treat costs and fees together; however, Ruback and Bergstrom have suggested that a cost refers to "a blanket charge for program admission/participation," while a fee refers to "a specific, individual charge for a service." Ruback & Bergstrom, *supra* note 82, at 253. For purposes of this Article, the terms fees and costs are used interchangeably.

103. *See supra* notes 59–65 and accompanying text.

104. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 319 (2014) (citing DALE PARENT, NAT'L INST. OF JUSTICE, DEP'T OF JUSTICE, RECOVERING CORRECTIONAL COSTS THROUGH OFFENDER FEES 1 (1990), https://www.ncjrs.gov/pdffiles1/Digitization/125084NCJRS.pdf).

105. Levingston & Turetsky, *supra* note 82, at 189; Logan & Wright, *supra* note 24, at 1185–86; Plunkett, *supra* note 64, at 59 (listing of costs may include charges for room and board, "prosecution, judicial proceedings, criminal defense, bail, booking, parole or probation supervision, electronic monitoring, substance abuse treatment, [and] medical care" (footnotes omitted) (first citing BANNON ET.AL., *supra* note 37, at 8; then citing MULLANEY, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, ECONOMIC SANCTIONS IN COMMUNITY CORRECTIONS 7 (1988); then citing Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323 (2009); then citing Kate Levine, Note, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191 (2007); then citing MULLANEY, *supra*, at 7; AM. CIVIL LIBERTIES UNION, *supra* note 12, at 30; then citing MULLANEY, *supra*, at 8; then citing NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FEES PAID BY JAIL INMATES: FINDINGS FROM THE NATION'S LARGEST JAILS 2 (I997); and then citing BARBARA KRAUTH & KARIN STAYTON, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., FEES PAID BY JAIL INMATES: FEE CATEGORIES, REVENUES, AND MANAGEMENT PERSPECTIVES IN A SAMPLE OF U.S. JAILS 15 (Connie Clem ed., 2005))).

prosecutors, police, prison officials, and other criminal justice agencies[106] as well as private companies that are the beneficiaries of outsourcing.[107]

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, pre-trial abatement, and rental of monitoring devices.[108] Application fees for public defenders exist in the majority of states.[109] The application fees vary by state and may vary based on the offense at issue.[110] The typical range is $25 to $100.[111] Some jurisdictions impose pretrial supervision or conditional bond fees.[112] The assessment of pre-judgment fees is not dependent upon conviction of the defendant.[113]

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.[114] Designated funds may finance crime stopper programs, retirement for police officers, courtroom technology, and a myriad of services unrelated to the underlying criminal charges.[115] For example, fees in Allegan County, Michigan help fund the county employees' fitness facility.[116]

Charges incurred and assessed during incarceration include fees for room and board, health care, haircuts, telephone, and work-release programs.[117] 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.

108. RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 15–16 (2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf; Levingston & Turetsky, *supra* note 82, at 189; Logan & Wright, *supra* note 24, at 1186–89; Ruback & Bergstrom, *supra* note 82, at 254; Shapiro, *supra* note 26.

109. Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052 (2006).

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.

116. Shapiro, *supra* note 26.

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.[118] Telephone charges have been a "significant moneymaker" with "rates far above the prevailing market—generat[ing] millions of dollars annually."[119]

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.[120] Forty-four states charge defendants for probation and parole services.[121] Probation is a common alternative to incarceration for misdemeanor offenses.[122] All of the states, except for Hawaii, assess defendants for monitoring devices.[123] 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."[124] Additionally, defendants are typically charged a "start-up" fee of up to $80.[125] Similarly, defendants may be assessed mandatory drug testing fees of $1250 per year.[126]

Court costs and fees help reimburse the burgeoning expenses incurred by courts, jails, prisons, and those appointed to supervise, monitor, and even represent defendants.[127] Their purpose is generally recognized as reimbursement as opposed to punishment, victim compensation, rehabilitation, or deterrence.[128] "Offender-funding" has been used to identify the process of making defendants pay for these expenses.[129]

118. EISEN, *supra* note 39, at 4.

119. Logan & Wright, *supra* note 24, at 1192–95; *see also* EISEN, *supra* note 39, at 2 (noting that an inmate's "short telephone call home can cost as much as $20"); SUBRAMANIAN ET AL., *supra* note 108, at 15. In October 2015, the Federal Communications Commission issued an order to cap rates on inmate calls beginning in 2016. *See* Press Release, Fed. Comm. Commission (Oct. 22, 2015), FCC Takes Next Big Steps in Reducing Inmate Calling Rates, http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1022/DOC-335984A1.pdf.

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.[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."[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.[132] As with fines and restitution, failure to pay fees can be grounds for revocation of probation and incarceration.[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*,[134] the United States Supreme Court recognized "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem."[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.[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."[137] In *Mayer v. City of Chicago*,[138] the Court extended *Griffin* to defendants charged with misdemeanors where the sentences were limited to fines.[139] As the Court stated, "The size of the

130. Logan & Wright, *supra* note 24, at 1177.

131. HUMAN RIGHTS WATCH, *supra* note 30, at 14.

132. ALEX BENDER ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 10 (2015), http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf (citing JUDICIAL COUNCIL OF CAL., UNIFORM BAIL & PENALTY SCHEDULES 16 (2015), http://www.courts.ca.gov/documents/2015-JC-BAIL.pdf). Additionally, failure to pay often results in driver's license suspension. *Id.* at 15.

133. BANNON ET AL., *supra* note 37, at 21; Beckett & Harris, *supra* note 12, at 524.

134. 351 U.S. 12 (1956).

135. *Id.* at 16.

136. *Id.* at 20.

137. *Id.* at 17.

138. 404 U.S. 189 (1971).

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.
141. 372 U.S. 335 (1963).
142. *Id.* at 343–44.
143. *Id.* at 344.
144. 399 U.S. 235 (1970).
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.
153. 401 U.S. 395 (1971).

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

154. *Id.* at 396.
155. *Id.*
156. *Id.* at 396–97 & n.3 (first citing TEX. CODE OF CRIM. PROC., art. 45.53 (1966); then citing HOUS. CODE § 35-8).
157. *Id.* at 399.
158. *Id.*
159. *Id.*
160. 461 U.S. 660 (1983).
161. *Id.* at 667–72.
162. *Id.* at 662.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 662–63.
168. *Id.* at 663, 674.
169. *Id.* at 670.

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.

174. OKLA. R. CRIM. P. 8.1 (2003).

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.

178. *Id.*; Harris, Evans & Beckett, *supra* note 26, at 1769–71.

179. Beckett & Harris, *supra* note 12, at 516.

180. Katzenstein & Nagrecha, *supra* note 26, at 557–59; Shapiro, *supra* note 26.

181. NAT'L RESEARCH COUNCIL, *supra* note 14, at 2.

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.[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.[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.[187] At the end of 2013, more than 4.75 million individuals were on probation or parole.[188] As a result, approximately one in every thirty-five adults was subject to incarceration, parole, or probation.[189]

High incarceration rates have created burdens on state and local budgets to fund the expenses of incarceration, parole, and probation.[190] In response, many states and localities have turned to offender-based funding.[191] Additionally, some jurisdictions use criminal justice debt to fund expenses outside of the criminal justice system.[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.[193]

While all monetary assessments have increased, the largest percentage increase has been in fees.[194] A recent NPR survey found that since 2010,

185. *See* LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 2 (2014), http://www.bjs.gov/content/pub/pdf/cpus13.pdf (reporting an estimated 2,220,300 persons incarcerated as of 2013).

186. SUBRAMANIAN ET AL., *supra* note 108, at 7–8.

187. NAT'L RESEARCH COUNCIL, *supra* note 14, at 40–41. *Id.* at 41; Beckett & Harris, *supra* note 12, at 524 ("nonpayment of monetary sanctions leads to a significant number of warrants, arrests, probation revocations, jail stays, and prison admissions in locales across the country").

188. GLAZE & KAEBLE, *supra* note 185, at 2.

189. *Id.* at 1–2 (reporting yearend numbers from 2012 and 2013).

190. EISEN, *supra* note 39, at 2.

191. AM. CIVIL LIBERTIES UNION, *supra* note 12, at 8 (stating that "[s]tates and counties, hard-pressed to find revenue to shore up failing budgets, see a ready source of funds in defendants who can be assessed LFOs"); HUMAN RIGHTS WATCH, *supra* note 30, at 13 (stating that "some localities expect their criminal courts to fund most or even all of their own operations with fines and fees extracted from defendants and offenders").

192. HUMAN RIGHTS WATCH, *supra* note 30, at 13–14 (asserting that some jurisdictions "[expect] their criminal courts to earn a profit" and warning of the danger that may occur when "courts . . . focus more on harvesting money from the people who appear before them than on the rational and humane administration of justice"). For example, in the Missouri cities of Bel-Ridge, Ferguson, and Florissant, fines and fees represented the first, second, and third top sources of income, respectively. THOMAS HARVEY ET AL., ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 28, 31, 34 (2014), http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf.

193. U.S. DEP'T OF JUSTICE, *supra* note 90, at 10 (stating that the projected revenue from fines and fees was $3.09 million, while total expected revenue was $13.26 million).

194. Harris, Evans & Beckett, *supra* note 26, at 1769–71; McCormack, *supra* note 113, at 229 (recognizing the "recent innovations in fee collection").

forty-eight states have increased their fees.[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.[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%.[197] Moreover, this data underestimates the total amount of monetary sanctions, as it only covers court-imposed assessments on felons sentenced to prison.[198] Additional statistics reflect, "felons sentenced to probation and misdemeanants are more likely than felons sentenced to prison to receive monetary sanctions."[199] Non-judicial sources, including prosecutors and prison officials, also assess fees.[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.[201] The growth in privatization of state prisons from 1999 to 2010 has been described as a "seismic shift."[202] During this time span, the percentage of prisoners in private state prisons increased by 40% while the total prison population grew by 18%.[203]

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

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.*

196. Harris, Evans & Beckett, *supra* note 26, at 1769.

197. *Id.* at 1769–70.

198. *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).

199. Harris, Evans & Beckett, *supra* note 26, at 1770.

200. *Id.* at 1769–71; Levingston & Turetsky, *supra* note 82, at 189; Logan & Wright, *supra* note 24, at 1185–96.

201. Logan & Wright, *supra* note 24, at 1193. For a discussion of the growth in the privatization of prisons, see Hadar Aviram, *The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity*, 11 HASTINGS RACE & POVERTY L.J. 111, 115–33 (2014). For a general discussion of the private probation industry, see HUMAN RIGHTS WATCH, *supra* note 30, at 15–21.

202. Aviram, *supra* note 201, at 115.

203. *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.[204] Privatization of probation services reportedly began in the 1970s when Florida delegated monitoring of misdemeanants on probation to the Salvation Army.[205] Currently, more than 1000 courts located in at least twelve states annually use private probation companies to monitor "[h]undreds of thousands of Americans."[206] 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.[207] Under these "offender-funded" probation models, private companies claim that public expenditures are not necessary for their services.[208]

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.[209] 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.[210] The private probation companies consist of both small and large firms.[211] Judicial Correction Services and Sentinel Offender Services are two of the largest private probation companies.[212] The collection practices of these businesses have been the subject of litigation and criticism.[213] 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.

205. Hannah Rappleye & Lisa Riordan Seville, *The Town That Turned Poverty into a Prison Sentence*, THENATION (Mar. 14, 2014), http://www.thenation.com/article/178845/town-turned-poverty-prison-sentence.

206. HUMAN RIGHTS WATCH, *supra* note 30, at 16; Rappleye & Seville, *supra* note 205. The states using private probation services include Alabama, Colorado, Florida, Georgia, Idaho, Michigan, Mississippi, Missouri, Montana, Tennessee, Utah, and Washington. HUMAN RIGHTS WATCH, *supra* note 30, at 16 n.20.

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, 460 (Ga. 2014) (an appeal involving thirteen individual civil actions); Complaint, Thompson v. Dekalb Cnty., No. 1:15-mi-99999-UNA (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/assets/2015.01.29_filed_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.[214]

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.[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."[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.[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.[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.[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.[220] In many cases, defendants were incarcerated for days before any hearing on ability to pay.[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."[222]

214. Agreement to Settle Injunctive and Declaratory Relief Claims ¶ 8, Mitchell v. City of Montgomery, No. 2:14-cv-00186-MHT-CSC (M.D. Ala. Nov. 17, 2014), http://media.al.com/opinion/other/montgomeryDoc%2051-1%20-%20Settlement%20of%20Injunctive%20and%20Declaratory%20Claims%2011-17-2014.pdf [hereinafter Montgomery Settlement].

215. AM. CIVIL LIBERTIES UNION, *supra* note 12, at 5.

216. Beckett & Harris, *supra* note 12, at 524.

217. AM. CIVIL LIBERTIES UNION, *supra* note 12, at 50 (citing the estimate of Glen Dewar, a former Montgomery County Public Defender).

218. Casey Smith & Cary Aspinwall, *Increasing Number Going to Jail for Not Paying Fines*, TULSAWORLD (Nov. 3, 2013), http://www.tulsaworld.com/news/local/increasing-number-going-to-jail-for-not-paying-fines/article_8b8d2229-c7ad-5e7f-aea2-baeb13390880.html.

219. Beckett & Harris, *supra* note 12, at 523–24 (citing RHODE ISLAND FAMILY LIFE CTR., COURT DEBT & RELATED INCARCERATION IN RHODE ISLAND 4 (2007), http://www.realcostofprisons.org/materials/Court_Debt_and_Related_Incarceration_RI.pdf).

220. BANNON ET AL., *supra* note 37, at 20.

221. *Id.*

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.[223] Often courts do not make any determinations of an individual's ability to pay.[224] 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.[225] 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."[226]

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.[227] The offenses included traffic tickets.[228] Describing the municipal jails as "debtors' prison[s],"[229] the complaints allege that the plaintiffs have been relegated to overcrowded, unsafe, and unsanitary conditions and denied medication and proper nutrition.[230] The complaints describe suicides and suicide attempts by indigent individuals unable to make the necessary payments to be released from confinement.[231] 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.[232] The

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").

225. HARVEY ET AL., *supra* note 192, at 3, 9; *see also* AM. CIVIL LIBERTIES UNION OF N.H., DEBTORS' PRISONS IN NEW HAMPSHIRE 1–2 (2015), http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf (finding that "in 2013 New Hampshire judges jailed people who were unable to pay fines and without conducting a meaningful ability-to-pay hearing in an estimated 148 cases").

226. U.S. DEP'T OF JUSTICE, *supra* note 90, at 53 (quoting MO. REV. STAT. § 560.026 (2012)).

227. Ferguson Complaint, *supra* note 1, ¶ 1; Class Action Complaint ¶ 1, Jenkins v. City of Jennings, No. 14:15-cv-00252 (E.D. Mo. Feb. 8, 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [hereinafter Jennings Complaint].

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-

233. Ferguson Complaint, *supra* note 1, ¶¶ 213–15; Jennings Complaint, *supra* note 227, ¶¶ 246–48.

234. Ferguson Complaint, *supra* note 1, ¶ 215; Jennings Complaint, *supra* note 227, ¶ 248.

235. Press Release, City of Ferguson (Feb. 9, 2015), https://localtvktvi.files.wordpress.com/2015/02/ferguson-media-statement-regarding-lawsuit.pdf.

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 (involving 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).

239. *See, e.g.*, AM. CIVIL LIBERTIES UNION OF N.H., *supra* note 225, at 1–2 (identifying lack of representation in hearings in New Hampshire). Additionally, a recent class action complaint filed against the City of Biloxi, Mississippi, also alleges constitutional violations for incarcerating defendants for failure to pay LFOs by not holding ability to pay hearings and by not providing indigent defendants with court-appointed counsel. Class Action Complaint ¶ 9, Kennedy v. City of Biloxi, Miss., No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015), https://www.aclu.org/sites/default/files/field_document/complaint_kennedy_v._city_of_biloxi.pdf [hereinafter Biloxi Complaint].

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

ants 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,

%20Background%20for%20web.pdf (noting that "Florida, Georgia, and Ohio refuse to recognize a right to counsel in civil proceedings that could result in incarceration").

241. PATEL & PHILIP, *supra* note 240, at 9; Gottschalk, *supra* note 13, at 490 (stating "many poor defendants are apparently waiving their right to counsel to avoid having to go into debt to repay the cost of an assigned public defender").

242. Thompson Complaint, *supra* note 213, ¶¶ 38–43, 102–06 (alleging violations of the Due Process Clause of the Fourteenth Amendment for failure to provide counsel, failure to provide notice of right to counsel, and misrepresentation regarding cost of counsel); Press Release, Am. Civil Liberties Union, ACLU Challenges Abusive Debt Collection Practices That Target the Poor (Jan. 29, 2015), https://www.aclu.org/criminal-law-reform-racial-justice/aclu-challenges-debt-collection-practices-target-poor.

243. Thompson Complaint, *supra* note 213, ¶¶ 22–23. For a discussion of pay-only probation, see *infra* notes 283 to 289 and accompanying text.

244. Thompson Complaint, *supra* note 242, ¶¶ 9, 51.

245. *Id.* ¶¶ 5, 17, 27–31.

246. *Id.* ¶¶ 33–35.

247. *Id.* ¶¶ 37–38.

248. *Id.* ¶¶ 39–40.

249. *Id.* ¶¶ 41–43.

250. *Id.* ¶ 46.

he should be jailed.[251] The court agreed and sentenced Thompson to nine days.[252]

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."[253] 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.[254] 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.[255]

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."[256] 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.[257] Anecdotal and empirical evidence illustrate how the system adversely affects

251. *Id.* ¶ 47.

252. *Id.* ¶ 54.

253. PATEL & PHILIP, *supra* note 240, at 14. Patel and Philip's Brennan Center Report characterized the courts' treatment of "'willful failure to pay' as ill-defined and amorphous, exacerbating existing confusions." *Id.* at 22.

254. N.Y. CRIM. PROC. §§ 420.10(3), (5) (McKinney 2005 & Supp. 2015).

255. BENDER ET AL., *supra* note 132, at 16 (citing CAL. VEH. CODE § 42003(c) (West 2014)).

256. Katzenstein & Nagrecha, *supra* note 26, at 561.

257. Amy R. Connolly, *Justice Dept. Examining Ferguson Racial Discrimination*, UPI.COM (Feb. 19, 2015), http://www.upi.com/Top_News/US/2015/02/19/Justice-Dept-examining-Ferguson-racial-discrimination/6031424340081/; Zachary Roth, *Movement Sparked by Ferguson Has Come a Long Way*, MSNBC.COM (Dec. 30, 2014), http://www.msnbc.com/msnbc/movement-sparked-ferguson-has-come-long-way.

these groups.[258] Statistics reflect that prisoners are "overwhelmingly poor"[259] and "overwhelmingly, people of color."[260] 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."[261] 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.[262] As of December 31, 2013, approximately 3% of black males were imprisoned, while 0.5% of white males were imprisoned.[263] 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.[264] Moreover, 59% of jailed inmates "earned less than $1,000 per month before their arrest and . . . 29% . . . were unemployed."[265]

Similarly, criminal justice debt has a disparate impact on the poor and minorities.[266] For example, forty-three states now impose a fee for an indigent's "free" public defender.[267] More than 80% of defendants qualify for the right to have appointed counsel.[268] 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.[269] In addition, black defendants are more likely than white defendants to remain in jail until trial because they are unable to post bail.[270] The discretionary nature of fees and fines makes them "especially vulnerable to ethnic and other disparities."[271] 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.

263. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 24247282, PRISONERS IN 2013, at 2 (2014), http://www.bjs.gov/content/pub/pdf/p13.pdf.

264. SUBRAMANIAN ET AL., *supra* note 108, at 15.

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

272. U.S. DEP'T OF JUSTICE, *supra* note 90, at 62.

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.

282. Harris, Evans & Beckett, *supra* note 26, at 1776–77.

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).

294. McCormack, *supra* note 113, at 230.

295. BENDER ET AL., *supra* note 132, at 4.

296. BANNON ET AL., *supra* note 37, at 29. For a detailed discussion of the relationship between criminal justice debt and the denial of voting rights, see Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349 (2012).

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").

303. *Id.*; MITALI NAGRECHA, MARY FAINSOD KATZENSTEIN & ESTELLE DAVIS, CTR. FOR COMMUNITY ALTERNATIVES, FIRST PERSON ACCOUNTS OF CRIMINAL JUSTICE DEBT: WHEN ALL ELSE FAILS, FINING THE FAMILY 3 (2015), http://communityalternatives.org/pdf/Criminal-Justice-Debt.pdf.

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).

305. Harris, Evans & Beckett, *supra* note 26, at 1762–63.

306. Beckett & Harris, *supra* note 12, at 513.

their supervision fees.[307] 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.[308]

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.[309]

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.[310] Distrust of the legal system by the poor and minorities is not a new issue.[311] 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."[312] For many people, their experience with the justice system is based on their interactions with the municipal court.[313] 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.[314] The fear of arrest for failure to pay criminal justice debt can cause individuals to avoid seeking necessary legal or medi-

307. *Developments in the Law: Policing*, 128 HARV. L. REV. 1723, 1729 (2015) (describing how private probation companies have become "debt collector[s] backed by carceral power"); *see also* HUMAN RIGHTS WATCH, *supra* note 30, at 27.

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).

312. Mayer v. City of Chicago, 404 U.S. 189, 197 (1971) (quoting Patrick V. Murphy, *The Role of the Police in Our Modern Society*, *in* 26 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 292, 293 (1971)).

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.[315] The same fear can result in reluctance to show up at their workplace.[316] 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.[317]

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.[318] 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."[319] The Department of Justice's report found "substantial evidence of racial bias among police and court staff in Ferguson."[320]

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.[321] 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.[322] The use of criminal jus-

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).

322. HUMAN RIGHTS WATCH, *supra* note 30, at 14.

tice debt to fund unrelated activities of states and localities "effectively turn[s] courts, clerks, and probation officers into general tax collectors."[323] 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.[324] 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."[325] 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.[326]

The problem of conflicts of interest may be even more dramatic with the privatization of services.[327] 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.[328] 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.[329] As a result, for these companies, "every person who successfully completes probation is a lost source of revenue."[330] 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.

329. Radley Balko, *A Debtors' Prison in Mississippi*, WASH. POST (Oct. 21, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/10/21/a-debtors-prison-in-mississippi/. For more detail about private probation companies relying solely on collections from probationers, see *supra* notes 207–208 and accompanying text.

330. *See* Balko, *supra* note 329 (asserting that "if you hire a probation company on a contract that makes probations 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.[331] The lack of oversight leads to accountability issues and creates the potential for corruption.[332]

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.[333] Based on their analysis, the cost of these sanctions outweighs the benefits.[334] 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.[346] 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.[347] Additionally, monetary sanctions can be effective for individuals who can pay.[348]

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."[349] In countries using a day-fine system, fines are typically the primary source of punishment.[350] Day-fines are calculated based on the severity of the crime and the defendant's daily income.[351] 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."[352] 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.[353]

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.[354] Additional-

ers of the Model Penal Code was to abolish fees and costs, they recognized that in the "short- or middle-term" most jurisdictions would not adopt an abolitionist approach, so they included an alternative that would allow for such sanctions subject to "a host of substantive and procedural limitations." Reitz, *supra* note 333, at 1757–60 (citing MODEL PENAL CODE: SENTENCING § 6.04D(2), Alternative § 6.04D(1) (Tentative Draft No. 3, 2014)).

346. *Id.* at 539–40 (citing surveys conducted by the Roper Center for Public Opinion Research and Gallup, including a 1991 survey which found that over ninety percent of respondents favored "requiring convicted criminals to pay a substantial share of the cost of their imprisonment" (quoting ROPER CENTER FOR PUBLIC OPINION RESEARCH, NATIONAL VICTIMS WEEK STUDY (1991)).

347. *Id.* at 540–41. For a discussion of the growth in use of fees, see *supra* notes 194 to 197 and accompanying text.

348. Ruback, *supra* note 82, at 577–78.

349. Tonry & Lynch, *supra* note 91, at 128. Professors Beckett and Harris affirmatively state that their abolition suggestion does not apply to day fine systems. Beckett & Harris, *supra* note 12, at 519 (asserting that their "analysis pertains only to the imposition of fees and fines in the contemporary United States and does not extend to European-style imposition of day fines").

350. Beckett & Harris, *supra* note 12, at 514 (noting that "fines serve as an alternative rather than as a supplement to incarceration"); Tonry & Lynch, *supra* note 91, at 128 (describing use of fines in the Netherlands, Germany, and Sweden).

351. Beckett & Harris, *supra* note 12, at 514–15; Tonry & Lynch, *supra* note 91, at 128.

352. George F. Cole, *Fines Can Be Fine—And Collected: Here's How*, JUDGES' J., Winter 1989, at 5, 7.

353. Beckett & Harris, *supra* note 12, at 514–15; Cole, *supra* note 352, at 7.

354. Cole, *supra* note 352, at 7. On the other hand, some commentators assert the day-fine system would create proportionality concerns because of the differences in fines for wealthy and poor defenders. *See, e.g.*, O'Malley, *supra* note 342, at 547.

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-

355. Cole, *supra* note 352, at 7.

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.

362. 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

363. Jeremy Pelzer, *Ohio Supreme Court Takes Lead in Cracking Down on Illegal 'Debtors' Prisons'*, CLEVELAND.COM (July 22, 2014), http://www.cleveland.com/open/index.ssf/2014/07/ohio_supreme_court_takes_lead.html; Kiela Parks, *Gov. Signs Debtors' Prison Ban Into Law*, COLO. RIGHTS BLOG (May 13, 2014), http://aclu-co.org/blog/gov-signs-debtors-prison-ban-law/. For a discussion of the Colorado legislation, see Recent Legislation, *Criminal Procedure—Indigency Tests—Colorado Requires On-The-Record Indigency Proceedings Prior to Incarceration for Failure to Pay Fines*, 128 HARV. L. REV. 1312 (2015). Highlighting the reforms from Colorado and Ohio is not meant to imply that other jurisdictions have not also adopted reforms. *See, e.g.*, PATEL & PHILIP, *supra* note 239, at 11–22 (discussing reform efforts in Florida, Maryland, Massachusetts, Rhode Island, and Washington).

364. *See* AM. CIVIL LIBERTIES UNION, *supra* note 12; AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES (2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf.

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").

373. *Ohio Bans Debtors' Prisons*, *supra* note 372, at 61. A copy of the "bench card" is available online. SUPREME COURT OF OHIO, OFFICE OF JUDICIAL SERVS., COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (2015), http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf.

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 reports 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

381. Jeremy Pelzer, *For Poorer Ohioans, Illegal Jail Time Can Be Tough to Fight*, CLEVELAND.COM (Aug. 4, 2014), http://www.cleveland.com/open/index.ssf/2014/08/for_poorer_ohioans_illegal_jai.html; *Ohio Bans Debtors' Prisons*, *supra* note 372 , at 61 ("extensive provision of new training programs").

382. Act of May 9, 2014, ch. 164, 2014 Colo. ALS 164, (codifies as amended at COLO. REV. STAT. § 18-1.3-702 (2015)); Parks, *supra* note 363.

383. Press Release, Am. Civil Liberties Union, Colorado Cities Illegally Jail Poor People for Failure to Pay Fines (Dec. 16, 2013), https://www.aclu.org/criminal-law-reform/colorado-cities-illegally-jail-poor-people-failure-pay-fines. The ACLU found that nine of the sixteen largest cities in Colorado use "pay or serve" warrants. Christopher N. Osher, *Colorado Cities Jail Poor Who Can't Pay Fines for Minor Offenses*, DENVER POST (Dec. 15, 2013), http://www.denverpost.com/news/ci_24726701/colorado-cities-jail-poor-who-cant-pay-fines.

384. Osher, *supra* note 383.

385. Letter from Rebecca T. Wallace & Mark Silverstein, ACLU of Colo., to Joyce Downing, Mayor of Northglenn 3 (Dec. 16, 2013), http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Downing-ACLU.pdf; Letter from Rebecca T. Wallace & Mark Silverstein, ACLU of Colo., to Joyce Jay, Mayor of Wheat Ridge 3 (Dec. 16, 2013), http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Jay-ACLU.pdf; *see also* Press Release, Am. Civil Liberties Union, *supra* note 383.

386. Press Release, Am. Civil Liberties Union, *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.[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."[389] Specifically, Colorado amended its statute dealing with the due process requirements for monetary payments.[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.[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.[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."[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.[394]

388. Letter from Rebecca T. Wallace & Mark Silverstein to Herb Atchison, *supra* note 388, at 5–6; Letter from Rebecca T. Wallace & Mark Silverstein to Joyce Downing, *supra* note 385, at 5–6; Letter from Rebecca T. Wallace & Mark Silverstein to Joyce Jay, *supra* note 385, at 6–7.

389. *End Debtors' Prisons*, AM. CIVIL LIBERTIES UNION OF COLO., http://aclu-co.org/campaigns/end-debtors-prisons/ (last visited Oct. 6, 2015). Additionally, the provision made the list of ten ways that Colorado made history in 2014. Nathan Woodliff-Stanley, *From Pot to Protests: 10 Ways Colorado Made History in 2014*, HUFF POST (Mar. 2, 2015), http://www.huffingtonpost.com/nathan-woodliffstanley-/from-pot-to-protests-10-w_b_6402052.html.

390. Act of May 9, 2014, ch. 164, 2014 Colo. ALS 164, (codifies as amended at COLO. REV. STAT. § 18-1.3-702 (2015)).

391. *Id.* (amending COLO. REV. STAT. § 18-1.3-702(a) (2013)); Recent Legislation, *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").

392. Act of May 9, 2014, ch. 164, 2014 Colo. ALS 164, (codifies as amended at COLO. REV. STAT. § 18-1.3-702 (2015) (amending COLO. REV. STAT. § 18-1.3-702(2)(a) (2013))).

393. *Id.* (amending COLO. REV. STAT. § 18-1.3-702(3)(a) (2013)).

394. *Id.* (amending COLO. REV. STAT. § 18-1.3-702(3)(c) (2013)).

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 . . . .").

396. Recent Legislation, *supra* note 363, at 1316–17.

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.").

398. Bearden v. Georgia, 461 U.S. 660, 667–72 (1983); *see supra* Part II B.

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 recognize 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 legislatures the opportunity to determine if the charge is one that should be imposed.[401] For example, a case could be made that courts should not require application fees or reimbursement charges for public defenders.[402] 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.[403] For example, the Ferguson report stressed the problems that occur when municipalities improperly use the criminal justice system for revenue collection rather than public safety.[404]

The process should also examine situations where imposition of fees is fiscally counterproductive.[405] 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."[406] Reforms following impact analysis studies of LFOs in Rhode Island led to reductions in incarceration 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 violates 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 restrictions 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 discussion 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 various 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).

404. U.S. DEP'T OF JUSTICE, *supra* note 90, at 2.

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 indigents, see *infra* note 39 and accompanying text.

406. RHODE ISLAND FAMILY LIFE CTR., COURT DEBT & RELATED INCARCERATION IN RHODE ISLAND 4 (2007), http://www.realcostofprisons.org/materials/Court_Debt_and_Related_Incarceration_RI.pdf.

ed.[407] The reforms in Rhode Island included allowing judges to establish payment plans and waive fees and fines for those unable to pay.[408] Additionally, to prevent unnecessary jail time, judges are required to promptly hear cases involving individuals arrested for failure to appear at payment hearings.[409]

Additionally, courts and legislators could look at standardizing charges to combat allegations about discriminatory treatment in the system.[410] 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."[411] 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."[412] Independent commissions with a broad range of interested parties could further reduce conflicts of interest and concerns over excessive reliance on revenue generation.[413] Additionally, independent commissions could create much needed transparency by evaluation and publication of their findings on existing and proposed fines and fees.[414] This would allow for comparison of fines and fees among municipalities and provide for more effective public scrutiny of local practices.[415]

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

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.*

410. *See, e.g.*, CARL REYNOLDS ET AL., TEX. OFFICE OF COURT ADMINISTRATION, A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION, AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES 27–30 (2009), https://csgjusticecenter.org/wp-content/uploads/2013/07/2009-CSG-TXOCA-report.pdf (describing a plan designed to "[c]larify and consolidate the sprawling variety of state and local fees and costs into a comprehensible package"); *see also* Burch, *supra* note 345, at 542 (discussing the Texas proposal).

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]

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416. Paul M. Stein, Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611, 631 (1969).

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.[421] Although this may seem like a heavy burden, courts routinely make assessments about an individual's need for a public defender.[422] 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.[423] 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.[424]

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.[425] 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

(West 2006). A 2010 study suggests that Texas extend this requirement to other fee considerations and that other states adopt this requirement. BANNON ET AL., *supra* note 37, at 29.

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").

422. *See, e.g.*, WASH. STATE OFFICE OF PUB. DEFENSE, DETERMINING AND VERIFYING INDIGENCY FOR PUBLIC DEFENSE 13–19 (2014), http://www.opd.wa.gov/documents/0185-2014_Determining_Indigency.pdf (discussing the process for determining indigency for the purposes of obtaining a public defender in Washington state). The topic of determining eligibility for counsel for indigent defendants is beyond the scope of this Article. For more detailed information, see 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 11.2(g) (3d ed. 2014) (discussing indigency standards); Wade R. Habeeb, Annotation, *Determination of Indigency of Accused Entitling Him to Appointment of Counsel*, 51 A.L.R.3d 1108, 1108–24 (1973).

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

424. *Id. But see* John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1215–18 (2013) (advocating the use of the Center for Women's Welfare's Self-Sufficiency Standards rather than the Federal Poverty Guidelines for determining eligibility for a public defender).

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. 660, 674 (1983).

to the court.[426] Other alternatives to incarceration include payment plans and community service.[427]

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.[428] The Ohio Plan also provides training for judges and court personnel.[429] 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.[430] Moreover, the improper incarceration of indigents for failure to pay may subject municipalities to costly lawsuits and federal investigations.[431]

Pro-bono clinics, legal-aid services, and law students all offer the potential for helping to educate indigent defendants about their rights.[432] Clear notices of procedures and rights should be provided to all defendants, posted in courtrooms, and provided on all citations.[433]

426. *Bearden* requires courts to consider the availability of "adequate alternative methods of punishing the defendant" before revoking probation. *Bearden*, 461 U.S. at 668–69.

427. *See, e.g.*, Montgomery Settlement, *supra* note 214, at app. 1 (listing payment plans and community service as alternatives to incarceration for those who the courts finds do not have the ability to pay).

428. For a discussion of the Ohio bench card, see *supra* notes 373 to 380 and accompanying text.

429. *Ohio Bans Debtors' Prisons*, *supra* note 372, at 61; *see also* AM. CIVIL LIBERTIES UNION, *supra* note 12, at 11 (suggesting training for judges and court officials). Similarly, the Montgomery settlement also requires the training of public defenders, and prosecutors. *See* Montgomery Settlement, *supra* note 214, ¶¶ 5–6.

430. *See* PATEL & PHILIP, *supra* note 240, at 14 ("Timely ability-to-pay determinations also save states money, allowing states to avoid needless costs incurred in futile collection attempts."). For a discussion of how incarcerating individuals for failure to pay is fiscally counterproductive, see *infra* note 405 to 406 and accompanying text.

431. *See, e.g.*, Ferguson Complaint, *supra* note 1, ¶ 1; Jennings Complaint, *supra* note 227, ¶ 1; U.S. DEP'T OF JUSTICE, *supra* note 90; Shapiro, *supra* note 12.

432. *See, e.g.*, Thomas F. Geraghty, *The Criminal/Juvenile Clinic as a Public Interest Law Office: Defense Clinics; The Best Way to Teach Justice*, 75 MISS. L.J. 699 (2006); Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853 (1996).

433. AM. CIVIL LIBERTIES UNION OF OHIO, *supra* note 364 (suggesting making available printed and online information regarding rights of defendants); AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 419 (suggesting that courts "develop educational materials to make sure that individuals understand that ability to pay is a crucial issue, are informed about mechanisms for seeking relief, and are aware of their right to counsel"); BETTER TOGETHER, MISSOURI COUNCIL FOR A BETTER ECONOMY, PUBLIC SAFETY-MUNICIPAL COURTS, 15 (2014), http://www.bettertogetherstl.com/wp-content/uploads/2014/10/BT-Municipal-Courts-

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.[434] Consumers who have complaints against civil debt collectors have the ability to file complaints with the Consumer Financial Protection Bureau ("CFPB").[435] The system allows consumers to submit complaints of abuses by debt collectors via the internet, mail, telephone, or fax.[436] The CFPB then, in turn, submits the complaints to the collectors to help resolve disputes.[437] 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.[438] 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.[439] Recording court hearings would assist in monitoring courtroom procedures and investigating courtroom complaints.[440]

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).[441] Such information should be available for public review.

Report-Full-Report1.pdf (suggesting that "a basic list of rights, procedures, and consequences should be listed on the back of every municipal citation issued" and that the list should be "prominently displayed at the entrance of every court session").

434. HUMAN RIGHTS WATCH, *supra* note 30, at 8 (suggesting "a mandate to receive and investigate confidential complaints of abusive behavior involving private probation firms from probationers and other members of the public").

435. *See Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, http://www.consumerfinance.gov/complaintdatabase/ (last visited Dec. 7, 2015).

436. CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REP. 11 (2013), http://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf.

437. *Consumer Complaint Database*, *supra* note 435.

438. *See* AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 419 at 20 (advocating "expand[ing] reporting requirements to account for the cost of collection LFOs").

439. Logan & Wright, *supra* note 24, at 1226.

440. *See* Montgomery Settlement, *supra* note 214, ¶ 1 (requiring recording of court proceedings as part of the City of Montgomery, Alabama's settlement agreement).

441. HUMAN RIGHTS WATCH, *supra* note 30, at 8–10 (recommending the publication of private probation company collection information and use of oversight mechanisms including inspec-

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,[442] and contracts with third parties could provide penalties for violations and non-compliance, including loss of future services from the jurisdiction.[443] 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.[444] 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."[445] 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.[446] In three-quarters of these cases, individuals were incarcerated for offenses that were only punishable by fines.[447]

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tions of private probation companies). Georgia has enacted legislation that became effective July 1, 2015 establishing oversight and requiring transparency and financial reporting requirements for private probation companies. H.B. 310, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015). For a description of the legislation, see *2015 Session of the General Assembly*, ACCG LEGISLATIVE UPDATE, May 2015, at 6, http://www.accg.org/library/external/2015_5_15_Legislative%20Update%20FINAL%20EV.pdf.

442. *See, e.g.*, Ohio State Bar Ass'n v. Goldie, 119 Ohio St. 3d 428, 2008-Ohio-4606, 894 N.E.2d 1226, at ¶¶ 17–18 (reprimanding 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). *But see* Jeremy Pelzer, *Punishment Is Rare for Judges Who Illegally Jail Poor Ohioans for Court Debts*, CLEVELAND.COM (Aug. 5, 2014), http://www.cleveland.com/open/index.ssf/2014/08/punishment_is_rare_for_judges.html (discussing difficulties in disciplining judges).

443. *See, e.g.*, Montgomery Settlement, *supra* note 214, ¶ 8 (establishing a three-year ban on contracts with private probation companies).

444. For example, in cases of elected judges, receiving a public reprimand could result in not being re-elected. *See* Pelzer, *supra* note 442 (reporting ACLU of Ohio's Mike Brickner's comments regarding how disciplining judges could lead to negative publicity, which could result in voters electing a different judge).

445. *Ohio Bans Debtors' Prisons*, *supra* note 372, at 61.

446. Letter from Nancy Woodliff-Stanley & Mark Silverstein, ACLU of Colo. to Wynetta Massey, Colorado Springs City Attorney 1–3 (Oct. 22, 2015), http://static.aclu-co.org/wp-content/uploads/2015/09/2015-10-22-Massey-Silverstein-Wallace-pay-or-serve.pdf; Press Release, Am. Civil Liberties Union of Colo., Colorado Springs Sentences Hundreds of Impoverished People to Debtors' Prison in Violation of U.S Constitution and State Law (Oct. 22, 2015),

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.

http://aclu-co.org/colorado-springs-sentences-hundreds-of-impoverished-people-to-debtors-prison-in-violation-of-u-s-constitution-and-state-law/.

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).