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## ELIMINATING THE CRIMINAL DEBT EXCEPTION FOR DEBTORS' PRISONS\*

CORTNEY E. LOLLAR\*\*

### INTRODUCTION

Although the exact number is unknown due to poor documentation,<sup>1</sup> the data available suggests nearly a quarter of the current incarcerated population is detained due to a failure to pay their legal financial obligations.<sup>2</sup> In federal courts alone, the amount of criminal legal debt owed to the U.S. government in fiscal year 2017 totaled more than \$27 billion, and to third parties, more than \$96 billion, not including interest.<sup>3</sup> In 2004, approximately sixty-six percent of all prison inmates were assessed a fine or fee as part of their criminal sentence.<sup>4</sup> Not surprisingly, legal financial obligations disproportionately impact poor defendants and defendants of color.<sup>5</sup>

Despite general acceptance of the premise that as a nation we have banned debtors' prisons, most states do not ban imprisonment for the debt stemming from criminal court involvement.<sup>6</sup> The United States Supreme Court has sanctioned laws permitting a person's incarceration for failing to pay a post-conviction criminal legal debt so long as there is sufficient evidence that the

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1. See, e.g., ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 10–11 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://perma.cc/T9WP-N545>].

2. See, e.g., COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<https://perma.cc/7D78-AVBE>] (confirming that in some jurisdictions, twenty percent of jail inmates are incarcerated for failure to pay their criminal justice debts).

3. EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2017, at 29 tbls.8A, 8B (2018), <https://www.justice.gov/usao/page/file/1081801/download> [<https://perma.cc/ETP3-SQEC>].

4. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 3.

5. BANNON ET AL., *supra* note 1, at 4; COUNCIL OF ECON. ADVISERS, *supra* note 2, at 1.

6. See Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 18–22 (2016).

failure to pay was “willful.”<sup>7</sup> In a series of cases culminating in *Bearden v. Georgia*,<sup>8</sup> the Supreme Court held that incarcerating someone who cannot afford to pay post-conviction criminal fines or fees—who is not “willfully” failing to pay—is a violation of the Constitution’s guarantee of due process.<sup>9</sup> The “critical” due process issue, according to the Court, is a defendant’s ability to pay.<sup>10</sup> Before incarcerating someone for failing to pay any type of criminal legal debt, the law requires the court to determine whether the defendant is able to pay that financial obligation.<sup>11</sup> If the court finds the failure to pay is “willful,” however, incarceration for nonpayment is perfectly acceptable.<sup>12</sup>

Rather than advocating to amend *Bearden* or more carefully monitor its implementation, this Essay argues that incarceration for the failure to pay a criminal debt should not be an exception to our prohibition of debtors’ prisons. No person should be incarcerated solely for failing to pay a criminal court-related debt. Not only is the practice morally troubling, with disparate impacts on low-wage earners and communities of color, it is ineffective and inefficient, both from a fiscal perspective and as a policy matter.

#### I. A BRIEF HISTORY OF THE CRIMINAL DEBT “EXCEPTION” TO DEBTORS’ PRISONS

This criminal debt “exception” to debtors’ prisons is intimately linked to this country’s complicated history regarding debtors and creditors. During this nation’s early years, debtors were regularly imprisoned for failure to pay commercial debts.<sup>13</sup> The prevailing sentiment reflected a view that the inability

7. See *Bearden v. Georgia*, 461 U.S. 660, 668 (1983).

8. 461 U.S. 660 (1983).

9. See *id.* at 668–69; *Williams v. Illinois*, 399 U.S. 235, 240–42 (1970) (holding that incarcerating someone for involuntary nonpayment of a fine or court cost violates the Fourteenth Amendment’s Equal Protection Clause when the aggregate imprisonment exceeds the statutory maximum imprisonment for the crime); *cf.* *Turner v. Rogers*, 564 U.S. 431, 435, 441–43 (2011) (considering civil-contempt sanctions for failure to pay child support); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 637–39 (1988) (addressing criminal-contempt sanctions for nonsupport); *Tate v. Short*, 401 U.S. 395, 398–99 (1971) (holding that converting a fine-only punishment into a sentence of incarceration when someone is indigent violates the Equal Protection Clause).

10. *Bearden*, 461 U.S. at 668–69 (describing the reasons for nonpayment as “critical” to the constitutional inquiry).

11. See *Turner*, 564 U.S. at 447–48 (holding that the state must provide procedural safeguards to ensure that due process is not violated by incarcerating someone who is unable to pay); *Hicks*, 485 U.S. at 637–38 (recognizing a defense of inability to pay in criminal contempt proceedings for failure to pay child support); *Bearden*, 461 U.S. at 673–74 (finding a violation of the Due Process Clause for the lower court not to inquire as to willfulness of failure to pay).

12. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 124 (2014) [hereinafter Lollar, *Criminal Restitution*]. And in some instances, such as in the child support context, the failure to pay does not even have to rise to the level of “willfulness.” Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 147–48 (2018) [hereinafter Lollar, *Criminalizing Fatherhood*].

13. See BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 79 (2002).

to pay one's debts was a moral failing.<sup>14</sup> Over the course of the nineteenth century, as attitudes about indebtedness began to change, society came to see debt as an economic misfortune rather than a moral failing.<sup>15</sup> In part as a result of this shift, one by one, state legislatures passed laws abolishing debtors' prisons.<sup>16</sup> Seen through this new lens, incarceration seemed an overly harsh punishment for a failure to pay one's debts, especially if unable to do so.<sup>17</sup>

By the beginning of the twentieth century, every state had abolished debtors' prisons, either by constitutional provision or by statute, and federal legislation confirmed that federal courts would respect these bans.<sup>18</sup> Because states vary significantly in the language they used to eliminate incarceration for a failure to pay debt, exceptions to the all-out ban on debtors' prisons are the norm.<sup>19</sup> Most states recognize two types of exceptions: one for those seemingly trying to evade payment or identification of assets and the other for debts not specifically covered by state law.<sup>20</sup> Often, this second exception includes debts related to the commission of a crime.<sup>21</sup>

The creation of a bankruptcy system paralleled the abolition of debtors' prisons during the 1800s. As state leaders moved away from incarceration as a key mechanism for enforcing the payment of commercial debts, national leaders moved toward the creation of a federal bankruptcy system that would allow for the discharge of those debts.<sup>22</sup> The legislation that ultimately managed to create a sustainable national bankruptcy system, the Bankruptcy Act of 1898,<sup>23</sup> did not place any explicit limitations on the discharge of criminal debt.<sup>24</sup> The Act did, however, prohibit the discharge of debts owed to either the United States or any state, county, or municipality that were as a result of "penalty or forfeiture."<sup>25</sup> Despite this prohibition, criminal debt owed to a federal or state government was not categorically nondischargeable under the law.<sup>26</sup> As a result, early courts split on whether penal or criminal debt was dischargeable.<sup>27</sup> In the

14. *Id.* at 37.

15. *See id.* at 93.

16. Hampson, *supra* note 6, at 18–19.

17. *See* MANN, *supra* note 13, at 102.

18. Hampson, *supra* note 6, at 19 n.138, 19–21.

19. *Id.* at 21–22.

20. *Id.* at 24–25.

21. *Id.* at 25 (“[D]ebtors’ prisons have not been abolished uniformly when it comes to ‘tort, crime, taxes and licensing fees, child support, and alimony.’”).

22. *See* Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 931–33 (2017); *see also* MANN, *supra* note 13, at 4–5 (tracing the development of a national bankruptcy system).

23. Nelson Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *superseded by* Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.).

24. Atkinson, *supra* note 22, at 931.

25. *Id.*

26. *Id.*

27. *Id.* at 932–35.

past fifty years, however, both Congress and the Supreme Court have taken the position that a majority of courts adopted over the previous half-century: criminal debt is not dischargeable in bankruptcy.<sup>28</sup>

## II. THE INEFFECTIVENESS OF THE CRIMINAL DEBT EXCEPTION

The consequence of these two dovetailing legal threads is that incarceration has become the primary mechanism for addressing the nonpayment of criminal debt. Such debt cannot be discharged under the bankruptcy system, and if someone does not pay her court debt, courts and legislatures have deemed that nonpayment worthy of enforcement via one of the most punitive sanctions we have: incarceration.

To be fair, courts have limited methods of enforcing payment of criminal debt. But if someone has the ability to pay and is simply attempting to skirt her obligations, garnishment of wages or the placement of liens on property, for example, remain effective methods of ensuring the debt is paid.<sup>29</sup> Most people incarcerated for failure to pay are not in a financial position to make those payments however. Approximately eighty-two percent of individuals at the state level<sup>30</sup> and approximately seventy-three percent at the federal level<sup>31</sup> were indigent before they were arrested and charged with a crime.<sup>32</sup> Certainly a

28. *Id.* at 934–35, 937–40; *see also* 11 U.S.C. § 523(a)(7) (2012).

29. *See* Lollar, *Criminalizing Fatherhood*, *supra* note 12, at 170; *see also* OFFICE OF CHILD SUPPORT ENF'T, FY 2017 CHILD SUPPORT ENFORCEMENT PRELIMINARY REPORT 34 tbl.P-29 (2018), [https://www.acf.hhs.gov/sites/default/files/programs/css/fy\\_2017\\_preliminary\\_data\\_report.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/fy_2017_preliminary_data_report.pdf) [<https://perma.cc/D4S7-Q3ZZ>]; ELAINE SORENSEN, OFFICE OF CHILD SUPPORT ENF'T, THE STORY BEHIND THE NUMBERS: THE CHILD SUPPORT PROGRAM IS A GOOD INVESTMENT 5 (2016), [https://www.acf.hhs.gov/sites/default/files/programs/css/sbtn\\_csp\\_is\\_a\\_good\\_investment.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/sbtn_csp_is_a_good_investment.pdf) [<https://perma.cc/W7X7-FPFS>]. To be clear, this author has concerns about wage garnishment and property liens as well, but the point here is other options short of incarceration exist.

30. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FACT SHEET (2011), [https://ojp.gov/newsroom/factsheets/ojpfis\\_indigentdefense.html](https://ojp.gov/newsroom/factsheets/ojpfis_indigentdefense.html) [<https://perma.cc/8MB8-85US>].

31. Radha Iyengar, *An Analysis of Federal Indigent Defense Counsel* 34 tbl.1 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007); *see also* *Defender Services*, U.S. COURTS, <http://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/998T-RUNJ>] (noting that appointed counsel represent the “vast majority” of individuals prosecuted in federal courts).

32. The conviction rates in both state and federal courts are high. According to several recent studies, fewer than three percent of state and federal criminal cases result in a trial. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5, 62 n.2 (2018) <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/MA6V-PP3F>]. Most cases—ninety to ninety-five percent—are resolved by a guilty plea. LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), [bja.gov/Publications/PleaBargainingResearchSummary.pdf](http://bja.gov/Publications/PleaBargainingResearchSummary.pdf) [<https://perma.cc/RRD8-9GL2>]. And for those defendants who choose to go to trial, the conviction rate is greater than eighty percent. *See, e.g.*, John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), <https://pewrsr.ch/2F1Qxn7> [<https://perma.cc/3WRL-NQP8>].

criminal conviction did not increase their prospects of being able to pay court debt.

Well-documented evidence shows that many individuals with criminal convictions have difficulty finding employment upon the termination of their incarceration.<sup>33</sup> It is not uncommon for criminal defendants to lose the jobs they had subsequent to their conviction and sentencing, even if they do not receive a sentence of jail time.<sup>34</sup> Finding employers who will hire an individual with a criminal conviction and an outstanding financial obligation is also a challenge. In addition to criminal background checks, employers increasingly use credit reports in their hiring decisions, and criminal financial obligations show up on such reports.<sup>35</sup> Further, any difficulties in keeping up with criminal-debt payments can add another hurdle to securing employment, while also risking disqualification from food stamps, low-income housing, housing assistance, federal Temporary Assistance to Needy Families (“TANF”) funds, and other benefits.<sup>36</sup>

Even individuals under court supervision who manage to find employment may not be able to both sustain themselves and meet their court-ordered financial obligations. Given the indigence statistics for criminal defendants prior to conviction, and the dim employment prospects afterward, the majority of employed individuals under community supervision likely fall into a low-wage earning group.<sup>37</sup> The vast majority of criminal defendants do

33. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1107 (2013) (“A criminal conviction often serves as a de facto informal basis for job denial.”); Lollar, *Criminal Restitution*, *supra* note 12, at 129.

34. Roger Boshier & Derek Johnson, *Does Conviction Affect Employment Opportunities?*, 14 BRIT. J. CRIMINOLOGY 264, 266–68 (1974); Lollar, *Criminal Restitution*, *supra* note 12, at 124; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942–43, 955–57, 959 (2003); Richard D. Schwartz & Jerome K. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 134–38 (1962); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 528 (2002) (noting that men in trusted or high-income positions prior to conviction experience large earnings losses after release from prison, and that felony conviction can disqualify someone from employment in certain fields).

35. See BANNON ET AL., *supra* note 1, at 27; Lollar, *Criminal Restitution*, *supra* note 12, at 125; Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 85 (2013). Financial information tends to stay on a credit report for seven years. 15 U.S.C. § 1681c(a) (2012); Plunkett, *supra*, at 85.

36. BANNON ET AL., *supra* note 1, at 28.

37. A majority of individuals sentenced on felony and misdemeanor charges receive monetary sanctions, with those defendants who receive probationary sentences more likely to receive such penalties. 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, 1770–71, 1786 (2010). On average, formerly incarcerated white, Hispanic, and black men owe approximately 103%, 69%, and 222% of their annual incomes to legal debt, respectively. *Id.* at 1776. “Felons who consistently pay \$50 a month will still possess legal debt after 30 years of regular monthly payment.” *Id.* Unfortunately, only a small percentage of federal and state parole and probation agencies report employment data, and those agencies that do report the data reveal a widely varying range of employment statistics. See John Rakis, *Improving the Employment Rates of Ex-Prisoners Under Parole*, FED. PROB., June 2005, at 7, 10.

not pay their criminal legal debt because they simply do not have the ability to pay their criminal legal debt on top of their daily living expenses for rent, food, and other necessities for survival. As the Council of Economic Advisers noted, “These monetary penalties often place a disproportionate burden on poor individuals who have fewer resources available to manage debt . . . High fines and fee payments may force the indigent formerly incarcerated to make difficult trade-offs between paying court debt and other necessary purchases.”<sup>38</sup>

Yet many of these individuals end up in prisons or jails despite their indigence. Courts manage to regularly skirt *Bearden’s* holding and often in creative ways. Some judges do not inform defendants of their right to have a hearing on their ability to pay outstanding criminal justice debt;<sup>39</sup> other courts operate a “fines or time” sentence, requiring defendants to choose between immediately paying the criminal legal debt or serving time in jail.<sup>40</sup> Some courts have implemented a system where a defendant agrees to pay the criminal legal debt as part of the plea agreement, making the failure to pay a violation of the plea agreement and skirting *Bearden’s* holding since *Bearden* himself went to trial.<sup>41</sup> Still other courts have either directly flaunted *Bearden* or, at the very least, engaged in a broad interpretation of the term “willful.”<sup>42</sup>

The constitutional requirement that the failure to pay be “willful” is the only legal limitation on post-conviction incarceration for failing to pay a criminal debt. As a consequence, under the current jurisprudence, the only circumstance in which a person should face the potential for incarceration for failure to pay a criminal legal debt is if someone has the financial ability to pay and still does not pay. But that’s not the reality. People with some ability to pay are either making payments, or the government is garnishing their wages, seizing their property, or employing some other mechanism for ensuring

38. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 3–4.

39. Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1490 (2016).

40. *Id.*

41. *Id.* at 1491.

42. See OFFICE OF JUDICIAL SERVS., SUPREME COURT OF OHIO, COLLECTION OF COURT COSTS AND FINES IN ADULT TRIAL COURTS 1–2 (2019), <http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf> [<https://perma.cc/8YRR-TUYF>]; Harris et al., *supra* note 37, at 1761, at 1782–83 (noting that “warrants may be issued, and arrests and confinement may occur, solely due to nonpayment of legal debt” and reporting that “nearly one in four of our respondents reported having served time in jail as a sanction for nonpayment”); Editorial, *Return of Debtors’ Prisons*, N.Y. TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/14/opinion/return-of-debtors-prisons.html> [<https://perma.cc/WK3Q-EDRU> (dark archive)]; Editorial, *The New Debtors’ Prisons*, N.Y. TIMES (Apr. 5, 2009), <http://www.nytimes.com/2009/04/06/opinion/06mon4.html> [<https://perma.cc/BT98-YGVR> (dark archive)]; see also RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV’TS JUSTICE CTR., REPAYING DEBTS (2007), [https://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying\\_debts\\_full\\_report.pdf?sfvrsn=2](https://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying_debts_full_report.pdf?sfvrsn=2) [<https://perma.cc/C2J7-L7UV>] (describing ways to aid policymakers in collecting fines, fees, and other court-imposed financial obligations).

payment.<sup>43</sup> Those with means generally do not go to jail for their failures to pay criminal debt.

### III. THE MORAL UNDERPINNING OF THE CRIMINAL DEBT EXCEPTION

Although some judges and commentators have pushed back against the loose to nonexistent compliance with *Bearden*,<sup>44</sup> visible change appears unavailing. It seems that the moral underpinning that led to the acceptance of debtors' prisons in the early nineteenth century has reemerged, allowing for the incarceration of those deemed "criminal," even if their failure to pay would be excused or even forgiven if the debt were commercial. As Professor Abbye Atkinson has astutely observed, "Congress and courts have relied on actual liability for misconduct as a proxy for dishonesty with respect to criminal and civil fines, penalties, and forfeitures."<sup>45</sup> A person's wrongdoing in her criminal case marks her as dishonest and morally questionable, thereby justifiably denying her the benefit of bankruptcy laws and opening the door to the possibility of incarceration if she fails to pay her criminal debt.

The moral underbelly justifying incarceration for criminal court-related debt is also intimately intertwined with race. Numerous scholars and jurists have commented on the disproportionate impact of the criminal debt exception on people of color.<sup>46</sup> The investigation of Ferguson, Missouri, stands as a well-known example of how race, criminal debt, and incarceration interact.<sup>47</sup> One commentator avers that the "natural legal ancestor" to our current practice of incarcerating people for failing to pay criminal debt is "America's perennial struggle with racism and the legacy of slavery."<sup>48</sup> Comparing our current system

43. Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1603, 1643 (2015).

44. See, e.g., *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 649–52 (E.D. La. 2017), *aff'd sub nom. Cain v. White*, 937 F.3d 446 (5th Cir. 2019) (finding that state court judges' practice of imposing court fines and fees and then imprisoning a criminal defendant for nonpayment, without any determination of ability to pay, violates the Fourteenth Amendment and the Supreme Court's holding in *Bearden*); *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 762 (M.D. Tenn. 2016), *appeal dismissed per stipulation*, No. 16-6129, 2018 WL 6978402 (6th Cir. Sept. 28, 2018) (granting preliminary injunction enjoining a private probation company from seeking or executing arrest warrants on misdemeanor probationers solely due to the nonpayment of probation fees, and from imposing preset secured-money bonds without any hearing or inquiry into probationer's ability to pay because such practices are violations of *Bearden*); BANNON ET AL., *supra* note 1, at 20, 32.

45. Atkinson, *supra* note 22, at 943.

46. *Id.* at 949–51; Hampson, *supra* note 6, at 26; ABA PRESIDENTIAL TASK FORCE ON BLDG. PUB. TR. IN THE AM. JUSTICE SYS., TEN GUIDELINES ON COURT FINES AND FEES 12 n.18 (2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/Is\\_sclaid\\_ind\\_10\\_guidelines\\_court\\_fines.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/Is_sclaid_ind_10_guidelines_court_fines.pdf) [<https://perma.cc/YM59-CKZ6>].

47. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 70–75 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/Z52X-KFTW>]; see also Atkinson, *supra* note 22, at 959–60.

48. Hampson, *supra* note 6, at 26.

to the system of convict-leasing in the American South that began after the Civil War, he asserts that the practice of incarceration for failure to pay a criminal debt marks another instance of “the use of *crime* (or alleged crime) to control populations of color.”<sup>49</sup>

On the surface, the primary motivation for the practice of incarcerating someone for failing to pay criminal legal debt is practical, not moral or theoretical. As many have recognized, financial penalties are a revenue source for state and local government agencies—a way to pay for court systems, criminal investigations, and probation services.<sup>50</sup> Yet this pragmatic approach belies a certain retributive sensibility and morality that is inseparable from the practical realities. Certainly, funding a criminal legal system on the backs of those least able to afford it is not an economically sound approach.<sup>51</sup> Some underlying desire to continue punishing a person for being a “criminal” undoubtedly allows us to justify capturing and detaining a person’s physical body when she does not pay a financial penalty.

The retributive moral instinct motivating our willingness to incarcerate someone solely for failing to pay a financial debt is the unmistakable theoretical justification for such an ineffective policy. A person who is incarcerated because she does not have the ability to pay a criminal legal obligation might well be deterred from engaging in any further criminal activity, but when the failure to pay in and of itself *becomes* criminal activity justifying further incarceration, the deterrence value is difficult to ascertain. An individual in that circumstance has no ability to be deterred due to the cyclical nature of the criminal debt system. Similarly, “there are no meaningful rehabilitative benefits when the practical result of incurring a penal fee is being too poor to pay the fine.”<sup>52</sup>

#### IV. ALTERNATIVES TO INCARCERATION FOR FAILURE TO PAY CRIMINAL DEBT

Rather than continuing to find ways to reinforce the law from *Bearden*, courts and legislators should eliminate incarceration for the nonpayment of criminal court-related debt. Sufficient mechanisms are already in place for those who have assets but choose not to disgorge them. Again, garnishment of wages

49. *Id.*

50. See ABA PRESIDENTIAL TASK FORCE ON BLDG. PUB. TR. IN THE AM. JUSTICE SYS., *supra* note 46, at 6; Atkinson, *supra* note 22, at 948–53; Olivia C. Jerjian, *The Debtors’ Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 244 (2017) (describing how states in the mid-1970s “were regularly billing defendants with fees that otherwise would have been paid by taxpayers”).

51. Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors’ Prisons*, 34 YALE L. & POL’Y REV. 93, 109–10 (2015) (highlighting specific examples where jurisdictions have incurred more expenses after incarcerating individuals who could not pay their minor fines or fees).

52. Atkinson, *supra* note 22, at 949.

and seizures of property can be quite effective means of ensuring payment.<sup>53</sup> But for the vast majority of defendants, who were indigent before their court involvement and face slim prospects for economic stability after, some other method short of incarceration (which carries its own economic costs) should be employed.

As a baseline, any assessment of criminal fines, fees, restitution, bail, or any other economic requirement stemming from criminal court involvement should start with an assessment of a person's ability to pay. The American Bar Association's recently adopted Guidelines on Court Fines and Fees recommends that before any sanction for nonpayment of fines, fees, or restitution, the court should hold an "ability-to-pay" hearing.<sup>54</sup> "Ability-to-pay" determinations should be based on objective, concrete criteria grounded in what someone can afford to pay at the time of the hearing, not what the court thinks they might be able to pay prospectively or under different circumstances.<sup>55</sup>

Then, as others have advocated, courts should move toward a "day" fine system like that employed in numerous other countries.<sup>56</sup> Rather than setting fixed amounts of court fees and fines, a "day" fine system calculates a person's financial obligation by assessing her daily income and multiplying that amount

53. See, e.g., EXEC. OFFICE FOR U.S. ATTORNEYS, *supra* note 3, at 64 tbl.16 (noting more than \$847 million seized in federal criminal forfeiture proceedings in FY 2017); Lollar, *Criminalizing Fatherhood*, *supra* note 12, at 170 (highlighting wage garnishment as the most effective method for child support debt collection). These are still far from perfect solutions, however. Often, the impact of wage garnishment and property seizures falls disproportionately on low-wage earners, creating cascading problems. See, e.g., Faith Mullen, *Another Day Older and Deeper in Debt: Mitigating the Deleterious Effects of Wage Garnishments on Appalachia's Low-Wage Workers*, 120 W. VA. L. REV. 973, 974–75 (2018) ("High interest rates on judgments exacerbate the problem of garnishments for low-wage workers . . . The combination of wage garnishment and high post-judgment interest rates makes it impossible for low-wage workers to get out of debt and can drive some workers out of the job market. This is particularly problematic in states with a high percentage of people living in poverty."); Steven L. Willborn, *Indirect Threats to the Wages of Low-Income Workers: Garnishment and Payday Loans*, 45 STETSON L. REV. 35, 38 (2015) (calculating that more than five million workers have their wages garnished each year and noting that "[w]orkers earning between \$25,000 and \$40,000 annually have the highest garnishment rate by income"); Theresa Zhen, *(Color)Blind Reform: How Ability-To-Pay Determinations Are Inadequate To Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 200 (2019) ("Nefarious collections agencies wrangle money out of low-income people through wage garnishment, harsh debt collection practices, bank levies, and tax intercepts.").

54. ABA PRESIDENTIAL TASK FORCE ON BLDG. PUB. TR. IN THE AM. JUSTICE SYS., *supra* note 46, at 4.

55. SHARON BRETT & MITALI NAGRECHA, CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 13–14 (2019), [http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions\\_layout\\_FINAL.pdf](http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf) [<https://perma.cc/XCV9-BYWZ>].

56. See, e.g., *id.* at 10; Beth A. Colgan, *Graduating Economic Sanctions According to Ability To Pay*, 103 IOWA L. REV. 53, 53–54, 56 (2017). Countries that use a day-fine system include Germany, France, Austria, Switzerland, Finland, Norway, Denmark, Uruguay, Colombia, Guatemala, Ecuador, Paraguay, Honduras, Nicaragua, Venezuela, Argentina, and the Dominican Republic. See EDWIN W. ZEDLEWSKI, NAT'L INST. JUSTICE, ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE 3–5 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/230401.pdf> [<https://perma.cc/5KL8-6F9L>].

by a predetermined number of units of punishment—“days” of income—based on the nature of the criminal violation. For example, if a person’s daily income is assessed at \$25, and they are found guilty of committing the crime of petit larceny, for which the punishment has been set at ten units, the person’s “day” fine (the amount they owe the court) would be \$250. Daily income or “day” values generally take into consideration other factors beyond income, such as an individual’s living expenses, cost of dependents, assets, or other forms of wealth.<sup>57</sup> If someone is truly financially unable to make payments, judges should waive the payment of those fines and fees. In support of such an approach, “[e]valuation research has shown that ‘day’ fine systems without statutory maximums have the . . . potential to increase collection rates, as all defendants should be capable of paying proportional fines, to increase total fine revenue collected, and to reduce arrest warrants for outstanding debt.”<sup>58</sup>

#### CONCLUSION

Not much will change until the justice system is no longer used as a revenue source for local court systems and governments. As the American Bar Association noted, “Requiring users to pay for judicial services is, in many ways, anathema to public access to the courts.”<sup>59</sup> We know that “many states and their municipalities have had to grapple with the question of how to fund the services they are tasked with providing to their constituents” in lean economic times.<sup>60</sup> And, as Professor Atkinson observed, “these general fiscal problems have overlapped with the rise of mass incarceration and increased policing over the last thirty years, which has strained at the seams the budgets of many state and local justice systems.”<sup>61</sup> Although it is simpler to push the costs of running these systems on to the users of these systems, for innumerable reasons trying to fund them from the pockets of the most economically disenfranchised is incredibly ineffective. Nickel and diming indigent defendants through court fines and fees and then incarcerating them when they cannot pay is unjustifiable.

Likewise, we will not fully change our system until we address the underlying racial and economic hierarchies that are so entrenched in it. Professor Atkinson has explained, “[W]e have consistently deployed debt as the legal means of reproducing existing social stratification and ordering where other, more definitely invidious legal regimes, like slavery, have failed.”<sup>62</sup> She

57. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 5 n.8; *see also* Colgan, *supra* note 56, at 74–96 (describing the various methods that states have employed for calculating financial ability to pay when using a day-fine system).

58. COUNCIL OF ECON. ADVISERS, *supra* note 2, at 5.

59. ABA Resolution 114 at 5 (2018) (adopting the ABA Guidelines on Court Fines and Fees).

60. Atkinson, *supra* note 22, at 957.

61. *Id.*

62. Email from Abbye Atkinson, Assistant Professor, Berkeley Sch. of Law, Univ. of Cal., to author (Oct. 17, 2018) (on file with author).

continues, “we can trace the use of penal debt through the Reconstruction Era, into turn of the century America . . . and into the present, as a significant legal justification for the continued social and economic subordination of various marginalized communities.”<sup>63</sup> Until we shift our cultural mindset, we will continue to find ways to marginalize and ultimately penalize low-wage earners and people of color, particularly African Americans, through our legal structures.

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63. *Id.* See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (discussing the seizure and forced labor of African Americans due to an inability to pay criminal fines based on legal loopholes and arbitrary laws).