

# Article

## THE NEW AMERICAN DEBTORS' PRISONS

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*State by state, Americans abolished imprisonment for debt in the first half of the nineteenth century. In forty-one states, the abolition of debtors' prisons eventually took the form of constitutional bans. But debtors' prisons are back, in the form of imprisonment for nonpayment of criminal fines, fees, and costs. While the new debtors' prisons are not historically or doctrinally continuous with the old, some aspects of them offend the same pragmatic and moral principles that compelled the abolition of the old debtors' prisons. Indeed, the same constitutional texts that abolished the old debtors' prisons constitute checks on the new today. As the criminal law literature grapples with debtors' prisons through more traditional doctrinal avenues, this Article engages with the metaphor head-on and asks how the old bans on debtors' prisons should be interpreted for a new era of mass incarceration.*

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## I. Introduction

Debtors' prisons are back. Or, at least, something like them. Over the past several years, Americans have witnessed the mass incarceration of debtors for failure to pay monetary obligations owed to the state, usually municipalities and usually stemming from low-level criminal behavior, such as traffic violations, shoplifting, prostitution, and domestic disputes.<sup>1</sup> The rising issue has been noted by a wide variety of voices, including students of law,<sup>2</sup> litigators,<sup>3</sup> journalists,<sup>4</sup> and even political satirists.<sup>5</sup> In some ways, we're seeing the unhappy return to the outmoded and unsavory practice of imprisonment for debt,<sup>6</sup> perhaps most famously portrayed by Charles Dickens in works like *David Copperfield*.<sup>7</sup> "The State of Georgia has come a long way since it was founded as a safe haven for debtors," laments a student commentator.<sup>8</sup> "Yes, America, we have returned to debtors' prisons," declares one sociologist.<sup>9</sup>

Keilee Fant, thirty-seven, is a certified nurse assistant and single mother who lives in Ferguson, Missouri.<sup>10</sup> In October 2013, while taking her

<sup>1</sup> See Telephone Interview with Douglas K. Wilson, Colorado Public Defender (Oct. 21, 2014) (notes on file with author).

<sup>2</sup> See, e.g., Sarah Dolisca Bellacicco, *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, 234 (2014); Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 Harv. C.R.-C.L. L. Rev. 189 (2016).

<sup>3</sup> See, e.g., *Civil Rights Attorneys Sue Ferguson Over "Debtors Prisons"* NPR (Feb. 8, 2015), <http://www.npr.org/blogs/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons>; Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 262–63 (2015) ("The rise of modern debtors' prisons is a phenomenon affecting hundreds of thousands of people all over the country, and it is happening almost entirely outside of the public consciousness.").

<sup>4</sup> See, e.g., Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>; *The New Debtors' Prisons; Criminal Justice* (2), THE ECONOMIST (Nov. 16, 2013), <http://www.economist.com/news/united-states/21589903-if-you-are-poor-dont-get-caught-speeding-new-debtors-prisons>.

<sup>5</sup> See *Last Week Tonight with John Oliver* (HBO television broadcast Mar. 22, 2015), <https://www.youtube.com/watch?v=0UjpmT5noto>; *The Colbert Report* (Comedy Central television broadcast June 11, 2014), <http://thecolbertreport.cc.com/videos/m87g43/the-word---debt-or-prison>.

<sup>6</sup> See, e.g., Alex Tabarrok, *Debtor's Prison for Failure to Pay for Your Own Trial*, MARGINAL REVOLUTION (Apr. 18, 2012), <http://marginalrevolution.com/marginalrevolution/2012/04/debtors-prison-for-failure-to-pay-for-your-own-trial.html>.

<sup>7</sup> See, e.g., *The New Debtors' Prisons*, N.Y. TIMES (Apr. 5, 2009), <http://nyti.ms/1kTwzOS>. The two novels cited most frequently seem to be *David Copperfield* (1850) and *Little Dorrit* (1857). Of course, Ebenezer Scrooge was a debt collector, and Bob Cratchit kept the books. See CHARLES DICKENS, *A CHRISTMAS CAROL* 58 (Dover Publications, 1991) ("[B]efore [our debt is transferred from Scrooge] we shall be ready with the money; and even though we were not, it would be bad fortune indeed to find so merciless a creditor in his successor.").

<sup>8</sup> Bellacicco, *supra* note 2, at 266.

<sup>9</sup> Alex Harris, *Yes, America, We Have Returned to Debtor's Prisons*, LATIMES.COM (June 6, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-harris-criminal-fines-20140608-story.html>.

<sup>10</sup> For this story, including more details, see Class Action Complaint, *Fant v. City of Ferguson*, No. 4:15-cv-00253 (E.D. Mo. Feb. 8, 2015), at 6–10 [hereinafter Complaint, *Fant v. Ferguson*], <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Ferguson-Debtors-Prison-FILE-STAMPED.pdf>. See also Monica Davey, *Ferguson One of 2 Missouri Suburbs Sued over Gantlet of Traffic Fines and Jail*, N.Y. TIMES (Feb. 8, 2015), [http://www.nytimes.com/2015/02/09/us/ferguson-one-of-2-missouri-suburbs-sued-over-gantlet-of-traffic-fines-and-jail.html?\\_r=0](http://www.nytimes.com/2015/02/09/us/ferguson-one-of-2-missouri-suburbs-sued-over-gantlet-of-traffic-fines-and-jail.html?_r=0).

children to school, she was arrested and taken to the City of Jennings jail for an unpaid debt of \$300—old traffic tickets. Insisting she couldn't pay, she remained in jail for three days until she was “released.” But she was held in the same jail for debts she owed to the City of Bellefontaine Neighbors. When her family paid off those debts, Fant was held for debts owed to Velda City. Then she was moved to county jail to be imprisoned for debts owed to a fourth, and a fifth, municipality. From there, she went to court in the City of Maryland Heights, which “released” her—to Ferguson, which held her in jail for an unpaid debt of \$1400—then let her out after three days. In January 2014, after she had already lost multiple jobs, Fant was arrested, again . . . .

Roelif Carter, sixty-two, is a military veteran who suffers from a brain aneurism and lives in Ferguson, Missouri.<sup>11</sup> Around 2005, he pleaded guilty to some traffic tickets and was put on a \$100-per-month payment plan. He made payments as best as he could, despite also relying on disability payments and food stamps. When Carter brought his money to the city clerk one day late, the clerk refused the money and told him a warrant had been issued. Carter was arrested, held in jail for three days, and told his debts totaled more than \$1000. No reasons given. The cycle continued.

Harriet Cleveland, forty-nine, has three children and worked at a day care in Montgomery, Alabama, until 2009, when she was laid off.<sup>12</sup> In August 2013, while babysitting her baby grandson, she was arrested for an unpaid debt of \$1554—operating a vehicle without insurance and then, once her license was suspended, operating without a valid license. (You have to get to work, and the kids have to get to school.) She slept thirty-one days on a jail cell floor, “block[ing] the sewage from a leaking toilet” with old blankets.

Thomas Barrett was scraping by in Augusta, Georgia, with not much more than food stamps and an alcohol addiction. In April 2012, at rock bottom, he stole a \$2 can of beer from a convenience store and received a sentence of twelve months of probation, which included a \$50 set-up fee, a \$39 monthly charge (to a private probation company), and a \$12 daily fee for his ankle bracelet.<sup>13</sup> In order to make his payments, Barrett began selling his own blood plasma. He still couldn't pay, and as a result faced arrest and imprisonment.

Linda Roberts, fifty-five, lived off of food stamps and disability checks in Colorado. After she shoplifted \$21 worth of food, she owed a debt of

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<sup>11</sup> For this story, including more details, see Complaint, *Fant v. Ferguson*, *supra* note 10 at 10–14.

<sup>12</sup> For this story, including more details, see Stillman, *supra* note 4; Amended Complaint at 1, *Cleveland v. Montgomery*, No. 2:13-cv-00732, (M.D. Ala. Nov. 12, 2013) [hereinafter Complaint, *Cleveland v. Montgomery*], [http://www.splcenter.org/sites/default/files/downloads/case/amended\\_complaint\\_harriet\\_cleveland\\_0.pdf](http://www.splcenter.org/sites/default/files/downloads/case/amended_complaint_harriet_cleveland_0.pdf).

<sup>13</sup> Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR.ORG (May 24, 2014), <http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor>; HUMAN RIGHTS WATCH, PROFITING FROM PROBATION 34 (2014), [https://www.hrw.org/sites/default/files/reports/use214\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/use214_ForUpload_0.pdf).

\$746, composed of court costs, fines, fees, and restitution.<sup>14</sup> She “paid” by spending fifteen days in jail.

Fant, Carter, Cleveland, Barrett, Roberts, and many more: these are the debtors of the new American debtors’ prisons. Their stories, all too familiar to those who lived through them, first reached a national audience through litigation and investigative journalism, then reports and studies. Systemic data are coming, but slowly; many of the municipal courts responsible don’t keep good records.<sup>15</sup> Still, we know the problem isn’t confined to a few states or a region—this is national<sup>16</sup>—and we know it goes deep. When the Department of Justice investigated the Ferguson Police Department in 2015, they discovered that the system was being used not only to enforce laws, but also to raise money.<sup>17</sup> And the Ferguson authorities did it through imprisonment for debt, deploying a vigilant surveillance force, assessing heavy fines for minor infractions, and issuing over 9000 warrants when its citizen-debtors failed to pay.<sup>18</sup> A 2015 class action lawsuit against the city of Austin, Texas, tallied about 900 jailed debtors within a twelve-month period.<sup>19</sup> And by one count, the city of Houston jailed people for nonpayment of criminal justice debt in over 70,000 cases.<sup>20</sup>

Providentially, modern imprisonment for debt is not escaping scrutiny—public, academic, or legal. Professor Alexandra Natapoff has decried it as part of the phenomenon she terms *misdemeanor decriminalization*,<sup>21</sup> while Professor Tamar Birkhead has sharply accused these institutions of comprising a *new peonage*.<sup>22</sup> There is a lot wrong with contemporary

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<sup>14</sup> For this story, including more details, see Recent Legislation, 128 HARV. L. REV. 1312, 1314 (2015) [hereinafter Hampson, Recent Legislation].

<sup>15</sup> Indeed, practitioners often remark that the first step in any solution is documenting the problem. See Colin Reingold, *Pretextual Sanctions, Contempt, and the Practical Limits of Bearden-Based Debtors’ Prison Litigation*, 21 MICH. J. RACE & L. 361, 373–74 (2016).

<sup>16</sup> A 2010 ACLU report found this problem present in Louisiana, Michigan, Ohio, Georgia, and Washington, and a 2011 Brennan Center report tagged fifteen states, including Pennsylvania, New York, and California. See ACLU, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010), [https://www.aclu.org/files/assets/InForAPenny\\_web.pdf](https://www.aclu.org/files/assets/InForAPenny_web.pdf); ALICIA BANNON ET AL., BRENNAN CENTER FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 6 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>. Subsequently, reports have been released on states including Nebraska, New Hampshire, and Oklahoma. See ACLU OF NEBRASKA, UNEQUAL JUSTICE: BAIL AND MODERN-DAY DEBTORS’ PRISONS IN NEBRASKA (2016); ACLU OF NEW HAMPSHIRE, DEBTORS’ PRISONS IN NEW HAMPSHIRE (2015); COOPER ET AL., ASSESSING THE COST: CRIMINAL FINES, COURT COSTS, AND PROCEDURE VERSUS PRACTICE IN TULSA COUNTY (2014).

<sup>17</sup> See Civil Rights Div., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9 (2015) (“City officials have consistently set maximizing revenue as the priority for Ferguson’s law enforcement activity.”); *id.* at 3 (“Ferguson has allowed its focus on revenue generation to fundamentally compromise the role of Ferguson’s municipal court.”).

<sup>18</sup> *Id.* at 10, 18, 42, 46, 52, 53, 55.

<sup>19</sup> Andrea Marsh & Emily Gerrick, Essay, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors’ Prisons*, 34 YALE L. & POL’Y REV. 93, 101 (2015).

<sup>20</sup> *Id.* at 104.

<sup>21</sup> Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

<sup>22</sup> Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015). The metaphor has been echoed by Professor Noah Zatz in Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927 (2016).

debtors' prisons, and a vibrant scholarly conversation is now underway.<sup>23</sup> This Article contributes to that conversation and analyzes the comparison between these institutions and the nineteenth-century debtors' prisons. It also develops an angle that has been underdeveloped: while most prior treatments have focused on the federal Constitution,<sup>24</sup> this Article focuses on state constitutions. And while several commentators have observed that contemporary debtors' prisons offend the same basic moral and political principles as nineteenth-century debtors' prisons, this Article is the first to argue comprehensively that imprisonment for criminal justice debt actually violates state constitutional bans.<sup>25</sup> It deepens the argument published (in necessarily truncated form) in my student Note,<sup>26</sup> adding a desperately needed historical analysis and providing a more thorough vision of the legal regime I propose.

There are no easy answers. Imprisonment for nonpayment of debt, or debtors' prison, is a much more complex concept than it initially seems. Take the definition piece by piece: (a) *Imprisonment*—usually understood as a tighter confinement than restrictions on travel or economic liberty,<sup>27</sup> the debtors might either be held in a separate wing or a separate institution, or confined alongside the general criminal population. (b) *Nonpayment*—often (but not always) the debtor is viewed as “holding the keys to his cell,” so nonpayment really means willful nonpayment. Thus the means test, usually in the form of an ability-to-pay hearing, and its procedural timing, has always been central to the debate over debtors' prisons. (c) *For*—the sanction is deployed either to *coerce* the debtor to pay the debt out of

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<sup>23</sup> See, e.g., David Angley, *Modern Debtors' Prison in the State of Florida: How the State's Brand of Cash Register Justice Leads to Imprisonment for Debt*, 21 *Barry L. Rev.* 179 (2016) (discussing the situation in Florida); Walter Kurtz, *Pay or Stay: Incarceration of Minor Criminal Offenders for Nonpayment of Fines and Fees*, 51 *TENN. B.J.* 16 (2015) (discussing the situation in Tennessee and arguing that the law on the books already prohibits imprisonment for debt—it's up to the Tennessee bar to enforce them).

<sup>24</sup> See, e.g., Atkinson, *supra* note 2; Bellacicco, *supra* note 2, at 250–61 (arguing that the new debtors' prisons constitute a violation of the Equal Protection Clause, the Due Process Clause, and the Excessive Fines Clause); Ann K. Wagner, *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. This is true as well of Professor Alexandra Natapoff's excellent recent piece, Natapoff, *supra* note 21, which uses the term, *see id.* at 1101, and discusses the relevant federal equal protection law, *see id.* at 1082–85. The historical debtors' prisons and the state bans are not a focus of Natapoff's article, however.

<sup>25</sup> An earlier version of this Article was posted on SSRN in August 2015, followed shortly by my student Note in early 2016. My Note, entitled *State Bans on Debtors' Prisons and Criminal Justice Debt*, made some of the same arguments but did so (of course) in sharply truncated form. Devon King, the author of a 2015 student Note, and Professor Neil Sobol, in a 2016 Article, have arrived at much the same destination as I did—and for good reason, as I'll show. There are differences, however, in focus and content, which I'll lay out at the relevant junctions. Cf. Hampson, Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 *HARV. L. REV.* 1024 (2016); Devon King, Note, *Towards an Institutional Challenge of Imprisonment for Legal Financial Obligation Nonpayment in Washington State*, 90 *WASH. L. REV.* 1349 (2015); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 *MD. L. REV.* 486 (2016).

<sup>26</sup> Hampson, *State Bans on Debtors' Prisons and Criminal Justice Debt*, *supra* note 25.

<sup>27</sup> *But see* Danshera Cords, *Lien on Me: Virtual Debtors Prisons, the Practical Effects of Tax Liens and Proposals for Reform*, 49 *U. LOUISVILLE L. REV.* 341, 361 (2011) (arguing that unpaid tax liens clouding a taxpayer's credit report “indefinitely puts the taxpayer in a kind of ‘virtual debtor’s prison.’”); John B. Mitchell and Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 *SEATTLE J. SOC. JUST.* 439 (2005) (discussing threat of taking away drivers' licenses to enforce repayment of debt).

concealed or otherwise exempt assets,<sup>28</sup> or it is deployed to *punish* the debtor for nonpayment. (d) *Debt*—monetary obligations have a wide variety of sources, and the law has distinguished between debts stemming from contract, torts of negligence, intentional torts, familial obligations like alimony and child-support payments, tax, government-provided services, criminal fines, criminal fees, and costs. Along multiple of these axes, it's not immediately obvious how analogous what's happening today is to the practices of the past.

With regard to the comparison, this Article makes a two-step argument. First, on the surface, the new American debtors' prisons aren't like the old at all. The old debtors' prisons dealt exclusively with contractual, commercial debt and typically held debtors in separate institutions. The new debtors' prisons deal with debt stemming from *crime* (different 1L class, different policy goals) and confine debtors alongside the general prison population. The abolitionist movement of the nineteenth century, which ultimately produced forty-one state constitutional bans and a whole host of subconstitutional checks on imprisonment for debt, stopped well short of abolishing *these* debtors' prisons. Where there wasn't a textual carve-out for criminal debts in the statutory and constitutional bans, the subsequent case law readily wrote it in.

And yet, while the old and new debtors' prisons are neither doctrinally nor historically connected, the Article contends that they're still related, but on a deeper, pragmatic level. First, regardless of whether the breach sounds in contract or crime, imprisonment as a remedy is an extremely blunt sanction liable to create massive inefficiencies, especially when there are less costly alternatives. Second, a huge chunk of debts stemming from crime, namely strict liability offenses and costs, have a distinctly civil feel to them and therefore trigger policy concerns more similar to those raised by commercial debt. Third, the nineteenth-century abolitionist movement was fueled by a growing sense that punishing breach of contract was unreasonable in a rapidly expanding commercial society in which it became clear financial obligations weren't always under the control of debtors and creditors. Likewise, recent developments in our understanding of crime in an era of mass incarceration<sup>29</sup> suggest we should begin to feel similarly about certain areas of our criminal law, particularly low-level offenses linked by sociologists to poverty and race.

These deeper rationales indicate the new debtors' prisons should be abolished as were the old. Of course, mass incarceration should force us to

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<sup>28</sup> More unsavory forms of collection actions, like debtors' prison, might induce a debtor "voluntarily" to make payment out of property that creditors cannot attach directly, or income they cannot garnish. Every state has an exemption statute protecting a core amount of the debtors' property from collection actions. *See, e.g.*, 9 R.I. GEN. LAWS § 9-26-4 (2015); *id.* § 9-26-4.1.

<sup>29</sup> That we have witnessed a period of mass incarceration in America is well known. *See, e.g.*, Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1552 (2016). There is some evidence that a rollback on mass incarceration is underway, *see* Natapoff, *supra* note 21, at 1056, although it remains to be seen how the results of the 2016 elections will affect current trends.

ask a number of difficult questions about the way we punish. But at least some of those questions—those related to debtors’ prisons—bring us back to a public conversation we’ve already had. Similarly, imprisonment for criminal justice debt could also falter elsewhere, say on the Eighth Amendment.<sup>30</sup> That’s not our concern here;<sup>31</sup> instead, this piece focuses on today’s debtors’ prisons through the rich doctrinal and historical context of the abolition of the historical institutions and the legal texts it produced.

The Article proceeds as follows. Part I reports on the new debtors’ prisons in greater depth, pulling out their common features and why, absent rigorous pushback, they’re here to stay. Part II provides a detailed historical introduction to the old debtors’ prisons and their abolition, showing how the new and the old are doctrinally distinguishable and historically discontinuous. Part III lays out three areas in which the functions and morals of the nineteenth-century abolition movement still carry lessons for us today. And Part IV sketches out a doctrinal map to suggest how current law could be used to cut back on the new American debtors’ prisons. I conclude by turning the page past adjudication to ask where new political movements and new legal texts could productively be deployed.

## II. IMPRISONMENT FOR DEBT IN 2016

There is nothing new under the sun: imprisonment for debt long antedates the year 2016, and the notes of alarm from legal commentators go back at least to the 1960s.<sup>32</sup> But the problem has become exacerbated since the Great Recession, when many municipalities were driven by financial need to look for alternative sources of money.<sup>33</sup> And it has become more visible in the wake of the public protests following Michael Brown’s death in Ferguson, Missouri.<sup>34</sup> Lawsuits followed. For example, in 2015, Equal

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<sup>30</sup> See, e.g., Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013) (discussing excessive fines jurisprudence after *United States v. Bajakajian*, 542 U.S. 321 (1998)).

<sup>31</sup> Another argument that raises similar themes is the late Professor Vern Countryman’s case that involuntary (or quasi-involuntary) Chapter 13 bankruptcy for individual debtors, which includes a payment plan from future wages, violates the Thirteenth Amendment. See Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 826–27 (1983). Professor Margaret Howard has raised the same argument in the wake of involuntary repayment plans in the 2005 amendments to the Bankruptcy Code, comparing the analysis to that of imprisonment for debt. See Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191, 231–32. But while themes of slavery, race, and debt are present in this Article, the only constitutional texts engaged with in this piece are the Fifth and Fourteenth Amendments to the U.S. Constitution and the imprisonment-for-debt provisions in most state constitutions. A Thirteenth Amendment violation, however, could of course be found if forced labor were at issue, see *infra* note 47 and accompanying text, an analytically distinct problem better saved for another day.

<sup>32</sup> See Derek A. Westen, *Comment, Fines, Imprisonment, and the Poor: “Thirty Dollars or Thirty Days,”* 57 CALIF. L. REV. 778, 787 (1969).

<sup>33</sup> Hampson, *supra* note 25, at 1024. Atkinson points out that municipalities often cannot rely on taxation due to state constitutional constraints on tax increases. Atkinson, *supra* note 2, at 195–96. The standard narrative suggests that modern imprisonment for debt is financially motivated, but Marsh & Gerrick, *supra* note 19, problematize this recitation, arguing that judges are also motivated by concerns like fairness and public safety.

<sup>34</sup> Marsh & Gerrick, *supra* note 19, at 98.

Justice Under Law and Arch City Defenders brought a lawsuit against the cities of Ferguson<sup>35</sup> and Jennings,<sup>36</sup> Missouri.<sup>37</sup> The Ferguson complaint described a “Kafkaesque journey through the debtors’ prison network of Saint Louis County—a lawless and labyrinthine scheme of dungeon-like municipal facilities and perpetual debt.”<sup>38</sup> The lawsuit prompted coverage of the new debtors’ prisons by *The New York Times*,<sup>39</sup> *The Washington Post*,<sup>40</sup> *The Atlantic*,<sup>41</sup> and National Public Radio.<sup>42</sup> Academics, including historians, social scientists, and legal scholars, have started to develop a growing literature on every aspect of this topic.<sup>43</sup>

The chief features of the problem are these: Criminal justice debt, sometimes called Legal Financial Obligations (LFOs), includes fines, fees, court costs, and interest.<sup>44</sup> (The precise labels vary, such as the \$100 “special assessment” in federal courts.) The debts are assessed for “a range of crimes, violations, and infractions, including shoplifting, domestic violence, prostitution, and traffic violations.”<sup>45</sup> Debtors allege being strung along through a complicated and intimidating system, including not knowing the precise amount of their debt, not knowing they were supposed to show up at court, and being afraid to appear in court due to fear that they would be imprisoned.<sup>46</sup> Some courts have imposed or suggested highly

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<sup>35</sup> Complaint, *Fant v. Ferguson*, *supra* note 10. As of January 2017, the case had survived a contentious motion to dismiss (the judge had initially dismissed, then reconsidered and then reinstated two allegations of unconstitutional imprisonment for debt) and was moving into discovery.

<sup>36</sup> Class Action Complaint, *Jenkins v. City of Jennings*, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015) [hereinafter Complaint, *Jenkins v. Jennings*], <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf>.

<sup>37</sup> See Complaint, *Fant v. Ferguson*, *supra* note 10, at 3 (“The City’s modern debtors’ prison scheme has been increasingly profitable to the City of Ferguson, earning it millions of dollars over the past several years. It has also devastated the City’s poor, trapping them for years in a cycle of increased fees, debts, extortion, and cruel jailings.”).

<sup>38</sup> *Id.* at 7.

<sup>39</sup> Tina Rosenberg, *Out of Debtors’ Prison, With Law as the Key* (Mar. 27, 2015 7:00 AM), [http://opinionator.blogs.nytimes.com/2015/03/27/shutting-modern-debtors-prisons/?\\_r=0](http://opinionator.blogs.nytimes.com/2015/03/27/shutting-modern-debtors-prisons/?_r=0) (“Although the United States outlawed debtors’ prison two centuries ago, that, in effect, is where Dawley kept going.”).

<sup>40</sup> Spencer S. Hsu, *Missouri Cities Sued Over Municipal Court Practices* (Feb. 8, 2015), [http://www.washingtonpost.com/local/crime/ferguson-and-jennings-mo-sued-over-municipal-court-practices/2015/02/08/256da2d2-ae4f-11e4-abe8-e1ef60ca26de\\_story.html](http://www.washingtonpost.com/local/crime/ferguson-and-jennings-mo-sued-over-municipal-court-practices/2015/02/08/256da2d2-ae4f-11e4-abe8-e1ef60ca26de_story.html).

<sup>41</sup> Jessica Pishko, *Locked up for Being Poor: How Private Debt Collectors Contribute to a Cycle of Jail, Unemployment, and Poverty* (Feb. 25, 2015), <http://www.theatlantic.com/national/archive/2015/02/locked-up-for-being-poor/386069/>.

<sup>42</sup> *Civil Rights Attorneys Sue Ferguson Over ‘Debtors Prisons* (Feb. 8, 2015 9:03 PM), <http://www.npr.org/blogs/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons>.

<sup>43</sup> See, e.g., ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016); Chrystin Ondersma, *A Human Rights Framework for Debt Relief*, 36 U. PA. J. INT’L L. 269 (2014); Gustav Peebles, *Washing Away the Sins of Debt: The Nineteenth-Century Eradication of the Debtors’ Prison*, 55 COMPARATIVE STUDIES IN SOC’Y & HISTORY 701 (2013) (overviewing the prison reform movement in Europe and the United States and how it connected to capitalism); Erika Vause, *Disciplining the Market: Debt Imprisonment, Public Credit, and the Construction of Commercial Personhood in Revolutionary France*, 32 LAW & HIS. REV. 647 (2014) (providing an account of debt imprisonment in revolutionary France).

<sup>44</sup> See Hampson, *supra* note 25, at 1024 & n.5.

<sup>45</sup> *Id.* at 1027.

<sup>46</sup> *Id.* at 1027–28. As for a lack of clarity about the amount owed, consider this anecdote, shared with permission: two years ago the Miami police issued my wife a moving violation for turning left contrary to a posted sign. But the ticket listed on amount and the website another. I looked around in the

irregular deals in lieu of payment, including janitorial work and (!) giving blood.<sup>47</sup> When connected to a traffic violation, debtors must navigate a complex maze of payments and court hearings or risk losing their driving licenses.<sup>48</sup>

The U.S. Constitution, as we'll see, requires courts to hold a special hearing prior to imprisoning a defendant for inability to pay their criminal justice debts. While many municipal courts aren't courts of record,<sup>49</sup> we know from reams of personal accounts that many courts fail to hold these hearings—or, if they do, they may last only as long as two minutes.<sup>50</sup> Debtors almost never have lawyers during these proceedings.<sup>51</sup>

Prison conditions are another troubling feature of the new system. Consider the following passage from the complaint against the city of Ferguson:

Once locked in the Ferguson jail, impoverished people owing debts to the City endure grotesque treatment. They are kept in overcrowded cells; they are denied toothbrushes, toothpaste, and soap; they are subjected to the constant stench of excrement and refuse in their congested cells; they are surrounded by walls smeared with mucus and blood; they are kept in the same clothes for days and weeks without access to laundry or clean underwear; they step on top of other inmates . . . in order to access a single shared toilet that the City does not clean; they develop untreated illnesses and infections in open wounds . . . ; they endure days and weeks without being allowed to use the moldy shower; their filthy bodies huddle in cold temperatures with a single thin blanket . . . ; they are not given adequate hygiene products for menstruation; they are routinely denied vital medical care and prescription medication, even when their families beg to be allowed to bring medication to the jail; they are provided food so insufficient and lacking in nutrition that inmates lose significant amounts of weight; they suffer from dehydration out of fear of drinking foul smelling water . . . ; and they must listen to the screams of other inmates languishing

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Florida statutes and couldn't understand how the Miami Police had arrived at either number. In fact it seemed possible the police had fluffed up the amount by basing it on the traffic *light* instead of a sign. When Cecilia went to the Miami traffic court, the official in charge began calling in drivers about half a dozen at a time (most of whom didn't speak any English) and summarily reduced their fines to \$100, just for showing up. When Cecilia spoke up, challenged the ticket amount and cited the Florida statutes, the official sighed, made a great show of flipping open the statute book, ran his finger down the page, and then told her she was free to go. No charge. We felt great about the outcome until we suspected that the system likely preferred swallowing a hundred-dollar loss to having one highly educated, outspoken litigant in the cogs.

<sup>47</sup> See Karakatsanis, *supra* note 3, at 262 (\$25 per day); Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), <http://nyti.ms/1GQ91ii>; see also Hampson, *supra* note 25, at 1028.

<sup>48</sup> See ACLU OF TEXAS, NO EXIT, TEXAS: MODERN-DAY DEBTORS' PRISONS AND THE POVERTY TRAP 2–3 (2016).

<sup>49</sup> See, e.g., Telephone Interview with Douglas K. Wilson, *supra* note 1.

<sup>50</sup> See, e.g., Hampson, *supra* note 25, at 1028; ACLU OF TEXAS, *supra* note 48, at 4, 6–7.

<sup>51</sup> See Karakatsanis, *supra* note 3, at 263–64.

from unattended medical issues as they sit in their cells without access to books, legal materials, television, or natural light. Perhaps worst of all, they do not know when they will be allowed to leave.<sup>52</sup>

This selection is brief in light of the fifty-five-page complaint against Ferguson and the sixty-two page complaint against Jennings.<sup>53</sup> The experience of being caught in this system is so dehumanizing that two inmates in Jennings, unable to purchase their own release, hanged themselves in the jail.<sup>54</sup> (In December of 2016, the city of Jennings settled for \$4.7 million and an agreement to change its practice.)

Like many aspects of the American criminal justice system,<sup>55</sup> the new debtors' prisons are discriminatory along the axes of race and wealth.<sup>56</sup> This result stems from both disproportionate poverty<sup>57</sup> and disproportionate policing<sup>58</sup> in communities of color—not only are such communities less able to pay debts owed to the state, but also aggressive enforcement patterns generate more criminal justice debt to begin with.

Even instances where defendants manage to scrounge up the money are morally and legally troubling, as the threat of imprisonment causes debtors to hand over money from disability and welfare checks, or induces family members and friends, who aren't legally responsible for the debt, to scrape together the money.<sup>59</sup> This coercive, imprisonment-for-debt system seems

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<sup>52</sup> Complaint, *Fant v. Ferguson*, *supra* note 10, at 2.

<sup>53</sup> Among other things, the complaints alleged that debtors had been held for extended periods of time without toothpaste, soap, or a change of clothes, *see* Complaint, *Fant v. Ferguson*, *supra* note 10, at 9, that prisoners were not given feminine products for menstruation, *id.* at 10, that their only drinking water came from an apparatus on top of the toilet, *id.* at 13, that prison staff refused to allow a spouse to bring medication for a brain aneurism, *id.* at 13–14, that walls were “moldy and covered in gum, paint chips, blood, mucus, and feces,” *id.* at 16, that prison staff denied medical treatment to a prisoner who developed boils “the size of eggs on his legs,” that “flared and popped,” filling his pants with blood and pus, *id.* at 19, that prisoners experienced a ratio of three or four men per bed, *id.* at 24, that prisoners were not given sufficient coverings for the cold temperatures of the cell, *id.* at 31, and that prisoners experienced sexual abuse and battery at the hands of jail staff, *id.* at 41. As the complaint points out, such conditions would be unconstitutional under the Eighth Amendment even for convicted criminals. *Id.* at 46.

<sup>54</sup> *See* Complaint, *Jenkins v. Jennings*, *supra* note 36, at 46. The debt of one such individual was \$500. *Id.*

<sup>55</sup> *See, e.g.*, WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); Karakatsanis, *supra* note 3, at 254 (“There is a lot to say about American policing; it is, of course, tied up in big things that people don’t like to talk about in polite company, such as structural racism . . . and capitalism—whose logic proudly depends on the perpetual reproduction of domination and control.”).

<sup>56</sup> *See, e.g.*, Complaint, *Fant v. Ferguson*, *supra* note 10, at 33; *see, e.g., id.* at 36 (“These policies and practices have created a culture of fear among the City’s poorest residents, who are afraid even to go to the City police department or the City court to explain their indigence because they know they will be jailed . . . . The same fear motivates many very many poor City residents to sacrifice food, clothing, utilities, sanitary home repairs, and other basic necessities of life in order to scrape together money to pay traffic debts to the City.”).

<sup>57</sup> *See, e.g.*, THE HENRY J. KAISER FAMILY FOUND., *Poverty Rate by Race/Ethnicity* (last visited Mar. 15, 2017), <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/>.

<sup>58</sup> *See, e.g.*, Natapoff, *supra* note 21, at 1065; Sonja B. Starr, *Explaining Race Gaps in Policing: Normative and Empirical Challenges* 4–7 (Univ. of Mich. Law Sch. Scholarship Repository, Working Paper No. 110), [http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1222&context=law\\_econ\\_current](http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1222&context=law_econ_current).

<sup>59</sup> *E.g.*, Complaint, *Fant v. Ferguson*, *supra* note 10, at 36 (“From the perspective of City officials, these coercive threats are successful . . . . because [they] have been crucial to pressuring family

ineluctably connected to the offender-funded model of criminal justice, especially when it interfaces with a growing trend toward privatization in the criminal system. Many of the debts are owed to for-profit prisons or probation companies like Judicial Correction Services (JCS), who wield the threat of imprisonment via contract with the state.<sup>60</sup>

The new American debtors' prisons also show flagrant disregard for American federalism. Many of the debtors who find themselves under the thumb of heavy criminal justice debt receive welfare payments, like disability, social security, and food stamps.<sup>61</sup> Of course, the first scandal is that people at that level of indigence should be considered able to pay debt of any significance. But it gets worse. Welfare programs in the United States overwhelmingly operate through federal-state cooperative programs, whereby states accept federal money in exchange for their promise to distribute the money to the target population within various guidelines. Thus federal welfare money goes into state treasuries with a number of strings attached. But if those same debtors can be pulled over for traffic violations, given heavy fines and fees, and induced, under threat of imprisonment, to take what little money they have and pay down their debt, the state recoups the money, and—voilà, the strings are cut. The state can use the money for whatever purpose it needs. The “Great Texas Warrant Roundup” is deliberately scheduled to coincide with tax refunds, including the Earned Income Tax Credit, a popular welfare program designed to deliver cash to working American families.<sup>62</sup> It's bad enough that those deemed poor enough to receive money for food (by Congress, no less) should be deemed solvent enough to pay debt. But states actually benefit from running debtors' prisons at the expense not only of the poor, but also of the federal government and, by corollary, their sister states.

The press has roundly panned the new debtors' prisons; public interest lawyers with Equal Justice Under Law and the Southern Poverty Law Center have taken a number of cities to court, including Jackson, Mississippi, and New Orleans, Louisiana;<sup>63</sup> and the ACLU adopted a strategy of raising awareness through a letter-writing campaign.<sup>64</sup>

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members—who have no legal obligation to pay any money . . . —to come up with money in order to get their loved ones released from jail.”).

<sup>60</sup> See Atkinson, *supra* note 2, at 208–09.

<sup>61</sup> See, e.g., Complaint, *Fant v. Ferguson*.

<sup>62</sup> ACLU of Texas, *supra* note 48, at 8–9.

<sup>63</sup> See Hampson, *supra* note 25, at 1030. The two organizations teamed up to sue the city of Montgomery, Alabama, in 2013. See Complaint, *Cleveland v. Montgomery*, *supra* note 12. And in May 2014, Equal Justice Under Law brought another challenge. See First Amended Class Action Complaint, *Mitchell v. City of Montgomery*, No. 2:14-cv-00186 (M.D. Ala. May 23, 2014). Both lawsuits ended in settlements with the city. Hampson, *supra* note 25, at 1030 n.52.

<sup>64</sup> For the letter campaign in Ohio, see Letter from Christine Link, Exec. Dir., ACLU of Ohio, et al., to Chief Justice Maureen O'Connor, Ohio Supreme Court (Apr. 3, 2013), [http://www.acluohio.org/wp-content/uploads/2013/04/2013\\_0404LetterToOhioSupremeCourtChiefJustice.pdf](http://www.acluohio.org/wp-content/uploads/2013/04/2013_0404LetterToOhioSupremeCourtChiefJustice.pdf). For the letter campaign in Colorado, see Hampson, *supra* note 25, at 1313 n.13. Between 2012 and 2013, the ACLU sent letters to Chief Justice Bender of the Colorado Supreme Court and three Colorado municipalities. See Hampson, *supra* note 25, at 1030 n.54.

Preliminary results have been encouraging, and the news on this issue continually unfolds. Litigation has had some major successes. For example, in 2014, the city of Montgomery settled, agreeing to “conduct the constitutionally required hearings, produce audio recordings, provide public defenders, and adopt a ‘presumption of indigence’ for defendants at or below 125% of the Federal Poverty Level.”<sup>65</sup> Some courts have taken it upon themselves to clarify the law, issuing opinions (Washington<sup>66</sup>) and bench memos (Ohio<sup>67</sup>) or amending rules (Missouri<sup>68</sup>) to require trial and sentencing judges to take more thorough steps before imprisoning anyone for failure to pay debts.<sup>69</sup> State legislatures have also attempted to develop solutions.<sup>70</sup> In 2014, Colorado almost passed a law (almost unanimously) requiring courts to maintain records of the constitutionally mandated ability-to-pay hearings.<sup>71</sup> The Georgia and Missouri legislatures have also moved to address the issue,<sup>72</sup> and a bill is pending in the Washington State legislature.<sup>73</sup>

Optimistically, these developments may suggest a solution is already underway. But it may not be so easy.<sup>74</sup> Many states haven’t passed any laws or clarifying guidance, and many of those states haven’t been sued yet. Litigation takes time; even settlements take time. Of the laws that have been passed, many do tighten the discretion given to sentencing courts but fail to

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<sup>65</sup> Hampson, *supra* note 25, at 1030.

<sup>66</sup> See *State v. Blazina*, 344 P.3d 680 (Wash. 2015) (clarifying that courts must make an individualized determination of ability to pay prior to incarcerating debtors for failure to pay criminal justice debt).

<sup>67</sup> See, e.g., Pierce J. Reed, *Chief Justice Maureen O’Connor: A Legacy of Judicial Independence*, 48 AKRON L. REV. 1, 8 (2015); Taylor Gillian, *Ohio Supreme Court Warns Judges to End “Debtors’ Prisons,”* JURIST (Feb. 7, 2014), <http://jurist.org/paperchase/2014/02/ohio-supreme-court-warns-judges-to-end-debtors-prisons.php>; OFFICE OF JUDICIAL SERVICES, THE SUPREME COURT OF OHIO, *Collection of Fines and Court Costs in Adult Trial Courts*, <https://www.supremecourt.ohio.gov/Publications/JCS/finestCourtCosts.pdf>.

<sup>68</sup> Order Dated December 23, 2014, Re: Rule 37.65 Fines, Installment or Delayed Payments—Response to Nonpayment (Dec. 23, 2014), <http://www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f8625662000632638/fe656f36d6b518a886257db80081d43c>.

<sup>69</sup> See Hampson, *supra* note 25, at 1030–31.

<sup>70</sup> Congress hasn’t taken action. In January of 2016, Representative Mark Takano of California introduced the End of Debtors’ Prison Act of 2016, a bill that would cut off certain federal grants to states or municipalities that collect fees from people placed on probation for nonpayment of fines or fees—but the bill has languished in subcommittee for almost a year. See CONGRESS.GOV, “H.R. 4364, End of Debtors’ Prison Act of 2016,” <https://www.congress.gov/bill/114th-congress/house-bill/4364> (last visited Mar. 15, 2017).

<sup>71</sup> See Hampson, *Recent Legislation supra* note 14, at 1313, 1315.

<sup>72</sup> Georgia’s House Bill 310 (again with few dissenters) provides guidance for courts in indigency determinations. See H.B. 310, 2015–2016 Reg. Sess. (Ga. 2015), <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/310>.

Among a host of other provisions, the law provides that courts shall waive, modify, or convert [LFOs] . . . upon a determination by the court . . . that a defendant has a significant financial hardship or inability to pay or that there are any other extenuating factors which prohibit payment or collection; provided, however, that the imposition of sanctions for failure to pay such sums shall be within the discretion of the court through judicial process or hearings. *Id.* at 25. Missouri’s law made imprisonment unavailable for traffic offenses and created limits on fundraising through such offenses. See Act of July 9, 2015, 2015 Mo. LAWS 453.

<sup>73</sup> H.B. 1390, 2015–2016 Reg. Spec. Sess. (Wash. 2015), <http://app.leg.wa.gov/bills/summary?BillNumber=1390&Year=2015#documentSection>.

<sup>74</sup> See Hampson, *supra* note 25, at 1031; Hampson, *Recent Legislation, supra* note 14, at 1316.

provide guidance at crucial points.<sup>75</sup> And it's not enough to get a law on the books: courts need to comply with these laws—and we already know many courts were not in compliance with longstanding Supreme Court precedent<sup>76</sup>—for “abolishing the new debtors’ prisons is more a test of moral and societal conviction as it is of sound drafting.”<sup>77</sup>

Clearly what's happening has tremendous legal and moral import. Like the debtors’ prisons of early America, imprisonment for debt may become one of the great moral and legal issues of our time. Does it matter whether we call these new institutions “debtors’ prisons” or not? Indeed it does. It matters because the label connects to the abolition of a historical practice, which left textual remnants in state constitutional and statutory texts across the nation. The analogy is invoked precisely because of its moral and legal relevance. The extent to which the analogy holds as a legal matter may be relevant for litigation and legislation; and the extent to which it holds as a moral matter may be vital to our shared ethical life.<sup>78</sup> It's to these questions that we now turn, beginning with a historical and doctrinal comparison of the contemporary and not-so-contemporary institutions.

### III. DEBTORS’ PRISONS, OLD AND NEW

This Part turns the pages back to the old debtors’ prisons. The literature already contains many partial histories of debtors’ prisons in America,<sup>79</sup> but all of them assume commercial debt is the only relevant kind of debt for the story and therefore end their account with the advent of federal bankruptcy law. None of them span the complete range of the abolition movement. And, since criminal justice debt cannot be discharged in bankruptcy, our account

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<sup>75</sup> In particular, some of the legislative responses leave unresolved the substantive definition of indigence for the purposes of ability-to-pay hearings. *See* Hampson, *Recent Legislation*, *supra* note 14, at 1316–19. Without that, discretion is left to the same courts and judges that have been imprisoning debtors thus far. *See id.* at 1316 (“An exclusively procedural solution . . . runs the risk of leaving substantive discretion in the hands of the very judges who drew underinclusive lines to begin with.”).

<sup>76</sup> *See, e.g.*, Telephone Interview with Nathan Woodliff-Stanley, Exec. Dir., ACLU Colorado (Oct. 23, 2014) (notes on file with author); Telephone Interview with Alec Karakatsanis, Co-Founder, Equal Justice Under Law (Apr. 14, 2015) (notes on file with author).

<sup>77</sup> Hampson, *supra* note 25, at 1031.

<sup>78</sup> For a recent exposition on the strengths of ethical analysis through the lens of *shared ethical life*, see Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

<sup>79</sup> *See, e.g.*, PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* (1974); EDWARD J. BALLEISEN, *NAVIGATING FAILURE* (2001) (focusing on the 1841 Bankruptcy Act); DAVID A. SKEEL, JR., *DEBT’S DOMINION* (2001). The classic history of bankruptcy is CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935). The best recent treatment is by Harvard Law Professor BRUCE H. MANN, *REPUBLIC OF DEBTORS* (2009). This short account cannot build on his excellent narrative, at least not until it cuts off at the repeal of the first national Bankruptcy Act in 1803—before the state abolitions of debtors’ prison. This ending point gives Mann’s account a distinctly national feel. Indeed, he describes the “debate over debtor relief” as being “recast as a debate on the merits of bankruptcy.” *Id.* at 191. This may be largely true, but the abolition of imprisonment for debt across the states seems to suggest that a state-level debate about attachment and execution law was ongoing as well. There are also good book-length treatments of imprisonment for debt in Europe. *See, e.g.*, MARGOT C. FINN, *THE CHARACTER OF CREDIT* 109–196 (2003).

must press onwards, past bankruptcy and to its side, looking to the annals of state constitutional law.

#### A. The Old Debtors' Prisons: Qualities and Functions

Imprisonment for debt has a venerable legacy, a remnant of even harsher sanctions, like enslavement, that were imposed on defaulting debtors in the ancient world.<sup>80</sup> British common law enabled private creditors to detain debtors to account for their debts at trial through body attachment, or the writ of *capias ad respondendum* (sometimes abbreviated as *ca. resp.* or *ca. re.*); and after a judgment through body execution, or the writ of *capias ad satisfaciendum* (*ca. sa.*).<sup>81</sup> The American colonies largely preserved these writs.<sup>82</sup> But the colonies had a bias against debtors' prison from the start.<sup>83</sup> Georgia was even founded as a safe haven for debtors,<sup>84</sup> and the young colonies advertised favorable provisions for debtors to entice newcomers.<sup>85</sup> Yet as the colonies became more established and the industrial and commercial economies expanded, more and more creditors had an incentive to enforce the old writs, especially toward the end of the 1700s and into the 1800s.<sup>86</sup>

Why imprison your debtor? Aside from sating vindictive feelings against someone thought to be deceptive, lazy, or irresponsible,<sup>87</sup> the sanction was quite useful for inducing repayment in certain situations. A creditor might suspect the debtor had hidden assets and wielded

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<sup>80</sup> The ancient Romans allowed debt slavery explicitly in the Twelve Tables (451–450 B.C.), as well as the dismemberment of the debtor unfortunate enough to have multiple vindictive creditors, see Note, *Body Attachment and Body Execution: Forgotten but Not Gone*, 17 WM. & MARY L. REV. 543, 543 n.3, 544 n.4 (1976), although the latter sanction was probably not much used in practice, see Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 24–25 (1926). The Hebrew Bible also contemplates a form of slavery for the repayment of debt, but cabins it through a familial right of redemption and strict temporal limits on the sale of property and people. See *Exodus* 21:1–11; *Leviticus* 25:8–55; *Deuteronomy* 15:1–18. The Christian New Testament alludes to the practice of imprisoning for nonpayment of debt in the parable of the unforgiving servant in Matthew's Gospel. See *Matthew* 18:21–25. Indeed, debt was associated with slavery to the ancient mind. See, e.g., *Proverbs* 22:7 (“[T]he borrower is the slave of the lender.”) (NRSV).

<sup>81</sup> Black defines *capias ad respondendum* as “[a] writ commanding the sheriff to take the defendant into custody to ensure that the defendant will appear in court,” and *capias ad satisfaciendum* as “[a] postjudgment writ commanding the sheriff to imprison the defendant until the judgment is satisfied.” *Capias*, BLACK'S LAW DICTIONARY (10th ed. 2014). For a thorough history of early English law on this subject, see Note, *supra* note 80, at 545–48. (A defendant already held in prison would be haled into court on parallel *habeas corpus* writs.)

<sup>82</sup> See *Landrigan v. McElroy*, 457 A.2d 1056, 1057–58 (R.I. 1983); Becky A. Vogt, *State v. Allison: Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 343 (2001). Detailed histories can be found in Note, *supra* note 80, at 543–50; and Note, *Present Status of Execution Against the Body of the Judgment Debtor*, 42 IOWA L. REV. 306, 306–08 (1957).

<sup>83</sup> See Seán McConville, *Local Justice: The Jail*, in THE OXFORD HISTORY OF THE PRISON 297, 310 (Norval Morris & David J. Rothman eds. 1995).

<sup>84</sup> See Ford, *supra* note 80, at 28; COLEMAN, *supra* note 79, at 249.

<sup>85</sup> See Vogt, *supra* note 82, at 343.

<sup>86</sup> See *id.*; COLEMAN, *supra* note 79, at 249. A similar effect was taking place in England at around the same time. See FINN, *supra* note 79, at 112.

<sup>87</sup> See MANN, *supra* note 79, at 79.

imprisonment to cause the debtor to fess up.<sup>88</sup> Moreover, certain kinds of property were statutorily exempt from attachment.<sup>89</sup> The threat of imprisonment could induce a debtor to turn over exempt property voluntarily, property that the creditor couldn't otherwise reach. A more troubling subset of this scenario concerns the assets of family and friends: absent imprisonment, even close relations would hardly be likely to proffer funds; with incarceration on the creditor's menu of sanctions, some of them might dig deep into their pockets.<sup>90</sup> In brief, debtors' prisons existed because they worked, at least for a time. While most imprisoned debtors simply couldn't pay,<sup>91</sup> for many creditors, putting their debtors through the crucible was worth the cost.

What were the prisons like? In both Britain and the post-Revolutionary United States,<sup>92</sup> debtors were typically held in separate institutions or separate wings of a common jail. The two most prominent institutions in America were New York's New Gaol and Philadelphia's Prune Street Jail.<sup>93</sup> Thus, unlike today, debtors were surrounded by other prisoners held for more or less the same offense, and they had the cognitive benefit of differentiating themselves from the "criminals" in the common jails. Harvard Law Professor Bruce Mann documents how the debtors in one prison formed a parliamentary society, complete with regulations, trials, and due process.<sup>94</sup> Visitors "came and went with relative ease,"<sup>95</sup> and in some cases families may have moved in with the incarcerated patriarch.<sup>96</sup>

Debtors' prisons held people from a range of socioeconomic classes, but the bulk of the inmates were poor.<sup>97</sup> Even where debtors could take a "poor man's oath" after some months of imprisonment, swearing that they had no assets with which to pay, and be released, they had to wait, usually thirty days, to qualify for those laws.<sup>98</sup> Debtors with accounts over a certain level, lines of credit only available to the middle class and up, were not eligible to take the oath.<sup>99</sup> But the very rich could evade capture by remaining within the confines of their locked houses, where they were immune from service of process. They "kept close," as the saying went.<sup>100</sup> Financier Robert

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<sup>88</sup> See *id.* This is also the economic justification advanced in Matthew J. Baker, Metin Cosgel & Thomas J. Miceli, *Debtors' Prisons in America: An Economic Analysis*, 84 J. ECON. BEHAVIOR & ORG. 216 (2012).

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> Mann notes that, prior to the Revolution, there were no debtors' prisons, "[s]trictly speaking," in the country. *Id.* at 85.

<sup>93</sup> *Id.* at 85.

<sup>94</sup> See *id.* at 147–52.

<sup>95</sup> *Id.* at 90.

<sup>96</sup> *Id.* at 91–92.

<sup>97</sup> See COLEMAN, *supra* note 79, at 254.

<sup>98</sup> See *id.*

<sup>99</sup> See MANN, *supra* note 79, at 50, 101.

<sup>100</sup> See MANN, *supra* note 79, at 26–27 (noting that "keeping close" was "an option available only to debtors with the financial resources to sustain it," *id.* at 26).

Morris, once the wealthiest man in America, evaded arrest for seven months by hiding out in “Castle Defiance,” his home outside Philadelphia.<sup>101</sup>

The debtors' prisons were racially homogenous, though: the American middle class was still predominantly white, and a free black man at risk of defaulting on a line of credit had more serious problems on his mind. There were women in the debtors' prisons, but it's hard to know how many were imprisoned as debtors. It was more common to see prostitutes or wives living with their imprisoned husbands.<sup>102</sup>

Conditions were dismal, at least for some.<sup>103</sup> Upper-class debtors were housed perhaps four or five to a room.<sup>104</sup> Debtors of a lower class lived in far more cramped quarters, slept in the hallway, or were relegated to a basement cell.<sup>105</sup> Debtors had to provide their own food (if they had the means),<sup>106</sup> and the living space was cramped and foul,<sup>107</sup> described as a “human slaughterhouse” and a “dismal cage.”<sup>108</sup> Prisoners faced starvation, violence, and disease,<sup>109</sup> including the alarming bouts of yellow fever that swept through the cities.<sup>110</sup> But the extremely wealthy, like Morris, were able to rent their own room, bring in furniture like a desk and chairs, and even redecorate.<sup>111</sup> Such debtors guarded their living space jealously. In fact, in Mann's “republic of debtors,” managing the housing and roommate market within the debtors' prison was of paramount concern.<sup>112</sup>

America did see some early reforms to the debtors' prison system. For example, a New Hampshire law passed in 1771 enabled debt prisoners to roam the prison yard and up to one hundred feet without it.<sup>113</sup> South Carolina allowed certain debts to be paid by installment.<sup>114</sup> But a swell of incarcerated debtors during the growth of commercial economy, including some blockbuster market crashes that landed some of the most wealthy Americans in debtors' prison, led to a growing public sentiment against these institutions.<sup>115</sup> States began to cabin their reach (by excluding certain classes of debtors, like women and Revolutionary War veterans) and widen

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<sup>101</sup> *Id.* at 28. Morris treated the engagement as a “game of cat and mouse.” *Id.* For example, Mann recounts how, when he had to let in a worker to repair his windows, he “went out on the widow's walk atop his roof, locking the door behind him in case the man had been deputized to serve writs.” *Id.* On Sunday, writs could not be served, so Sunday became the only day debtors were free to walk about, and even then with some trepidation. *Id.*

<sup>102</sup> *Id.* at 91–92.

<sup>103</sup> As Coleman points out, “[r]eformers used such examples to create the impression that these conditions were typical rather than exceptional. They were not.” COLEMAN, *supra* note 79, at 254.

<sup>104</sup> MANN, *supra* note 79, at 87.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See COLEMAN, *supra* note 79, at 254 (“[I]nvariably there were instances of the grossest inhumanity—nursing mothers deprived of their liberty, aged Revolutionary veterans jailed for trifling amounts, prisoners crowded into tiny, foul cells, and cases of exploitation, brutality, and death.”).

<sup>108</sup> MANN, *supra* note 79, at 87.

<sup>109</sup> *Id.* at 88.

<sup>110</sup> *Id.* at 97.

<sup>111</sup> *Id.* at 100.

<sup>112</sup> See *id.* at 154.

<sup>113</sup> See Note, *supra* note 80, at 548–49.

<sup>114</sup> See *id.* at 549.

<sup>115</sup> See MANN, *supra* note 79, at 102.

the scope of the confinement—some of them out to the state borders.<sup>116</sup> After Massachusetts banned the imprisonment of petty debtors in 1811, momentum was building for complete abolition.<sup>117</sup>

#### B. The Abolition Movement: Purposes and Limits

The abolition movement began in the 1750s and 1760s, when pamphlets criticizing the practice began to appear.<sup>118</sup> The early literature pointed out the inefficiencies of jailing merchants and skilled tradesmen for events beyond their control.<sup>119</sup> By the 1780s, voluntary societies for the relief of debtors were being organized.<sup>120</sup> In 1800, lawyer William Keteltas, himself in debtors' prison, began publishing a newspaper called *Forlorn Hope*,<sup>121</sup> which denounced the criminal treatment of debtors, characterizing it as a “lingering death.”<sup>122</sup> The emblem of his newspaper demonstrates the themes that would resound throughout the growing movement:

[A] black slave clad only in a loincloth, on bended knee, with his hands clasped together and his head tilted upward in an attitude of supplication, chained by the wrists to a white man dressed in a tattered shirt and worn breeches, standing with his head bowed and his hands chained at his waist. Above them curled a banner with the words, “We should starve were it not for the Humane Society.” Below them wrapped another banner with the defiant slogan, “Liberty Suspended But Will Be Restored.”<sup>123</sup>

The stockbroker and state legislator John Pintard, also in debtors' prison, also made explicit the connection between imprisonment for debt and slavery.<sup>124</sup> While Keteltas clearly meant to condemn both practices, other writers simply urged that society not treat debtors as badly as slaves.<sup>125</sup>

Over time, a national debate became focused on the propriety of a national bankruptcy statute,<sup>126</sup> lighting up a constitutional provision that had been largely skimmed over at the Constitutional Convention.<sup>127</sup> But as the federal government tinkered with bankruptcy,<sup>128</sup> states began working on their own protections for debtors. In 1821, Kentucky, led by former congressman Colonel Richard M. Johnson (later Senator and Vice

<sup>116</sup> Note, *supra* note 80, at 549–50; COLEMAN, *supra* note 79, at 257.

<sup>117</sup> See COLEMAN, *supra* note 79, at 256.

<sup>118</sup> MANN, *supra* note 79, at 81.

<sup>119</sup> *Id.* at 84.

<sup>120</sup> *Id.* at 89.

<sup>121</sup> *Id.* at 103.

<sup>122</sup> *Id.* at 105.

<sup>123</sup> *Id.* at 110.

<sup>124</sup> *Id.* at 126.

<sup>125</sup> *Id.* at 144–45.

<sup>126</sup> See *id.* at 191.

<sup>127</sup> *Id.* at 182.

<sup>128</sup> Even though multiple bills were proposed through the 1790s, Congress only managed to pass a temporary bankruptcy bill in 1800. See *id.* at 187.

President), became the first state to abolish debtors' prisons.<sup>129</sup> Ohio and Illinois were next.<sup>130</sup> Many other states followed suit in the 1830s and 1840s,<sup>131</sup> and by the 1870s the practice was discontinued by almost all of the states then part of the Union.<sup>132</sup>

Contrary to the oft-repeated (and unsubstantiated) claim,<sup>133</sup> the federal government has never abolished debtors' prisons across the United States. In 1832, again due to the efforts of Johnson, Congress *did* abolish imprisonment for debt in the District of Columbia and the territories.<sup>134</sup> And beginning at the end of the eighteenth century, it passed a series of Conformity Acts, extending the same protections to debtors in federal court as they would have enjoyed in the state court where the federal court sat. In 1792, the Second Congress passed an act giving debtors the same "privileges of the yards or limits of the respective gaols" and establishing safety valves for debtors with estates worth less than \$20 and those whose creditors failed to pay their prison bills.<sup>135</sup> That law had a sunset provision,<sup>136</sup> so in 1800, Congress passed a bill doing roughly the same thing, for the long haul.<sup>137</sup> Then, in 1839, after a number of states had banned imprisonment for debt, Congress passed a law providing that federal courts would follow the rules of the states in which they sat.<sup>138</sup> That law

<sup>129</sup> See LELAND WINFIELD MEYER, *THE LIFE AND TIMES OF COLONEL RICHARD M. JOHNSON OF KENTUCKY* 263 (1932). Johnson, who would later become Van Buren's Vice President, has been described as "the prime mover toward getting the federal government to legislate against the imprisonment of persons for debt." See *id.* at 282–89; see also Henry Burnett, *Chancery Jurisdiction in Kentucky in Cases of Fraudulent Conveyance*, 1 KY. L.J. LOUISVILLE 368, 371 (1881–1882).

<sup>130</sup> See MEYER, *supra* note 129, at 287.

<sup>131</sup> See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 16 (1995).

<sup>132</sup> See Note, *supra* note 80, at 550; COLEMAN, *supra* note 79, at 257.

<sup>133</sup> There are various conflicting accounts available of when debtors' prisons were "abolished" in this way, with dates in print including 1832, 1833, 1839, and 1896. Several online sources have repeated 1833. *E.g.*, BANNON, *supra* note 16, at 19. These sources seem to trace back to a law review article that asserted the proposition without any support. Tabb, *supra* note 131, at 16. Warren's account, though, had pointed to the 1839 federal statute, see WARREN, *supra* note 79, at 52, and in a footnote gave some statistics from 1833, which may have caused the confusion, see *id.* at 52 n.8. Another source has 1832. *End of Debt Prison*, U.S. Census Bureau (Dec. 11, 2014), <http://www.prnewswire.com/news-releases/us-census-bureau-daily-feature-for-december-11-300008038.html>. Another source misdated the original passing of the federal statute to 1896. See Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 154 (2002).

<sup>134</sup> See H.R. REP. NO. 22-5, at 1–13 (1832); see also MEYER, *supra* note 129, at 289. The bill read as follows:

[I]t shall not be lawful for any of the courts of the United States to issue a *capias ad satisfaciendum*, or any other process, by which the body may be subject to arrest or imprisonment, upon any judgment at law or final decree in chancery, for payment of money founded upon any contract, express or implied, which may have been entered into, or upon cause of action, which may have accrued after the fourth day of July next; and upon all such contracts and causes of action after judgment, imprisonment shall be totally and absolutely abolished.

H.R. REP. NO. 22-5, at 12 (1832).

<sup>135</sup> 2 Cong. Ch. 29, May 5, 1792, 1 Stat. 265 (1792). The act was entitled, "An Act for the relief of persons imprisoned for Debt."

<sup>136</sup> See *id.* § 4 ("That this act shall continue and be in force, for the space of one year from the passing thereof, and from thence to the end of the next session of Congress, and no longer.")

<sup>137</sup> 6 Cong. Ch. 4, Jan. 6, 1800, 2 Stat. 4 (1800). This act bore the same name as its predecessor.

<sup>138</sup> 25 Cong. Ch. 35, Feb. 28, 1839, 5 Stat. 321 (1839). The act was entitled, "An Act to abolish imprisonment for debt in certain cases," and read as follows:

remains on the books today.<sup>139</sup> However, it's also clear that, early on, federal courts exempted from the scope of the Conformity Act legal actions in which the United States was the creditor.<sup>140</sup>

Moreover, during the same century, the federal government would begin, in fits and starts, to blanket the states with uniform debtor relief under the Bankruptcy Clause of the U.S. Constitution.<sup>141</sup> A bankruptcy statute generally enables debtors, after jumping through various hoops (usually including turning over control of their assets to their creditors), to receive a discharge of the remaining debt, which permanently bars the creditor from taking legal action to collect it, including arrest or imprisonment. The first United States bankruptcy act was passed in 1800 (following the Panic of 1797), but was repealed in 1803.<sup>142</sup> Other attempts went into force from 1841–1843 (following the Panic of 1837)<sup>143</sup> and from 1867–1878 (following the Panic of 1857 and the Civil War).<sup>144</sup> Permanent bankruptcy legislation was passed in 1898 (following the Panic of 1893).<sup>145</sup> Thus some Americans enjoyed limited respite from debtors' prison under the federal bankruptcy statutes during three brief intervals from 1800–1898 and thereafter under the permanent federal bankruptcy statute.

The abolitionist movement would eventually secure constitutional bans against imprisonment for debt in forty-one states.<sup>146</sup> While the Midwestern and Western states were among the first to ban debtors' prisons (creditors of the day would bemoan that their debtors had “gone west”; some debtors

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[N]o person shall be imprisoned for debt in any State, on process issuing out of a court of the United States, where by the laws of such State, imprisonment for debt has been abolished; and where by the laws of a State, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein as are adopted in the courts of such State.

*Id.* The law had to be clarified in 1841. It seems the former law left available to creative litigants the interpretation that the abolition only referred to states where debtors' prisons had been abolished as of the time of the passage of the law. The 1841 act clarified that the statute should be construed to abolish debtors' prison wherever a state had abolished it, even if the abolition took place in the future. *See* 26 Cong. Ch. 2, Jan. 14, 1841, 5 Stat. 410 (1841) (“[T]he act . . . shall be so construed as to abolish imprisonment for debt . . . in all cases whatever, where, by the laws of the State in which the said court shall be held, imprisonment for debt has been, or shall hereafter be, abolished”) (emphasis added).

<sup>139</sup> *See* 28 U.S.C. § 2007 (2012) (originally passed in 1948).

<sup>140</sup> *See* *United States v. Hewes*, 26 F.Cas. 297 (E.D. Pa. 1840).

<sup>141</sup> U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”). Professor David Skeel points out that part of the reason for the failure of the early Bankruptcy Acts is that they were administered through the federal district courts. *See* SKEEL, *supra* note 79, at 27.

<sup>142</sup> *See* Tabb, *supra* note 131, at 13–14; *see also* Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

<sup>143</sup> *See* Tabb, *supra* note 131, at 13–14; *see also* Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, repealed by Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

<sup>144</sup> *See* Tabb, *supra* note 131, at 13–14; *see also* Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, repealed by Act of June 7, 1878, ch. 160, 20 Stat. 99.

<sup>145</sup> *See* Tabb, *supra* note 131, at 13–14. The 1898 Act was amended in 1938 by the Chandler Act, Ch. 575, 52 Stat. 840 (repealed 1978). The most recent major reforms are the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, and the Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. 109-9, Apr. 20, 2005, 119 Stat. 23 (codified as amended in scattered sections of 11, 12, 18, and 28 U.S.C.).

<sup>146</sup> For a comprehensive listing of all of the bans and their exact text, see Hampson, Appendix, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. F. (2016).

even scratched “GTT” on their doors—“Gone to Texas”),<sup>147</sup> the nine states that never put it into their constitutions are mostly clustered along the Atlantic seaboard: Connecticut, Delaware, Louisiana, Maine, Massachusetts, New Hampshire, New York, Virginia, and West Virginia. These states abolished imprisonment for debt via statute. Not all states moved early: Florida, for example, didn’t ban debtors’ prisons until its Reconstruction Constitution in 1868.<sup>148</sup> The twenty states admitted to the Union after mid-century, including a number of western states, Alaska, and Hawaii, had as territories been living without debtors’ prisons for years by act of Congress, but all of them included bans in their constitutions when they joined the Union. Similarly, the constitutions of many Indian tribes ban imprisonment for debt, including the Choctaw Nation<sup>149</sup> and the Chickasaw Nation.<sup>150</sup> Today, the Constitution of Puerto Rico reads, “No person shall be imprisoned for debt.”

The text of the provisions varies from broad pronouncements (like Texas’s “No person shall ever be imprisoned for debt.”) to subtle formulae loaded with exceptions.<sup>151</sup> But where the text of the ban doesn’t include the carve-outs, courts have been quick to read them in.<sup>152</sup> Statutes followed a similar pattern: some enacted broad, morally powerful statements;<sup>153</sup> some clearly but narrowly banned the writ of *capias ad satisfaciendum*;<sup>154</sup> and others “abolished” debtors’ prisons through procedural protections for debtors.<sup>155</sup>

Notably, the current text isn’t necessarily the original language, especially for the older bans: First, many states began with statutes and later

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<sup>147</sup> PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900* (1999).

<sup>148</sup> FLA. CONST. art. I, § 15 (1868).

<sup>149</sup> CHOCTAW CONST. art. I, § 12.

<sup>150</sup> CHICKASAW CONST. art. I, § 12.

<sup>151</sup> See, e.g., MD. CONST. art. III, § 38 (“No person shall be imprisoned for debt, but a valid decree of a court of competent jurisdiction or agreement approved by decree of said court for the support of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony (either common law or as defined by statute), shall not constitute a debt within the meaning of this section.”); see also Hampson, *supra* note 25, at 1035 and sources cited n.97.

<sup>152</sup> As the Supreme Judicial Court of Massachusetts said, “Even the significant word ‘abolished,’ when taken, as it must be, in connection with the other detailed provisions of the act, is found to mean only that imprisonment for debt, from the time it went into operation, should be regulated, modified, and mitigated in conformity with these provisions.” *Appleton v. Hopkins*, 71 Mass. (5 Gray) 530, 532–33 (1855).

<sup>153</sup> Hampson, *supra* note 25, at 1035. In 1855, Massachusetts passed a statute saying, “imprisonment for debt is hereby forever abolished in Massachusetts.” *Appleton*, 71 Mass. at 532. The statute was also meant to punish fraudulent debtors. See *id.* at 533. In 1831, Maine passed a statute entitled the “abolition of imprisonment for honest debtors,” and another in 1835 that strengthened the escape valve for poor debtors. See *Codman v. Lowell*, 3 Me. (3 Greenl.) 52, 57 (1824); *Gooch v. Stephenson*, 15 Me. (3 Shep.) 129, 130 (1838).

<sup>154</sup> E.g., W. VA. CODE § 56-3-2 (“The . . . writ of *capias ad satisfaciendum* [is] abolished and shall not hereafter be issued.”) (1849); CODE OF VA. § 8.01-467 (“No . . . writ of *capias ad satisfaciendum* . . . shall be issued hereafter.”) (1849).

<sup>155</sup> E.g., ME. REV. STAT. ANN. § 3605 (all provisions for arrests repealed in 1971); MASS. ANN. LAWS. c. 224 § 6 (repealing arrest on execution unless creditor can show through specified procedures that the debtor intends to leave the commonwealth); N.Y. DEBTOR AND CREDITOR LAW §§ 120–132; N.H. REV. STAT. 568.

constitutionalized,<sup>156</sup> probably mostly to remove the question from fickle legislatures.<sup>157</sup> Thus not having a constitutional provision might mean simply that the state legislature maintained its conviction.<sup>158</sup> Second, some of the bans were modified over time. The Georgia provision, for example, began with exceptions for fraud and delivery of estate, but these carve-outs were eventually removed, leaving only “There shall be no imprisonment for debt.”<sup>159</sup> Similarly, Texas’s first constitutional ban, found in its 1833 Constitution, included a fraud exception.<sup>160</sup> But the text was whittled down at least twice before Texas joined the Union in 1845, when it read as it does today: “No person shall ever be imprisoned for debt.”<sup>161</sup> Kansas also has a dynamic story, with a fairly typical ban present in its Topeka Constitution but absent from the proslavery Lecompton Constitution.<sup>162</sup> But the ban on debtors’ prisons made it into the Leavenworth Constitution and the Wyandotte Constitution, with which Kansas joined the Union in 1861.<sup>163</sup>

### 1. Functional Reasons for the Ban

Why ban debtors’ prisons? There were (and are) good reasons. Laying out these reasons is important, as imprisonment for debt, it seems, once

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<sup>156</sup> States who initially banned imprisonment for debt via statute and later constitutionalized that value include New Jersey, *see Note, Civil Arrest of Fraudulent Debtors: Toward Limiting the Capias Process*, 26 RUTGERS L. REV. 853, 855 n.19 (1972), South Carolina, *see Lowden v. Moses*, 14 S.C.L. (3 McCord) 93 (S.C. Ct. App. 1825), and Ohio, *see Parker v. Sterling*, 10 Ohio 357, 358 (1841).

<sup>157</sup> For example, the South Carolina legislature apparently banned imprisonment for debt in 1815, but then brought it back in 1823. *See Lowden*, 14 S.C.L. at 101. An alternative concern was whether banning imprisonment for debt ran up against the Contract Clause of the federal constitution. *See, e.g., MEYER*, *supra* note 129, at 235 (describing Johnson’s concern that the 1821 Kentucky ban would be struck down on these grounds). But the Supreme Court addressed this issue just before most states began banning imprisonment for debt. The Contract Clause in the federal Constitution, *see* U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”), was held around this time not to be a ban on state abolition of imprisonment for debt. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); *Mason v. Haile*, 25 U.S. (12 Wheat.) 370 (1827). States generally did not develop separate contract clause jurisprudence under their own constitutions. *See, e.g., Lowden*, 14 S.C.L. at 101; *Wood v. Malin*, 10 N.J.L. 208, 209 (N.J. 1828).

<sup>158</sup> *See, e.g., Makarov v. Commonwealth*, 228 S.E.2d 573, 575 (1976) (“[T]here is no explicit proscription in Virginia’s Constitution against imprisonment for debt. But it is nevertheless established in this State that a person may not be imprisoned, absent fraud, for mere failure to pay a debt arising from contract or for mere failure to pay a judgment for a debt founded on contract.”).

<sup>159</sup> In *State v. Higgins*, 326 S.E.2d 728 (Ga. 1985), the Georgia Supreme Court described the transformation of its constitutional ban of debt, which began in 1798 with a carve-out for fraud and delivery of estate. *See id.* at 728. The Georgia Constitution of 1861 removed the fraud carve-out. *Id.* The Constitution of 1865 clarified that the delivery-of-estate provision only referred to *nonexempt* assets. *Id.* at 728–29. Finally, in 1868, the text was again changed, this time to read, “There shall be no imprisonment for debt,” a formulation that survived into the constitutions of 1877, 1945, 1976, and 1983. *Id.* at 729.

<sup>160</sup> The ban read, “The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditor, or creditors, in such manner as shall be prescribed by law.” TEX. CONST. art. 15 (1833).

<sup>161</sup> TEX. CONST. art. I, § 15 (1845); *see also* *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 229 (Tex. 1991) (Mauzy, J., dissenting) (discussing the changes in Texas’s imprisonment-for-debt ban).

<sup>162</sup> Topeka Constitution, art. I, sec. 15, <http://www.kansasmemory.org/item/221061/text>; Lecompton Constitution, <http://www.kansasmemory.org/item/207409/text>

<sup>163</sup> Leavenworth Constitution, art. I, sec. 15, <http://www.kansasmemory.org/item/207410/text>; Wyandotte Constitution, Bill of Rights, sec. 16, <http://www.kansasmemory.org/item/90272/text>.

made sense. Indeed, one can imagine various scenarios under which private parties might agree to body attachment in a debt contract, as a commitment mechanism. The functional reasons for the ban (and the fairly rapid change in public opinion) have been well rehearsed in the literature, but it's worth reiterating here the major themes. The first explanation seems the most plausible driver of the change, while the second and third explanations help explain the speed with which it took place—and how it became a socio-cultural change in addition to a legal one:

Theme Number One: Imprisonment for debt lost its appeal as a coercive sanction against rapidly improving alternatives, for both creditors and debtors. As historian Peter Coleman put it, “the debtors’ prison disappeared because it was obsolete.”<sup>164</sup> In colonial America, information about assets available to secure or pay off a debt was not reliable, and debtors or potential debtors couldn’t easily signal their willingness and ability to pay *ex ante*.<sup>165</sup> The corporate form hadn’t truly taken off, making it difficult to sell equity in commercial enterprises. And the welfare state hadn’t come into existence to provide social insurance for those seeking subsistence credit. With the rise of the corporation, secured credit (including the chattel mortgage, the promissory note, and the crop-lien system), and credit testing, most entrepreneurial endeavors of any merit could find funding.<sup>166</sup> In fact, under such conditions, it makes sense to have a *ban* on imprisonment for debt. Without a flat ban, entrepreneurs might signal their creditworthiness by signing off on imprisonment clauses excessively, defeating the shift to more cost-effective signals.<sup>167</sup> And the sanction of imprisonment for debt would send debtors and their families into the arms of charity,<sup>168</sup> driving up public costs for private gain. Better to make the right non-disclaimable: any increase in the cost of credit, on this view, is worth it as a form of social insurance.

Theme Number Two: Society began to view itself as evolving from a regressive, punitive society to a progressive society focused on efficiency.<sup>169</sup> The prison, once marketed as an opportunity for reflection and repentance, came to be seen as a haven of luxury and rest: not the best training ground

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<sup>164</sup> COLEMAN, *supra* note 79, at 268. This view is given further support by Baker et al., *supra* note 88.

<sup>165</sup> See, e.g., MANN, *supra* note 79, at 7 (“Before Dun & Bradstreet pioneered centralized credit reporting in the nineteenth century, the decision to extend or withhold credit rested on personal ties or experience, or, absent those, on second- or third-hand information . . .”); COLEMAN, *supra* note 70, at 250.

<sup>166</sup> See COLEMAN, *supra* note 79, at 260–65 (“[L]oans became written, enforceable contracts subject to the law of commercial instruments. The debtors’ prison had no more place in this world of lending and borrowing than it had had in the older world of mutual trust and understanding.” *Id.* at 261); Vogt, *supra* note 82, at 345–46.

<sup>167</sup> See Samuel A. Rea, Jr., *Arm-Breaking, Consumer Credit, and Personal Bankruptcy*, 22 ECON. INQUIRY 188 (1984).

<sup>168</sup> See, e.g., Note, *supra* note 80, at 548 (“[The] families [of incarcerated debtors] often became dependent on charity.”). One might be particularly concerned about this outcome from a behavioral law-and-economics perspective on individual action. See Russell Korobkin, *A “Traditional” and “Behavioral” Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441 (2004).

<sup>169</sup> See Peebles, *supra* note 43.

for failed capitalist workers. A system that punished debt with incarceration felt inefficient compared to a model that encouraged thrift and hard work. Under modern, commercial conditions, the opportunity cost of imprisoning otherwise capable workers seemed far too high,<sup>170</sup> especially as the perceived benefits of imprisonment dropped sharply.

Theme Number Three: Nonpayment of private debt and breach of contract more generally underwent a shift from sounding in *sin* to sounding in *risk*.<sup>171</sup> As modern commercial life picked up steam (quite literally), expectations about one's financial future necessarily became more probabilistic: agrarian finance is on average more predictable than commercial finance.<sup>172</sup> Under these conditions, the sin or crime label, with all the sanctions normally associated with it, came to be viewed as inappropriate for nonpayment of debt: too punitive, not nuanced enough. Importantly, since this shift took place in the register of cultural values, and not legal texts, mores were able to swing fairly rapidly, helping explain the tectonic shift in the legal landscape. Imprisonment for debt came to be viewed as unfair, especially given the externalities it imposed upon families and the community.<sup>173</sup> Behavior worth imprisonment could always be reframed in criminal law, and it was.

## 2. Doctrinal Limits on the Ban

The “abolition” of imprisonment for debt was not absolute.<sup>174</sup> The constitutional texts, or alternatively courts interpreting them, created two kinds of exceptions: for bad behavior and for non-covered debts.

First, debtors who seemed to be evading payment could be imprisoned without violating the bans, whether the evasion took the form of concealing assets, transferring them, or fleeing the state.<sup>175</sup> Indeed, if a court identified a particular asset and ordered it to be turned over, a debtor who failed to do so could be held in contempt of court.<sup>176</sup>

Second, debtors who failed to pay non-covered debts could also be imprisoned with immunity. States vary on which debts are covered by the state bans. The core, of course, is private, contractual debt, and some state

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<sup>170</sup> See, e.g., Note, *supra* note 80, at 547–48 (pointing out the “irony” of imprisoning debtors whose chief concern is raising money to pay back their creditors and noting that the “demand for manpower [in the American colonies] to build and protect the new communities . . . made debtors’ prison an impractical institution.”); Vogt, *supra* note 82, at 345; Mann, *supra* note 79, at 58.

<sup>171</sup> This theme has been emphasized by both Bruce Mann and anthropologist Gustav Peebles. For example, Mann discusses Samuel Moody, a “creditors’ minister,” MANN, *supra* note 79, at 36, who preached that “Debts must be paid, tho’ all go for it,” and “to lie in Debt, is a Sin,” *id.* at 38. But his sermons came “at a time of contest in the economic culture of New England.” *Id.* at 43. A new critique was made possible by the “redefinition of debt from moral delict to economic risk.” *Id.* at 82. See also Peebles, *supra* note 43.

<sup>172</sup> See MANN, *supra* note 79, at 35, 56 (quoting Benjamin Franklin); BALLEISEN, *supra* note 79, at 26–48 (describing the interwoven structure and commercial risks of the developing economy).

<sup>173</sup> See, e.g., COLEMAN, *supra* note 79, at 250.

<sup>174</sup> See Hampson, *supra* note 25, at 1036 & n.103.

<sup>175</sup> For a discussion of the constitutional provisions and case law, see sources cited in Hampson, *supra* note 25, at 1036 n.104; see also James, *supra* note 133, at 359.

<sup>176</sup> See sources cited in Hampson, *supra* note 25, at 1036 n.107.

bans explicitly limit their coverage to debts *ex contractu*.<sup>177</sup> But as the literature has known for over a century,<sup>178</sup> debtors' prisons have not been abolished uniformly when it comes to "tort, crime, taxes and licensing fees, child support, and alimony."<sup>179</sup>

The movement for abolition, then, accomplished its core objective and then ground to a halt, leaving a residue of texts behind and in many cases leaving courts as the ultimate arbiters of where exactly the line was to be drawn. While what I've called the "new American debtors' prisons" crack these questions back open, it's important to realize they were never definitively answered in the first place.

### C. The True Historical Antecedents

Let's pull back from the history and return to the central comparison of the Article. This account of the abolition movement draws out a troublesome feature of the connection between the new debtors' prisons and the old: in many ways, they don't look the same at all. To the contrary, the new debtors' prisons exist exclusively within the doctrinal carve-out for crime, a carve-out the abolition movement seemed content to leave alone. And because the source of the debt is criminal, not contractual, many of the policy rationales that fueled the abolitionist movement don't seem to apply.

And there's an heir with better claim to the title of "new American debtors' prisons," courts sometimes use their contempt powers to imprison debtors for failing to comply with orders to pay their civil, contractual debts. While the practice of using this ability to enforce contractual debt seems to be rare, some authors in the legal literature have lambasted its continued use as creating a *de facto* debtors' prison regime in the United States.<sup>180</sup> This practice is particularly concerning when the creditors at issue are payday lenders, who seem as likely merely to threaten imprisonment as they are actually to use it.<sup>181</sup>

<sup>177</sup> See, e.g., ARK. CONST. art. II, § 16 ("No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud."); MICH. CONST. art. I, § 21 ("No person shall be imprisoned for debt arising out of or founded on contract, express or implied, except in cases of fraud or breach of trust."); *Bray v. State*, 37 So. 250 (Ala. 1904); *In re Sanborn*, 52 F. 583, 584 (N.D. Cal. 1892).

<sup>178</sup> See Hampson, *supra* note 25, at 1036 n.103.

<sup>179</sup> See *id.* at 1036–37 & nn. 111–15 (citing sources).

<sup>180</sup> See 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, 367 (2005) (discussing courts' use of contempt proceedings to enforce "a variety of fees and other expenses"); Lea Shepard, *Creditors' Contempt*, 2011 B.Y.U. L. REV. 1509, 1518 (detailing the common-law ability of creditors to bring *in personam* actions against debtors, enforced by the courts' contempt ability); *id.* at 1526 (discussing "nonappearance contempt" for no-shows). Richard E. James, by contrast, makes an argument that would have held wide appeal in the past, namely, that we should rigorously use imprisonment for nonpayment of civil debt to ensure that courts are respected and their judgments obeyed. See James, *supra* note 133 at 145 (2002). Authors have pointed out, too, that statutes enable imprisonment for failure to pay child support or alimony. See Ressler, *supra* note 180, at 363. Still other authors have expressed concern with imprisonment for contractual debts owed to the state. See Vogt, *supra* note 82, at 335–36 (panning the use of imprisonment for failure to return military equipment after discharge).

<sup>181</sup> See, e.g., Jim Gallagher, *Illinois law limits "debtors prison,"* ST. LOUIS POST-DISPATCH, (July 26, 2012), [http://www.stltoday.com/business/local/illinois-law-limits-debtors-prison/article\\_422369fc-](http://www.stltoday.com/business/local/illinois-law-limits-debtors-prison/article_422369fc-)

Furthermore, what's happening today has more natural legal ancestors in other institutions than the debtors' prisons. One more plausible, legal-historical cosmogony is that contemporary imprisonment for debt is really the latest reincarnation of America's perennial struggle with racism and the legacy of slavery. Historians David Oshinsky, Douglas Blackman, and Mary Ellen Curtin have all documented the rise of the convict-leasing system in the American South in the years immediately following the Civil War,<sup>182</sup> until it was abolished in Alabama in the late 1920s.<sup>183</sup> That system had much in common with the new debtors' prisons. Once the Thirteenth Amendment made slavery unconstitutional, certain southern states immediately attempted to achieve the same functional result through a rash of new crimes, such as vagrancy (inability to prove employment), that were enforced only against blacks and rested handily within the Thirteenth Amendment's carve-out for crime.<sup>184</sup> One simple legal innovation later, black convicts were being leased out to private corporations engaged in the massive undertaking of industrializing the South,<sup>185</sup> laboring in railways, sawmills, cotton fields and coal mines under conditions so horrible their stench seeps through the historians' pages.<sup>186</sup> By the end of the 1880s, over 10,000 black convicts were engaged in forced labor in fields, work camps, and mines.<sup>187</sup> Mississippi's 1876 Leasing Act captured anyone who couldn't pay the fines and court costs,<sup>188</sup> an eerily familiar tactic. On this account, the use of *crime* (or alleged crime<sup>189</sup>) to control populations of color is hardly

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d76a-11e1-8d07-001a4bcf6878.html; Letter from Deborah Fowler, Deputy Dir., Texas Appleseed, and Ann Baddour, Dir., Fair Financial Services Program, to the Hon. Richard Cordray, Dir., Consumer Financial Protection Bureau et. al. (Dec. 17, 2014) (expressing "deep concern" about the use of "criminal charges by payday loan businesses to collect debts" in certain jurisdictions of Texas), <https://www.texasappleseed.org/sites/default/files/Complaint-CriminalCharges-PaydayBusinesses-Final2014.pdf>.

<sup>182</sup> See generally DAVID M. OSHINSKY, *WORSE THAN SLAVERY* (1996); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* (2008); MARY ELLEN CURTIN, *BLACK PRISONERS AND THEIR WORLD* (2000).

<sup>183</sup> See OSHINSKY, *supra* note 182, at 56.

<sup>184</sup> See, e.g., BLACKMON, *supra* note 182, at 53; OSHINSKY, *supra* note 182, at 21; see also U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.") (emphasis added).

<sup>185</sup> See, e.g., BLACKMON, *supra* note 182, at 54–55 (discussing "leasing prisoners to private parties"); 65–66 (noting that arrests rose and fell with the need for labor).

<sup>186</sup> For an extended account, see BLACKMON, *supra* note 182, at 311–320 (detailing the utterly unconscionable conditions of life and death in the prison slave mines in 1908); see also OSHINSKY, *supra* note 182, at 36; *id.* at 59 ("On many railroads, convicts were moved from job to job in a rolling iron cage, which also provided the lodging . . . [for] upwards of twenty men. . . . The prisoners slept side by side, shackled together, on narrow wooden slabs. They relieved themselves in a single bucket and bathed in the same filthy tub of water. With no screens on the cages, insects swarmed everywhere. It was like a small piece of hell, an observer noted—the stench, the chains, the sickness, and the heat.").

<sup>187</sup> BLACKMON, *supra* note 182, at 90.

<sup>188</sup> OSHINSKY, *supra* note 182, at 41–42.

<sup>189</sup> Blackmon, among others, notes that the system made it easy for white southerners to accuse black men of debt and fraud, process them rapidly through a corrupt criminal justice system, and then profit by their labor. See BLACKMON, *supra* note 182, at 7 ("Instead of thousands of true thieves and thugs drawn into the system over decades, the records demonstrate the capture and imprisonment of thousands of random indigent citizens, almost always under the thinnest chimera of probable cause or judicial process."); see also *id.* at 132, 148.

new, the second-best strategy of white supremacy after property.<sup>190</sup> The Fourteenth and Fifteenth Amendments blocked more obvious instances of this racist spirit, but the workarounds persisted from Reconstruction into the Civil Rights Era. For historian Michelle Alexander, the age of mass incarceration is just the latest manifestation of American die-hard racist attitudes: the “new Jim Crow.”<sup>191</sup>

Another legal-historical account would put less emphasis on *race* and more on *class*. The new debtors' prisons, on this view, are just the latest manifestation of the underbelly of capitalism: an exploited working class. Political scientist Marie Gottschalk, for example, wants to ensure we don't lose track of the importance of the rise of neoliberalism in our account of mass incarceration.<sup>192</sup> Historian Heather Ann Thompson points out that American employers have found prison labor to be extremely attractive, due to low wages, benefits, and liabilities.<sup>193</sup> Private companies that have leased convict labor include Starbucks, Microsoft, Wal-Mart, Victoria's Secret, Honda, and Merrill Lynch.<sup>194</sup> Similarly, a number of commentators have pointed out that the availability of prison labor saps unions of bargaining power.<sup>195</sup> Sociologist Loïc Wacquant has referred to this phenomenon as “the criminalization of poverty that is the indispensable complement to the imposition of precarious and underpaid wage labor as civic obligation for those trapped at the bottom of the class and caste structure.”<sup>196</sup>

The ultimate sufficiency of these alternate lenses is beyond our scope here. This theme is developed extensively and powerfully in Birkhead's excellent treatment, which deems these institutions a “new peonage.”<sup>197</sup> This analysis might well leave us wondering how the old and new debtors' prisons are related—if at all.

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<sup>190</sup> See, e.g., BLACKMON, *supra* note 182, at 287 (“Alabama's slave system had evolved into a forced labor agricultural and industrial enterprise unparalleled in the long history of slaves in the United States.”).

<sup>191</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW* (2013); see also BLACKMON, *supra* note 182, at 384 (“[Americans] recoil from the implication that emancipated black Americans could not exercise freedom, and remained under the cruel thumb of white America, despite the explicit guarantees of the Constitution, the Fourteenth and Fifteenth amendments, and the moral resolve of the Civil War.”). But see MARIE GOTTSCHALK, *CAUGHT* 119–20 (2015) (critiquing a narrow race lens for failing to produce a workable solution, account for the effects of neoliberalism, capture prison conditions, and engage with new demographic changes).

<sup>192</sup> See GOTTSCHALK, *supra* note 191, at 139. Gottschalk specifically points out that the increase in racial disparity took place before the burgeoning of the American prison system and that, absent racial disparities, we'd still have a prison crisis by most measures, *see id.* at 121.

<sup>193</sup> Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 722 (2010).

<sup>194</sup> *See id.* at 720 n. 39.

<sup>195</sup> See, e.g., Thompson, *supra* note 193, at 717 (noting that prison labor contributed to the decline of the strengths of unions in the second half of the twentieth century); BLACKMON, *supra* note 182, at 90 (noting the convict-labor system served also as a defense against unions).

<sup>196</sup> Loïc Wacquant, *The Place of the Prison in the New Government of Poverty*, in *AFTER THE WAR ON CRIME* 23, 25 (Mary Louise Frampton et al. eds., 2008). For Wacquant and many other theorists, the problem is tied up in welfare policy as well. *See id.*

<sup>197</sup> *See supra* note 22 and accompanying text.

#### IV. THE PRAGMATIC CONNECTION

And yet, it can't be said that the old institution of the old debtors' prisons, and its abolition, has nothing to say to the new. To the contrary, despite the historical and doctrinal gap, there's a deeper connection—a pragmatic one. This Part argues that, in at least three areas, the lessons American society learned in the nineteenth century can still apply today.

##### A. Incarceration and Its Inefficiencies

First, imprisonment as a punitive technique is a blunt instrument, no matter what doctrinal breach leads to its imposition. For some purposes, of course, blunt instruments may come in handy. But the abolitionists emphasized that imprisoning individuals who otherwise could work carried heavy social costs in addition to the costs of debtor upkeep.<sup>198</sup> The risk of malnutrition, disease, and death that skyrocketed in close quarters seemed less and less worth it. Prison was socially disruptive too. Even though debtors were separated from the general population, they were nonetheless treated as criminals and, as the abolitionists complained, like slaves.

Today, American society faces exactly the same concerns in the new debtors' prisons. The carceral state incurs extremely high fixed and variable costs,<sup>199</sup> and those who have been imprisoned find it very difficult to obtain work after their release. This is due not only to social stigma,<sup>200</sup> but also to collateral consequences such as the loss of a driver's license or ineligibility for certain jobs.<sup>201</sup> Unlike the debtors' prisons of old, we do not separate out our debtors; instead, we put those guilty of inability to pay alongside those convicted of more serious crimes.<sup>202</sup> Furthermore, as in the context of commercial debtors' prisons, "ability to pay" is not endogenous to the sanctions wielded against the debtor: here, as there, the threat of imprisonment increases the risk that the debtor will turn to family, friends, or church—people and institutions not legally obligated to pay—or to illegal sources of money.<sup>203</sup>

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<sup>198</sup> For contemporary arguments in this same vein, see American Bar Association, *The Social Costs Of Incarceration*, [http://www.americanbarfoundation.org/uploads/cms/documents/abf\\_rl\\_summer\\_2010.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/abf_rl_summer_2010.pdf).

<sup>199</sup> See, e.g., CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 2* (July 20, 2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

<sup>200</sup> See, e.g., Complaint, *Fant v. Ferguson*, at 10 ("Because of [Mr. Nelson's] recent jailings—including one while he was in uniform on his way to an important painting job—he has lost a number of jobs and finds it difficult to be re-hired because painting contractors know that he could be jailed on the way . . .").

<sup>201</sup> See, e.g., Natapoff, *supra* note 21, at 1089–91. Other scholars have pointed out that, in some states, these debtors are disenfranchised until they pay back their entire debt to the state. See Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 177 PENN. ST. L. REV. 349 (2012).

<sup>202</sup> Westen, *supra* note 32, at 793.

<sup>203</sup> *Bearden v. Georgia*, 461 U.S. 660, 670–71 (1983) ("Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming.

In the past, the erstwhile efficiency of debtors' prisons was undermined by rapidly improving alternatives—secured credit, equity financing, and credit reporting in the commercial sphere.<sup>204</sup> These cost-effective methods of credit financing enabled the scientific, rational regulation of credit *ex ante*, spreading out the costs of bad debt through interest rates. Such methods were far superior to the threat of imprisonment *ex post*. Today, opportunities for flexible payment schedules,<sup>205</sup> community service, and informal sanctions<sup>206</sup> make it similarly hard to believe that incarceration for debt is the cheapest tool for most penal purposes. This is especially true in most of the imprisonment-for-debt cases, where the mild nature of the underlying offense generally does not indicate that the offender must be incapacitated or severely punished for the benefit of society.

Similarly, if the ultimate objective of the state in wielding imprisonment is to fund the government, imprisoning those who could otherwise be released to seek employment seems similarly irrational.<sup>207</sup> Just as the ban on debtors' prisons forced creditors and debtors to seek alternatives through better information or quasi-insurance in the form of higher interest rates, cutting back on imprisonment for criminal costs would not leave state and municipal governments powerless to act, it would simply remove the most onerous and inefficient form of collection action—and require them to find more cost-effective ways of funding the criminal justice system. Indeed, several commentators have argued that imprisonment for criminal justice debt is simply not worth the cost.<sup>208</sup>

## B. Civil Debts in Criminal Law

Second, even though the debts of the modern debtors' prison arise *ex delicto*, not *ex contractu* (the terminology some courts use), many of these monetary obligations actually seem quite *civil* in various respects.

Setting aside (for now) the fine itself, court costs and fees are more obviously grounded in the goal of funding the government. Insofar as they pay for fixed costs, they seem akin to a general tax; insofar as they pay for variable costs, they are properly analogized to a fee for service. Even

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Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.”)

<sup>204</sup> See *supra* notes 171–73 and accompanying text.

<sup>205</sup> See *Bearden*, 461 U.S. at 672 (“[G]iven the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine . . . a sentencing court can often establish a reduced fine or alternate public service in lieu of a fine that adequately serves the State’s goals of punishment and deterrence . . .”) (citations omitted).

<sup>206</sup> For a discussion of the academic debate on informal sanctions, see Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2078–79 (2006).

<sup>207</sup> Of course, as one reader pointed out, the problem in Ferguson isn’t so much irrational means as rational ones, serving evil ends.

<sup>208</sup> See, e.g., Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 519 (2011); Pat O’Malley, *Politicizing the Case for Fines*, 10 CRIMINOLOGY & PUB. POL’Y 547, 551 (2011). A Rhode Island study concluded that 15% of cases of imprisonment for criminal justice debt ended up costing the state money. 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](http://www.realcostofprisons.org/materials/Court_Debt_and_Related_Incarceration_RI.pdf).

interest meets this definition, as it covers the time-value of the money the state spent on the debtor's process. The widespread and harshly criticized phenomenon of privatization in the criminal justice system<sup>209</sup> makes a number of these debts seem even more civil: they're owed to private, for-profit institutions which, by virtue of their contractual relationship to the state, can threaten arrest and imprisonment for nonpayment.<sup>210</sup> If court costs, fees, and interest reflect the offender-funded model of the criminal justice system, it's properly described as a regressive tax, imposing the costs of the system upon those least able to pay.<sup>211</sup>

And while fines are probably grounded in the core of a state's "penological interests,"<sup>212</sup> "in punishment and deterrence,"<sup>213</sup> that framing of fines is open to question, too. Westen points out (cautiously) that the fine was originally developed in England when the state needed money and jail was cheap.<sup>214</sup> And if fines are actually grounded in deterrence, it's not clear why the American system is the regressive counterpart of the Scandinavian day-fine system, which imposes a graduated system of fines based on the individual's daily salary.<sup>215</sup> The civil nature of the fine is especially open to question for strict liability offenses, where the behavior was not criminal at common law and the authorizing statute does not provide for imprisonment. The argument that imprisonment for nonpayment of fines triggers a civil dimension of the law strikes a blow at what many may consider to be at the core of criminal law,<sup>216</sup> but that's perhaps an endeavor worth commencing.<sup>217</sup> After all, "law reaches past formalism."<sup>218</sup>

Of course, one might counter that the baseline costs of government that should be funded through tax do not include the variable costs of infractions or crimes. Thus, when an offender triggers the criminal justice system, it is both fair and efficient to ask her to pay: fair, because that individual is the proximate cause of the variable cost, and efficient, because that individual faces the deterrent effect of the full costs of her choice. But it's highly implausible that the dollar amounts of these fines and fees are empirically

<sup>209</sup> See generally Note, *Policing and Profit*, 128 HARV. L. REV. 1723 (2015).

<sup>210</sup> See, e.g., *id.* at 1723, 1726.

<sup>211</sup> See *id.* at 1728, 1734; Natapoff, *supra* note 21, at 1098 and n.208.

<sup>212</sup> *Bearden v. Georgia*, 461 U.S. 660, 670 (1982).

<sup>213</sup> *Id.* at 672.

<sup>214</sup> Westen, *supra* note 32, argues that the historical pedigree of imprisonment for nonpayment of fines should "give us pause," *id.* at 779, before we come to the conclusion that nonpayment of fines is illegitimate. Yet, he says, in today's world, "a careful reexamination of the penology and legality of fines is badly needed," *id.* at 786–87.

<sup>215</sup> Some members of the law-and-economics school would support the Scandinavian model, at least under certain conditions. See A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984).

<sup>216</sup> Such a move is perhaps the reverse of Cardozo's famous phrase, "assault upon the citadel of privity," speaking of strict liability to consumers on the part of manufacturers. See William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099 (1960) (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (1931)).

<sup>217</sup> Cf. Complaint, *Fant v. Ferguson*, *supra* note 11, at 33 ("Decisions regarding the operation of the court and the jail—including but not limited to the assessment of fines, fees, costs, and surcharges . . . are significantly influenced by and based on maximizing revenues collected rather than on legitimate penological considerations.").

<sup>218</sup> *Lee v. Weisman*, 505 U.S. 577, 595 (1992).

tethered down to the actual marginal costs of the justice system, and in any case this counter misunderstands the destination of the argument: the issue here isn't about the propriety of assessing these debts—it's about what sanctions can be used to collect them.

### C. Crime, Contract and Situationism

Third, just as it came to be seen as inefficient and unfair to punish people harshly for breach of contract in a fast-paced commercial world, so too society may come to see other infractions as products of the external world, and less under the control of the offender.<sup>219</sup> American society, given its history, has particular reason to question any crimes that seem to punish people more for their poverty than for their behavior. And there's reason to think that these sorts of "crime-traps" are happening, at least to some extent.<sup>220</sup> Remember that Harriet Cleveland's debt and subsequent imprisonment stemmed from her financial inability to keep a car lawfully on the road, which she needed to do to pay the bills.<sup>221</sup> If our vision for criminal law trends in this direction, then, just as the abolition of debtors' prisons in the commercial context forced lenders to bear the risk of improvident lending, so too, in the quasi-criminal world of traffic violations (to give one example), abolition of debtors' prisons would force society to take responsibility for ensuring that fewer infractions occur, a task that might be accomplished through better support, education, and policing.<sup>222</sup>

Of course, the deterrence justification for imprisonment is still powerful. In a debt contract, both the lender and the debtor have the ability to walk away. Such shared control is not the case for the types of offenses we're concerned with today. At the same time, the assessment of the debt and other collections remedies besides imprisonment might be enough to deter some kinds of violations. American society experienced a rapid sea change in our attitudes toward debt across the long nineteenth century, and given the longstanding critique of American criminal law, we might well see the same with certain behaviors we now call crime.

### D. "Forgive Us Our Debts"

These pragmatic connections should not be surprising. After all, the English language uses the word *debt* to refer both to monetary obligations incurred by contract and monetary obligations incurred by wrongdoing,

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<sup>219</sup> Cf. Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 418–25 (2006) (describing the inverse process, by which we blame victims for the injustices they suffer); see also Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 10, 23–33 (1985) (arguing some criminal activity may come from poverty).

<sup>220</sup> See *supra* notes 48–51 and accompanying text.

<sup>221</sup> Cleveland v. City of Montgomery, 300 F.R.D. 578, 579–80 (M.D. Ala. 2014)

<sup>222</sup> See, e.g., Barack Obama, President of the United States, *Remarks by the President at the NAACP Conference* (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

violation, or crime. And some features of imprisonment for debt are common to all debts, regardless of how the debt was incurred or who the creditor is.

Perhaps this is why the word *debt* itself, when present in the bans, required interpretation—for then, as today,<sup>223</sup> the word could have a very broad scope of application. Most famously, *debt* is used in the 1611 KJV translation of the Lord’s Prayer (“And forgive us our debts, as we forgive our debtors.”)<sup>224</sup> as an analogy for *sin*, a wrong committed against God, who is clearly more similar to a sovereign government than to the phone company. This little word has caused a lot of litigation over the years. For example, American notes have since the 1860s contained the obligation that they are “legal tender for all debts, public and private.” In 1868, the Supreme Court decided that the notes were not legal tender for taxes, which weren’t “debts” in the meaning of the statute.<sup>225</sup> More recently, the Court had to decide whether payments owed for a license were debts under the Bankruptcy Code and summed up with the toying phrase, “a debt is a debt . . . .”<sup>226</sup>

Perhaps the best evidence that the word *debt* does not clearly exclude criminal justice debt is the number of constitutional provisions, discussed above, that were enacted with language clarifying exactly what kinds of debts the people meant to ban. Against that backdrop, the broad language remaining in some constitutions, like Texas’s “No person shall ever be imprisoned for debt,” remain interpretatively open. As some have argued is true of other constitutional provisions, like “due process,” perhaps abolishing imprisonment for “debt” was always, as a matter of text and purpose, meant to embody a fundamental moral and pragmatic principle.

## V. REINVIGORATING THE BAN

Based on the pragmatic connections I have laid out, the ban on the old debtors’ prisons should extend to cover some aspects of the new. In common cause with Professor Neil Sobol and Devon King, the author of a 2015 student Note (although we don’t seem to have been aware of each other), I argued in *State Bans on Debtors’ Prisons and Criminal Justice Debt* that the law lays out two tiers of scrutiny for imprisonment for debt,<sup>227</sup> what Sobol calls a “hybrid” approach.<sup>228</sup> This Part expands on my earlier argument and provides a comprehensive doctrinal scaffold for this approach.

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<sup>223</sup> See, e.g., *Debt*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Liability on a claim; a specific sum of money due by agreement or otherwise . . . .”). The Seventh Circuit had to decide whether municipal fines were “debts” for the purposes of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p in *Gulley v. Markoff & Krasny*, 664 F.3d 1073 (7th Cir. 2011). It said they weren’t, but relied on the statutory definition restricting the obligations to those arising out of “transactions.” See *id.* at 1074–75.

<sup>224</sup> *Matthew* 6:9–13.

<sup>225</sup> See *Lane Cty v. Oregon*, 74 U.S. 71, 79 (1868).

<sup>226</sup> *F.C.C. v. NextWave Personal Comm’s Inc.*, 537 U.S. 293, 303 (2003).

<sup>227</sup> See Hampson, *supra* note 25, at 1043–44.

<sup>228</sup> Sobol, *supra* note 21, at 532–37.

What are the two tiers? First, the state constitutional and statutory laws that are the focus of this Article might apply to some aspects of the new debtors' prisons, either on their own terms or because federal equal protection requires states to treat certain types of debts similarly. And, second, the Fourteenth Amendment regulates the extent to which states can imprison for nonpayment of debt in the criminal context.<sup>229</sup> Three cases from the 1970s and 1980s, *Williams v. Illinois*,<sup>230</sup> *Tate v. Short*,<sup>231</sup> and *Bearden v. Georgia*,<sup>232</sup> all constrained the ability of courts to imprison criminal defendants for inability to pay fines, fees, and court costs.

As one might expect, there's some overlap, and enforcing *Bearden* protections should be a priority of the federal courts. But as it turns out, while the *Bearden* line of cases has been broadly applied across the spectrum of criminal debts (and, as I'll argue, it should be even more broadly applied) the protections it offers are limited. By contrast, the state debtors' prison bans, while not as broadly applicable, provide defendants with more rigorous protections.

#### A. *Bearden* Claims

Let's start with federal protections. The *Bearden* line of cases—including *Williams* and *Tate*, decided under the Equal Protection and Due Process Clauses of the U.S. Constitution—requires the government not to imprison criminal defendants unable to pay their criminal justice debts without a determination that no alternative method would accommodate the government's interest in assessing the debt. I've called this requirement a "special finding, a basic threshold that ensures the defendant isn't invidiously punished for being poor."<sup>233</sup>

*Williams v. Illinois* and *Tate v. Short* both address imprisonment for failure to pay debts imposed at sentencing. In *Williams*, the defendant was sentenced to a one-year term of imprisonment (the statutory maximum), a \$500 fine, and \$5 in costs.<sup>234</sup> The sentence provided that if *Williams* was in default at the end of his prison term, he would be imprisoned further until he "work[ed] off" the debt at the rate of \$5 a day.<sup>235</sup> The result was that *Williams* spent 101 days in prison beyond the statutory maximum.<sup>236</sup> The Court vacated the judgment, holding that "when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with

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<sup>229</sup> The equal protection clauses present in many state constitutions might do similar work, but have not been analyzed at length here.

<sup>230</sup> *Williams v. Illinois*, 399 U.S. 235 (1970).

<sup>231</sup> *Tate v. Short*, 401 U.S. 395 (1971).

<sup>232</sup> *Bearden v. Georgia*, 461 U.S. 660 (1982).

<sup>233</sup> *Hampson*, *supra* note 25, at 1044.

<sup>234</sup> *Williams*, 399 U.S. at 236.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 237.

an impermissible discrimination that rests on ability to pay.”<sup>237</sup> The Court reasoned that it would violate the Equal Protection Clause<sup>238</sup> to allow a statutory maximum prison term statute to apply only to those who couldn’t pay, and not to those who could.<sup>239</sup> *Tate* pressed forward the logic of *Williams*. In *Tate*, also decided within an equal protection framework, the statute provided only for fines.<sup>240</sup> (Thus *Tate* might be viewed as just a particular example of the *Williams* holding, one where the statutory maximum was zero days.<sup>241</sup> Indeed, that’s how the *Bearden* Court read it.<sup>242</sup>) The Court “adopt[ed]” the “view” that courts may not “jail[] an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term . . . extends beyond the maximum.”<sup>243</sup>

*Bearden v. Georgia*, decided about a decade later, brought the developing rule into the procedural context of the revocation of parole.<sup>244</sup> In *Bearden*, the defendant was ordered to pay a \$500 fine and \$250 in restitution over the course of four months as a condition of parole.<sup>245</sup> After he was laid off, he had difficulty making his payments and was sentenced to prison for the remainder of his probationary period.<sup>246</sup> Even though the resulting prison time would not have surmounted the statutory maximum, the Court held that the court couldn’t automatically convert nonpayment into imprisonment “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”<sup>247</sup> Writing for the Court in *Bearden*, Justice O’Connor said that both equal protection and due process analyses were triggered.<sup>248</sup>

In *Bearden*, the Supreme Court clarified that courts may take a defendant’s finances into consideration when attempting to settle on an appropriate sentence.<sup>249</sup> And that makes sense, both to preserve sentencing

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<sup>237</sup> *Id.* at 240–41. The *Williams* Court treated its determination with regard to fines as determinative of its position on fees. It’s not clear whether the Court saw fines and costs as completely equivalent—indeed, it acknowledges that they “reflect quite different considerations” while imprisonment in both contexts “ensur[es] compliance with a judgment”—but the issue was not, at least, squarely before the Court. *Id.* at 245 n.20.

<sup>238</sup> See U.S. CONST. amend. XIV.

<sup>239</sup> See *Williams*, 399 U.S. at 242.

<sup>240</sup> See *Tate v. Short*, 401 U.S. 395, 397 (1971).

<sup>241</sup> See *id.* at 397–98.

<sup>242</sup> See *Bearden v. Georgia*, 461 U.S. 660, 664 (1982).

<sup>243</sup> *Id.* at 399 (citing *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)).

<sup>244</sup> See *Bearden*, 461 U.S. at 661.

<sup>245</sup> *Id.* at 662.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 668.

<sup>248</sup> See *id.* at 665–67.

<sup>249</sup> See *Williams v. Illinois*, 399 U.S. 235, 243 (1970) (“The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted of the same offense does not, of course, give rise to a violation of the Equal Protection Clause. Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear.”). In *Bearden*, Justice O’Connor opined in dicta that equal protection had no purchase at the sentencing stage, where financial background was a “point on a spectrum rather than a classification.” *Bearden v. Georgia*, 461 U.S. 660, 666 n.8 (1983). She suggested

discretion and to ensure that courts don't over-imprison in an attempt to avoid imposing a worthless fine on a judgment-proof defendant.<sup>250</sup>

All three cases recognized two limits on the protections they demanded. First, in all three cases, the Court stressed that willful nonpayment was not protected.<sup>251</sup> As the *Bearden* Court put it, the probationer needed to make “sufficient bona fide efforts to seek employment or borrow money . . . ,”<sup>252</sup> a standard which we'll call the “bona fide efforts test.” Willfulness doctrine under *Bearden* results in a challenging ability-to-pay threshold that demands not just the transfer of current assets, but also good faith efforts to secure new ones—including, the Supreme Court suggested, credit applications and job hunts.<sup>253</sup> How courts apply *Bearden*'s bona-fide-efforts test was left unspecified and unregulated, and the Court has never revisited the issue. But in reviewing the determinations of lower courts, factual determinations subject to review for clear error,<sup>254</sup> state and federal appellate courts have affirmed that some effort to find employment is required,<sup>255</sup> and some have put the burden on the debtor or have established a burden-shifting framework.<sup>256</sup> Second, the Court also provided states with a carve-out allowing imprisonment when the states' traditional punitive goals could not be met by any alternatives.<sup>257</sup> But the Court implied alternatives would be

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that due process could strike down such sentencing considerations that were “so arbitrary or unfair as to be a denial of due process,” *id.*, but went on to give sentencing judges the green light to consider financial background, *see id.* at 669–70 (courts can consider the “entire background of the defendant, including his employment history and financial resources”). *See also* Hampson, *supra* note 25, at 1043–44.

<sup>250</sup> Hampson, *supra* note 25, at 1043–44.

<sup>251</sup> In *Williams*, the Court emphasized that “nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs.” *Williams*, 399 U.S. at 242 n.19. Similarly, the *Tate* Court said, “We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so.” *Tate*, 401 U.S. at 400.

<sup>252</sup> *Bearden*, 461 U.S. at 668.

<sup>253</sup> *Id.* at 660–61.

<sup>254</sup> *See, e.g.*, *United States v. Montgomery*, 532 F.3d 811, 814 (8th Cir. 2008); *United States v. Nevis*, 108 F.3d 340, 340 (9th Cir. 1996).

<sup>255</sup> *Compare* *Martin v. Solem*, 801 F.2d 324, 332 (8th Cir. 1986) (finding that the debtor was “not totally disabled and had some ability to work . . . odd jobs . . . cannot meet the *Bearden* test”), *with* *U.S. v. Davis*, 140 F. App'x 190 (11th Cir. 2005) (failure to seek employment as an appropriate factor).

<sup>256</sup> *See, e.g.*, *State v. Bower*, 823 P.2d 1171, 1174–75 (Wash. Ct. App. 1992) (holding that a debtor “should be prepared to show the court his actual income, his reasonable living expenses, his efforts, if any, to find steady employment, [and] his efforts, if any, to acquire resources from which to pay his court-ordered obligations . . . .”); *United States v. Brown*, 899 F.2d 189, 194 (2d Cir. 1990) (“[T]he probationer is entitled to an opportunity to demonstrate that there was a justifiable excuse for any violation that occurred . . . .”); *United States v. Pinjuv*, 218 F.2d 1125, 1133 (9th Cir. 2000) (“No evidence was submitted in this matter by Pinjuv that her disruptive conduct was involuntary.”); *Del Valle v. State*, 80 So.3d 999, 1015 (Fla. 2011) (establishing burden-shifting framework); *see also* *Del Valle*, 80 So.3d at 1014 n.10 (listing cases). *But see* *United States v. Johnson*, 347 F.3d 412, 416 (2nd Cir. 2003) (“[T]he [*Bearden*] Court held that a defendant's probation could not be revoked for failure to pay a fine or restitution without evidence and findings that he was responsible for the default . . . .”).

<sup>257</sup> *See* *Tate*, 401 U.S. at 400–01 (“Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.”).

available in most cases.<sup>258</sup> Lower courts have relied on that carve-out when defendants have committed other forms of unlawful behavior that call the probation into question, such as failing to file tax returns.

The common sense, fundamental rule of *Bearden* has been applied across the full spread of criminal debts, and lower courts are rapidly expanding its terrain. Courts have held that supervised release is sufficiently similar to parole for the *Bearden* rule to apply.<sup>259</sup> The Florida Supreme Court held that a lower prison sentence couldn't be conditioned on paying restitution.<sup>260</sup> And in *Walker v. City of Calhoun*,<sup>261</sup> a federal district court applied the rule of *Bearden* to monetary bail, opining that the Fourteenth Amendment barred a government from imprisoning a defendant for inability to make bail without a special finding that parallels *Bearden*, where the court would ask whether any alternatives to imprisonment could meet the state's legitimate interest in having the defendant stand trial.<sup>262</sup> There are some gaps in *Bearden*'s coverage, however: courts have not decided whether *Bearden* applies to debts incurred as part of a plea bargain.<sup>263</sup> That's quite important, as plea-bargaining comprises the vast majority of the resolution of criminal cases.<sup>264</sup>

Federal protections under *Bearden*, then, have a broad scope of application (the full range of criminal monetary sanctions and charges, at every procedural stage) but a high threshold before its protections kick in: the bona fide efforts test. How courts should apply that threshold has been left as a vague factual determination that leaves discretion with the same judges who preside over the troublesome hearings in Ferguson and elsewhere.<sup>265</sup> *Bearden*'s protections could be enhanced by a statutory rule or

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<sup>258</sup> See *Bearden*, 461 U.S. at 672 (“Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State’s interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.”).

<sup>259</sup> See, e.g., *United States v. Montgomery*, 532 F.3d 811, 813 (8th Cir. 2008).

<sup>260</sup> See *Noel v. State*, 191 So.3d 370, 378 (Fla. 2016).

<sup>261</sup> *Walker v. City Calhoun*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at 10–11 (N.D. Ga. Jan. 28, 2016). This decision arose in the context of a preliminary injunction, which the Eleventh Circuit vacated on appeal for lacking the specificity required under Rule 65. See *Walker v. City of Calhoun*, No. 16-10521 (11th Cir. Mar. 9, 2017) (unpublished opinion).

<sup>262</sup> See *id.* at \*11.

<sup>263</sup> Compare *Commonwealth v. Marshall*, 345 S.W.3d 822, 829–30 (Ky. 2011), with *State v. Nordahl*, 680 N.W.2d 247 (N.D. 2004). Holding that *Bearden* didn't apply to plea bargaining, the North Dakota Supreme Court suggested in *Nordahl* that the breach of a plea bargaining agreement suggested either that the defendant misrepresented his assets ex ante or didn't adequately secure them to pay the debt ex post. The court was particularly concerned about allowing debtors to bargain their way out of criminal sanctions in bad faith. See *id.* at 253. Alternatively, then, we might say either that *Bearden* doesn't apply to defendants who breach their plea bargaining obligations, or that breach of such obligations is a *per se* failure of *Bearden*'s bona-fide-efforts test. See, e.g., *id.* at 252 (“Nordahl is presumed to have had knowledge of his assets and obligations at the time he entered into the plea agreement. Nordahl entered into security agreements in order to secure financing. Nordahl knew or should have known the encumbrances on his assets could frustrate his ability to liquidate and fulfill the restitution obligation.”); *id.* (“[P]rior knowledge of inability to pay negates the good faith efforts present in the *Bearden* ruling.”); accord *Dickey v. State*, 570 S.E.2d 634, 636 (Ga. Ct. App. 2002); *Patton v. State*, 458 N.E.2d 657, 658–60 (Ind. Ct. App. 1984).

<sup>264</sup> See, e.g., LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (2011) (estimating that between 90 and 95% of state and federal criminal cases end in a plea bargain).

<sup>265</sup> See Hampson, Recent Legislation, *supra* note 14, at 1316.

presumption that SNAP-eligibility, or some other proxy for indigence, means the debtor has met the bona fide efforts test.<sup>266</sup> At the very least, statutes, like Colorado's, that require courts to conduct their *Bearden* hearings on the record will enable the appellate system to look more intelligently at the most appropriate considerations.<sup>267</sup>

*Bearden* claims can go a long way in challenging the new debtors' prisons. Ignorance and flagrant disregard of *Bearden* may be the biggest problem.<sup>268</sup> Still, there's reason to look to state constitutional and statutory law for additional firepower.<sup>269</sup>

## B. Imprisonment-for-Debt Claims

How can state constitutional bans on imprisonment for debt fit into the scheme envisioned by *Bearden*? This section fits the state bans into the puzzle. As noted above, a large number of monetary obligations have been held not to be "debts," carved out from the state bans. We'll get to that problem in a moment. But in order to understand why it matters, it's best to start at the end: the protections the state bans provide.

### 1. The Protections Offered by the State Bans

When a state court has determined that a particular monetary obligation counts as "debt" under its ban, it must determine how to apply the ban's protections. While states differ here, too, the means tests in the imprisonment-for-debt context are more favorable to debtors than the *Bearden* bona-fide-efforts test. Making out colorable imprisonment-for-debt claims, while relatively untrodden ground, has clear advantages for debtors.<sup>270</sup>

In all states, the ban on imprisonment for debt clamped down on the old writ of *capias ad satisfaciendum*, or body execution, by which a creditor could petition the court to arrest the debtor until he answered for his debt.<sup>271</sup> As noted above, some states simply passed a law abolishing that writ. What varies from state to state is how the abolition interacts with the general ability of courts to hold contempt proceedings that wield the sanction of imprisonment either to punish a party for refusing to comply with a court order or to coerce a party into complying.

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<sup>266</sup> See *id.* at 1319.

<sup>267</sup> See *id.* at 1315–16.

<sup>268</sup> See Natapoff, *supra* note 21, at 1085.

<sup>269</sup> Natapoff also discusses ways courts attempt to get around the constitutional prohibitions through civil contempt, *see id.* at 1084–85. This may be better characterized as an example of ignoring *Bearden* than skirting around it—how can one constitutionally be found in civil contempt of an order the court had no constitutional authority to issue?—but a good case on point, to my knowledge, has yet to be decided.

<sup>270</sup> See Hampson, *supra* note 25, at 1037–38.

<sup>271</sup> Some states, as noted above, abolished the writ. Others, like New Jersey, modified the conditions under which it could be imposed. *See Perimutter v. DeRowe*, 274 A.2d 283 (N.J. 1971); Note, *supra* note 145, at 853.

States follow one of two approaches. The more blunt approach is what I've called the "no-hearing rule."<sup>272</sup> Under this approach, the judgment creditor has recourse to the usual set of tools available to judgment creditors—eviction, foreclosure, repossession, garnishment—but not *capias*. The judgment creditor simply cannot imprison the debtor, whether it's called contempt or anything else.<sup>273</sup> The more nuanced approach is what I've called the "specific, nonexempt property" rule, whereby a court may issue an injunction to turn over specific, nonexempt property under the control of the debtor (all states set aside property that debtors may keep safe from collections actions). And a debtor who fails to comply with that order can be imprisoned for contempt of court.<sup>274</sup> Even so, creditors are often required to attempt to recoup their losses through the *in rem* actions available to judgment creditors before asking the court for help.<sup>275</sup>

To see the appeal of the state bans, compare either of these approaches to the protections offered by *Bearden*.<sup>276</sup> Recall that the bona fide efforts test leaves the door open to inquiries about employment or credit. The much more debtor-friendly tests under the state bans either (a) foreclose imprisonment altogether or (b) allow it only under the tightly constrained rubric of an injunction to turn over specific, nonexempt assets—usually only after the creditor has already tried everything else. If you were a debtor, you'd be far better off under the protection of the state bans than under *Bearden*.

## 2. The Scope of the State Bans

What kinds of debts should receive the debtor-friendly, state law protections? As noted above, the state constitutional bans on imprisonment for debt uniformly exempt crime from their scope. Some monetary obligations generated by crime, like fines, don't seem easily swept under the imprisonment-for-debt provisions.<sup>277</sup> But there are three kinds of "criminal" monetary sanctions that states might nonetheless hold to be subject to the ban.

### a. Regulatory Offenses

First, so-called "regulatory offenses" or "public welfare offenses," particularly where the statute only authorizes monetary fines.<sup>278</sup> While traditionally *crime* referred only to intentionally committed wrongs,

<sup>272</sup> See Hampson, *supra* note 25, at 1037.

<sup>273</sup> See *id.* at 1037. For discussion of caselaw, see *id.* 1037 n.116.

<sup>274</sup> See *id.* at 1037–38. For discussion of caselaw, see *id.* 1037 n.117.

<sup>275</sup> See Shepard, *supra* note 180, at 1529–30 (describing the rule and its principle in the common law rule that creditors would have to exhaust legal remedies before turning to equitable remedies); see also Hampson, *supra* note 25, at 1038.

<sup>276</sup> See Hampson, *supra* note 25, at 1043.

<sup>277</sup> See Westen, *supra* note 32, at 779–87.

<sup>278</sup> See generally Hampson, *supra* note 25, at 1038–40.

industrialization triggered the creation and rapid growth of strict liability offenses, often recognizable by the lack of any punitive sanction.<sup>279</sup> As the Court said in *Morissette v. United States*:<sup>280</sup>

[Public welfare offenses] do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger of probability of it which the law seeks to minimize.<sup>281</sup>

The line can be fuzzy at times, but courts have to engage in characterization when, for example, trying to decide whether a statute that contains no *mens rea* requirement should be interpreted to have one implicitly.<sup>282</sup> Factors courts consider include “any required culpable mental state, the purpose of the statute, its connection to common law, whether or not it is regulatory in nature, whether it would be difficult to enforce with a scienter requirement, and whether the sanction is severe.”<sup>283</sup>

Recall the critiques of the modern debtors’ prison discussed above. While some of the underlying charges, like prostitution or domestic disputes, might entail a *mens rea*, much of the fervor has centered on regulatory crimes, such as traffic fines. Sweeping certain regulatory offenses under the debtors’ prison ban would capture the bulk of the legal actions and deal a major blow to the modern debtors’ prisons. And it would do so by drawing a sharp line between two distinguishable domains of criminal law.<sup>284</sup>

And there are good rationales for including such offenses where constitutionally possible. To be fair, the provisions limiting the ban to debts arising *ex contractu*<sup>285</sup> seem inhospitable to this interpretation. But in states whose constitutional provisions restrict the ban to “civil actions,”<sup>286</sup> that exempt out “fines and penalties imposed for the violation of law,”<sup>287</sup> or

<sup>279</sup> *See id.* at 1038.

<sup>280</sup> *Morissette v. United States*, 342 U.S. 246, 255–56 (1952).

<sup>281</sup> *Id.*

<sup>282</sup> *See* Hampson, *supra* note 25, at 1038 n.124.

<sup>283</sup> *Id.*

<sup>284</sup> *Cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) (“[C]riminal law is not one field but two. The first consists of a few core crimes . . . murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else.”).

<sup>285</sup> *E.g.*, MICH. CONST. art. I, § 21 (“No person shall be imprisoned for debt arising out of or founded on contract, express or implied . . . .”); S.D. CONST. art. IV, § 15 (“No person shall be imprisoned for debt arising out of or founded upon a contract.”).

<sup>286</sup> *E.g.*, ARK. CONST. art. II, § 16.

<sup>287</sup> OKLA. CONST. art. II, § 13.

whose case law has specifically mentioned “crime,”<sup>288</sup> an originalist meaning of those provisions might nonetheless exclude regulatory offenses, because regulatory offenses didn’t then exist.<sup>289</sup> To the contrary, they only really became a prominent feature of American law after the abolition of debtors’ prisons was nearly complete.<sup>290</sup>

As suggested above, the clearest cases are strict liability crimes where the statute authorizes only nominal or modest fines, such as many traffic offenses. As the Ohio Supreme Court put it, “In today’s society, no one, in good conscience, can contend that a nine-dollar fine for crashing a stop sign is deserving of three days in jail if one is unable to pay.”<sup>291</sup> State courts, depending on the text of their constitutions, should hold that such fines constitute civil “debt” under their state constitutional bans. If the legislature feels that imprisonment is a necessary sanction to place in the trial court’s toolbox, it would have to amend the statutes to provide for it.

#### b. Costs

Second, costs.<sup>292</sup> Unlike strict liability offenses, the historical pedigree of imposing costs on defendants long antedates the abolition of debtors’ prison. But its quality as *criminal* has been contested. Indeed, since costs are imposed primarily to defray the government’s expenses, they are fundamentally different from monetary obligations imposed to punish wrongdoers or compensate victims.<sup>293</sup>

Before laying out the argument, I should add that the majority rule holds that costs fall outside the scope of the ban. Here’s an extreme case, from 1905. In *Ex parte Diggs*,<sup>294</sup> the defendant, Diggs, was sentenced to jail for ninety days for assault, a fine of \$50, costs of \$16.40, and jail fees of \$2.<sup>295</sup> Diggs was sent into the employ of a private contractor, Williams, to work off the remainder of his debt.<sup>296</sup> Williams then furnished Diggs with \$15 worth of clothing and shoes,<sup>297</sup> as required by statute.<sup>298</sup> Despite the fact that the debt was quasi-contractual and between two private parties, the Mississippi Supreme Court said, “[t]o be a debt within the meaning of the Constitution, the obligation existing between the parties must be either

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<sup>288</sup> *E.g.*, *Plapinger v. State*, 120 S.E.2d 609, 611 (Ga. 1961) (“The rule is that the constitutional provision prohibiting imprisonment for debt is not violated where the legislative purpose is to punish for an act declared criminal, not to enforce imprisonment for debt.”)

<sup>289</sup> *Hampson*, *supra* note 25, at 1039.

<sup>290</sup> *Id.*

<sup>291</sup> *Strattman v. Studt*, 253 N.E.2d 749, 753 (Ohio 1969).

<sup>292</sup> *See generally* *Hampson*, *supra* note 25, at 1040–41.

<sup>293</sup> *Id.* at 1040.

<sup>294</sup> *Ex parte Diggs*, 38 So. 730 (Miss. 1905).

<sup>295</sup> *Id.* at 730.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 731.

purely contractual, or arise from some legal liability growing out of the debtor's dealings with another."<sup>299</sup> Most other courts have agreed.<sup>300</sup>

But not all. The Ohio Supreme Court has come out the other way. In *Strattman v. Studt*,<sup>301</sup> the defendant was sentenced to pay costs and, having already served the statutory maximum, was imprisoned when he was unable to pay. Distinguishing between the “punitive, retributive, or rehabilitative purpose” behind fines and the purpose behind costs of “lightening the burden on taxpayers financing the court system,”<sup>302</sup> the Ohio Supreme Court held that a judgment for costs was a “civil, not a criminal, obligation,” and that the government could only use the tools available to civil creditors.<sup>303</sup> The bench card promulgated by Ohio Supreme Court Chief Justice O'Connor begins as follows: “*Fines are separate from court costs. Court costs and fees are civil, not criminal, obligations and may be collected only by the methods provided for the collection of civil judgments.*”<sup>304</sup>

If doctrine should follow function, the holding of *Strattman* should become the law. Even though costs have been constructively treated as punitive, they are fundamentally about funding public services. Insofar as courts need broader discretion in imposing monetary sanctions on criminals for penal purposes, the legislature can simply increase the maximum monetary and nonmonetary sanctions available.

### c. Definitionally Civil Offenses

Finally, and straightforwardly, state law often *defines* certain monetary obligations as civil.<sup>305</sup> In some instances the definitions serve to reduce the scope of procedural protections;<sup>306</sup> in others they act as a check against a municipality's ability to create new crimes.<sup>307</sup> One shouldn't need a lawyer to see that when “debt” in the constitution is restricted to “civil” debts and

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<sup>299</sup> *Id.* at 730. The court continued, “The term ‘debt,’ as employed in a constitutional provision prohibiting the imprisonment therefore, does not extend to or embrace any pecuniary obligation imposed by the state as a punishment for crime, whether the money, the payment of which is demanded, be for fines or costs, or even, in certain quasi criminal proceedings, other penalties of a moneyed nature which may be lawfully inflicted by a court.” *Id.*

<sup>300</sup> *See, e.g.,* Lee v. State, 75 Ala. 29, 30 (1883) (“[I]t is manifest that fines, forfeitures, mulcts, damages for a wrong or tort, are not a debt within this clause of the Constitution. . . . [W]hen a citizen, by his own misconduct, exposes himself to the punitive powers of the law, the expense incident to his prosecution and conviction, each and all of these may result in subjecting the defaulter to a money liability. These are not debts incurred by contract *inter partes*, but are the result of being members of the social compact, or body politic.”).

<sup>301</sup> *Strattman v. Studt*, 253 N.E.2d 749, 750–51 (Ohio 1969). *See generally* Hampson, *supra* note 25, at 1041.

<sup>302</sup> *See Strattman*, 253 N.E.2d at 754.

<sup>303</sup> *Id.*

<sup>304</sup> Office of Judicial Services, The Supreme Court of Ohio, Collection of Fines and Court Costs in Adult Trial Courts, <https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf> (citing *Strattman v. Studt*, 253 N.E.2d 749 (Ohio 1969)).

<sup>305</sup> For a discussion of variety among states and cited provisions, see Hampson, *supra* note 25, at 1042–43.

<sup>306</sup> *Id.* at 1042 n. 152.

<sup>307</sup> *Id.* at 1042 n. 153.

the state chooses to label a particular monetary obligation as “civil,” the ban applies.

### 3. *Strange* Claims

The three kinds of monetary obligations listed above have good claims to being “debts” for the purposes of the constitutional ban on imprisonment for debt. But sorting out what is and is not a qualifying debt can be challenging, and this is not a settled area of law. State courts have struggled to land on any consistent treatment of money owed to the government stemming from various noncommercial obligations. For example, the majority rule is that failure to pay income tax falls outside the ban,<sup>308</sup> as does failure to pay licensing fees,<sup>309</sup> but a few states have swept income taxes under the meaning of “debt.”<sup>310</sup> Similarly, failure to pay a mandatory service charge—such as for inspection services or garbage collection—is generally held to fall outside the scope of the ban,<sup>311</sup> but the state supreme courts of Washington and Iowa have described such obligations as more similar to contractual debts.<sup>312</sup>

States do have broad discretion in interpreting their own constitutions. But they may not apply state law in an irrational or discriminatory way.<sup>313</sup> Indeed, the United States Supreme Court has suggested that costs are necessarily civil in a pair of cases from the 1970s: *James v. Strange*<sup>314</sup> and *Fuller v. Oregon*.<sup>315</sup> This line of cases forms the basis for what we’ll call “*Strange* claims.”

In *James v. Strange*, a Kansas statute that provided for recoupment of attorneys’ fees failed to provide “any of the exemptions provided by [the Kansas Code of Civil Procedure] except the homestead exemption.”<sup>316</sup> Worried that the state was giving itself far too much collections power, the

<sup>308</sup> See, e.g., *People v. Pillon*, 171 N.W.2d 484, 487 (Mich. 1969).

<sup>309</sup> See, e.g., *Austin v. Seattle*, 30 P.2d 646, 648 (Wash. 1934) (noting that the “great weight of authority” supports the view that “taxes and license fees are not debt within the purview of such constitutional provisions as ours.”).

<sup>310</sup> See *State v. Higgins*, 326 S.E.2d 728, 730 (Ga. 1985) (“We hold that an income tax is a debt—albeit a public debt, as opposed to a private, contractual debt. It is, however, a debt nonetheless. Therefore, we agree that [the challenged statute] is unconstitutional on state law grounds to the extent that it authorizes imprisonment for mere nonpayment of income taxes.”); *City of Cincinnati v. DeGolyer*, 267 N.E.2d 282, 284 (Ohio 1971) (“A tax, like the court costs in a criminal case, is a civil obligation.”).

<sup>311</sup> See, e.g., *Ex parte Small*, 221 P.2d 669, 677 (Okla. 1950) (failure to pay garbage collection and DDT spraying fee was more similar to “an expense incident to the maintenance of law”); *Lavender v. City of Tuscaloosa*, 198 So. 459 (Ala. Ct. App. 1940) (holding mandatory privy cleaning fees outside the scope of the ban); *Town of Marion v. Baxley*, 5 S.E.2d 573, 574, 576 (S.C. 1939) (same for sanitary tax); *Benson v. City of Andalusia*, 195 So. 443, 445–46 (Ala. 1940) (same for “sewer service charge”).

<sup>312</sup> See, e.g., *State v. McFarland*, 110 P. 792, 794 (Wash. 1910) (“We think . . . that part of [the statute] which makes a mere failure to pay the inspection fee a misdemeanor punishable by fine and imprisonment is clearly unconstitutional as being a violation of [the constitutional ban on] imprisonment for a debt.”); *Hubbell v. Higgins*, 126 N.W. 914, 918 (Iowa 1910).

<sup>313</sup> See, e.g., U.S. CONST. amend. XIV.

<sup>314</sup> *James v. Strange*, 407 U.S. 128 (1972).

<sup>315</sup> *Fuller v. Oregon*, 417 U.S. 40 (1974).

<sup>316</sup> See *Strange*, 407 U.S. at 129–31. For my previous discussion of this case, see Hampson, *supra* note 25, at 1032–33.

Court noted that Kansas “strip[ped] from indigent defendants the array of protective exemptions [it] ha[d] erected for *other* civil judgment debtors.”<sup>317</sup> It warned that a State may not “impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor.”<sup>318</sup>

In *Fuller v. Oregon*, the Court upheld an Oregon recoupment statute for costs—fees for an attorney and an investigator<sup>319</sup>—where a defendant wouldn’t be forced to pay unless he was able.<sup>320</sup> Unlike in *Strange*, the statute provided enough of the same protections to free it from the charge of forbidden discrimination.<sup>321</sup> But the majority in *Fuller* skirted a major issue—Oregon’s constitutional ban on imprisonment for debt—by noting it hadn’t been preserved for appeal.<sup>322</sup> That wasn’t enough for Justices Marshall and Brennan, who thought this no small detail, and pointed out the injustice that “well-heeled” defendants could not be imprisoned for failing to pay their private attorneys, while those with court-appointed counsel did not have the same peace of mind.<sup>323</sup>

*Strange* and *Fuller* are more suggestive than determinative<sup>324</sup> (after all, they left many issues open) but they do trace the outline of an insight. As states interpret the contours of their constitutional bans, they may not place specific monetary obligations on one side of the line for irrational reasons. Indeed, since *Strange* and *Fuller* are best read as embodying some form of heightened scrutiny,<sup>325</sup> a state may need a particularly good reason. A *Strange* claim, then, is an argument that the state has made an irrational or otherwise impermissible classification in its application of its ban on debtors’ prisons. And they are rare, at least so far: we’ve seen hints of a *Strange* claim in the lawsuits against Ferguson and Jennings.<sup>326</sup>

*Strange* claims should be brought to the courts. Consider the three types of debt covered above. While sculpting regulatory offenses and costs out of the state bans might be possible under rational basis, if *Strange* stands for heightened scrutiny, such a classification may be constitutionally impermissible. As for definitionally civil offenses, the category most similar to *Fuller*, it’s hard to see what legitimate interest the state has in deeming debts civil to avoid the procedural protections available in a criminal

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<sup>317</sup> *Strange*, 407 U.S. at 135.

<sup>318</sup> *Id.* at 138.

<sup>319</sup> *Fuller*, 417 U.S. at 42.

<sup>320</sup> *See id.* at 45–46. The inquiry required by the statute resembles *Bearden*. *See Hampson, supra* note 25, at 1033 n.85.

<sup>321</sup> The majority found that the statute was “wholly free of the kind of discrimination that was held in *James* to violate the Equal Protection Clause.” *Fuller*, 417 U.S. at 47–48.

<sup>322</sup> *See Hampson, supra* note 25, at 1033–34.

<sup>323</sup> *Fuller*, 407 U.S. at 60–61 (Marshall, J., dissenting).

<sup>324</sup> In *Strange*, the Court was resistant to a broad holding, focusing only on the Kansas law at issue. *See Strange*, 407 U.S. at 132–33 (“The statutes vary widely in their terms. . . . [A]ny broadside pronouncement on their general validity would be inappropriate.”). And *Fuller* didn’t settle the issue of state bans on debtors’ prisons.

<sup>325</sup> *See Hampson, supra* note 25, at 1033.

<sup>326</sup> *Id.* at 1042.

proceeding, while deeming them criminal for the purposes of imprisonment for debt.

### C. A Two-Tier Solution to Imprisonment for Debt

What could comprehensive regulation of imprisonment for debt in America look like? As I've noted, several scholars have landed on the idea that the law creates a two-tiered or "hybrid" approach, with *Bearden* regulating core criminal debts and the imprisonment-for-debt claims regulating civil debts, expansively understood. But let's fill out the framework.

First, *Bearden*, against the backdrop of the fundamental American concept of liberty and our historical experience of a mass abolition movement to end debtors' prisons, may (and should) provide a basic level of protection against *all* imprisonment for debt. Recall that *Bearden* protects only those debtors unable to pay and only when alternatives, like structured payments or community service, would meet the state's penal interest.<sup>327</sup> This is, of course, a common-sense rule for *any* criminal debt. For fines, the government should have to show there's no alternative that accomplishes the state's penal interest. For bail, the government should have to show there's no alternative that would accomplish the state's interest in the defendant being present for trial. These are not impossible showings to make in appropriate cases.

But if *Bearden* applies to criminal justice debt, it should apply *a fortiori* to civil debts, indeed, all debts. In other words, if a state were to repeal its ban on debtors' prisons tomorrow, *Bearden* would provide a backstop. For, under *Bearden*, the state should have to show that there was no other way to accomplish its interest in private law than imprisoning debtors unable to pay their judgment creditors. Needless to say, no state could meet that burden.

And *Bearden* should apply across the whole gray, middle ground of status debts, including tax obligations and domestic support obligations, like alimony, child support, and payments for children's juvenile justice expenses.<sup>328</sup> If this seems unworkable, consider that the taxation and domestic support systems already have ability-to-pay determinations, or means tests, built in—such means tests are precisely how the state determines the amount of the debt to begin with. Thus, even under *Bearden*, the state would be entitled to a presumption that a debtor who doesn't pay properly calculated taxes or domestic support obligations is able to pay. But if a debtor overcame that presumption, showing either that the calculation was wrong or that her financial situation had changed through no fault of her own, the state should have to consider, at a *Bearden* hearing, whether alternatives to imprisonment would meet its interest in collecting taxes and enforcing domestic support obligations.

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<sup>327</sup> See *supra* Section A.

<sup>328</sup> Cf. *In re Rivera*, 14-60044 (9th Cir. Aug. 10, 2016) (holding that parental obligations to pay their children's juvenile justice debts are dischargeable in bankruptcy).

Next, against the wall-to-wall coverage of *Bearden* I advance, states can increase—and have increased—the protections they offer to debtors of certain types. The bans on imprisonment for debt in state constitutions do precisely this, protecting civil judgment debtors historically and, as argued here, debts of a civil nature regardless of whether they arise out of a contract or out of a legal proceeding. (Indeed, while not analyzed here, domestic support obligations, like alimony and child support payments, may well count as debts under certain states bans.<sup>329</sup>) Imprisonment, as a punitive remedy, is for all the reasons described throughout this Article, not generally an appropriate measure to take against these debtors, so they benefit from either a more favorable ability-to-pay test or a blanket prohibition on imprisonment. The state bans on imprisonment for debt increase protections above the *Bearden* baseline, for certain debts.

As this point, it becomes important to address a key counterargument. Removing a coercive sanction for repayment of debt will make that debt, on the whole, less valuable to the creditor. In the private context, as discussed above, this may make it difficult for certain individuals and groups to obtain credit. In the criminal context, then, the government as lender may pull back on the extension of credit in a parallel way, by cutting back on procedural expenses, by using imprisonment as a sanction for more offenses, by amending the authorizing statutes, or by altering sentencing practices. A reinvigorated ban on the debtors' prison executed purely through the judicial interpretation of constitutional texts—when the legislative and executive branches are not on board—faces the very practical concern that the government will respond to judicial action in ways that undermine the ultimate policy objective. In other words, what about backlash?<sup>330</sup>

While these concerns are valid, there are a number of reasons to suspect they aren't weighty enough to carry the day, although empirical work might shed better light on the matter. First, just as nonzero transaction costs mean that initial allotments of legal rights aren't always shifted, nonzero "political action costs" suggest that a successful ban won't automatically result in more incarceration *ex ante* or narrower procedural safeguards.<sup>331</sup> This is especially true as the new abolition of debtors' prisons is limited in scope to those areas that seem the most unfair and the least functionally necessary. Second, insofar as states are motivated by filling their coffers, the ban simply rules out one of the most regressive ways of doing so. States may still assess the debts, and may still use other tools to attempt to collect on them. And insofar as states are motivated by the traditional objectives of penal law, the ban simply requires that punishment not be hidden in the

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<sup>329</sup> See *Stehle v. Zimmerebner*, 497 S.W.3d 188 (2016) (holding that imprisonment for nonpayment of child support payments when unable to do so violated the imprisonment for debt clause of the Arkansas Constitution).

<sup>330</sup> For an overview of the "backlash" thesis in the context of *Brown v. Board of Education*, see Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994).

<sup>331</sup> For a theoretical discussion of political action costs, see Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016).

guise of imprisonment for nonpayment of debt. Authorization statutes, enabling sentencing courts to impose imprisonment or monetary fines, can be amended if necessary. Finally, federal constitutional law provides safeguards. Assuming a constant quantum of punishment per case, forcing it into one doctrinal location enables the Eighth Amendment, say, to regulate it more cleanly. And there are independent backstops on the minimum procedures governments may use, namely, the Fifth and Fourteenth Amendments.

Additionally, imprisonment-for-debt claims and state-by-state legislation would minimize backlash concerns. Unlike the main case studies that drive the backlash thesis, *Brown v. Board of Education*<sup>332</sup> and *Roe v. Wade*,<sup>333</sup> the chief doctrinal argument here interprets state constitutional texts. The principle is simple: “where a state has chosen to ban debtors’ prisons, it shouldn’t be able to welcome them back in surreptitiously by grafting them onto the criminal system.”<sup>334</sup> In any case, the specter of a heavy-handed federal government imposing its will on the states isn’t nearly as concerning here. Federalism concerns are at a nadir. Furthermore, regarding the counter-majoritarian difficulty, the argument doesn’t address itself only to the judiciary: insofar as its argument calls for a certain moral, economic, and legal conviction, the solution should be carried out by the full range of legal actors, including legislative and executive.

## VI. CONCLUSION: THE NEW ABOLITIONISM

My analysis has so far focused on constitutional and statutory interpretation. The key legal actors have therefore been courts. Just as this article’s focus on imprisonment-for-debt provisions points out that federal courts aren’t the only courts that matter, so too we must realize that courts themselves are not the only institutional actors whose views are relevant to our shared ethical life. The problem of the new debtors’ prisons is so serious, for the reasons described above, that entrusting the entire solution to the courts makes little sense,<sup>335</sup> especially as some interpretive principles, like *stare decisis*, tug against the reinterpretations proposed here.

First, state constitutions could be amended, although the political action costs of doing so may well be too steep. None of the lists of bans on debtors’ prisons in the literature focuses on how the provisions changed over time,<sup>336</sup> but some of them have been amended several times. In fact, at least some of the provisions that currently read as a flat ban (“There shall be no imprisonment for debt”) previously had carve-outs and exceptions in them,

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<sup>332</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>333</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>334</sup> Hampson, *supra* note 25, at 1044.

<sup>335</sup> Indeed, Colin Reingold, Litigation Director of the Orleans Public Defenders, argues that since *Bearden* has been skirted for so long that change will only occur after solid data reaches policymakers and appellate judges. Reingold, *supra* note 15, at 374.

<sup>336</sup> See, e.g., Vogt, *supra* note 82, at 335 n.9; Michael M. Conway, Note, *Imprisonment for Debt: In the Military Tradition*, 80 Yale L.J. 1679, 1679 n.1 (1971).

which were subsequently *removed*.<sup>337</sup> Indeed, some courts have focused on the history of constitutional amendments when interpreting the text of the ban.<sup>338</sup> In particular, local abolitionist movements should consider pushing for constitutional amendments to match the broadest possible formation: “No person shall be imprisoned for debt.” The nine states without such constitutional provisions should consider adding them. Such a constitutional amendment would likely be interpreted by reviewing courts as being intended to address our contemporary “mischief”: the new debtors’ prisons.

Second, just because a state constitution fails to ban debtors’ prisons doesn’t mean we have to construct them. There’s no constitutional *requirement* that we imprison people for failing to pay their debts. For costs and strict-liability crimes, state and federal legislators should consider passing statutes requiring courts to use only those tools available to civil debtors in the collection of criminal debts. For fines, legislators should explicitly require courts to comply with the U.S. Constitution under *Bearden* and, like Ohio, provide resources to help courts swiftly move through backed-up dockets, such as establishing a fair and fast presumption of indigence on a finding of SNAP-eligibility. At the very least, imprisonment should only be undertaken after a hearing on the record.

Building a social movement can be more effective than litigation or constitutional referenda, especially when it’s buttressed by sound legal arguments. In Ohio, the ACLU built a public movement by filing requests for public records, court-watching, sending letters to judges and court administrators, and collecting data.<sup>339</sup> Given the range of responses detailed above—judgments, settlements, bench cards, legislation—it would be foolish to rely on one method of legal change alone.

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There are many things wrong with mass incarceration. One of them is rampant imprisonment for debt. The new debtors’ prisons take a different doctrinal form, and they’re not exactly the historic heirs of the old ones—but on a deeper level, they trigger the same concerns that precipitated the abolition of their predecessors. Our shared history and values demand that a

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<sup>337</sup> See *supra* notes 158–161 (discussing the evolution of the constitutional bans of Georgia and Texas).

<sup>338</sup> In *Carr v. State*, 17 So. 350 (Ala. 1895), the Alabama Supreme Court noted that the current constitution’s lack of an exception for “cases of fraud” was different from the Alabama constitutions of 1819, 1861, and 1865. See *id.* at 351. The court said,

In *Ex parte Hardy*, 68 Ala. 303, 318, it was held—and we do not understand that there was any division of opinion on this point—that the elimination of the exception as to frauds was a pregnant omission, which left the guaranty of immunity from imprisonment to the debtor to apply to all cases of debt, whether they involved fraud or not.

*Id.*

<sup>339</sup> See Eric Balaban, *Shining a Light into Dark Corners: A Practitioner’s Guide to Successful Advocacy to Curb Debtor’s Prisons*, 15 LOY. J. PUB. INT. L. 275 (2014); Jocelyn Rosnick & Mike Brickner, *The Ohio Model for Combatting Debtors’ Prisons*, 21 MICH. J. RACE & L. 375 (2016) (laying out hurdles to a litigation-based approach and outlining the “Ohio Model” alternative for curbing debtors’ prisons).

new abolitionist movement dismantle the new American debtors' prisons, just as we did the old.