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PUNITIVE INJUNCTIONS

NIREJ S. SEKHON*

In theory, courts are only supposed to incarcerate an individual after having provided her with the host of procedural protections required by constitutional criminal procedure – appointed counsel and proof beyond a reasonable doubt to name just two. In practice however, individuals are routinely incarcerated for violating injunctions to which criminal procedure's protections do not apply. At any given time, millions are subject to such injunctions and hundreds of thousands are in jail or prison for having violated one. Child support orders and probation orders are the most common examples of what this article terms "punitive injunctions." Just last term, in Turner v. Rogers*, the Supreme Court once again concluded that constitutional criminal procedure does not apply to the enforcement of such injunctions. This article argues that courts have inordinately used punitive injunctions against the poor and socially marginal. Punitive injunctions expand the pool of individuals who may be incarcerated and extend the time any particular individual is subject to custodial supervision. Contrary to official accounts, punitive injunctions do not meaningfully advance remedial or rehabilitative purposes. Rather, their widespread use demonstrates that the United States has unjustifiably taken a punitive course in managing poverty. Extending constitutional criminal procedure to the enforcement of punitive injunctions would be better than the status quo. But it would only be marginally better. For that reason, this article proposes farther-reaching reforms that would limit courts' power to impose such injunctions in the first place.*

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INTRODUCTION

In theory, a host of procedural protections, including a heightened burden of proof and right to appointed counsel, make it difficult for the State to incarcerate individuals. In practice, however, courts routinely incarcerate individuals for violating injunctions to which the reasonable doubt standard and other protections associated with criminal procedure do not apply. These "punitive injunctions" can take various forms, but child support orders and probation orders are among the most common. At any given time, millions of people are subject to such injunctions,[1] and hundreds of thousands are incarcerated for having violated one.[2] Yet, the Constitution requires only minimal procedural protections when enforcing such injunctions.[3] This, not surprisingly, raises a host of questions regarding the accuracy and fairness of the detention that results.

This Article is not primarily a call to increase the procedural protections that apply when courts enforce punitive injunctions. More aggressive reform is necessary because punitive injunctions are more than just a procedural oversight in our system of justice. These injunctions are intimately bound with how courts, and "mass justice" courts in particular,[4] use the threat of custodial detention to control the poor and socially marginal *en masse*.[5] Contrary to official policy accounts, these injunctions do not meaningfully serve remedial or rehabilitative purposes.

The facts in the Supreme Court's recent case of *Turner v. Rogers* illustrate how such injunctions operate.[6] In *Turner*, the Court held that South Carolina need not provide counsel to an indigent contemnor prior to jailing him.[7] Michael Turner spent a year in jail for failing to pay court-ordered child support following what might, charitably, be described as an abbreviated hearing.[8] The Supreme Court decided that, while financially-beleaguered South Carolina need not pay for Mr. Turner's attorney, neither should it send the financially-beleaguered Mr. Turner to jail without a finding that he could actually afford to pay the court-ordered child support.[9] The family

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[1] *See infra* notes 172, 173, 223 and discussion (showing that approximately five million persons are subject to probation orders and twelve million are subject to child support orders).

[2] *See infra* notes 174, 226, 227 and discussion (reviewing quantitative data).

[3] The contempt proceeding by which punitive injunctions are enforced is generally considered "civil" while "probation revocation" does not fit comfortably into either the "civil" or "criminal" categories. *See infra* Section I.A.

[4] *See infra* Section I.C.

[5] It is the poor who inordinately crowd the halls of what I call "mass justice courts." *See infra* notes 128-142, 173 and discussion.

[6] 131 S.Ct. 2507, 2512 (2011).

[7] *See id.*

[8] *Id.* at 2513-14; Brief of Amicus Curiae The Constitution Project in Support of Petitioner at 8, Turner v. Rogers, 131 S.Ct. 2507 (2011) (No. 10-10) (stating that Mr. Turner "spoke a total of 169 words at his hearing" and "received less than a minute of the court's time").

[9] Turner v. Rogers, 131 S.Ct. 2507, 2520 (2011).

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court had neglected to make such a finding on the record – meaning, the judge had neglected to properly fill out the pre-printed form that constituted the court order.[10] One imagines the family court judge beleaguered in her own right, managing a docket overloaded with cases like Mr. Turner's.[11] In South Carolina, around 15% of all persons in jail are there for having violated a family court order.[12] That this practice helps mothers like Ms. Rogers seems unlikely. The scant record in *Turner* suggests that both Ms. Rogers' and her child's lives were full of hardship.[13] It strains the imagination to think that Mr. Turner's year in jail changed that fact in any significant way.

Other than *pro bono* counsel appealing the case to the Supreme Court, little is unusual about the family court proceeding in *Turner*. It is broadly representative, not just of contempt proceedings in family court, but also of how punitive injunctions are imposed and enforced.[14] Like the family court in *Turner*, low-level criminal courts manage torrents of defendants, most of whom are charged with petty crimes of the sort unlikely to win anyone much notoriety – such as, minor drug crimes, low-value thefts, and assaults of the pushing and shoving variety.[15] These cases are almost never tried; many do not even get past arraignment.[16] They are processed in a manner that has been called, fairly, "assembly line" justice.[17] Probation is among the most common criminal sentences imposed by such courts.[18] In some jurisdictions, the vast majority of convicted defendants receive some form of probation.[19] "Probation revocation" proceedings, for constitutional purposes, look a lot like the contempt proceeding in *Turner*.

Consider the plight of a hypothetical defendant who is convicted of misdemeanor theft and misdemeanor possession of a controlled substance. Upon conviction, the court is likely to impose some term of probation.[20] For relatively minor crimes such as these, the court may impose probation in lieu of most or even all of the jail time the defendant might have received. The court is likely to impose conditions that are standard in the jurisdiction for this sort of case – they might include enrolling in a drug treatment program, regularly submitting to drug testing, and paying restitution to the theft victim. Provided that the defendant complies with the probation conditions,

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[10] *Id*. at 2514.

[11] *See* Brief for Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae In Support of Petitioner at 22-24, Turner v. Rogers, 131 S.Ct. 2507 (2011) (No. 10-10) (describing the volume of contempt proceedings in South Carolina family courts).

[12] *Id.* at 23.

[13] *See* Brief for Petitioner at 9-10, n.6, Turner v. Rogers, 131 S.Ct. 2507 (2011) (No. 10-10).

[14] *See infra* Section I.C (defining "mass justice").

[15] The vast majority of criminal cases in the United States are of this variety. *See, e.g.,* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011) (citing 2008 study of eleven states that found misdemeanors represented 79% of total caseload).

[16] *Id.* at 306-07.

[17] *Id.* at 295; *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 391 (1993) (describing the history of the criminal trial as "quick and dirty affairs" thus negating the theory that plea bargaining created "assembly line justice"); Brief for Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae In Support of Petitioner, *supra* note 11, at 14 (describing family courts hearings in South Carolina as "assembly line justice").

[18] *See infra* notes 226, 264 and discussion reviewing empirical data.

[19] *See infra* note 224 and discussion.

[20] *Id.*

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the jail sentence will remain "suspended."[21] That sentence will hang over the defendant until the probation term is complete. Should he violate any condition, the court could subject him to any portion of the suspended sentence that it sees fit.[22] While he is entitled to a probation revocation hearing, the Constitution does not require the procedures that apply in criminal cases – including free counsel and the beyond a reasonable doubt standard.[23]

This Article demonstrates that the traditional equity rationales offered for punitive injunctions ring hollow. In theory, such injunctions are supposed to allow courts to leverage their power to detain in order to efficiently incentivize behavior modification.[24] In practice, however, many of the individuals subject to punitive injunctions do not have the material or social resources to comply with demanding behavioral or financial conditions.[25] Many of those (like Mr. Turner) subject to such orders will cycle through custodial detention at substantial cost to the State.[26] Neither behavior modification nor remediation provides a convincing basis for why that should be so.

The utility of punitive injunctions is best understood in terms of monitoring and controlling the poor and socially marginal *en masse*. Punitive injunctions have powerful net widening and strengthening effects.[27] Net widening occurs because punitive injunctions give courts leeway to quickly convict and sentence without having to commit significant up-front resources. In marginal cases, it may be easier to impose an injunction today (that carries the possibility of detention tomorrow) than to impose detention today.[28] Once individuals are caught in the penal net,[29] punitive injunctions will often extend the time they remain there. Those who are least able to satisfy injunction conditions will tend to remain subject to those conditions for the longest period of time. During that period, courts have the power to summarily detain perceived troublemakers without an exacting showing of individual misconduct. For those subject to punitive injunctions, this will mean, as was true for Mr. Turner, spending intermittent spells, sometimes quite lengthy ones, incarcerated.

Punitive injunctions do not conform to the traditional notion of judicial power, "the

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21 While there are marked similarities between the two, it is important not to confuse probation with parole. NEIL P. COHEN, 1 THE LAW OF PROBATION AND PAROLE §1:1 (2d ed. 1999) [hereinafter COHEN Volume 1] (summarizing differences). The former is court imposed and managed while the latter is administratively imposed and managed. *Id.* Probation is a criminal sentence while parole is not. *Id.* There are various kinds of intermediate sanctions that are homologous to probation. *Id.* For example, most jurisdictions have some form of "diversion" – if a defendant completes a probationary term without incident, the court will dismiss the indictment against her. *Id.*

22 NEIL P. COHEN, 2 THE LAW OF PROBATION AND PAROLE §27:3, 27:11 (2d ed. 1999) [hereinafter COHEN Volume 2].

23 *See infra* notes 78-84 and discussion.

24 *See infra* Sections II.A and II.B.2.

25 *See infra* note 173 and discussion.

26 *See infra* notes 197, 198 and discussion.

27 *See* LOÏC WACQUANT, PUNISHING THE POOR 134 (George Steinmetz et al. trans., 2009).

28 *See infra* notes 248-264 and discussion.

29 Loïc Waquant uses expressions like "penal net," "correctional mesh," and "carceral wave" interchangeably. *See id* at 98, 125, 131. These expressions are used in their intuitive senses to describe the institutions and processes that we associate with custodial detention and supervision. He uses the net, wave, and mesh metaphors to suggest both the reach of these institutions/processes and the difficulty individuals have extricating themselves from custodial detention and or supervision once it has been imposed. *See id.* at 125-34.

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power to decide."[30] The ideal of individualized justice ballasts the power to decide. Accuracy and evenhandedness are its core values. In a criminal case, that means the State must clear heightened procedural hurdles in order to obtain a conviction. Those hurdles reflect the settled conclusion that, on average, exercising punitive power is graver than exercising redistributive power. The power to decide assumes rigid symmetry between process and result: only a criminal process can beget a criminal result. Courts do not employ punitive injunctions in order to obtain individualized justice. Rather, the goal is securing obedience from groups imagined by judges and the public as "problem populations" or "disobedient classes."[31] Enforcing punitive injunctions is relatively unconstrained by procedural restrictions.[32] This is because the distinction between civil and criminal processes is fluid, sometimes to the point of indeterminacy.[33]

This Article makes several original descriptive and normative contributions. Descriptively, it contributes to the sparse literature on contempt and probation. The little scholarship that does exist tends to treat each as a *sui generis* doctrinal oddity.[34] These accounts fail to evaluate the mechanisms' pervasive sociological effects on marginal communities. By doing exactly that, this Article helps bridge the gap separating sociological accounts of criminal justice from legal scholarship. Sociologists have persuasively argued that the United States has increasingly come to rely upon penal mechanisms to manage poverty.[35] These scholars, however, do not account for how specific legal mechanisms produce the sociological effects they criticize. In contrast, legal scholars focus intensively on specific judicial mechanisms, criticizing problems with accuracy, fairness, and consistency.[36] Legal scholars, however, tend to stop there. This

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[30] Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring).

[31] *See* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 129-30 (1990). Socially constructed notions of deviance have consistently tracked class and other significant cleavages in society. *See id.* (noting that class and power relations that prevail in society will shape the understanding of who constitutes a "problem population"); *see also* NICOLE HAHN RAFTER, CREATING BORN CRIMINALS 12, 84-85 (1997) (noting the extent to which turn of the century criminal justice policy was explicitly population-based).

[32] *See infra* Section I.A.

[33] *See infra* notes 86-88 and discussion.

[34] Regarding contempt, *see, e.g.,* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 349, 355 (2000) (suggesting that legal categories used in contempt are "confusing" and difficult to apply); Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 IND. L.J. 723, 756 (1994) (concluding that civil contempt is based on false premises about why people choose to comply); Earl Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1045-46 (1993) (suggesting criminal-civil binary in contempt is not analogous to any other areas of law); Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L. Q. 85, 125- 26 (1992) (noting that contempt is *sui generis* and that contempt "is fundamentally different in principle and function from a crime"). Regarding probation, *see, e.g.,* Cecelia M. Klingele, *Rethinking the Use of Community Supervision*, -- J. CRIM. L. & CRIMINOLOGY -- (forthcoming), http://ssrn.come/abstract=2232078 6 (arguing that "community supervision" which includes probation may not reduce incarceration rates); Wayne Logan, *The Importance of Purpose in Probation Decision Making*, 7 BUFF. CRIM. L. REV. 171, 172 (2003) (stating that "[p]robation . . . represents a singular exception to this massive shift" away from judicial discretion in sentencing); Daniel Piar, *A Uniform Code of Procedure For Revoking Probation*, 31 AM. J. CRIM. L. 117, 118-19 (2003) (highlighting ostensible anomaly that individuals can be jailed for probation violation on lesser showing than required for criminal conviction); Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals For Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 77 (2000) ("The continuing existence of this sweeping deference to the quirks and peculiarities of individual sentencing is particularly striking in today's political climate . . . .").

[35] *See infra* notes 124-133 and discussion.

[36] *See infra* notes 139-151 and discussion.

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Article goes farther, arguing that courts' use of punitive injunctions is best understood as a method for subduing the poor and socially marginal. Normatively, this Article advocates for significantly limiting when and how courts use punitive injunctions.

The Article proceeds in three parts. Part I provides background on punitive injunctions and the techniques used to enforce them. Part I surveys both legal and sociological accounts, identifying the descriptive gap separating them. Part II, the Article's analytical core, develops a descriptive account of punitive injunctions to fill the gap identified in Part I. After identifying punitive injunctions' core features, Part II then uses that conceptual framework to analyze child support orders, probation and problem-solving courts,[37] and finally, in the way of a historical antecedent, labor injunctions. Part II reveals the range of contexts across which courts have used punitive injunctions to achieve control over the poor and socially marginal. Part III explains why requiring additional procedural protections when courts enforce punitive injunctions cannot be the normative end-all. Part III then advances a proposal to greatly curtail certain courts' power to impose punitive injunctions.

I. BACKGROUND

A. *Civil Proceeding Yields Criminal Result?*

Despite impacting some seventeen million people,[38] contempt and probation revocation, the mechanisms through which punitive injunctions are enforced, inhabit a legal nether region. Neither fits comfortably into the axiomatic criminal-civil binary that defines the American legal tradition. The Supreme Court's recent *Turner* opinion illustrates the point.

For years, Michael Turner had been in and out of South Carolina jails for failing to heed a family court injunction requiring him to pay child support.[39] During each injunction, Mr. Turner had spent anywhere from a few days to one year in custody.[40] Until his Supreme Court case though, Mr. Turner never had the benefit of counsel, state-appointed or otherwise.[41] Because Mr. Turner had been jailed for civil contempt, the South Carolina Supreme Court concluded that Mr. Turner was not constitutionally entitled to a state-appointed attorney.[42]

Mr. Turner had failed to abide by a 2003 family court order requiring that he pay $51.73 per week in child support.[43] The family court decided that Mr. Turner could pay this amount based on its finding that Mr. Turner *could* earn $1386 per month, notwithstanding that the order

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[37] "Problem solving" courts, such as drug courts, take a therapeutic approach to offenders with a view to avoiding recidivism. Such offer defendants the opportunity to avoid jail in exchange for complying with court-imposed conditions of which treatment – e.g., narcotics addiction in drug courts – is the most important. For a full description, *see infra* Section II.B.2.

[38] *See infra* note 161 and discussion.

[39] Turner v. Rogers, 131 S.Ct. 2507, 2513 (2011).

[40] *Id*.

[41] Brief for Petitioner, *supra* note 13, at *2-3.

[42] Price v. Turner, 691 S.E.2d 470, 472 (S.Ct. 2010). Long ago, the Supreme Court held that the state must provide free counsel to indigents in criminal prosecutions. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

[43] Brief for Petitioner, *supra* note 13, at *8-9.

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indicated he was "unemployed."[44] Mr. Turner's arrears quickly mounted.[45] By Mr. Turner's account, he struggled to retain employment, to overcome substance abuse and physical disability, and he also spent time in custody for a criminal offense.[46] The family court held him in contempt of its child support order on five previous occasions.[47] Each time, he was sentenced to a term of imprisonment that could be purged by paying the arrears. On four of the occasions, Mr. Turner spent only a short period of time in jail, or avoided it by paying some portion of his arrears.[48] In the case that went to the Supreme Court, Mr. Turner had been held in contempt for failing to pay $5,728.76 in arrears.[49] He served twelve months in jail, the statutory maximum.[50] Mr. Turner had argued that he was unable to pay the arrears, but the family court judge did not make an express finding regarding that fact.[51]

On appeal, Mr. Turner suggested that his inability to pay rendered the South Carolina contempt proceeding "criminal" in nature:[52] the one year in jail was, in effect, a fixed term of punishment because he was financially incapable of satisfying the only condition that would have terminated his confinement.[53] A "criminal" proceeding must conform to constitutional criminal procedure, which, among other things, requires state-appointed counsel.[54] While the power to sanction contempt has existed since time immemorial in the Anglo legal tradition,[55] the distinction between civil and criminal contempt has not.[56] The Supreme Court drew the distinction more than one hundred years ago despite observing that "[c]ontempts are neither wholly civil nor altogether criminal."[57]

In *Gompers v. Buck's Stove*, the Court explained that civil contempt "is remedial[] and for the benefit of the complainant" while criminal contempt "is punitive[] to vindicate the authority of the court."[58] In *Gompers*, the American Federation of Labor's leadership challenged contempt orders entered against them for violating an injunction that restrained the tactics they

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44 *Id*. at *8.

45 *Id.* at *9.

46 *Id*. at 9, 11.

47 Turner v. Rogers, 131 S.Ct. 2507, 2513 (2011).

48 *Id*.

49 *Id*.

50 Brief for Petitioner, *supra* note 13, at 34.

51 *See Turner*, 131 S.Ct. at 2513.

52 Brief for Petitioner, *supra* note 13, at 42-50; *see also* discussion *infra* Section I.B (explaining distinction between civil and criminal contempt).

53 *See* Brief for Petitioner, *supra* note 13, at 16-17, 42. Mr. Turner's argument was actually somewhat more nuanced. He argued that he needed a lawyer to help him properly demonstrate inability to pay – the factual question upon which the distinction between "civil" and "criminal" contempt hinges. *Id.* 36, 39-40; *see infra* notes at 67-76 and discussion.

54 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

55 Non-common law countries do not share this tradition. RONALD L. GOLDFARB, THE CONTEMPT POWER 1–2 (Columbia Univ. Press 1963).

56 There is an early mention of the distinction in STEWART RAPALJE, A TREATISE ON CONTEMPT § 21 (New York, L.K. Strouse & Co. 1890); *see also* Dudley, *supra* note 34, at 1035-36 (providing historical account of cases leading up to *Gompers*).

57 Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911).

58 *Id*.

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could use in protesting Buck's Stove's labor practices.[59] The lower court had sanctioned for contempt despite the fact that the underlying civil dispute had settled.[60] The district court did not adhere to rules of criminal procedure when imposing the sanction.[61] The Supreme Court deemed the sanction "criminal."[62] It explained that a remedial sanction is one that seeks to coerce affirmative conduct – e.g., surrendering property, paying damages, etc.[63] A contemnor can avoid incarceration by simply doing as ordered: "[H]e carries the keys of his prison in his own pocket."[64] Civil contempt is purely instrumental, a utilitarian mechanism for inducing specific behavior. In contrast, criminal contempt punishes the contemnor for doing "that which he has been commanded not to do."[65] The point is not to induce any specific behavior, but rather to punish wrongful conduct and "vindicate the authority of the law."[66]

In *Turner v. Rogers*, Mr. Turner, the alleged contemnor, argued that South Carolina should have appointed him counsel in order to *maintain* the contempt proceeding's civil nature.[67] Mr. Turner accepted the South Carolina legislature's having labeled the contempt proceeding "civil."[68] However, he contended in his brief that, for the label to withstand constitutional scrutiny, he must have had the financial ability to comply with the child support order.[69] Given that factual question's centrality in determining the proceeding's nature, Mr. Turner argued that due process obliged South Carolina to provide him with counsel.[70]

While rejecting Mr. Turner's Due Process claim, the Supreme Court did conclude that the family court should have made an express finding regarding his ability to pay.[71] The Court remanded for that purpose.[72] The Court also accepted Mr. Turner's assertion "that ability to comply marks a dividing line between civil and criminal contempt."[73] This characterization is puzzling. In theory, a court's tolerance for factual error should be lower in criminal cases than civil ones.[74] Criminal cases require proof beyond a reasonable doubt, while civil cases do not. It is the nature of a proceeding that determines the allowance for factual error. But the *Turner* Court

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59 *Id.* at 419-20.

60 *Id.* at 451-52.

61 *See id.*

62 *See id.* at 452, 444-46.

63 *See id.* at 442.

64 *Id.* (quoting In re Nevitt, 117 F. 448, 461 (8th Cir. 1902)).

65 *Id.*

66 *Id.* at 443. This formulation echoes retributive and expressive theories of punishment. Punishment is meted out for the moral wrong of disobeying the court. By the same token, punishment is a public reaffirmation of the prohibition's validity and, more generally, the court's authority to promulgate it. *See* JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 115 (1970).

67 Brief for Petitioner, *supra* note 13, at *38-40.

68 *Id.* at *6.

69 *Id.* This was in addition to a more general argument that due process requires counsel whenever incarceration is a possibility. *Id.* at *27-37.

70 Brief for Petitioner, *supra* note 13, at *38-4039.

71 Turner v. Rogers, 131 S.Ct. 2507, 2520 (2011).

72 *Id*.

73 *Id.* at 2518.

74 *See, e.g.,* Addington v. Texas, 441 U.S. 418, 423 (1979) ("In a criminal case . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.").

suggests that this relationship is inverted in a contempt proceeding.[75] The threshold question of what a proceeding's nature is turns on a factual question that is, itself, subject to error. What quantum of error is permissible? The answer, of course, depends on the nature of the proceeding.[76]

While not as neatly circular, the process-result relation is no less counterintuitive in the probation context. Probation entails conditional release in lieu of detention.[77] Typically, detention is "suspended" for so long as the probationer abides by the conditions specified in the probation order. Courts have considerable latitude to incarcerate when a probation violation is alleged. Where a court concludes that an individual has failed to live up to a probation condition, it can "revoke" probation and impose whatever portion of the suspended sentence remains outstanding.[78] For example, a court may impose the erstwhile-suspended sentence all at once or 'unsuspend' incrementally, imposing short periods of incarceration, but then re-release with a lower-balance suspended sentence. Returning to the hypothetical defendant from the Introduction,[79] assume the court imposes probation and suspends a one-year jail sentence where one-year is the statutory maximum for misdemeanors. If the court finds the defendant has violated a probation condition, it can impose the entirety of the one-year sentence or some portion of it. If the court imposed one month of jail for the violation, upon release the defendant would remain subject to the probation order and have an eleven-month balance of the suspended sentence hanging over him.

Constitutional due process only requires minimal procedural protections in probation revocations. A state must generally prove by a preponderance of evidence that the condition was violated,[80] a state need not provide counsel to the probationer,[81] there need not be a jury trial,[82] and evidentiary rules are relaxed.[83] While revocation may be appealed, the standard of review is deferential to the trial court.[84] And for short sentences, that right will be moot – i.e., the alleged violator will have served time for the revocation before the appeal is complete.[85]

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75 *See Turner*, 131 S.Ct. at 2516. Of course, the Court was not answering the specific question of what burden of proof must be satisfied in a contempt proceeding for failure to pay child support. This, however, is a central question whenever a criminal punishment is predicated upon a refusal to abide by a civil order. *See* Maggio v. Luma Camera Serv., 333 U.S. 56, 81-92 (1948) (Frankfurter, J., dissenting) (raising issue in the context of a contempt motion in a bankruptcy proceeding).

76 Respondents highlighted this problem. *See* Brief of Respondents at *40-42, Turner v. Rogers, 131 S.Ct. 2507 (2011) (No. 10-10). They argued that the Court should simply treat the proceeding as civil without regard for the error problem. *Id.* at *42.

77 COHEN Volume 1, *supra* note 21, §1:1.

78 COHEN Volume 2, *supra* note 22, §27:3, 27:11.

79 *See supra* notes 20-22 and discussion.

80 Piar, *supra* note 34, at 127; *cf.* Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973) (stating that probation hearings must meet minimum requirements of due process then listing the necessary requirements).

81 Gagnon, 411 U.S. at 790 ("We think . . . that the decision as to the need for counsel [for probationers] must be made on a case-by-case basis . . . ."); *see also* Piar, *supra* note 34, at 135 ("[T]he Court struck a compromise, holding that the right to counsel in revocation hearings should be determined case-by-case . . . .").

82 *See* COHEN Volume 2, *supra* note 21, at §21:49.

83 *See id.* at §20:11.

84 *See* COHEN Volume 2, *supra* note 22, §29:18.

85 *See, e.g.,* Turner v. Rogers, 131 S.Ct. 2507, 2508 (2011) (showing that Mr. Turner had served his one-year jail sentence well before his case made it to the Supreme Court).

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While probation is a "criminal sentence,"[86] any subsequent probation revocation proceeding is not "criminal."[87] Ironically, however, the jail-time imposed subsequent to a finding that probation conditions have been violated is "criminal" even though the revocation proceeding is not.[88]

The structural homology between the child support order in *Turner* and probation should be relatively clear.[89] The essential mechanism in both contexts is the same: a conduct rule backed by threat of detention. While criminal courts have recourse to a larger menu of conditions when imposing probation, the power to impose a child support order may be broader than it appears on its face. In Mr. Turner's case, the support order, at various points, required finding employment and obtaining addiction counseling.[90] Despite these similarities, legal scholars have not analyzed the structural homology between these injunctions.

B. Legal Critiques

Despite the millions of people subject to punitive injunctions, neither contempt nor probation generates very much interest among legal scholars. The dominant scholarly approach to contempt tends to highlight its doctrinal inconsistency or circularity and criticize the discretion it affords judges. Most commentators agree that increased procedural protections for alleged contemnors – i.e., those protections already available to criminal defendants – are the answer. Quite separately, the few legal writers who have written about probation tend to focus on the discretion it affords judges and the excesses that discretion enables.

Legal scholars have observed that the criminal-civil binary in contempt is indeterminate and leaves too much room for judicial manipulation.[91] In his influential piece on contempt, Earl Dudley noted that the problem dates back one hundred years to the Supreme Court's decision in *Gompers v. Buck's Stove*.[92] Dudley's primary criticism is that the criminal-civil binary leaves courts too much room to instrumentally craft sanctions that are "civil."[93] By strategically using language suggesting coercive purpose, courts can dodge the more restrictive rules of criminal procedure.[94] For example, including a "purge clause" in a contempt order will likely secure its

[86] Alabama v. Shelton, 535 U.S. 654, 658 (2002) (suspended sentence with probation is a criminal sentence that cannot be imposed without state-provided counsel); *Feiock*, 485 U.S. at 639, 639 n.11.

[87] Although the Court has not gone so far to refer to it as "civil." *See* Gagnon v. Scarpelli, 411 U.S. 778, 788-89 (1973) (distinguishing probation revocation from criminal trial).

[88] *Compare Shelton*, 535 U.S. at 654 (Once probation is revoked, "the defendant is incarcerated not for the probation violation, but for the underlying offense.") *with* Gagnon, 411 U.S. at 782 ("Probation revocation . . . is not a stage of a criminal prosecution . . . .").

[89] The Supreme Court has recognized this in *Feicock,* 485 U.S. at 637 (noting the similar circumstances of contemnors and probationers).

[90] *See* Brief for Petitioner, *supra* note 13, at *8, *15 n.10. The order to pay was, by implication, an order to work; the court imputed income to Mr. Turner despite his unemployment at the time the order was entered. *See id.*

[91] *See, e.g.,* Livingston, *supra* note 34, at 389-90 (arguing that United Mine Workers v. Bagwell, 512 U.S. 821 (1994) has made the distinction indeterminate); Dudley, *supra* note 34, at 1028, 1062; Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 687-88 (1981).

[92] *See* Dudley, *supra* note 34, at 1037-38.

[93] *See id.*

[94] *See id.* at 1046.

status as "civil."[95] A purge clause is a condition that, if satisfied, terminates detention.[96] The contempt order in *Turner* required Mr. Turner's release upon payment of his arrears.[97] Because courts can condition release upon performance that is highly unlikely, civil contempt allows them considerable discretion to detain.[98] This combined with the fact that the very court that enters an order enjoys authority to punish the order's violation creates unique danger for bias.[99]

Some have suggested that the Court should do away with the criminal-civil binary in contempt all together and rely on due-process interest balancing and focus on a proceeding's actual consequences.[100] This echoes legal critiques of the criminal-civil binary in American law more generally. Courts typically defer to a legislature's label of "civil" or "criminal."[101] The Court has deferred to legislature's "civil" label even where detention seemed glaringly

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[95] *See* Hicks v. Feicock, 485 U.S. 624, 640 (1988); Shillitani v. United States, 384 U.S. 364, 370 (1966); *see also* Gompers, 221 U.S. at 442 (To be classified as a civil case, the contemnor should be able to "end the sentence and discharge himself at any moment by doing what he had previously refused to do.").

[96] *But see Bagwell*, 512 U.S. at 836. Announcing a schedule of penalties in advance of the contumacious conduct may convert an otherwise "civil" contempt sanction into a "criminal" one. *Id.* In *Bagwell*, a Virginia court issued a "complex injunction" against a labor union that contained just such a schedule. *See id.* at 837. The injunction was complex because it contained a "detailed" list of "both mandatory and prohibitory provisions." *See id.* at 835-6. The Court hinted that the decree was akin to a legislative and judicial act rolled into one. *See id.* at 831, 838; *see also id.* at 840 (Scalia, J., *concurring*). Introducing "complexity" into the analytic mix, however, destabilizes the criminal-civil binary further. As at least one commentator has noted that many injunctions are "complex," including those issued in child support and domestic violence cases. *See* Livingston, *supra* note 34, at 388-90, 91-97.

[97] *See* Turner v. Rogers, 131 S.Ct. 2507, 2513 (2011). Similarly, in *Shillitani* the Court concluded that Shillitani was a civil contemnor for refusing to comply with a civil subpoena because the trial court allowed for his release if he agreed to testify. *See Shillitani*, 384 U.S. at 365. Detention cannot be longer in duration than the proceeding for which the subpoena was issued. *Id.* at 371.

[98] *See* Beres, *supra* note 34, at 727-28.

[99] *See, e.g.,* Livingston, *supra* note 34, at 350-51 (noting that threat of bias is most pitched in cases of "direct contempt" where the contumacious conduct is directed at the judge herself); Dudley, *supra* note 34, at 1043, 1079; Meier, *supra* note 34, at 85.

[100] *See, e.g.,* Brooke Coleman, *Prison is Prison*, 88 NOTRE DAME L. REV. 2399, 2437 (2013); Dudley, *supra* note 34, at 1033, 1081; *see also* Martineau, *supra* note 91, at 687-88 (detailing the Wisconsin Judicial Council's abandonment of the criminal/civil distinction and imposition of procedural regulations for contempt). Due process interest balancing requires that courts weigh the likelihood of an erroneous deprivation of an individual's rights against the additional cost of providing additional process. *See Turner*, 131 S.Ct. at 2517-18.

[101] *See* Hudson v. United States, 522 U.S. 93, 93, 100 (1997) (quoting United States v. Ward, 448 U.S. 242, 249 (1980)) (noting that a legislative scheme is to be considered on its face, and also that "'only the clearest proof' will suffice to override . . . what has been denominated a civil remedy into a criminal penalty"). *Hudson* was a change of course after the Court's decision in *Halper*. *See id.* at 101-02 (citing United States v. Halper 490 U.S. 435 (1989)). *Halper* had suggested that courts should look beneath legislative labels and consider the punitive effects of a particular "civil" scheme in ascertaining whether it was actually "criminal." *See id.* at 101-02 (citing Halper 490 U.S. at 447) (suggesting the importance of "assessing the character of the actual sanctions imposed"). Following *Hudson*, courts pay little heed to a sanction's punitive effects when considering whether a legislative label of "civil" is constitutionally appropriate; this fact has not escaped commentators' notice (or criticism). *See, e.g.,* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries,* 94 VA. L. REV. 79, 126-29 (2008) (noting that weight is given to the manner in which a sanction is labeled alone); *see also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798, 1801 (1992) (stating that courts will avoid labeling a sanction as "punitive" to avoid to evade criminal procedural rules).

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punitive.[102] Contempt differs from other areas of law in that it is judicial rather than legislative choice accounts for whether a sanction is criminal or civil.[103] Ordinarily, judicial classifications of contempt are not entitled to deference while legislative classifications are.[104] But the distinction between legislative and judicial choice can be quite murky. While the South Carolina legislature has labeled child support matters "civil," the legislature has conferred vast discretion on all courts, including family courts, to use contempt sanctions as they like.[105] Deferring to the legislative label in a case like *Turner* is just to defer to the sanctioning court.

While not everyone is happy with the erosion of the criminal-civil binary,[106] scholars accept that there is a vast grey zone between the two. These scholars agree that more procedural protections ought to be afforded in many (nominally) civil proceedings.[107] For example, the one law review article that has discussed contempt sanctions in the child support context at length is consistent with the mold.[108] Professor Patterson argues that excessive judicial discretion is among the most significant problems with child support and that increased procedural protections should be a big part of the solution.[109]

As a practical matter, it is unclear how much difference the additional protections would make to someone like Mr. Turner. Had Mr. Turner been charged and convicted of criminal

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[102] *See* Kansas v. Hendricks, 521 U.S. 346, 350, 361 (1997) (permitting civil detention of sex offenders *following* completion of criminal sentence). In the immigration context, lengthy "civil" detention is quite common. *See, e.g.,* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301-02 & n.10 (2011) (noting how harsh deportation can be for deportees); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1004-07 (2002) (describing instances of immigration detention).

[103] *Cf.* Bagwell, 512 U.S. at 838; Dudley, *supra* note 34, at 1046-47.

[104] *See id.*

[105] *See* S.C. CODE ANN. § 63-3-620 (1976). The South Carolina statute does not distinguish between "criminal" and "civil" contempt and allows family courts to sanction at their discretion:

> An adult who willfully violates, neglects, or refuses to obey or perform a lawful order of the court, or who violates any provision of this chapter, may be proceeded against for contempt of court. An adult found in contempt of court may be punished by a fine, by a public works sentence, or by imprisonment in a local detention facility, or by any combination of them, in the discretion of the court, but not to exceed imprisonment in a local detention facility for one year, a fine of fifteen hundred dollars, or public works sentence of more than three hundred hours, or any combination of them.

Id.

[106] *See, e.g.,* Carol S. Steiker, *Punishment and Procedure: Punishment Theory And The Criminal-Civil Procedural Divide*, 85 GEO. L. J. 775, 814 (1997) (stating that a "middleground" jurisprudence depletes procedural protections and "undermine[s] the usefulness" of criminal procedure as a whole).

[107] *See, e.g.,* Rosen-Zvi & Fisher, *supra* note 101, at 130; Susan R. Klein, *Redrawing The Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 720-21 (1999) (arguing that the Double Jeopardy Clause, among other procedural guarantees, should be granted in the case of serious civil sanctions); Mann, *supra* note 101, at 1869-70 (stating that the more serious the sanction, the more procedure must protect the accused); Dudley, *supra* note 34, at 1081-92 (suggesting that criminal procedures used to avoid erroneous convictions should be employed depending on the severity of a given sanction).

[108] *See* Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of the Debtor's Prison*, 18 CORNELL J. L. & PUB. POL'Y 95, 133 (2008) (noting that due process measures should be afforded those threatened with civil incarceration).

[109] *Id.* at 133.

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contempt, his sentence would very likely have included some term of probation.[110] And among the probation conditions would almost surely have been paying child support.[111] As described above, the Constitution does not require any more of probation revocation hearings than it does of civil contempt.[112]

Legal scholars have had even less to say about probation than contempt. The little that has been written tends to highlight the extent to which probation is one of the few areas within criminal justice where courts have retained considerable formal discretion.[113] This is true with regard to the three central features of probation: 1) How much of a sentence to suspend;[114] 2) What conditions to impose;[115] and 3) In the case of an alleged violation, whether to revoke and how much of the suspended sentence to re-impose.[116] The case involving the hypothetical defendant in the Introduction illustrates points one and three.[117] With regard to point two, courts have a lengthy menu of conditions from which to craft a probation order. [118] The menu includes substance abuse and mental health treatment,[119] victim/community restitution,[120] restraints on movement,[121] restraints on association,[122] community service,[123] and payment of family support,[124] among others.

With few exceptions,[125] legal commentators tend to focus on the formal discretion courts

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[110] *See infra* notes 223-224 and discussion (summarizing empirical data); *see also,* Feicock, 485 U.S. at 640 (child support case in which probation was imposed). This is not just a hypothetical as many states do actually criminalize failure to pay child support. *See* Rebecca May & Marguerite Roulet, *A Look At Arrests Of Low-Income Fathers For Child Support Nonpayment* 13-38 (Jan. 2005) (summarizing various states' approach).

[111] *See Feicock*, 485 U.S. at 640 (child support case in which probation was imposed).

[112] *Turner* echoed *Bearden v. Georgia* in requiring lower courts to make an affirmative finding that alleged contemnors are financially able to pay whatever amount they have been enjoined to pay. *See* Bearden v. Georgia, 461 U.S. 660, 668 (1983) (same for probation).

[113] *See, e.g.,* Logan, *supra* note 34, at 172; Horwitz, *supra* note 34, at 77.

[114] *See* COHEN Volume 1, *supra* note 21, §§ 2:2-2:4 (noting judicial discretion as to the combination of probation and jail time).

[115] *See id*. Legislatures rarely require the inclusion of specific conditions for specific offenses. *See id.* at § 13:3.

[116] *See id.*

[117] *See supra* notes 20-22, 79 and discussion.

[118] *See* Logan, *supra* note 34, at 189 (noting the probation is one of the few sentencing options to survive the attack on sentencing discretion in recent decades). Most jurisdictions require only that conditions be "reasonable." *See* Horwitz, *supra* note 34, at 91-100 (summarizing how courts have understood "reasonableness" in various jurisdictions).

[119] COHEN Volume 1, *supra* note 21, § 13:3, § 13:14.

[120] *Id.* at § 11:1, § 11:9.

[121] *Id.* at §§ 10:1-10:10. The range of restrictions is potentially quite broad including home detention. *See* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1333 (2008) (discussing electronic monitoring). Might also include prohibitions on being present in particular neighborhoods or parts of town. For example, probation for prostitution offenses often entail a prohibition on entering so-called "prostitution zones." *See* Sandra L. Moser, 91 J. CRIM. L. & CRIMINOLOGY 1101, 1101-02 (2001).

[122] COHEN Volume 1, *supra* note 21, §§ 9:8-9:10.

[123] *See id.* at § 10:22.

[124] *See id.* at § 12:1.

[125] *See generally,* Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOKLYN L. REV. 753 (2010) (exploring the consequences of probation's overuse).

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enjoy and on the sensationalist excesses that such discretion sometimes enables.[126] For example, so-called "shaming" conditions have generated considerably more scholarly and public attention than probation generally.[127] But, shaming conditions are atypical. Nor do courts generally exercise their discretion in totally idiosyncratic or unpredictable ways. In the vast majority of cases, various factors (of which the law is just one) predict the conditions any court imposes.[128] The routine use of probation in mass justice contexts – i.e., their non-sensationalist everyday application – generates individual and aggregate harms that have not been fully engaged by legal scholars.

C. Punishment, Poverty, and Mass Justice

Over the last decade, sociologists have argued that the United States has substituted criminal justice approaches for welfare approaches to poverty.[129] This scholarship provides a rich account of the social motives driving criminal justice and welfare policy. These scholars, however, do not identify the specific legal and institutional mechanisms through which these processes occur. On the other hand, legal scholars who write about mass justice provide a detailed view of institutional dynamics in mass justice courts. They do not, however, provide particularly compelling accounts of the social and political motives animating these dynamics.

Sociologists have argued that American criminal justice policy is designed to contain and subdue restive elements of the working classes. Loïc Waquant's recent work on neoliberalism and criminal justice is a particularly sharp example of the genre. In his book *Punishing the Poor*, he argues that the United States has substituted punitive mechanisms for welfare mechanisms.[130] He links the rampant increases in America's incarceration rate with welfare reform in the late 1990s, which curtailed the availability of public benefits to the poor.[131] Wacquant argues that the dramatic spike in incarceration rates had nothing to do with reducing crime.[132] Similarly, welfare

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[126] *See generally*, Joanna Nairn, *Is There A Right To Have Children? Substantive Due Process and Probation Conditions that Restrict Reproductive Rights*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2010) (focusing on women sentenced as part of probation to avoid procreating); Horwitz, *supra* note 34, at 78 (explaining that appellate review of probation conditions are highly deferential); *see generally*, Phaedra Athena O'Hara Kelly, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges To Scarlet Letter Probation Conditions*, 77 N.C. L. REV. 783 (1999) (showing courts that impose probation conditions that are intended to shame defendants).

[127] *See, e.g.,* Horwitz, *supra* note 34, 144-49 (describing "shaming" conditions such as being forced to publicize one's own offense); Toni Masaro, *The Meanings Of Shame Implications For Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 690-91 (1997) (same).

[128] MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT 142-45 (1992).

[129] *See, e.g.,* WACQUANT, *supra* note 27, at 41 (noting relation between criminal and welfare institutions); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 201 (1990) (analogizing welfare benefits to crime control to show both work "to forge a new social order in the conditions of late modernity"); Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC. 43, 55 (2001) (showing how poorly funded welfare institutions are correlated with crime rates); *see also* Ashley Rubin, *Punitive Penal Preference and Support for Welfare: Applying The "Governance Of Social Marginality" Thesis To The Individual Level*, 13 PUNISHMENT & SOC. 198, 219-220 (2011) (showing correlation between individuals who oppose welfare and individuals that support harsher punishment).

[130] WACQUANT, *supra* note 27, at 41.

[131] *See id.* at 76-78.

[132] *Id.* at 159; *but see* Bruce Western, *Poverty Politics And Crime Control In Europe And America*, 40 CONTEMP. SOC. 283, 285 (2011) (criticizing Wacquant's argument oversimplifying the relationship between crime and

reform had nothing to do with reducing poverty.[133]

Wacquant attributes both hyper-incarceration and welfare reform to the rise of "neoliberalism" in the United States.[134] Wacquant uses the expression pejoratively to refer to a set of economic arrangements and a political sensibility that celebrate "the individual" and "competition" in ways that systematically disadvantage the most vulnerable.[135] The rise of neoliberalism has hastened states' withdrawal from social welfare functions.[136] Correspondingly, the State has amplified its punitive function, more aggressively punishing those who fall between the now yawning cracks in the social safety net.[137] Those who once received welfare benefits are the demographic doppelgangers of those who find themselves incarcerated.[138]

Wacquant is not the first to draw the equation between welfare policy and criminal justice. Katherine Beckett and Bruce Western have argued that penal and welfare institutions should be understood as a "single policy regime" for dealing with the socially marginal.[139] David Garland has described shifts in American criminal justice policy over the last two decades as "penal welfarism."[140] All this work builds on earlier sociology that recognized the extent to which criminal justice mechanisms are used to manage the poor.[141] This is not because the poor commit particularly serious crimes, but rather, because they appear disorderly or disruptive to the middle-class eye.[142]

These accounts provide a rich account of penal policy's consequences and the broad set of socio-political motives that animate it. They do not, however, explain how courts (or specific legal mechanisms) produce such consequences. On the other hand, scholars who write about "mass justice" do the latter without doing the former.

I use the expression "mass justice" in an intuitive, colloquial sense to describe the style of adjudication that prevails in specific, high-volume courts.[143] I use the expression to refer to both particular institutions – e.g., South Carolina's family courts;[144] and categories of cases – e.g., labor injunctions.[145] Mass-justice courts manage cases implicating matters of political salience –

incarceration).

[133] WACQUANT, *supra* note 27, at 80.

[134] *Id.* at xiii-xv, 20.

[135] *Id.* at 5-6.

[136] *Id.* at 80.

[137] *Id.* at 98-99.

[138] *Id.*

[139] Beckett & Western, *supra* note 129, at 44.

[140] GARLAND, *supra* note 129, at 186.

[141] *See* JOHN IRWIN, THE JAIL 1, 85 (1985); STANLEY COHEN, VISIONS OF SOCIAL CONTROL 107-09 (1985). Cohen's book in particular anticipates more contemporary work on crime and welfare. *See id.* at 44 (summarizing arguments).

[142] *See* Robert J. Sampson & Stephen Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCH. Q. 319, 336-37 (2004).

[143] I am not the first to use the expression "mass justice." *See, e.g.,* Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225, 235 (2009) (using "mass justice" to describe adjudication that occurs in administrative contexts); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1289 (1975) (same).

[144] *See infra* Section II.A.

[145] *See infra* Section II.C. While mass justice courts tend to be state courts, it is not necessarily true. In the case of labor injunctions, federal courts operated as mass justice courts. That federal courts could act in such a way is not

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e.g., crime and derelict parents – but have high caseloads such that no single case generates particular public interest. Malcolm Feeley's study of low-level criminal courts in 1979 Connecticut remains the shining example of scholarship on mass justice. While institutional practice in mass justice institutions – particularly low-level criminal courts – remains understudied by law scholars, there is a growing universe of work.[146]

As described by Feeley, routinization and high caseloads make docket clearing an urgent institutional priority.[147] The same holds for the institutional actors that appear in such courts – particularly public defenders.[148] Docket clearing, in turn, impels summary processes and adaptive mechanisms that privilege quick resolution over the values that ballast individualized justice: accuracy and evenhandedness.[149] Many have decried the process as "assembly-line justice."[150] That is, quick and mechanical disposition without rigorous fact finding.[151] This includes disposition by agreement and/or summary process.[152] In the criminal context, the plea-based system of adjudication is an example of disposition by agreement.[153] Mr. Turner's family court case, of course, is an example of summary disposition.[154]

"Mass" has a double meaning, referring to both the courts' caseloads and the demographic profile of those appearing before them. Scholars writing about mass justice acknowledge that those courts are populated by the politically and economically marginal. High-volume criminal courts are a clear example.[155] As *Turner* illustrates, so too are family courts.[156] In

just a long-past historical fact either. *See* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation* Streamline, 98 CAL. L. REV. 481, 503 (2010) (describing mass processing of criminal reentry cases in federal courts in Arizona).

[146] *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315-16 (2011-12) (discussing how the problems of mass justice in misdemeanor processing); Roberts, *supra* note 15, at 280 (describing how the "stories of assembly-line representation in the lower courts have received little attention").

[147] FEELEY, *supra* note 128, at 270-72.

[148] *See* Natapoff, *supra* note 146, at 1343.

[149] Feeley, however, points out that we should not imagine judicial practice as having diverged from our due process ideals at a moment in time. *See* FEELEY, *supra* note 128, at 268, 272-74.

[150] *See, e.g.*, FRIEDMAN, *supra* note 17, at 391 ("Trials' in many places, and for most defendants, had been quick and dirty affairs, without lawyers and without much of the trappings of due process."); Brief for Elizabeth G. Patterson as Amici Curiae Supporting Petitioner, *supra* note 11, at *14; *but see* FEELEY, *supra* note 128, at 13 (criticizing expression for being too simplistic).

[151] *See* Natapoff, *supra* note 146, at 1345 (describing plea bargaining in misdemeanor cases).

[152] *See id.*

[153] *See, e.g.*, Roberts, *supra* note 15, at 306-09 (describing the volume of cases in misdemeanor contexts create an incentive to judges, defense counsel, and prosecutors to pursue guilty pleas); *see also* FRIEDMAN, *supra* note 17, at 391-93 (noting that resource constraints and crowded dockets have impelled plea bargaining in criminal courts).

[154] *See* Brief for The Constitution Project as Amici Curiae Supporting Petitioner, *supra* note 8, at *8, (describing that Mr. Turner "spoke a total of 169 words at his hearing" and "received less than a minute of the court's time").

[155] *See* FEELEY, *supra* note 128, at xxii (stating criminal courts everywhere "are populated by the poor and disadvantaged"). This fact has almost certainly been true for as long as there have been mass justice courts. *See, e.g.*, Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 605-08 (1956) (describing how Philadelphia criminal courts summarily handled vagrancy cases – "up to 1600 summary cases a month"). The universe of non-residential parents subject to contempt are inordinately poor. *See* Brief for the Center for Family Policy and Practice as Amici Curiae Supporting Petitioner at *16-*23, Michael D. Turner, Turner v. Rogers, 131 S.Ct. 2507 (2011) (No. 10-10).

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the face of a heavy caseload, one surmises that judges might view incarceration as a quick and effective tool for ascertaining whether someone like Mr. Turner *could* pay.[157] The broad allowance for factual error in civil contempt gives courts considerable leeway to use detention in this way.[158] Given these institutional dynamics, there is little reason to think that requiring an express finding of ability to pay (as the *Turner* Court did) will make any difference: "making a factual finding" would have required little more than a few additional marks on the pre-printed family court order.[159]

Legal scholars tend to cast the practices that prevail in mass justice settings as the unintended byproduct of resource constraints and routinization.[160] Scholars, in fact, have suggested that layering formal procedural protections over one another might entrench summary justice rather than make it better.[161] Formal rules and institutional practices may very well exist in ironic disjuncture. Bill Stuntz has, for example, argued that the development of robust criminal procedure rights since the 1960s has made criminal trials more expensive and, as a consequence, impelled plea bargaining and other summary processes to the detriment of defendants.[162] This should sound a cautionary note for anyone proposing procedural fixes for mass justice's dysfunctions.

Scholars of mass justice readily concede that the poor and socially marginal crowd the halls of mass justice institutions.[163] But, these scholars do not provide a particularly rich account for why that is true. There is, in other words, a gap separating critical accounts like Wacquant's from legal scholarship about mass justice. The argument developed in Section II below helps fill that gap.

II. PUNITIVE INJUNCTIONS

Punitive injunctions are a pervasive and defining mechanism within mass justice courts. Millions are subject to such injunctions.[164] And hundreds of thousands are held in custody for having violated them.[165] The concept of a "punitive injunction" developed herein helps identify

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[156] *See Turner*, 131 S.Ct. at 2513-14.

[157] *See* Brief for Elizabeth G. Patterson as Amici Curiae Supporting Petitioner, *supra* note 11, at *13-*14.

[158] *See* Oriel v. Prela, 49 S. Ct. 173, 174-75 (1929). The *Oriel* Court, in deciding a bankruptcy appeal, approvingly quoted from a D.C. Circuit judge who characterized civil contempt as follows:

> I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity [regarding the contemnor's claim that he could not pay], and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, name the [contemnor's] inability to obey the order, he has always been released, and . . . he would always have the right to be released as soon as the fact becomes clear that he cannot obey.

Id. at 175 (quoting In re Epstein, 206 F. 568, 570 (D.C. Cir. 1913)).

[159] *See, e.g., Turner*, 131 S.Ct. at 2513 (showing the lack of findings by the judge about Mr. Turner's ability to pay).

[160] FEELEY, *supra* note 128, at 270-74.

[161] *See, e.g.,* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2039 (2008).

[162] *Id.* at 1978.

[163] *See, e.g.,* FEELEY, *supra* note 128, at 4; Natapoff, *supra* note 146, at 8.

[164] *See infra* notes 172-176, 223 and discussion.

[165] *See infra* notes 174, 226-227 and discussion reviewing.

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structural homologies across different areas of law and types of courts. In so doing, this Section advances three related claims. First, it provides an account of the broad socio-political motives that underlie mass justice. While punitive injunctions are frequently held out as promoting individual agency and responsibility, they are used systematically against the economically and socially marginal. This should not be understood as an unintended consequence or institutional design flaw. Second, punitive injunctions lead to net widening and strengthening – they sweep more people into custodial supervision and keep them there longer than would otherwise be true. Third, when imposing and enforcing punitive injunctions, mass justice courts act in ways that significantly deviate from our traditional understanding of the judicial function.

The injunctions at issue here are "punitive" to the extent that they fail to systematically serve rehabilitative or remedial functions. This is true notwithstanding that, by official accounts, such injunctions are supposed to promote individual agency and responsibility. For example, Congress's rationale for aggressively pursuing non-resident fathers for child support was remedial – reimbursing the state for child-related welfare expenses. Progressive Era reformers offered rehabilitation as the driving rationale for probation. Courts were supposed to leverage their detention power to induce behavioral change that would, in turn, forestall future crime. Today, the same rationale is offered for "innovations" in criminal justice such as drug, mental-health, and other so-called "problem solving" courts.

In practice, these injunctions are used to manage the poor and socially marginal on a population basis. Such injunctions are entered against individuals who are members of groups that have, *a priori*, been cast as "disobedient." "Disobedience" here is not a discrete legal fact. Rather, it is shorthand for a shared set of judicial, political, and/or public assumptions about a particular group's antisocial proclivities. It is a sociological construct that reflects broad-based anxieties about the underclass – so-called "problem populations"[166] or "dangerous classes."[167] For example, broadly shared class and race anxieties about "deadbeat dads" animated the changes in federal law that prompted aggressive use of contempt actions against fathers like Mr. Turner.[168] Racial anxiety about new immigrants and "the mentally deficient" fueled the rise of probation in the early twentieth century.[169] As a historical matter, late nineteenth-century labor cases prefigured today's punitive injunctions.[170] So-called "labor injunctions" were impelled by partisan anxieties about the restive working classes.

In operation, punitive injunctions lead to more individuals being swept up into what Loïc Wacquant has called the carceral net. This is often (but not always) by policymakers' express design. Even when not by design, it is a sufficiently salient effect that it should not be thought of as an unintended consequence. Punitive injunctions are typically roughly-hewn and of a one-size-fits-all nature. Historically, they have been entered against entire groups.[171] While that practice does not prevail in contemporary family and criminal courts, punitive injunctions do typically contain standardized features that are, quite often, demographically determined. Moreover, they are often imposed reflexively without meaningful consideration for individuals' ability to comply.

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[166] *See* GARLAND, *supra* note 31, at 129-30 (noting that class and power relations that prevail in society will shape the understanding of who constitutes a "problem population"); *see also* RAFTER, *supra* note 31, at 84-85 (noting the extent to which turn of the century criminal justice policy was explicitly population-based).

[167] FRIEDMAN, *supra* note 17, at 102.

[168] *See infra notes* 199-203 and discussion.

[169] *See infra* notes 239-245 and accompanying text.

[170] *See infra* notes 360-375 and accompanying text.

[171] *See infra* Section II.C.

Those subject to a punitive injunction are vulnerable to more summary forms of detention than would otherwise be true. The procedural constraints limiting courts' ability to sanction for violating these injunctions is relaxed. This has both formal and informal dimensions. Formally, procedural rules are relaxed when enforcing punitive injunctions: the burden of proof is not beyond a reasonable doubt, court-appointed counsel is not constitutional required, and evidentiary rules are relaxed. Informally, appellate review will typically be unavailable as a practical matter. "Efficiency" is the rationale typically offered for relaxing these procedural restraints. "Efficiency," however, functions more as an apology for mass justice than as an empirically verifiable claim about producing desirable outcomes cost-effectively.

Sections A and B below demonstrate that contempt orders like the one in *Turner* and criminal probation are best understood as punitive injunctions. Section B also shows that much lauded innovations in criminal justice, like "problem solving courts," are best understood as punitive injunctions. Section C sketches a historical context for punitive injunctions by analyzing nineteenth-century labor injunctions. Finally, Section D concludes by suggesting that when enforcing punitive injunctions, courts deviate quite dramatically from traditional understandings of the judicial function.

A. Disciplining Deadbeat Dads

There are approximately twelve million outstanding child support orders in the United States.[172] Of the more than seventy billion dollars that is owed pursuant to these orders, nearly half of it is owed by fathers who earn less than twenty thousand dollars per year.[173] States use incarceration as a debt collection device most aggressively against these indigent fathers. There is astoundingly little quantitative information as to how many so-called "deadbeat dads" are in jail or prison at any given time. One recent estimate put the number at as high as ninety thousand.[174]

On its surface, *Turner* might seem like a straightforwardly remedial case – i.e., a bounded legal dispute between parents who do not get along.[175] Most fathers in Mr. Turner's position, however, actually owe arrears to the state as opposed to the custodial parent.[176] This is true because federal welfare reforms in the 1990s inaugurated an aggressive "collection agency" approach to child support.[177] While the official policy rationale for welfare reform was promoting individual responsibility, among its most significant effects has been expanding the carceral dragnet for so-called "deadbeat dads."[178] Courts use incarceration most aggressively against

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[172] Office of Child Support Enforcement, *FY2009 Annual Report to Congress*, OFFICE OF CHILD SUPPORT ENFORCEMENT at Fig. 2 (Dec. 1, 2009), http://www.acf.hhs.gov/programs/css/resource/fy2009-annual-report (last visited Feb. 1, 2014).

[173] Office of Child Support Enforcement, *Understanding Child Support Debt: A Guide to Exploring Child Support Debt In Your State* 1, 5 (May 2004) *available at* http://www.acf.hhs.gov/sites/default/files/ocse/dcl_04_28a.pdf.

[174] Douglas Galbi, *Persons in Jail or in Prison for Child-Support Debt*, PURPLE MOTES (Mar. 22, 2011), purplemotes.net/2011/03/22/persons-in-jail-for-child-support-debt/.

[175] *See, e.g.,* Brief of Respondents, *supra* note 76, at 11 ("Mrs. Rogers grew impatient with petitioner's pattern of dilatory payments.").

[176] Patterson, *supra* note 108, at 99 ("Almost half the national child support debt is owed not to custodial parents, but to the government.").

[177] *Id.* at 101.

[178] *See* WACQUANT, *supra* note 27, at xviii, 79, 81, 103 (noting role of "moral individualism" and "hegemonic market ideology" in accounting for welfare reform).

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economically marginal, non-custodial fathers like Mr. Turner.[179] Mr. Turner's case is not out of the ordinary. Family court orders accounted for up to 16% of those in South Carolina jails between 2005 and 2009.[180]

A child support order, like a custody order or any number of family court orders, is at base an injunction.[181] It is not necessarily just an order to make future payments either. In Mr. Turner's case, he was variously ordered to obtain work and narcotics addiction treatment.[182] There is nothing new about family courts leveraging their power to detain in order to obtain obedience from a non-custodial parent.[183] What is of recent vintage, however, is the intensive expansion of the carceral net in order to advance an anti-welfare agenda.[184] More than three decades of welfare reform have created powerful incentives for states to aggressively pursue non-custodial parents for child support. This change marks a broader political and social shift in the United States from welfare-oriented to punitively oriented approaches to race and poverty.[185]

Shifts in welfare law, which began in 1974 and culminated in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), have created a "super-collection agency approach to child support enforcement."[186] In 1974, Congress began building the child support enforcement bureaucracy that exists today.[187] The 1974 amendments to the Social Security Act required welfare recipients, as a condition for receiving state assistance, to cooperate in establishing paternity and assign child support payments to the state.[188] Official debate about cost-saving in public assistance has been tied to child support enforcement ever since. In the 1980s, Congress required states to establish paternity within specified time limits or risk reduction in federal welfare transfers.[189] As part of the PRWORA in 1996, Congress transformed welfare into a block-grant program and established strict limits on recipient eligibility.[190] Congress also

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[179] Patterson, *supra* note 108, at 118; *see also* SHARON HAYS, FLAT BROKE WITH CHILDREN 80 (2003) (describing demographic details of fathers of dependent children who receive welfare); Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae in Support of Petitioner, *supra* note 11, at 8 (inferring from survey data that 75% of those held in contempt in South Carolina for violating child support order were indigent).

[180] Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae Supporting Petitioner, *supra* note 11, at 4.

[181] Margaret M. Mahoney, *The Enforcement of Child Custody Orders By Contempt Remedies*, 68 U. PITT. L. REV. 835, 836 (2007).

[182] *See* Brief for Petitioner, *supra* note 13 at 8, 10 (stating the order for child support required Mr. Turner make weekly payments even though he was unemployed at the time; noting how a show cause order issued by the family court led to suspension of a jail sentence in exchange for Mr. Turner's completion of a drug treatment program).

[183] *See* Buck v. Buck, 60 Ill. 105 (1871) (stating that contempt in child support cases is "carried on in a shape of a criminal process for a contempt of authority of the court").

[184] *See* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 344-48 (2005).

[185] *See* WACQUANT, *supra* note 27, at 41, 43, 58, 167-69.

[186] Murphy, *supra* note 184, at 344-48.

[187] *See id.* at 345.

[188] Patterson, *supra* note 108, at 99, 101. In her compelling ethnographic work, Sharon Hays has demonstrated the ways in which this requirement puts poor women in compromising, sometimes dangerous positions. *See* HAYS, *supra* note 179, at 79, 81-82 (noting that nearly half of child support debt in the United States is owed to the government).

[189] Murphy, *supra* note 184, at 346. The current scheme is similar to the version in the 1980s. *See* 42 U.S.C. § 608 (a)(3)(A) (2006).

[190] *See generally* 42 U.S.C. § 603 (2006) (refusing benefits for conditions such as being a teenager not

required that states establish paternity for children with only one residential parent and to routinize child support enforcement.[191] The PRWORA mandated that states create computerized databases regarding child support orders and used mechanized collection tactics such as income withholding, tax refund interception, or vehicle license revocation.[192] Where such enforcement measures were once court ordered, the PRWORA streamlined their imposition by mandating that they be carried out as administrative actions.[193] Federal law requires States to satisfy specified performance benchmarks for establishing paternity and expediting child support collection.[194]

Courts have become more involved in collecting child support from the poor as they have become less involved in collecting it from the middle class. The mechanization of child support has meant that there is less recourse to courts for those who earn wages or have readily identifiable assets – i.e., middle class parents.[195] States use contempt most aggressively against those without income or assets that can be targeted using automated collection techniques.[196] Of course, this corresponds to the most economically marginal fathers like Mr. Turner. There is no empirical evidence to suggest that this approach actually saves state resources, helps dependent children, or helps custodial mothers.[197] But that was not likely the real point with regard to poor fathers. The point was more likely to make a symbolic statement about the moral degeneracy of that group.[198]

The public, judges, and bureaucrats have been primed for the harsh treatment of child support debtors by nearly three decades of "deadbeat dads" and anti-welfare rhetoric. The deadbeat dad is equated with a criminal whose failure to pay child support is willful and malevolent.[199] The expression found broad public traction in the years leading up to the PRWORA's passage and was used to dramatic effect by President Clinton.[200] The deadbeat dad not only shortchanged his child, but to the extent that he was poor, also shortchanged the taxpayer. Deadbeat dad rhetoric intersected with the racialized anti-welfare rhetoric that characterized the entire political moment.[201] Politicians cast PRWORA as a response to the black

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living under adult supervision or to teenagers that do not attend high school or other training programs).

[191] *See* Murphy, *supra* note 184, at 345.

[192] *See* 42 U.S.C. § 666(a) (2006) (specifying procedures States must adopt); *see generally* 42 U.S.C. § 654 (2006) (requiring States to develop capacity for automated data processing).

[193] *See* 42 U.S.C. § 666(c)(1) (enumerating procedures for paternity determination and child support collection that States must provide for without court order).

[194] *See* 42 U.S.C § 652(g) (2006) (enumerating performance measures for States).

[195] *See* Patterson, *supra* note 108, at 100, 105.

[196] *See id.* at 101; *see also Implementation of Welfare Reform and Child Support Enforcement: Hearings Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 104th Cong.182-83 (1996) (testimony regarding different state practices using contempt in child support enforcement).

[197] *See* HAYS, *supra* note 179, at 77 (noting that collections approach is not cost effective); Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae in Support of Petitioner, *supra* note 11, at 24-27 (reviewing costs of detention in South Carolina).

[198] *See* HAYS, *supra* note 179, at 77.

[199] *See id.* at 76-77; Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. POVERTY. L. & POL'Y 127, 130, 130 n.11, 137 (2011). Related, Congress actually passed the "Deadbeat Parents' Punishment Act of 1998," criminalizing serious failures to pay child support across state lines. *See* 18 U.S.C. § 228 (2006) (requiring it applies to any person who "willfully fails to pay a support obligation with respect to a child").

[200] *See* Cammett, *supra* note 199, at 141, 141 n.70.

[201] *See* WACQUANT, *supra* note 27, at 41, 43, 58, 167-69.

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underclasses' profligate sexuality and economic parasitism.[202] The "deadbeat dad" typified these pathologies.[203]

Mr. Turner's incarceration exemplifies the institutional shifts that have occurred in welfare law over the last thirty years. The State's role in securing child support orders, the persistence of arrears, and the aggressive use of contempt ensure that people like Mr. Turner will revolve in and out of custody.[204] Rebecca Rogers, the mother of Mr. Turner's child, assigned her right to collect child support to South Carolina when she applied for welfare.[205] Once she had done so, state institutions acted quickly to assign financial responsibility and collect on it. Upon establishing Mr. Turner's paternity, the South Carolina Department of Social Services moved for a child support order in family court.[206] The family court required Mr. Turner to make payments of $51.73 per week based on his "imputed" gross income of $1386 per month.[207] This notwithstanding that the order listed Mr. Turner as "unemployed."[208] The family court calculated this obligation based on "imputed" income – the income level that the family court determined Mr. Turner was capable of earning in a month – rather than Mr. Turner's apparent income of zero.[209] This, of course, meant that Mr. Turner had to obtain employment in order to comply with the order. Earlier failures to comply on account of addiction issues also resulted in the family court requiring that Mr. Turner enroll in drug treatment.[210] He was jailed when he failed to comply with that condition.[211]

The child support entered against Mr. Turner was retroactive to an earlier date, so that he was in arrears from the moment the order was entered.[212] The arrears triggered orders to show cause. The arrearage continued to mount even during the periods that Mr. Turner spent incarcerated.[213] Pursuant to federal law, states cannot allow retroactive modification of child

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[202] *See id.* at 82-84; *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME 191-93 (2009) (discussing child custody); Steven M. Berezney, *Zablocki Reborn?: The Constitutionality of Probation Conditions Prohibiting Deadbeat and Abusive Fathers From Conceiving Children*, 5 J.L. SOC. 255, 256 (2003) (discussing criminal cases in which "deadbeat dads" were put on probationary sentence that included a condition limiting freedom to reproduce).

[203] *See* WACQUANT, *supra* note 27, at 84; *see also* SIMON, *supra* note 202 (discussing child custody); Berezney, *supra* note 202 (discussing criminal cases in which "deadbeat dads" were put on probationary sentence that included a condition limiting freedom to reproduce).

[204] It is not just men who are vulnerable to punitive injunctions. *See infra* notes 318-320 and discussion.

[205] Brief for Petitioner, *supra* note 13, at 8.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*; *see also* Cammett, *supra* note 199, at 142-43 (noting court practice of imputing income in child support cases and setting child support amounts *in absentia*); Patterson, *supra* note 108, at 108-09 (also noting court practice of imputing income in child support cases and setting child support amounts *in absentia*).

[210] Brief for Petitioner, *supra* note 13, at *15 n.10.

[211] *Id.*

[212] *Id.* at *9.

[213] *Id.* at *10. The arrearage also mounted during those periods that Mr. Turner was incarcerated for unrelated criminal charges. *Id.* at *11; *see also* NANCY THOENNES, CTR. FOR POL'Y RES., CHILD SUPPORT PROFILE MASSACHUSETTS INCARCERATED AND PAROLED PARENTS, FATHERS IN THE CRIMINAL JUSTICE SYSTEM: A COLLABORATION BETWEEN CHILD SUPPORT ENFORCEMENT AND CRIMINAL JUSTICE AGENCIES IN MASSACHUSETTS, 24-29 (May 2002).

https://scholarship.law.upenn.edu/jlasc/vol17/iss2/4

support orders.[214] This means that someone like Mr. Turner cannot erase past arrearage that is based on an unrealistic (or simply incorrect) level of imputed income. Absent some dramatic change in his economic fortunes, Mr. Turner will be in debt forever. He can realistically expect to spend more time in jail than he already has.[215] At least one commentator has described this cycle of arrearage and incarceration as "the silent return of the debtor's prison."[216]

The *Turner* Court, essentially, mandated that contempt proceedings for child support conform to the strictures required in probation hearings. That seems intuitive enough given that criminal and family courts use detention to manage substantially overlapping demographic groups.[217] The Court held that the state need not provide counsel, but must provide alternative procedures to determine whether to detain an individual who is unable to pay.[218] The Court, in essence, treated the proceeding in *Turner* as the constitutional equivalent of a probation revocation.[219] The parallel was apropos given that a number of states criminalize failure to pay child support.[220]

B. *Injunctions Not to Sin*[221]

1. Probation

Probation allows courts to sweep more people into the criminal justice system and keep them there for longer than would likely occur otherwise. Probation is among the most common sentences meted out.[222] Numbering almost five million, probationers are the largest segment of

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[214] *See* 42 U.S.C. § 666(a)(9)(C); *see also* Cammett, *supra* note 199, at 148-49 (discussing elements of the federal law prohibiting states from retroactively modifying judgments cannot be retroactively).

[215] *See* Turner v. Rogers, 131 S.Ct. 2507, 2513 (2011).

[216] *See* Patterson, *supra* note 108, at 95. While it is difficult to say precisely how many individuals find themselves in Mr. Turner's position, it is safe to think the number is quite high. *Id.* at 117-18; *see also* Galbi, *supra* note 174.

[217] *See* Brief for Elizabeth G. Patterson as Amici Curiae Supporting Petitioner, *supra* note 11, at *5; *see also* Brief of Center for Family Policy and Practice as Amicus Curiae in Support of Petitioner, *supra* note 155, at *16-*23; Cammett, *supra* note 199, at 153-54 (noting relationship between mass criminal incarceration and child support arrears).

[218] *See Turner*, 131 S.Ct. at 2512.

[219] *See* Bearden v. Georgia, 461 U.S. 660, 668-69 (1983) (must be finding of ability to pay where payment of sum is part of probation condition); Gagnon v. Scarpelli, 411 U.S. 778, 788-90 (1973) (finding that counsel is not required in probation revocation).

[220] *See Feiock*, 485 U.S. at 639-40 (example of child support case in which probation was imposed). This is not just a hypothetical as many states do actually criminalize failure to pay child support. *See* May & Roulet, *supra* note 110, at 13-38 (summarizing state-by-state findings on state and local arresting practices for nonpayment of child support).

[221] *See* Arthur W. Towne, *Probation & Suspended Sentence*, 7 J. AM. INSTITUTION CRIM. L. & CRIMINOLOGY 654, 664 (1917).

[222] In 2006, 46.2% of state felony cases included some term of probation. *See* United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. *National Judicial Reporting Program,* Inter-university Consortium for Political and Social Research (2006) (last visited Oct. 1, 2013), *available at* http://www.icpsr.umich.edu/icpsrweb/ICPSR/ssvd/studies/27701/datasets/0001/variables/V8?paging.startRow=126. There is no national data available for probation in the misdemeanor context. There is, however, data available for at least some individual states and municipalities. For example, in New York City in 2012, 32.7% of those accused of misdemeanors were subject to court-ordered conditions. *See, e.g.,* New York State Division of Criminal Justice Services, *New York City Adult Arrests Disposed (Apr. 2012)*, Computerized Criminal History System (last visited Feb 1, 2014), *available at* http://www.criminal

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those serving criminal sentences in the United States.[223] This holds most true in lower criminal courts where, in some jurisdictions, probation might appear as a part of most sentences.[224] There are fewer procedural hurdles to jailing a probationer than non-probationer.[225] This fact combined with its pervasiveness means that "probation revocations" account for a substantial portion of new admissions to jails and prisons.[226] Again, the proportion will often be even higher in low-level criminal courts for which data is not centrally collected, if at all.[227] It is the poor and minorities who find themselves disproportionately caught in the wider and stronger penal net that probation helps create.[228]

Probation is an "injunction not to sin" that is entered in lieu of incarceration; that is, a defendant's jail sentence is "suspended" pending completion of the conditions specified in the

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justice.ny.gov/crimnet/ojsa/dispos/nyc.pdf. Such conditions were imposed as part of a sentence following conviction, either in the form of "probation" or "conditional release." *See* N.Y. Penal Law § 65.05 (defining "conditional release"). Alternatively such conditions were imposed as part of an arrangement in which compliance would culminate in the criminal charges being dismissed after a specified period of time – i.e., the case was "adjourned in contemplation of dismissal" (ACD). *See* N.Y. C.P.L. § 170.56. The discussion in this Section and throughout uses the term "probation" generically to describe court-ordered conditions imposed in connection with a criminal case. As the New York City example suggests such conditions are not always termed "probation."

[223] *See* Lauren E. Glaze, *Correctional Populations in the United States*, BUREAU OF JUSTICE STATISTICS (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf.

[224] *See* Tamara Flinchum et al., *Structured Sentencing Statistical Report for Felonies and Misdemeanors*, NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, Fiscal Year 2008/09 51 (March 2010), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy0809R.pdf (80% of misdemeanor sentences in North Carolina include probation); Denise Leifker & Lisa L. Sample, *Probation Recommendations and Sentences Received: The Association Between the Two and the Factors That Affect Recommendations*, 22 CRIM. JUST. POL'Y REV. 494, 503 (2011) (showing that 92.4% of sentences included probation in California jurisdiction studied).

[225] *See infra* notes 280-285 and discussion.

[226] Precise data is difficult to come by. From data compiled by the Bureau of Justice Statistics, however, it appears that roughly 18% of prison admissions in 2006 were for probation violations. I arrived at that number by dividing the number of probationers who were admitted on their original charge (128,969) by total prison admissions (730,860). LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2009 25 (2010), *available at* http://www.bjs.gov/content/pub/pdf/ppus09.pdf; HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 4 (2010), *available at* http://www.bjs.gov/content/pub/pdf/p09.pdf**.** Because it does not include admissions to jails, this figure likely understates by a good bit the number of revocation-based admissions by a significant amount. *See* Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 166 (1997) (citing study that demonstrated 30-50% revocation-based admission rate in the 1990s).

[227] *See, e.g.,* LINDA FREEMAN, NEW MEXICO SENTENCING COMMISSION, LENGTH OF STAY IN DETENTION FACILITIES: A PROFILE OF SEVEN NEW MEXICO COUNTIES 3 (2012), *available at* http://nmsc.unm.edu/reports/2012/final-update-length-of-stay.pdf, (noting that 18.1% of county jail bookings were for probation violations); THOMAS BLOMBERG ET AL., CENTER FOR CRIMINOLOGY AND PUBLIC POLICY RESEARCH, BROWARD COUNTY JAIL POPULATION TRENDS AND FORECAST 26 (2010), *available at* http://www.criminologycenter.fsu.edu/p/pdf/pretrial/Broward%20Co.%20Jail%20Population%20Forecast%202010.pdf (report found that in 36.4% of admissions to county jail, probation violation was most serious charge); *Corrections Alternatives Advisory Committee: Final Report,* 2006 Leg., 123rd Sess. 12 (Me. 2006), *available at* http://www.maine.gov/corrections/caac/CAACFinalReport.pdf (noting that 60% of new admission to county jails was for probation violations). Even when data are available for probation-revocation-based jail admissions, they will often understate the phenomenon. For a partial explanation as to why, see *infra* note 277.

[228] *See* WACQUANT, *supra* note 27, at 41, 43, 58, 69-70, 167-69, 197 (describing predominance of blacks in prison since 1980s).

injunction.[229] As conceived by Progressive Era reformers, probation was supposed to allow courts to leverage their punitive power to rehabilitate offenders and forestall future harm.[230] Progressive Era reformers advanced probation as a corrective measure for the overly formalist, harsh justice that prevailed in the nineteenth-century.[231] Reformers criticized the penal regime's harshness on utilitarian grounds. They argued that incarceration often succeeded in doing little more than creating criminals – the harshness of penal institutions combined with the opportunity to network consolidated detainees' incentives to commit crimes.[232] Reformers viewed probation as part of a broader shift towards a penal ethos of rehabilitation.[233] Criminal conviction was a strategic opportunity to shape reformable convicts' future behavior.[234] By applying a calibrated sequence of 'carrots' and 'sticks,' probation would incrementally cajole (and coerce) convicts into conforming to societal norms.[235]

Despite Progressive Era reformers' emphasis on individualization and rehabilitation,[236] probation functioned as a population-based, disciplinary technique from early on.[237] Many Progressives did not view the destitute and marginal people who were the objects of their interests as full-fledged individuals.[238]During the Progressive era when probation was born, it was common for criminal justice policy makers to use the expression "criminal class" to encompass all lower classes.[239] Beginning in the late nineteenth century, the United States witnessed rampant industrialization and mass immigration.[240] The throngs of new immigrants that crowded the laboring classes alarmed Progressive Era reformers just as much as they did the Protestant middle class.[241] For all of their faith in science's capacity to fix social problems, Progressive Era

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229 *See* COHEN Volume 1, *supra* note 21, § 1:1, at 1-3.

230 *See* DAVID J. ROTHMAN CONSCIENCE AND CONVENIENCE 6 (2002).

231 *See id.* at 18-23, 43, 68 (noting harshness and inflexibility of penal institutions in nineteenth-century). Offense category determined the sentence without regard of individual circumstances. *Id.*

232 *See id.*; *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 265-67 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (noting that criticism that prison created criminals was coterminous with creation of prison itself).

233 *See* COHEN Volume 1, *supra* note 21, § 1:5 (noting rehabilitation as the primary theory animating probation).

234 Progressive Era reformers believed that trained experts should collect extensive personal information about offenders so that individualized treatment could be crafted. *See* ROTHMAN, *supra* note 230, at 63-64.

235 *See* Towne, *supra* note 221, at 660-62 (noting the difficulty of breaking "bad habits"); *see also* FOUCAULT, *supra* note 232, at 128 ("The apparatus of corrective penalty . . . must rest on a studied manipulation of the individual.").

236 *See, e.g.,* ROTHMAN, *supra* note 230, at 59; *see* SHELDON E. GLUECK, PROBATION AND CRIMINAL JUSTICE 101 (Sheldon Glueck eds., 1933).

237 *See, e.g.,* LEWIS E. MACBRAYNE & JAMES P. RAMSAY, ONE MORE CHANCE 331 (1916) (noting that is the "class" of "accidental and occasional offenders" who are most likely to be reformed through probation).

238 *See* RAFTER, *supra* note 31, at 119.

239 *Id.* at 118-19.

240 *Id.* at 57, 157.

241 The foreign born and their progeny crowded the ranks of the laboring classes and incarcerated. *See* ROTHMAN, *supra* note 230, at 23 (discussing nineteenth century penitentiary in Illinois); *see also* GARLAND, *supra* note 31, at 150 (noting that Foucaultian theory helps understand relationship between discourses on criminality and social control of laboring classes).

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reformers were as enmeshed in social hierarchy as those they criticized.[242] Both the right and left conceived of the new, lower classes as predisposed towards disobedience and criminality.

In the burgeoning field of criminology, Progressive Era writers were quick to ascribe these qualities to biological defectiveness.[243] The need to manage these so-called defects impelled tectonic shifts in criminal justice beginning in the late nineteenth century. Fundamentally, Progressives advocated treating defendants for who they were as opposed to what they had done.[244] This was an attractive idea to judges and to other criminal justice personnel who were confronted with a more racially heterogeneous universe of defendants with each passing year.[245]

Even in theory, "individualization" was a metaphor for population-based control. Probation's proponents argued that courts should rely on actuarial prediction and new taxonomies of mental defectiveness.[246] "Individualization" required culling and sorting criminals into categories based on the probability of recidivism. Probation was supposed to be reserved for those criminals who would be most susceptible to reconditioning.[247] Many reformers believed that likely recidivists should be denied probation, perhaps even detained indefinitely, regardless of how minor the underlying offense.[248] In this vein, reformers devised various predictive techniques to distinguish "re-formable" criminals from "born" ones.[249] Probation was reserved for the former group alone.[250] Of course, constructing a comprehensive psycho-social profile of every criminal defendant would have been impossible then, just as it is now.[251] Thus, reformers devised various "actuarial" techniques to identify the presence or absence of demographic and psychiatric indicia thought to predict recidivism; early examples of such indicia included paternal race and criminal history.[252]

From its inception, probation likely contributed to net widening in mass justice courts.[253] First, it created more latitude to impose a criminal sentences in marginal cases.[254] Criminal-court judges quickly took to probation as a tool for managing their dockets.[255] Probation allowed courts

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[242] *See* ROTHMAN, *supra* note 230, at 1, 6, 8, 10 (describing Progressive Era reformers as optimistic reformers who were interested in "curing" crime, but failed to recognize that criminal justice institutions applied the reformers' discretion-enhancing reforms in a manner that was inconsistent with reformers' idealistic vision); *see also* RAFTER, *supra* note 31, at 133-34 (suggesting that Progressives' "energetic liberal reforms" helped fuel eugenics in the United States).

[243] RAFTER, *supra* note 31, at 157.

[244] *See* ROTHMAN, *supra* note 230, at 77, 103-4.

[245] *See id.* (noting extent to which immigration had altered demographic profile of criminal defendants).

[246] *See* RAFTER, *supra* note 31, at 151.

[247] *See id.*

[248] *See* ROTHMAN, *supra* note 230, at 63, 71-72 (noting reformers' view that recidivists should not be eligible for probation and the importance of indeterminate sentencing).

[249] *Id.* at 58 (noting Progressives' use of Cesare Lombroso's theory of "born criminals"); *see also* RAFTER, *supra* note 31, at 123 (also noting the same).

[250] *See* RAFTER, *supra* note 31, at 123-24.

[251] *Cf.* Logan, *supra* note 34, at 178, 178 n.29.

[252] BERNARD HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 110 (2009).

[253] *See* ROTHMAN, *supra* note 230, at 108-10 (describing early judicial practices of imposing probation on petty criminals who, absent probation, might not have received any punishment at all).

[254] *See id.*

[255] *See, e.g*, Logan, *supra* note 34, at 178; *see also* ROTHMAN, *supra* note 230, at 70-71, 78 (explaining the

to quickly convict and sentence without contributing to jail congestion, at least not in the first instance.[256] There were numerous jurisdictions where judges granted probation liberally in minor cases.[257] Absent probation, in any number of marginal cases, judges might very well have imposed no sentence at all.[258] This has remained a persistent feature of probation in mass justice courts. For example, Malcolm Feeley observed this in the Connecticut criminal courts in the 1970s.[259] Other sociologists have recognized net widening as a salient consequence of probation and intermediate sanctions generally.[260] Likely because of its attractiveness to judges and other criminal justice personnel, probation proliferated rapidly. By 1915, 25 states had probation laws and,[261] by 1956, virtually all states did.[262] Early in the twentieth century, probationers came to outnumber those in detention.[263] That remains true today.[264]

Individualization certainly does not occur in mass justice courts today.[265] Probation orders are, more often than not, of the cookie-cutter variety.[266] Prosecutors play a substantial role

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advantages of indeterminate sentencing, specifically the implementation of probation, as seen by early Progressives); Maurice Vanstone, *The International Origins and Initial Development of Probation: An Early Example of Policy Transfer*, 48 BRIT. J. CRIMINOLOGY 735, 746 (2008) (considering the cost-efficiency of probation); FRIEDMAN, *supra* note 17, at 391 (noting probation's role in facilitating plea bargaining in early twentieth century).

[256] *See* ROTHMAN, *supra* note 230, at 102, 110.

[257] *See id.* at 102 (stating that judges had broad discretion to grant probation as they "saw fit"); *see also* Towne, *supra* note 221, at 663-64 (noting that an initial goal of probation was to "sav[e] offenders from the full severity of the law").

[258] ROTHMAN, *supra* note 230, at 110; Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POLICY 51, 56-57 (2013) (summarizing sociological literature documenting probation's net-widening effects).

[259] FEELEY, *supra* note 128, at 69 (quoting criminal court judge).

[260] *See, e.g.*, Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 200 (1998) (discussing the growing number people in prison post-federal guidelines, which urged for more jail time for certain offenses).

[261] MACBRAYNE & RAMSEY, *supra* note 237, at 328.

[262] ANDREW R. KLEIN, ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS, AND PROBATION 68 (2d ed. 1997) (noting that all contiguous states adopted probation by 1956, with Alaska and Hawaii following soon thereafter).

[263] Logan, *supra* note 34, at 178. In the 1990s, 30 to 50% of prison admissions were for probation revocation. Petersilia, *supra* note 226, at 166.

[264] According to the Bureau of Justice Statistics, approximately 1 in every 48 adults in the United States was on probation or parole in 2010, compared to about 1 in every 104 adults in custody. GLAZE & BONCZAR, *supra* note 226, at 2.

[265] *See supra* notes 247, 263 and accompanying text; *see also* Rodney Kingsnorth et al., *Criminal Sentencing and the Court Probation Office: The Myth of Individualized Justice Revisited*, 20 JUST. SYS. J. 255, 269 (1999) (arguing against the "myth of individualized justice"). In theory, court-appointed probation officers were supposed to make individualized recommendations to judges to help individualize sentences. *Id.* at 271 (referring to the initial role of probation officers as that of "agent of individualization"). In practice, however, probation officers tend to function as agents of the state and are often harsher than prosecutors. *Id.* at 268 (studying one jurisdiction and finding that when probationers disagree with the negotiated plea it is "almost three times more likely to be in a punitive rather than in a lenient direction"). In some jurisdictions, however, the function of a probation office does not remotely approximate even this level of individual review. In Georgia, for example, probation offices have been privatized and "act essentially as collection agencies." *Profiting From the Poor: A Report on Predatory Probation Companies in Georgia*, THE LAW OFFICE OF THE SOUTHERN CENTER FOR HUMAN RIGHTS, (July 2008) 1, 2, http://www.schr.org/files/profit_from_poor.pdf.

[266] *See* ROTHMAN, *supra* note 230, at 108-10 (noting that from early on, judges have applied probation in a rote, one-size-fits-all manner rather than in the individualized manner that reformers had advocated for).

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in determining what the probation conditions will be for any given offense – e.g., plea agreements typically contain prosecutorial recommendations regarding probation.[267] In most jurisdictions, judges will be all too willing to impose the recommended sentence.[268] That recommendation will rarely be rigorously individualized.[269] Courts tend to impose conditions that are determined by nature of the charges.[270] For someone convicted of a minor drug and theft offense, like the hypothetical defendant from the introduction, probation conditions may include paying restitution, drug treatment, and drug testing conditions.[271] A judge is very unlikely to probe the life circumstances impelling such a defendant to commit criminal acts and tailor treatment accordingly. Even if she were inclined to do so, there is an incredible scarcity of rehabilitation resources available for criminal defendants – particularly when one considers the complex socio-economic factors that produce the poverty that besets those who are caught up in the criminal justice system.

In addition to net widening, probation also contributes to net strengthening – i.e., it keeps people "in the system" for longer.[272] Probation revocations account for a substantial portion of admissions to jail and prison.[273] For many, probation is less an alternative to incarceration and more just a deferral of incarceration. There are almost certainly large numbers of individuals who spend more time detained for probation violations than they would have had they simply received a fixed term jail sentence upon conviction.[274]

There are two reasons why any given individual might spend more time in the criminal justice web as a result of probation. First, to the extent that probation is in lieu of a jail sentence, the jail sentence remains "suspended."[275] A judge may impose any portion of that suspended sentence upon finding that a probationer has violated the terms of his probation.[276] The judge is free to re-impose the probation conditions upon the individual's release – and, of course, whatever balance of the suspended sentence remains will continue to hang over his head.[277]

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[267] This dynamic has existed from the earliest moments in probation's history. *See id.* at 78.

[268] *See* Russell Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1267 (2008).

[269] *See id.*

[270] COHEN Volume 1, *supra* note 21, § 10:7; *see also* Moser, *supra* note 121, at 1101 (describing practice in Florida); Maine Report, *supra* note 227, at 22 (describing practice in Maine).

[271] COHEN Volume 1, *supra* note 21, §§ 1.1, 13.3.

[272] *See* Horwitz, *supra* note 125, at 765-66 (explaining how probationers who violate conditions of probation are often incarcerated for long periods of time).

[273] *Supra* notes 229-230.

[274] Horwitz, *supra* note 125, at 765-66. It is extraordinarily difficult to say precisely how many individuals. *Infra* note 277.

[275] *See supra* notes 78-83 and discussion.

[276] *Id.*

[277] It is difficult to make accurate quantitative claims about the frequency of jail admissions for probation revocations because institutions are not always consistent in how they record data. *See* VERA INSTITUTE OF JUSTICE, LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT: FINAL REPORT: REVISED 111 (Sept. 2011) i, xxiv. http://www.vera.org/sites/default/files/resources/downloads/LA_County_Jail_Overcrowding_Reduction_Report.pdf (discussing the difficulty in analyzing non-felony booking because of the lack of accurate and available data). An admission precipitated by probation violation might be recorded as such. *Id.* Alternatively, it might be recorded as an admission for the underlying criminal case in which probation was imposed. *Id.* If the latter occurs with regularity in a particular system, jail admissions precipitated by probation violations will be greatly understated. *Id.*

https://scholarship.law.upenn.edu/jlasc/vol17/iss2/4

Returning to the hypothetical defendant from the Introduction, he is likely to be subject to both periodic drug testing and treatment conditions.[278] Assume that each of his misdemeanor crimes is punishable by a maximum of one-year in jail. Further assume that, if forced to impose detention upon sentencing (with no probation), a judge *would have* sentenced the defendant to one month in jail.[279] Now assume, in lieu of detention, the judge imposed one year of probation with a one-year suspended sentence. Each time the defendant violates a probation condition, a judge can impose any portion of that one-year suspended sentence. If a judge takes probation violations very seriously or there are a number of violations, one could readily imagine the defendant spending more than a month in detention during the period that the court has jurisdiction over him. If the court does not credit the defendant's time in jail towards the probationary term and, upon the defendant's release, re-imposes whatever balance of the probationary term remains, the defendant will certainly remain "in the system" for longer than one year.

The second reason probationers are likely to get stuck in the penal net for longer is because they are more vulnerable to new convictions than they otherwise would be.[280] Virtually all probation orders include a condition not to commit any "new criminal law violations" (NCLV).[281] The limited procedural protection afforded in revocation proceedings amplifies prosecutorial leverage to obtain new convictions when the proposed revocation is based on violation of an NCLV condition.[282] Prosecutors have three choices regarding a probationer they believe has committed a new criminal law violation: move for revocation, move for contempt, or file a new criminal charge. Obtaining a conviction for criminal contempt may preclude conviction for the underlying crime on double jeopardy grounds.[283] Probation revocation, however, does not have the same preclusive effect.[284] Accordingly, there is powerful incentive for states to both move for revocation and file new criminal charges.

Moving for revocation increases that state's strategic leverage in plea negotiations for the new criminal charge because proving a probation violation is easier than proving guilt in a criminal trial – i.e., the state would agree to withdraw the revocation motion in exchange for a plea of guilty on the new criminal charge.[285] For example, returning to our hypothetical defendant: while on probation, assume that he is arrested for engaging in a new theft. The

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[278] *See supra* notes 20-22, 79, 271 and discussion.

[279] The example is for purely illustrative purposes. The underlying intuition behind the example is simply that a judge in a crowded urban or suburban court is very unlikely to impose the statutory maximum for a relatively minor crime. Rather, she is likely to impose a relatively lenient sentence. FEELEY, *supra* note 128, at 3 (noting that low-level courts tend toward leniency).

[280] The relationship between probation and plea bargaining is a longstanding one. *See* ROTHMAN, *supra* note 241, at 98-101 (noting that from the early twentieth century, probation has been a tool to induce pleas, not to provide individualized treatment).

[281] *See* COHEN Volume 1, *supra* note 21, § 8:1; *see also* TONY FABELO, CRIMINAL JUSTICE POLICY COUNCIL, TRENDS, PROFILE AND POLICY ISSUES RELATED TO FELONY PROBATION REVOCATIONS IN TEXAS, (May 2002) i (59% of felony probation revocations in Texas during the period under study were for new criminal law violations) http://www.lbb.state.tx.us/Public_Safety_Criminal_Justice/Reports/felpro2.pdf.

[282] *See* Horwitz, *supra* note 125, at 766-71.

[283] *See* United States v. Dixon, 509 U.S. 688, 697-99 (plurality opinion).

[284] Horwitz, *supra* note 125, at 783-84.

[285] *See id.* at 784-85; *see also* Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 435 (2011) (arguing that the *de facto* standard of proof in criminal cases is lower than "beyond a reasonable doubt" for repeat offenders).

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prosecutor is now well-positioned to extract a plea on the new theft charge, even if the case is factually weak. The prosecutor will threaten to move for revocation based on the NCLV condition if the defendant does not plead guilty to the new charge. Because the procedural hurdles are lower for probation revocation than for a new criminal conviction, the defendant will plead more readily. The sentence for the new theft charge is likely to include a new term of probation.

The "revolving door" phenomenon in criminal justice may be less about criminals' pathology than just a predictable consequence of net widening and strengthening. Any population subject to intensive policing/prosecution will regularly move between supervised release and incarceration over time. Of course, it is the poor and urban minorities that are subject to the most intensive forms of policing.[286]

2. "Problem-Solving Courts"

For many, "problem-solving courts" represent an innovative method of leveraging courts' coercive power to induce behavioral change. The approach is roughly analogous to probation. Accordingly, one ought to view problem-solving courts skeptically.[287]

The history of problem-solving courts mirrors that of probation. Pioneered in the late 1980s, judges have led the problem-solving court movement.[288] Much as with probation's early history, deterrence and docket management concerns have impelled the movement.[289] In theory – and again, much like probation – problem-solving courts use a "therapeutic model" to rehabilitate offenders.[290] They are open to those offenders the court deems most amenable to rehabilitation. Such courts have been created to address any number of "problem populations,"[291] but drug courts are the most common.[292] Admission may require a plea of guilt, or the functional equivalent.[293] In exchange for remaining out of jail, participants are required to comply with various conditions, most significantly those relating to treatment.[294]

The most significant difference between probation and problem solving courts is that, in the latter, judges play an active role administering therapeutic conditions.[295] Participants must

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[286] *See* Nirej Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1173-74 (2011).

[287] More than twenty years ago, Stanley Cohen warned of the net-widening and net-strengthening implications of new, ostensibly rehabilitative, criminal justice institutions. *See* COHEN, *supra* note 141, at 44, 49. For more general, recent criticism of problem-solving courts, *see* Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*. 100 GEO. L.J. 1587, 1591 (2012); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786 (2008).

[288] *See* McLeod, *supra* note 287, at 1605.

[289] *Id.* at 422-23; *see also* Rekha Mirchandani, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 LAW & SOC. INQUIRY 853, 855 (2008).

[290] *See* Eric Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009).

[291] *See* Mirchandani, *supra* note 289, at 853-54 (describing types of social problems).

[292] Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts And the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1477 (2004).

[293] *See id.* at 1482. Criteria usually pertain to the individual's criminal history and the nature of the charged offense. *See id* at 1481.

[294] *Id* at 1482.

[295] *Id.* at 1462 (discussing "problem-solving courts" such as drug courts, in which the judge plays a role in treating participants).

regularly appear in court and report on their progress.[296] Those proceedings are not adversarial. Typically, hearings are "collaborative:" judges, prosecutors, social workers, and defense counsel are supposed to work together to ensure compliance.[297] While judges have considerable discretion to oust participants and impose jail time, they are only supposed to do so when it is clear that a participant is not amenable to rehabilitation.[298] Drug courts, for example, are supposed to tolerate the occasional relapse.[299] That problem-solving courts are cut of the same philosophical cloth as probation,[300] might explain why they have proliferated so quickly.[301] The movement finds considerable support across the political spectrum and has been heralded as an important part of the solution to mass incarceration.[302]

The problem-solving courts' limitations are similar to probation's. For example, the defendants who are most readily offered admission to drug courts are those with no prior criminal records who have been arrested for relatively minor drug crimes.[303] These are the same kind of minor cases that, in crowded jurisdictions, might not have been seriously pursued at all. For those defendants who have serious addiction issues, being admitted to drug court may very well extend the time that they remain "in the system." Data for New York City courts suggest the extent to which such individuals fail to satisfy the conditions imposed upon them by drug courts.[304] Such failures often garner longer spells of detention than would likely have been imposed if fixed term detention were imposed in the first instance.[305]

In some problem-solving courts, family law and criminal law quite literally intersect. For example, in 2001, New York created Integrated Domestic Violence (IDV) courts that roll criminal and family court functions into one.[306] IDV courts are supposed to efficiently manage the issues that beset families where domestic violence has occurred. Part of what "efficient management" entails is more intensive and consistent monitoring of offenders – i.e., avoiding the conflicts and gaps created by a piecemeal approach.[307] IDV courts are built on a model of punitive injunction that has long-defined pre-trial release in domestic violence cases.

Courts typically enjoy discretion to impose conditions upon defendants released from

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[296] *See* John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L. REV. 97, 104, 113 n.67 (2007).

[297] The "collaboration" begins to look less therapeutic if any individual consistently fails to satisfy the conditions of release.

[298] *See* Casey, *supra* note 292, at 1482.

[299] *See id.*

[300] *See* Bozza, *supra* note 296, at 104, 140 (noting probation departments are similar to and capable of functioning like problem-solving courts); Casey, *supra* note 292, at 1480 (identifying reasons for proliferation of drug courts).

[301] *See supra* notes 255, 263 and accompanying text.

[302] *See* Miller, *supra* note 290, at 428 (discussing drug courts). Miller suggests that this may be because supporting drug courts allow policy-makers to present themselves as supporting reform without requiring an "explicit discussion" of the class and race consequences of narcotics enforcement. *Id.*

[303] *See* Bowers, *supra* note 287, at 798.

[304] *Id.* at 786.

[305] *Id.*

[306] *See* Integrated Domestic Violence Courts Overview, NYCOURTS.GOV, http://www.nycourts.gov/courts/problem_solving/idv/home.shtml (last visited Feb 1, 2014).

[307] *See* Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 38-39 (2005).

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custody pending trial.[308] Those conditions bear considerable similarity to those courts might impose as part of probation.[309] For example, no-contact orders (NCOs) are stock pre-trial conditions of release in domestic violence cases.[310] Typically, NCOs forbid any contact whatsoever with the alleged victim and also forbid presence in a shared dwelling.[311] NCOs are premised on the assumption that an alleged batterer's presence in the home creates a high risk of DV assault.[312] Once established that the defendant is a member of a disobedient population ("batterers"),[313] behavior that would "ordinarily [be] innocent" is taken as the prelude to violence.[314] Most jurisdictions criminalize the violation of NCOs – i.e., should a defendant violate an NCO, the state could file a new criminal law charge or move for contempt.[315] Demonstrating presence in a shared dwelling (in violation of NCO) is, of course, easier than proving assault, particularly if the alleged victim elects no to cooperate with the prosecution.[316] The NCO, in other words, makes it easier to obtain a conviction of alleged batterers than would otherwise be possible.

This style of punitive injunction has proliferated to other mass justice courts, principally family courts. While initially justified as a technique for managing sexist violence in romantic relationships,[317] courts began applying NCOs in cases involving other intimate relationships – e.g., parent-child relationships.[318] Now, criminal and family courts routinely issue NCOs against parents in child neglect cases.[319] The irony, of course, is that, in this context, NCOs are typically issued *against* women, not *for* their protection.[320]

C. Taming Workers

"Labor injunctions" in the late nineteenth century were a historical precursor of the contemporary punitive injunctions discussed above. Labor injunctions dramatically expanded the ancient equity power of the private injunction. Courts used labor injunctions in tandem with indirect contempt sanctions to intervene frequently and aggressively in labor disputes.[321] Net

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[308] *See* 8A AM. JUR. 2D *Bail and Recognizance* § 92 (2013).

[309] *See id.* § 48.

[310] *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 16 (2006) (arguing that use of NCOs in misdemeanor DV cases has shifted the political and social meaning of the home). This should not be confused with a civil NCO obtained by the putative victim herself. *See* David M. Zlotnick, *Empowering the Battered Woman, The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1190-97 (1995) (arguing in favor of victim-initiated civil NCOs backed by contempt as opposed to police-initiated criminal action).

[311] *See* Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 946-47 (1999).

[312] *See* Suk, *supra* note 310, at 19-21.

[313] *See id.* at 20.

[314] *See id.* at 22.

[315] *See id.* at 16-17; *see also supra* notes 280-285 and accompanying text.

[316] Complaining witnesses often refuse to cooperate with the prosecution in DV cases. *See id* at 19.

[317] *See* David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact On Parent Defendants*, 85 IND. L.J. 1445, 1457, 1461 (2010).

[318] *See id.* at 1447; Mahoney, *supra* note 181, at 836 (noting that custody order is an injunction).

[319] *See* Jaros, *supra* note 317, at 1457-58 (detailing practice in New York State).

[320] *See id* at 1457.

[321] *See* WILLIAM E. FORBATH, LAW & THE SHAPING OF THE AMERICAN LABOR MOVEMENT 60-62 (1991).

widening was the labor injunction's express purpose.[322] Prevailing biases about the unruly, working classes impelled punitive injunction's development in the labor context.[323] Critics called the new practice "government by injunction."[324]

The emergence of large-scale labor organizing and protest in the late nineteenth century made criminal convictions an unlikely device for social control. Prior to labor injunction's advent, states had prosecuted union leaders and members as criminal co-conspirators.[325] Such cases were episodic and decidedly local in nature, much like the labor movement itself was during the early nineteenth century.[326] Following the civil war, there was a dramatic expansion of industrial and commercial enterprise in the United States. The same period also witnessed the intensive concentration of industrial capital. Goliath enterprises came to dominate entire industries. These entities were not specific to particular cities or even states. There was corresponding growth in unionization during the, so-called, Gilded Age.[327] Workers' organizations not only grew, they collaborated with one another in challenging large-scale enterprise.[328] The famous Pullman strike is a good example. Employees of the Pullman Palace Car Company, based in the company town of Pullman, Illinois, went on strike over wage cuts.[329] Some 3100 Pullman workers went on strike.[330] The company refused to negotiate.[331] The Pullman strikers then appealed to the American Railway Union (ARU). It, in turn, agreed to commence a "sympathy strike."[332] ARU workers refused to inspect, switch, or haul Pullman cars on *any* railroad line.[333]

Historically, equity courts had used injunctions sparingly, to abate private nuisances that threatened irreparable harm to tangible property.[334] Somewhat implausibly, nineteenth century courts seized upon this limited power to "regulate[] the clash of conduct in modern industry" under the guise of containing "public nuisances," a new concept.[335] In so doing, courts dramatically expanded the notion of "property" which injunctions could protect and the number of persons to whom a single injunction could apply. "Property" came to encompass anything of value, including prospective but unrealized business transactions.[336] The injunctions that

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322 *See* In re Debs, 158 U.S. 564, 582, 594 (upholding courts' power to enjoin Pullman strikes and hold violators in contempt).

323 *See* FORBATH, *supra* note 321, at 63, 83, 95.

324 FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 1 (1930).

325 *See,* ARCHIBALD COX et al., LABOR LAW 7 (15 ed. 2011); FORBATH, *supra* note 321, at 59-61 (noting that state court cases for criminal conspiracy were a rarity compared to labor injunctions).

326 *See* COX, *supra* note 325, at 7, 15-17.

327 *See id.* This history is well recounted in numerous other sources. *See, e.g.,* FORBATH, *supra* note 321; DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 5 (1987); ELIAS LIEBERMAN, UNIONS BEFORE THE BAR 30 (1950); FRANKFURTER & GREENE, *supra* note 324, at 131; EDWARD BERMAN, LABOR AND THE SHERMAN ACT (1930).

328 *See* FORBATH, *supra* note 321, at 63.

329 *See* LIEBERMAN, *supra* note 327, at 30-32.

330 *See id.* at 32.

331 *See* FORBATH, *supra* note 321, at 74.

332 *See id.*

333 *See* LIEBERMAN, *supra* note 327, at 32-33. The strike impacted mail delivery, which then precipitated federal involvement. *Id* at 33.

334 FRANKFURTER & GREENE, *supra* note 324, at 47.

335 *Id.* at 20, 24.

336 *See* FORBATH, *supra* note 321, at 85.

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protected such property could bind thousands of workers.[337] Federal courts first used such injunctions in the 1870s,[338] but it was the passage of the Sherman Act in 1890 that fanned the practice.[339]

Although we remember the Sherman Act as a salvo against monopoly capital, in its first several decades, nearly 20% of the cases brought under the Act were brought against labor unions and their members.[340] Despite Congress' intentions,[341] judges seized upon the Act's general language prohibiting "every contract [or] combination in the form of trust or otherwise . . . in restraint of trade or commerce."[342] This language provided a ready vehicle for a largely republican federal bench[343] to check increases in trade union membership and activism between 1890 and 1929.[344] Although the Sherman Act itself did not expressly authorize the use of broad labor injunctions, the Supreme Court approved the technique in 1895.[345]

The labor injunction was a calculated net-widening tactic.[346] The scale of worker protest coupled with local juries' sympathies limited criminal prosecutions' effectiveness. Because labor injunctions were civil suits in equity, judges rather than juries acted as the finders of fact in contempt cases. The communities from which jurors were drawn often sympathized with workers.[347] For example, of the criminal cases that arose from a Chicago garment strike in 1924 and went to jury trial, 0.2% resulted in convictions.[348] In contrast, of the cases in equity for labor injunction violations, 99% resulted in decisions against the worker.[349]

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[337] *See id.* at 83-84; FRANKFURTER & GREENE, *supra* note 324, at 86, 123, 126; *see also* In re Debs, 158 U.S. 564, 597 (1895) (reasoning that if courts have the power to enjoin one person from engaging in particular conduct, that power must extend to enjoining more than one person from engaging in the same conduct).

[338] Labor injunctions evolved from federal decrees entered by courts to manage labor disputes involving bankrupt railroads that were in federal receivership. *See* FORBATH, *supra* note 321, at 66-67.

[339] Passage of the Norris LaGuardia Act in 1932 curtailed the practice. COX, *supra* note 325, at 27.

[340] *See* BERMAN, *supra* note 327, at 4 (summarizing cases brought during the period from the Act's passage in 1890 until 1930). Nearly all of the cases during the Act's first seven years were brought against labor unions. *Id.* While some injunctions were obtained under state law, *see, e.g.*, Vegelahn v. Guntner, 44 N.E. 1077 (1896), the Sherman Act became the primary vehicle for obtaining labor injunctions.

[341] *See* BERMAN, *supra* note 327, at 51-53 (concluding from Congressional debates that Congress did not intend the Sherman Act to apply to labor organizations).

[342] COX, *supra* note 325, at 18 (quoting the Sherman Act) (internal quotations omitted).

[343] *See, e.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911) ("[I]t is the duty of government to protect the one against the many, as well as the many against the one."); *see also* FORBATH, *supra* note 321, at 63.

[344] *See* MONTGOMERY, *supra* note 327, at 258, 289, 332 (noting relationship between economic climate, trade unionism, and strikes).

[345] The Sherman Act was first invoked in 1893 in support of a labor injunction. *See* FORBATH, *supra* note 321, at 71. The Court approved of the practice in *In re* Debs in 1895. 158 U.S. 564, 594, 599 (1895); *see also* Deitrich Loewe v. Martin Lawlor, 208 U.S. 274, 302 (1908) (citing United States v. Workingmen's Amalgamated Council, 54 F. 994 (1893), which concluded that Congress intended for the Sherman Act to apply to organized labor).

[346] *See* FORBATH, *supra* note 321, at 95 (noting that the courts frequently pointed to the inability of traditional criminal prosecutions to "deter such vast conspiracies"). The Sherman Act actually contained criminal provisions and, of course, state criminal laws forbidding conspiracy also remained on the books.

[347] *See* FORBATH, *supra* note 321, at 101.

[348] *See id.* (two convictions out of roughly 900 prosecutions).

[349] *See id.* (255 convictions out of 258 cases, most of which were for engaging in peaceful protest).

Labor injunctions covered wide swathes of conduct, a good bit of which was independently punishable as crime.[350] For instance, the injunction in *In re Debs*,[351] prohibited railroad workers "from in any way or manner interfering with, hindering, obstructing, or stopping any of the business" of certain named railroads.[352] The general prohibition was accompanied by several very specific ones – e.g., it forbade workers from "injuring or destroying any part of the tracks, roadbed, or road" and "interfering with . . . signals or switches."[353] This combination of breadth and specificity was typical.[354]

The conduct rules in labor injunctions often extended to whole communities. The injunction at issue in *Debs* is, again, illustrative. It applied to "all persons combining and conspiring with [the named defendants], and *all other persons whomsoever*."[355] Courts drafted labor injunctions so as to bind large numbers of workers regardless of whether they were parties to the case or not. The breadth of these injunctions created correspondingly broad arrest authority. For example, in 1917, during the first two weeks of a ladies garment workers' strike, police arrested 1,000 workers for violating court orders.[356] This was not unusual.[357] Because conduct rules in the injunctions were often expressed in sweeping terms, judges had ample room to sanction.[358] Although convictions were rare in comparison to arrests, judges had considerable discretion to impose fines and jail time for injunction violations.[359]

The labor injunction's advent was, in substantial measure, a function of the anxieties of the Protestant middle-class (who constituted the ranks of federal judges) about the working classes.[360] Employers were quick to use unlawful violence against workers – the private security employers used to break up strikes often carried labor injunctions in hand when going about their brutal strike-busting.[361] Notwithstanding, it was rare for courts to enjoin employer violence.[362] This speaks to the profoundly skewed ways in which judges and the public viewed striking workers. Judges readily imagined workers as predisposed to disobedience.[363]

Workers' proclivity for disobedience was imagined in two registers. First, thick ribbons of socialist sentiment ran through trade unionism.[364] The antagonism towards laissez-faire capitalism expressed by mass organizations like the Knights of Labor and Industrial Workers of

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[350] FRANKFURTER & GREENE, *supra* note 324, at 105.

[351] *Id*. at 18-19.

[352] *In re* Debs, 158 U.S. at 570.

[353] *Id.* at 571.

[354] *Id.*

[355] In re Debs, 158 U.S. at 570 (italics added). The injunction in *Gompers* contained very similarly language. *See* 221 U.S. at 452 fn. *. Most labor injunctions did. *See* FRANKFURTER & GREENE, *supra* note 324, at 88-89.

[356] *See* FORBATH, *supra* note 321, at 107.

[357] *See id.* at 108.

[358] FRANKFURTER & GREENE, *supra* note 324, at 113 (union sympathizer held in contempt of a labor injunction for using the word "scab").

[359] *See* FORBATH, *supra* note 321, at 107; FRANKFURTER & GREENE, *supra* note 324, at 58.

[360] *See* FORBATH, *supra* note 321, at 30 n.58, 63, 83, 94.

[361] *See* COX, *supra* note 325, at 18; FORBATH, *supra* note 321, at 111.

[362] FORBATH, *supra* note 321, at 118.

[363] *See id.* at 126-27.

[364] *See id* at 12-13.

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the World was particularly worrisome to employers and the federal judiciary.[365] "Sympathy strikes" and "secondary boycotts" in particular, inspired deep judicial anxiety about economic aggregation and worker radicalism.[366] Such protests could galvanize entire working class communities.[367] Judges did not hesitate to unleash vitriol against worker radicalism in their opinions.[368] This was a view that media outlets were also happy to propagate along with anti-foreign invective.[369]

Second, in many industries and especially at the lowest rungs, non-Anglo-Saxon immigrants from southern and eastern Europe dominated labor.[370] Their arrival inspired broad anxiety among middle-class whites.[371] There was also widespread animosity toward these immigrants' inability to assimilate given their non-Anglo cultural practices.[372] A late nineteenth-century patrician would have been surprised to hear that these newcomers' children would be perceived as full-fledged white Americans in the course of one or two generations.[373] That process of white racialization, however, was far from complete by the close of the nineteenth century. Notwithstanding, trade unionists and immigrants had secured allies in Congress.[374] Thus, it was left to courts to control the decidedly, non-American rabble clamoring for a socialist state.[375]

At first glance, the Supreme Court's decision in *Gompers* appears to have restrained courts' power to use labor injunctions.[376] But, as suggested in Section I.B, *Gompers* left courts considerable discretion to impose and enforce such injunctions.[377] Accordingly, courts continued

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365 *See id.* at 12-13, 48-49; *see also* MONTGOMERY, *supra* note 327, at 312-13 (the historical overlap with the Russian Revolution in 1917 amplified employer hostility to unions).

366 FORBATH, *supra* note 321, at 60, 60 n. 2. "Sympathy strikes" were boycotts organized to show solidarity with workers protesting some other company. *Id.* at 60 n.3. In a "secondary boycott" unions urged their members and the public not to purchase the products of companies that did business with the targeted employer. *Id.*

367 In re Debs, 158 U.S. at 581-82. The Supreme Court saw this as a serious dilemma: "If all the inhabitants of a state, or even a great body of them, should combine to obstruct interstate commerce . . . prosecutions for such offenses had in such a community would be doomed in advance to failure." *Id.*

368 FORBATH, *supra* note 321, at 33, 63-64.

369 *See* TROY RONDINONE, THE GREAT INDUSTRIAL WAR, FRAMING CLASS CONFLICT IN THE MEDIA 1965-1950 88, 100-01, 123 (2010); Christopher R. Martin, *The News Media and Strikes*, in THE ENCYCLOPEDIA OF STRIKES IN AMERICAN HISTORY, 44-45 (Aaron Brenner et al. eds. 2009).

370 *See* RAFTER, *supra* note 31, at 127.

371 *Id.*

372 *See id.*

373 *See generally* DAVID R. ROEDIGER, WORKING TOWARD WHITENESS 27-34 (2005) (arguing that the constructing the notion of "ethnicity" allowed southern and eastern European immigrants to become "white" over time); *see also* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 103 (1995) (suggesting that unions in 19th century aided in "assimilating the Irish into white America).

374 Those allies would ultimately succeed in enacting the Norris-LaGuardia Act, which significantly curtailed federal labor injunctions. *See* FORBATH, *supra* note 321, at 158-66.

375 Media depictions were unvarnished in their negative representations of immigrants and their revolutionary predilections. *See* RONDINONE, *supra* note 369, at 123.

376 221 U.S. at 419-20. The American Federation of Labor's leadership challenged orders of contempt entered against them for violating a labor injunction. *Id.* The AFL had disobeyed an injunction prohibiting a secondary boycott. *Id.* at 441.

377 *Id.* (explaining that "character and purpose" of punishment determine whether it is civil or criminal).

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to aggressively use them to manage worker protest up until the passage of the Norris-LaGuardia Act in 1932, which curtailed the practice.[378]

D. Coda: Government By Injunction

Punitive injunctions represent "government by injunction" in each of the contexts that have been discussed. They are a technique of discipline and social control that deviates from our traditional understanding of what courts are supposed to do.[379] Alternatively, they might reveal the extent to which our traditional understanding of the judicial function is highly idealized. Courts have long-wielded powers that have a despotic air: "government by injunction" may just be a question of quantity rather than quality.

Our idealized account of courts centers on the "power to decide."[380] This is the limited power to authoritatively resolve individual disputes pursuant to private or public law with the goal of achieving individualized justice.[381] Courts are emblems of democratic equality in this regard: all those appearing before a court are equals.[382] The ideal conception assumes a system of legislative governance. A legislature should have, *a priori*, defined conduct of the sort alleged by the plaintiff to be wrongful. It also should have specified whether wrongful conduct is subject to civil or criminal process. The values of notice and evenhandedness are particularly important in the criminal context because, on average, our system takes deprivations of liberty more seriously than deprivations of property. Procedural rules reflect that judgment, providing greater protections in criminal than in civil cases.

Punitive injunctions do not conform to this ideal. The discussion of labor injunctions above, in part, sought to illustrate punitive injunctions' vintage. In truth, the vintage may be even more ancient. Contempt has been described as an "inherent power" of courts.[383] The same has been said of the power to suspend a criminal sentence and impose conditions.[384] An inherent

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[378] *See* FORBATH, *supra* note 321, at 143, 158-66.

[379] In using the expression "power to discipline," I take a page from Michel Foucault. *See* FOUCAULT, *supra* note 232. But it really is only a page. Foucault looked closely at the point of power's application to the body. *Id.* at 128. His understanding of power cannot be reduced to an account of a single institution. *Id.* at 131. The brand of judicial power that I am concerned with would likely be a "minor process," *id.* at 138-39, or "technology of power" in Foucault's terms. *Id.* at 131. I also assume that dominant norms can pre-exist power's exercise. In contrast, Foucault suggests that the relation between dominant norms and disciplinary power is non-linear and mutually constitutive. *Id.* 183-84.

[380] *See ex rel. Louis Vuitton*, 481 U.S. at 816.

[381] *See* Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 43 (1983) (quoting Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 755-56 (1982)) ("[T]he interpretation of the judge is uniquely authoritative [because] judicial interpretation is authoritative in the sense that it legitimates the use of force against those who refuse to accept or give effect to the meaning embodied in that interpretation [and] individual has a moral duty to obey the judicial interpretation. . . [because] the judge is part of an authority structure that is good to preserve.").

[382] *See* Judith Resnik, *Fairness In Numbers: A Comment on* AT&T v. Conception*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 91 (2011) (contending that the "egalitarian exchanges of mutual recognition [in court] make adjudication itself a democratic practice").

[383] *See, e.g., Gompers*, 221 U.S. 440-44. One might think that in a constitutional democracy an inherent power was simply an enumerated one. That, however, is not the case for the contempt power. There is no mention of it in the Constitution. *See Young*, 481 U.S. at 816 (per Article III, "[t]he judicial power is the power to decide" and nothing else) (Scalia, J., concurring).

[384] *See, e.g.,* Recent Case, *Criminal Law – Suspended Sentence – Necessity of Jury Trial to Determine Violation of Condition Only*, 40 HARV. L. REV. 133, 133 (1926); *but see* Ex Parte U.S., 242 U.S. 27 (1933) (concluding

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power is one that need not be enumerated in a Constitution or statute – it simply is what a court *is.*

Punitive injunctions are redolent of monarchical absolutism. The power to discipline hails from courts' unmediated authority to sanction a subject population. The goal was not individualized justice, but rather to preserve the sovereign's dignity. Of that point, the history of "direct contempt" is illustrative.[385] At English common law, direct contempt was considered an affront to the King and could be punished summarily.[386] Because courts were an extension of monarchical prerogative and because the King had a monopoly on state violence, courts had unmediated power to punish direct contempt: the judge, at the King's behest, could send the contemnor straight to jail.[387] To this day, the conduct rules enforced through direct contempt need not be codified in advance of a court's sanction. Those appearing in court must perform rites of respect that are not codified – e.g., standing when the judge enters or exits, using appropriate honorifics, and heeding the judge's instructions. Direct contempt's emphasis on "obedience, cooperation, and respect" reflect monarchical sovereignty's deep etching.[388]

These "inherent powers" are a species of what Markus Dubber has called "police power."[389] Police power is antithetical to legislative governance.[390] In a careful historical survey, Dubber describes the police power as the sovereign power to manage a "household" and those in it.[391] "Households" encompass a range of social organizations from a literal household to entire countries. For example, Dubber describes how in monarchical England, society was organized as a series of hierarchical households with the King as the ultimate householder.[392] Household members were subjects, not citizens.[393] Chief among the police power was the householders' unmediated power to discipline subordinates.[394] In monarchical England, that power included the discretion to physically beat subordinates.[395] And courts were extensions of the sovereign. While our expectation of courts has evolved considerably, their monarchical lineage is still discernible.

III. RESTRAINING PUNITIVE INJUNCTIONS

Legislatures should greatly curtail mass justice courts' use of punitive injunctions.

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that courts do not have inherent power to suspend sentence and impose conditions). Most jurisdictions, however, enacted probation statutes to fill the gap left by the *Ex Parte U.S.* decision. *See*, Logan, *supra* note 34, at 175-76.

385 GOLDFARB, *supra* note 55, at 50-52, 68-79 (Direct contempt is an "aggressive offense[] . . . aimed at the court itself."). Today, the power to sanction for direct contempt is often codified, although the rules, characteristically, leave much to judicial discretion. *See, e.g.,* FED. R. CRIM. P. 42(b) (allowing summary punishment of contempt where committed in judge's presence and "if the judge saw or heard the contemptuous conduct and so certifies").

386 *Id.* at 12.

387 *See* GOLDFARB, *supra* note 55, at 12.

388 *See* GOLDFARB, *supra* note 55, at 11.

389 *See generally* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005) (discussing the origins of the police power).

390 *See id.* at 3, 82 (referring to such governance as legal).

391 *See id.* at 3-8.

392 *See id.* at 16.

393 *See id.* at 49-50.

394 *See id.* at 31, 40.

395 A prerogative that found particularly pitched, racist expression in the South. *See id.* at 31-32, 61-62. Markus Dubber has provided a thorough account of the police power's export to the United States and its deeply fraught relationship with republican ideals of popular governance. *See id.* at 81-93.

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Eliminating, or least significantly curtailing, the power will make for more effective reform than imposing additional procedural safeguards will. If reform were limited to just the latter, punitive injunctions could be even further entrenched as a tool for containing the poor and socially marginal. Procedural protections – particularly constitutionally mandated ones – create the symbolic air of individualized justice. That appearance of justice, however, may very well contribute to the further obfuscation of punitive injunctions' undemocratic consequences. This outcome, I fear, could be true *even if* the Court concluded that there is a constitutional right to appointed counsel for individuals like Mr. Turner.

Turner illustrates why additional procedural protections are unlikely to make very much difference in cases like Mr. Turner's. Like *Gompers* one hundred years before it, *Turner* introduces procedural restraints that are easily manipulated by lower courts. *Turner* held that, as a matter of due process, family court judges must make an express finding that an alleged contemnor is able to pay before failing to jail him for having failed to actually do so.[396] The *Turner* Court emphasized "the need for accuracy" in order to minimize the "risk of wrongful incarceration,"[397] echoing the familiar due-process balancing framework established in *Mathews v. Eldridge*.[398] It would have been easy enough for the family court judge to put the words, "I find Mr. Turner able to pay" on the record. Post-*Turner*, a family court judge who is unsure of whether an individual can pay will have as much latitude to see what (if anything) incarceration will shake out of him. As with *Gompers* one hundred years before, *Turner* formalizes the practice that it purports to restrain.[399]

One could plausibly argue that the Court simply got the balance wrong here – i.e., that due process should require provision of free counsel or some other more stringent procedural protection.[400] While requiring free counsel would have been a better result than what the Court actually decided in *Turner*, how much difference it would make is a real question. Defense attorneys in mass justice contexts are not able to provide the kind of rigorous, individualized advocacy that our idealized notions of judicial process might have us believe.[401] Defense counsel might end up playing a role in facilitating quicker, more cursory process in mass justice contexts.[402] Accordingly, we should be skeptical of procedural fixes that are unaccompanied by systematic re-thinking about how particular judicial institutions exercise power.

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[396] Turner v. Rogers, 131 S.Ct. 2507, 2512 (2011).

[397] *Id.* at 2518.

[398] *See id.* at 2517. Any number of commentators have criticized the fundamental premise of interest balancing. *See, e.g.,* Resnik, *supra* note 382, at 158-59 (citing Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46 (1976) (*Mathews* purports to convert issues constitutional values into a technocratic, empirical question.). The Court does not purport to answer the *Mathews* factors with empirical certainty. Rather, it simply answers the questions with impressionistic conclusions. *See, e.g., Turner*, 131 S.Ct. at 2519 ("[T]here is available a set of 'substitute procedural safeguards,' which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty.") (internal citation omitted); Mashaw, *supra* note 398, at 39.

[399] *Supra* notes 376-377 (discussing *Gompers*).

[400] *See* Resnik, *supra* note 382, at 158-60.

[401] *See, e.g.,* Roberts, *supra* note 15, at 288-89; FEELEY, *supra* note 128, at 81, 82, 86-90 (describing public defenders' high case loads, lack of resources and their tendency to "burn out").

[402] *See, e.g.,* FEELEY, *supra* note 128, at 189-92 (describing defense counsel's role in plea negotiations); *but see id.* at 60 (presence of counsel "eliminates more gross displays of arbitrariness and favoritism").

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A. Enjoining Punitive Injunctions

Mass justice courts' ability to impose punitive injunctions should be substantially curtailed, if not eliminated altogether. This proposal flows readily from the discussion in Section II above. Commentators have long-recognized that mass justice courts do not behave consistently with liberal notions of State power or individualized justice. To simply suggest doing away with them, however, is fatuous. They are here to stay. Limiting the range of powers they enjoy is a more plausible way of reconciling their existence with liberal ideals.

Liberal precepts counsel in favor of tightly circumscribing the State's power to incarcerate. The liberal justification for concentrating coercive power in the State is to permit organized coexistence while maximizing liberty and equality.[403] Incarceration is a paradigmatic form of state coercion.[404] Incarceration both deprives individuals of liberty and stigmatizes. Both features hold true even for nominally "civil" detention: being jailed as a "deadbeat dad" or for being in contempt of an NCO is unlikely to help one secure friends or social standing.[405] Liberal theories of punishment require that such grave sanctions be reserved for those who violate particularly salient public norms.[406] To the extent that the State attempts to maximize social utility for a democratic majority, it should not do so at the expense of core individual rights, liberty and equality being supreme.[407]

The rationales offered for what I have called punitive injunctions are of a utilitarian stripe. Probation is supposed to serve rehabilitative ends and, thereby, forestall future crime.[408] Child support orders are supposed to impel fathers to contribute (financially and otherwise) toward raising their children.[409] Doing so, in theory, defrays welfare's costs and facilitates parental bonds between children and fathers. While theoretically plausible, there is scant empirical evidence to suggest that either mechanism actually produces the salutary social benefits promised.[410] Given how expensive incarceration is, there is good reason to think both are cost

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[403] Liberal theorists come in all stripes, but many notable writers in the liberal tradition would hold liberty and equality as the fundamental building blocks for a social order. *See, e.g.,* JOHN RAWLS, A THEORY OF JUSTICE 52-53 (1999) (The principles of equality and liberty apply to "the basic structure of society and govern the assignment of rights and duties and regulate the distribution of social and economic advantages."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1978) (describing different conceptions of equality, and focusing on the right to equal concern and respect as a basic right from which other conceptions of equality derive); Michael Ignatief, *The Myth of Citizenship*, *in* THEORIZING CITIZENSHIP 53, 75 (Ronald Beiner ed. 1995) (equality is a central feature of the liberal tradition).

[404] *See* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 310, 312 (2004).

[405] Moral theorists might argue that it is the stigmatizing quality of a sanction that makes it "criminal." *See* FEINBERG, *supra* note 66, at 98-99. I do not take up that debate here.

[406] *See* Dolovich, *supra* note 404, at 400 (using Rawlsian device of the "original position" to argue that punishment of "non-serious offenses" is only legitimate if doing so deters commission of "serious offenses").

[407] While not expressly writing with the liberal tradition, Herbert Packer's theory of the criminal punishment is broadly consistent with this formulation. HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 61-63 (1968). He suggests that to be legitimate, criminal sanctions must be imposed pursuant to a utilitarian rule designed to prevent wrongdoing generally. *Id.* But punishment for violating such a rule may only be imposed upon an individual who is actually blameworthy. *Id.*

[408] *Supra* Section II.B.2.

[409] *Supra* Section II.A.

[410] *See* HAYS, *supra* note 179, at 10, 19, 77 (noting that welfare reform was a "neo-liberal" experiment and that there is no empirical evidence to support conclusion that the child support rules it created have been cost effective).

ineffective.[411]

Section II sought to demonstrate that the primary "utility" of probation and contempt is marking and managing the lowest social economic classes in our society. Using the threat of incarceration and actual incarceration for that purpose offends both liberty and equality principles.

The prescription here echoes liberal, retributive theories where the requirement of blameworthiness is designed to protect individuals from undeserved punishment.[412] Individuals should only be jailed if it can be said, with high levels of certainty, that their conduct was wrongful. Many, perhaps most, probation revocations and family court detentions do not satisfy this requirement. Jailing an individual longer for a probation violation than for the underlying criminal conduct is inconsistent with retributive principles. Jailing someone for conduct that is not criminalized at all – as is often true in the child support context – is also inconsistent with retributive principles.

Suggesting that legislatures curtail mass justice courts' power to use punitive injunctions raises a host of classification questions. What, precisely, should count as a punitive injunction and a mass-justice court? Rote sentences of probation in low-level criminal cases would certainly count. As would child support orders in cases like Mr. Turner's. The implication in the former context is that courts and prosecutors should make determinations about detention based on the nature of the underlying conduct. To the extent that prohibited conduct does not seem serious enough to warrant a jail sentence or fine, the individual should go free. Probation should not be available as a means to keep such cases "in the system." In the child support context, the implications of the prescription are even farther reaching. The State should not use detention in lieu of welfare. Jailing individuals like Mr. Turner accomplishes virtually nothing for poor mothers and children. Its primary function seems to be keeping tabs on the underclass and generating symbolic meaning about the moral depravity of "deadbeat dads." The former is not a legitimate action for a liberal democracy to undertake. The second should be the province of criminal law not welfare law.[413]

This Section should not be taken as an argument for eliminating contempt or probation altogether. Contempt often serves an important role in enforcing judgments. For example, in a child support action between middle-class parents where one simply refuses to pay a court-ordered award after extensive process, contempt may be the only way to compel payment. The same holds true in any number of contests between private parties. With probation, there may be non-mass justice contexts in which it functions, less as an instrument of population-based social control, and more genuinely as a tool for rehabilitation.

The proposal here admittedly leaves a good bit of gray area. However, given the political challenges that separate the normative prescription here from becoming a policy reality, it is appropriate to leave the technocratic details to a later day.

B. Incremental Change

The sweeping changes suggested in Section III.A are unlikely to come to pass anytime soon. There is virtually no chance that a Norris-LaGuardia equivalent will emerge in the

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[411] Brief for Elizabeth G. Patterson as Amici Curiae Supporting Petitioner, *supra* note 11, at *22-27 (describing "staggering" costs of detaining child-support contemnors); *see also* HAYS, *supra* note 179, at 77 (stating that child support enforcement is not cost effective).

[412] *See, e.g.,* PACKER, *supra* note 407, at 62-63.

[413] *See* Steiker, *supra* note 106, at 803-05 (blaming, a symbolic act, is criminal punishment's function).

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probation or child-support contexts. Passed by Congress in 1932, the Norris-LaGuardia Act curtailed labor injunctions. Labor unions and supporters in Congress had, for decades, advocated for such legislation.[414] Unions, workers, and their supporters amassed political power during the late nineteenth and early twentieth centuries.[415] Those who constitute the contemporary ranks of America's "dangerous classes" and "problem populations" are not politically organized. Nor is there is much popular sympathy for them.[416] These political facts have driven America's increased reliance on punitive techniques for managing poverty over the last three decades.[417]

The absence of broad-based support for curtailing punitive injunctions means that only modest reforms are likely possible for the near term. We should not be satisfied with any one of the following as a complete solution to the problems described in this Article. But, they may be steps in the direction of a more just detention policy.

Provide free counsel. Providing public defenders (or the functional equivalent in family court) would be a step in the right direction. This cannot be the answer in and of itself for reasons already noted.[418] But, there are two ways in which appointed counsel could help.

First, attorneys will increase the factual accuracy of courts' determinations. The average increase in accuracy may not be dramatic, but counsel would be a good check on more egregious manifestations of error and bias.[419] Any increase in accuracy would be positive. There is no reason to develop the case for appointed counsel here at length since the argument has been made elsewhere.[420] The Supreme Court noted (in *Turner*, ironically enough): "the freedom 'from bodily restraint,' lies 'at the core of the liberty protected by the Due Process Clause.'" [421] Criminal detention is, therefore, only permissible after a defendant has had an opportunity to present her defenses with "skill and knowledge."[422] This should be true whenever custodial detention is at issue. Even if the Court will not go so far in interpreting the Due Process Clause, the argument remains morally compelling.[423] And state legislatures, where they haven't already,[424] should

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[414] *See* FORBATH, *supra* note 321, at 147.

[415] *See id.* at 147-48, 162-63. The damage may very well have been done by 1932, though. William Forbath has persuasively argued that labor injunctions involved the courts in the violence faced by trade unionists and removed local officials' authority in responding to protests. *See id.* at 1-9. Well before 1930, labor injunctions had helped channel American trade unionism into a liberal, reformist movement as opposed to a radicalized, class-consciousness based movement. *See id.*

[416] *See* WACQUANT, *supra* note 27, at 82-83 (describing the perception that recipients of welfare programs are lower-class blacks "mired in idleness and vice" and stating that such racial animus and class prejudice perception has made it impossible for those on welfare to politically organize); MICHELLE ALEXANDER, THE NEW JIM CROW 43-45 (2010) (discussing political discourse surrounding poverty, including the school of thought that character failings accounted for poverty).

[417] *See* WACQUANT, *supra* note 27, at 41, 43, 58 (explaining opposition by suggesting that amongst middle-class voters, welfare is understood to benefit poor blacks).

[418] *See supra* notes 400-402 and discussion.

[419] While one should not expect dramatic increases in accuracy across cases, one can expect state-appointed counsel to control "the more gross displays of arbitrariness and favoritism." FEELEY, *supra* note 128, at 60.

[420] *See generally* Brief for Petitioner, *supra* note 13, at *27-50 (discussing the importance of the right to counsel).

[421] *See* Turner v. Rogers, 131 S.Ct. 2507, 2518 (2011) (internal quotes omitted) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

[422] *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

[423] *See* Application of Gault, 387 U.S. 1, 36-37 (1967) (due process requires appointment of counsel and other procedural protections associated with criminal proceeding in juvenile delinquency proceeding).

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adopt it.

Attorneys also help ensure that there is a stream of empirical information about the effects of states' punitive practices. Attorneys who work with indigent clients are in unique position to collect and disseminate such information. Judith Resnik recently observed that, among the chief benefits of *pro bono* counsel taking Mr. Turner's case to the Supreme Court was that they revealed how paltry the procedural safeguards are in South Carolina family court contempt proceedings.[425] Relying on *pro bono* counsel to litigate an occasional, high profile case to generate such information is better than nothing, but not by very much. Part of what allows the practices this Article describes to remain undisturbed is their invisibility. Counsel helps disrupt that invisibility.

Allow for modification of arrears. Federal welfare law makes it impossible to modify past arrears and difficult to modify child support awards going forward.[426] As discussed above, this restriction helps ensure that once caught in the penal web, poor fathers remain there. After the passage of some amount of time it becomes impossible for poor fathers to pay the entirety of their accumulated arrears. Quite preposterously, arrears continue to mount while fathers are in custody for having violated a child support order (or for any other reason). Arrears oftentimes include interest payments. Large arrears mean that such fathers remain vulnerable to incarceration for years and potentially even past their children reaching the age of maturity.[427] Allowing courts to modify arrears would help avoid this. Reducing arrears to manageable levels may induce some to make payments. States might actually stand to collect a small bit of revenue rather than spend a good bit on incarceration.

Courts should also regularly revisit child support orders and reevaluate whether the ordered amount is within the fathers' ability to pay. This would be less necessary if there was a prohibition on the entry of child support orders *in absentia*.

Restrict the no new criminal law violation condition. The condition that probationers commit no new criminal law violations appears in virtually every probation order.[428] As described in Section II.B.1, this condition makes it easier for prosecutors to obtain new convictions for alleged misconduct than they otherwise could.[429] This condition also helps ensure that individuals remain enmeshed in the carceral web for longer. Remaining in that web for longer is appropriate if an individual actually commits new crimes. As described above, however, the NCLV condition increases prosecutors' leverage to obtain a plea of guilt on new criminal charges.[430] That compromises the accuracy of any subsequent conviction obtained by plea – both the guilty and innocent have the same incentive to plead guilty in the face of a prosecutor's threat to move for probation revocation. One solution to this problem is to simply eliminate the NCLV condition. Another plausible solution might be to restrict its application to cases in which guilt on the new criminal law charge has been found after a trial on the new criminal law charge.

Require a hypothetical custodial sentence. As noted in Section II.B, it is entirely possible

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[424] The New Jersey Supreme Court held that its state constitution requires that the state appoint counsel in contempt proceedings for child support violations. *See, e.g.,* Pasqua v. Council, 892 A.2d 663, 676 (N.J. 2005).

[425] Resnik, *supra* note 382, at 160.

[426] *See supra* note 214 and discussion.

[427] *See supra* notes 213-217 and discussion.

[428] *See supra* notes 281-286 and discussion.

[429] *See id.*

[430] *See id.*

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for defendants to spend more time incarcerated on probation violations than they would have on the underlying criminal charge for which they were convicted.[431] This is perverse from a retributive perspective. It is, however, difficult to make quantitative, empirical claims about this phenomenon with precision. When judges suspend a sentence and release someone on probation – as is so often true in minor cases – they do not say what amount of time they *would have* sentenced a person to jail were probation not a component of the sentence. Indeed, part of the point that this Article has tried to make is that probation saves courts from having to make such a calculation. If judges were to actually do so (in good faith),[432] that declaration would serve as a good yardstick for measuring the fairness of any subsequent detention precipitated by probation revocation.

For example, take our hypothetical defendant from the Introduction.[433] Under the scheme proposed here, upon sentencing, the judge would have said that one month in jail was the appropriate punishment for the narcotics and theft misdemeanors. The defendant then would receive an actual sentence of probation. Upon any subsequent probation violation, the hypothetical custodial sentence of one month would serve as a guidepost for imposing jail time.[434] Perhaps even more importantly, hypothetical sentences would help generate important information about probation's detention-related costs.

Systematically study institutional practices. The rationale typically offered for punitive injunctions is utilitarian: that these mechanisms generate social utility to justify their costs.[435] In *Turner*, South Carolina never suggested that it had studied the costs and benefits of its family court detention practices. As noted repeatedly above, there is little precise quantitative data about the frequency and duration of incarceration for violating a punitive injunction. While threatening detention is cheap, actual detention is quite expensive. It is far from clear that, in the aggregate, using contempt to enforce child support orders against poor fathers is cost effective.[436] Similar skepticism of probation seems justified – particularly if significant numbers of individuals are spending more time in jail as a result of probation violations than they would have had they simply been sent to jail on the underlying criminal charge. States should study these questions empirically. It may very well be that punitive injunctions are harmful not only for the communities impacted, but also for states' bottom line.

IV. CONCLUSION

That social problems related to community health and well-being are conceptualized on a population basis is inevitable in a modern state. We expect an entire range of state agencies to engage problems in just such a way: Health and Human Services ought to be concerned with decreasing incidences of disease within the United States, Housing and Urban Development ought to be concerned with minimizing homelessness, and so on. We, however, tend to think of courts as serving a very different function than such agencies. Courts are supposed to guarantee justice

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[431] *Cf.* Bowers, *supra* note 287, at 792 (describing studies of New York City drug courts).

[432] A profound weakness in this prescription is the room it leaves for easy manipulation.

[433] *See supra* notes 20-22, 79 and discussion.

[434] Another approach might be to require judges to suspend no more than the actual sentence that would have been imposed. This would, however, create fairly powerful incentives to impose higher sentences on the front end – i.e., to maximize sentencing discretion upon finding a probation violation.

[435] *See supra* notes 186-194, 231-235 and discussion.

[436] *See supra* notes 196-198 and discussion.

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in individual cases – they are supposed to check the unfairness that can result from population-based approaches to social problems. The way punitive injunctions are used in mass justice courts calls this understanding of courts into question. That should, in and of itself, be troubling to legal scholars.

This Article has also shown the significant role that punitive injunctions play in enmeshing the poor and socially marginal in what sociologists have termed a penal web. This occurs without these injunctions serving the various utilitarian ends that they were, theoretically, designed to serve. This account both supports the sociological claim that poverty has been criminalized in the United States and suggests a reform trajectory. Contrary to what legal scholars have suggested, simply adding layers of procedural protection to the enforcement proceedings for these injunctions is not likely to be particularly helpful. Rather, legislatures should move toward curtailing courts' power to impose such injunctions at all.

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