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State Bans on Debtors' Prisons and Criminal Justice Debt

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NOTES

STATE BANS ON DEBTORS' PRISONS AND CRIMINAL JUSTICE DEBT

Since the 1990s, and increasingly in the wake of the Great Recession, many municipalities, forced to operate under tight budgetary constraints, have turned to the criminal justice system as an untapped revenue stream.[1] Raising the specter of the "debtors' prisons" once prevalent in the United States,[2] imprisonment for failure to pay debts owed to the state has provoked growing concern in recent years.[3] These monetary obligations are not contractual liabilities in the ledger of an Ebenezer Scrooge,[4] but sums that the state itself assesses through the criminal justice system. Sometimes called "legal financial obligations" (LFOs), the total debt generally includes a mix of fines, fees, court costs, and interest.[5] And unlike civil collection actions (for the most part[6]), incarceration is very much on the menu of sanctions that the unpaid creditor, usually a municipality,[7] can impose.

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[1] *See, e.g.*, Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 886–87 (2013); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1098–99 (2015).

[2] *See infra* section III.A, pp. 1034–38.

[3] *See, e.g.*, Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 262–63 (2015); McLean, *supra* note 1, at 885–91; Campbell Robertson, *Suit Alleges "Scheme" in Criminal Costs Borne by New Orleans's Poor*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleanss-poor.html. At the same time, however, legal commentators have been concerned about imprisonment for criminal debt since at least the 1960s. *See, e.g.*, Derek A. Westen, Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778, 787 n.79 (1969) (listing sources).

[4] In addition to featuring in DAVID COPPERFIELD (1850) and LITTLE DORRIT (1857), debtors' prisons lurk in the shadows of Dickens's classic A CHRISTMAS CAROL (1843). Those who did not pay the debts so meticulously recorded by the shivering Bob Cratchit could have been thrown in prison by Scrooge — part of why he was so hated and feared by his debtors. *See* CHARLES DICKENS, A CHRISTMAS CAROL AND OTHER CHRISTMAS BOOKS 71–72 (Robert Douglas-Fairhurst ed., Oxford Univ. Press 2006) ("[B]efore [our debt is transferred from Scrooge] we shall be ready with the money; and even though we were not, it would be a bad fortune indeed to find so merciless a creditor in his successor.").

[5] *See, e.g.*, State v. Blazina, 344 P.3d 680, 680–81, 684 (Wash. 2015); ACLU OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS 3 (2014), http://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20(3).pdf [http://perma.cc/X66N-G5EA] ("[T]he average amount of LFOs imposed in a felony case is $2540 . . . ."); *Developments in the Law — Policing*, 128 HARV. L. REV. 1706, 1727–29 (2015).

[6] In some circumstances, courts can exercise their contempt power to imprison debtors for failure to pay civil debts. *See, e.g.*, Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1526–27.

[7] *See* Telephone Interview with Douglas K. Wilson, Colo. State Pub. Def., Office of the State Pub. Def. (Oct. 21, 2014) (notes on file with Harvard Law School Library).

This practice both aggravates known racial and socioeconomic inequalities in the criminal justice system[8] and raises additional concerns. First, assessing and collecting such debt may not be justifiable on penal grounds. Instead, it seems to be driven primarily by the need to raise revenue, an illegitimate state interest for punishment, and one that, in practice, functions as a regressive tax.[9] Second, imprisonment for criminal justice debts has a distinctive and direct financial impact. The threat of imprisonment may create a hostage effect, causing debtors to hand over money from disability and welfare checks, or inducing family members and friends — who aren't legally responsible for the debt — to scrape together the money.[10]

Take the story of Harriet Cleveland as a window into the problem: Cleveland, a forty-nine-year-old mother of three from Montgomery, Alabama, worked at a day care center.[11] Starting in 2008, Cleveland received several traffic tickets at a police roadblock in her Montgomery neighborhood for operating her vehicle without the appropriate insurance.[12] After her license was suspended due to her nonpayment of the ensuing fines and court costs, she continued to drive to work and her child's school, incurring more debt to Montgomery for driving without a license.[13] Over the course of several years, including after she was laid off from her job, Cleveland attempted to "chip[] away" at her debt — while collection fees and other surcharges ballooned it up behind her back.[14] On August 20, 2013, Cleveland was arrested at her home while babysitting her two-year-old grandson.[15] The next day, a municipal judge ordered her to pay $1554 or spend thirty-one days in jail.[16] She had no choice but to "sit out" her debt at the rate of $50 per

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[8] *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2, 6–7 (2011); Karakatsanis, *supra* note 3, at 254; Natapoff, *supra* note 1, at 1065.

[9] *See* Natapoff, *supra* note 1, at 1098 & n.208; *Developments in the Law — Policing*, *supra* note 5, at 1734. This concern is amplified by the growing trend toward outsourcing portions of the criminal justice system, such as collection, to private actors like Sentinel Offender Services, a probation company that wields the threat of imprisonment via contract with the state. *See id.* at 1726–27.

[10] *See, e.g.*, Robertson, *supra* note 3 (describing how a debtor's mother and sister "scraped together what money they [could]").

[11] *See* Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc [http://perma.cc/5SU8-EF72].

[12] *Id.*

[13] *Id.*

[14] *Id.*; *see also* Amended Complaint at 2, Cleveland v. City of Montgomery, No. 2:13-cv-00732 (M.D. Ala. Nov. 12, 2013) [hereinafter Complaint, *Cleveland v. Montgomery*], http://www.splcenter.org/sites/default/files/downloads/case/amended_complaint-harriet_cleveland_0.pdf [http://perma.cc/Y4CM-99AK].

[15] Complaint, *Cleveland v. Montgomery*, *supra* note 14, at 2; *see* Stillman, *supra* note 11.

[16] Complaint, *Cleveland v. Montgomery*, *supra* note 14, at 4.

day.[17] In jail, "[s]he slept on the floor, using old blankets to block the sewage from a leaking toilet."[18]

Stories like Cleveland's have inspired a naissance of advocacy and scholarship that challenge the legal basis for incarceration upon nonpayment of criminal justice debts.[19] But existing approaches have failed to recognize an alternate potential font of authority: state bans on debtors' prisons.[20] Most commentators have thus far focused on the 1983 Supreme Court case *Bearden v. Georgia*.[21] *Bearden* held that a court cannot, consistently with the Fourteenth Amendment, revoke parole for failure to pay criminal debt when the debtor has made "sufficient bona fide" efforts to pay.[22] *Bearden* established a powerful (albeit somewhat vague) standard that protects debtors whose inability to pay isn't willful, by requiring courts to hold ability-to-pay hearings.[23] But, as argued below, certain types of criminal justice debtors fall under an even higher degree of protection than *Bearden* provides.

Another type of legal claim should be considered alongside *Bearden*: one based on the many state constitutional bans on debtors' prisons.[24] These state bans were enacted over several decades in the

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[17] *Id.* at 7.

[18] Stillman, *supra* note 11. Cleveland sued the city, alleging that Montgomery's debt collection procedures and her resultant incarceration violated the Alabama and U.S. Constitutions. *See* Complaint, *Cleveland v. Montgomery*, *supra* note 14, at 2–3. They ultimately settled. *See* Judicial Procedures of the Municipal Court of the City of Montgomery for Indigent Defendants and Nonpayment, Cleveland v. City of Montgomery, No. 2:13-cv-00732 (M.D. Ala. Sept. 12, 2014) [hereinafter Settlement Agreement, *Cleveland v. Montgomery*], http://www.splcenter.org/sites/default/files/downloads/case/exhibit_a_to_joint_settlement_agreement_-_judicial_procedures-_140912.pdf [http://perma.cc/ZAH6-DFQS]. Still, as described below, there's reason to suspect such settlements will not completely solve the problem. *Cf. infra* notes 55–59 and accompanying text (discussing judicially created solutions in certain states).

[19] *See infra* Part II, pp. 1032–34.

[20] *See infra* Part III, pp. 1034–43.

[21] 461 U.S. 660 (1983).

[22] *Id.* at 662; *see also id.* at 661–62. The Court also required that a court consider whether alternate sanctions (such as a restructured payment schedule or community service) could meet the state's interest in punishment and deterrence before resorting to incarceration. *See id.* at 672.

[23] Under *Bearden*, what counts as "bona fide efforts" was left unspecified, apart from vague references to searching for employment or sources of credit. *See id.* at 668. This kind of open-ended standard, taken on its own terms, may generate a number of problems. It may leave too much discretion in the hands of the same legal actors responsible for the state of play. *See* Recent Legislation, 128 HARV. L. REV. 1312, 1316 (2015). And it seems ill-equipped to protect impoverished debtors who see no reason to embark upon, much less document, futile searches for credit or employment.

[24] While outside the scope of analysis here, Professor Beth Colgan has argued that incarceration for criminal justice debt might also violate the Excessive Fines Clause of the Eighth Amendment. *See* U.S. CONST. amend. VIII; Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014). Others assert that certain prison conditions arguably violate the Cruel and Unusual Punishments Clause or the Thirteenth Amendment's prohibition on involuntary servitude. *See* U.S. CONST. amend. VIII; *id.* amend XIII; Class Action Complaint at 57–58, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015) [hereinafter

first half of the nineteenth century, as a backlash against imprisonment for commercial debt swept the nation. While the contemporary discussion on criminal justice debt often makes cursory reference to this historic abolition of debtors' prisons,[25] the legal literature contains no sustained analysis of whether the state bans on debtors' prisons might invalidate some of what's going on today.

This Note takes a first pass at this missing constitutional argument. Part I describes the contemporary problem with criminal justice debt in greater detail. Part II covers a range of preexisting federal constitutional limitations on imprisonment for criminal justice debt. Part III introduces the state bans and argues that they should be held to apply to some fines for regulatory offenses, costs, and definitionally civil debts — both as a matter of sound interpretation of state law and as a matter of federal equal protection doctrine. Leaving traditional fines and restitution outside the scope of the state bans, this proposal would nonetheless engage with the most problematic types of criminal justice debt. Part IV explains why it makes good sense to subject the new debtors' prisons to the two-tiered regulation of both *Bearden* and these state bans, in the form of new imprisonment-for-debt claims.

I. CRIMINAL JUSTICE DEBT

Since a large portion of criminal justice debt is routed through municipal courts that aren't courts of record,[26] systemic, nationwide data aren't easily generated. But out of the mix of disturbing narratives and reports one can distill several common elements. Underlying the debts is a range of crimes, violations, and infractions, including shoplifting, domestic violence, prostitution, and traffic violations.[27] The monetary obligations come under a mix of labels, including fines, fees, costs, and interest, and are generally imposed either at sentencing or as a condition of parole.[28] Arrest warrants are sometimes issued when debtors fail to appear in court to account for their debts, but courts often fail to give debtors notice of summons, and many debtors avoid the courts out of fear of imprisonment.[29] When courts have actually held

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Complaint, *Jenkins v. Jennings*], http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [http://perma.cc/LM7S-LZW2].

[25] *See, e.g.*, Sarah Dolisca Bellacicco, Note, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System*, 48 GA. L. REV. 227, 234 (2013).

[26] *See, e.g.*, Telephone Interview with Douglas K. Wilson, *supra* note 7.

[27] *See id.*

[28] *See* sources cited *supra* note 5.

[29] *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 45–50 (2015) [hereinafter DOJ, FERGUSON INVESTIGATION], http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/8CQS-NZ9F].

the ability-to-pay hearings required by *Bearden*[30] — and they've often neglected to do so[31] — such hearings have been extremely short, as many misdemeanor cases are disposed of in a matter of minutes.[32] Debtors are almost never provided with legal counsel.[33] The total amount due fluctuates with payments and added fees, sometimes wildly, and debtors are often unaware at any given point of the amount they need to pay to avoid incarceration or to be released from jail.[34] Multiple municipalities have allowed debtors to pay down their debts by laboring as janitors or on a penal farm.[35] One Alabama judge credited debtors $100 for giving blood.[36]

The problem is widespread. In Colorado, Linda Roberts's offense of shoplifting $21 worth of food resulted in $746 of court costs, fines, fees, and restitution.[37] Ms. Roberts, who lived exclusively on SNAP and Social Security disability benefits, "sat out" her debt by spending fifteen days in jail.[38] And in Georgia, Tom Barrett was sentenced to twelve months of probation for stealing a can of beer.[39] But six months in, despite selling his blood plasma, Barrett still couldn't pay the costs associated with his sentence — including a $12-per-day ankle bracelet, a $50 set-up fee, and a $39-per-month fee to a private probation company — and faced imprisonment.[40] A 2010 Brennan Center report flagged problematic "criminal justice debt" practices in fifteen states, including California, Texas, Michigan, Pennsylvania, and New

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[30] *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[31] *See, e.g.*, Complaint, *Jenkins v. Jennings*, *supra* note 24, at 43 ("The City prosecutor and City judge do not conduct indigence or ability-to-pay hearings. Regular observers of the City court have never once seen an indigence or ability to pay hearing conducted in the past decade.").

[32] *See, e.g.*, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION 4–5 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [http://perma.cc/Y8BN-GVZ2]; Karakatsanis, *supra* note 3, at 262.

[33] *See, e.g.*, Karakatsanis, *supra* note 3, at 263–64.

[34] *See, e.g.*, ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 18 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [http://perma.cc/6SVB-KZKQ]; HUMAN RIGHTS WATCH, *supra* note 32, at 23.

[35] *See* Class Action Complaint at 1–3, Bell v. City of Jackson, No. 3:15-cv-732 (S.D. Miss. Oct. 9, 2015) [hereinafter Complaint, *Bell v. Jackson*], https://assets.documentcloud.org/documents/2455850/15-10-09-class-action-complaint-stamped.pdf [https://perma.cc/3CKT-XXX4] (describing reduction of debt at a rate of $58 per day of work); Karakatsanis, *supra* note 3, at 262 ($25 per day).

[36] Campbell Robertson, *For Offenders Who Can't Pay, It's a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), http://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html.

[37] Recent Legislation, *supra* note 23, at 1314.

[38] *Id.* at 1314 & n.25.

[39] Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014, 4:58 PM), http://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor.

[40] *Id.*

York.[41] A 2010 ACLU report claimed that required indigency inquiries — the heart of the constitutional protection provided by *Bearden* — were markedly absent in Louisiana, Michigan, Ohio, Georgia, and Washington.[42]

And the problem is deeply engrained, at least in some places. The best evidence to date is the Department of Justice's 2015 report on the Ferguson Police Department. The investigation revealed that Ferguson law enforcement — including both police and the municipal court — was deployed to raise revenue.[43] In March 2010, the city's finance director emailed then–Police Chief Thomas Jackson:

> [U]nless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year. What are your thoughts? Given that we are looking at a substantial sales tax shortfall, it's not an insignificant issue.[44]

In 2013, the municipal court issued over 9000 warrants for failure to pay fines and fees resulting in large part from "minor violations such as parking infractions, traffic tickets, or housing code violations."[45] The city also tacked on fines and fees for missed appearances and missed payments — and used arrest warrants as a collection device.[46]

The problem has become especially severe — or has at least drawn increased attention — within the past several years.[47] In 2015, nonprofits Equal Justice Under Law and ArchCity Defenders sued the cities of Ferguson[48] and Jennings,[49] Missouri, alleging that they were

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[41] *See* BANNON ET AL., *supra* note 34, at 6.

[42] *See* ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 17 (2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf [http://perma.cc/2C7C-X56S] (Louisiana); *id.* at 29 (Michigan); *id.* at 43 (Ohio); *id.* at 55 (Georgia); *id.* at 65 (Washington).

[43] *See* DOJ, FERGUSON INVESTIGATION, *supra* note 29, at 3, 9–10.

[44] *Id.* at 10.

[45] *Id.* at 3.

[46] *See id.* at 42, 53. Residents of Ferguson also suffered unconstitutional stops and arrests, *see id.* at 18, misleading information about court dates and appearances, *see id.* at 46, and, of course, the death of Michael Brown at the hands of the police in August 2014, *see id.* at 5.

[47] *See, e.g.*, Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson over "Debtors Prisons,"* NPR (Feb. 8, 2015, 9:03 PM), http://www.npr.org/blogs/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons ("We've seen the rise of modern American debtors prisons, and nowhere is that phenomenon more stark than in Ferguson and Jennings municipal courts and municipal jails . . . ." (quoting lawyer Alec Karakatsanis)); *The New Debtors' Prisons*, THE ECONOMIST (Nov. 16, 2013), http://www.economist.com/news/united-states/21589903-if-you-are-poor-dont-get-caught-speeding-new-debtors-prisons [http://perma.cc/5M9N-74HT].

[48] *See* Class Action Complaint, Fant v. City of Ferguson, No. 4:15-cv-00253 (E.D. Mo. Feb. 8, 2015) [hereinafter Complaint, *Fant v. Ferguson*], http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Ferguson-Debtors-Prison-FILE-STAMPED.pdf [http://perma.cc/MVJ9-Q9CQ]. As of October 2015, the case had survived a contentious motion to dismiss — the judge had initially dismissed, then reconsidered and reinstated, two allegations of unconstitutional imprisonment for debt — and was moving toward trial.

[49] *See* Complaint, *Jenkins v. Jennings*, *supra* note 24.

running the equivalents of modern debtors' prisons.[50] The Ferguson complaint described a "Kafkaesque journey through the debtors' prison network of Saint Louis County — a lawless and labyrinthine scheme of dungeon-like municipal facilities and perpetual debt."[51] Equal Justice Under Law and the Southern Poverty Law Center have also sued a handful of other municipalities,[52] and the ACLU has pursued an awareness campaign in a number of states, sending letters to judges and mayors in Ohio[53] and Colorado.[54]

Facing this pressure from advocates and litigants, cities, courts, and legislatures have made some changes. The city of Montgomery settled in 2014, agreeing to conduct the constitutionally required hearings, produce audio recordings,[55] provide public defenders, and adopt a "presumption of indigence" for defendants at or below 125% of the federal poverty level.[56] In Ohio, Chief Justice Maureen O'Connor took rapid action, issuing guidance materials to clarify the procedures trial and municipal judges should take before imprisoning debtors for failure to pay.[57] The Supreme Court of Washington confirmed in

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[50] *See* Complaint, *Fant v. Ferguson*, *supra* note 48, at 3.

[51] *Id.* at 7.

[52] Two lawsuits against the City of Montgomery have settled. *See* Settlement Agreement, *Cleveland v. Montgomery*, *supra* note 18; Agreement to Settle Injunctive and Declaratory Relief Claims, Mitchell v. City of Montgomery, No. 2:14-cv-00186 (M.D. Ala. Nov. 17, 2014) [hereinafter Settlement Agreement, *Mitchell v. Montgomery*], http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf [http://perma.cc/R8S9-HW4N]. As of the time of publication, Equal Justice Under Law had litigated (or is litigating) similar issues against Jennings, Missouri; Ferguson, Missouri; New Orleans, Louisiana; Jackson, Mississippi; and Rutherford County, Tennessee. *See* Permanent Injunction, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Sept. 16, 2015); Complaint, *Fant v. Ferguson*, *supra* note 48; EQUAL JUSTICE UNDER THE LAW, *Shutting Down Debtors' Prisons*, http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/ [http://perma.cc/56WT-6RLC] (last visited Nov. 23, 2015).

[53] *See* Letter from Christine Link, Exec. Dir., ACLU of Ohio, et al., to Chief Justice Maureen O'Connor, Ohio Supreme Court (Apr. 3, 2013), http://www.acluohio.org/wp-content/uploads/2013/04/2013_0404LetterToOhioSupremeCourtChiefJustice.pdf [http://perma.cc/R3T5-WPEL].

[54] *See* Recent Legislation, *supra* note 23, at 1313 n.13. In 2012 and 2013, the ACLU of Colorado sent letters to Chief Justice Bender of the Colorado Supreme Court and three Colorado municipalities. *See, e.g.*, Letter from Mark Silverstein, Legal Dir., ACLU of Colo., and Rebecca T. Wallace, Staff Att'y, ACLU of Colo., to Chief Justice Michael Bender, Colo. Supreme Court, and Judge John Dailey, Chair, Criminal Procedure Comm. (Oct. 10, 2012), http://static.aclu-co.org/wp-content/uploads/2013/12/2012-10-10-Bender-Dailey-Wallace.pdf [http://perma.cc/5F9Y-U7RC]; Letter from Rebecca T. Wallace, Staff Att'y, ACLU of Colo., and Mark Silverstein, Legal Dir., ACLU of Colo., to Herb Atchison, Mayor of Westminster, Colo. (Dec. 16, 2013), http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Atchison-ACLU.pdf [http://perma.cc/7ZZS-X3RL].

[55] *See* Settlement Agreement, *Mitchell v. Montgomery*, *supra* note 52, at 2–3.

[56] *See* Settlement Agreement, *Cleveland v. Montgomery*, *supra* note 18, at 1.

[57] *See* OFFICE OF JUDICIAL SERVS., SUPREME COURT OF OHIO, COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (2015), http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf [http://perma.cc/43AE-V32F]; *see also* Taylor Gillan, *Ohio Supreme Court Warns Judges to End "Debtors' Prisons,"* JURIST (Feb. 7, 2014, 7:14 AM), http://jurist.org/paperchase/2014/02/ohio-supreme-court-warns-judges-to-end-debtors-prisons.php [http://perma.cc/EA4L-BKHJ].

March 2015 that the sentencing judge must make "an individualized inquiry into the defendant's current and future ability to pay before the court imposes [criminal justice debt]."[58] And in August 2015, Ferguson Municipal Judge Donald McCullin withdrew almost 10,000 arrest warrants issued before 2015.[59] As for legislatures, in 2014, the Colorado General Assembly almost unanimously passed a bill requiring courts to make ability-to-pay determinations on the record before imprisoning debtors for nonpayment of debt.[60] And in 2015, both the Georgia[61] and Missouri[62] legislatures passed laws addressing the issue.

Perhaps this pushback will resolve the concerns described above. But there are many reasons to think there's a long road ahead. First, some of the responses leave unresolved the substantive definition of indigence for the purposes of ability-to-pay hearings.[63] Without such a definition, discretion is left to the same courts that have been imprisoning criminal debtors thus far.[64] Second, even tightly written laws,[65] settlements, and resolutions need to be enforced, which requires accountability and monitoring.[66] Abolishing the new debtors' prisons is as much a test of moral and societal conviction as it is of sound drafting. And finally (of course) some states haven't taken much action, if any, to address the issue — nor has it been raised in the federal courts within the last decade, apart from the litigation previously discussed.

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[58] State v. Blazina, 344 P.3d 680, 685 (Wash. 2015).

[59] *See* Krishnadev Calamur, *A Judge's Order Overhauls Ferguson's Municipal Courts*, THE ATLANTIC (Aug. 25, 2015), http://www.theatlantic.com/national/archive/2015/08/judges-order-overhauls-fergusons-municipal-courts/402232 [http://perma.cc/7R4J-CPCZ]. Additionally, the Supreme Court of Missouri recently amended its rules to require municipal judges to push back deadlines or allow installment plans for debtors who couldn't pay court costs, fines, and fees. *See* Order Dated December 23, 2014, re: Rule 37.65 Fines, Installment or Delayed Payments — Response to Nonpayment (Mo. Dec. 23, 2014) (en banc), http://www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f862566200063 2638/fe656f36d6b518a886257db80081d43c [http://perma.cc/BTX3-4ERC].

[60] *See* Recent Legislation, *supra* note 23, at 1313, 1315.

[61] Georgia's law provides guidance for courts in indigency determinations. *See* Act of May 5, 2015, 2015 Ga. Laws 422.

[62] Missouri's law clamps down on raising revenue through traffic fines and removes incarceration as a penalty for traffic offenses. *See* Act of July 9, 2015, 2015 Mo. Laws 453.

[63] *See* Recent Legislation, *supra* note 23, at 1316–19 (criticizing the lack of such a definition in recent Colorado legislation).

[64] *See id.* at 1316.

[65] The Missouri legislation, for example, seems to constrain municipal collection of criminal justice debt within certain domains. *See* Act of July 9, 2015, 2015 Mo. Laws at 457 (codified at MO. REV. STAT. § 479.353(2) (West, Westlaw through 2015 Veto Sess.)) (prohibiting confinement for traffic violations except in enumerated situations).

[66] *See, e.g.*, Telephone Interview with Nathan Woodliff-Stanley, Exec. Dir., ACLU of Colo. (Oct. 23, 2014) (notes on file with Harvard Law School Library); Telephone Interview with Alec Karakatsanis, Co-Founder, Equal Justice Under Law (Apr. 14, 2015) (notes on file with Harvard Law School Library).

II. FEDERAL CONSTITUTIONAL LIMITATIONS

Legal commentators have long recognized that the federal constitution imposes limits on imprisonment for criminal justice debt under the Equal Protection and Due Process Clauses. This Part outlines those limits, which stem from two main lines of cases in the 1970s and early 1980s, and undergird almost all debt-imprisonment litigation today.

The first line of cases prohibits states from discriminating on the basis of indigence when contemplating imprisonment for nonpayment of criminal justice debt. In *Williams v. Illinois*,[67] the defendant's failure to pay a fine and costs would have resulted in a term of imprisonment beyond the statutory maximum.[68] And in *Tate v. Short*,[69] the defendant's failure to pay would have resulted in imprisonment when the statute didn't allow for imprisonment at all.[70] The Court struck down imprisonment in each case.[71] The third and most discussed case in the trilogy, *Bearden v. Georgia*, struck down the automatic revocation of parole for nonpayment of criminal justice debt.[72] *Bearden* established a "bona fide efforts" test that asks how seriously one has tried to secure employment and credit, in addition to measuring assets.[73] The *Bearden* line of cases thus endeavors to shield criminal justice debtors making a good faith effort to pay, while leaving willful nonpayment unprotected.[74]

The second line of cases limits states' ability to treat civil debtors differently based on the procedural origins of their debt. The Court identified some of those limits in a pair of equal protection cases in the 1970s: *James v. Strange*[75] and *Fuller v. Oregon*.[76]

The debtor in *James v. Strange* owed $500 to pay for a court-appointed attorney and challenged the Kansas recoupment statute under which the state had attempted to recover the money.[77] The Court struck down the recoupment statute because it failed to provide "any of the exemptions provided by [the Kansas Code of Civil Procedure] . . . except the homestead exemption."[78] Avoiding broad com-

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[67] 399 U.S. 235 (1970).

[68] *Id.* at 236–37, 240–41.

[69] 401 U.S. 395 (1971).

[70] *Id.* at 397–98.

[71] *See id.* at 398–99; *Williams*, 399 U.S. at 242.

[72] Bearden v. Georgia, 461 U.S. 660, 668–69 (1983).

[73] *See id.* at 668.

[74] *See Tate*, 401 U.S. at 400; *Williams*, 399 U.S. at 242 n.19.

[75] 407 U.S. 128 (1972).

[76] 417 U.S. 40 (1974).

[77] *James*, 407 U.S. at 129.

[78] *Id.* at 131. In this context, exemptions laws are provisions that exempt a certain amount of personal property from attachment and garnishment. *See id.* at 135.

mentary on the general validity of various state recoupment statutes,[79] the Court nonetheless expressed concern with the classification drawn by Kansas's recoupment statute, which "strip[ped] from indigent defendants the array of protective exemptions Kansas ha[d] erected for *other* civil judgment debtors,"[80] including state exemptions from attachment and restrictions on wage garnishment.[81] While a state could prioritize its claim to money over other creditors (say, by giving its liens priority), "[t]his does not mean . . . that a State may impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor."[82] The Court suggested that it was applying rational basis scrutiny, although in light of the Court's strong language some judges have read *James* as subjecting the classification to some form of heightened scrutiny.[83]

Similarly, the debtor in *Fuller v. Oregon* owed fees for an attorney and an investigator.[84] But in *Fuller*, the Court upheld Oregon's recoupment statute because the defendant wouldn't be forced to pay unless he was able.[85] The majority found that the recoupment statute provided all of the same protections as those provided to other judgment debtors, and was therefore "wholly free of the kind of discrimination that was held in *James v. Strange* to violate the Equal Protection Clause."[86] Justice Marshall, joined by Justice Brennan in dissent, cited the Oregon constitutional ban on imprisonment for debt and pointed out that indigent defendants could be imprisoned for failing to pay their court-appointed lawyers, while "well-heeled defendants" who had stiffed their hired counsel could not.[87] The majority opinion pointed out that this issue hadn't been preserved for appeal,[88] and opined in dicta that the state ban on imprisonment for debt was an issue for

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[79] *See id.* at 132–33 ("The statutes vary widely in their terms." *Id.* at 132. "[A]ny broadside pronouncement on their general validity would be inappropriate." *Id.* at 133.).

[80] *Id.* at 135 (emphasis added).

[81] *Id.* at 135–36.

[82] *Id.* at 138. The Court also likened the classification to the "invidious discrimination" of *Rinaldi v. Yeager*, 384 U.S. 305 (1966). *James*, 407 U.S. at 140 (quoting *Rinaldi*, 384 U.S. at 309).

[83] *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 105–06 (1973) (Marshall, J., dissenting); Johnson v. Bredesen, 624 F.3d 742, 749 (6th Cir. 2010).

[84] Fuller v. Oregon, 417 U.S. 40, 42 (1974).

[85] *See id.* at 45–46. The statute seems to have provided for a *Bearden*-like inquiry: "[N]o convicted person may be held in contempt for failure to repay if he shows that 'his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment . . . .'" *Id.* at 46 (quoting OR. REV. STAT. § 161.685(2) (1973) (omission in original)).

[86] *Id.* at 48; *see also id.* at 47–48.

[87] *Id.* at 61 (Marshall, J., dissenting); *see also id.* at 60–61.

[88] *See id.* at 48 n.9 (majority opinion). Justice Douglas agreed the issue wasn't properly in front of the Court. *See id.* at 57 (Douglas, J., concurring in the judgment).

state courts to decide.[89] Justice Douglas, concurring in the judgment, agreed, but noted the "apparent inconsistency between [the relevant state constitutional provision] and the recoupment statute."[90]

Thus, under *James* and *Fuller*, states cannot discriminate invidiously against at least some classes of criminal justice debtors (note that neither case involved fines) merely by virtue of the fact that the debts arise from a criminal proceeding.

The federal protections under the *Bearden* and *James* lines of cases are important tools for ensuring our criminal justice system doesn't imprison for poverty. But, as argued below, the state bans on debtors' prisons can supplement *Bearden* — and they may well be relevant to the inquiry under *James*.

III. STATE CONSTITUTIONAL LIMITATIONS

As noted above, the state bans on debtors' prisons have been given short shrift in the legal literature and recent litigation.[91] This Part begins by providing a brief historical overview of the state bans[92] and then argues that ignoring them is a legal mistake: these imprisonment-for-debt provisions plausibly extend to some parts of contemporary debtors' prisons.

A. The "Abolition" of Debtors' Prisons

The problems posed by nineteenth-century debtors' prisons in the United States differ in many ways from the challenges posed today by criminal justice debt. Most importantly for present purposes, the debts at issue historically were contractual, not criminal. Imprisonment for nonpayment of contractual debt was a normal feature of American commercial life from the colonial era into the beginning of the nineteenth century.[93] But with the rise of credit testing and the replacement of personal lending networks with secured credit, imprisonment for nonpayment came to be seen as a harsh and unwieldy sanction,[94] and a growing movement pressed for its abolition.

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[89] *See id.* at 48 n.9 (majority opinion).

[90] *Id.* at 58 (Douglas, J., concurring in the judgment); *see also id.* ("It may be . . . that the Oregon courts would strike down the statute as being inconsistent with the constitutional provision if they faced the issue.").

[91] *But cf.* Complaint, *Fant v. Ferguson*, *supra* note 48, at 53 (arguing governments may not "take advantage of their position to impose unduly harsh methods of collection"); Complaint, *Jenkins v. Jennings*, *supra* note 24, at 58–59 (same).

[92] A more complete history would undoubtedly be helpful, but remains outside the scope of this Note.

[93] *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA 249–56 (1974).

[94] *See id.* at 260–65; Becky A. Vogt, State v. Allison*: Imprisonment for Debt in South Dakota*, 46 S.D. L. REV. 334, 345–46 (2001).

Eventually, the movement against imprisonment for debt would produce forty-one state constitutional provisions.[95] Some of the provisions read as flat bans;[96] others have various carve-outs and exceptions in the text.[97] But subsequent case law narrows the practical differences among them by reading into the flat bans largely the same carve-outs.[98] The nine states that haven't constitutionalized a ban on imprisonment for debt — Connecticut, Delaware, Louisiana, Maine, Massachusetts, New Hampshire, New York, Virginia, and West Virginia — all have taken statutory action.[99] Some statutes look on the surface a lot like the constitutional bans.[100] Practically, some explicitly abolished the old writ of *capias ad satisfaciendum* (holding the body of

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[95] The constitutional imprisonment-for-debt provisions are as follows: ALA. CONST. art. I, § 20; ALASKA CONST. art. I, § 17; ARIZ. CONST. art. II, § 18; ARK. CONST. art. II, § 16; CAL. CONST. art. I, § 10; COLO. CONST. art. II, § 12; FLA. CONST. art. 1, § 11; GA. CONST. art. I, § 1, ¶ XXIII; HAW. CONST. art. I, § 19; IDAHO CONST. art. I, § 15; ILL. CONST. art. I, § 14; IND. CONST. art. I, § 22; IOWA CONST. art. I, § 19; KAN. CONST. Bill of Rights, § 16; KY. CONST. § 18; MD. CONST. art. III, § 38; MICH. CONST. art. I, § 21; MINN. CONST. art. I, § 12; MISS. CONST. art. III, § 30; MO. CONST. art. I, § 11; MONT. CONST. art. II, § 27; NEB. CONST. art. I, § 20; NEV. CONST. art. I, § 14; N.J. CONST. art. I, ¶ 13; N.M. CONST. art. II, § 21; N.C. CONST. art. I, § 28; N.D. CONST. art. I, § 15; OHIO CONST. art. I, § 15; OKLA. CONST. art. II, § 13; OR. CONST. art. I, § 19; PA. CONST. art. I, § 16; R.I. CONST. art. I, § 11; S.C. CONST. art. I, § 19; S.D. CONST. art. VI, § 15; TENN. CONST. art. I, § 18; TEX. CONST. art. I, § 18; UTAH CONST. art. I, § 16; VT. CONST. ch. II, § 40(3), para. 4; WASH. CONST. art. I, § 17; WIS. CONST. art. I, § 16; WYO. CONST. art. I, § 5. Laying the provisions out in one place seems necessary, as the stringcites available in the legal literature are now outdated. *See* Vogt, *supra* note 94, at 335 n.9; Note, *Body Attachment and Body Execution: Forgotten but Not Gone*, 17 WM. & MARY L. REV. 543, 550 n.45 (1976); Note, *Imprisonment for Debt: In the Military Tradition*, 80 YALE L.J. 1679, 1679 n.1 (1971). An Appendix to this Note, available on the *Harvard Law Review Forum*, provides the critical language of each of the forty-one state constitutional bans. *See* Appendix, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. F. 153 (2015), http://harvardlawreview.org/2015/11/state-bans-on-debtors-prisons-and-criminal-justice-debt-appendix.

[96] *See, e.g.*, ALA. CONST. art. I, § 20 ("That no person shall be imprisoned for debt."); GA. CONST. art. I, § 1, ¶ XXIII ("There shall be no imprisonment for debt."); TEX. CONST. art. I, § 18 ("No person shall *ever* be imprisoned for debt." (emphasis added)).

[97] *See, e.g.*, COLO. CONST. art. II, § 12 ("No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases of tort or where there is a strong presumption of fraud."); MD. CONST. art. III, § 38 ("[A] valid decree of a court . . . for the support of a spouse or dependent children, or for the support of an illegitimate child or children, or for alimony . . . , shall not constitute a debt within the meaning of this section.").

[98] *See infra* notes 103–15 and accompanying text.

[99] *See* Armstrong v. Ayres, 19 Conn. 540, 546 (1849); Johnson v. Temple, 4 Del. (4 Harr.) 446, 447 (1846); State v. McCarroll, 70 So. 448, 448 (La. 1915); Gooch v. Stephenson, 15 Me. 129, 130 (1838); Appleton v. Hopkins, 71 Mass. (5 Gray) 530, 532 (1855); Eams v. Stevens, 26 N.H. 117, 120 (1852); Whitney v. Johnson, 12 Wend. 359, 360 (N.Y. Sup. Ct. 1834); Werdenbaugh v. Reid, 20 W. Va. 588, 593, 598 (1882) (discussing Virginia and West Virginia).

[100] For example, in 1855, Massachusetts passed a statute saying: "Imprisonment for debt is hereby forever abolished in Massachusetts." *Appleton*, 71 Mass. (5 Gray) at 532.

the debtor in satisfaction of the debt),[101] and others reinvigorated procedural protections for debtors who genuinely couldn't pay.[102]

Of course, these bans don't straightforwardly apply to criminal justice debt. As the literature has long recognized, the "abolition" of debtors' prisons was tightly constrained in scope.[103] The doctrinal limits on the bans' coverage cabined them along two dimensions: First, debtors evading payment were sculpted out from the bans. For instance, a number of constitutional provisions contained (or had read in) an exception for fraud.[104] The fraud exception has been interpreted to cover cases of concealed assets or fraudulent contracting.[105] In some cases, even leaving the state would count as fraud.[106] And if a court ordered a party to turn over specific assets, that party's refusal to comply would give rise to the jailable offense of civil contempt of court without offending the constitutional bans.[107] Second, courts have held a long list of monetary obligations not to count as "debts." Some constitutional provisions limited the ban to debts arising out of contract, as opposed to tort or crime.[108] In these places, failure to pay child support or alimony could give rise to arrest and incarceration.[109]

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[101] The 1849 Virginia statute took this approach, which was carried over into West Virginia when that state broke away from Virginia. *See Werdenbaugh*, 20 W. Va. at 593, 598.

[102] Despite its strong language, the Massachusetts statute functioned this way: the indigent debtor was required to appear in court before receiving a discharge. *See* Thacher v. Williams, 80 Mass. (14 Gray) 324, 328 (1859).

[103] For example, one author, writing in 1889, pointed out a number of ways in which the state bans were limited. *See* J.C. Thomson, *Imprisonment for Debt in the United States*, 1 JURID. REV. 357 (1889). Over one hundred years later, another author identified the same carve-outs and concluded there's a de facto debtors' prison system in the United States. *See* Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 149–54 (2002) (discussing civil contempt); *id.* at 155–56 (discussing child support payments); *id.* at 156–57 (discussing taxes).

[104] For constitutional provisions, see, for example, ARIZ. CONST. art. II, § 18 ("There shall be no imprisonment for debt, except in cases of fraud."). For case law, see, for example, *Towsend v. State*, 52 S.E. 293, 294 (Ga. 1905) ("[I]n enacting the statute now under consideration, the [l]egislative purpose was not to punish . . . a failure to pay a debt, but . . . the act of securing the money or property of another with a fraudulent intent . . . ." (quoting Lamar v. State, 47 S.E. 958, 958 (Ga. 1904))); and *Appleton*, 71 Mass. (5 Gray) at 533 (noting that a major purpose of the statute was "to punish fraudulent debtors").

[105] *See* Note, *Civil Arrest of Fraudulent Debtors: Toward Limiting the* Capias *Process*, 26 RUTGERS L. REV. 853, 855 (1973).

[106] *See id.*

[107] *See, e.g.*, Samel v. Dodd, 142 F. 68, 70 (5th Cir. 1906); Boarman v. Boarman, 556 S.E.2d 800, 804–06 (W. Va. 2001); State v. Burrows, 5 P. 449, 449 (Kan. 1885); *see also* Thomson, *supra* note 103, at 364 ("[T]he imprisonment is for the contempt and not for the debt." (quoting State v. Becht, 23 Minn. 411, 413 (1877))).

[108] *See, e.g.*, MICH. CONST. art. I, § 21 ("No person shall be imprisoned for debt arising out of or founded on contract, express or implied, except in cases of fraud or breach of trust."); *In re* Sanborn, 52 F. 583, 584 (N.D. Cal. 1892).

[109] *See* Thomson, *supra* note 103, at 366.

So too with criminal costs and fines.[110] Thus, in most states today one can be imprisoned for failure to pay noncommercial debts, including debts stemming from tort,[111] crime,[112] taxes and licensing fees,[113] child support,[114] and alimony.[115]

Many kinds of monetary obligations, then, have been held to fall outside the scope of the state bans. But once a monetary obligation qualifies as a "debt," states have implemented the bans' protections in one of two ways: First, some states have held that their bans on imprisonment for debt remove the courts' ability to issue contempt orders for nonpayment of qualifying debts.[116] This is the "no-hearing rule." The judgment creditor may pursue execution proceedings, attempting to attach nonexempt property, say, or garnish wages. But the court will not issue a civil contempt order to coerce the debtor into paying. Second, even in states that allow contempt proceedings, most courts require a sharply limited (and debtor-favorable) inquiry. Courts emphasize that the contempt lies in failing to comply with an injunction to turn over *specific* property that is currently under the debtor's control.[117] And that specific property must also be *nonexempt* under the

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[110] *See id.* at 367. Courts, however, did make clear that the legislature couldn't criminalize the mere nonpayment of commercial debt as a constitutional workaround. *See, e.g.*, Bullen v. State, 518 So. 2d 227, 233 (Ala. Crim. App. 1987).

[111] *See, e.g.*, Davis v. State, 185 So. 774, 776 (Ala. 1938).

[112] *See, e.g.*, State *ex rel.* Lanz v. Dowling, 110 So. 522, 525 (Fla. 1926); Plapinger v. State, 120 S.E.2d 609, 611 (Ga. 1961); Boyer v. Kinnick, 57 N.W. 691, 691 (Iowa 1894). It's interesting to note that the Illinois state constitution specifically *includes* criminal fines. *See* ILL. CONST. art. I, § 14 ("No person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment.").

[113] *See, e.g.*, City of Fort Madison v. Bergthold, 93 N.W.2d 112, 116 (Iowa 1958); Voelkel v. City of Cincinnati, 147 N.E. 754, 756–57 (Ohio 1925).

[114] *See, e.g.*, State v. Hopp, 190 N.W.2d 836, 837 (Iowa 1971); *In re* Wheeler, 8 P. 276, 277–78 (Kan. 1885).

[115] *See, e.g.*, State *ex rel.* Krueger v. Stone, 188 So. 575, 576 (Fla. 1939); Roach v. Oliver, 244 N.W. 899, 902 (Iowa 1932).

[116] *E.g.*, *In re* Nichols, 749 So. 2d 68, 72 (Miss. 1999) ("The [creditors] are free to collect the judgment by execution, garnishment, or any other available lawful means so long as it does not include imprisonment.").

[117] *See, e.g.*, Harrison v. Harrison, 394 S.W.2d 128, 130–31 (Ark. 1965). In *Lepak v. McClain*, 844 P.2d 852 (Okla. 1992), the Oklahoma Supreme Court sustained the contempt-of-court power when used "to require the delivery of . . . identified property owned by and in the possession or control of the judgment debtor . . . if the judgment debtor unjustly refuses to apply the identified property towards the satisfaction of a judgment"; however, the court struck it down under the ban on imprisonment for debt when contempt was used "to require the judgment debtor to set aside and deliver a portion of his/her future income toward the satisfaction of the judgment debt." *Id.* at 855. At an initial pass, states with cases affirming this rule include the following: Utah, *see In re* Clift's Estate, 159 P.2d 872, 876 (Utah 1945), Missouri, *see* State *ex rel.* Stanhope v. Pratt, 533 S.W.2d 567, 574–75 (Mo. 1976) (en banc); Zeitinger v. Mitchell, 244 S.W.2d 91, 97–98 (Mo. 1951) (citing *In re Clift's Estate*, 159 P.2d at 876), and Oklahoma, *see* Sommer v. Sommer, 947 P.2d 512, 519 (Okla. 1997); *Lepak*, 844 P.2d at 855.

state's exemption laws.[118] An injunction as a general rule is a "drastic and extraordinary remedy."[119] Accordingly, some states require that creditors attempt execution through in rem actions before resorting to in personam actions.[120] Herein lies the attractiveness of the state bans to the civil debtor — the protections offered to a qualifying debtor, as a general rule, far exceed those offered to the criminal debtor.

B. New Applications of the Bans

The doctrinal carve-outs for crime suggest that the state bans wouldn't apply to criminal justice debt. Nevertheless, three specific kinds of criminal monetary obligations might actually be covered by the bans: fines for regulatory offenses, costs, and definitionally civil debts. This section advances arguments from text, purpose, and original meaning, which in many cases converge on this result.

First, infractions known as "regulatory offenses," also known as "public welfare offenses." The most relevant example is traffic violations, which have played a major role in Ferguson and elsewhere. How to define the category? Although at common law, scienter requirements were generally necessary to a criminal charge (hence the regular practice of courts reading them into statutes),[121] the development of criminal law for regulatory purposes during industrialization made it increasingly desirable to impose strict liability in a number of situations. But some strict liability crimes, like statutory rape, are more easily analogized to traditional crimes despite the absence of a mens rea. A "regulatory offense" might be better defined, then, as a strict liability offense where the statute authorizes only a reasonable fine (and not a more penal-minded sanction, such as imprisonment).[122] In some states, offenses meeting this latter definition aren't even defined as "crimes."[123] An altogether different type of definition would look instead to the historical origin of the offense.[124]

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[118] *See, e.g.*, Shepard, *supra* note 6, at 1531–32.

[119] Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010).

[120] *See* Shepard, *supra* note 6, at 1529–30 (describing the rule's origin in the common law precept that creditors must exhaust legal remedies before turning to equitable ones).

[121] *See, e.g.*, United States v. Balint, 258 U.S. 250, 251–52 (1922) ("[T]he general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime . . . ."); *see also* Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 767 (1943) (citing as generally accepted the maxim that an act does not make one guilty unless the mind is guilty).

[122] For a similar analysis, see *State v. Anton*, 463 A.2d 703, 706–07 (Me. 1983).

[123] *See, e.g.*, FLA. STAT. § 775.08(3) (2015); MO. REV. STAT. § 556.016 (2000), *repealed and replaced by* Act effective Jan. 1, 2017, 2014 Mo. Laws 941, 1152 (to be codified at MO. REV. STAT. § 556.061(29)) (defining "infraction").

[124] Indeed, when trying to determine whether or not to read a scienter requirement into a statute, courts are guided by principles like those laid out in *Morissette v. United States*, 342 U.S. 246 (1952), looking to any required culpable mental state, the purpose of the statute, its connection to

Interpreting fines for regulatory offenses to fall under the bans of many states is consistent with the bans' text, purpose, and original meaning. Starting with the text, twenty-two state bans refer to "debt" or "debtor" without drawing further distinctions between different kinds of debts,[125] and there's no textual reason why such words should exclude monetary obligations triggered by statutorily regulated conduct and owed to the state.[126] Indeed, the presence of such qualifying language in the other bans[127] strongly suggests that the words "debt" and "debtor" weren't inherently limited to commercial life as a matter of the original meaning of the text — just as they aren't today.

But the carve-outs for crime? To be fair, provisions limiting the ban to debts arising out of contract (four states)[128] or stemming from civil cases (seven states)[129] would seem to leave regulatory offenses uncovered. But other carve-outs for crime[130] aren't so clean-cut, as their purpose likely had nothing to do with regulatory offenses. To the contrary, regulatory offenses became prominent within American criminal law only *after* the abolition of debtors' prisons.[131] The Court in

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common law, whether or not it is regulatory in nature, whether it would be difficult to enforce with a scienter requirement, and whether the sanction is severe. *See, e.g.*, *Ex parte* Phillips, 771 So. 2d 1066 (Ala. 2000) (applying *Morissette*'s framework).

125 This includes the state constitutional bans of Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Minnesota, Mississippi, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, and Wyoming. *See* sources cited *supra* note 95.

126 *See, e.g.*, *Debt*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Liability on a claim; a specific sum of money due by agreement or otherwise . . . ."). Indeed, in *People ex rel. Daley v. Datacom Systems Corp.*, 585 N.E.2d 51 (Ill. 1991), the Supreme Court of Illinois held that municipal fines counted as "debts" for the purposes of the Collection Agency Act. *Id.* at 60.

127 *E.g.*, S.D. CONST. art. VI, § 15 ("No person shall be imprisoned for debt arising out of or founded upon a contract.").

128 This carve-out can be found in the state bans of Michigan, New Jersey, South Dakota, and Wisconsin. *See* sources cited *supra* note 95; *see also, e.g.*, MICH. CONST. art. I, § 21 ("No person shall be imprisoned for debt arising out of or founded on contract, express or implied . . . .").

129 To be found in the state bans of Arkansas, California, Iowa, Nebraska, New Mexico, Ohio, and Tennessee. *See* sources cited *supra* note 95.

130 This category would include constitutional provisions with an express carve-out for crime, *e.g.*, OKLA. CONST. art. II, § 13 (exempting "fines and penalties imposed for the violation of law"), and states where case law has specifically mentioned "crime," *e.g.*, Plapinger v. State, 120 S.E.2d 609, 611 (Ga. 1961).

131 *See generally* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62–67 (1933) (tracing the development of public welfare offenses in the United States). Professor Jerome Hall, writing in 1941, said: "[The act requirement] and the *mens rea* principle constituted the two most basic doctrines of [Bishop's] treatise on criminal law. They are still generally accepted as such in this country." Jerome Hall, *Prolegomena to a Science of Criminal Law*, 89 U. PA. L. REV. 549, 557–58 (1941). Yet Hall was *critiquing* a blind adherence to mens rea as a ubiquitous doctrine in criminal law. *See id.* at 558 (arguing that mens rea, like the act requirement, becomes "little more than a point of orientation . . . once we encounter involuntary manslaughter, other crimes of negligence, and various statutory offenses").

Morissette v. United States[132] identified the "pilot of the [regulatory offenses] movement" in such crimes as "selling liquor to an habitual drunkard" and "selling adulterated milk," citing cases from 1849,[133] 1864,[134] and 1865.[135] A law review article published in 1933 called the "steadily growing stream of offenses punishable without any criminal intent whatsoever" a "recent movement" in criminal law,[136] placing the beginnings of the trend in the middle of the nineteenth century.[137] By comparison, all but a few states had enacted their bans on debtors' prisons by the 1850s.[138] So reading the carve-outs as unrelated to regulatory crimes is consistent with both text and original meaning. The abolition movement certainly did not intend to exclude such debts from the ban; whether legislatures meant to include them depends upon how sparing one's assumptions about past intent are.

Many state courts could therefore plausibly hold today that fines for regulatory offenses constitute civil "debt" under their state constitutional bans. While such holdings might raise a stare decisis issue in many instances, the risk of deprivations of liberty is high, and the world of criminal justice has changed so dramatically,[139] that revisiting precedent might be jurisprudentially sound. As the Ohio Supreme Court put it: "In today's society, no one, in good conscience, can contend that a nine-dollar fine for crashing a stop sign is deserving of three days in jail if one is unable to pay."[140]

Second, costs. Despite arising out of a criminal proceeding, costs are cleanly distinguishable from fines, restitution, and forfeiture in their basic purpose: compensating for or subsidizing the government's marginal expenditures on criminal proceedings. But of course, funding the government is not one of the traditional purposes of penal law.

Because the purpose of costs is not purely or event mostly to punish, they are arguably debts within the text of the state bans. As one

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[132] 342 U.S. 246 (1952).

[133] *Id.* at 256 (citing Barnes v. State, 19 Conn. 398 (1849)).

[134] *Id.* (citing Commonwealth v. Farren, 91 Mass. (9 Allen) 489 (1864)).

[135] *Id.* (citing Commonwealth v. Nichols, 92 Mass. (10 Allen) 199 (1865); Commonwealth v. Waite, 93 Mass. (11 Allen) 264 (1865)).

[136] Sayre, *supra* note 131, at 55.

[137] *Id.* at 56; *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–14 (2001) (describing the massive growth in statutory offenses in several states from the second half of the nineteenth century until the early twenty-first century); *cf.* Myers v. State, 1 Conn. 502 (1816) (holding that a defendant who rented his carriage on Sunday, a crime punishable by a fine of twenty dollars, couldn't be found guilty without a showing of mens rea). The late Professor William J. Stuntz also noted that regulatory crimes and "core crimes" like murder "have dramatically different histories." Stuntz, *supra*, at 512.

[138] *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 52 (1935).

[139] *Cf., e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2410–11 (2015) (identifying the "ero[sion]" of "statutory and doctrinal underpinnings," *id.* at 2410, as a principal justification for overruling precedent in federal stare decisis doctrine).

[140] Strattman v. Studt, 253 N.E.2d 749, 753 (Ohio 1969).

might guess, the states have split on whether costs fall within the scope of the bans. The majority rule, often tersely stated, is that they don't.[141] But at least one court has held otherwise. In *Strattman v. Studt*,[142] the defendant was sentenced to the statutory maximum of six months, a fine of $500, and costs.[143] After having served his time, and when he couldn't pay his debt, he was imprisoned to sit out his debt at $3 per day.[144] The Ohio Supreme Court held that costs are imposed "for the purpose of lightening the burden on taxpayers financing the court system," not for a "punitive, retributive, or rehabilitative purpose, as are fines."[145] Observing that costs arose out of an "implied contract" with the court, *Strattman* held that "[a] judgment for costs in a criminal case is a civil, not a criminal, obligation, and may be collected only by the methods provided for the collection of civil judgments."[146] Future state supreme courts confronting the issue should embrace *Strattman*'s logic and ban cost-related imprisonment.

Indeed, federal constitutional law may compel an answer on this point. Costs trigger the precedents, discussed above, of *James* and *Fuller*.[147] Many state bans on imprisonment for debt provide equally (or more) unequivocal protections to the civil debtor than the exemption statutes in *James* did; a strong logic therefore suggests that the Court could more widely enforce *James*'s prohibition on jailing defendants for failing to pay court costs. Additionally, interpreting the *James* and *Fuller* Courts as applying some degree of heightened scrutiny,[148] the disparate application of the imprisonment-for-debt bans is an even better indicator of "invidious discrimination"[149] than the dispar-

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[141] *See, e.g.*, Lee v. State, 75 Ala. 29, 30 (1883); Mosley v. Mayor of Gallatin, 78 Tenn. 494, 497 (1882).

[142] 253 N.E.2d 749.

[143] *Id.* at 750.

[144] *Id.* at 750–51.

[145] *Id.* at 754.

[146] *Id.* In fact, the recent bench card promulgated by Ohio Supreme Court Chief Justice O'Connor begins as follows: "*Fines are separate from court costs.* Court costs and fees are civil, not criminal, obligations and may be collected only by the methods provided for the collection of civil judgments." OFFICE OF JUDICIAL SERVS., *supra* note 57 (citing *Strattman*, 253 N.E.2d at 754).

[147] *See supra* notes 75–90 and accompanying text.

[148] This possibility is made more credible by Justice O'Connor's note in the related case of *Bearden v. Georgia* that "[d]ue process and equal protection principles converge in the Court's analysis in these cases." 461 U.S. 660, 665 (1983). Of course, while the disparity between how indigent and "well-heeled" defendants are treated, *see supra* note 87 and accompanying text, is arguably not *right*, it seems reasonable enough to pass rational basis scrutiny, *see, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980). For example, a state could plausibly maintain that imprisonment for nonpayment of costs attendant to crime helps to deter criminal behavior, such that abolishing such imprisonment for civil debts, while maintaining it for criminal debts, is reasonable.

[149] James v. Strange, 407 U.S. 128, 140 (1972) (quoting Rinaldi v. Yeager, 384 U.S. 305, 309 (1966)).

ate applications of the Kansas and Oregon exemption statutes. Despite the Court's reluctance to rule on an issue not properly briefed, federal courts might return to the issue and confirm that states must apply their bans on imprisonment for debt to costs (and other quasi-civil debts) in a criminal case.[150] In fact, the lawsuits against Ferguson and Jennings hinted at this argument,[151] although neither complaint cited the Missouri Constitution. When dealing with costs, the states may adopt the reasoning of *Strattman* in their interpretations of state law, or the Fourteenth Amendment, under *James* and *Fuller*, may itself demand that reasoning.

Finally, violations of monetary obligations that are statutorily defined as civil. For both regulatory offenses and costs, a reviewing court must assess and characterize the debt as civil or quasi-civil for the purposes of coverage under the state ban. But sometimes, the relevant statute explicitly tags the criminal justice debt as civil or as receiving civil protections.[152]

For example, in some jurisdictions, courts have held that violations of municipal ordinances constitute civil actions.[153] In *Kansas City v. Stricklin*,[154] for example, the Supreme Court of Missouri noted that these proceedings "are not prosecutions for crime in a constitutional sense."[155] Case law in a number of states supports this approach,[156] although a fifty-state survey cannot be conducted here. As much of the furor regarding contemporary debtors' prisons revolves around municipalities, this is no minor point. Similarly, some collections statutes explicitly redefine certain debts as civil for the purposes of collec-

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[150] It may also be worth pointing out that *James* and *Fuller* dealt most concretely with attorneys' fees. There's probably no principled reason to distinguish between attorneys' fees and other costs, like a judgment fee or a clerk fee, but doctrinally the Court may have felt especially sensitive to discrimination with respect to assigning lawyers, given its recent decision mandating counsel for indigent defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[151] *See* Complaint, *Fant v. Ferguson*, *supra* note 48; Complaint, *Jenkins v. Jennings*, *supra* note 24.

[152] The possibility that all violations of municipal ordinances (in some states) might fall under the bans is made more morally salient by the fact that many courts treat such violations as civil for the purposes of setting (lowered) procedural protections for defendants. *See, e.g.*, State v. Anton, 463 A.2d 703, 705 (Me. 1983); Kansas City v. Stricklin, 428 S.W.2d 721, 725–26 (Mo. 1968) (en banc).

[153] Naturally, there may be some overlap between this category and the two mentioned above. For example, violations of municipal ordinances boil down to the "regulatory crimes" category in states where municipalities are not empowered to imprison. Take Wisconsin, where the municipal inability to create crimes prohibits them from punishing infractions by either fine or imprisonment. *See* State v. Thierfelder, 495 N.W.2d 669, 673 (Wis. 1993); *see also* WIS. STAT. § 939.12 (2014) (defining "crime").

[154] 428 S.W.2d 721.

[155] *Id.* at 724.

[156] *See, e.g.*, City of Danville v. Hartshorn, 292 N.E.2d 382, 384 (Ill. 1973) (describing violations of municipal ordinances as "quasi-criminal in character [but] civil in form" (quoting City of Decatur v. Chasteen, 166 N.E.2d 29, 39 (Ill. 1960))).

tion. The debt in *James* had this characteristic, as the underlying statute specified that the "total amount . . . shall become a judgment *in the same manner and to the same extent as* any other judgment under the code of civil procedure."[157] In Florida, convicted indigents assessed costs for due process services are expressly provided with the same protections as civil-judgment debtors.[158] But not all collections statutes are so explicit, of course.[159]

IV. THE ADDED VALUE OF THE STATE LAW APPROACH

If courts begin to recognize claims under the state bans on debtors' prisons, imprisonment for some criminal debts would become subject to both federal and state restrictions. This Part lays out how the state law protections would differ from the federal protections, and why having multiple levels of protection makes sense.

To start, state debtor protections would not merely duplicate the federal ones. In fact, under the state law protections, criminal justice debtors would face a much friendlier inquiry than they would under *Bearden*'s freestanding equal protection jurisprudence.[160] This is true under either of the two rules detailed above. Instead of a test that asks whether the debtor has sought employment or credit per *Bearden*, in some states there would be a limited inquiry into whether the debtor possessed specific, nonexempt property that the debtor could be ordered to turn over. And many debtors currently caught in the cogs of the criminal justice system would have no such property. In other states, the court simply could not imprison for failure to pay the debt, although it could pursue other execution remedies available at law.

Why have two tests? Regulating criminal justice debt through both *Bearden* claims and imprisonment-for-debt claims makes a lot of sense. On this understanding of the law, debtor protections co-vary quite straightforwardly with the state's interest in collecting.

The baseline principle, of course, is that a court may consider a defendant's financial resources to inform its decision whether to impose jail time, fines, or other sanctions.[161] Without this discretion, courts

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[157] James v. Strange, 407 U.S. 128, 130 n.3 (1972) (emphasis added) (quoting KAN. STAT. ANN. § 22-4513(a) (Supp. 1971)).

[158] *See* FLA. STAT. § 938.29(4) (2015) (specifying that such debtors shall not "be denied any of the protections afforded any other civil judgment debtor").

[159] *Cf., e.g.*, MISS. CODE ANN. § 99-37-13 (West 2015) ("[A] default . . . may be collected by any means authorized . . . for the enforcement of a judgment."); MO. REV. STAT. § 560.031(5) (2000) ("[T]he fine may be collected by any means authorized for the enforcement of money judgments.") (to be transferred to MO. REV. STAT. § 558.006 by Act effective Jan. 1, 2017, 2014 Mo. Laws 941).

[160] While constitutional carve-outs for fraud will capture some debtors, it can't plausibly lower the protections of the ban to the level of *Bearden*: the failure to search for a job or to seek credit is hardly fraudulent.

[161] *E.g.*, Bearden v. Georgia, 461 U.S. 660, 669–70 (1983).

might impose prison terms unnecessarily, to avoid the risk of assessing a fine on a judgment-proof defendant. And the Court has made clear this discretion is central to the core penal goals of deterrence, incapacitation, and retribution.[162] Against that baseline, the tradition of *Bearden* simply mandates that once a sentencing court has imposed a monetary obligation, it may not convert that obligation into imprisonment for failure to pay absent a special finding, a basic threshold that ensures the defendant isn't invidiously punished for being poor.

Imprisonment-for-debt claims would impose a heightened requirement on financial obligations that, unlike traditional fines and restitution, really further noncriminal goals — despite being imposed from within the criminal system. Regulatory offenses are assessed to deter low-level misbehavior, and costs are assessed to replenish the coffers of the criminal justice system, or to fund the government. Indeed, costs function more as fees for service or taxes than as punishments. More problematically, these monetary obligations, unlike most taxes, are not indexed to wealth, income, or any other proxy for ability to pay. They therefore impose the burden of funding the government on those individuals and communities least equipped to bear the weight. Conceptually, then, imprisonment-for-debt claims would regulate the new debtors' prisons along a fundamentally distinct dimension and should join *Bearden* claims as a way to challenge unconstitutional imprisonment.

Now, the imprisonment-for-debt claims wouldn't challenge the propriety of assessing such charges in the first place. The proper textual and analytical hook for that question is the Excessive Fines Clause.[163] They would, however, challenge a state's use of collection methods unavailable to civil creditors. Where a state has chosen to ban debtors' prisons, it shouldn't be able to welcome them back in surreptitiously, by grafting them onto the criminal system.[164]

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So far, the vast majority of academic commentators, litigators, legislatures, and other legal actors have focused on the federal protections

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[162] *See id.* at 672.

[163] *See* Colgan, *supra* note 24.

[164] A state, of course, could repeal its ban on debtors' prisons, but any attempt to do so would create an unlikely coalition of criminal and civil debtors, and the political-action costs of doing so are likely too high. *See generally* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, MINN. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2544519 [http://perma.cc/9APA-W5VQ]. Indeed, based upon the state-by-state abolition of debtors' prisons in the nineteenth century, the bans highlight the self-determination of states within the federalist structure. This tiered regulatory model thus gives each state the ability to pursue multiple legitimate ends — including both punishment and subsidizing the criminal justice system — so long as it doesn't discriminate in applying its own law.

extended under *Bearden* and its predecessors.[165] *Bearden* represents a powerful tool for change, yet state law bans on debtors' prisons could provide even greater protections for certain criminal justice debtors where the state's interest in collecting isn't penal. *Bearden* and imprisonment-for-debt claims could operate side-by-side in a manner that's both administrable and functionally appealing.

The new American debtors' prisons seem problematic along multiple dimensions. But aside from clear policy concerns, they may violate constitutional laws at both the federal and state levels. Some of these laws — the state bans on debtors' prisons — were enacted over a hundred years ago, but can and should be invoked today.[166] The task of operationalizing these bans for a new social evil rests in the hands of litigators and courts. But the spirit behind them ought to drive other constitutional actors — executives, legislators, and citizens — to take swift action.[167]

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[165] *See supra* p. 1028.

[166] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.").

[167] For an argument that awareness campaigns are more effective than litigation, see Eric Balaban, *Shining a Light into Dark Corners: A Practitioner's Guide to Successful Advocacy to Curb Debtor's Prisons*, 15 LOY. J. PUB. INT. L. 275 (2014).