Unsupervised: Court Fees, Privatized Probation, and the Resurgence of

Debtors’ Prisons in the South

By: Michaela Holcombe

The phrase “debtors’ prison” inevitably conjures images of older and regressive times. Evidence indicates that debtors’ prisons existed in ancient Rome.1 Pamphlets decrying the practice of jailing those too poor to pay their debts date back as far as the 1750s.2 For participants in the American Revolution, “the very words ‘debtors’ prison’ were a war cry.”3 Nevertheless, American courts were still jailing those who could not afford to pay their debts well after the Revolutionary War: in 1828, the Prison Discipline Society estimated that over a thousand people were jailed in New York City alone for failure to pay their debts.4 Of the approximately $25,000.00 the imprisoned debtors collectively owed, the entire group managed to pay only $295.00 while imprisoned.5 Due to the economic reality that debtors’ prisons make little financial sense and growing public criticism, Britain banned debtors’ prisons in 1869.6 By the end of the Reconstruction, most of the United States had followed suit.7

The default image that jumps to mind, then, is not necessarily inaccurate: the practice of jailing the poor for failure to pay their debts is archaic and, on paper, outlawed. Unfortunately, in practice, debtors’ prisons are alive and well in present-day

2 Id.
3 Id.
4 See id.
5 Id.
6 Id.
7 Id.
Despite Supreme Court precedent condemning the practice of jailing those who cannot afford to pay their debts, two procedural vehicles keep modern debtors’ prisons stocked: (1) civil contempt orders requiring imprisonment of someone who has not paid judicially imposed fees, such as child support; and (2) revoking probation for failure to pay court fees and fines imposed as probation conditions.9

This paper focuses on how the common practice of jailing probationers who cannot pay their court fines and fees, along with the use of privatized probation, have led to a resurgence of debtors’ prisons in the South. Part I summarizes how public probation works and examines its purposes by detailing North Carolina’s current probation program. Part I also details some of the fees and fines routinely charged as court and probation costs in North Carolina. Part II delves into the recent but growing phenomenon of privatized probation, in which courts outsource probation to private for-profit companies, who then charge the costs of supervision directly to their probationers. Part II discusses how and why courts, particularly in the South, are attracted to the idea of privatized probation, and will also contrast how the reality of privatized probation differs from the system as advertised. Part III then explores how debtors’ prisons are still used in the United States, despite Supreme Court precedent declaring the practice to be unconstitutional. Finally, Part IV concludes with a discussion of the larger costs of jailing those who cannot pay their debts, both in terms of collateral consequences for the jailed debtor and expanded societal costs.

Part I: Public Probation: Why We Use It and How It Works.

a. Why We Use Probation.

The specific details of public probation programs vary among the states. This paper sketches North Carolina’s probation program as an example of the typical way in which public probation programs operate. As defined by the North Carolina Department of Public Safety, the agency tasked with handling probation in our state,\textsuperscript{10} “[p]robation is a period of court-ordered community supervision of an offender imposed as an alternative to punishment.”\textsuperscript{11} Probation, then, provides “conditional relief” from incarceration.\textsuperscript{12}

Providing “conditional relief” from incarceration serves several purposes, including social and theoretical ones. An optimistically titled brochure published by the North Carolina Department of Public Safety chirps that “[t]he purpose of supervision is to help you [the probationer] lead a law abiding life and monitor your activities and compliance while on supervision.”\textsuperscript{13} Probation, then, ideally provides both rehabilitation and control of probationers’ behavior.\textsuperscript{14} In terms of collateral consequences, probation

\begin{footnotesize}
\begin{enumerate}
\item HOWARD ABADINKSY, PROBATION AND PAROLE: THEORY AND PRACTICE 437-38 (Frank Mortimer, Jr. et. al., eds., 9th ed. 2006).
\end{enumerate}
\end{footnotesize}
allows low-level offenders to remain in their communities, lessening the effects of a criminal conviction.

Probation also “offers the first line of defense against prison overcrowding,” which has become a serious concern for state governments facing ballooning costs and shrinking budgets. Addressing that economic reality, probation is much cheaper than incarceration. The yearly cost per inmate in a minimum custody facility in North Carolina is $25,616.00. The most expensive type of incarceration, “close custody,” costs $34,960.00 per inmate. The yearly average cost, which factors in the costs of minimum custody, medium custody, and close custody, is $29,160.00 per inmate. In contrast, the yearly cost per offender for “probation/parole supervision” is only $1,566.00. The biggest probation expense, electronic monitoring and GPS, costs $2,595.00 per offender. That number is approximately ten percent of the least expensive incarceration option in the state.

b. An Overview of North Carolina’s Probation Program.

North Carolina probationers are classified into two punishment levels: community and intermediate. A community punishment level may include “fines, restitution, 

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15 Id. at 439.
16 See HOWARD ABADINKSY, PROBATION AND PAROLE: THEORY AND PRACTICE 16 (Frank Mortimer, Jr. et. al., eds., 9th ed. 2006).
18 Id.
19 Id.
20 Id.
21 Id.
community service and/or substance abuse treatment.” An intermediate level requires that an offender be placed on supervised probation with at least one additional condition, which could be special probation, residential community corrections, electronic house arrest, intensive supervision, day reporting, or drug treatment court. While community probation or “unsupervised” probation and supervised probation differ in important ways, they both allow fines and fees to be charged to the probationer. Regardless of the type of probation involved, when a probationer violates a condition of his probation, even if the violation is a failure to pay rather than a new criminal offense or absconding from the jurisdiction, probation officers can “immediately place probationers in cognitive behavioral programming, a substance abuse treatment program, or under electronic monitoring” without court approval or a hearing. This is a recent change to North Carolina law – before the Justice Reinvestment Act was adopted in June of 2011, probation officers were required to request a hearing before the court to alter the conditions of probation. As part of this new system of “delegated authority,” probation officers can also “place a probationer in jail for two to three days” without a court’s approval or a hearing. If the probationer repeatedly fails to pay the required amounts, she can be imprisoned for up to ninety days. If the probationer has been confined for

23 Id.
24 Id.
27 JUSTICE REINVESTMENT IN NORTH CAROLINA: THREE YEARS LATER, supra note 25, at 3.
28 Id.
29 N.C.G.S. § 15A-1344(d2) (2015); JUSTICE REINVESTMENT IN NORTH CAROLINA: THREE YEARS LATER 3 (“Probationers in North Carolina who repeatedly violate
ninety days twice before, her probation can then be revoked on her next violation or failure to pay.\(^\text{30}\)

c. North Carolina Probation and Court Fees.

North Carolina is one of a majority of states that uses “offender-funded” probation, meaning that the state charges probationers to fund the state’s probation program.\(^\text{31}\) As part of supervised probation, probationers must satisfy a number of mandatory conditions, including, among others: paying a supervision fee,\(^\text{32}\) paying “the costs of court, any fine ordered by the court, and . . . restitution or reparation,”\(^\text{33}\) and paying the State of North Carolina for the costs of any “appointed counsel, public defender, or appellate defender” who represented the probationer “in the case for which he was placed on probation.”\(^\text{34}\) The value of legal services is currently priced at $75.00 per hour, plus fees and expenses.\(^\text{35}\) These fees are presumed to be the regular conditions of probation unless the court issuing the sentence waives them at the time in its sentencing order.\(^\text{36}\) On top of these required fees, the court may also order that a

\(^{30}\) Id.

\(^{31}\) State-By-State Court Fees, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees.


\(^{33}\) N.C.G.S. § 15A-1343(b)(9).

\(^{34}\) N.C.G.S. § 15A-1343(b)(10).


\(^{36}\) N.C.G.S. § 15A-1343(b) (“Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court.”)
probationer be placed under house arrest with electronic monitoring, perform community service, and pay “the fee prescribed by law” for both electronic monitoring and community service supervision. North Carolina charges probationers $40.00 per month as a supervision fee. For community service supervision, probationers are charged a one-time per sentence fee of $250.00. Finally, electronic monitoring fees generate $90.00 per offender, plus a daily fee “that reflects the actual cost of providing electronic monitoring.” That daily fee is $4.37 per probationer, bringing the monthly payment charged to each probationer for electronic monitoring to $133.00.

As mentioned above, a probationer must pay court fees incurred during the disposition of her criminal case. These court fees can easily add hundreds, even thousands, of dollars to a probationer’s total debt. Mandatory general district court fees, including those for criminal cases in front of magistrates, typically total $178.00. Those fees include charges for use of the facilities ($12.00), a “telecommunications and data

37 N.C.G.S. § 15A-1343(a1)(1).
38 N.C.G.S. § 15A-1343(a1)(2).
39 Id.
40 N.C.G.S. § 15A-1343(c)(1).
41 N.C.G.S. § 143B-708(c) (2012).
42 N.C.G.S. § 15A-1343(c2).
44 N.C.G.S. § 15A-1343(b)(9), supra note 33 and accompanying text.
45 Joseph Shapiro, As Court Fees Rise, the Poor Are Paying the Price, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.
47 Id.
connectivity fee” ($4.00), a service fee ($5.00), and fees for law enforcement officer retirement insurance and law enforcement officer training and certification ($7.50 and $2.00, respectively). The fees only increase for more serious district court offenses and cases in superior court.

Additional criminal fees can be added depending on the facts of each case. These additional fees include: jail fees for any pretrial confinement ($10.00 per day), jail fees for partial incarceration for certain types of probation ($40.00 per day), a pretrial release service fee ($15.00), a criminal record check fee ($25.00), and many other potential fees. On top of these fees, North Carolina requires defendants who cannot afford a lawyer to pay the paradoxical “Appointment of Counsel Fee for Indigent Defendants,” a $60.00 charge. Finally, in 2009, North Carolina established a $25.00 late fee for failure to pay fines or other imposed court costs on time and added a $20.00 fee for those who want to set up installment plans.

48 Id.
49 Id.
50 Id.
51 See Criminal Court Costs and Fees, supra note 47.
52 Criminal Court Costs and Fees, supra note 47, at 1 (“The appendix summarizes the basic costs common to all dispositions in a particular trial division. It does not include additional cost items that must be assessed depending on individual factors for each case... those costs are assessed separately.”).
53 Id. at 2.
54 Id.
55 Id.
56 Id.
57 Id.
59 CRIMINAL JUSTICE DEBT, supra note 35, at 7.
60 Id.; Criminal Court Fees and Costs, supra note 47, at 2.
While the state can actually profit from some of these charges (most notably, community service fees), the costs of debt collection can outstrip any gains – especially when people are incarcerated for failure to pay. In 2009 in Mecklenburg County, 564 people were arrested because they fell behind on their debt payments. To get out of jail before waiting for a court hearing, each person was required to pay the full amount of her remaining debt. 246 of those arrested could not pay and were jailed for an average of four days before a hearing was scheduled. At the majority of those hearings, the debts were cancelled due to the probationers’ inability to pay. Though Mecklenburg County collected $33,476.00 from those who had been arrested, incarcerating them cost over $40,000.00.

The economic realities of these collections efforts are typical and illustrate a problem for the courts and the counties they sit in: the costs of collection outweigh the benefits the litany of fees is intended to create. Seeing the distance between states’ hoped-for gains and the ongoing realities of budget shortfalls, private probation companies declared themselves to be the solution.

Part II: Privatized Probation.

a. As Advertised.

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61 Community service program fees are $250.00 per sentence, while the cost per offender is only $55.00 per year. Costs of Corrections, supra note 17. Assuming a community service sentence of one year or less, the state makes $195.00 off each offender.
63 Id.
64 Id.
65 Id.
66 Id.
In theory, privatized probation is a continuation of the offender-funded probation model used by North Carolina and a majority of other states. The difference is that private probation companies bear the costs of misdemeanor supervision; they offer probation services free of charge to the state – in exchange, they collect fees from the probationers they monitor. The fees that private probation companies charge are their only revenue source. Because they only charge their probationers and not local courts or governments, privatized probation companies pitch themselves as the solution to funding problems. Sentinel Offender Services (“Sentinel”), a large private probation company operating out of Georgia, asks: “Got Budget Challenges?” Sentinel boasts that its services “have saved many government agencies hundreds upon hundreds of millions of dollars in monitoring fees and jail costs,” all while providing “full service, offender paid [sic] electronic monitoring programs and complete probation services for more than 500,000 probationers and parolees nationwide.” Judicial Correction Services (“JCS”), a private probation company operating in several states, explains how the community benefits from its operations more directly: “Supervision is completely offender-funded. This means your tax dollars are not going to support the probation office.”

67 HUMAN RIGHTS WATCH, supra note 12, at 2.  
68 Id. at 2-3.  
69 Id.  
Although cost is the primary factor the companies emphasize (“Can YOU afford not to completely review and capitalize upon our Offender Funded [sic] Programs?”), they also mention “community improvements,” noting that “over 1.2 million hours of community service have been completed by probationers,” drug testing and “classes based on cognitive-behavioral therapy” are available to probationers, and that the companies make “financial assessments” to address “potential financial delinquencies.” JCS promises to revitalize the communities in which it operates by “hiring locally, paying above industry standards, and promoting from within.” Sentinel credits its successes to the fact that it has “worked closely with [its] customers” in order to provide, with what one assumes is unintended irony, “‘solutions’ for your ‘challenges.’”

Expansion and a high volume of referrals sustain the private probation companies’ business model: “[r]elatively low margins on a per-offender basis can translate into significant profits when multiplied out over a large number of probationers.” Because of this profit motive, private probation companies view courts that sentence high volumes of misdemeanor offenders to probation in order to collect fines and fees as high-value targets. These areas tend to be poorer and suffering economically. The practice of using court fees and fines as a source of income is so

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73 Offender Funded Visual, supra note 69.
74 Id.
75 Probation & Court Services, supra note 70.
76 For the Community, supra note 71.
77 Probation & Court Services, supra note 70.
78 Id.
79 Id. at 17.
80 Id.
81 See Ethan Bronner, Poor Land in Jail as Companies Add Huge Fees for Probation, NY TIMES (July 3, 2012) http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?_r=0; PROFITING FROM PROBATION, supra note 12, at 3 (“An
pervasive that the Conference of State Court Administrators, an independent group, released a review of applicable law and recommendations entitled, “Courts Are Not Revenue Centers.”

That report notes that traffic violations (a common case referral in the counties that use private probation companies) are particularly susceptible to misuse: “[i]n traffic infractions, . . . court leaders face the greatest challenge in ensuring that fines, fees, and surcharges are not simply an alternate form of taxation.” Similarly, the report condemns the use of surcharges and fees used for purposes that “have no relationship to the operation of the courts or justice system.”

Given the financial pressures under which many jurisdictions labor, it is perhaps not surprising that over 1,000 U.S. courts to date are persuaded by the advertising.

Privatized probation companies currently operate in at least a dozen states: Georgia, Tennessee, Alabama, Mississippi, Missouri, Florida, Colorado, Utah, Washington, Michigan, Montana, and Idaho. Despite the regionally diverse array of states in which private probation companies operate, they have the strongest presence in the South. In 2012 in Georgia, 648 courts delegated over 250,000 probation cases to private probation companies. The increasingly number of counties and municipalities depend on local courts as sources of revenue by trying to fund through misdemeanor fines what they cannot or will not fund through taxation.

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82 Carl Reynolds & Jeff Hall, Courts Are Not Revenue Centers, Conference of State Court Administrators (2012) http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx.
83 PROFITING FROM PROBATION, supra note 12, at 1 (“Many of these offenders are guilty of only minor traffic violations like speeding or driving without proof of insurance.”).
84 Courts Are Not Revenue Centers, supra note 88, at 1.
85 Id. at 8.
86 PROFITING FROM PROBATION, supra note 12, at 16.
87 Id. at 12 n.3.
88 Id. at 16-17.
companies.\textsuperscript{89} Tennessee courts assigned somewhere between 50,000 to 80,000 cases.\textsuperscript{90} Over one hundred of Alabama’s courts contract with private companies for probation services.\textsuperscript{91}

North Carolina, too, has made preliminary overtures toward privatized probation. A 2010 appropriations bill required the North Carolina Department of Correction (now the North Carolina Department of Public Safety) to prepare a “plan for implementing a pilot program on the privatization of probation services.”\textsuperscript{92} In its response memo, the Department of Correction notably emphasized that private probation companies may create “financial hardship” for probationers – in particular, the Department cited concerns about the monthly supervision fees private companies charge their probationers.\textsuperscript{93} (Conceding the reality that it also charges supervision fees, the Department protests that its probation officers “are careful not to violate solely on failure to pay those fees.”\textsuperscript{94} A review of Mecklenburg County’s collection woes\textsuperscript{95} should inform any assessment of the truthfulness of that defense.) Notwithstanding the wellbeing of North Carolina probationers, the Department’s primary concern was cost: “DCC does not have funds to pay a vendor to perform [probation] services.”\textsuperscript{96} Not surprisingly, the Department recommended that its supervision of low-level offenders not be outsourced to a private

\textsuperscript{89} Id. at 16.
\textsuperscript{90} Id.
\textsuperscript{91} PROFITING FROM PROBATION, supra note 12, at 16.
\textsuperscript{93} N.C. DEP’T. CORRECTION, LEGISLATIVE REPORT ON PLAN FOR A PILOT PROGRAM ON PROBATION SERVICES, SL 2010-31, at 5 (March 1, 2011).
\textsuperscript{94} Id.
\textsuperscript{95} Supra, notes 62-66 and accompanying text.
\textsuperscript{96} REPORT ON PLAN FOR A PILOT PROGRAM ON PROBATION SERVICES, supra note 93, at 6.
company. Though this reasoning appears to dodge the fact that private probation companies pledge to monitor low-level offenders at no cost to the local government, it reflects the reality that privatized probation is too expensive to bear, both for the counties they claim to serve and the probationers they supervise.

b. As Practiced.

The reality of privatized probation differs radically from the rosy picture created by companies’ marketing materials. In traditional probation, meaning cases in which the probationer has to satisfy monitoring and reporting requirements as well as other non-monetary probation conditions, it is unclear that private probation companies are equipped to provide useful services. Part of the problem is volume: as noted above, the business model requires that private probation companies process as many offenders as possible. The huge numbers of probationers assigned to private probation officers makes actual, informed supervision practically impossible. For example, one representative private probation officer in Georgia was tasked with supervising an average caseload of “600 offenders from five different courts across multiple counties.” In contrast, the North Carolina Department of Public Safety has established, and reports on, a caseload goal of 60 offenders requiring actual supervision per probation officer. The average caseload of a private probation officer, then, is ten times higher than the recommended caseload for a public probation officer.

\[97 Id.\]
\[98 PROFITING FROM PROBATION, supra note 12, at 17.\]
Traditional probation cases, however, are rarely assigned to private probation companies. Because private probation companies operate within cash-strapped court systems and monitor only low-level offenders, their probationers are especially likely to be sentenced to “pay-only probation”: a type of probation in which low-level offenders, such as those who are in court to pay a speeding ticket and fines, are put on probation with no conditions other than making payments. When these cases are assigned to private probation companies, the companies charge the probationers a supervision fee in order to make a profit – but their supervision consists only of collecting money and determining when someone is behind on their payments. This monthly supervision fee increases the debt of a probationer who already struggled to pay her initial court fines and fees. In jurisdictions that use private probation companies, courts include as a condition of probation that the probationer must pay all the fees the private company “is entitled to levy against them.” Therefore, failure to pay the probation companies’ supervision fees constitutes a probation violation, which can result in the probationer’s incarceration. The only difference between the job of a private probation officer and debt collector in this context is that a debt collector cannot put out a warrant for arrest when a debtor falls behind on her payments. It is worth noting that North Carolina has a

100 PROFITING FROM PROBATION, supra note 12, at 3.
101 Id. Supervision fees vary from state to state: Georgia’s average $35.00 per month, while Alabama’s average around $40.00 per month. Id. at 24. In some states, like Montana, supervision fees can reach up to $100.00 per month. Id.
102 Id.
103 PROFITING FROM PROBATION, supra note 12, at 16.
104 Id.
version of “pay-only” probation for probationers described as “collection cases.” In 2012 and 2013, there were over 1,700 North Carolina probationers with “no special condition of probation other than monetary conditions.” In contrast to private probation companies, however, North Carolina does not charge supervision fees in collection cases.

Allowing private probation companies to supervise pay-only probationers is problematic because it presents an inescapable conflict of interest. Some probationers are financially unable to pay their fees and fines – in those cases, the probationer is entitled to a hearing in which she demonstrates that she is too indigent to pay her fees. In jurisdictions that use private probation companies, however, many courts allow the companies to determine for themselves who is able to pay and who is not. Given that the companies’ only revenue sources are the fees they collect from probationers, if they decide that a probationer is unable to pay, the probationer is no longer a profit source. This delegation of court authority to the probation company is similar to North Carolina’s delegation of authority to state probation officers, allowing them to jail a probationer for two to three days for violations without a hearing or court order. In jurisdictions that have contracted with private probation companies, courts abdicate their authority largely

107 N.C. GEN. STAT. §15A-1343(b) (“Defendants placed on unsupervised probation are subject to the provisions of this subsection except that defendants placed on unsupervised probation are not subject the regular conditions contained in subdivisions . . . (6) . . . .”).
109 PROFITING FROM PROBATION, supra note 12, at 5.
110 See supra notes 25-28 and accompanying text.
due to a desire for convenience and expedience: probation company employees often prepare warrants for the arrest of their probationers and present those warrants to the judge for a signature.\footnote{PROFITING FROM PROBATION, supra note 12, at 57-58.} A Mississippi judge explains that there is “a lot of paperwork,” so there is not time “to scrutinize everything”; because the private company probation officers present the warrants and “give their reasons right there,” he concluded, “[y]ou just sign it.”\footnote{Id. at 58.} Because private probation companies market themselves to courts in jurisdictions that are struggling economically, the courts “lack the institutional resources to ensure proper oversight of those companies.”\footnote{Id. at 57.} In those areas, the result is that the only people tracking “important baseline data” about how a company deals with its probationers are the company’s employees.\footnote{Id. at 57.} Some companies encourage this state of affairs by discouraging probationers from speaking to the court directly: JCS gives new probationers written instructions, one of which is “\textit{Do not contact the court, [sic] they will be unable to help you.}”\footnote{Id. at 59 (emphasis in original).}

This conflict of interest and lack of oversight incentivize unscrupulous companies and their employees to use the threat of incarceration to dredge up money, regardless of whether the probationer can afford to pay.\footnote{PROFITING FROM PROBATION, supra note 12, at 5 (“Companies’ financial interests are often best served by using the threat of imprisonment to squeeze probationers and their families as hard as possible to pay as much as they can, no matter how severe a hardship this imposes.”).} In Georgia, one probation officer’s method is to approach the family of a probationer she has had incarcerated and tell them that “it is up to them whether their son, daughter or spouse comes home that night or spends the
week in jail awaiting a probation revocation hearing that could land him or her behind bars for weeks or months.”¹¹⁷ In theory, probationers are arrested not to encourage payment, but to guarantee the probationer’s presence at a probation violation hearing.¹¹⁸ In practice, private probation companies use the threat of incarceration before a violation hearing to squeeze probationers and their families for money. The shakedown works by ostensibly arresting each probationer for a hearing on the probation violation of failure to pay. Instead of having a hearing, however, the probation officer “negotiates with the jailed probationer for partial payment of what they owe.”¹¹⁹ If the probationer or her family can produce the negotiated amount, the probation officer asks the judge to order the probationer’s release and they remain on probation without having had a revocation hearing or, in many cases, without appearing in court at all.¹²⁰ These abusive debt collection practices, while officially discouraged by private probation companies,¹²¹ are also incentivized: companies provide bonuses for officers who exceed collection benchmarks.¹²²

The profit motive similarly incentivizes another practice: paying as little of a probationer’s money toward her fine as possible so as to keep the probationer on the hook longer. Rather than apply probationers’ payments to their court fees, private probation companies split the payments so that some money is siphoned off to pay for the

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¹¹⁷ Id. at 6 (citing an interview with an unnamed probation officer “with a medium-sized firm.”).
¹¹⁸ Id. at 51.
¹¹⁹ Id. at 52.
¹²⁰ Id.
¹²¹ Id. at 47.
¹²² PROFITING FROM PROBATION, supra note 12, at 43.
company’s supervision fees.\textsuperscript{123} Not only does this practice keep the probationer under supervision longer, meaning more supervision fees for the company, but the practice also allows the private probation officers to obtain warrants for defaulting probationers’ arrests. A Georgia private probation officer explained the practice, saying “when [the court fine] gets down to not that much money, I make sure there are still some fines left along with the fees. I can’t get a warrant out on somebody who only owes [company] fees.”\textsuperscript{124}

Despite the fact that private probation companies deny that abusive debt collection practices occur in their businesses, those practices are the subject of recent litigation in Georgia\textsuperscript{125} and Alabama.\textsuperscript{126} In a trial order stemming from one of several ongoing Alabama cases, Judge Harrington concluded that the private probation companies operating in the Harpersville Municipal Court system were running “a judicially sanctioned extortion racket.”\textsuperscript{127} Before beginning his findings of fact, Judge Harrington noted that “[t]he admitted violations are so numerous as to defy a detailed chronicling.”\textsuperscript{128} Among the order’s litany of violations, the second defined pay-only probation as it is practiced in many jurisdictions that contract with private probation

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\textsuperscript{123} Id. at 51.
\textsuperscript{124} Id.
\textsuperscript{127} Id. at *1.
\textsuperscript{128} Id.
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companies: “Defendants [are] placed on ‘probation’ with JCS only when unable to pay the entire amount of assessed fines and court costs on the day of trial.”

Even disregarding the lack of oversight of and abusive debt collection tactics used by many private probation companies, a strong argument exists that pay-only probation, the lifeblood of private probation companies, is unconstitutional. Though the Supreme Court has held that “poverty, standing alone, is not a suspect classification,” and thus cannot require a compelling interest and narrow tailoring under the Court’s equal protection precedent, an equal protection violation claim is essentially that “other persons similarly situated as is the claimant unfairly enjoy benefits that he does nor or escape burdens to which he is subjected.” As pay-only probation is applied, similarly situated defendants receive radically different punishments depending on their economic status. For example, in a court using pay-only probation with private probation companies and a monthly supervision rate of $40.00 per month, consider the differences between three defendants, each sentenced to pay a fine of $500.00 for a traffic offense.

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129 Id.
130 Harris v. McRae, 448 U.S. 297, 323 (1980).
132 United States v. Cronn, 717 F.2d 164, 169 (5th Cir. 1983).
133 This example is a modified version of the hypothetical posed by Human Rights Watch. PROFITING FROM PROBATION, supra note 12, at 27-28. I have altered the fine amount to reflect what an offender would be charged for a North Carolina traffic violation and North Carolina district court costs and fees. I have also altered the monthly supervision fee to mirror the supervision fee charged by the state of North Carolina. Therefore, any errors in the calculation are my own.
134 A violation of N.C.G.S. § 20-217, failure to stop for a properly marked and designated school bus, carrying a fine of $500.00 for an offense in which no one is injured. N.C.G.S. § 20-217(e).
plus $190.00 for district court costs and fees,\textsuperscript{135} bringing the total amount owed to $690.00:

- The first defendant can afford to pay the full fine on the day of her hearing. Because she can pay the fine immediately, she is not placed on pay-only or any other kind of probation.

- The second defendant cannot afford to pay the full fine on the date of the hearing, but can afford $100.00 per month. She will be on probation for 12 months, pay $480.00 in monthly supervision fees, and $1,170.00 total. Including North Carolina’s installment payment plan fee, she pays $1,190.00 total and $500.00 more than the first defendant.

- Our third defendant cannot afford to pay the full fine immediately, but she can afford $60.00 per month. She will be on probation for 35 months, pay $1,400.00 in monthly supervision fees, and $2,070.00 in total. Including North Carolina’s installment payment plan fee, she pays $2,090.00 total, $900.00 more than the second defendant, and $1,420.00 more than the first.

The numbers reveal a counterintuitive result: those who can afford less pay significantly more over time than those who can afford the full fine up front. The third defendant pays 300\% of what the first defendant pays “precisely because she is less able to afford it.”\textsuperscript{136} Less of the poorer probationer’s payment goes toward her court fine, keeping her on probation longer.\textsuperscript{137} Given the same hypothetical discussed above, imagine the case of a fourth defendant who can only afford to pay $25.00 per month. Her

\begin{footnotes}
\item[135] \textit{Criminal Court Costs and Fees, supra} note 47, at 5.
\item[136] \textit{Profiting From Probation, supra} note 12, at 28.
\item[137] \textit{Id.} at 27.
\end{footnotes}
payments will never reach the original amount of the fine, as she is being charged more in supervision fees each month than she can afford to repay. In theory, then, our hypothetical poorest defendant is facing a Sisyphean debt collection process: no matter how many years she is on probation, she will never be able to pay back what she owes, and the sum she owes will only continue to grow. In reality, statutes generally limit the amount of time an offender can serve probation for any one offense, although those guilty of multiple offenses can serve consecutive probation sentences.\textsuperscript{138} North Carolina limits the sentence to “a maximum of five years,”\textsuperscript{139} but provides that probation may be extended by up to three years beyond the original sentence.\textsuperscript{140} If our hypothetical fourth defendant paid $25.00 per month for the eight years permitted for one offense under North Carolina law, by the time her probation is ended by statute and assuming at least one dollar of each payment addresses her actual court fine, she will have paid $2,304.00 of pure supervision fees, with $594.00 outstanding on her original court fine.

Under the rational basis test, which would apply to any challenge to the practice of pay-only probation because the poor are not a suspect class,\textsuperscript{141} the state interest in probation is not the collection of increasingly grievous fines and fees, but rather in “deterrence and punishment”\textsuperscript{142} and, in probation generally, “rehabilitation and control.”\textsuperscript{143} Subjecting the poor to spiraling fees in excess of those charged to more well-

\begin{thebibliography}{99}
\bibitem{138} Id. at 29.
\bibitem{139} N.C.G.S. § 15A-1342(a).
\bibitem{140} Id.
\bibitem{141} See supra notes 130-131 and accompanying text.
\bibitem{142} Sarah Bellacicco, supra note 9, at 256.
\bibitem{143} PROBATION AND PAROLE: THEORY AND PRACTICE, supra note 9, at 437-38.
\end{thebibliography}
off defendants in no way furthers the state’s interest. Because pay-only probation fails even the rational basis test, it is unconstitutional.

Turning from pay-only probation to the practice of incarcerating those who fail to pay fines, it is popularly understood that the Supreme Court has already declared debtors’ prisons to be unconstitutional. Given this precedent, how is it that people are routinely jailed for failure to pay their debts?

Part III: The Resurgence of Debtors’ Prisons.

a. Bearden v. Georgia: Protection for Indigent Defendants?

Bearden v. Georgia, a 1983 Supreme Court case addressing the practice of jailing those who fail to pay their court fines and associated fees, does not actually declare that practice to be unconstitutional. The specific question addressed by the Court was “whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant’s probation for failure to pay a fine and restitution.” The facts of the case are not unusual: Bearden pled guilty to felony burglary and theft and was sentenced to three years’ probation for the burglary with a concurrent one-year probation sentence for the theft. As part of his probation conditions, he was ordered to pay a $500.00 fine and $250.00 in restitution. By borrowing money from his parents,

144 Sarah Bellacicco, supra note 9, at 256.
147 Id.
148 Id. at 661.
149 Id. at 662.
150 Id.
Bearden was able to pay $200.00. Later, he was laid off from his job and unable to find new work despite his best effort, due in part to his illiteracy and ninth-grade education. Bearden notified the probation office that his payments would be late because of his difficulties finding a job; shortly thereafter, Georgia filed a petition to revoke his probation because he had not paid the remaining debt.

Summarizing its existing precedent, the Court noted that if the State determines that a fine or restitution adequately serves its interest in penalizing criminal conduct, “it may not thereafter imprison a person solely because he lacked the resources to pay.” However, the law distinguishes between offenders “based on the reasons for non-payment”: if the probationer “willfully” refuses to pay the fine when she has the means, “the State is perfectly justified in using imprisonment as a sanction to enforce collection.” This reasoning informs the Court’s conclusion: courts can incarcerate those who fail to pay their debts if that failure is “willful”; if it is not, the court “must consider alternate measures of punishment other than imprisonment,” but can still imprison a probationer who has made “bona fide efforts to pay” if the court finds that “alternate measures are not adequate to meet the State’s interests in punishment and deterrence.” This holding requires a court to “inquire into the reasons for failure to pay” in revocation proceedings for failure to pay violations. Incarcerating a probationer

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151 461 U.S. at 662.
152 Id.
153 Id. at 663.
154 Id. at 667.
155 Id.
156 461 U.S. at 668.
157 Id. at 672.
158 Id.
without a hearing as to the willfulness of her refusal to pay would be “contrary to the fundamental fairness required by the Fourteenth Amendment.”\textsuperscript{159}

All that \textit{Bearden} requires in actuality is: (1) a hearing as to the probationer’s ability to pay and (2) a finding of fact that the probationer’s failure to pay was “willful.” Even if the court finds that the probationer made “bona fide efforts to pay,” if the court makes a finding of fact that incarceration is the only punishment that will adequately serve the State’s interests, the probationer can still be imprisoned. Despite the available inference that “imprisoning a probationer who, through no fault of his own, had been unable to pay his debts despite making bona fide efforts to do so violate[s] the Equal Protection Clause of the Fourteenth Amendment,”\textsuperscript{160} this case is hardly the definitive precedent it is popularly portrayed to be.

\textbf{b. \textit{Bearden}’s Irrelevance to the Majority of Offenders.}

Even so, \textit{Bearden} has been alternatively ignored, distinguished, or weakened in many jurisdictions.\textsuperscript{161} Ignorance and laziness have informed many jurisdictions’ response to \textit{Bearden}. In many courts, the hearings required by \textit{Bearden} simply do not take place: defendants do not know they are entitled to a hearing on their ability to pay and judges do

\textsuperscript{159} \textit{Id.} at 673.

\textsuperscript{160} \textit{In For A Penny}, AMERICAN CIVIL LIBERTIES UNION 5 (October 2010) https://www.aclu.org/files/assets/InForAPenny_web.pdf.

\textsuperscript{161} \textit{Id.} (“[C]ourts across the United States routinely disregard the protections and principles the Supreme Court established in \textit{Bearden} . . ..”); Walter Kurtz, \textit{Pay or Stay: Incarceration of Minor Criminal Offenders for Nonpayment of Fines and Fees}, 51 Tenn. B.J. 16, 16-17 (July 2015) (“As legislatures have tacked more and more costs on to the convicted, the system has often failed to separate out those who are able to pay from the indigent. This has taken place in spite of court decisions holding that it is unconstitutional to jail indigents for nonpayment unless it is willful or the defendant failed to make bona fide effort to pay.”).
not want the hearings to clog up their dockets.\textsuperscript{162} Even when \textit{Bearden} hearings do occur, they are frequently resolved in one or two minutes.\textsuperscript{163}

Other jurisdictions have found ways to distinguish their cases from \textit{Bearden}. For example, case law in Georgia (and other states) distinguishes between court fines and costs received in a sentence stemming from a conviction and court fines and costs received as the result of a plea agreement.\textsuperscript{164} A probationer subject to court fines and fees as the result of a plea agreement is in a different situation than the probationer in \textit{Bearden}, these jurisdictions reason, because “the defendant affirmatively agreed to pay the fine by accepting the plea bargain.”\textsuperscript{165} Because “a defendant’s agreement to a plea bargain is similar to the establishment of a private contract between the probationer and the State,” no finding of willfulness is required.\textsuperscript{166} These jurisdictions view the mandatory court fines and fees as “bargained-for.”\textsuperscript{167} Given that the vast majority of criminal cases are resolved through plea agreements rather than trials,\textsuperscript{168} \textit{Bearden’s} protections, limited as they are, ostensibly apply to five percent or less of criminal offenders.\textsuperscript{169}

North Carolina has not accepted this reasoning, but has instead opted to make the offender’s protests of poverty relatively easy to ignore. Case law in North Carolina, by no

\textsuperscript{162} Joseph Shapiro, \textit{supra} note 145; \textit{PROFITING FROM PROBATION}, \textit{supra} note 12, at 4.
\textsuperscript{163} \textit{PROFITING FROM PROBATION}, \textit{supra} note 12, at 5.
\textsuperscript{164} Sarah Bellacicco, \textit{supra} note 9, at 236-37.
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{169} \textit{Id.} (“While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of federal and state court cases are resolved through this process.”).
means anomalous, places the burden of proving that a probation violation was not willful on the defendant. 170 Probation hearings are not “governed by the rules of a criminal trial,” 171 so they fall within the discretion of the trial court. 172 The burden of proof is not “beyond a reasonable doubt,” but rather “evidence satisfying the trial court in its discretion that the defendant violated a valid condition of probation without lawful excuse.” 173

Allowing individual judges to determine at their own discretion whether someone is incapable of paying or “willfully” refusing to pay offers an offender little in the way of protection or due process. 174 Some judges decide that a probationer can afford to pay her debt because she has a cell phone or a cigarette habit. 175 Others will say that offenders should get the money from family members or use government benefits to pay their court fees. 176 Still other judges note that defendants pleading poverty “come in wearing expensive NFL jackets” or have “tattoos on their arms.” 177 Though the defendant before each of these judges may receive her Bearden-required hearing, it is not at all clear that her due process and equal protection rights have been meaningfully asserted or protected.

170 State v. Tozzi, 84 N.C. App. 517, 521 (1987) (“The burden is on defendant to present competent evidence of his inability to comply with the conditions of probation; . . . otherwise, evidence of defendant’s failure to comply may justify a finding that defendant’s failure to comply was willful or without lawful excuse.”).
171 State v. Freeman, 47 N.C. App. 171, 175 (1980).
172 Id.
173 State v. Tozzi, 84 N.C. App. at 520-21.
175 Joseph Shapiro, supra note 145; CRIMINAL JUSTICE DEBT, supra note 35, at 21.
176 Id.
177 Id.
Part IV: Conclusion: The Costs of Debtors’ Prisons and Possible Solutions.

The problems discussed in this paper, particularly the practice of jailing those who are too poor to pay their fees, is by no means limited to states where courts contract with private probation companies. As the discussion of North Carolina’s fee schedule and probation program demonstrate, the same abuses and practices can occur in states that use offender-funded models to support public probation programs and the court system itself. A Brennan Center study examining the fifteen states with the highest number of incarcerated people (North Carolina ranked in at number eleven) found that all fifteen of the studied states are currently engaged in “introducing new user fees, raising the dollar amounts of existing fees, and intensifying the collection of fees and other forms of criminal justice debt such as fines and restitution.” The practice of jailing those who are too poor to pay their legal financial obligations carries overt and hidden costs, both economic and in the form of collateral consequences for offenders and the larger community.

One of the most obvious costs jailing people to collect debt imposes is inherent in the practice: incarcerating people for failure to pay costs the state money for each day the debtor spends in jail. Recall Mecklenburg County’s attempt to collect money owed by offenders within its borders. In the case of the county, enough information was available to calculate the financial benefit (or lack thereof) incurred. However, many courts and governments where debtors’ prisons are most common do not keep track of the costs of using this particular method of debt collection. This lack of information is

178 CRIMINAL JUSTICE DEBT, supra note 35, at 1.
179 Supra notes 62-66 and accompanying text.
180 CRIMINAL JUSTICE DEBT, supra note 35, at 2.
due in part to the reality that debt collection “involves myriad untabulated expenses, including salaried time from court staff, correctional authorities, and state and local government employees.”\textsuperscript{181} Costs are particularly burdensome for local sheriffs’ offices and the courts themselves.\textsuperscript{182} In many cases, the costs of incarceration for failure to pay debt “end up costing the state more than they produce.”\textsuperscript{183}

The collateral consequences of debtors’ prisons are myriad and serious. Most obviously, the use of debtors’ prisons interferes with a person’s ability to actually maintain a job and earn the money necessary to pay off her debts. There are almost limitless other problems. Some states suspend driving privileges for those who miss debt payments, making it increasingly difficult to get to work.\textsuperscript{184} Notably, this policy can also lead to new convictions and fines for driving with a suspended license.\textsuperscript{185} Some states also require offenders to pay off their criminal justice debt before they are eligible to vote.\textsuperscript{186} In the vast majority of states, debt stemming from court costs and fines damages credit and can make repaying other debts, such as child support, impossible.\textsuperscript{187} This damage to credit scores impacts a person’s ability to find housing for those applying for loans and those seeking public and rental housing.\textsuperscript{188} Similarly, the majority of

\begin{footnotes}
\item[181] Id.
\item[182] Id.
\item[184] CRIMINAL JUSTICE DEBT, supra note 35, at 2.
\item[185] Id.
\item[186] Id.
\item[187] Id.
\item[188] Id. at 27.
\end{footnotes}
employers use background checks on a potential employee that include a credit check.\footnote{Adam Levin, 7 Steps to Deal with Employers Looking at Your Credit Report, ABC News (Sept. 22, 2013), http://abcnews.go.com/Business/top-steps-deal-employers-credit-report/story?id=20309128 (“One study from the Society of Human Resource Management estimates that 60\% of companies checked some [or all] job applicants’ credit reports.”).} In this context, debt stemming from criminal court costs and fines constitutes another barrier to employment (and a potential way for employers to identify people with criminal records without requesting them specifically).\footnote{See CRIMINAL JUSTICE DEBT, supra note 35, at 27.}

While the consequences of the type of practices discussed in this paper are far-reaching and almost too many to mention, one final cost should be addressed: the use of debtors’ prisons undermines public trust and confidence in their governments and the courts.\footnote{See Ending Modern-Day Debtors’ Prisons, AMERICAN CIVIL LIBERTIES UNION (last accessed Nov. 8, 2015), https://www.aclu.org/feature/ending-modern-day-debtors-prisons.} The conflicts of interest present in private probation are perhaps less immediate for individual public probation officers but no less real in court systems where low-level offenders are jailed to collect debt as revenue. “[W]hen courts are over-dependent on fees, such reliance can interfere with the judiciary’s independent constitutional role, divert courts’ attention away from their essential functions, and . . . threaten the impartiality of judges and other court personnel with institutional, pecuniary incentives.”\footnote{CRIMINAL JUSTICE DEBT, supra note 35, at 30.} These possibilities should be of particular concern to law students, lawyers, and the judiciary.

Although the use of debtors’ prisons is common and facilitated by a number of complex and overlapping factors, solutions are possible. The most tenable and immediate solution to some of these problems is more education about defendants’ rights at all
levels of the criminal justice system – for offenders themselves, their lawyers, and particularly the judges who are responsible for complying with Bearden and the Constitution. In at least one jurisdiction, educating the judiciary as to their rights and responsibilities when dealing with indigent defendants appears to have made a difference. In Ohio, after the ACLU brought a suit condemning many of the practices discussed in this paper, the Supreme Court of Ohio crafted a simple solution: “bench cards.”  

193 Bench cards are essentially cheat sheets, kept at the bench, by individual judges.  

194 The cards tell the judges “that the law require[s] them to determine whether a person [can] afford a fine.”  

195 Ohio Supreme Court Chief Justice Maureen O’Connor admitted that the cards constituted “a re-education of the judiciary” that appears to have worked.

196 In the best of all possible worlds, education alone could both ensure that Bearden is enforced and improve the accuracy and fairness of Bearden hearings.

However, given that Bearden hearings do take place in some jurisdictions and provide only questionable value, broader and more sweeping solutions are also available. Accepting that court fees are not per se unconstitutional, courts could make indigent defendants exempt from fees and be tasked with setting up payment plans under which fees are repaid depending on each individual defendant’s ability.  

198 Alternatively, courts should rely on community service programs for low-level offenders rather than fines and

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194 Id.
195 Id.
196 Id.
198 Id. at 32.
fees.\textsuperscript{199} Legislatures should eliminate costs that penalize the poor, such as “payment plan fees, late fees, collection fees, and interest.”\textsuperscript{200} As of the date of this writing, no state legislature appears to have taken these steps. Given the increased litigation and public exposure of the abusive practices discussed here, however, it is not impossible that a political will may develop and push politicians into previously unexplored territory.

Though privatized probation significantly compounds the problems with jailing offenders to collect debt, debtors’ prisons are used in many jurisdictions, not all of which have ties to private probation companies. Incarceration as a method of debt collection, whether the offender is on probation or not, raises significant constitutional and moral concerns by creating a dual-tiered system of justice. Therefore, debtors’ prisons and the systems of privatized probation that help create them diminish the effectiveness and integrity of the judicial system. Economically, civically, and morally, the costs of debtors’ prisons and privatized probation are too expensive to bear.

\textsuperscript{199} \textit{Id.}  
\textsuperscript{200} \textit{Id.}