

## Article

# Improving Economic Sanctions in the States

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## INTRODUCTION

Economic sanctions provide an appealing alternative to incarceration in the face of state budget cuts and the increasing pressures of mass incarceration. In theory, monetary sanctions provide a measure to impose punishment on the offender without incarceration, all while funding the criminal justice system. In many European countries, economic sanctions provide just such an alternative.<sup>1</sup>

But once again, the United States exemplifies its exceptionalism in the context of punishment.<sup>2</sup> Here in the United States, economic sanctions do not replace incarceration; rather, they supplement and extend traditional punishment.<sup>3</sup> As

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1. See Katherine Beckett & Alexis Harris, *On Cash and Conviction: Monetary Sanctions As Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 513–15 (2011).

2. The United States is the leading incarcerator in the world. *Highest to Lowest - Prison Population Total*, INT'L CTR. PRISON STUD., [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (last visited Apr. 6, 2015) (showing the world's prison population rates). Several aspects of our justice system, from incarcerating juvenile offenders to the severity of our penal system, are exceptional in the context of other countries with similar political economies. See Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 237–38 (2009) (describing unique features of the U.S. criminal justice system that make it exceptional); Nicola Lacey, *American Imprisonment in Comparative Perspective*, DAEDALUS, Summer 2010, at 102, 106 (examining “American ‘penal exceptionalism’” based upon political structures).

3. Beckett & Harris, *supra* note 1, at 509; Alexis Harris et al., *Drawing*

states struggle to close budget gaps produced by the untenable pressures of mass incarceration, economic sanctions are increasing without much restraint.<sup>4</sup> Many states are expanding the types of offenses that trigger economic fines as the principle punishment.<sup>5</sup> At the same time, economic sanctions increasingly finance critical aspects of the criminal justice system.<sup>6</sup>

This trend is developing in contrast to the reality that most offenders cannot pay economic sanctions in full. The average formerly incarcerated male lives at or below the poverty line in the United States.<sup>7</sup> While courts are constitutionally required to consider an individual's ability to pay economic sanctions,<sup>8</sup> evidence demonstrates that they regularly do not.<sup>9</sup> As a result, many offenders face unmanageable criminal justice debt upon release into the community.<sup>10</sup> Moreover, aggressive collection practices and profit-oriented collection services make the outcome of economic sanctions, i.e., criminal justice debt, a roadblock to successful reintegration to society.<sup>11</sup>

When the American Law Institute (ALI) set out to revise and update the Model Penal Code,<sup>12</sup> one of the major undertakings of the project was re-envisioning the use of economic sanctions as punishment. Since 2001 the ALI Reporters have considered and drafted several versions of the revised Code to create an approach to economic sanctions that balances oft-competing perspectives on this method of punishment.<sup>13</sup> These drafts tried to find the right compromise between allowing

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*Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1770 (2010) (“[M]onetary sanctions are now a common supplement to confinement and criminal justice supervision.”).

4. See *infra* notes 46–52 and accompanying text.

5. See *infra* Part I.

6. *Id.*

7. See *2014 Poverty Guidelines*, U.S. DEP'T HEALTH & HUM. SERVS., <http://aspe.hhs.gov/poverty/14poverty.cfm> (last visited Apr. 6, 2015) (a single individual lives at the poverty line in the United States if he or she earns \$11,670 per year); see *infra* notes 93–94.

8. *Bearden v. Georgia*, 461 U.S. 660, 698–69 (1983).

9. See *infra* notes 113–123 and accompanying text.

10. See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7–10 (2010); *infra* Part II.

11. See BANNON ET AL., BRENNAN CTR. FOR JUSTICE, *supra* note 10, at 24–29. For more discussion, see *infra* Part II.

12. MODEL PENAL CODE: SENTENCING (Tentative Draft No. 3, approved with amendments May 19, 2014).

13. Professor Kevin Reitz has worked as the Model Penal Code: Sentencing Reporter since 2001. He was joined by Cecelia Klingele as Associate Reporter in 2012. MODEL PENAL CODE: SENTENCING (Lance Liebman, Foreword, Tentative Draft No. 3, 2014).

courts to use economic sanctions as an alternative method of punishment and setting realistic limits on the use of economic sanctions to promote an offender's reintegration into society.<sup>14</sup>

The current version of the revised Code takes pivotal steps to improve economic sanctions. First, it prohibits costs, assessments, and other "user fees" that require offenders to pay for services in the criminal justice system.<sup>15</sup> Second, in the event that such assessments are not eliminated, the revised Code clarifies the hierarchy of payment, prioritizing restitution over any other court-imposed costs or fees.<sup>16</sup> Finally, it caps economic sanctions based upon a "reasonable financial subsistence" standard.<sup>17</sup> This standard limits the total amount of economic sanctions that a court can impose on the individual based upon the amount required to maintain reasonable necessities for the individual and his or her family.<sup>18</sup> These measures will do much to address the dangers of unfettered economic sanctions in the states, from the appearance of a conflict of interest in the court system to the unconstitutional incarceration of offenders for their failure to pay criminal justice debt.<sup>19</sup>

Though these measures provide critical improvements, the revised Code avoids tackling one of the key problems with economic sanctions in the states: defining ability-to-pay determinations. Courts are constitutionally required to assess whether an individual can pay court-imposed debts.<sup>20</sup> Courts vary in their interpretation of this mandate, with some courts making the determination before or after the imposition of fines, and some measuring the individual's ability to pay at the time of sentencing or in the future, based on predicted earning power.<sup>21</sup>

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14. See Kevin Reitz, *Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1739 (2015) ("The widespread practice in American law is to impose economic penalties with uncertain chances of collection and with insufficient concern for their long-term impact on offender reintegration and public safety.").

15. User fees are "financial obligations imposed not for any traditional criminal justice purpose such as punishment, deterrence, or rehabilitation but rather to fund tight state budgets." BANNON ET AL., *supra* note 10, at 1. The Code recommends eliminating such costs. MODEL PENAL CODE: SENTENCING § 6.04D (Tentative Draft No. 3, 2014). For further discussion, see *infra* Part III.

16. MODEL PENAL CODE: SENTENCING § 6.04(10) (Tentative Draft No. 3, 2014); see *infra* Part III.

17. MODEL PENAL CODE: SENTENCING § 6.04 cmt. b (Tentative Draft No. 3, 2014).

18. *Id.* § 6.04(B).

19. See *infra* Part III.

20. *Bearden v. Georgia*, 461 U.S. 660, 668–70 (1983).

21. See *infra* Part II.

The revised Code addresses this issue by establishing the “reasonable financial subsistence” standard and requiring an assessment prior to the imposition of cumulative fees and fines. It does not, however, define the “reasonable subsistence” standard with specificity; rather, the Code leaves this measure to the discretion of judges and legislatures for clarification.<sup>22</sup> Such a step is in line with the drafters’ desire to promote different practices amongst the states,<sup>23</sup> but it leaves unanswered a question that courts consistently struggle to address.<sup>24</sup>

This Article makes two interventions in relation to the Code’s efforts to improve economic sanctions. First, it proposes measures that can build on the important improvements captured in the revised Code. These measures include reforms to increase the amount of information available to courts and the public relating to the accumulation of criminal justice debt and the creation of monitoring agencies to provide individuals within the justice system with more information about the economic sanctions imposed upon them. Second, this Article observes how rational use of economic sanctions as a method of punishment in the United States is inextricably intertwined with two trends in justice reform: the budget crisis in state court systems<sup>25</sup> and the pressures of budget-cut criminal justice reform.<sup>26</sup>

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22. See *infra* Part III.

23. The states are considered experimental grounds in sentencing reform, and accordingly we expect some variety in their methods and use of punishment. At the same time, since the 1970s there has been a focused effort to reduce unwarranted disparities in sentencing between different judges in the same jurisdiction and to guide unfettered discretion. This Article argues that the disparities in use of and approach to economic sanctions require further guidance regarding discretion beyond that provided by the revised Model Penal Code. See *infra* Part IV.A.

24. See, e.g., Brief of Amici Curiae ACLU Fund of Mich. et al. in Support of Joseph Bailey, at 16, *People v. Bailey*, 2014 WL 310203 (Mich. Ct. App. Jan. 28, 2014) (No. 311682) (“Although pay-or-stay sentences are routine in some courts in Michigan, there is a troubling lack of consistency in the imposition of these sentences.”); ACLU, *IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS* 17–80 (2010) (describing limited ability-to-pay analyses conducted in Louisiana, Michigan, Ohio, Georgia, and Washington). For further discussion, see *infra* Section III.

25. The economic downturn in 2008 resulted in a significant decrease in funding to state courts. See, e.g., Maura Dolan, *Cutbacks in California Court System Produce Long Lines, Short Tempers*, L.A. TIMES (May 10, 2014), <http://www.latimes.com/local/la-me-court-cuts-20140511-story.html> (pointing to the economic downturn as the cause of court underfunding). This development spread to the federal judiciary with sequestration. Adam Liptak, *Budget Cuts Imperil Federal Court System, Roberts Says*, N.Y. TIMES (Dec. 31, 2013), <http://www.nytimes.com/2014/01/01/us/politics/budget-cuts-imperil-court-system-chief-justice-says.html>. As a result, state courts have sought funding from alternative sources to address this crisis. E.g., Dolan, *supra* (explaining that

These trends perversely disincentivize courts and legislatures from reining in the severity of economic sanctions.<sup>27</sup> Though the revised Code discourages the use of economic sanction proceeds to support court operations,<sup>28</sup> courts may continue to rely on revenue from monetary sanctions to supplement their budgets unless legislatures revitalize court funding.<sup>29</sup> At the same time, cost-effectiveness increasingly justifies and motivates criminal justice reforms.<sup>30</sup> This cost-cutting environment drives states to continue transferring justice system costs to offenders.<sup>31</sup> These trends may exist in tension with the Model Penal Code's efforts to create a revised approach to economic sanctions. They will also affect the revised Code's ability to successfully improve the imposition of economic sanctions in the long-term.<sup>32</sup>

Though economic sanctions are an appealing sentencing option given the economic and fiscal pressures mass incarceration places on the American justice system, this Article does not suggest that the expansion of economic sanctions is the answer to reducing mass incarceration. Economic sanctions can and do pull a broad scope of individuals into the justice system who may not need to be there at all.<sup>33</sup> Rather, this Article focuses on how to improve the use of economic sanctions whether it is used as an alternative to incarceration, a supplement to incarceration, or a standalone sanction.

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Kings County Superior Court held a garage sale to raise money). As part of that response, courts are more aggressively collecting debts from criminal offenders. *See infra* Part I.

26. States and the federal government have implemented reforms to reduce reliance on incarceration as a cost-saving measure. *See infra* Part I. Such reforms show great potential in reducing overincarceration in the United States, but they also present perils to the extent that reforms that save money do not necessarily improve the justice system. *See* Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 210–22 (2013); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 630–33 (2012); Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, DAEDALUS, Summer 2010, at 62, 63, 67–69.

27. *See infra* Part III.

28. *See* MODEL PENAL CODE: SENTENCING § 6.04(D) (Tentative Draft No. 3, 2014).

29. *See infra* Part IV.

30. *See* Eaglin, *supra* note 26, at 202; Fan, *supra* note 26, at 70; Jessica M. Eaglin, *The Drug Court Paradigm*, at 26 (forthcoming 2015); *see infra* notes 201–202 and accompanying text.

31. *See infra* notes 59–70 and accompanying text.

32. *See infra* Part IV.

33. *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. (forthcoming 2015).

This Article unfolds in four parts. Part I describes the rise of economic sanctions in recent decades. Part II demonstrates the troubling outcome of this development: the associated rise of criminal justice debt. It also chronicles the variety of approaches courts take in determining whether an individual has the ability to pay economic sanctions. Part III provides an overview of the Model Penal Code's improvements to economic sanctions, with a particular emphasis on the new "reasonable financial subsistence" standard. Part IV proposes additional measures to supplement the reforms embodied in the revised Model Penal Code. It also discusses how funding shortages in the courts and budget-cut criminal justice reform may prevent efforts to improve economic sanctions in the states. The Article then concludes.

### I. THE EXPANSION OF ECONOMIC SANCTIONS

Between 1972 and 2010, the U.S. prison population increased exponentially, from fewer than 200,000 prisoners to more than 1.6 million.<sup>34</sup> Including jails, the United States now incarcerates approximately 2.3 million people on any given day.<sup>35</sup> By 2012, one in 108 American adults was incarcerated.<sup>36</sup> During these decades, the contours of American exceptionalism expanded as the United States acquired the distinction of leading incarcerator in the world.<sup>37</sup> Today, despite minor decreases in recent years,<sup>38</sup> the current rate of incarceration remains far

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34. BUREAU OF JUSTICE STATISTICS, PRISONERS 1925–81 tbl.1 (1982), available at <http://www.bjs.gov/content/pub/pdf/p2581.pdf> (showing 196,092 sentenced prisoners in 1972); E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 2 tbl.1 (2014). The U.S. rate of incarceration grew exponentially as well. In 1972, the United States incarcerated 161 residents per 100,000 in the population. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis et al. eds., 2014). By 2012, the United States incarcerated 707 per 100,000, or more than four times the rate in 1972. *Id.*

35. There are approximately 1.55 million individuals incarcerated in state and federal prisons in the United States. CARSON, *supra* note 34, at 1. Additionally, there are more than 730,000 individuals incarcerated in local jails across the country. TODD D. MINTON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2013 - STATISTICAL TABLES 1 (2014).

36. OLIVER ROEDER, ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? PRISON, POLICING, AND OTHER THEORIES 20 (forthcoming 2015).

37. INT'L CTR. PRISON STUD., *supra* note 2 (showing the world's prison population rates).

38. CARSON, *supra* note 34, at 1.

outsized in comparison to the average pre-1980s rate, and to the rates of other countries with similar political and economic structures.<sup>39</sup>

Other aspects of the criminal justice system expanded along with the increasing prison population. In 2012, about 4.8 million offenders were serving sentences of probation or parole in the United States.<sup>40</sup> Not unlike incarceration, the United States places individuals on probation and parole at a rate far outsized in comparison to other democratic countries around the world.<sup>41</sup> In other words, “mass incarceration” and “mass supervision” developed in tandem in the United States.<sup>42</sup>

These phenomena created untenable pressures on the criminal justice system. State and federal correctional costs now exceed \$80 billion per year.<sup>43</sup> After adding judicial, legal, and police costs, this amount climbs to \$260 billion annually.<sup>44</sup> Since the Great Recession, budget constraints in the states have resulted in funding cuts to court systems.<sup>45</sup> As a result, ever-growing offender populations cycle through cash-strapped justice systems.

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39. See NAT'L RESEARCH COUNCIL, *supra* note 34, at 33 & n.1; THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 1 (2014), *available at* [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf). Compare Lacey, *supra* note 2, at 108 (asserting that U.S. penal disparity must be examined by “unraveling longer-term institutional dynamics”), with INT'L CTR. FOR PRISON STUDIES, *supra* note 2 (displaying U.S. penal disparity against other countries' prison populations).

40. LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2012).

41. MODEL PENAL CODE: SENTENCING § 6.03, reporters' note, at e (Tentative Draft No. 3, 2014) (acknowledging that the rates of probation and postrelease supervision in the United States are, by international standards, as exceptional as U.S. incarceration rates).

42. See *id.* (“Arguably, the U.S. engages in ‘mass probation’ or ‘mass supervision’ . . . on a par with the nation’s ‘mass imprisonment’ or ‘mass incarceration.’”); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 66 (2013) (demonstrating a correlation between larger increases in probation rates and larger increases in incarceration rates between the 1980s and 2000s).

43. INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 9 (2013).

44. *Id.*

45. See DANIEL J. HALL, NAT'L CTR. FOR STATE COURTS, RESHAPING THE FACE OF JUSTICE: THE ECONOMIC TSUNAMI CONTINUES 1 (asserting that “[t]he Great Recession continues to leave state courts reeling,” as state court administrators reported that twenty-nine states had budget decreases in fiscal year 2011, thirty-five state courts reported deficits in 2010, and in 2009 thirty-three state courts reported deficits.).

Within this context, economic sanctions are emerging as an understudied but oft-used method of punishment.<sup>46</sup> “Economic sanctions” broadly refer to any legal financial obligations, including restitution, fines, and fees. Restitution compensates a victim for harm stemming from criminal wrongdoing.<sup>47</sup> “Fines” are sanctions imposed on an offender to punish him or her for criminal wrongdoing.<sup>48</sup> The imposition of fines is relatively rare in the United States.<sup>49</sup> Fees, on the other hand, have no relation to the criminal offense; rather, this type of economic sanction is imposed on the offender to offset costs in the criminal justice system.<sup>50</sup>

During the era of mass incarceration, the prevalence of restitution orders increased. At the federal level, Congress steadily expanded restitution starting in 1990.<sup>51</sup> By 1996, it enacted legislation requiring restitution for crimes of violence and property offenses.<sup>52</sup> Similar legislative trends developed in the states. By 2004, one-third of states required courts to order restitution to victims in cases involving certain types of crimes.<sup>53</sup> Restitution repayment has a utilitarian effect. Repayment of this eco-

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46. While “the widespread use and potential harms of economic sanctions have received minimal attention in the academic literature,” Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 284 (2014), specific policy organizations, academics, and practitioners are raising awareness about this issue. See, e.g., Harris et al., *supra* note 3, at 1776; Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175; ACLU, *supra* note 24, at 11 (urging better data collection by jurisdictions to better study economic sanctions and debt collection practices); BANNON ET AL., *supra* note 10. Economic sanctions represent a trend that expands beyond just state governments. As more and more government functions in the criminal justice system are privatized, the fees and fines associated with the criminal justice system increase. See, e.g., ACLU *supra* note 24, at 59–61. Though this issue is outside the scope of this Article, the restrictions on imposition of economic sanctions may have some effect in the privatized context as well.

47. BANNON ET AL., *supra* note 10, at 4.

48. *Id.*

49. See, e.g., Pat O'Malley, *Politicizing the Case for Fines*, 10 CRIMINOLOGY & PUB. POL'Y 547, 551 (2011) (“[M]ost countries outside the United States rely heavily on fines and have done so for many decades.”).

50. BANNON ET AL., *supra* note 10, at 12.

51. See Crime Control Act of 1990, Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863 (1990) (codified as amended at 18 U.S.C. § 3663(a)) (broadening scope of offenses that qualify for restitution to include defendant’s conduct in a scheme, conspiracy, or pattern of conduct).

52. See Mandatory Victim Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, § 204, 110 Stat. 1214 (1996) (codified as amended at 18 U.S.C. § 3663(a)).

53. *Restitution*, NAT’L CTR. FOR VICTIMS CRIME, <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution> (last visited Apr. 6, 2015).



conomic sanction is proven to decrease recidivism amongst offenders.<sup>54</sup> Despite this reality, many states do not prioritize repayment of this sanction above other legal financial obligations.<sup>55</sup>

Due to the pressures on justice systems created by mass incarceration, some states are shifting toward fines-based punishment as a viable alternative to incarceration for low-level offenses. Decriminalization of certain low-level offenses has grown in popularity in recent years. For example, in 2010, the American Bar Association Commission on Homelessness and Poverty urged jurisdictions “to undertake a comprehensive review of the misdemeanor provisions of their criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal sanctions.”<sup>56</sup> Many states responded by reclassifying offenses as “nonjailable” or “fines-only.”<sup>57</sup>

The decriminalization of possession of marijuana serves as an excellent example of how states reclassifying offenses leads to the creation of more economic sanctions in the justice system. Decriminalization means “the reduction or elimination of traditional criminal penalties for conduct that remains prohibited.”<sup>58</sup> This is distinguished from legalization, which removes conduct from criminal regulation entirely.<sup>59</sup> Two states—

54. *Id.*

55. All states and the federal government prioritize child support over restitution. DOUGLAS N. EVANS, JOHN JAY COLLEGE OF CRIMINAL JUSTICE, *THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION* 6, 8 (2014). In some states, legal fees and fines are also prioritized over restitution. *Id.*

56. AM. BAR ASS'N CRIMINAL JUSTICE SECTION COMM'N ON HOMELESSNESS & POVERTY, *REPORT TO THE HOUSE OF DELEGATES* 16, 19 (2009).

57. For example, North Carolina revised its misdemeanor grid to transform many misdemeanor offenses into fine-only offenses while reclassifying certain offenses to qualify for that designation. *See* N.C. GEN. STAT. § 15A-1340.23(d) (2013) (revising the Code in 2013 to provide that “[u]nless otherwise provided for a specific offense, the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall consist only of a fine”); 7 N.C. GEN. STAT. § 18B.14 (2013) (reclassifying some misdemeanors from Class 2 to Class 3 offenses); *see also* SPAGENBURG PROJECT, CTR. FOR JUSTICE, LAW & SOC'Y AT GEORGE MASON UNIV., *AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING*, at i (2010) (recognizing “significant movement” toward states reclassifying low level misdemeanors into charges that do not carry the possibility of confinement).

58. Natapoff, *supra* note 33, at 11.

59. *Id.* at 12 (decriminalization “merely reduces and/or alters the penalties for engaging in . . . impermissible behavior” as opposed to legalization

Colorado and Washington—legalized marijuana in 2012.<sup>60</sup> By 2014, thirty-four states plus the District of Columbia implemented legislation to legalize its medicinal use or decriminalize the substance in part (for medical use) or in full (for minor offenses).<sup>61</sup> Many of these states have only “partially” decriminalized possession,<sup>62</sup> meaning the offense is reclassified as a nonjailable misdemeanor. In other words, these offenses now result in the imposition of fines for offenders, as opposed to incarceration. This trend suggests that further experimentation with marijuana decriminalization will expand the imposition of economic sanctions as a primary method of punishment.<sup>63</sup>

The most troubling increase in economic sanctions occurred in relation to “user fees.” Fees emerged in the 1970s to supplement criminal justice systems,<sup>64</sup> and since the 1990s have increased in scope.<sup>65</sup> Individuals are increasingly expected to pay for various aspects of their adjudication in the criminal justice

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where the behavior is not prohibited).

60. See COLO. CONST. art. XVIII, § 16 (amended 2012); WASH. REV. CODE §§ 69.50.363, 69.50.101(t)–(y) (codifying Initiative Measure No. 502, approved Nov. 6, 2012).

61. David Firestone, *Let States Decide on Marijuana*, N.Y. TIMES, July 27, 2014, at SR.10; see *State Medical Marijuana Laws*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 29, 2015), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (“A total of 23 states, the District of Columbia and Guam now allow for comprehensive public medical marijuana and cannabis programs.”).

62. See *State Laws with Alternatives to Incarceration for Marijuana Possession*, MARIJUANA POL’Y PROJECT, <http://www.mpp.org/assets/pdfs/library/State-Decrim-Chart.pdf> (last visited Apr. 6, 2015). States that have partially decriminalized possession are Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, and New York. See *id.*

63. Cf. Editorial, *Repeal Prohibition, Again*, N.Y. TIMES, July 27, 2014, at SR.1 (discussing the “rapidly growing movement among the states to reform marijuana laws”).

64. O’Malley, *supra* note 49, at 551.

65. Alan Rosenthal & Marsha Weissman, *Sentencing for Dollars: The Financial Consequences of a Criminal Conviction* 13 (Feb. 1, 2007) (unpublished manuscript) (on file with the Center for Community Alternatives Justice Strategies) (asserting that “the use of financial penalties has flourished since the early 1990’s”); see also Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WILLIAM & MARY L. REV. 2045, 2054 (2006) (asserting that application fee laws have gained popularity over the past decade, increasing by 300% from 1994 to 2004); see also, e.g., REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, *THE HIDDEN COSTS OF FLORIDA’S CRIMINAL JUSTICE FEES* 5 (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf> (“From 1996 through 2007, the Florida Legislature created or authorized more than 20 new categories of legal financial obligations (‘LFOs’) – surcharges, fees, and other monetary obligations – related to criminal cases and violations.”).

system. Such fees include public defender fees,<sup>66</sup> daily jail fees,<sup>67</sup> court administration fees,<sup>68</sup> DNA database costs,<sup>69</sup> drug testing costs,<sup>70</sup> probation supervision fees,<sup>71</sup> and other fees. These fees

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66. See Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NAT'L PUB. RADIO (May 19, 2014, 4:02 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=312158516> (explaining the results of a nationwide survey conducted by NPR with help from NYU's Brennan Center for Justice and the National Center for State Courts, discovering that at least forty-three states and the District of Columbia allow for a defendant to be billed for a public defender); see also Wright & Logan, *supra* note 65, at 2046, 2052 (claiming that since the early 1990s, there has been a rise in the number of states authorizing or compelling judges to impose fees on indigent criminal defendants who seek appointed counsel).

67. See Shapiro, *supra* note 66 (reporting that forty-one states may charge inmates room and board for jail and prison stays); see e.g., ALA. CODE § 14-6-22(a)(1)–(3) (2011) (requiring defendants in misdemeanor cases to pay for housing, maintenance, and medical costs in addition to a jail incarceration fee of up to \$20 per day, which may be remitted upon a showing of hardship); ARIZ. REV. STAT. ANN. § 13-804.01 (2010) (imposing a fee, based on the costs of incarceration and the person's ability to pay, for those convicted of a misdemeanor); CAL. PENAL CODE §§ 1203.1c(a), 1203.1m(a) (2014) (authorizing courts to charge a fee for defendants who must serve a period of confinement in jail as a term of probation or a conditional sentence and to require defendants to pay the reasonable cost of incarceration in state prison after making a determination of their ability to pay); FLA. STAT. § 951.033(2)–(3) (2014) (authorizing detention facilities to determine the financial status of prisoners and require prisoners to “pay for all or a fair portion of daily subsistence costs”); GA. CODE ANN. § 42-1-4(d) (2014) (requiring that “[a]n amount determined to be the cost of the inmate's keep and confinement” be deducted from the earnings of inmates participating in work-release programs); LA. CODE CRIM. PROC. ANN. art. 890.2(A)–(B) (2014) (after making a determination of a defendant's ability to pay, courts may impose an additional fine equal to the expected costs to the state of imprisonment); MICH. COMP. LAWS § 801.83(1)(a) (2009) (authorizing counties to seek reimbursement of up to \$60 per day of imprisonment for the entire period the person was confined, including any period of pretrial); N.Y. CORRECTION LAW § 189.2 (Consol. 2014) (imposing a maximum \$1 per week incarceration fee for each week of confinement); N.C. GEN. STAT. § 7A-313 (2014) (providing that persons lawfully confined in jail awaiting trial are liable to pay the country or municipality maintaining the jail \$10 for every 24 hours of confinement the unless the case has been dismissed).

68. See, e.g., *Other Statutory Provisions*, CT. COSTS, FEES & FINES FOR MUN. CTS. (Tex. Comptroller Pub. Accounts, Austin, Tex.), 2009, at 3, available at <http://www.texasahead.org/lga/96-864.pdf>; *Fines, Fees, Costs, and Rates*, MICHIGAN CTS., <http://courts.mi.gov/administration/admin/pages/fines,-fees,-costs,-and-rates.aspx> (last visited Apr. 6, 2015).

69. See, e.g., N.Y. PENAL LAW § 60.35(1)(a)(v) (McKinney 2015) (requiring defendants convicted of an offense under N.Y. EXEC. LAW § 995(7) (McKinney 2015) to pay a \$50 DNA databank fee); see also Paris Achen, *ACLU Finds Clark County Courts Set Excessive Fines on Felons*, COLUMBIAN, Feb. 24, 2014, available at <http://www.columbian.com/news/2014/feb/24/aclu-finds-clark-county-courts-set-excessive-fines> (finding that Washington state requires judges to impose a \$100 DNA database fee).

70. See e.g., FLA. STAT. § 948.034(1)(a)4 (requiring any person who resides in a community residential drug punishment center to submit to routine drug

increasingly represent normal assessments in the United States. Today, at least forty-three states and the District of Columbia may charge defendants a public defender fee.<sup>72</sup> In forty-one states, inmates may be charged for room and board during a jail stay.<sup>73</sup> In forty-four states, individuals may be billed for probation and parole supervision.<sup>74</sup> Interestingly, fees have increased in part to offset diminishing funding for alternatives to incarceration.<sup>75</sup> In all states except Hawaii and the District of Columbia, persons are charged for electronic monitoring devices used for court supervision.<sup>76</sup>

Portions of economic sanctions collected may also support rehabilitative services offered for other offenders. For example,

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testing and bear the costs of such testing); *see also* Rosenthal & Weissman, *supra* note 65, at 16 (asserting that many counties have enacted local legislation authorizing the collection of fees for “services” such as drug testing); *see also e.g.*, *Fines and Fees*, S. CTR. FOR HUM. RTS., <https://www.schr.org/our-work/debtors-prisons> (last visited Apr. 6, 2015) (finding that courts in Georgia are assessing more fees, including the cost of drug tests, to help meet costs of the criminal justice system).

71. *See* Joseph Shapiro, *Measures Aimed At Keeping People Out of Jail Punish the Poor*, NAT’L PUB. RADIO (May 24, 2014, 4:58 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=314866421> (finding that in at least forty-four states offenders can be billed for their own probation and parole supervision); *see e.g.*, ALA. CODE § 15-22-2(a) (requiring defendants to pay a \$40 per month fee toward the cost of supervision for parole or probation); CAL. PENAL CODE §§ 1203.1b(a), 1203.1e(a)–(b) (mandating that a defendant pay all or a portion of the reasonable cost of probation or parole supervision after a determination of a defendant’s ability to pay); FLA. STAT. § 948.09(1)(a) (requiring any person on parole or probation to pay the total sum equal to the amount of court-imposed supervision time); GA. CODE ANN. § 42-8-34(d)(1) (imposing a \$23 per month probation fee in addition to a one-time \$50 fee for defendants convicted of a felony); N.Y. EXEC. LAW § 257-c (McKinney 2015) (imposing a \$30 per month fee for DWI-related probation supervision); MO. REV. STAT. § 217.690.3 (2014) (allowing the board to require payment of a fee up to \$60 per month for probation supervision); N.C. GEN. STAT. § 15A-1343(cl) (requiring defendants to pay a \$40 monthly fee for supervised probation unless exempted by the court); OHIO REV. CODE ANN. § 2951.021(A)(1) (2014) (allowing courts to impose a monthly probation fee); 18 PA. CONS. STAT. ANN. § 11.1102(e) (2014) (mandating a monthly fee for parole and probation).

72. Shapiro, *supra* note 71.

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*; *see, e.g.*, GA. CODE ANN. § 42-8-35(a)(14) (authorizing the Georgia Department of Corrections to assess and collect fees from probationers for electronic surveillance or global positioning satellite system monitoring); *Pre-trial Services*, ALACHUACOUNTY.US, <http://www.alachuacounty.us/Depts/CourtServices/Pages/PretrialServices.aspx> (noting that defendants in Alachua County, Florida “supervised on electronic monitoring pay nominal fees to defray program costs”).

California's recently adopted Proposition 47 converts sentences for low-level nonviolent crimes such as drug possession and petty theft from felonies to misdemeanors for most offenders.<sup>77</sup> The anticipated financial savings from this reform are explicitly earmarked: 25% of the savings will be directed to school programs designed to prevent crime; 10% will be directed to "trauma recovery services for crime victims"; and 65% will be directed to "mental health and substance abuse treatment programs to reduce recidivism of people in the justice system."<sup>78</sup> Fees and fines may be used to support victim-related programming as well.<sup>79</sup>

The use of economic sanctions is largely unfettered. Judges enjoy a great deal of discretion when imposing economic sanctions.<sup>80</sup> Very little guidance exists on how or when to use this sanction.<sup>81</sup> As economic sanctions are becoming more common, they may be more severe and more onerous as well.<sup>82</sup> Though many fees and fines fall within the judge's discretion to impose, states have increasingly created mandatory economic sanctions by statute. For example, the Florida legislature increased the mandatory fine for solicitation of prostitution from \$500 to \$5,000 in 2013.<sup>83</sup> In Pennsylvania, the legislature created a mandatory minimum fine of \$75,000 for misdemeanor theft.<sup>84</sup> Washington law requires courts to conduct a victim "penalty

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77. Specifically, this proposition requires misdemeanor sentences for two types of "wobbler" offenses: drug possession offenses, and petty theft, stolen property and forging/writing bad checks where the amount is \$950 or less, unless the offender was previously convicted of rape, murder, child molestation and/or is a registered sex offender. See *Proposition 47: Criminal Sentences, Misdemeanor Penalties, Initiative Statute*, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2014: OFFICIAL VOTER INFORMATION GUIDE 34 (2014), available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf#page=70>.

78. *Id.* at 76.

79. *Id.*; see also Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender and Society*, 99 MINN. L. REV. 1779, 1800 (2015).

80. See Ruback, *supra* note 79, at 1787–05.

81. See *id.*; see also *id.* at 1810.

82. See *id.* at 1828 (noting that a Human Rights Watch report found "that courts do little to determine whether offenders are actually able to pay their fines and fees").

83. Children and Minors – Sexual Exploitation – Florida Safe Harbor Act, ch. 2012-105, § 769.07, 2012 Fla. Sess. Law Serv. (West); see FLA. STAT. § 796.07(6) (2014).

84. Pennsylvania Race Horse Development and Gaming Act, ch. 4, § 1518(b)(2)(i)(A), 2004 Pa. Laws 75, *invalidated by* Commonwealth v. Eisenberg, 98 A.3d 1268 (Pa. 2014).

assessment” every time an individual is convicted of a crime.<sup>85</sup> Even in “victimless” crimes, the court must impose these fines, amounting to \$500 per felony and \$250 per misdemeanor, in addition to any other required fees and fines.<sup>86</sup> These laws demonstrate how economic sanctions are expanding without check from the legislature; indeed, the legislatures are attempting to eliminate judicial discretion in some instances.

## II. INABILITY TO PAY AND THE RISE OF CRIMINAL JUSTICE DEBT

The rise of economic sanctions is disconnected from the reality of incarceration—specifically, that the majority of offenders are unable to pay the fees and fines imposed by the courts in accordance with legislation. As a result, more individuals bear the burden of criminal justice debt and more courts bear the burden of trying to collect unpaid debts.

Most offenders lack the resources to pay growing court-imposed fees and fines. Before incarceration, most offenders require assistance in obtaining legal counsel.<sup>87</sup> Upon release, employment opportunities for ex-offenders are bleak.<sup>88</sup> Studies demonstrate that the likelihood of receiving a callback from a job application declines by fifty percent where the individual

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85. WASH. REV. CODE § 7.68.035(1) (2014).

86. WASH. REV. CODE § 7.68.035(1)(a). For a comprehensive summary of the breadth and consequences of contemporary economic sanctions, see Colgan, *supra* note 46, at 284–95.

87. By 1996, almost seventy-five percent of state prisoners received publicly provided legal counsel of convictions leading to incarceration. BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE (1996), *available at* <http://www.bjs.gov/content/pub/pdf/id.pdf>.

88. NAT'L RESEARCH COUNCIL, *supra* note 34, at 233 (collecting studies demonstrating that “roughly half [of ex-prisoners] remain jobless up to a year after their release”). This is partially on account of the social stigma of a criminal record, which detrimentally affects offenders’ ability to obtain employment whether they have been incarcerated in prison or simply placed under correctional supervision. See Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 14 (discussing an audit study that “offers clear evidence for the negative effects of criminal stigma”). Accordingly, the opportunity for offenders captures a broader swath of individuals beyond just those sent to prison. Indeed, the Brennan Center calculates that nearly 70 million Americans, or approximately thirty percent of the adult population, have criminal records. See CHETTIAR ET AL., *supra* note 43, at 3 & 49 n.5; see also MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27 n.2 (2011), *available at* [http://www.nelp.org/page/-/SCLP/2011/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf) (estimating that 65 million adults have criminal records in the United States).

has a criminal record.<sup>89</sup> For African Americans and Latinos, this reality is particularly damaging to employment opportunities. Minorities without a criminal record are less likely than white applicants just released from prison to obtain employment.<sup>90</sup> Criminal records significantly reduce the odds of a black or Hispanic applicant receiving a job offer. Indeed, the odds of a black applicant with a criminal record receiving a job are reduced by 57%.<sup>91</sup> Even for those offenders who can obtain employment, serving time in prison or jail depresses annual earnings significantly.<sup>92</sup> The average formerly incarcerated white male earns only approximately \$12,094 per year.<sup>93</sup> Black and Hispanic offenders earn less.<sup>94</sup> The stigma of conviction makes employment, housing, and other basic necessities difficult to obtain.<sup>95</sup> Again, these disadvantages are disproportionately borne by African Americans and Latinos, who often face discrimination in accessing housing regardless of criminal records. Adding criminal justice debt to the challenges an individual faces upon criminal conviction only further burdens the in-

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89. Western & Pettit, *supra* note 88 (discussing Devah Pager's experimental studies on job seekers with criminal records).

90. U.S. COMM'N ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY 196 (2012) (statement of Glenn E. Martin, Vice President, Development and Public Affairs, Director, David Rothenberg Center for Public Policy at the Fortune Society).

91. *Id.*

92. Studies show that serving time in either prison or jail reduces hourly wages for men by approximately 11%, annual employment by nine weeks and annual earnings by 40%. *Id.*

93. In 2008 dollars, the average formerly incarcerated white male earned an average income of \$11,140. Harris et al., *supra* note 3, at 1776. Translating that into 2014 dollars, the average formerly incarcerated white male makes approximately \$12,094. See *Consumer Price Index for All Urban Consumers: All Items*, FED. RES. BANK ST. LOUIS, <http://research.stlouisfed.org/fred2/series/CPIAUCSL#> (last visited Apr. 6, 2015) (providing translating data for determining 2014 figure).

94. See Harris et al., *supra* note 3, at 1776 (finding that formerly incarcerated black men earn \$8,012 per year in 2008 dollars, and formerly incarcerated Hispanic men earn \$10,432 per year in 2008 dollars). In 2014 dollars, formerly incarcerated black men earn on average \$8,698 per year and formerly incarcerated Hispanic men earn \$11,325 per year. See *Consumer Price Index*, *supra* note 93 (providing translating data for determining 2014 figures). For more details on the disproportionate effect that incarceration plays on minorities' economic mobility and earning power, see Western & Pettit, *supra* note 88, at 12–14.

95. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 491–92 (2010) (documenting the denial of public housing based on criminal convictions); Western & Pettit, *supra* note 88 (documenting the stigmatizing effect of criminal convictions in employment).

dividual and his or her family.<sup>96</sup> This debt also stands to exacerbate racial disparities that already exist in society.

Despite offenders' inability to pay, courts continue to impose economic sanctions; as a result, the number of people owing court-imposed monetary sanctions continues to rise. In 1991, 25% of individuals leaving prison owed fees; by 2004, that number increased to 66%.<sup>97</sup> Today, it is estimated that as many as 80% to 85% of individuals leaving prison owe fees.<sup>98</sup> By 2011, offenders owed more than \$50 billion in criminal justice debt across the country.<sup>99</sup>

Economic sanctions can prove debilitating to an offender. Failure to pay can generate late fees, interest, and additional collection fees.<sup>100</sup> These additional costs exacerbate the severity of the already-onerous fees and fines imposed by the court. Nonpayment may lead to driver's license suspension, wage garnishment, prolonged court supervision, arrest warrants, and incarceration.<sup>101</sup> It also subjects individuals to aggressive collection tactics and "payment plan" fines that often result in insurmountable debt.<sup>102</sup> Punishment for nonpayment affects more than just the individual who incurs the debt; it affects the lives of the family and friends who assist the individual upon reentry to a community.<sup>103</sup>

Debilitating criminal justice debt is damaging for society at large as well. Debt collection consumes time public employees could spend doing traditional functions, thus increasing the cost of court operations. Moreover, the aggressive collection tactics like wage and tax garnishment may deter individuals from obtaining traditional employment.<sup>104</sup> For some, it may incentivize a turn toward underground economies and even criminal behavior.<sup>105</sup> Recidivism comes at a high cost to society. Not only does it threaten public safety, but recidivism negates the in-

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96. See MITALI NAGRECHA & MARY FAINSOD KATZENSTEIN, CTR. FOR CMTY. ALTS., FIRST PERSON ACCOUNTS OF CRIMINAL JUSTICE DEBT: WHEN ALL ELSE FAILS, FINING THE FAMILY 3 (2015), available at <http://communityalternatives.org/pdf/Criminal-Justice-Debt.pdf>.

97. Harris et al., *supra* note 3, at 1769.

98. Shapiro, *supra* note 66.

99. EVANS, *supra* note 55, at 4.

100. BANNON ET AL., *supra* note 10, at 1.

101. ACLU, *supra* note 24, at 5–9; BANNON ET AL., *supra* note 10, at 11.

102. HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 14, 43, 55 (2014).

103. NAGRECHA & KATZENSTEIN, *supra* note 96, at 3.

104. BANNON ET AL., *supra* note 10, at 27.

105. *See id.*



vestment that society already placed in punishing and rehabilitating an offender in the first instance.

In fact, the additional cost municipalities pay to punish debtors may outweigh the amount recovered through collection.<sup>106</sup> Enforcement measures, including incarceration, use system resources, including the processing time spent by employees and possible processing through the jail system. These real costs may not be recouped by the collection of outstanding legal financial obligations. A 2011 study in Massachusetts concluded that an additional jail fee would increase taxpayer expense because of the resources required for successful implementation.<sup>107</sup> In Rhode Island, a 2008 study demonstrated that incarcerating individuals for failure to pay debts in many instances resulted in the state spending more money on enforcement than the offenders owed in total court debt.<sup>108</sup>

In theory, economic sanctions are limited by an offender's "ability to pay." In 1983, the Supreme Court held in *Bearden v. Georgia* that no individual may be incarcerated for their non-willful failure to pay court-imposed financial obligations.<sup>109</sup> However, evidence suggests that courts routinely fail to adequately assess a defendant's ability to pay. In 2010, the Brennan Center released a report on fees and fines imposed on defendants in fifteen states.<sup>110</sup> The report concludes: "Despite the fact that most criminal defendants are indigent, none of the fifteen examined states pay adequate attention to whether [these] individuals have the resources to pay criminal justice debt, either when courts determine how much debt to impose or during the debt collection process."<sup>111</sup> A growing body of literature supports this assertion.<sup>112</sup>

Moreover, states do not provide meaningful standards or methodologies for ability-to-pay determinations. For example,

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106. See ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 5–6 (2012).

107. *Id.* at 11.

108. *Id.* at 12.

109. 461 U.S. 660 (1983).

110. The Brennan Center studied practices and statutes in the fifteen states with the largest prison populations in 2010: California, Arizona, Texas, Louisiana, Alabama, Georgia, Florida, North Carolina, Virginia, New York, Pennsylvania, Ohio, Michigan, Illinois, and Missouri. BANNON ET AL., *supra* note 10, at 1, 6.

111. *Id.* at 13 (emphasis omitted).

112. See, e.g., ACLU, *supra* note 24; Harris et al., *supra* note 3; PATEL & PHILIP, *supra* note 106; Nate Rawlings, *Welcome to Prison. Will You Be Paying Cash or Credit?*, TIME (Aug. 21, 2013), <http://nation.time.com/2013/08/21/welcome-to-prison-will-you-be-paying-cash-or-credit>.

there is no consensus amongst courts as to when or how to determine ability to pay. Michigan requires courts to make ability-to-pay assessments according to a “manifest hardship” standard.<sup>113</sup> However, courts do not make that assessment before imposing fees and fines; rather, courts only make that assessment when the fee is enforced and the defendant challenges that enforcement based upon his or her ability to pay.<sup>114</sup> As a result, courts across the state routinely fail to make this assessment.<sup>115</sup> Even where courts do make this assessment, the defendant bears a “heavy burden of establishing his extraordinary financial circumstances” and lower courts are granted broad discretion to decide how to assess ability to pay.<sup>116</sup> As another example, Ohio requires lower courts to consider the offender’s financial resources and future ability to pay before imposing economic sanctions.<sup>117</sup> A hearing on this issue is permissible, but not required. Nevertheless, an American Civil Liberties Union (ACLU) of Ohio investigation demonstrates that twenty-two percent of bookings in a rural county related to failure to pay fines.<sup>118</sup> The report explains that individuals who failed to pay court fees and fines were summoned into court, assigned an arbitrary monthly payment plan without analysis of ability to pay, and later arrested based on failure to pay.<sup>119</sup> A similar problem exists across the state.<sup>120</sup> These states demonstrate that “ability to pay” is a difficult and sometimes arbitrary assessment left to the lower courts to determine and define.

The lack of guidance to courts results in vastly different approaches to the fundamental question of whether an offender

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113. MICH. COMP. LAWS § 771.3(6)(b) (2015) (allowing courts to consider whether “payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family”); *Id.* § 780.766(12) (allowing courts to consider whether payment of restitution “will impose a manifest hardship on the defendant or his or her immediate family”); *People v. Jackson*, 769 N.W.2d 630, 633 (Mich. 2009) (“[O]nce an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship.”) (*overruling* *People v. Dunbar*, 690 N.W.2d 476 (Mich. Ct. App. 2004)).

114. *Jackson*, 769 N.W.2d at 645.

115. See Brief of Amici Curiae The ACLU Fund of Mich. et al. in Support of Joseph Bailey, *supra* note 24.

116. *Jackson*, 769 N.W.2d at 645.

117. OHIO REV. CODE § 2929.19(B)(5) (2015).

118. AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO DEBTORS’ PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 8 (2013).

119. *Id.* at 8.

120. See *id.* at 9.

has the ability to pay. Some courts may look at the defendant's present ability to pay,<sup>121</sup> while others may make predictions about a defendant's future ability to pay after a term of incarceration.<sup>122</sup> Still others do not consider ability to pay before the imposition of fines, but instead wait until an offender's post-imposition non-payment to decide whether the offender should be punished for failure to pay.<sup>123</sup> As a result, the amount of economic sanctions imposed on similar offenders may vary between and within jurisdictions.

The current disparities in sentencing with economic sanctions are intolerable. Since the 1970s, the distinction between "warranted" and "unwarranted" disparities has grown.<sup>124</sup> "Unwarranted" disparities are generally considered those disparities between offender sentences based upon race, geography, or the philosophical leanings of a particular judge. Inter-judge disparities, meaning disparities between judges within the same jurisdictions, are widely considered unwarranted.<sup>125</sup> In the context of incarcerative punishments, policy shifted toward cabining unfettered discretion at sentencing. Limiting standards were introduced to guide discretion and eliminate "unwarranted" disparities that existed amongst jurisdictions across the country.<sup>126</sup> These principles attempted to strike a balance

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121. See, e.g., MICH. COMP. LAWS §§ 771.3(6)(b), 780.766(12) (2014).

122. See WASH. REV. CODE § 9.92.070 (2014) ("[W]henver any judge . . . shall sentence any person to pay any fine and costs . . . no commitment or imprisonment of the defendant shall be made for failure to pay such fine or costs."). As of early 2015, a group of policy organizations planned to introduce legislation referred to as the Prioritizing Restitution and Successful Reentry Act of 2015. This bill would reform Washington State courts to "determine that the offender has the current ability to pay the installment amount and satisfy his or her basic living expenses as defined by RCW 10.101.010." Poverty Action Network, Columbia Legal Servs. & ACLU of Wash., Prioritizing Restitution and Successful Reentry Act of 2015, at 10 (on file with author). This new provision illustrates that the vagueness of the current law results in alternative temporal analyses of ability to pay. See *id.*

123. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 7-504(a) (2014) ("A defendant who is unable to pay a fine ordered by a court may apply to the court for a reduction of the fine.").

124. Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 431 (2000) (noting the broad and bipartisan consensus that emerged in the 1970s amongst lawmakers that discretion in sentencing should be regulated to reduce disparities in sentencing).

125. Ryan W. Scott, *The Effects of Booker on Inter-Judge Sentencing Disparity*, 22 FED. SENT'G REP. 104, 104 (2009) ("Not all forms of disparity in sentencing are a cause for concern, but *inter-judge* disparity is widely recognized as unwarranted." (citation omitted)).

126. See, e.g., MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 69–85 (1973).

between individualized justice and equality on one hand, and objectivity and consistency in the law on the other.<sup>127</sup> While states and the federal system adopted a variety of measures to infuse these principles in sentencing for incarceration,<sup>128</sup> few jurisdictions took any measures to meaningfully guide discretion in the context of economic sanctions.<sup>129</sup> The variety of approaches to using economic sanctions and the punitiveness of debt collection demonstrate the need for principles to guide the discretion of judges and legislatures who impose growing fees and fines on individual offenders.

### III. REINVIGORATING ECONOMIC SANCTIONS THROUGH THE MODEL PENAL CODE

The revised Model Penal Code strives to provide the guiding principles and measures needed to improve the use of economic sanctions in the United States. The ALI seeks to do this in three ways.

First, it recommends that states eliminate user fees that treat offenders as a “special class of taxpayers” required to pay for underfunded criminal justice programs and operations.<sup>130</sup> Specifically, the revised Code states that

No convicted offender . . . shall be held responsible for the payment of costs, fees, and assessments.

Costs, fees, and assessments . . . include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender.<sup>131</sup>

These user fees are some of the most offensive drivers of criminal justice debt because they do not further any of the traditional purposes of punishment.<sup>132</sup> Rather, these debts at-

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127. *Id.* at 103–05, 111–15.

128. States adopted several measures to address unwarranted disparities in sentencing. Primarily, they responded by creating sentencing commissions, creating guidelines, and increasing appellate review of sentencing decisions. See Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 69–70 (1999); Cf. FRANKEL, *supra* note 126, at 103–24.

129. See Logan & Wright, *supra* note 46, at 1215–25 (proposing an LFO “commission” similar to those existing in most states that currently study, monitor and issue recommendations on incarceration-based sentencing policies).

130. Reitz, *supra* note 14, at 1757.

131. MODEL PENAL CODE: SENTENCING § 6.04D (Tentative Draft No. 3, 2014).

132. BANNON ET AL., *supra* note 10, at 4 (“Unlike fines, whose purpose is to punish, and restitution, whose purpose is to compensate victims, user fees are

tend to budget constraints in the justice system.<sup>133</sup> Elimination of such economic sanctions will reduce the appearance of problematic conflicts of interest in judicial enforcement of criminal justice debt collection.<sup>134</sup> Where the courts are not forced to collect economic sanctions designed exclusively to keep the courthouse doors open, there is less opportunity to question whether judges impose fines simply to sustain the court. Additionally, this provision will promote the use of economic sanctions as an alternative method of punishment. By confining sanctions such that they must further one of the purposes of punishment, this provision logically improves economic sanctions by allowing courts to use them as an exclusive method of punishment.

Second, the revised Code prioritizes economic sanctions for collection purposes. Currently, states vary in whether restitution is the first-order item for collection.<sup>135</sup> Under proposed section 6.04(10), offender payments apply to victim restitution first.<sup>136</sup> Moreover, the Code prohibits the payment of any economic sanctions other than restitution as a condition of probation or parole.<sup>137</sup> This provision is contrary to standard practices across the country, where payment of any criminal justice debt may be a condition of probation, parole, or other correctional supervision.<sup>138</sup> These provisions provide sensible improvements to varying state practices given that restitution is proven to reduce recidivism amongst offenders and promote reintegration into law-abiding society.<sup>139</sup>

Finally, and most important for this discussion, the revised Code creates the “reasonable financial subsistence” standard. Section 6.04(b) of the revised Code provides that “No economic

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explicitly intended to raise revenue.”); *see also The Colbert Report* (Comedy Central television broadcast June 11, 2014).

133. BANNON ET AL., *supra* note 10, at 4.

134. *See id.* at 30 (discussing courts’ conflicts of interest).

135. EVANS, *supra* note 55, at 6; Ruback, *supra* note 79, at 1792–94.

136. MODEL PENAL CODE: SENTENCING § 6.04(10) (Tentative Draft No. 3, 2014) (“If the court imposes multiple economic sanctions including victim compensation, the court shall order that payment of victim compensation take priority over the other economic sanctions.”).

137. *See id.* § 6.03(8) (permitting “[g]ood-faith efforts to make payment of victim restitution under § 6.04A” as the only economic sanction that can be enforced as a condition of probation).

138. The Brennan Center concluded in 2010 that “[a]ll fifteen states studied in this report make at least some forms of criminal justice debt a condition of probation and parole, including for the indigent, putting individuals at risk of incarceration if a court finds that missed payments were willful.” BANNON ET AL., *supra* note 10, at 21.

139. *See* Ruback, *supra* note 79, at 1812–13.

sanction may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after compliance with the sanction.”<sup>140</sup> This provision acknowledges the reality that the massive growth in the criminal justice system has a concentrated effect on communities suffering from the most severe socioeconomic inequality.<sup>141</sup> As such, the rise of economic sanctions has placed additional economic burdens on the backs of those least capable of paying.<sup>142</sup>

The “reasonable financial subsistence” standard improves economic sanctions in two ways. First, it confronts the reality that mass incarceration disproportionately affects socioeconomically disadvantaged populations. As Bruce Western and Becky Pettit explain, “[m]ost of the growth in incarceration rates [between 1980 and 2008] is concentrated at the very bottom, among young men with very low levels of education.”<sup>143</sup> By 2008, 37% of black men without a high school diploma were in prison or jail.<sup>144</sup> By comparison, only 12% of white men without a high school diploma were incarcerated.<sup>145</sup> Incarceration is highly concentrated in urban communities of color that systemically lack economic stability.<sup>146</sup> A 2011 study by the Pew Research Center found that the median wealth of white households has grown to twenty times that of black households and eighteen times that of Hispanic households.<sup>147</sup> While wealth de-

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140. MODEL PENAL CODE: SENTENCING § 6.04(6) (Tentative Draft No. 3, 2014).

141. See THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4–5 (2010), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/CollateralCosts1pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/CollateralCosts1pdf.pdf); WASH. OFFICE OF PUB. DEF., DETERMINING AND VERIFYING INDIGENCY FOR PUBLIC DEFENSE 19 (2014), available at [http://www.opd.wa.gov/documents/0185-2014\\_Determining\\_Indigency.pdf](http://www.opd.wa.gov/documents/0185-2014_Determining_Indigency.pdf) (estimating that 80% to 90% of defendants qualify for indigent representation); Western & Pettit, *supra* note 88, at 8 (“The social inequality produced by mass incarceration is sizable and enduring for three main reasons: it is invisible, it is cumulative, and it is intergenerational.”).

142. See Reitz, *supra* note 14, at 1757–66 (stating that because most offenders come from the lowest rungs of the socioeconomic ladder, “to require offenders to pay for government interventions that are forced upon them is regressive taxation taken to an extreme”).

143. Western & Pettit, *supra* note 88, at 10.

144. *Id.*

145. *See id.*

146. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6–7 (2010); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 3 (2007).

147. PAUL TAYLOR ET AL., PEW RESEARCH CTR., TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 1

clined in all households during the Great Recession, it dipped disproportionately amongst minority households.<sup>148</sup> Moreover, minority households have struggled more to recover wealth during the subsequent economic recovery.<sup>149</sup> These realities illustrate that incarceration disproportionately affects those communities that have the least economic stability. The “reasonable financial subsistence” standard takes this into account by trying to assess how much income an individual requires to maintain their own families before determining how much the state may take as a method of punishment.<sup>150</sup>

Second, this standard rises above the constitutional floor created by the Supreme Court’s jurisprudence on debtors’ prisons. In *Bearden v. Georgia*, a Georgia court revoked a defendant’s probation for failure to pay a \$550 fine in the period prescribed by the sentencing judge, and instead placed the individual in jail for the rest of his probation period.<sup>151</sup> The Supreme Court struck down the incarceration period and remanded the case to the Georgia court for further analysis.<sup>152</sup> As the *Bearden* Court explained, “if [a] probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.”<sup>153</sup> The Georgia court neither made an assessment of whether the defendant willfully failed to pay his fine; nor did it take into consideration alternatives, such as extending the period for making payments, reducing the fine, or directing the probationer to do community service rather than make monetary payment.<sup>154</sup> As such, the Supreme Court held the revoca-

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(2011), available at [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf).

148. *Id.*

149. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession>.

150. MODEL PENAL CODE: SENTENCING § 6.04(6) cmt. h (Tentative Draft No. 3, 2014) (suggesting total economic sanctions be limited so offenders retain sufficient means for family obligations).

151. 461 U.S. 660, 663 (1982). The sentencing judge imposed a \$500 fine and ordered the defendant to pay \$250 in restitution for burglary and theft. *Id.* at 662. The defendant paid \$200 upfront in accordance with the court’s order, but failed to pay the \$550 balance within the four month period ordered by the court. *Id.* at 662–63.

152. *Bearden*, 461 U.S. at 674.

153. *Id.* at 668–69.

154. *Id.* at 672–74 (“[T]he sentencing court could extend the time for mak-

tion of probation unconstitutional.<sup>155</sup> This case, along with a series of cases arising before the Court in that period, prohibits incarcerating an individual solely due to nonwillful inability to pay fines.<sup>156</sup>

Here, the Code takes a pivotal step forward by trying to define parameters for ability to pay—namely, that an offender must retain sufficient finances for personal expenditures.<sup>157</sup> This principle values the law-abiding reintegration of offenders over considerations of retribution alone.<sup>158</sup> While the Court in *Bearden* conceded that inability to pay may include failure to seek employment or borrow money as means to pay the debt owed to society,<sup>159</sup> this new standard focuses on what the individual needs to reintegrate rather than what that individual can do to change his or her situation. As such, this concept of reasonable subsistence is explicitly higher than the constitutional floor.<sup>160</sup> Moreover, by creating a cap on economic sanctions, the Code requires courts to evaluate all the monetary fees and fines imposed on the individual. Courts must also assess the ability to pay before the imposition of this sanction—a practice not routine among the courts. These are meaningful developments.

Though these improvements are meaningful, the Code leaves legislatures and courts wide discretion to define reasonable financial subsistence.<sup>161</sup> The revised Code suggests that legislatures may go beyond the Code in defining an ability-to-pay standard for use by the courts. It even goes so far as to provide proposed language for a provision.<sup>162</sup> To the courts, the

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ing payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine.”).

155. *Id.* at 674.

156. *See e.g., id.*; *Tate v. Short*, 401 U.S. 395, 400–01 (1971); *Williams v. Illinois*, 399 U.S. 235, 244–45 (1970).

157. MODEL PENAL CODE: SENTENCING § 6.04(6) cmt. h (Tentative Draft No. 3, 2014).

158. *Id.* (noting the goal of the Code is to not “allow economic penalties to override the goal of returning offenders to productive lives”).

159. *Bearden*, 461 U.S. at 668 (“[A] probationer’s failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime.”).

160. *Id.* (“Subsection (6) is based on grounds of public policy, not the minimum requirements of Due Process. . .”).

161. MODEL PENAL CODE: SENTENCING § 6.04 cmt. h (Tentative Draft No. 3, 2014) (noting that “[s]ome jurisdictions may choose to adopt particularized rules to help implement the broad [reasonable subsistence] principle”).

162. *Id.* (“No economic sanction may be imposed on an indigent offender as defined by the state’s eligibility rules for appointment of counsel in a criminal



Comments explain, “reasonable financial subsistence” rises above the constitutional minimum set by federal law.<sup>163</sup> This leaves wide discretion to courts in the absence of legislation.

The Code falls short of defining reasonable financial subsistence with specificity.<sup>164</sup> The Code’s gap in definition reflects a policy decision to allow courts and legislators the opportunity to explore alternative working standards for reasonable subsistence.<sup>165</sup> Rather than define criteria, the Code defines the question with precision – whether the person could maintain reasonable financial subsistence while paying the fees and fines imposed by a court. As such, the Code asks courts to continue an analysis it already conducts: tailoring fees and fines to the circumstances of the individual.<sup>166</sup> But without specified criteria, there is room for courts to continue struggling with ability to pay analyses. As a result, the disparities in sentencing that contribute to the offensiveness of economic sanctions are likely to persist.

#### IV. BUILDING ON THE CODE AND ROADBLOCKS TO REFORM

In adopting the new Model Penal Code’s “reasonable financial subsistence” standard, most states would take a huge stride toward improving the use of economic sanctions in their courts. Nevertheless, the Code may not, and probably cannot, resolve persistent failure to pay court-imposed fees and the accompanying problems of criminal justice debt because they are symptoms of larger, systemic shortcomings. In this section, I briefly set forth practical reforms that build on the strides taken by the Model Penal Code. I also identify two systemic trends that converge at the site of economic sanctions and criminal justice debt: underfunded courts and budget-cut criminal justice reform. For the reasons discussed here, the realities of the-

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case. Qualification for or receipt of any of the following public benefits shall serve as evidence that the offender would not retain sufficient means for reasonable living expenses and family obligations after compliance with one or more economic sanctions.”)

163. *Id.* (describing the relationship between reasonable financial subsistence and federal constitutional law).

164. *Id.* (detailing different approaches states may take in implementing the reasonable financial subsistence principle).

165. *See* MODEL PENAL CODE: SENTENCING § 6.04 cmt. h (Tentative Draft No. 3, 2014) (describing states’ ability to customize the principle for application within its jurisdiction).

166. *See* *Bearden v. Georgia*, 461 U.S. 660, 672 (1982) (describing “the general flexibility of tailoring fines to the resources of a defendant”).

se trends will influence “improvement” of economic sanctions as much as the revised Model Penal Code itself.

#### A. BUILDING ON THE CODE: PRACTICAL REFORMS TO INFORM ECONOMIC SANCTIONS

The imposition of onerous fees and fines is, on the one hand, an issue of lack of information. The amount of fees imposed on individuals can be difficult to quantify, and few understand or can assess the amount of fees and fines facing individual offenders as they are processed through the criminal justice system.<sup>167</sup> The Code addresses this information gap by making the sentencing judge the only purveyor of fees.<sup>168</sup> To build on this, however, a central agency or entity should compile information about the imposition of fees and fines to better understand their breadth. Sentencing commissions, already in existence, represent one agency that is well-equipped to further study this issue.<sup>169</sup> These agencies typically collect data on sentencing practices and trends, and issue policy recommendations on potential sentencing reforms to improve the justice system.<sup>170</sup> Often, these agencies aggregate data on characteristics of the individual offenders, the types of offenses imposed in the courts, and the length of sentence received by an offender.<sup>171</sup> Expanding the scope of their focus to include trends and practices in economic sanctions would be a logical expansion of sentencing commissions’ role in informing judicial sentencing practices.

An independent agency that follows the individual offender rather than the court could be another viable alternative. For example, Georgia created the Georgia Superior Court Clerks’ Cooperative Authority (GSCCCA) to monitor the collection of court-imposed fees and fines by the lower courts and standard-

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167. See, e.g., Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions As Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 513 (2011) (“It is not just the courts that have been authorized to impose monetary sanctions; a broad range of criminal justice agencies now are permitted to levy such fees.”); ACLU, *supra* note 24, at 11 (calling for further data collection on the issue of criminal justice debt).

168. MODEL PENAL CODE: SENTENCING § 6.04(2) cmt. e (Tentative Draft No. 3, 2014) (“One guiding premise of § 6.04 is that all economic sanctions . . . must be considered by sentencing courts as a package . . . [thus placing] the sentencing court in control of the total amount of all economic sanctions that will be imposed on an offender.”).

169. See Logan & Wright, *supra* note 46, at 1215–26 (recommending sentencing commissions as entities well-equipped to monitor LFOs).

170. *Id.* at 1215 (describing the current work of sentencing commissions).

171. See *id.*

ize their allocation.<sup>172</sup> Using its CourtTRAX system, the GSCCCA centralizes information on the collection of fees and fines across the state as part of a “fees and fines project.”<sup>173</sup> Currently, the agency’s data collection does not capture the amount of fees and fines imposed on an individual offender, nor does it capture the amount of debt outstanding in the state.<sup>174</sup> It could do this without much difficulty, however, given that it monitors fees and fines collection from all courts in the state.<sup>175</sup> A similar monitoring system could be created, either run through this agency or by a nonprofit organization, to follow the individuals providing the funding as well as the funds once collected by the court.<sup>176</sup>

Another challenge is better informing the sentencing judge on how to assess an offender’s ability to pay. Judicial training programs and checklists would combat some of the quick response solutions—including incarceration—that often befall individuals who fail to pay legal financial obligations when they appear before a court repeatedly.<sup>177</sup> The Supreme Court of Ohio

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172. See 2004 Ga. Laws ES3 (establishing the fees and fines project in Georgia and establishing the GSCCCA as the “collecting and remitting agent for the centralized collection and remittance of certain court costs and fees and certain additional penalties and bonds in criminal cases”).

173. *Id.*

174. See Ga. Superior Court Clerks’ Coop. Auth., *Reports*, COURTTRAX (2015), <http://www.courttrax.org/reportsCanned.asp> (describing the aggregation of reported data at the court level).

175. This includes collecting monthly reports on legal financial obligation collection from the superior courts, state courts, probate courts, municipal courts, magistrate courts and juvenile courts in the state. *Id.*

176. There are nonprofit organizations that monitor the amount of fees and fines imposed on individual offenders. For example, in 2008 the Rhode Island Family Life Center issued a report on its three year, independent study of court debt in the state. That report concluded that 18% of all jailings were on account of failure to pay court debts, which average \$826 per offender. R.I. FAMILY LIFE CTR., COURT DEBT AND RELATED INCARCERATION IN RHODE ISLAND FROM 2005 THROUGH 2007, at 4 (2008), available at <http://www.opendoorsri.org/sites/default/files/CourtDebt.pdf>. More recently, the ACLU of Washington conducted a year-long study estimating that 20% of individuals incarcerated in the Benton County were incarcerated for failure to pay court debt, which averages \$2,540 per case. ACLU OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS’ PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 3–4 (2014), available at <https://aclu-wa.org/LFO>. Such reports suggest that monitoring systems need not be created by state agencies alone, as nonprofit organizations demonstrate an ability to fill the gap in how much an individual faces in criminal justice debt and how collection is enforced.

177. Bret Crow, *Bench Card Offers Guidance on Collection of Court Fines, Costs*, COURT NEWS OHIO (Feb. 4, 2014), [http://www.courtnewsOhio.gov/happening/2014/benchCards\\_020414.asp#VNKrXGTF9XY](http://www.courtnewsOhio.gov/happening/2014/benchCards_020414.asp#VNKrXGTF9XY) (describing the clarity provided by judicial training and reference materials regarding when

recently took steps to address this concern through the issuance of “bench cards” for all state judges to clarify how better to address the collection of fees and fines.<sup>178</sup> This two-page document, circulated to all state judges, defines and distinguishes fines versus court costs, and details enforcement options for both types of legal financial obligations.<sup>179</sup> By providing the courts with a list of collection methods, this measure may negate the impulse to incarcerate without full consideration of other enforcement methods.<sup>180</sup> Alternatively, judges could receive training to understand the alternative sanctions that are available for failure to pay, including community service programs and alternative payment plan options.<sup>181</sup> Such training would provide judges with information to better understand the offender’s ability to pay and their enforcement options.

The revised Code’s “reasonable financial subsistence” standard combats this problem by requiring courts to obtain information to make the assessment.<sup>182</sup> The actual method of information collection, however, is left unspecified. One method of assessment that makes sense is the presumption of a waiver of fees and fines where an individual already receives any public welfare benefits. Indeed, the Code suggests this measure in the comments, though it is not set forth within the Code itself.<sup>183</sup> This reform has practical appeal. In Maricopa County, Arizona, for example, the county courts provide fee deferrals for certain individuals whose income is less than 150% of the fed-

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incarceration is appropriate for enforcing fines).

178. *Id.*

179. OFFICE OF JUDICIAL SERVS., SUPREME COURT OF OHIO, COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS 2 (2014), available at <http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf>.

180. *Id.* (clarifying for judges that they are not allowed to use jail as a method of collection for costs).

181. *Id.* (describing two alternate methods of resolution: cancellation and community service).

182. MODEL PENAL CODE: SENTENCING § 6.04 cmt. h (Tentative Draft No. 3, 2014).

183. In the comments to section 6.04, the Reporters set forth a provision that was “too specific to be included” but “consistent with the spirit of subsection (6),” which states:

No economic sanction may be imposed on an indigent offender as defined by the state’s eligibility rules for appointment of counsel in a criminal case. Qualification for or receipt of any of the following public benefits shall serve as evidence that the offender would not retain sufficient means for reasonable living expenses and family obligations after compliance with one or more economic sanctions.

*Id.*

eral poverty level.<sup>184</sup> The deferral package allows the individual to share his or her financial situation with the court at an early stage in the criminal justice process, thus providing the sentencing judge with additional information at sentencing.<sup>185</sup> Replicating such documentation in jurisdictions across the country would do much to give judges a sense of what types of financial obligations individuals face and how additional criminal justice debt could affect their ability to reintegrate into society successfully.

#### B. ROADBLOCKS TO IMPROVEMENT: INTERSECTING TRENDS IN JUSTICE REFORM

On a larger scale, the accumulation of economic sanctions and the accrual of criminal justice debt are the side effects of two larger trends in criminal justice reform. First, state courts are persistently underfunded, leading courts to seek revenue through economic sanctions.<sup>186</sup> While economic sanctions always existed, additional fees and fines proliferated in the 1990s.<sup>187</sup> By 2003, the Conference of State Court Administrators declared that state courts were facing “the worst fiscal crisis in many decades.”<sup>188</sup> This issue came to a head with the Great Recession of 2008. As one scholar notes, “[i]n most states, courts received 10 to 15 percent less funding in the years 2008 through 2011 than they did in 2007.”<sup>189</sup> By 2010, more than for-

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184. The fee deferral option exists for court fees or costs in family court, tax, civil, juvenile and mental health cases. SUPERIOR COURT OF ARIZ., FEE DEFERRAL APPLICATION (2014), available at <http://www.superiorcourt.maricopa.gov/sscDocs/packets/gnf1z.pdf> (citing an income less than 150% of the federal poverty line as one basis for deferral).

185. *Id.* (noting the application is to be used “at the beginning of the case”).

186. CONFERENCE OF STATE COURT ADM’RS, POSITION PAPER ON STATE JUDICIAL BRANCH BUDGETS IN TIMES OF FISCAL CRISIS 2 (2003), available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/BudgetWhitePaper.ashx> (“State judicial systems . . . have found it difficult to obtain adequate resources even in good economic times.”).

187. In 1986, the Conference of State Court Administrators issued a set of standards related to court filing fees, surcharges, and miscellaneous fees in response to the burgeoning reliance upon courts to generate revenue to fund both the courts and other functions of government. *See generally* CONFERENCE OF STATE COURT ADM’RS, STANDARDS RELATING TO COURT COSTS: FEES, MISCELLANEOUS CHARGES AND SURCHARGES AND A NATIONAL SURVEY OF PRACTICE (1986). The prevalence of the practice has expanded and intensified since the 1990s. *See, e.g.*, CONFERENCE OF STATE COURT ADM’RS, COURTS ARE NOT REVENUE CENTERS 1 (2012), available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx> (renewing examination due to persistence of the issue).

188. CONFERENCE OF STATE COURT ADM’RS, *supra* note 186, at 2.

189. Michael J. Graetz, *Trusting the Courts: Redressing the State Court*

ty states cut their courts' funding.<sup>190</sup> In response, state courts started seeking revenue to support their operational costs.<sup>191</sup>

Whether judges impose more fees and harsher fines in light of fiscal scarcity is an issue that deserves more research. At the very least, state legislatures do not deter such action when they expand mandatory economic sanctions.<sup>192</sup> In some instances, they are actively encouraging courts to use sanctions to supplement necessary operational costs. The Oklahoma state courts have collected more in the last five years than in any other time in state history.<sup>193</sup> In response, the legislature decreased state appropriations to the courts, reducing their funding by seven percent in 2014.<sup>194</sup> In fact, the state's 2014 budget praises the courts for attaining "the highest court fund collections possible."<sup>195</sup> Such statements create a perverse incentive for judges to increase the imposition of fees and fines.<sup>196</sup> It may also compromise judicial impartiality at sentencing.<sup>197</sup>

Even where fees and fines do not directly fund court operational costs, they often will fund general state budgets or unre-

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*Funding Crisis*, DAEDALUS, Summer 2014, at 96, 97.

190. *Id.*

191. See, e.g., Maura Dolan, *Cutbacks in California Court System Produce Long Lines, Short Tempers*, L.A. TIMES (May 10, 2014), <http://www.latimes.com/local/la-me-court-cuts-20140511-story.html> (noting that the Kings County Superior Court "resorted to holding a garage sale to raise money"); BANNON ET AL., *supra* note 10, at 30 ("All of the states studied in this report use criminal justice debt to provide budgetary support to courts.").

192. See BANNON ET AL., *supra* note 10, at 1 (describing expanded use of fees in light of the fiscal crisis).

193. Suzy Khimm, *Will the Government Stop Using the Poor As a Piggy Bank?*, MSNBC (Sept. 9, 2014, 3:27 PM), <http://www.msnbc.com/msnbc/will-the-government-stop-using-the-poor-piggy-bank>.

194. *Id.*

195. MARY FALLIN, EXECUTIVE BUDGET FOR FISCAL YEAR ENDING JUNE 30, 2015 B-36 (2014), available at <http://www.ok.gov/OSF/documents/bud15.pdf>.

196. See Khimm, *supra* note 193 (suggesting some judges have increased momentum for revenue collection in response to praise in Governor Fallin's budget).

197. See BANNON ET AL., *supra* note 10, at 30 ("[I]n its most extreme form, [reliance on fees] threaten[s] the impartiality of judges and other court personnel with institutional, pecuniary incentives."); Logan & Wright, *supra* note 46, at 1201–03 (chronicling limited concern for enforcement and collection neutrality in the courts). U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42 (2015) ("The impact that revenue concerns have on court operations undermines the court's role as a fair and impartial judicial body."). The Brennan Center further asserts that similar perverse incentives exist at various points in the criminal justice system during the era of mass incarceration, from police and asset forfeiture to prosecutors and conviction rate rewards. See CHETTIAR ET AL., *supra* note 43, at 11–12.

lated criminal justice system costs, such as rehabilitative programs unrelated to the particular individual's offense.<sup>198</sup> Such costs present a regressive tax on individuals in the criminal justice system to support government functions that the tax-paying public enjoys without understanding the "real costs of enforcement."<sup>199</sup> As such, it can distort the public's perception of how much the current justice system actually costs as well as the actual benefits or burdens gained from this system.<sup>200</sup>

Second, the desire to cut costs through reforms in the criminal justice system will influence and potentially prevent improvements to economic sanctions in the states. The United States finds itself at a pivotal moment in reshaping punitive policies that have sustained overreliance on incarceration for more than thirty-five years. Conservative and progressive lawmakers alike are calling for reconsideration of policies that harshly punish low-level, nonviolent offenders as a measure to save taxpayer money and improve the effectiveness of the justice system.<sup>201</sup> In response, states are revisiting and expanding alternatives to incarceration, decriminalization of low-level crimes, and graduated sanctions.<sup>202</sup>

But in reality, reducing incarceration costs money, too. Alternatives to incarceration and treatment programs are less expensive than incarceration,<sup>203</sup> but they are not without costs, many of which are being offset onto the individuals being processed through the justice system. Individuals now pay for court-ordered supervision, electronic monitoring,<sup>204</sup> drug test-

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198. Khimm, *supra* note 193 (noting that fees are channeled into the state's general revenue fund).

199. Logan & Wright, *supra* note 46, at 1178.

200. *Id.*

201. See BRENNAN CTR. FOR JUSTICE, SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE (2015) (compiling conservative and progressive lawmakers views on criminal justice reform); Eaglin, *supra* note 26, at 191 n.5; Fan, *supra* note 26, at 583 (detailing bipartisan reform movements).

202. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1590–91 (2012).

203. See, e.g., Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, FED. PROBATION, Sept. 2009, at 3, 6 (calculating that pretrial detention costs \$19,000 on average while nonincarcerative supervision costs between \$3,100 and \$4,600 per defendant).

204. See, e.g., MICH. COMP. LAWS § 791.285(b)(2) (2006) (requiring individuals in the lifetime electronic monitoring program to reimburse the department for the actual costs of monitoring the individual); Samuel R. Wiseman, *Pretrial Detention and the Right To Be Monitored*, 123 YALE L.J. 1344, 1374 (2014) ("[F]or better or worse, it is likely that monitoring programs will shift pretrial flight prevention costs to defendants; some defendants in pretrial release programs already pay for the cost of their own monitoring.").

ing, drug treatment, diversion programs, and more.<sup>205</sup> These alternatives are necessary to reduce reliance on incarceration, but truly moving beyond mass incarceration—including using economic sanctions in a way that is productive and proportionate—requires changing the way we punish for more than just cost-cutting reasons. It requires rethinking the role of punishment in the criminal justice system and in society more broadly.

The Model Penal Code takes an important stride toward this type of fundamental rethinking, as it refocuses economic sanctions around the goal of successful reintegration into society.<sup>206</sup> There is reason to believe that broader public and political opinion has not similarly reoriented itself around this framework, despite the apparent shift toward rehabilitative reforms. As I explain elsewhere, neorehabilitative reforms maintain the same framework of exclusion that created policies that increased prison populations, even though the rhetoric of reform has changed.<sup>207</sup> Accordingly, unless and until the public and politicians develop the will to fund a reintegrative system,<sup>208</sup> economic sanctions may be another alternative to incarceration implemented in the wrong way despite the ALI's efforts to the contrary.<sup>209</sup>

Though the revised Model Penal Code takes important steps to curtail the likelihood of excessive economic sanctions, their occurrence likely will not recede without either or both of these broader trends reversing course as well. Without additional funding, the courts have little incentive to engage in meaningful ability-to-pay determinations for offenders facing mounting criminal justice debt.<sup>210</sup> Similarly, legislators have lit-

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205. Some of these costs may decline as technological alternatives expand. See Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1371 (2008) (“[U]nlike the level or even escalating costs of physical forms of incapacitation, the cost of imposing a technological restraint may decrease over its period of use.”).

206. MODEL PENAL CODE: SENTENCING § 6.04 cmt. b (Tentative Draft No. 3, 2014).

207. See Eaglin, *supra* note 26, at 222–25.

208. *Id.* at 225 (noting that a reintegrative model of punishment could lead to permanent reduction in the U.S. prison population); Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, DAEDALUS, Summer 2010, at 124, 129 (urging advocates to simultaneously focus on reducing mass incarceration and “the sufficient infusion of funds to help criminal offenders become law-abiding citizens”).

209. See Weisberg & Petersilia, *supra* note 208, at 127 (explaining that “it is puzzlingly easy to implement alternative sanctions in the wrong way”).

210. See *supra* note 196 and accompanying text.



tle incentive to encourage them to do so. Moreover, until states start investing more funds in alternatives to incarceration, lawmakers will try to offset the costs of justice system on individuals least likely to be able to pay.<sup>211</sup> In turn, failure to pay criminal justice debt will persist. But as pressure to create cost-effective alternatives to incarceration increase, there is little incentive to shift more of the costs toward the state and away from the individual.

### CONCLUSION

Economic sanctions are but one of a plethora of methods a court may select for punishment. Until this point, economic sanctions have been used as a supplement to reform rather than an alternative. The Model Penal Code intervenes at a critical juncture with a revised approach. The Code emphasizes that fees and fines are punishment in and of themselves, rather than a supplement. It also aptly places the court as a check on excessive fines from the legislature. But the interventions by the Model Penal Code alone will not eliminate the disproportionately severe effects this method of punishment inflicts on the poor through the creation of criminal justice debt. Additional reforms are necessary. Moreover, successful implementation of the revised Code's policies is inextricably linked with other trends in justice reform. Unless advocates and lawmakers fund courts and move beyond the cost-cutting framework to justice reform, the efforts to improve economic sanctions in the states will remain tenuous at best.

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211. See *supra* note 194 and accompanying text.