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THE NEW AMERICAN DEBTORS' PRISONS

Christopher D. Hampson*

Presented at *Misdemeanor Defendants and the 85th Legislative Session*, a Conference held in coordination with the Texas Journal on Civil Rights & Civil Liberties, the American Journal of Criminal Law, and the Texas Fair Defense Project

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

Law Clerk, Hon. Richard A. Posner, U.S. Court of Appeals for the Seventh Circuit. J.D., Harvard Law School, Master of Theological Studies, Harvard Divinity School, 2016. Winner of the 2015 Steven L. Werner Writing Prize in Criminal Justice, Harvard Law School. This Article has come together over more than two years of ruminations with legal scholars and practitioners. Many thanks go to Yonathan Arbel, Alec Karakatsanis, Bruce Mann, Oren Bar-Gill, Andrew Crespo, Henry Smith, Adrian Vermeule, David Skeel, Dick Fallon, Chris Desan, Sven Beckert, Jacob Goldin, Rachel Sachs, Mark Jia, Nicholas Dube, and Mary Schnoor for insightful discussions and comments. Declan Conroy, Lauren Ross, and Jon Gould, as well as many other editors on the *Harvard Law Review*, were instrumental in my thought as it developed through my student Note. Many thanks to the editors of the *American Journal of Criminal Law* for helping get this piece polished for publication. Any errors that remain are my own. My deepest gratitude to Cecilia, Olivia, and Jonathan for their love and patience during the writing process.

I. Introduction

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

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

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[1] *See* Telephone Interview with Douglas K. Wilson, Colorado Public Defender (Oct. 21, 2014) (notes on file with author).

[2] *See, e.g.*. Sarah Dolisca Bellacicco, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System*, 48 GA. L. REV. 227, 234 (2014); Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 Harv. C.R.-C.L. L. Rev. 189 (2016).

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

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

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

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

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

[8] Bellacicco, *supra* note 2, at 266.

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

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

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

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

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

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

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

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[11] For this story, including more details, see Complaint, *Fant v. Ferguson*, *supra* note 10 at 10–14.

[12] For this story, including more details, see Stillman, *supra* note 4; Amended Complaint at 1, Cleveland v. Montgomery, No. 2:13-cv-00732, (M.D. Ala. Nov. 12, 2013) [hereinafter Complaint, *Cleveland v. Montgomery*], http://www.splcenter.org/sites/default/files/downloads/case/amended_complaint-_harriet_cleveland_0.pdf.

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

$746, composed of court costs, fines, fees, and restitution.[14] She 'paid' by spending fifteen days in jail.

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

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

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

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

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

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

[18] *Id.* at 10, 18, 42, 46, 52, 53, 55.

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

[20] *Id.* at 104.

[21] Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

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

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

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

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

[24] *See, e.g.*. Atkinson, *supra* note 2; Bellacicco, *supra* note 2, at 250–61 (arguing that the new debtors' prisons constitute a violation of the Equal Protection Clause, the Due Process Clause, and the Excessive Fines Clause); Ann K. Wagner, *The Conflict over* Bearden v. Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL. F. 383. This is true as well of Professor Alexandra Natapoff's excellent recent piece, Natapoff, *supra* note 21, which uses the term, *see id.* at 1101, and discusses the relevant federal equal protection law, *see id.* at 1082–85. The historical debtors' prisons and the state bans are not a focus of Natapoff's article, however.

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

[26] Hampson, *State Bans on Debtors' Prisons and Criminal Justice Debt*, *supra* note 25.

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

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

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

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

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

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

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

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

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

II. IMPRISONMENT FOR DEBT IN 2016

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

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

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

[32] *See* Derek A. Westen, *Comment, Fines, Imprisonment, and the Poor: 'Thirty Dollars or Thirty Days,'* 57 CALIF. L. REV. 778, 787 (1969).

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

[34] Marsh & Gerrick, *supra* note 19, at 98.

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

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

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

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

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

[38] *Id.* at 7.

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

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

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

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

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

[44] *See* Hampson, *supra* note 25, at 1024 & n.5.

[45] *Id.* at 1027.

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

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

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

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

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

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

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

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

[49] *See, e.g.*, Telephone Interview with Douglas K. Wilson, *supra* note 1.

[50] *See, e.g.*, Hampson, *supra* note 25, at 1028; ACLU OF TEXAS, *supra* note 48, at 4, 6–7.

[51] *See* Karakatsanis, *supra* note 3, at 263–64.

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

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

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

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

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[52] Complaint, *Fant v. Ferguson*, *supra* note 10, at 2.

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

[54] *See* Complaint, *Jenkins v. Jennings*, *supra* note 36, at 46. The debt of one such individual was $500. *Id.*

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

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

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

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

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

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

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

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

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

[60] *See* Atkinson, *supra* note 2, at 208–09.

[61] *See, e.g.*, Complaint, *Fant v. Ferguson*.

[62] ACLU of Texas, *supra* note 48, at 8–9.

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

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

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

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

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[65] Hampson, *supra* note 25, at 1030.

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

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

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

[69] *See* Hampson, *supra* note 25, at 1030–31.

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

[71] *See* Hampson, Recent Legislation *supra* note 14, at 1313, 1315.

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

> Among a host of other provisions, the law provides that courts shall waive, modify, or convert [LFOs] upon a determination by the court that a defendant has a significant financial hardship or inability to pay or that there are any other extenuating factors which prohibit payment or collection; provided, however, that the imposition of sanctions for failure to pay such sums shall be within the discretion of the court through judicial process or hearings.

Id. at 25. Missouri's law made imprisonment unavailable for traffic offenses and created limits on fundraising through such offenses. *See* Act of July 9, 2015, 2015 MO. LAWS 453.

[73] H.B. 1390, 2015–2016 Reg. Spec. Sess. (Wash. 2015), http://app.leg.wa.gov/billsummary?BillNumber=1390&Year=2015#documentSection.

[74] *See* Hampson, *supra* note 25, at 1031; Hampson, Recent Legislation, *supra* note 14, at 1316.

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

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

III. DEBTORS' PRISONS, OLD AND NEW

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

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

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

[77] Hampson, *supra* note 25, at 1031.

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

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

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

A. The Old Debtors' Prisons: Qualities and Functions

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

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

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

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

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

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

[84] *See* Ford, *supra* note 80, at 28; COLEMAN, supra note 79, at 249.

[85] *See* Vogt, *supra* note 82, at 343.

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

[87] *See* MANN, *supra* note 79, at 79.

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

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

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

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

[89] *See id.*

[90] *See id.*

[91] *See id.*

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

[93] *Id.* at 85.

[94] *See id.* at 147–52.

[95] *Id.* at 90.

[96] *Id.* at 91–92.

[97] *See* COLEMAN, *supra* note 79, at 254.

[98] *See id.*

[99] *See* MANN, *supra* note 79, at 50, 101.

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

Morris, once the wealthiest man in America, evaded arrest for seven months by hiding out in 'Castle Defiance, his home outside Philadelphia.[101]

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

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

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

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

[102] *Id.* at 91–92.

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

[104] MANN, *supra* note 79, at 87.

[105] *Id.*

[106] *Id.*

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

[108] MANN, *supra* note 79, at 87.

[109] *Id.* at 88.

[110] *Id.* at 97.

[111] *Id.* at 100.

[112] *See id.* at 154.

[113] *See* Note, *supra* note 80, at 548–49.

[114] *See id.* at 549.

[115] *See* MANN, *supra* note 79, at 102.

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

B. The Abolition Movement: Purposes and Limits

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

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

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

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

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[116] Note, *supra* note 80, at 549–50; COLEMAN, *supra* note 79, at 257.
[117] *See* COLEMAN, *supra* note 79, at 256.
[118] MANN, *supra* note 79, at 81.
[119] *Id.* at 84.
[120] *Id.* at 89.
[121] *Id.* at 103.
[122] *Id.* at 105.
[123] *Id.* at 110.
[124] *Id.* at 126.
[125] *Id.* at 144–45.
[126] *See id.* at 191.
[127] *Id.* at 182.
[128] Even though multiple bills were proposed through the 1790s, Congress only managed to pass a temporary bankruptcy bill in 1800. *See id.* at 187.

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

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

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

[130] *See* MEYER, *supra* note 129, at 287.

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

[132] *See* Note, *supra* note 80, at 550; COLEMAN, *supra* note 79, at 257.

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

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

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

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

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

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

[137] 6 Cong. Ch. 4, Jan. 6, 1800, 2 Stat. 4 (1800). This act bore the same name as its predecessor.

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

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

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

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

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

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

[139] *See* 28 U.S.C. § 2007 (2012) (originally passed in 1948).

[140] *See* United States v. Hewes, 26 F.Cas. 297 (E.D. Pa. 1840).

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

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

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

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

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

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

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

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

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

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[147] PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1999).

[148] FLA. CONST. art. I, § 15 (1868).

[149] CHOCTAW CONST. art. I, § 12.

[150] CHICKASAW CONST. art. I, § 12.

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

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

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

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

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

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

1. Functional Reasons for the Ban

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

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

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

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

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

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

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

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

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

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

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

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

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[164] COLEMAN, *supra* note 79, at 268. This view is given further support by Baker et al., *supra* note 88.

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

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

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

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

[169] *See* Peebles, *supra* note 43.

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

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

2. Doctrinal Limits on the Ban

The 'abolition' of imprisonment for debt was not absolute.[174] The constitutional texts, or alternatively courts interpreting them, created two kinds of exceptions: for bad behavior and for non-covered debts.

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

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

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

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

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

[173] *See, e.g.*, COLEMAN, *supra* note 79, at 250.

[174] *See* Hampson, *supra* note 25, at 1036 & n.103.

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

[176] *See* sources cited in Hampson, *supra* note 25, at 1036 n.107.

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

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

C. The True Historical Antecedents

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

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

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

[178] *See* Hampson, *supra* note 25, at 1036 n.103.

[179] *See id.* at 1036–37 & nn. 111–15 (citing sources).

[180] *See* Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 367 (2005) (discussing courts' use of contempt proceedings to enforce "a variety of fees and other expenses"); Lea Shepard, *Creditors' Contempt*, 2011 B.Y.U. L. REV. 1509, 1518 (detailing the common-law ability of creditors to bring *in personam* actions against debtors, enforced by the courts' contempt ability); *id.* at 1526 (discussing "nonappearance contempt" for no-shows). Richard E. James, by contrast, makes an argument that would have held wide appeal in the past, namely, that we should rigorously use imprisonment for nonpayment of civil debt to ensure that courts are respected and their judgments obeyed. *See* James, *supra* note 133 at 145 (2002). Authors have pointed out, too, that statutes enable imprisonment for failure to pay child support or alimony. *See* Ressler, *supra* note 180, at 363. Still other authors have expressed concern with imprisonment for contractual debts owed to the state. *See* Vogt, *supra* note 82, at 335–36 (panning the use of imprisonment for failure to return military equipment after discharge).

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

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

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

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

[183] *See* OSHINSKY, *supra* note 182, at 56.

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

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

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

[187] BLACKMON, *supra* note 182, at 90.

[188] OSHINSKY, *supra* note 182, at 41–42.

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

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

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

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

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

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

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

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

[194] *See id.* at 720 n. 39.

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

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

[197] *See supra* note 22 and accompanying text.

IV THE PRAGMATIC CONNECTION

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

A. Incarceration and Its Inefficiencies

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

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

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[198] For contemporary arguments in this same vein, *see* American Bar Association, The Social Costs Of Incarceration, http://www.americanbarfoundation.org/uploads/cms/documents/abf_rl_summer_2010.pdf.

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

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

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

[202] Westen, *supra* note 32, at 793.

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

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

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

B. Civil Debts in Criminal Law

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

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

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

[204] *See supra* notes 171–73 and accompanying text.

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

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

[207] Of course, as one reader pointed out, the problem in Ferguson isn't so much irrational means as rational ones, serving evil ends.

[208] *See, e.g.*. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 519 (2011); Pat O'Malley, *Politicizing the Case for Fines*, 10 CRIMINOLOGY & PUB. POL'Y 547, 551 (2011). A Rhode Island study concluded that 15% of cases of imprisonment for criminal justice debt ended up costing the state money. RHODE ISLAND FAMILY LIFE CTR., COURT DEBT & RELATED INCARCERATION IN RHODE ISLAND 4 (2007), http://www.realcostofprisons.org/materals/Court_Debt_and_Related_Incarceration_RI.pdf.

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

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

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

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[209] *See generally* Note, *Policing and Profit*, 128 HARV. L. REV. 1723 (2015).

[210] *See, e.g.. id.* at 1723, 1726.

[211] *See id.* at 1728, 1734; Natapoff, *supra* note 21, at 1098 and n.208.

[212] Bearden v. Georgia, 461 U.S. 660, 670 (1982).

[213] *Id.* at 672.

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

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

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

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

[218] Lee v. Weisman, 505 U.S. 577, 595 (1992).

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

C. Crime, Contract and Situationism

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

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

D. 'Forgive Us Our Debts'

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

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

[220] *See supra* notes 48–51 and accompanying text.

[221] Cleveland v. City of Montgomery, 300 F.R.D. 578, 579–80 (M.D. Ala. 2014)

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

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

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

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

V REINVIGORATING THE BAN

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

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

[224] *Matthew* 6:9-13.

[225] *See* Lane Cty v. Oregon, 74 U.S. 71, 79 (1868).

[226] F.C.C. v. NextWave Personal Comm's Inc., 537 U.S. 293, 303 (2003).

[227] *See* Hampson, *supra* note 25, at 1043–44.

[228] Sobol, *supra* note 21, at 532–37.

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

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

A. *Bearden* Claims

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

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

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

[230] Williams v. Illinois, 399 U.S. 235 (1970).

[231] Tate v. Short, 401 U.S. 395 (1971).

[232] Bearden v. Georgia, 461 U.S. 660 (1982).

[233] Hampson, *supra* note 25, at 1044.

[234] *Williams*, 399 U.S. at 236.

[235] *Id.*

[236] *Id.* at 237.

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

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

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

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

[238] *See* U.S. CONST. amend. XIV.

[239] *See Williams*, 399 U.S. at 242.

[240] *See* Tate v. Short, 401 U.S. 395, 397 (1971).

[241] *See id.* at 397–98.

[242] *See* Bearden v. Georgia, 461 U.S. 660, 664 (1982).

[243] *Id.* at 399 (citing Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

[244] *See Bearden*, 461 U.S. at 661.

[245] *Id.* at 662.

[246] *Id.*

[247] *Id.* at 668.

[248] *See id.* at 665–67.

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

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

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

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

[250] Hampson, *supra* note 25, at 1043–44.

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

[252] *Bearden*, 461 U.S. at 668.

[253] *Id.* at 660–61.

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

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

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

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

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

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

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

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

[259] *See, e.g.*, United States v. Montgomery, 532 F.3d 811, 813 (8th Cir. 2008).

[260] *See* Noel v. State, 191 So.3d 370, 378 (Fla. 2016).

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

[262] *See id.* at *11.

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

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

[265] *See* Hampson, Recent Legislation, *supra* note 14, at 1316.

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

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

B. Imprisonment-for-Debt Claims

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

1. The Protections Offered by the State Bans

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

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

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[266] *See id.* at 1319.

[267] *See id.* at 1315–16.

[268] *See* Natapoff, *supra* note 21, at 1085.

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

[270] *See* Hampson, *supra* note 25, at 1037–38.

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

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

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

2. The Scope of the State Bans

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

a. Regulatory Offenses

First, so-called 'regulatory offenses' or 'public welfare offenses, particularly where the statute only authorizes monetary fines.[278] While traditionally *crime* referred only to intentionally committed wrongs,

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[272] *See* Hampson, *supra* note 25, at 1037.

[273] *See id.* at 1037. For discussion of caselaw, see *id.* 1037 n.116.

[274] *See id.* at 1037–38. For discussion of caselaw, see *id.* 1037 n.117.

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

[276] *See* Hampson, *supra* note 25, at 1043.

[277] *See* Westen, *supra* note 32, at 779–87.

[278] *See generally* Hampson, *supra* note 25, at 1038–40.

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

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

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

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

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

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[279] *See id.* at 1038.

[280] Morissette v. United States, 342 U.S. 246, 255–56 (1952).

[281] *Id.*

[282] *See* Hampson, *supra* note 25, at 1038 n.124.

[283] *Id.*

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

[285] *E.g.*, MICH. CONST. art. I, § 21 ("No person shall be imprisoned for debt arising out of or founded on contract, express or implied —"); S.D. CONST. art. IV, § 15 ("No person shall be imprisoned for debt arising out of or founded upon a contract.").

[286] *E.g.*, ARK. CONST. art. II, § 16.

[287] OKLA. CONST. art. II, § 13.

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

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

b. Costs

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

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

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

[289] Hampson, *supra* note 25, at 1039.

[290] *Id.*

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

[292] *See generally* Hampson, *supra* note 25, at 1040–41.

[293] *Id.* at 1040.

[294] Ex parte Diggs, 38 So. 730 (Miss. 1905).

[295] *Id.* at 730.

[296] *Id.*

[297] *Id.*

[298] *Id.* at 731.

purely contractual, or arise from some legal liability growing out of the debtor's dealings with another. '[299] Most other courts have agreed.[300]

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

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

c. Definitionally Civil Offenses

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

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

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

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

[302] *See Strattman*, 253 N.E.2d at 754.

[303] *Id.*

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

[305] For a discussion of variety among states and cited provisions, see Hampson, *supra* note 25, at 1042–43.

[306] *Id.* at 1042 n. 152.

[307] *Id.* at 1042 n. 153.

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

3. *Strange* Claims

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

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

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

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[308] *See, e.g.*, People v. Pillon, 171 N.W.2d 484, 487 (Mich. 1969).

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

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

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

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

[313] *See, e.g.*, U.S. CONST. amend. XIV.

[314] James v. Strange, 407 U.S. 128 (1972).

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

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

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

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

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

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

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[317] Strange, 407 U.S. at 135.

[318] *Id.* at 138.

[319] *Fuller*, 417 U.S. at 42.

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

[321] The majority found that the statute was 'wholly free of the kind of discrimination that was held in *James* to violate the Equal Protection Clause.' *Fuller*, 417 U.S. at 47–48.

[322] *See* Hampson, *supra* note 25, at 1033–34.

[323] *Fuller*, 407 U.S. at 60–61 (Marshall, J., dissenting).

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

[325] *See* Hampson, *supra* note 25, at 1033.

[326] *Id.* at 1042.

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

C. A Two-Tier Solution to Imprisonment for Debt

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

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

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

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

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[327] See *supra* Section A.

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

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

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

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

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

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

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

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

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

VI. CONCLUSION: THE NEW ABOLITIONISM

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

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

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[332] Brown v. Board of Education, 347 U.S. 483 (1954).

[333] Roe v. Wade, 410 U.S. 113 (1973).

[334] Hampson, *supra* note 25, at 1044.

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

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

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

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

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

* * *

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

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[337] *See supra* notes 158–161 (discussing the evolution of the constitutional bans of Georgia and Texas).

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

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

Id.

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

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

Article

TIME FOR A DIVORCE: UNCOUPLING DRUG OFFENSES FROM VIOLENT OFFENSES IN FEDERAL SENTENCING LAW, POLICY, AND PRACTICE

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I. Introduction

There is an unprecedented growing sentiment that the United States imprisons far too many people for far too long, especially for non-violent drug crimes. This sentiment is leading to unique collaborations between the political left and right aimed at reducing the 'mass incarceration' caused by the war on drugs and its affiliated policies.[1] Remarkably, when it comes to drugs, the pendulum of crime policy is swinging from the long dominant 'tough on crime' extreme towards a more compassionate and reasoned understanding of drug crimes and the impact of imprisonment on defendants and their families and communities.

However, one issue lost in the reform discussion is how throughout federal sentencing law and practice, drug offenses are pervasively linked to violent offenses to lengthen prison sentences. Throughout federal criminal statutes, sentencing guidelines and policies, drug crimes and violent crimes are not only treated equally, but also interchangeably to increase a defendant's prison sentence.[2] This interchangeable equivalence is ingrained in federal criminal statutes and sentencing guidelines providing some of the lengthiest terms of imprisonment.[3]

These statutes, guidelines, and policies were designed to remove serious offenders primarily responsible for the drug related violence from the community for extended periods of time. The equivalency and interchangeability of violent offenses with non-violent drug offenses, however, has resulted in a growing gap between intent and results.[4] It has contributed significantly to the country's mass incarceration problem and its growing elderly prison population (whose healthcare and other needs are co-opting an increasing percentage of our criminal justice resources), and has aggravated the racial disparities in our prison population.[5]

If we are truly serious about reducing our over-reliance on imprisonment and confronting the disparities tied to the 'war on drugs' and federal drug policies, then an action-item that must be on the agenda is de-coupling violent conduct from non-violent drug conduct for sentencing purposes. This article discusses one such policy—the career offender guideline—as an example of the wayward approach of equating drug offenses with violent offenses. It also discusses a recent effort and recommendation by the United States Sentencing Commission (the 'Sentencing Commission") to mitigate

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[1] *See generally* Inimai M. Chettiar, *A National Agenda to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUSTICE (Apr. 27, 2015), https://www.brennancenter.org/analysis/national-agenda-reduce-mass-incarceration (discussing methods of reducing mass incarceration).

[2] *See, e.g.*, 18 U.S.C. § 924(e) (2012) (known as the Armed Career Criminal statute, which imposes a 15-year mandatory minimum sentence when a defendant convicted of possessing a firearm as a prohibited person has two prior convictions "for a violent felony or serious drug offense, or both. ").

[3] *Id.*

[4] Christopher Ingraham, *Here's How Much Americans Hate Mandatory Minimum Sentences*, WASH. POST (Oct. 1, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/01/heres-how-much-americans-hate-mandatory-minimum-sentences/.

[5] *Id.*

the consequences of equating drugs with violence under the career offender guideline—a first step that likely will go nowhere because of Congress.

II. The Career Offender Guideline

The career offender guideline is Section 4B1.1 of the United States Sentencing Guidelines ("U.S.S.G. ").[6] The section holds that a defendant is a career offender, and therefore subject to the accompanying enhanced penalties, if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[7]

Offenders who qualify are exposed to the enhanced penalties provided in the section.[8] The enhanced penalties come in the form of drastically altered guidelines coordinates that subject a defendant to guidelines ranges at or near the maximum terms of imprisonment allowed by the statute of conviction.[9] First, the offender's base offense level is set at the greater of: (a) the level applicable to the offense of conviction; or the more likely, (b) the level set by the table within the career offender guidelines.[10] The table establishes offense levels high enough to meet Congress's mandate (discussed later) that career offenders receive prison sentences 'at or near the maximum term authorized. '[11] The second alteration places all qualifying career offenders, no matter their actual criminal history point total, in criminal history category VI – the guidelines' highest category.[12]

Qualifying as a career offender changes the entire landscape of a defendant's prison exposure. It can transform a sentencing exposure that normally would be a few years into decades of imprisonment, and even life im-

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[6] U.S SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM'N 2014).

[7] *Id.*

[8] *See* 28 U.S.C. § 994(h) (2006) (directing the Sentencing Commission to specify prison terms "at or near the maximum the term" for qualifying career offenders).

[9] *Id.* For the unfamiliar, the Sentencing Guidelines specify a base offense level for every federal offense, and that pre-set offense level increases or decreases based on enumerated contextual factors of a particular case. The base offense level with the adjustments produces a final offense level that ranges from one to forty-three. Separately, to account for the varying criminal records of defendants, the Commission established a point-based system for measuring a defendant's criminal record and status at the time of the instant conviction. A defendant's total number of criminal history points determines into which of the six criminal history categories he/she falls. Using the guidelines' sentencing table, the final offense level is cross-referenced with the defendant's criminal history category to yield a defendant's presumptive sentencing range

[10] 28 U.S.C. § 994(h) (2012).

[11] *Id.*

[12] *Id.*

prisonment.[13] As a real world example, I once had a client, Mr. Derrick Allen, who was charged with distributing 18 grams of heroin for $1000.[14] Mr. Allen had three prior convictions for distributing small amounts of drugs: a) nine bags of crack worth $20 each; b) six bags of cocaine, 21 heroin gel caps, and 17 morphine pills—valued altogether at $425; and c) three small bags of marijuana and 24 bags of cocaine—valued altogether at $174.[15] He had no history of violence or using weapons.[16] Everyone recognized that Mr. Allen was a drug addict who sold small amounts of drugs to fund his addiction. Nonetheless, because of his three qualifying non-violent drug convictions, Mr. Allen's presumptive post-trial guidelines range went from 33–41 months (non-career offender range based on offense level 14 at criminal history category V) to a career offender range of 151 to 181 months imprisonment (offense level 29 at criminal history category VI).[17] Due to the career offender guideline, Mr. Allen's four convictions (the instant offense and the three priors) for distributing a total of $1779 in drugs, without violence or a weapon, increased Mr. Allen's presumptive guidelines range by 400%.[18]

A. History of the Career Offender Guideline[19]

Mr. Allen's case shows the problem of focus here: how the equating of non-violent drug offenses with violent offenses to increase imprisonment has led to the over-punishment and over-incarceration of non-violent drug offenders. It was not supposed to be this way. Sticking with the career offender guideline, a review of the provision's history shows that Congress's intent was not to create a means to incarcerate non-violent drug offenders and addicts such as Mr. Allen for decades of their lives.[20]

In passing the Sentencing Reform Act ("SRA") in 1984, Congress directed the Sentencing Commission to 'assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants.'[21] To Congress, the defendants in these categories were those who: (1) were at least eighteen years old; (2) had been convicted of a felony that was either a 'crime of violence' or an offense described in certain provisions of the Controlled Substances Act and/or Con-

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[13] *Id.*

[14] United States v. Derrick Allen, No. 1:14CR00198, (D. Md. 2015).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Somewhat realizing the absurdity of a career offender sentence for Mr. Allen, the government agreed to a plea agreement where the government sought a sentence of 108 to 132 months. Thankfully, the Honorable James K. Bredar credited Mr. Allen's non-violent history and obvious drug addiction, and imposed a sentence of 66 months.

[19] For the history of Career Offender guidelines this article relies greatly on what I believe is the most comprehensive deconstruction of the guideline: Amy Baron-Evans & Jennifer Coffin, Unraveling and 'Deconstructing' the Career Offender Guideline, (Apr. 25, 2010), https://www.fd.org/pdf_lib/WS2011/Deconstructing_Offender_Guideline.pdf.

[20] *See id.* at 2 (finding the United States Sentencing Commission 'significantly deviated' from Congress' original directive concerning the career offender guideline).

[21] 28 U.S.C. § 994(h) (1988).

trolled Substance Import Act; and (3) had previously been convicted of two or more prior felonies, each of which was a crime of violence or an offense described in the Controlled Substances Act and/or Controlled Substance Import Act.[22]

For drug offenders, Congress's goal was not to punish with near statutory maximum sentences all 'repeat drug traffickers, but rather a specific type of repeat offender who posed the most danger to society and was responsible for distributing large amounts of illegal drugs.'[23] Congress's target was repeat drug offenders:

- for whom drug trafficking is 'extremely lucrative',
- who distributes drugs to 'an unusual degree' through 'continuing patterns of criminal activity',
- who have 'substantial ties outside of the United States from whence most dangerous drugs are imported into the country' and
- who have the resources and contacts to 'to escape to other countries with relative ease in order to avoid prosecution.'[24]

In other words, Congress wanted the career guideline to reach and punish kingpins and major drug traffickers, who by the nature of their continuous criminal conduct, are at or near the top of the drug trafficking chain, and who benefit from the money, resources, and foreign contacts not available to lower level drug offenders.

The career offender guideline was part of the Sentencing Guidelines that debuted on November 1, 1987.[25] The inaugural career offender guideline was similar to the current version in that it applied to offenders with predicate convictions for violent or controlled substance offenses.[26] However, the reach of 'controlled substance offense' is much more expansive today than what it was in 1987.[27]

From the start, the Sentencing Commission interpreted Congress's directive (Section 994(h)) in regards to drug offenses far beyond what Congress intended.[28] Rather than limiting the reach of the career offender guideline to kingpins and the like, the Sentencing Commission has continually extended the provision to reach federal and state controlled substance offenses

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[22] *Id.*

[23] S. REP. NO. 98-225, at 175 (1983).

[24] *Id.* at 20, 212.

[25] *See* U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING pt. C, 3 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C12_Career_Offenders.pdf.

[26] *Id.*

[27] *Id.* at 3–4 (reviewing the history of the definition of "controlled substance offense"). The definition of "crime of violence" has also greatly expanded since 1987, but will not be examined for the purposes of this article.

[28] *See* Baron-Evans & Coffin, *supra* note 19, at 12–15 (summarizing the history of amendments to §4B1.1 that expanded the universe of federal and state drug offenses that qualified as career offender predicates).

that prohibit 'the manufacture, import, export, distribution' (or possession with the intent to do any of these things) of drugs and are punishable by imprisonment for a term exceeding one year.[29] This unexplainable expansion has brought nearly every federal and state drug offense other than simple possession within the ambit of the career offender guideline, and as a result, exposes addicts, low level street dealers, and others responsible for mere drops in the ocean of drug trafficking to the harsh sentences suggested by the career offender guideline.

The Sentencing Commission's expansion of the career offender guideline to reach state drug offenses, in particular, is a direct contravention of congressional intent. Section 994(h) directed the Sentencing Commission to craft the career offender guideline to reach offenders who had previous convictions for drug offenses described in three pieces of federal legislation: the Controlled Substances Act, the Controlled Substances Import and Export Act, and the Drug Trafficking Vessel Interdiction Act of 2008.[30] Neither Section 994(h) nor its legislative history directs the Sentencing Commission to designate *state* drug offenses as career offender predicates.[31] If Congress intended for state drug offenses to serve as career offender predicates, it certainly knew how to do so.[32]

The absence of language relating to state drug convictions in Section 994(h) should be seen as an intentional choice by Congress. At least one circuit has done so. In *United States v. Knox*,[33] the Seventh Circuit aptly explained how the Sentencing Commission went far beyond Congress's call when the Commission promulgated the career offender guideline. The specific question before the circuit court was whether Section 994(h) reached a drug conspiracy conviction charged under 21 U.S.C. Section 846.[34] The court started its analysis by noting that Section 994(h) reflected Congress's intent for the career offender guideline to reach a select and defined set of drug offenses.[35] The court then deconstructed Section 994(h) to show how the Sentencing Commission's career offender guideline includes drug offenses not enumerated in the statute.[36] Next, the court noted that while the Sentencing Commission had the authority to include drug offenses not identified in Section 994(h), 'nothing in the text requires the Commission to do so, and therefore the Commission's decision to include additional drug offenses 'reflect an exercise of discretion.'[37] However, the court stressed, '[s]uch policy decisions made by the Commission in developing

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[29] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(b) (U.S. SENTENCING COMM'N 2015).

[30] 28 U.S.C. § 994(h)(1)(B) (2012).

[31] *See also* S. Rep. No. 98-225 (1983).

[32] *See, e.g.*. 21 U.S.C. §§ 841(a), (b) (2012) (providing for increased penalties for prior convictions for a "felony drug offense").

[33] 573 F.3d 441 (7th Cir. 2009).

[34] *Id.* at 448.

[35] *Id.* ("[T]he precision with which § 994(h) includes certain drug offenses but excludes others indicates that the omission of § 846 was no oversight.").

[36] *Id.* at 448–449; *see also id.* at 449 ("Relying on the 'general guideline promulgation authority under 28 § 994(a)-(f), the Sentencing Commission has gone beyond the specific offenses listed in § 994(h) ").

[37] *Id.* at 449.

the Guidelines are not binding on sentencing courts."[38] As the *Knox* court recognized, the Sentencing Commission has steadily added state and other drug offenses not listed in Section 994(h) to expand the career offender guideline's definition of 'controlled substance offenses' well-beyond what Congress wanted.[39]

Early on, the Sentencing Commission relied solely on Section 994(h) as its authority for the expansion.[40] This justification met its end in the 1990s, when some circuits began vacating career offender sentences on the ground that the Commission had exceeded the plain statutory language of Section 994(h).[41] In response, the Sentencing Commission changed course and amended Section 4B1.1 to switch the Commission's reliance from Section 994(h) to the general grant of authority provided by 28 U.S.C. Section 994(a)-(f), (o), and (p), to justify the expansion of the career offender guideline's definition of 'controlled substance offense."[42] Missing from this shift was the required explanation and empirical evidence justifying the Sentencing Commission's policy decision to expand the reach of Section 4B1.1 beyond the drug offenses included in Section 994(h)'s plain language.[43] To this day, the Sentencing Commission has remained silent as to the 'data' or 'comments' justifying its expansion of the career offender guideline to reach nearly every drug offense.

In sum, the career offender guideline is contrary to the words and intent of Congress. The goal of Congress was to bring the full weight of federal sentencing to bear on repeat offenders at the top of the drug distribution chain.[44] The goal was *not* to expose drug addicts, low-level drug traffickers, and street dealers to near maximum statutory penalties. Yet, without

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[38] *Id.* at 449-450 (citing *Kimbrough v. United States*, 552 U.S. 85, 101–02 (2007)).

[39] *See also* Sarah F. Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1172–73 (2010) (noting that courts applied the career offender provision in 2,321 drug-related cases in 2008, compared to 616 drug-related cases in 1996).

[40] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM'N 1990) ("28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined by the statute, receive a sentence of imprisonment 'at or near the maximum term authorized. Section 4B1.1 implements this mandate.").

[41] *See, e.g.*, United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993); United States v. Ballazerius, 24 F.3d 698 (5th Cir. 1994) (Both cases were superseded by the Commission amending the Guidelines in 1994 (amendment 528) that altered the source of the Commission's authority for the career offender guideline); *See* United States v. Lightbourn, 115 F.3d 291, 293 (5th Cir. 1997) ("The amendment to the sentencing guidelines speaks directly to this point and effectively eliminates the concerns of the Bellazerius court.").

[42] U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 1 cmt. background (U.S. SENTINCING COMM'N 2014).

[43] *See* 28 U.S.C. § 994(o) (2012) (authorizing the Commission to revise the guidelines "in consideration of comments and data" the Commission received).

[44] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM'N 2014) (explaining the goal of the career offender guidelines is to "focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate."). Indeed, as recently stated by the current chair of the Sentencing Commission, the career offender guideline is part of a regime that "ensure[s] that the most dangerous or serious offenders will continue to receive appropriately severe sentences. ' Chief Judge Patti B. Saris, *A Generational Shift for Drug Sentences*, 52 AM. CRIM. LAW REV. 1, 21 (2015), http://www.ussc.gov/sites/default/files/pdf/news/speeches-and-articles/article_saris_112014.PDF.

sufficient explanation, that is what the Sentencing Commission has done by repeatedly expanding the reach of the career offender guideline to nearly every state and federal drug offense.

III. Impact of the Career Offender Guideline

For the past ten years, career offenders have consistently accounted for between 3% and 3.6% of all federal prison inmates each year.[45] Because of their lengthy sentences, career offenders now account for more than 11% of the total federal prison population, or 20,329 federal career offender inmates for fiscal year 2014.[46] One sign of progress is that the percentage of career offenders receiving a sentence within their career offender guideline range has fallen from 43.5% in fiscal year 2005 to 27.5% in fiscal year 2014.[47] However, while career offenders are increasingly receiving sentences below their presumptive career offender guideline ranges, they are still receiving lengthy sentences. For fiscal year 2014, the average career offender sentence was 147 months imprisonment, or slightly more than 12 years.[48] For that fiscal year, slightly over half (50.9%) of career offenders received a prison sentence between 10 and 20 years, 13.8% received sentences of 20 years or more, 25% received sentences between five and ten years imprisonment, and only 10.3% received a sentence of less than five years.[49]

In accordance with its design, the career offender guideline has a profound impact on the offense levels and criminal history category placements of qualifying defendants. Take for example the 2,269 defendants sentenced as career offenders in fiscal year 2014.[50] For nearly half (46.3%), the career offender guideline caused an increase in both the final offense level and criminal history category.[51] An additional 32.6% of these offenders saw an increase in their offense level, but not their criminal history category.[52] Another 12.4% saw an increase in their criminal history category, but not their offense level.[53] In total, for fiscal year 2014, 'the career offender designation affected the final guideline range for the majority (91.3%) of offenders sentenced under [the career offender guideline].'[54]

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[45] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 18, fig. 1 (2016), http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements.

[46] *Id.* at 24.

[47] *Id.* at 22.

[48] *Id.* at 18, Key Findings.

[49] *Id.* at 24.

[50] *Id.* at 18.

[51] *Id.*at 21.

[52] *Id.*

[53] *Id.*

[54] *Id.*

A. The Logical and Moral Failure of the Career Offender Guideline

The career offender guideline's over-expansive definition of 'controlled substance offense' is not the provision's only fault. As the title and subject of this article suggests, the career offender guideline is a logical and moral failure because of its predicate equivalency of drug offenses and violent offenses.

The career offender guideline puts qualifying drug offenses on the same footing as qualifying violent offenses. If a prior drug conviction meets the definition provided by Section 4B1.2(a), it holds the same predicate weight and consequences as a conviction for armed robbery, rape, arson, or murder.[55] This is true even if the prior drug offense did not involve violence or a firearm or other weapon.[56] Indeed, a conviction for selling $100 of cocaine is as equally a qualifying predicate as killing another person for $100 of cocaine.

Once a defendant qualifies as a career offender, he/she is exposed to a predetermined punishment range, regardless of whether his/her qualifying predicates are for drug offenses, violent offenses, or a mixture of both.[57] The result is a sentencing mechanism that allows absurdist consequences that are unjustifiable logically and morally. Two defendants who share an instant offense that triggers the career offender guideline are subject to the same range of punishment even if one defendant's predicate convictions are for violent crimes, and the other defendant only has non-violent drug offense predicates.[58] For instance, a defendant with two priors for selling small amounts of drugs is subject to the same offense level, criminal history category, and therefore presumed sentencing range, as a defendant with two priors for rape, murder, or arson.

Because these absurdist outcomes are not only possible, but probable, the career offender guideline must be seen as a policy failure. There is no plausible justification for a sentencing policy that subjects repeat low-level drug traffickers to the same sentencing exposure as repeat violent offenders.

These absurdist outcomes are assisted by the career offender guideline tethering a career offender's offense level to the statutory maximum of the instant offense. This is a problem because many federal drug offenses carry statutory maximums that exceed those for violent offenses. For in-

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[55] However, after *Johnson v. United States,* 135 S. Ct. 2551 (2015) (discussed later), there are even *less* crimes that qualify as violent felonies triggering the enhanced penalties provided by the Armed Career Criminal Act, the career offender guidelines, and similar enhanced penalty statutes and guideline provisions.

[56] U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) (U.S. SENTENCING COMM'N 2014).

[57] The instant crime or offense provides the only variation in sentencing exposure under Section 4B1.1(b). The longer the statutory maximum penalty for the instant crime of violence or drug offense, the higher the assigned career offender offense level. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) (U.S. SENTENCING COMM'N 2014). However, consistent with the remainder of the guideline, there is no difference in the designated offense level based on the instant offense being either a crime or violence or a drug crime.

[58] U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b) (U.S. SENTENCING COMM'N 2014).

stance, a drug offender convicted for violating 21 U.S.C. Section 841(b)(1) faces a statutory maximum of life imprisonment, compared to a statutory maximum of twenty years for a robbery offender convicted under 18 U.S.C. Section 1951 or an arson offender convicted for violating 18 U.S.C. Section 844(i). Under the career offender guideline, the drug offender's offense level is 37, while the robbery and arson offenders share a level 32.[59] This translates into the drug offender having a presumptive guideline range (before any deductions) of 360 months to life, while the range for the arson and robbery offenders is 210-262 months imprisonment.

B. The Missing Kingpins: The Misapplication of the Career Offender Guidelines.

Congress trusted the Sentencing Commission to structure the career offender guideline in a manner flexible enough to distinguish between drug offenders.[60] As explained by a leading Commission lawyer in 1987:

> Reasonably construing [Congress's decision to empower the Commission to draft the career offender guideline] in its present context and in light of the total legislative history, it is sensible to conclude that Congress did not intend a purely mechanical application which would be unduly harsh in some instances and inconsistent with the overall instructions to the Sentencing Commission. Counsel further doubts that Congress would desire the Commission to adopt a strict, literalistic reading which exacerbates prison impact. Most members of the legislative body would probably appreciate a less extreme, more flexible approach, so long as it clearly achieved the fundamental objective of severely punishing career criminals.[61]

Unfortunately, a 'purely mechanical application' that 'exacerbates prison impact' is a fitting description of the career offender guideline as it currently exists. The career offender guideline applies whether the defendant is a low-level street dealer or major trafficker responsible for distributing tons of illegal narcotics. All that matters is whether the instant and past convictions meet the expansive definition of 'controlled substance offense. Section 4B1.1's failure to distinguish drug offenders has resulted in an unwarranted

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[59] *Id.*

[60] *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENTENCING COMM'N 2014). ([T]he Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate. ").

[61] Memorandum from John Steer to the U.S. SENTENCING COMM'N, (March 26, 1987), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf.

and prejudicial uniformity—i.e. all qualifying drug offenders, regardless of conduct or culpability, are exposed to the same near-maximum penalties. It is a problem the Sentencing Commission's staff recognized and warned about in 1988:

> In its current form, the Career Offender guideline is potentially both under-inclusive and over-inclusive.
>
> As amended, the guideline focuses exclusively on the count of conviction, rather than the conduct involved, both as to the instant offense and the prior offenses. In much the same way. the guideline is also potentially over-inclusive. It makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions. For example, two defendants convicted of the same federal drug felony each with two prior drug offenses, would be subject to the same career offender sanction, even if one defendant was a drug 'kingpin' with serious prior offenses, while the other defendant was a low-level street dealer whose two prior convictions for distributing small amounts of drugs resulted in actual sentences of probation.[62]

Therefore, it is no surprise that the Sentencing Commission's steady expansion of "controlled substance offense' has led to a dramatic increase in the number of defendants qualifying as career offenders. For fiscal years 1996 through 2011, the annual number of career offenders more than doubled from 909 career offenders to 2,157 career offenders.[63] The number reached 2,269 career offenders for fiscal year 2014.[64] While the Sentencing Commission has also expanded the definition of 'crime of violence' for career offender purposes, recent statistics show that the incessant increase in the number of career offenders is largely due to the expanded definition of 'controlled substance offense. From 2008 through 2012, 11,516 defendants were sentenced as career offenders.[65] Of these, a drug trafficking offense was the primary offense for 8,503 offenders, or 73.8% of the defend-

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[62] Memorandum from Gary J. Peters to the U.S. SENTENCING COMM'N (March 25, 1988), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf.

[63] U.S. SENTENCING COMM'N, *supra* note 25, at 9.

[64] U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf (2015).

[65] Sentencing data (demographic, departures/variances, sentencing by guideline provision) held by the U.S.S.C. is available through the interactive "sourcebook" on the commission's website: http://isb.ussc.gov/Login. This data was compiled using the "Offenders Receiving Career Offender/Armed Career Criminal Adjustments in Each Primary Offense Category" available under the "All Tables and Figure" portion of the interactive sourcebook.

ants.[66] Firearm and robbery offenses were a distant second and third, constituting 10.9% and 7.7% of the defendants, respectively. [67]

This raises the question of who are the drug offenders sentenced as career offenders—are they the kingpins and major drug suppliers Congress sought to reach, or low-level/street level dealers and addicts? Statistics show that the overwhelming majority is the latter. For instance, in 2012, more than half (52.1%) of the 2, 232 defendants sentenced as career offenders saw increases in both their final offense level and criminal history category.[68] For these offenders, the average increase was *seven offense levels* (from 24 to 31) and *two criminal history categories* (from IV to VI).[69] In contrast, for *only 5%* of the career offenders sentenced in 2012 did the career offender guideline have no impact on an offender's offense level or criminal history category (because their pre-career offender numbers were already at career offender levels).[70]

Another good indicator of the gap between the purpose and application of the career offender guideline is the rate at which career offenders receive role enhancements. If the career offender guideline was successfully reaching drug kingpins, drug bosses, and major suppliers, then role enhancements (provided by U.S.S.G. §3B1.1) should be ubiquitous. But they are not —not even close. From 1996 through 2011, the percentage of career offenders receiving an aggravating role adjustment pursuant to Section 3B1.1 actually *decreased* from 7.4% to 5.8%.[71] This means that an overwhelming majority of drug offense-based career offenders sentenced during those years were not organizers or leaders (Section 3B1.1(a)) or managers or supervisors (Section 3B1.1(b)-(c)) of a drug operation—they were your everyday, lower-level drug trafficking offenders or addicts selling to feed their addiction.

Finally, the career offender guideline has also failed to punish the class of recidivist drug offenders it was designed to reach. An analysis by the Sentencing Commission determined that the 'recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history category VI. '[72] The Sentencing Commission found that offenders in criminal history category VI had a recidivism rate two years after release of 55%.[73] For the subset of offenders who were career offenders because of violent crime predicates, the rate was

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[66] *Id.*

[67] *Id.*

[68] U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf (2013).

[69] *Id.*

[70] *Id.* at 2.

[71] *Supra* note 65 (U.S.S.C. website interactive sourcebook).

[72] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, 134 (2004).

[73] *Id.*

52%.[74] In comparison, career offenders drug crime predicates had a much lower recidivism rate of 27%, which 'more closely resembles the rates for offenders in the lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules in Chapter Four of the *Guidelines Manual.*'[75] As a result, the Sentencing Commission concluded that the 'career offender guideline thus makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.'[76] Simply put, the over-inclusion of qualifying drug offenses has resulted in harsh, unnecessarily long prison sentences that have little correlation to the recidivism risk posed by many drug offenders sentenced as career offenders.

C. Career Offender Guideline & Racial Sentencing Disparity

A key motivation for the promulgation of the sentencing guidelines was the growing sentencing disparity between minority and white defendants for similar offenses. Unfortunately, 15 years after enactment, the Sentencing Commission found that the 'increasingly severe treatment of other crimes, particularly drug offenses and repeat offenses, has widened the gap among different offender groups, and the 'sentencing guidelines and mandatory minimum statutes, have a greater impact on Black offenders than did the factors taken into account by judges in the discretionary system'[77] In other words, elements of the guidelines are exacerbating the racial sentencing divide, not narrowing it. The career offender guideline and its expansive inclusion of drug offenses, the Sentencing Commission determined, is a key contributor to this growing disparity:

> In 2000, there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the guidelines. Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline. Most of the offenders were subject to the guideline because of the inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline Commentators have noted the relative ease of detecting and prosecuting offenses that take place in open-air markets, which are most often found in impoverished minority neighborhoods. ., which suggests

[74] *Id.*
[75] *Id.* (emphasis in original).
[76] *Id.* (emphasis in original).
[77] U.S. SENTENCING COMM'N, *supra*, note 72, at 135.

> that African-Americans have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers.'[78]

These findings were made before the Supreme Court rendered the sentencing guidelines advisory in *United States v. Booker*.[79] Despite this monumental decision, the racial disparity among career offenders has not only persisted post-*Booker*. it has widened. The percentage of black career offenders increased from 58.8% of all career offenders pre-*Booker* to 64.9% as of September 2011.[80] In comparison, the percentage of white career offenders decreased from 24.7% of all career offenders to 19.4% as of September 2011.[81] This racial disparity narrowed slightly in fiscal year 2014: 59.7% of career offenders were Black, 21.6% were White, and 16% were Latino.[82] According to the Sentencing Commission the racial disparity represents an 'institutionalized unfairness' built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges.'[83]

IV Lack of Empirical Evidence Linking Drugs and Violence

From nearly all perspectives—design, logic, moral, and application—the career offender guideline is a failure. Its continued existence and use is therefore justified only if there is a demonstrable link between drugs offenses and violent offenses warranting their continued interchangeable equivalency under Section 4B1.1.

That drugs and violence go hand-in-hand is a largely unchallenged and readily accepted presumption that pervades the public consciousness and crime policy. Yet, as exposed by Utah law professor Shima Baradaran, there is a near complete lack of scholarship and study supporting the presumed link.[84] In addition to exposing the lack of empirical support for the presumed link between drugs and violence, Professor Baradaran has demonstrated how the little empirical evidence that is available shows that the link is unclear at best. She is not alone in her conclusion.[85]

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[78] *Id.* at 133–34.

[79] 543 U.S. 220 (2005).

[80] U.S. SENTENCING COMM'N, *supra* note 25, at 10.

[81] *Id.*

[82] *Quick Facts: Career Offenders*, U.S. SENTENCING COMM'N, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf (2015).

[83] U.S. SENTENCING COMM'N, *supra*, note 26, at 135.

[84] Shima Baradaran, *Drugs and Violence*, 88 S. CAL. REV. 227, 233–34 (2015).

[85] *See id.(citing* Robert Nash Parker & Kathleen Auerhahn, *Alcohol, Drugs, and Violence*, 24 ANN. REV. SOC. 291, 294 (1998) ("In general, little evidence suggests that illicit drugs are uniquely associated with the occurrence of violent crime."); Eric J. Workowski, *Criminal Violence and Drug Use: An Exploratory Study Among Substance Abusers in Residential Treatment*, 37 J. OFFENDER REHABILITATION 109, 118 (2003) ("These findings reveal a weak relationship between substance abuse and violence among this addict population and, clearly, not all addicts are violent. In fact, most of this population is not."); Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 ALB. L. REV. 749, 756

Perhaps the dearth of reliable scholarship is due to the lack of agreement as to what 'link' actually means. In other words, what does it mean to say that drugs and violence are 'linked"? You ask ten different people, you will likely get ten varied responses. But generally. when people say drugs and crime are linked, they are referring to one or a combination of the following three relationships (or models) as established by the often cited work of Paul Goldstein:

1) A person commits a violent act as a result of using/ingesting drugs (the psychopharmacological model);
2) A drug user engages in 'economically-oriented' violent crime (e.g. robbery) to support his/her drug use (the economic compulsive model);
3) Violence is intrinsically involved with the distribution and sale of illegal drugs (the systemic model). [86]

Each model provides a separate and distinct context for the interplay between drugs and violence. These contexts reflect variations among the models as to the victims of the violence, the motivation for the violence, what drugs are involved, and the role drugs played in the violence. For instance, under the psychopharmacological model the 'violence may involve drug use by either offender or victim. In other words, drug use may contribute to a person behaving violently. or it may alter a person's behavior in such a manner as to bring about that person's violent victimization. '[87] In comparison, under the systemic model the '[v]ictims of systemic violence are usually those involved in drug use or trafficking. '[88]

Goldstein's tripartite scheme remains the leading and most commonly cited framework for the link between drugs and violence.[89] This is understandable – Goldstein's models provide clean and clear lines between varying violent conduct and drug activity. However, even Goldstein admitted that there was insufficient empirical evidence to support his models, and that it was impossible to assess the causal relationship for key parts of his

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(2000) (stating that the final report of a task force established to study the drug-violence nexus "concluded that drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting the drug laws"); Jeffrey Fagan, *Interactions Among Drugs, Alcohol, and Violence*, HEALTH AFFAIRS, Winter 1993, at 65, 75 (finding that despite the accumulating evidence on the validity of the drugs-violence relationship, persistent difficulty in establishing causal linkages remains); Michelle Torok et al.. *Conduct Disorder as a Risk Factor for Violent Victimization and Offending Among Regular Illicit Drug Users*, 41 J. DRUG ISSUES 25, 25-26 (2011) ("Despite the available evidence, little is actually known about the causal mechanisms associating substance use and violence.").

[86] Paul Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework,* 39 J. OF DRUG ISSUES (1985), http://www.drugpolicy.org/docUploads/nexus.pdf.

[87] *Id.*

[88] *Id.*

[89] Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal,* 40 LAW & SOC. INQUIRY 746, 770–71 ("Paul Goldstein's (1985) tripartite classification scheme remains the most commonly cited framework for understanding the possible connections [between drugs and violence.").

scheme.[90] Indeed, Goldstein recognized that more data was needed because '[n]o evidence currently exists as to the proportions of violence engaged in by drug users and traffickers that may be attributed to each of the three posited models.'[91]

Despite the lack of data, Goldstein's three models served as the foundation of a lost in history effort by the federal government in the mid-1990s to measure the link between drugs and violence.[92] The effort was a 28-member task force assigned to 'report to the United States Sentencing Commission specific findings, conclusions, and recommendations concerning the relationship (if any) between drugs and violence.'[93] The task force's membership included high-ranking attorneys from the Justice Department's criminal division, law professors, medical school professors, nursing school professors, economists, professors of criminology, social scientists, high-ranking lawyers from the Office of National Drug Control Policy, a federal district court judge, the staff director of the Sentencing Commission, legal advisors from the U.S. Department of Health & Human Services, and a number of congressional aides.[94] Ex-officio members included a former director of the Office of National Drug Control Policy, the late-Senator Edward Kennedy, a commissioner of the Sentencing Commission, New Jersey Governor Christine Todd Whitman, U.S. Representative Bobby Scott, and U.S. Attorney General Janet Reno.[95] The task force's extensive effort included reviewing prominent research on the issue, funding four original studies, and having experts present research to the task force.[96]

In the end, after two years of trying, the task force failed to reach any unanimous conclusions.[97] On June 27, 1996, the task force released its 'unreconciled' final report.[98] The report was 'unreconciled' because it contained conclusions supported by the task force's academic members, but not by its government and political members who found the report's key conclusion politically troublesome. The conclusion causing the divide: 'drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting drug laws.'[99] In a stinging criticism of drug laws 'built on the premise that long-term imprisonment of drug offenders would abate violent crime, the report further concluded that there was 'no evidence that such policies decreased

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[90] Paul Goldstein, *supra* note 86 ("The incidence of psychopharmacological violence is impossible to assess at the present time, both because many instances go unreported and because when cases are reported the psychopharmacological state of the offender is seldom recorded in official records.").

[91] *Id.*

[92] Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship Symposium on Drug Crimes*, 63 ALB. L. REV. 749, 755 (2000).

[93] *Id.* at 749.

[94] *Id.* at 749, n. 1.

[95] *Id.*

[96] *Id.* at 754.

[97] The task force was impaired by predictable political forces given the topic, as well as more mundane but critical disagreements such as how to define "violence." *Id.* at 751–52, 754–55.

[98] *Id.* at 749.

[99] *Id.* at 756.

either drug use or violence .[and] the retention of such policies, premised on the belief that drugs cause violence, could hinder the adoption of other, more appropriate, remedies.'[100]

The final report did not go so far as to say that there was no relationship between drugs and violence. However, the report made clear that 'whether any link existed at all depended on which of the [Goldstein] three types of drug-violence relationships was being examined and the quality of the research available.'[101] In other words, without more research, the only thing that was clear was that the existence and strength of any link varied among the Goldstein models, as well as among drug types, across time, and across different drug markets.[102]

Not much has changed since the task force issued its final report twenty years ago. The 'tough on crime' perspective that promotes imprisonment still dominates and has led to a drastic increase in the number federal statutes imposing mandatory minimum sentences (particularly for drug offenses) and an exploding prison population.[103] In the intervening two decades, research into the link between drugs and violence has not improved, has not firmly validated the link, and has not advanced the discussion much.[104]

V *Johnson v. United States*: The Unintended Consequence Drug Offenders Will Suffer

In *Johnson v. United States,*[105] an 8-1 opinion by the late-Justice Scalia, the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") was too vague to survive constitutional due process review. In doing so, the Supreme Court struck a boundless definition of what constituted a violent offense that had been used for many years to impose 15-year mandatory minimum sentences.[106] *Johnson* has unleashed a torrent of litigation that is redefining (and significantly limiting) what constitutes a violent offense not only for the ACCA, but also for the career offender guideline and other enhanced penalty provisions containing residual

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[100] *Id.* at 757–58.

[101] *Id.*at 749 n.1.

[102] *Id.* at 756–57.

[103] At yearend 1985 there were 502,507 adult prisoners in federal and state correctional institutions combined. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Prisoners in 1996 (1997), http://www.bjs.gov/content/pub/pdf/p96.pdf. By yearend 1996, the combined prison population was up to 1,182,169 adult prisoners. *Id.* At yearend 2014, there were 1,561,500 adult prisoners in federal and state correctional institutions combined. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf. Among those years, the federal prison population increased from 40,223 inmates in 1985, to 105,544 inmates in 1996, to 210,567 inmates in 2014.

[104] Baradaran, *supra* note 84, at 276–81 (discussing more recent studies and concluding, "Overall, the drug violence link is at the very least over-exaggerated and lacks reliable empirical support.").

[105] 135 S. Ct. 2551 (2015).

[106] The residual clause held that a prior crime qualified as a violent offensee under the statute if the crime "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2555.

clause clones.[107] This litigation is leading to reduced sentences for a significant number of ACCA and other defendants collectively by hundreds of years.[108]

While *Johnson* has provided a windfall of relief for defendants whose prior convictions are no longer deemed violent under law, the decision brought no relief for ACCA, career offender, or other enhanced penalty defendants who received or face elongated sentences because of prior non-violent drug convictions. Indeed, a tragic unintended consequence of *Johnson* may be an *increase* in the number of drug defendants sentenced under the ACCA and career offender guideline. That is because as *Johnson* each day limits the world of defendants susceptible to enhanced penalties for 'violent' offenses, prosecutors will likely fill the gap with defendants whose drug offenses and prior convictions offer no *Johnson*-like constitutional bar. Finding comfort in the unproven, yet readily accepted and preached belief that violence is a natural extension of illegal drug activity, it is easy to see how prosecutorial forces will realign themselves in this post-*Johnson* world. Their strategy will shift to bringing in federal court more defendants whose prior drug convictions make them unquestionably qualified for the enhanced penalties provided by the ACCA, the career offender guideline, and similar enhanced penalty statutes and guideline provisions. The result will be a dramatic increase in the number of non-violent drug offenders sentenced to unreasonably long and overly punitive prison sentences, while the number of repeat 'violent' offenders suffering the same fate will nose-dive.

Johnson is a landmark decision that is changing the face and practice of federal sentencing. But the decision also highlights the continuing lack of sentencing proportionality and balance suffered by non-violent drug offenders who receive enhanced sentences. While the reach of enhanced penalties for 'violent' offenses shrinks, their reach for drug offenses has only known growth. This circumstance is not just a distortion, but a perverted misuse of Congress's authorization and intent for these enhanced penalty provisions. Without a focused effort now to decouple non-violent drug offenses from violent offenses in these statutes and provisions, the 'mass incarceration' that nearly everyone finds troublesome will only worsen and swell.

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[107] *See* United States v. Gardner, 823 F.3d 793, 804 (4th Cir. 2016) (indicating defendant's prior conviction for North Carolina common law robbery cannot qualify as a ACCA violent felony after *Johnson*); United States v. Parnell, 818 F.3d 974 (9th Cir. 2016) (holding that armed robbery conviction under Massachusetts statute does not qualify as a ACCA violent felony post-*Johnson*); United States v. Pawlak, 822 F.3d 902, 911 (6th Cir. 2016) (joining the 3rd and 10th Circuits in holding that in light of *Johnson*, the identical residual clause in career offender guidelines is unconstitutionally vague); United States v. Bell 158 F. Supp. 3d 906 (N.D. Cal. 2016) (indicating that post-*Johnson* the felony offenses of assault on a federal officer and robbery of government property were not crimes of violence triggering enhanced penalties provided by 18 U.S.C. § 924(c)).

[108] As of the end of June 2016, more than 500 *Johnson*-based petitions had been filed in one month in the Fourth Circuit and 350 petitions were pending in the Eighth Circuit. *See* Ann E. Marimow, *One of Scalia's final opinions will shorten some federal prison sentences*, WASH. POST (June 24, 2016), https://www.washingtonpost.com/local/public-safety/small-words-big-consequences-for-possibly-thousands-of-federal-prisoners/2016/06/23/0d3d7934-3199-11e6-95c0-2a6873031302_story.html.

VI. U.S.S.C's First Step at Decoupling the Career Offender Guideline

On July 28, 2016, the Sentencing Commission submitted a report to Congress concerning its multi-year study of 'statutory and guideline definitions relating to the nature of a defendant's prior conviction. .and the impact of such definitions on the relevant statutory and guideline provisions, with a particular focus on the career offender guideline.[109] The study included 'a detailed analysis of career offenders' prior criminal history and recidivism after release from federal prison. '[110]

As the study progressed, the data caused the Sentencing Commission to have 'concerns that the career offender directive fails to meaningfully distinguish among career offenders with different type of criminal records and has resulted in overly severe penalties for some offenders. '[111] In particular, the data showed that Section 4B1.1's formulaic approach failed to adequately account for and differentiate how a defendant qualified under the provision, most notably drug convictions as compared to violent convictions. These concerns were fueled by four findings during the study:

1) Career offenders are primarily convicted of drug trafficking offenses – nearly three-quarters (74.1%) of career offenders in fiscal year 2014 were convicted of a drug trafficking offense and would have been sentenced pursuant to §2D1.1 (offenses involving drugs and narco-terrorism).

2) Career offenders are sentenced to long terms of incarceration, receiving an average sentence of more than 12 years (147 months).

3) As a result of these lengthy sentences, career offenders now account for more than 11 percent of the total Bureau of Prisons population.

4) Even though they continue to receive lengthy sentences, career offenders are increasingly receiving sentences below the guideline range, often at the request of the government. During the past ten years, the proportion of career offenders sentenced within the applicable guideline range has decreased from 43.3 percent in fiscal year 2005 to 27.5 percent in fiscal year 2014, while government sponsored departures have steadily increased from 33.9 percent to 45.6 percent.[112]

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[109] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS, 1, 6 (2016), http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements.

[110] *Id.* at 2.

[111] *Id.*

[112] *Id.*

These findings, and the concerns they caused, led the Sentencing Commission to more closely examine the relationship between an offender's career offender status and the nature of his/her instant offense and prior convictions. To achieve this, the Commission categorized the study's subjects into three distinct categories based on their prior and instant offenses: drug trafficking offenses only, violent offenses only, and mixed.[113] By the end, the 'Commission found clear and notable differences' concerning the reach, impact and efficacy of Section 4B1.1 among the three categories of career offenders.[114]

The first 'clear and notable' difference is that 'career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future.'[115] The Sentencing Commission found that close to half of the violence only offenders (42.1%) and mixed offenders (44.5%) were already in criminal history category VI prior to application of the career offender guideline, compared with just 23.3% of drug trafficking only offenders.[116] Another comparative gap was found when the Commission looked at recidivism rates among the three categories of career offenders.[117] Just over half (54.4%) of drug trafficking only career offenders were arrested for a new crime or an alleged violation of supervise release within eight years of their release from prison, compared to recidivism rates of 69.4% for mixed career offenders and 69.0% for violent only career offenders.[118]

The second 'clear and notable difference' the Commission discovered is that the career offender guideline has 'the greatest impact on federal drug trafficking offenders' because of the high statutory maximums provided by federal drug offense statutes, particularly 21 U.S.C. Section 841.[119] Generally, 'federal drug trafficking offenders often face much higher statutory maximum penalties than those offenders convicted of a violent federal offense.'[120] For instance, for fiscal year 2014, 31.7% of drug trafficking only offenders had an instant offense carrying a life imprisonment maximum punishment, compared to just 10.5% of violent only offenders.[121] This disparity translates into a related disparity in the criminal history and offense level impact of the Section 4B1.1. 'More than half (57.5%) of offenders in the drug trafficking only category had both an increased final offense level

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[113] *Id.*

[114] *Id.*

[115] *Id.* at 2, 26.

[116] *Id.* at 30. '[O]ffenders in the drug trafficking only category were distributed to a greater extent across CHC III through VI.' *Id.* The Commission's analysis consisted of a 20% random sampling of the 2,269 offenders sentenced under §4B1.1 in fiscal year 2014. *Id.* at 30 fig. 10.

[117] *See id.* at 38–42. The Commission analyzed the records of 1,988 career offenders who re-entered the community in calendar years 2004 through 2006. *See id.* at 38.

[118] *Id.* at 40–41.

[119] *Id.* at 3.

[120] *Id.* at 31.

[121] *Id.* at 32 (fig. 11).

and [criminal history category] as a result of the application of the career offender guideline, as compared to approximately 40 percent for each of the other two categories.'[122]

These 'clear and notable differences' led the Sentencing Commission to conclude its study by recommending amendments to 28 U.S.C. Section 994(h) (and thereby Section 4B1.1) designed to 'differentiate between career offenders with different types of criminal records, and focus the career guideline on offenders who have committed at least one 'crime of violence.'[123] The amendments are needed, according to the Commission, because of 'clear and notable differences between drug trafficking only career offenders and those career offenders who have committed a violent offense, and also because 'drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline.'[124]

Just looking at recent history, it is doubtful that Congress will act on the Sentencing Commission's recommendations. In 2011, the Commission strongly urged Congress to reduce the mandatory minimum penalties for drug offenses and expand the safety valve provided by 18 U.S.C. Section 3553(f) to reach more drug offenders.[125] The Commission argued that the reforms were needed because 'certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted under the particular criminal statute' which has 'led to inconsistencies in application of certain mandatory minimum penalties' and racial disparities in sentencing.[126] The Commission echoed these recommendations in 2015 in support of the Sentencing Reform Act then pending in Congress.[127] Despite these recommendations, which were based on the Commission's extensive study of the issues, Congress has failed to implement any of the recommended reforms.[128] There is no reason to believe that the Sentencing Commission's recommendation to amend Section 994(h) will not suffer the same fate of inactivity.

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[122] *Id.* at 33.

[123] *Id.* at 3. The Commission also found that '[e]ven though they continue to receive lengthy sentences, career offenders are increasingly receiving sentences below the guideline range, often at the request of the government.' *Id* at 2.

[124] *Id.* at 27.

[125] U.S SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1, 355 (2011), http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

[126] *Id.* at 345, 347.

[127] U.S Sentencing Comm'n, Statement on Bipartisan Sentencing Reform Legislation: House Judiciary Committee votes to Approve the Sentencing Reform Act (H.R. 3713) (Nov. 18, 2015), http://www.ussc.gov/about/news/press-releases/november-18-2015.

[128] Take for example the Smarter Sentencing Act first introduced in 2013, which would (among other things) significantly reduce the mandatory minimums imposed by 21 § U.S.C. 841. Despite the bi-partisan origin of bill, and the wide bi-partisan list of sponsors, the bill has yet to receive a floor vote in the Senate. The legislation's companion bill in the House of Representatives has faced a similar fate.

VII. Conclusion

The career offender guideline provides a vivid example of the problem with equating drug offenses with violent offenses for sentencing purposes. The problem starts with the lack of objective and empirical evidence demonstrating a link between drugs and violence, and continues through to the racial disparity in sentencing caused by sentencing policies based on the perceived link. Interchanging drugs with violence for sentencing leads to not only morally deficient sentencing practices and outcomes, but illogical and ineffective ones as well. It is time to de-couple drugs and violence for sentencing if we truly are going to address the mass incarceration problem that is fueling the divide between many citizens and law enforcement (and the courts), crippling our inner city communities, consuming an increasing amount of our country's resources, and bestowing on this country the dubious honor of having the world's largest prison population.

Article

OLD DOG, NEW TRICKS: FIGHTING CORRUPTION IN THE AFRICAN NATURAL RESOURCE SPACE WITH THE MONEY LAUNDERING CONTROL ACT

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I. Introduction

The Foreign Corrupt Practices Act (FCPA), the U.S.'s primary tool in its corruption fighting arsenal, aims its anti-bribery components at American business transactions abroad.[1] Driven by a respect for the democratic process of foreign nations, the advantages for American businesses in a commercial climate with less bribery, and the effects of bribery on the free enterprise system, the FCPA has been vigorously enforced by the Obama Administration.[2] However, like the corruption fight in general, the FCPA is limited: the statute reaches only the bribe-maker rather than the recipient of the bribe. [3]

Top oil producing African countries, though benefiting greatly from the extractive industries, are crippled by corruption.[4] Corruption is a unique threat in the oil and gas industry: state permitting requirements, exposure to state officials, and an accepted culture of corruption create a commercial landscape in which bribery is merely a cost of doing business.[5] At its core, corruption siphons funds owed to the citizenry and transfers them to the pockets of entrenched state actors who use the proceeds of corruption to both perpetuate their power and dodge prosecution.[6] However, the effects of

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[1] Heather Diefenbach, *FCPA Enforcement Against Foreign Companies: Does America Know Best?*. 2 CORNELL INT'L L.J. ONLINE 47, 47-48 (2014), http://cornellilj.org/fcpa-enforcement-against-foreign-companies-does-america-know-best/.

[2] Mark Brzezinski, *Obama Administration Gets Tough on Business Corruption Overseas*, WASH. POST (May 28, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052704154.html.

[3] *Foreign Corrupt Practices Act*, DOJ (July 20, 2016), https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

[4] *Can Nigeria's President Defeat Oil Industry Corruption?*. BBC NEWS (Oct. 21, 2015), http://www.bbc.com/news/world-africa-34580862.

[5] EY, *Managing Bribery and Corruption Risks in The Oil and Gas Industry*, at* 5 2014, http://www.ey.com/Publication/vwLUAssets/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry/$FILE/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry.pdf

[6] *Id.*

corruption are even more damaging than the economic framework suggests, and viewing corruption through a rights-sensitive framework uncovers the full array of harm corruption engenders.[7] Corruption limits access to food, water, healthcare, and justice.[8] Corruption also warps the political process, saddles efforts at distributing foreign aid, and facilitates criminal activity within and across borders, including trafficking and terrorism.[9] The costs of corruption on human rights and democracy are too high to ignore.

Unfortunately. the tried-and-true FCPA is losing its teeth in African oil producing countries due to its jurisdictional limitations.[10] As African oil producing countries increasingly look to China for trade, concessional loans, and foreign aid, state leaders can now look past the cumbersome demands attached to Western aid.[11] Under China's 'no-strings attached' trade and aid philosophy, money and morals occupy facially separate spheres: no longer do African leaders have to implement anti-corruption measures or commit to safeguarding human rights when accepting foreign aid or sealing trade deals.[12] Moreover, China's 'petro-diplomacy' allows bribes flowing from Chinese state-owned oil companies to entrenched state actors adequate cover to dodge censure by sparsely enforced Chinese anti-corruption laws.[13] 'No-strings, competitive by design, harms domestic and international efforts to fight corruption and its consequences. [14]

Recognizing the FCPA's corruption-fighting limitations in the face of the 'no-strings' philosophy, this Note argues that the U.S. should use the Money Laundering Control Act (MLCA) to fight corruption in the African oil and gas space. Corruption and money laundering are inextricable: the proceeds of corruption are laundered to allow the bribe-seeker to retain funds that may be otherwise unsecure in the bribe-seeker's home country.[15] That money then flows through banks that the U.S. regulates and

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[7] Ashley Jones, *A Bitter Pill That Must Be Swallowed: An Ethics Based View of Corruption*, ARK. J. OF SOC. CHANGE AND PUB. SERV. (Oct. 26, 2013), http://ualr.edu/socialchange/2013/10/26/a-bitter-pill-that-must-be-swallowed-an-ethics-based-view-of-corruption/.

[8] *Id.*

[9] *Id.*

[10] Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Alterations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-corruption Initiatives*, 26 AM. U. INT'L L. REV. 315, 336–37 (2011), http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1702&context=auilr.

[11] Cindy Hurst, *China's Oil Rush in Africa*, IAGS 4, 14 (July 2006), http://www.iags.org/chinainafrica.pdf.

[12] Tom Murphy, *China's Aid to Africa: No Strings, More Problems*, HUMANOSPHERE (Dec. 8, 2015), http://www.humanosphere.org/world-politics/2015/12/chinas-aid-africa-no-strings-problems/.

[13] FINANCIAL ACTION TASK FORCE, LAUNDERING THE PROCEEDS OF CORRUPTION, (July 2011), http://www.fatfgafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf.

[14] *Supra* note 12.

[15] Miriam Wasserman, *Dirty Money*, 12 FED. RESERVE BANK OF BOSTON, (Jan. 1, 2002), https://www.bostonfed.org/publications/regional-review/2002/quarter-1/dirty-money.aspx

facilitates.[16] The MLCA, unlike the FCPA, is unique in its capability to reach the foreign official who takes a bribe and sends that money to a bank under U.S. jurisdiction.[17]

The U.S. has a strong federal interest in fighting corruption using the MLCA even when the FCPA is limited from doing so in certain instances.[18] The presence of demand-side corruption undermines the high-level goals of the FPCA and international agreements to which the U.S. is a party.[19] Furthermore, Congress intended the MLCA to reach the engine of continued criminal activity—by choking corruption's proceeds, the MCLA also retards the ability of the bribe-taking state actor to funnel funds into criminal activity. Thus, this Note argues that the Department of Justice (DOJ) should energetically prosecute foreign officials using the MLCA and tailored asset forfeiture initiatives to fulfill both the intent of the MLCA and the goals of the FCPA. To reach this conclusion, this Note analyzes recent MLCA cases against foreign officials, including a controversial ruling, which raises concerns about the MLCA's application in historically FCPA territory.[20] This Note argues that concerns about the MLCA's use to prosecute bribery are off the mark, and that the U.S. has both a moral obligation towards, and a strong federal interest in, prosecuting corruption by using the existing, compatible MLCA framework.

II. Background on the Foreign Corrupt Practices Act

The enactment of the FCPA was the first time a government made bribery payments to foreign officials a criminal offense.[21] Passed in the aftermath of the Watergate scandals,[22] at its core, the FCPA is an anti-bribery statute.[23] To effectuate its goals, the FCPA includes anti-bribery provisions[24] and accounting provisions[25] aimed at deterring grease payments to 'foreign officials. Under the statute, a 'foreign official' is defined as

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[16] *Id.*

[17] Miwa Shoda & Andrew G. Sullivan, *Attacking Corruption at its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L L.J. 1 (2015), https://jenner.com/system/assets/publications/14373/original/Shoda_Sullivan_California_Int_Law_Journal.pdf?1440539681.

[18] *Id.*

[19] Lucinda A. Low, Sarah R. Lamoree, & John London, *The 'Demand Side' of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563 (2015), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5145&context=flr.

[20] Shoda, *Supra* note 17.

[21] Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 930, 930 (2012), http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Koehler.pdf.

[22] Linda Chatman Thomsen, Director, SEC Division of Enforcement, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (Mar. 27, 2008) (https://www.sec.gov/news/speech/2008/spch032708lct.htm) (revealing payments by U.S. firms to obtain and retain business abroad).

[23] THE CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE & THE ENF'T DIVISION OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11-12 (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter 2012 DOJ-SEC FCPA GUIDE].

[24] 15 U.S.C. § 78dd-1 (2012).

[25] *Id.* § 78m.

'any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of [the same].'[26]

The promotion of democracy across the globe is a principle ingrained into the U.S. national fabric and naturally serves as a key driver for U.S. foreign policy.[27] The FCPA was born out of a similar interest.[28] Congress was primarily motivated to deter U.S. political contributions to foreign governments, specifically to prevent private U.S. interference with democratic elections.[29] Discussing the impact of corporate donations on foreign governments, Representative Robert Nix (D-PA) commented that '[t]he interference in democratic elections with corporate gifts undermines everything [the U.S.] is trying to do as a leader of the free world.'[30] However, foreign policy was not the only consideration behind the FCPA.[31] Congress was also concerned that the impact of bribes on the free enterprise system (long-term economic landscape), the advantages for American businesses of a business climate with less bribery, and global leadership in the anti-corruption space.[32]

The FCPA boasts a broad jurisdiction. First, the statute applies to companies that are issuers, or domestic and foreign companies traded on U.S. exchanges or that are traded over-the-counter (OTC) and are required to file reports with the SEC.[33] These companies are required to maintain books, records, and controls to help the SEC monitor assets that could be used in bribery schemes.[34] Second, the FCPA applies to 'domestic concerns, or any citizen, national, or resident of the United States, and any corporation and business entity organized under the laws of the United States or any individual U.S. state, or having its principal place of business

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[26] *Id.* § 78(f)(1)(A). Though beyond the scope of this note, the definition of foreign official leaves much to be desired clarity-wise. *See generally* Alexander G. Hughes, Note, *Drawing Sensible Borders for the Definition of "Foreign Official" Under the FCPA*, 40 AM. J. OF CRIM. L. 253 (2013), *available at* http://ajclonline.org/wp-content/uploads/2013/08/40-3-Hughes.pdf (discussing the limitations of the statutory definition of "foreign official").

[27] U.S. DEP'T OF STATE, *Democracy*, http://www.state.gov/j/drl/democ/index.htm, (last visited Oct. 17, 2016).

[28] Cyavash Nasir Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 14 J. INT'L BUS. & L. 351, 353 (July 10, 2012), http://law.hofstra.edu/pdf/academics/journals/jibl/jibl_volxii_regulating_the_regulators_ahmadi.pdf. ("The FCPA was enacted because corruption and its concomitant effect threatened foreign policy interests. The very payments that were diminishing shareholder value were also destabilizing the governments of Japan, the Netherlands, and Italy.")

[29] Koehler, *supra* note 21, at 934.

[30] *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 2 (1975) (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations). Notably, Rep. Nix was the first African American to represent Pennsylvania in the House of Representatives. *Biography of Robert Nix*, U.S. House of Rep. History, Art & Archives, http://history.house.gov/People/Detail?id=18971 (last visited May 3, 2016).

[31] *See generally* Koehler, *supra* note 21, at 939–943.

[32] *Id.* at 943.

[33] 15 U.S.C § 78dd-1 (2012).

[34] 2012 DOJ-SEC FCPA GUIDE, *supra* note at 23.

in the United States.[35] Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.[36] Third, the statute extends to any person (foreign person and foreign entity) that is not a U.S. issuer or organized in the U.S. who commits any act in furtherance of an FCPA violation while in U.S. territory,[37] either directly or through any agent.[38]

The anti-bribery provisions of the FCPA prohibit (i) corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value; '(ii) to a foreign official; (iii) in order to obtain or retain business.'"[39] The statute carries both criminal and civil penalties. [40] Individuals can face up to five years in prison for violating the anti-bribery provisions of the FCPA and are also subject to fines of up to $250,000.[41] Businesses can be fined up to $2 million for bribery violations and up to $25 million for each violation of the FCPA's accounting provisions.[42] Criminal fines may also be increased to up to twice the benefit the defendant obtained by the corrupt payment under the Alternative Fines Act.[43] The DOJ has authority to pursue civil penalties up to $16,000 (inflation adjusted) per violation for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders),[44] foreign nationals, and companies for violations committed in the U.S.[45] The penalty, if levied on an individual, may not be paid by the employer or principal.[46] The SEC may also obtain civil penalties in federal court or in administrative proceedings[47] against issuers (and their officers, directors, employees, agents, or stockholders) not to exceed the greater of (a) gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation ranging from $7,500 to $150,000 for an individual and from $75,000 to $725,000 for a company (inflation adjusted values).[48]

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[35] 15 U.S.C. § 78dd-2 (2012).

[36] *Id.* § 78dd-2(h)(1).

[37] For a list of current U.S. territories, *Persons Employed in a U.S. Possession / Territory – FIT*, IRS (Oct. 31 2016), https://www.irs.gov/Individuals/International-Taxpayers/Persons-Employed-In-U.S. Possessions.

[38] 15 U.S.C. § 78dd-3(a); *see also* U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL § 9-1018 (Nov. 2000) (the Department "interprets [Section 78dd-3(a)] to confer jurisdiction whenever a foreign company or national *causes* an act to be done within the territory of the United States by any person acting as that company's or national's agent.").

[39] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 390 (2010) (paraphrasing the language of the FCPA, 15 U.S.C. 78dd-1).

[40] Criminal penalties are calculated according to the U.S. Sentencing Guidelines. See 2012 DOJ-SEC FCPA GUIDE, *supra* note 23 , at 68–69 (an overview of the Guidelines as applied to the FCPA).

[41] *Id.*

[42] *Id.*

[43] 18 U.S.C. § 3571(d) (2012)

[44] 15 U.S.C. §§ 78dd-2(g)(2)(B), 78dd-3(e)(2)(B), 78ff(c)(2)(B) (2012); *see also* 17 C.F.R. § 201.1004 (providing adjustments for inflation pushing civil penalties from $10,000 to $16,000).

[45] *Id.* §§ 78dd-2(g)(1)(B), 78dd-3(e)(1)(B), 78ff(c)(1)(B).

[46] *Id.* §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).

[47] *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, 15 U.S.C. §§ 202, 301, 401, and 402 (2012) (codified in scattered sections of Title 15 of the United States Code).

[48] 15 U.S.C. § 78u(d)(3); *see also* 17 C.F.R. § 201.1004 (providing adjustments pushing civil penalties from $5,000 to $7,500 and $50,000 to $75,000 for individuals, and from $50,000 $75,000 and $500,000 to $725,000 for companies).

The FCPA's accounting provisions impose two major obligations on issuers. First, issuers must make and keep books, records and accounts that, in reasonable detail, accurately and fairly reflect an issuer's transactions and dispositions of an issuer's assets ("books and records' provision).[49] Second, issuers must devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over a firm's assets ("internal controls' provision).[50] Individuals violating accounting provisions are subject to fines of up to $5 million and imprisonment up to 20 years, while corporations and other business entities violating such provisions are subject to a fine of up to $25 million.[51] The FCPA is enforced against both U.S. and non-U.S. citizens.[52] Many of these cases involve actions against non-U.S. agents of U.S. companies.[53] For example, in 2009 the DOJ took action against Ousama Naaman, a Canadian citizen, because he was considered to have been acting 'on behalf of a publicly traded U.S. chemical company and its subsidiary."[54] Notably, the FCPA does not apply to the demand-side of the bribe, or the foreign official originating the bribe.[55] These foreign officials are exempt from the statute's otherwise broad reach. [56]

Courts have paid particular attention to the FCPA's jurisdictional limits.[57] The statute has been strictly interpreted as a supply-side anti-corruption statute (covering the entity supplying the bribe).[58] Courts have ruled that Congress's specific focus under the FCPA was on American businesses operating in foreign spaces rather than the foreign state officials or citizens of foreign nations demanding the bribe (demand-side enforcement).[59] For example, in *U.S. v. Castle*, the DOJ charged Canadian

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[49] *Id.* § 78m(b)(2)(A).

[50] *Id.* § 78m(b)(2)(B).

[51] *Id.* § 78ff(a).

[52] Susan Rose-Ackerman, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U ANN. SURV. AM. L. 433, 447 (2012).

[53] *Id.*

[54] Amy D. Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 552 (2011) (quoting Office of Public Affairs, *Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Program*, U.S. DEP'T OF JUSTICE, (Sept. 15, 2014), https://www.justice.gov/opa/pr/canadian-national-charged-foreign-bribery-and-paying-kickbacks-under-oil-food-program).

[55] *Id.* at 504–05.

[56] *Id.*

[57] Miwa Shoda and Andrew G. Sullivan, *Attacking Corruption at its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L L.J. 1 (2015), https://jenner.com/system/assets/publications/14373/original/Shoda_Sullivan_California_Int_Law_Journal.pdf?1440539681.

[58] *Id.*

[59] The Sixth Circuit was the first court to articulate the FCPA's purpose, holding that the "[the FCPA was] primarily designed to protect the integrity of American foreign policy and domestic markets, rather than to prevent the use of foreign resources to reduce production costs." Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).

officials and bribe recipients with conspiracy to violate the FCPA.[60] The Fifth Circuit dismissed the government's indictment.[61] Reviewing the legislative history leading to the enactment of the FCPA, the court determined that Congress purposefully chose to exempt foreign officials from prosecution.[62] The court noted that this decision was policy-based, reflecting a product of Congress's concern with the 'inherent jurisdictional, enforcement, and diplomatic difficulties' raised by the application of the statute to noncitizens of the United States. '[63]

A. Enforcement

Both the Department of Justice (DOJ) and the Securities Exchange Commission (SEC) have enforcement authority under the FCPA.[64] While the SEC can only pursue civil actions against issuers, the DOJ can enforce criminal penalties against issuers and non-issuers.[65] The DOJ also has both criminal and civil enforcement responsibility for the FCPA's anti-bribery provisions over domestic concerns.[66] The statute's enforcement has been a priority for the Obama Administration.[67] From 2003 to 2006, there were only 38 enforcement actions brought under the statute.[68] In 2010 alone, authorities brought 74 enforcement actions.[69] 2014 boasted the second highest corporate enforcement action settlement amounts in dollars on record.[70] 2014 also showed a focus on large corporate enforcement actions—individual actions have fallen nearly 64% since 2009 (though the number of corporate actions were still low compared to 2010).[71] This suggests that the DOJ and SEC are shifting their capabilities to high profile cases. However, FCPA prosecution has slowed in 2015: enforcement actions from DOJ and SEC are down 23% from 2014, and 77% from the high in

[60] United States v. Castle, 925 F.2d 832, 834 (5th Cir. 1991).

[61] *Id.* at 836.

[62] *Id.* at 834.

[63] *Id.* at 835 (citing H.R. Conf. Rep. No. 831, 95th Cong. (1st Sess. 14), as reprinted in 1977 U.S.C.C.A. N. 4121, 4126).

[64] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 2

[65] *Id.* at 4.

[66] *Id.*

[67] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 38 (2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[68] *See* PHILIP UROFSKY & DANFORTH NEWCOMB, SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 1 Total SEC/DOJ Matters Initiated: 2002-2010 (2011), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2011/01/Shearman-Sterlings-Recent-Trends-and-Patterns-i__/Files/View-January-2011-Recent-Trends-and-Patterns-in-__/FileAttachment/January-2011-Trends--Patterns.pdf.

[69] *See* Paul T. Friedman, Ruti Smithline & Angela E. Kleine, *Client Alert 2010: Another Record-Breaking Year for FCPA Enforcement, Confirming 'New ERA'* MORRISON & FOERSTER LLP (2011), http://media.mofo.com/files/Uploads/Images/110112-FCPA-Enforcement.pdf.

[70] *Corporate FCPA Enforcement in 2014 Compared to Prior Years*, FCPA PROFESSOR (Jan. 13, 2015), http://fcpaprofessor.com/corporate-fcpa-enforcement-in-2014-compared-to-prior-years/.

[71] *Id.*

2010.[72] The DOJ also shifted its focus from corporations to individuals in 2015 (the SEC showed no such shift).[73]

Bribe paying firms are usually large firms that have high profit margins, operate in research-intensive industries perceived to be relatively corrupt, and do business in many geographic markets that are known for corruption.[74] Often, these firms operate in the natural resource space, such as multinational oil and gas companies.[75] The mean bribe amounts firms pay is $23.43 million, while the median bribe amount is $1.05 million, indicating that bribe payments are skewed toward big players. [76] The mean monetary penalty imposed on bribe paying firms is $93.5 million.[77] Nigeria, Iraq, Saudi Arabia, and Brazil, oil rich nations, are among the top eight countries with the most FCPA bribery enforcement actions.[78]

The FCPA is particularly relevant in the natural resource space, specifically due to the prevalence of state-owned oil and gas companies which qualify key employees as foreign officials.[79] 11 out of the 20 largest FPCA settlements involved oil and gas companies or oil and gas transactions.[80] Many companies operate joint ventures in which foreign government officials hold leadership positions, increasing the probability of bribery. Bribery in the resource space may just be a cost of doing businesses. In an Organization for Economic Co-Operation and Development (OECD) analysis of 427 cases of bribery in international business, extractive industries (oil and minerals) topped the list with the most cases of bribery.[81] Like garbage accumulating on a city street, perception has the power to perpetuate the status quo. Transparency International identified companies in the oil and gas sector as being

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[72] Gibson, Dunn & Crutcher, *2015 Year-End FCPA* (2016), http://www.gibsondunn.com/publications/documents/2015-Year-End-FCPA-Update.pdf.

[73] *See id.*at 3 (discussing the "Yates Memorandum" penned by U.S. Deputy Attorney General Sally Yates issued to all federal prosecutors announcing a focus on individual corporate officer responsibility in investigations of misconduct).

[74] Jonathon M. Karpoff et al., *The Economics of Foreign Bribery: Evidence from FCPA Enforcement Actions 20* (June 16, 2016) (unpublished manuscript) (on file with Social Science Research Network), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222.

[75] *Id.* at 12.

[76] *Id.* at 15.

[77] *Id.*

[78] *Id.* at 4.

[79] Clinton R. Long, *Navigating the FCPA's Ambiguous 'Instrumentality' Provision: Lessons for the Energy Industry*, 12 RICH. J. GLOBAL L. & BUS. 393, 400 (2013) (noting that in 2007 "77 percent of the world's oil reserves [were] held by national oil companies with no private equity, and there [were] 13 state-owned oil companies with more reserves than ExxonMobil, the largest multinational oil company") (internal quotation marks omitted).

[80] Baker & McKenzie, *Globalization of the Supply Chain* 6 (June 18, 2013), http://www.bakermckenzie.com/files/webinars/wbtradefcpaantibriberytrendsjun13/Final%20Presentation%20-%20June%2018%202013.pdf.

[81] *See* OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS, OECD PUB. 8 (2014),http://www.oecdilibrary.org/docserver/download/2814011e.pdf?expires=1462388364&id=id&accname=guest&checksum=FABE51C35B9F0D2EB0FBD522C20A9E0E (two-thirds of cases occurred in just four industries: extractive (19%); construction (15%); transportation and storage (15%), and information and communication (10%)).

perceived to bribe more than companies in other sectors.[82] As developed countries dry up domestic reserves, they find it necessary to look beyond their borders to developing countries where levels of corruption remain high.[83] Africa, Latin America, and the Middle East, high-growth markets for international investors and source markets for natural resources imports,[84] tend to have lower rankings in Transparency International's Corruption Perception Index.[85] Oil producing countries in Africa are particularly susceptible to corruption.[86] Two of the top five oil producing nations in Africa all rank near the bottom of Transparency International rankings. [87]

Top Oil Producing African Nations, Production, and Transparency International Ranking

Country	Production (millions of barrels per day)	Transparency International Corruption Ranking[88]
Nigeria	1.8 M B/D (2015)[89]	136/167
Angola	1.7 M B/D (2015)[90]	163/167
Algeria	1.2 M B/D (2015)[91]	88/167
Egypt	0.7 M B/D (2014)[92]	88/167
Libya	04. M B/D (2015)[93]	161/167

The oil and gas business is high-risk, high-reward, and the enormous payoffs can be limited by delays or downtime, creating perverse incentives between operations on the ground and corporate policy at headquarters.[94]

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[82] *Bribe Payers Index*, TRANSPARENCY INT'L, https://www.transparency.org/bpi2011/results (last visited May. 3, 2016).

[83] Ernst & Young, *Managing Bribery and Corruption Risks in the Oil and Gas* Industry 4 (2014), http://www.ey.com/Publication/vwLUAssets/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry/$FILE/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry.pdf.

[84] *Id.* at 5.

[85] TRANSPARENCY INT'L INDEX, *supra* note 82. A lower ranking in Transparency International's Corruption Perception Index indicates a higher level of corruption.

[86] TRANSPARENCY INT'L INDEX, *supra* note 82 (Angola, Libya, Sudan, and South Sudan are all ranked as 16 or less)

[87] *Id.* (Angola and Libya).

[88] TRANSPARENCY INT'L INDEX, *supra* note 82.

[89] OPEC, *Nigeria Facts and Figures,* OPEC, http://www.opec.org/opec_web/en/about_us/167.htm (last visited May 4, 2016) [hereinafter OPEC Nigeria].

[90] OPEC, *Angola Facts and Figures*, OPEC, http://www.opec.org/opec_web/en/about_us/147.htm (last visited May 4, 2016).

[91] OPEC, *Algeria Facts and Figures*, OPEC, http://www.opec.org/opec_web/en/about_us/146.htm (last visited May 4, 2016).

[92] EIA Beta, *EIA Analysis: Egypt*, EIA (June 2, 2015), https://www.eia.gov/beta/international/analysis.cfm?iso=EGY.

[93] EIA Beta, *EIA Analysis: Libya*, EIA (Nov. 19, 2015), https://www.eia.gov/beta/international/analysis.cfm?iso=LBY.

[94] Ernst & Young, *supra* note 83 at 7.

Resource extraction is also highly regulated and involves significant interaction with politically exposed persons (PEPs) due to license and permitting requirements.[95] This dynamic allows PEPs to demand grease payments for supplying permits and licenses, and additionally to help companies avoid state sanctions after permitting is allowed (for example, to dodge environmental or safety regulations).[96]

Congress has paid close attention to the unique corruption risks presented by the oil and gas space. The Extractive Industries Disclosure Provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires the SEC to issue regulations requiring issuers engaged in the development of oil, natural gas, or minerals to file an annual report of payments made to the US government or a foreign government.[97] The SEC's rulemaking, however, has faced numerous barriers. In 2013, U.S. District Judge John Bates tossed the SEC's extractive industries disclosure rule, labeling the rule 'arbitrary and capricious.'[98] Specifically, the court was concerned with the SEC's interpretation that Congress required disclosure to be public, and the SEC's refusal to exempt those countries which prohibited payment disclosures from the rule's requirements.[99] In February of 2016, the SEC re-proposed rules under Section 1504 addressing the issues raised in the 2013 litigation.[100] After nearly seven years of severe pushback the SEC has seen from industry groups critical of Section 1504,[101] the SEC released final rules in June 2016.[102] In February of 2017, Congress passed a joint resolution disapproving of Section 1504,[103] and repealed the SEC's final rule under Section 1504.[104] Though Section 1504 still remains in effect, given the significant political and industry censure, Section 1504's future is unclear. Whatever its fate may be, Section 1504's passage represented another example of America's leadership in the global corruption fight: since

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[95] *Id.* at 8.

[96] *Id.* at 9.

[97] *Specialized Corporate Disclosure*, SEC, https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml (last visited May 4, 2016).

[98] *Am. Petroleum Inst. v. S.E.C.* 953 F. Supp. 2d 5, 11 (D.D.C. 2013).

[99] *Id.* at 16, 21.

[100] Michael L. Littenberg, *A Deep Dive into SEC's Latest Mining Proposals*, LAW 360 (Feb. 10, 2016, 11:50 AM), http://www.law360.com/articles/757101/a-deep-dive-into-sec-s-latest-mining-disclosure-proposal.

[101] WOLTERS KLUWER LEGAL & REGULATORY SOLUTIONS U.S. WHITE PAPER, DODD-FRANK FIVE YEARS LATER: THE WEIGHT ON THE FINANCIAL SERVICES INDUSTRY 14 (Amy Leisinger, et al. eds., 2015).

[102] U.S SEC. AND EXCH. COMM'N, ADOPTS RULES FOR RESOURCE EXTRACTION ISSUERS UNDER DODD-FRANK ACT (June 27, 2016), https://www.sec.gov/news/pressrelease/2016-132.html.

[103] Samuel Rubenfeld, *U.S. House Passes Resolution to Kill Extractive Anti-Graft Rule* (Feb. 1, 2017), WALL ST. J. http://blogs.wsj.com/riskandcompliance/2017/02/01/u-s-house-passes-resolution-to-kill-extractive-anti-graft-rule/.

[104] Kate Bateman, *Trump's Repeal of Section 1504 of Dodd-Frank Will Hurt U.S. National Security*, FOREIGN AFFAIRS (Feb. 7, 2017), https://www.foreignaffairs.com/articles/2017-02-07/corrupt-practice.

Section 1504 became law. 30 countries have passed similar rules for the extractive sector.[105]

B. 'Resource Curse'

The 'resource curse' denotes the connection between national mineral dependence and the risks of violent conflict, economic inequality, limitations on democracy. and increased corruption.[106] Empirically rooted in an influential study by economists Jeffery Sachs and Andrew Warner,[107] three different attributes define the 'curse' (1) currency appreciation and its negative effect on the competitiveness of other industries, (2) fluctuation in commodity prices and disruptive effects, and (3) effect on political conditions.[108] Take Nigeria for example. State-owned Nigerian National Petroleum Company (NNPC) partners with international oil companies (IOCs).[109] Through these international partnerships, oil rich Nigeria earned $350 billion between 1970 and 2000 during its oil boom, but income per capita fell and inequality increased significantly.[110] Nigeria is a victim to perpetual corruption in the oil and gas industry, and state actors are slow to investigate corruption in the oil industry versus other industries (like the financial services sector).[111] The 'resource curse' presents a consistent trend in oil producing nations: citizens of nations with poor governance but abundant stores of natural resources often do not gain the value to which they are entitled from state actors. Far from being contained, the 'resource curse' has spillover effects to resource-demanding nations. Two are particularly immediate. First is the effect on the cost of extracted materials (though due to shale boom, not as of late for the U.S.).[112] Second is the risk borne by investors who provide the capital necessary for extraction. In fact, Section 1504 of Dodd-Frank was the end product of Congress's particular concern with the 'resource curse.'[113]

There are indicators that African countries are diversifying their national industries through services and manufacturing, even those countries whose

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[105] Kate Bateman, *Trump's Repeal of Transparency Measure Will Hurt U.S. National Security*, FOREIGN AFFAIRS (Feb. 17, 2017), https://www.foreignaffairs.com/articles/2017-02-07/corrupt-practice

[106] Littenberg, *supra* note 100.

[107] *See generally* Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 5398, 1995) (discussing the strong correlation between natural resource abundance and poor economic growth).

[108] Nicholas Shaxson, *Oil, Corruption, and the Resource Course*, 83 INT'L AFFAIRS 1123, 1124 (2007), http://projects.iq.harvard.edu/sites/projects.iq.harvard.edu/files/gov2126/files/shaxson_2007.pdf.

[109] Joint Venture Operation, *Nigerian National Petroleum Corporation*, *http://www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx* (last visited Nov. 14, 2016).

[110] Nicholas Shaxson, *supra* note 108, at 1123–24

[111] G. UGO NWOKEJI, THE NIGERIAN NATIONAL PETROLEUM CORPORATION AND THE DEVELOPMENT OF THE NIGERIAN OIL AND GAS INDUSTRY: HISTORY, STRATEGIES AND CURRENT DIRECTIONS 3, 56 (2007), http://www.bakerinstitute.org/media/files/page/9b067dc6/noc_nnpc_ugo.pdf

[112] *Id.*

[113] Imran Rahman, *Drilling for Disclosure After Api v. Sec: Incentivizing Voluntary Payment Transparency in the Resource Extraction Industry Through Exemptions to Section 1504 of the Dodd-Frank Act*, 21 SW. J. INT'L L. 479, 482–83 (2015).

economies have been historically driven by natural resources.[114] For example, oil represents 95% of Nigeria's exports, yet services now represent 60% of GDP.[115] However, oil still represents a significant percentage of Nigeria's output (35%).[116] Nigerian citizens, like the citizens of other African oil producing nations, still have to grapple with the 'resource curse' and the effects of corruption in the resource space for the near future.[117] Corruption had a limited impact on the state-building enterprise of the United States: much of the country's national political framework was entrenched after the Mexican-American War and Civil War, providing needed cushion for the era of 'Boss Tweed' and related political rent-seekers.[118] Thus, given that many countries in Africa are still in their earlier trials as political states in search of stability, corruption has significantly higher costs.[119]

III. Is FCPA Enforcement Worth It?

Some estimates suggest that $1 trillion is paid in bribes annually, nearly 3% of global GDP.[120] Bribery has hit Africa especially hard.[121] From 1980-2009, Africa lost more than $1.2 trillion in illicit financial outflows.[122] Clearly, corruption is a problem in +developing countries, especially those in Africa. The question that policymakers must confront is whether the FCPA is worth its salt in fighting corruption.

A. Costs of the FCPA

The principal effect of the FCPA is to divert U.S. FDI to less corrupt countries, and encourage substitution between U.S. and foreign investors in more corrupt countries.[123] Firms that are targeted for anti-bribery enforcement face large direct costs in the form of penalties, investigation and legal expenses, and monitoring costs that average 5.1% of market

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[114] *The Twilight of the Resource Curse?* ECONOMIST (Jan. 10, 2015), http://www.economist.com/news/middle-east-and-africa/21638141-africas-growth-being-powered-things-other-commodities-twilight.

[115] *Id.*

[116] OPEC Nigeria, *supra* note 89.

[117] *The Twilight of the Resource Curse? supra* note 114.

[118] Ian Shapiro & Adira Levine, *Corruption in Africa: Shifting Standards and Challenges in* AFRICA AT A FORK IN THE ROAD: TAKING OFF OR DISAPPOINTMENT ONCE AGAIN? 263, 262–63 (Ernesto Zedillo et al. eds., 2015), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.694.4907&rep=rep1&type=pdf#page=261.

[119] *Id.*

[120] *The Costs of Corruption,* WORLD BANK, (Apr. 8, 2004), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[121] Shapiro & Levine, *supra* note 118, at 261.

[122] *Id.*

[123] Ames R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business After 1977* 19–21 (1995), (Nat'l Bureau of Econ. Research, Working Paper No. 5266), http://www.nber.org/papers/w5266.

capitalization, including 3.3% in direct costs and 1.0% in reputation loses.[124] FCPA investigations have a negative effect on firm share price, regardless of the firm's culpability, reflecting investors' expectations of future government sanctions or the loss of future business.[125] Nevertheless, there is evidence that the FCPA in its current form is limited in its ability to change the incentives of bribe paying firms both in its imposition of a civil penalty and its enforceability.[126] Using FCPA enforcement data from 1978 to May 2013, researchers determined that the optimal civil penalties under the FCPA to deter bribery (reducing the net present value of a bribe from a company's perspective to zero) need to increase significantly for the FCPA to have a deterrent effect, or alternatively, the probability of being caught needs to increase nearly 59% to reduce the company's ex-ante net present value to zero.[127] Surprisingly, bribe recipients only capture 16.3% of the value of contracts for which bribes are paid (contrary to arguments that bribe recipients extract the most surplus from bribe contracts).[128] The authors thus conclude that bribe-paying firms avoid transferring most of the contract value to the bribe recipients.[129] Stated another way, measured by its ability to mold ex-ante incentives, the FCPA may not be worth its costs in its current form simply due to its inefficacy.[130]

Additionally, looking to corruption specifically, corruption may facilitate growth when people are not free.[131] In relatively poor, un-free countries, corruption can overcome some of the barriers presented by formal and informal institutions that act to restrict commerce.[132] Bureaucracies and regulators can arbitrarily limit beneficial trades, and in such cases, corruption can increase economic growth by allowing trade.[133] Where an over-centralized bureaucracy may constrain growth, corruption may be a 'welcome lubricant easing the path to modernization.'[134] Finally, the FCPA may have a preclusive effect in regards to investment in developing countries, especially at times when the country may need it the most.[135] For example, one commentator recommended passing an exemption to the FCPA for Haiti after the country's devastating earthquake in 2010 as

[124] Karpoff, *supra* note 74, at 3.
[125] *Id.*
[126] *Id.* at 29.
[127] *Id.* at 5
[128] *Id.* at 4.
[129] *Id.* at 5.
[130] Karpoff, *supra* note 74, at 1–2, 29.
[131] Anna Kochanova, *How Does Corruption Affect Economic Growth?*, WORLD ECONOMIC FORUM, (May 6, 2015), https://www.weforum.org/agenda/2015/05/how-does-corruption-affect-economic-growth/.
[132] *Id.*
[133] Richard L. Cassin, *Graft is Good, Sometimes*, FCPA BLOG, (Jan 25, 2010, 5:47 PM), http://www.fcpablog.com/blog/2010/1/26/graft-is-good-sometimes.html#sthash.Wv4EMzl9.dpuf.
[134] SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 69 (New Haven and London, Yale University Press 7th ed. 1973).
[135] Ashby Jones, *Is the FCPA Standing in the Way of Haiti's Recovery?*, WALL ST. J. (Mar. 16, 2010, 4:10 PM), http://blogs.wsj.com/law/2010/03/16/is-the-fcpa-standing-in-the-way-of-haitis-recovery/

American business owners shied away from investing in the country due to FCPA liability.[136]

B. Benefits of the FCPA

However, a powerful defense of the FCPA focuses on attacking FCPA critics' simplistic characterization of lost business for FCPA compliant companies, or lost contracts due to a competitor's submittance to a bribe.[137] First, the 'loss' for a lost contract is not the profits that would have been earned from a corrupt deal.[138] Instead, the firm can usually shift its business elsewhere, and resources from fixed locations can enter the international market where they can be purchased by American business.[139] Second, there are long-term benefits to the United States enforcing the FCPA rigorously.[140] A unified front against international corruption is one way to encourage global compliance, improving the fairness and efficiency of global trade, facilitating investment, and enhancing the welfare of citizens in countries crippled by corruption.[141] According to this argument, in the long run, the benefits of fighting corruption to the U.S. and its standing to the world outweigh the cost of lost contracts to U.S. companies presently.[142]

The FCPA, though burdensome in regards to control costs for businesses under its jurisdiction, is less burdensome than analogous anti-corruption statutes.[143] For example, the requirement that bribery be accompanied with knowledge narrows the FCPA relative to the U.K. Bribery Act. [144] The FCPA certainly is not the most restrictive anti-corruption statute on the books.[145] Finally, the FCPA does not stand alone in penalizing overseas bribery.[146] The OECD Anti-Bribery Convention[147]

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[136] *Id.* Tyler Cowen, *One of the Beset Ways to Help Haiti: Modify FCPA*, MARGINAL REVOLUTION (March 15, 2010, 9:24 AM), http://marginalrevolution.com/marginalrevolution/2010/03/one-of-the-best-ways-to-help-haiti.html.

[137] Rose-Ackerman, supra note 52, at 435.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 461–63.

[141] *Id.*

[142] SUSAN ROSE-ACKERMAN & RONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT, CASES CONSEQUENCES AND REFORM 477 (2016).

[143] Geoffrey Gauci & Jessica Fisher, *The UK Bribery Act and the US FCPA: The Key Differences*, ASSOCIATION OF CORPORATE COUNSEL, (June 1, 2011), http://www.acc.com/legalresources/quickcounsel/UKBAFCPA.cfm?makepdf=1.

[144] *Compare* Bribery Act (2010) §7, c.23 *with* 15 U.S.C. 78dd-1(a)(3)).

[145] For example, the U.K. Bribery Act prohibits receiving and giving bribes and also criminalizes bribes directed at private parties. DAN DANIELSON & DAVID KENNEDY, BUSTING BRIBERY: SUSTAINING THE GLOBAL MOMENTUM OF THE FOREIGN CORRUPT PRACTICES ACT 23-4 (Open Society Found., 2011), http://www.law.harvard.edu/faculty/dkennedy/publications/BustingBribery.pdf.

[146] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Oct. 30, 2016).

[147] *See* OECD Convention on Combating Bribery of Foreign Public Officials: Ratification Status as of 21 May 2014, OECD (2014), http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf, [hereinafter RATIFICATION STATUS] (listing the signatories to the OECD Anti-Corruption Treaty).

imposes the principles behind the FCPA to multinationals around the world.[148] The list includes some of the U.S.'s closest allies and commercial competitors.[149] The FCPA was actually modified in 1998 to bring the statute in line with the OECD Anti-Bribery Convention's stricter requirements,[150] and other regional anti-bribery frameworks also impose requirements of varying strength on their signatories.[151] Rigorous enforcement of the FCPA therefore has a lower cost to the United States when there is some statutory parity between nations which invest in corruption heavy areas,[152] a trend that should continue as globalization advances.[153] Thus, the argument that the FCPA places the U.S. at a significant competitive disadvantage is at least tempered by broad international agreement to fight bribery and corruption through frameworks similar to the FCPA—companies operating transnationally (like those in extractive industries) already face a significant possibility of liability under a variety of statutes through other jurisdictions.[154]

Besides, the FCPA is legislation which Congress can amend.[155] Noteworthy recommendations include temporary exemptions for certain countries, creating a statutory affirmative defense for FCPA violations, or clarifying key definitions ("foreign official") to help companies improve their compliance efforts.[156] Finally. in a practical sense, the FCPA is not going anywhere. Since its enactment, the statute has only been amended two times. It was first amended in 1988 to add two affirmative defenses,[157] and then in 1998 to conform to the requirements of the Anti-Bribery Convention (of which the U.S. was a founding party).[158] Scholars and industry groups have pushed FCPA amendments to no avail. As one commentator provides, FCPA reform is in 'sleep mode.'[159]

IV Costs of Corruption: Too High to Ignore

Although the debate about the burdens and benefits of the FCPA continues, the bottom line is that corruption has costs that are too high to ignore. Tipping the FCPA cost-benefit analysis is the impact of corruption

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[148] Rose-Ackerman, *supra* note 52, at 440.

[149] DANIELSON & KENNEDY, *supra* note 145, at 20.

[150] Rose-Ackerman, *supra* note 52, at 440.

[151] Lucinda A. Low, et al., Ethics, Extraterritorial Anticorruption Laws, and Anti-Money Laundering Laws, 51 RMMLF-INST 3 §3,01, ¶3.02 (2005).

[152] DANIELSON & KENNEDY, *supra* note 145, at 22-23.

[153] *Id.* at 24.

[154] *Id.* at 5–6, 7–8.

[155] DANIELSON & KENNEDY, *supra* note 145, at 19.

[156] *See generally* Brady Dennis & Tom Hamburger, *5 Proposed Amendments to the Foreign Corrupt Practices Act*, WASH. POST. (April 25, 2012), https://www.washingtonpost.com/business/economy/5-proposed-amendments-to-the-foreign-corrupt-practices-act/2012/04/25/gIQAXbuVhT_story.html; *see also Amendments to Simplify the FCPA for U.S. Businesses,* FCPA PROFESSOR (Sep. 24, 2012), http://fcpaprofessor.com/amendments-to-simplify-the-fcpa-for-u-s-businesses/, [hereinafter *Amendments to Simplify*].

[157] Congress added two affirmative defenses: (1) the local law defense; and the (2) reasonable and bonafide promotional defense. 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[158] *Id.* at 4.

[159] *Amendments to Simplify*, *supra* note 156.

on growth, corporate behavior and most importantly, human rights and democracy.

Corruption damages economic growth, reduces domestic and foreign investment, retards business development, and promotes informal economies.[160] Corruption leads to distorted prices and inflates the cost of government contracts in developing countries,[161] hinders both developing and mature economies, and increases the costs of doing business and the stability of the global market. Corruption is especially impactful on small to medium sized businesses.[162] Because bribes are usually paid without a written contract, corruption comes without guarantees and cost projections (bribe amounts may be raised in the next instance).[163] Also, contracts secured through bribery may be legally unenforceable.[164] At the company level, failure to actively avoid corruption leads to cultures where employees and third parties can rationalize stealing from the company, leading to reputational losses and a flight of employees, shareholders, and customers.[165] Bribery not only hurts a company's bottom line, but places the company's reputation in jeopardy. [166]

Corruption shapes culture. It is not a coincidence that the U.S. does not have a high degree of corruption, either historically or presently.[167] Corruption, when entrenched in a society, is self-perpetuating.[168] Reducing corruption becomes difficult because of a lack of trust between the citizenry and its political leaders, many of whom rise inevitably due to corruption's propelling force.[169] Thus, the argument that corruption may be beneficial in the short-term or under certain conditions (highly inefficient or bloated bureaucracy) falls short.[170] As economists Daniel Kaufmann and Shang-Jin Wei have shown, bribes beget more bribes: far from cutting through the red tape, they give bureaucrats a reason to produce more of it.[171]

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[160] DANIELSON & KENNEDY, *supra* note 145, at 17.

[161] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[162] DANIELSON & KENNEDY, *supra* note 145, at 18.

[163] PriceWaterhouseCoopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme* at *6 (2008), http://www.pwc.com/th/en/publications/assets/confronting_corruption_printers.pdf.

[164] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[165] DANIELSON & KENNEDY, *supra* note 145, at 18.

[166] 2012 DOJ-SEC FCPA GUIDE, *supra* note 12, at 3.

[167] *Corruption by Country: U.S.* TRANSPARENCY INT'L, https://www.transparency.org/country/#USA (last visited Oct. 30, 2016).

[168] James T Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 15 THIRD WORLD L. STUD. 65, 68–69 (1999).

[169] *Id.* at 70.

[170] *Id.* at 98.

[171] James Surowiecki, *Invisible Hand, Greased Palm*, NEW YORKER (May 14, 2012), http://www.newyorker.com/magazine/2012/05/14/invisible-hand-greased-palm.

A. Tipping the Balance: Viewing Corruption through a Rights-Sensitive Framework

Many scholars have focused on the relationship between corruption and economic factors, but comparatively little has been devoted to the intersection of corruption and human rights.[172] In liberal, rights-based societies, commitments to the rule of law and protecting individual rights take political and societal primacy.[173] Corruption is fundamentally at tension with the goals of rights-based societies as corruption carries an impact that cannot be framed as an economic cost alone. Corruption's moral failings do not stem simply from bureaucrats taking a piece of the economic pie owed to the citizenry, but for corruption's perverse effect on human rights and democracy. Corruption remains one the leading causes of poverty, violence, and even terrorism.[174] Corruption facilitates criminal activity within and across borders, including human, weapons, and drug trafficking.[175] The impact of corruption can be seen as affecting the most basic human needs: food, water, education, health, and access to justice can be violated if a bribe is necessary to obtain them.[176] For this reason, the UN endorses a human rights-sensitive approach to corruption to better uncover corruption's true harms.[177]

Corruption also limits one of the most conventionally accepted methods of providing African countries with development assistance: foreign aid. Though impact of foreign aid is itself questionable in the context of African aid for reasons aside from corruption,[178] foreign aid targeting the citizen-in-need often ends up 'supporting bloated bureaucracies in the form of the poor-country governments and donor-funded non-governmental organizations.'[179] In fact, the World Bank has participated in the corruption of nearly $100 billion of its loans intended for development.[180] Foreign aid

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[172] James T. Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 125-26 (2009).

[173] Rights-based societies are societies that draw a strong distinction between moral-rights and moral-oughts, and put primacy on the just over the good. Liberal rights-based societies are those committed to giving lexical having and seizing the opportunity to lead a life of moral integrity. Richard S. Markovits, *Liberalism and Tort Law: On the Content of the Corrective-Justice-Securing Tort Law of a Liberal, Rights-Based Society*, 2 UNIV. OF ILL. L. REV 243, 244 (2006).

[174] Dr. Peter Eigen, *Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry*. 29 HOUS. J. INT'L L. 327, 330 (2006-2007).

[175] 2012 DOJ-SEC FCPA GUIDE, *supra* note 23, at 3.

[176] Gathii, *supra* note 118, at 172.

[177] THE HUMAN RIGHTS CASE AGAINST CORRUPTION, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER 4, (2013), http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf.

[178] Numerous commentators have argued that foreign aid is actually detrimental for African countries. According to economist Dambisa Moyo, '[a]id is an unmitigated political, economic and humanitarian disaster.' Dambisa Moyo, *Why Foreign Aid is Hurting Africa*, WALL ST. J., http://www.wsj.com/articles/SB123758895999200083 (last visited May, 5, 2016). For a more thorough analysis of the failings of conventional foreign aid in Africa, *see generally* DAMBISA MOYO, DEAD AID: WHY AID ISN'T WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA (1st Reprint ed. 2010) (arguing that African leaders should stop accepting foreign aid).

[179] *Id.*

[180] *Id.*

combined with corruption has a displacement effect on the voice of citizens: leaders no longer have to please citizens but instead must satisfy donors who often have interests in tension with the public.[181] It is telling that across Africa, over 70% of the public purse comes from foreign aid.[182] For this reason, economists have suggested that instead of relying on foreign aid, African governments need to focus on fighting corruption.[183]

Corruption has a particularly sizable impact on the African resource space.[184] Oil revenue meant for citizens in oil rich nations is siphoned off for government officials, leading to unrest among citizens and warping the political process.[185] Corruption allows officials the opportunity to gain political power and dodge prosecution while dipping into the state's coffers.[186] If the level of corruption in Nigeria was closer to Ghana, Nigeria, which had an output of $513 billion in 2014, might be 22% bigger.[187] If Nigeria does nothing to police corruption, by 2030, the cost of corruption could rise to nearly $2,000 per person.[188] This is in spite of Nigeria's significant oil wealth. Instead, Nigeria's wealth is siphoned off, damaging investment in public health, education, and basic transportation.[189] Corruption also breeds more nefarious activities in the resource space. The State Department identified the Niger Delta (the 'ground zero' of Nigerian oil production)[190] as a breeding ground for militant ethnic groups engaging in terrorist acts.[191]

Perhaps most damaging is corruption's influence on governments' ability to protect human rights.[192] Corruption undermines democracy, a tested safeguard for human rights protection.[193] Without a voice in government, groups without political power are preyed on and ignored by state actors who use government as a vehicle for monetary and political enrichment.[194] Entrenched corruption deflates the will of the citizenry to use

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[181] *Id.*

[182] *Id.*

[183] Stephanie Hanson, *Corruption in Sub-Saharan Africa,* COUNCIL ON FOREIGN RELATIONS (Aug. 6, 2009), http://www.cfr.org/africa-sub-saharan/corruption-sub-saharan-africa/p19984.

[184] Terra Lawson-Remer & Joshua Greenstein, *Beating the Resource Curse in Africa: A Global Effort,* COUNCIL ON FOREIGN RELATIONS (Aug. 2012), http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780/.

[185] *Id.*

[186] *Id.*

[187] *The $20-Billion Hole in Africa's Largest Economy*, ECONOMIST (Feb. 2, 2016), http://www.economist.com/news/middle-east-and-africa/21689905-most-nigerians-live-poverty-millions-would-be-spared-if-officials-stopped.

[188] *Id.*

[189] *Id.*

[190] Michael Watts, *Resource Curse? Governmentality, Oil and Power in the Niger Delta*, NIGERIA, 9 GEOPOLITICS 50, 50 (2004), http://www.tandfonline.com/doi/pdf/10.1080/14650040412331307832.

[191] *Id.*

[192] HUMAN RIGHTS CASE AGAINST CORRUPTION, *supra* note 177.

[193] Democracy provides "the natural environment for the protection and effective realization of human rights. *Democracy: The Human Rights Normative Framework*, UN, http://www.un.org/en/sections/issues-depth/democracy/index.html#DHR (last visited May 4, 2016); *and see* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at Art. 21(3) (1948) (the will of the people should be expressed by universal and equal suffrage).

[194] DANIELSON & KENNEDY, *supra* note 145, at 18.

the political system to effectuate lasting change, and the ability of those citizens to access the levers of power to better their collective condition. Corruption can even lead to ethnic violence or tip a stable country into a political crisis.[195] Kenyan analysts widely agree that the violence following the December 2007 elections was motivated by corruption in the political process.[196]

In short, corruption hurts more than the public fisc: corruption takes lives, cripples democracy, and impairs the rule of law.[197] Factoring the congressional imperative to fight corruption and the benefit to U.S. businesses from operating in a global environment where anti-corruption efforts are only increasing, using the FCPA to combat corruption makes sense for the U.S. and its citizens. For the citizens of developing countries like those in Africa where corruption is commonplace, rigorous enforcement of anti-corruption laws has a positive effect towards securing basic human rights, creating a healthy political environment where democracy has a greater chance to flourish, and limiting the litany of illegal activities that corruption helps finance. Thus, fighting corruption should be seen as a shared goal for the U.S. and for the demand-side country, whether it is Nigeria, India, or Russia.

V The FCPA is Losing Teeth in Africa

Unfortunately, the FCPA is losing teeth in Africa due to China's growing commercial presence in the oil and gas space, in addition to the U.S.'s increased ability to meet much of its energy needs with local supply. The U.S. must look to alternative jurisdictional and statutory frameworks to adequately fight corruption in those African countries.

A. China's Commercial Presence in Africa

Africa is among the fastest growing regions in the world.[198] However, economic growth has faltered as the global commodity super-cycle has culminated, lowering the price of oil, gas, metals, and minerals.[199] As a net-

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[195] Hanson, *supra* note 183.

[196] Hanson, *supra* note 183.

[197] It is important to note that the balance of rights and corruption isn't purely distributive bargaining: the two can get easily tangled. Procedural rights like due process are often used to perpetuate corruption (for example, the right not to have a burdensome delay in legal proceedings can be abused by corrupt officials). Take for example the Ng'eny and Saitoti cases from the Kenyan high court. According to one commentator, these cases present a clear example of how the judiciary used Kenya's Bill of Rights to shield government ministers from any prosecutions for engaging in corruption. In both decisions, the Kenyan court ignored criminal law precedent and artificially narrowed its inquiry to due process and natural justice rights, going against well-settled Kenyan criminal law jurisprudential concepts. *See, e.g.*, Republic v. Jud. Comm'n of Inquiry into the Goldenberg Affair *ex parte* George Saitoti, petition 102 of 2006 (High Ct. of Kenya at Nairobi July 31, 2006) (finding that prosecuting Saitoti would be contrary to the Constitution of Kenya); Republic v. Attorney Gen. *ex parte* Kipng'eno Arap Ng'eny (Ng'eny Case), petition 406 of 2001 (High Ct. of Kenya at Nairobi Nov. 13, 2001) (Elec. Kenyan L. Rep. Case Search) (finding that prosecuting Cabinet Minister Kipng'eno Arap Ng' eny was barred due to a constitutional protections enforcing a reasonable time hearing).

[198] *World Bank Africa Overview*, WORLD BANK, http://www.worldbank.org/en/region/afr/overview (last updated Sept. 21 2016).

[199] *Id.*

exporter, Africa is significantly affected by falling commodity prices.[200] Growth has slowed to 3.4% in 2015 (versus 3.1% for global growth in 2015 and matching projected global growth in 2016), down from 4.6% in 2014, representing the weakest pace since 2009.[201]

A key part of Africa's growth is China. Since 2000, China has been Africa's largest trading partner.[202] From 2005–2010, almost 14% of Chinese investment abroad, representing approximately $44 billion, found its way to sub-Saharan Africa.[203] For Africa as a whole, China accounts for about 3% (2012) of the stock of direct investment in Africa. [204] However, this percentage masks the impact that China has on African economies.[205] Generally, most FDI flows to advanced economies (looking at world FDI, the U.S. receives six times as much direct investment than in Africa).[206] In this manner, Chinese and Western investment are very similar.[207] However, there is a key difference: Western investment tends to stay away from countries with poor governance in regards to property rights and rule of law.[208] Chinese investment is blind to those attributes, and the countries where China's investment share is large are usually countries with weak governance.[209]

Africa enjoyed a period of vibrant economic growth through its trading activity with China but Africa's trade relationship with China cooled significantly during the commodities downturn in 2015.[210] In the first half of 2015, Africa's exports to China fell 38% year-over-year.[211] Direct investment from China fell nearly 40% for the same period.[212] Clearly, the commodities downturn has affected Sino-African trading relations. However, China is still expected to drive over one-third of global oil demand until at least 2035, according to projections by the Energy Information Administration and the International Energy Agency.[213] Thus,

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[200] *Africa's Pulse*, 11 WORLD BANK, Apr. 2015, at 2, https://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol11.pdf.

[201] WORLD ECONOMIC OUTLOOK UPDATE 1 (INTL. MONETARY FUND 2016), https://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf

[202] Wenjie Chen et al., *Why is China Investing in Africa? Evidence From the Firm Level*, (2015), http://www.brookings.edu/~/media/research/files/papers/2015/08/why-china-is-investing-in-africa/why-is-china-investing-in-africa.pdf.

[203] *Trying to Pull Together; The Chinese in Africa*, ECONOMIST, (Apr. 23, 2011, 11:06) http://www.economist.com/node/18586448.

[204] Chen et al., *supra* note 202, at 3.

[205] *Id.*

[206] *Id.* at 6.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 6–7.

[210] *Africa-China Exports Fall by 40% After China Slowdown*, BBC NEWS (Jan. 13, 2016), http://www.bbc.com/news/world-africa-35303981.

[211] *Id.*

[212] *Id.*

[213] Luke Kawa, *Deutsche Bank: China's Oil Demand Growth Could be Cut in Half by the End of the Decade*, BLOOMBERG (Mar. 9, 2016, 9:15 AM), http://www.bloomberg.com/news/articles/2016-03-09/deutsche-bank-china-s-oil-demand-growth-could-be-cut-in-half-by-the-end-of-the-decade.

even if China's thirst for oil slows down significantly. African oil will play a key role in China's resource portfolio for at least the next decade.

China's thirst for international sources of crude has come at a time when U.S. appetite has slowed, largely due to growing domestic sources of crude.[214] U.S. crude imports declined 20% between 2010 and 2014 amid the domestic energy boom. [215] U.S. imports of crude oil from Africa fell by more than 90% between 2010 and early 2014.[216] In contrast, China moved to the largest importer of oil for the first time in 2014,[217] and gets 22% of oil from Africa (2014).[218] China's commercial ties to Africa have been accompanied by favorable views of China by citizens of African countries—majorities and pluralities in all African countries surveyed by Pew Global had a positive view of China.[219] 60% of the people in nine African countries surveyed by Pew stated that the Chinese Government respects its peoples' individual freedoms.[220] By contrast, no more than 11% of those surveyed in France, Germany. Spain, Canada, and the U.S. responded that China respects individual liberty.[221]

Unlike the U.S., corruption may just be a business expense for Chinese firms. China is not a signee to the OECD Anti-Corruption Convention.[222] Although China has ratified the UN Convention Against Corruption (UNCAC),[223] the UNCAC is largely a dead letter without the necessary and currently absent robust enforcement.[224] China has very recently adopted its own FCPA-type laws,[225] yet has conspicuously failed to systematically them.[226] The culture of corruption in China also ensnares American businesses: almost 1/3 of cases brought under the FCPA involve bribery in China.[227] This is not to say that China hasn't enforced any anticorruption measures—China has investigated and prosecuted high-level businessmen

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[214] Eric Yep, *Why China's Thirst for Oil Can't Lift Prices*, WALL ST. J. (Aug. 26, 2015, 10:59 AM), http://www.wsj.com/articles/why-chinas-thirst-for-oil-cant-lift-prices-1440574814.

[215] Nicole Friedman, *After Years of Decline, U.S. Oil Imports Rise*, WALL ST. J., http://www.wsj.com/articles/after-years-of-decline-u-s-oil-imports-rise-1445851800 (updated Oct. 26, 2015, 7:24 PM).

[216] *This Week in Petroleum*, EIA (Mar. 21, 2014), http://www.eia.gov/petroleum/weekly/archive/2014/140521/twipprint.html

[217] Christopher Alessi & Beina Xu, *CFR Backgrounders: China in Africa*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/china/china-africa/p9557, (updated Apr. 27, 2015).

[218] *Id.*

[219] Richard Wike et al., *Views of China and the Global Balance of Power*, PEW RESEARCH CTR. (JUNE 23, 2015), http://www.pewglobal.org/2015/06/23/2-views-of-china-and-the-global-balance-of-power/.

[220] *Id.* (surveying South Africa, Tanzania, Kenya, Senegal, Burkina Faso, Ghana, Uganda, Nigeria, Ethiopia).

[221] *Id.*

[222] RATIFICATION STATUS, *supra* note 147.

[223] United Nations Convention Against Corruption, arts. 15–16, Oct. 31, 2003, 43 I.L.M. 37, [hereinafter "UNCAC"].

[224] *See* Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?* 8 J. INT'L ECON. L. 191, 205 (2005) (lack of robust monitoring for the UNCAC means enforcement will be low and it remains to be seen whether the UNCAC is any more than rhetoric).

[225] *China Amends Criminal Law to Cover Foreign Bribery*, COVINGTON AND BURLING 1 (2015), https://www.cov.com/media/files/corporate/publications/2015/09/alert_china_criminal_law_amendments_en.pdf.

[226] *Id.*

[227] Michael Volkov, *China: The Corruption Problem Child*, CORRUPTION, CRIME & COMPLIANCE (Jan. 24, 2012), http://blog.volkovlaw.com/2012/01/china-the-corruption-problem-child/.

active in the Africa-China oil trade. Recently, China began probing into the offshore deals made by province governor Su Shalin, the former chairman of state-owned Sinopec Group, investigating whether Shalin led the company to overpay for drilling rights in Angola between 2007–2011.[228] This increased scrutiny may however derive from the nature of investments and deals made earlier in the decade, moves which now seem risky due to plummeting oil prices.[229] Anti-corruption enforcement in China, though plausible, is in practice more likely to be aimed at punishing state leaders or political rivals than a reflection of state policy to fight corruption globally.[230]

B. The Costs of "No-Strings Attached" on Africa

China's foray into Africa, though highlighted in recency, isn't new.[231] China's government strengthened its influence in Africa from the 1950s to the 1970s by exporting its ideology. building formal relationships with African countries in that time.[232] China's then primary motivation was strategic diplomacy rather than resource extraction, 'wrestling diplomatic recognition away from Taiwan and countering the influences of both the West and, in particular, the Soviet Union.'[233] This focus changed from ideological to economic as China began to shift to a market economy in the 1990s, forming a relationship based on mutual economic benefit, a policy position officially coroneted at the China-Africa summit in Beijing in 2008.[234] However, China's status as an economic superpower has given China the opportunity to push its unique trade and aid philosophy (commercial trade agreements, development assistance, loans, and investment), one that continues to clash with Western convention. China's trade and aid relationship with Africa has been labeled, pejoratively, as 'no-strings attached.'[235]

Under the 'no-strings' policy, China's official state stance eschews human rights and anti-corruption goals, standing in contrast to Western aid and trade policies.[236] Describing 'no-strings, Sierra Leone's Ambassador to

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[228] Brian Spegele, *China Probes Graft in Angola Oil Deals*, WALL ST. J. (Oct. 20, 2015, 10:44 PM), http://www.wsj.com/articles/china-probes-graft-in-angola-oil-deals-1445339130.

[229] *Id.*

[230] Macabe Wu & Hsinchao Wu, *How to Discipline 90 Million People*, ATLANTIC (Apr. 7, 2015), http://www.theatlantic.com/international/archive/2015/04/xi-jinping-china-corruption-political-culture/389787/.

[231] Yun Sun, *Africa in China's Foreign Policy*, BROOKINGS INST. 1,5, 7 (2014), http://www.brookings.edu/~/media/research/files/papers/2014/04/africa-china-policy-sun/africa-in-china-web_cmg7.pdf.

[232] *Id.*

[233] DEBORAH BRAUTIGAM , THE DRAGON'S GIFT 34 (Oxford University Press 2009).

[234] Sanders Moody, China in Sub-Saharan Africa: Demand Extracting Supply, 20 INT'L AFFAIRS REV. 3–4 (2011), http://womin.org.za/images/regional-and-global-perspectives/brics/Sanders%20Moody%20-%20China%20in%20Sub%20Saharan%20Africa.pdf.

[235] Madison Condon, *China in Africa: What the Policy of Nonintervention Adds to the Western Development Dilemma*, 27 FLETCHER J. OF HUMAN SEC. 5, 7 (2012), http://fletcher.tufts.edu/Praxis/~/media/Fletcher/Microsites/praxis/xxvii/2CondonChinaAfrica.pdf.

[236] *Id.*

China commented that the 'Chinese just come and do it [t]hey don't hold meetings about environmental impact assessments, human rights, bad governance, and good governance Chinese investment is succeeding because they don't set high benchmarks.'[237] 'No-strings attached' is forcing Western companies to compete outside of the usual measures of cost, technology, and investment—now battling on an ideological front that straddles issues entangling sovereignty, paternalism, and hegemony. At the 2015 African-China summit in Johannesburg, African leaders praised China and Chinese President Xi Jinping for treating their nations as equal trading partners, as opposed to Western nations who seem to dictate more than cooperate.[238] Zimbabwe President Robert Mugabe, chairman of the African Union, said that Mr. Xi 'is doing to us what we expected those who colonized us yesterday to do.'[239] Even the theme of the summit, 'Africa-China Progressing Together: Win-Win Cooperation for Common Development,' reflected a commitment to a partnership between presumptive equals. Mr. Xi, framing the relationship, stated that 'African affairs should be decided by the African people.'[240] Aside from allowing decision makers to shop around offers, African leaders have welcomed China's model as an alternative to the West, preferring the flexibility[241] of the 'Beijing Consensus' to that of the 'Washington Consensus.'[242]

The extraction space is again suspect. Many Chinese companies operating in the oil and gas industry in foreign jurisdictions are state-owned companies that are not listed on U.S. exchanges.[243] All five of the largest Chinese crude oil companies are state-owned. Of the five largest companies, only one is listed on the NYSE directly (Sinopec), while another is listed through a subsidiary (China National Petroleum).[244] The FCPA is limited in its ability to reach the parent corporation of a subsidiary unless the subsidiary can be labeled the 'alter ego' of the parent corporation.[245]

Given China's aggressive and successful courting of business in African oil producing states, there is evidence that on the margins, 'no-strings

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[237] Ian Taylor, *China's Oil Diplomacy in Africa*, 82 INT'L AFFAIRS 937, 946 (2006).

[238] Norimitsu Onishi, *China Pledges $60 Billion to Aid Africa's Development*, N.Y. TIMES (Dec. 4, 2015), http://www.nytimes.com/2015/12/05/world/africa/china-pledges-60-billion-to-aid-africas-development.html.

[239] Onishi, *supra* note 238.

[240] *Id.*

[241] Some have argued that the flexibility that "no-strings" offers promotes good will, allowing conflicts to be scaled back quickly through diplomatic means. David Cohen, *China and Non-Intervention*, DIPLOMAT (Dec. 3, 2011), http://thediplomat.com/2011/12/china-and-non-intervention/. Others have pointed out that "no-strings" is conducive to transformation, and that China is evolving on "no-strings" as its ties with Africa deepen. Emily Rauhala, *Libya, China and the Myth of 'No-Strings' Investment*, TIME (Feb. 25, 2011), http://world.time.com/2011/02/25/libya-china-and-the-myth-of-no-strings-investment/. (arguing that the costs of "no-strings" are too high to justify any benefits stemming from its perceived flexibility or transformability).

[242] Ronald I. McKinnon, *China in Africa: The Washington Consensus*, 13 INT'L FIN. 495, 501 (2010).

[243] PÉTER HARDI ET AL., DEBATES OF CORRUPTION AND INTEGRITY 39 (Palgrave Macmillan 2015)

[244] J. William Carpenter, *The 5 Biggest Chinese Oil Companies (SNP)*, INVESTOPEDIA (Sept. 15, 2015, 11:15 AM), http://www.investopedia.com/articles/markets/091515/5-biggest-chinese-oil-companies.asp.

[245] Mike Koehler, *The SEC's Recent Alter Ego Theories*, FCPA PROFESSOR (Feb. 29, 2016), http://fcpaprofessor.com/the-secs-recent-alter-ego-theories/#more-18415.

attached' makes a difference: state-owned Chinese firms can outbid western firms, Chinese business is accompanied by aid with few conditions, and Chinese firms do not have to accommodate legal liability for human rights violations in domestic courts or anti-bribery prosecutions.[246] Even Chinese concessional loans are often explicitly or implicitly tied to guarantees to market access of African resources, largely oil.[247] 'No-strings attached, is competitive by design.

'No-strings attached' can have destructive implications. In the late 1990s, American and Canadian companies abandoned South Sudanese oil fields due to consumer and investor pressure stemming from human rights concerns, and China took their place.[248] Chinese media described the state-owned oil enterprise CNPC and Sudanese joint venture as the largest overseas project to date.[249] The Sudanese government in turn used Chinese oil money for the ethnic cleansing of the south Sudanese, even using arms that China supplied to do it.[250]

Aside from its commercial activities in Africa in the natural resource sector, China is a growing source of foreign aid for the continent. Unlike members of the OECD, China does not regularly publish figures detailing loans and aid flowing to Africa.[251] Therefore, estimates of Chinese aid vary wildly as $189.3 billion for 2011 alone to $14.4 billion between 2010 and 2012.[252] Additionally, Chinese aid also differs from OECD-defined official development assistance (aid is often bundled with other financial commitments).[253] Regardless of the exact number, in late 2015 China promised to invest $60 billion in development aid (including grants, loans, and export credits) towards Africa.[254]

Chinese competitors have complained about the aid-exploration link, aptly labeled the 'Oil Diplomacy. Aside from signing traditional contracts (like PetroChina's $800 million 30,000 barrel per day supply agreement with Nigerian National Petroleum Corporation in 2005),[255] or loans (in 2005 Angola took a $2 billion dollar loan in exchange for oil deals),[256] it is clear

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[246] STEPHEN BROWN & CHANDRA LEKHA SRIRAM, CHINA'S ROLE IN HUMAN RIGHTS ABUSES IN AFRICA: CLARIFYING ISSUES OF CULPABILITY IN CHINA, IN ROBERT ROTBERG, ED., CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE 259 (Brookings Instit. Press 2008).

[247] Chris Alden & Martyn Davies, *A Profile of the Operations of Chinese Multinationals in Africa*, 13 SOUTH AFRICAN J. OF INT'L AFFAIRS 83, 86 (2006).

[248] Condon, *supra* note 235, at 9.

[249] *China's Involvement In Sudan, Arms and Oil*, HUMAN RIGHTS WATCH (2003), https://www.hrw.org/reports/2003/sudan1103/26.htm.

[250] Condon, *supra* note 235, at 9.

[251] Deborah Brautigam, *5 Myths About Chinese Investment in Africa*, FOREIGN POLICY (Dec. 4, 2015), http://foreignpolicy.com/2015/12/04/5-myths-about-chinese-investment-in-africa/.

[252] Winslow Robertson & Lina Benabdallah, *Monkey Cage: China Pledged to Invest $60 Billion in Africa, Here's What That Means*, WASH. POST (Jan. 7, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/07/china-pledged-to-invest-60-billion-in-africa-heres-what-that-means/.

[253] *Id.*

[254] Onishi, *supra* note 238.

[255] Taylor, *supra* note 237, at 945.

[256] *Id.*

that African leaders accept Chinese foreign aid in exchange for access to natural resources. The Indian petroleum secretary reported that both Nigeria and Angola, oil producing countries, have conveyed that preferences for exploration and extraction will be given to those nations with the best aid packages.[257] India has since followed suit in offering multi-billion dollar oil-for-infrastructure deals in China.[258] May have characterized Chinese aid commitments as *solely* a vehicle for securing oil concessions and mining rights.[259] However, this 'sole reason' argument has been challenged by empirical studies measuring the flow of Chinese aid.[260] Still it is notable that most of China's foreign aid is distributed by the Ministry of Commerce and the China Export-Import Bank, whose central mandate is to strengthen the Chinese economy.[261] This lends some credence to the argument that aid policy is closely tied to the national objective of securing commodities for consumption in China. [262]

Like Chinese trade policy, 'no-strings attached' in the aid space has consequences which are equally dire. Consider Uganda. When Western donors showed disfavor towards the country on part of the Uganda's draconian homosexuality laws, Uganda began to focus on drawing in more Chinese aid.[263] Chinese aid also perpetuates ethnic favoritism—aid flows directly to state leaders who are almost three times more likely to spend Chinese aid in in areas where the leaders have some ethnic ties, not necessarily where the aid is needed the most.[264] State actors also use Chinese aid to control the political process and repress political rivals,[265] distorting the democratic process (if available). Worse still, some commentators have linked the receipt of Chinese aid, which does not disproportionately go to countries with high rates of civilian repression (dictatorships or resource rich nations), to increasing police and military violence against civilians.[266] Western aid is not followed by any comparable increase in violence.[267]

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[257] Condon, *supra* note 235, at 19.

[258] *Id.*

[259] Charles Wolf, Jr., *The Strategy Behind China's Aid Expansion*, RAND (Oct. 9, 2013), http://www.rand.org/blog/2013/10/the-strategy-behind-chinas-aid-expansion.html.

[260] One study compiling official development assistance flows from 2000 to 2013 found that aid flows are linked to Chinese foreign policy interests (for example, aid does not flow to countries which recognize Taiwan as a state), and are not predominantly motivated by natural resource acquisition interests. Alex Dreher et al., *Apples and Dragon Fruits: The Determinants of Aid and Other Forms of State Financing From China to Africa*, AID DATA 16, 19 (Aid Data, Working Paper No. 15, 2015), http://aiddata.org/sites/default/files/wps15_apples_and_dragon_fruits.pdf.

[261] BRAUTIGAM, *supra* note 233, at 31.

[262] Condon, *supra* note 235, at 6.

[263] Clint Richards, *Uganda Looks to China*, DIPLOMAT (Mar. 4, 2014), http://thediplomat.com/2014/03/uganda-looks-to-china/.

[264] Alex Dreher et al., *Aid on Demand, African Leaders and the Geography of China's Foreign Assistance*, AID DATA 8 (Aid Data, Working Paper No. 3, 2014), http://www.andreas-fuchs.net/uploads/1/9/8/9/19897453/chinese_aid.pdf.

[265] Robertson & Benabdallah, *supra* note 252.

[266] *Id.*

[267] *Id.*

C. 'No Strings' and Corruption

What is clear is that Chinese aid and Chinese trade policy share the same philosophical nexus: separate the money from the morals. This philosophy poses significant problems towards fighting corruption. Under 'no-strings attached, China, unlike the West, avoids imposing anti-corruption measures in both its aid distribution and through domestic anti-corruption statutes.[268] Given China's particular national interest in securing natural resources globally. the primacy that Chinese trade and aid policy places on natural resources is problematic for African nations seeking to avoid the 'resource curse, and a temptation for African leaders not to diversify their economies as revenue continues to flow from exports to China.[269] Aid thus finds itself in a 'race to the bottom, and as noted, corruption handicaps the already questionable efficacy of foreign aid.

Take Angola for example. Angola has enormous oil reserves, yet is saddled with corruption and poverty.[270] Within a three year period, $4.2 billion dollars of oil revenue was extracted from Angola's public accounts.[271] Seeing a need for increased transparency, the International Monetary Fund began to attach transparency requirements to the loans it provided to Angola for post-war reconstruction.[272] Instead, Angola took $2 billion in loans from China's Export-Import Bank without conditions regarding corruption or transparency.[273] In return, Angola would provide China with 40,000 barrels of oil per day.[274] Although China may realize that perpetuating corruption is at some point against their self-interest (again, China has significant problems with corruption domestically), donors and critics have suggested that 'no-strings attached' undermines anti-corruption efforts,[275] and that China will continue to make deals with corrupt governments insofar as it obtains access to natural resources.

VI. Fighting 'No-Strings' With the MLCA

In regards to the FCPA, when the United States uses anti-corruption tools and China does not, it leads to a competitive disadvantage for

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[268] Taylor, *supra* note 237, at 958.

[269] *Id.* at 951.

[270] *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and its Impact on Human Rights*, HUMAN RIGHTS WATCH 36, tbl. 8 (Jan. 12, 2004). https://www.hrw.org/report/2004/01/12/some-transparency-no-accountability/use-oil-revenue-angola-and-its-impact-human.

[271] *Id.*

[272] Condon, *supra* note 173, at 8.

[273] Patrick J. Keenan et al., *Curse or Cure? China, Africa, and The Effects of Unconditioned Wealth*, BERKELEY J. OF INT'L LAW (2009) (*citing* John Reed, *Angolan Oil Loan Likely to Raise Transparency Issues*, FIN. TIMES (Oct. 10, 2005), https://www.ft.com/content/a70afe4e-39b4-11da-806e-00000e2511c8).

[274] Taylor, *supra* note 237, at 958.

[275] Andy Spalding, *Creating an African Alliance, Enforcing our Bribery Laws*, FCPA BLOG (Aug. 6, 2014, 5:48 AM), http://www.fcpablog.com/blog/2014/8/6/creating-an-african-alliance-enforcing-our-bribery-laws.html.

American firms and to a dominant market position for Chinese firms.[276] The Obama Administration has expressed these concerns to African leaders.[277] But given African leaders' positive attitudes to both Chinese aid and trade practices, the potential for political gain from Chinese aid, and the flexibility of the 'no-strings attached' policies and limited anti-corruption enforcement from China, China will continue to exert a large influence over African countries rich in natural resources, and implement policies (or allow policies to be implemented) which are antithetical to Western notions of fairness and progress.

The FCPA cannot keep up with 'no strings attached. The limitations of the FCPA in current form lead to (1) decreased American competitiveness abroad and as a corollary. (2) the perpetuation of corruption due to non-prosecution from countries like China. Chinese facilitation of corruption leads to a 'windfall for African officials—but exploitation for the African people.'[278] Although this Note has focused on the Chinese impact in African oil producing nations, other nations like India and Malaysia, known for being equally soft on corruption, are ramping up their commercial presence in Africa as well. Their increasing presence will lead to the same corruption related problems even if China were to dramatically scale back their operations or change their tune on corruption. India, for example, has a relatively small domestic hydrocarbon resource base, importing 80% of its crude needs.[279] IEA projections predict India will export 90% of its oil by 2020.[280] India is increasingly looking to African oil: in 2015, India boosted imports of African crude in 2015 to the highest in at least five years, or nearly 20% of India's overall crude imports (up from 16.7% in 2014).[281] India plans on increasing imports from Nigeria specifically, one of the most corrupt nations as measured by Transparency International's Corruption Index.[282] India is notorious for corruption domestically. especially for the pervasive impact of corruption on day-to-day lives of Indians: 30% of households surveyed in Delhi reported paying a bribe within the last twelve months for basic government services in 2015.[283] The Indian analogue to the FCPA utilizes a weak enforcement mechanism,[284] and the agency responsible for investigating violations of corruption laws is crippled by a lack of resources.[285] It is clear that India's growing commercial presence in

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[276] *Id.*

[277] *Id.*

[278] Demas, supra note 10, at 348.

[279] Nidhi Verma, *India's 2015 Imports of African Oil Highest in at Least 5 Years – Trade Data*, RUETERS (Jan. 15, 2016, 7:24 AM), http://www.reuters.com/article/india-oil-imports-idUSKCN0UT1D2.

[280] *Id.*

[281] Verma, *supra* note 279.

[282] TRANSPARENCY INT'L INDEX, *supra* note 82.

[283] Aditi Malhotra, *Everyday Corruption in India's Capital*, WALL ST. J (Oct. 20, 2015), http://blogs.wsj.com/briefly/2015/10/20/everyday-corruption-in-indias-capital-the-numbers/.

[284] Sherbir Panag, *Misconceptions About India's Anti-Corruption Framework* FCPA PROFESSOR (June 10, 2014), http://fcpaprofessor.com/misconceptions-about-indias-anti-corruption-framework.

[285] *See* Interview by Ajay Vaishnav with Joginder Singh, Former Director of the CBI, TIMES OF INDIA (Jan. 11, 2012, 12:00AM), http://articles.timesofindia.indiatimes.com/2012-01-11/edit-page/30612267_1_cbi-case-cbidirector-central-bureau (supporting an independent CBI and complaining of the lengthy government sanction process and CBI's backlog).

Africa will be plagued with many of the same problems posed by Chinese investment. Thus, even if China changes its philosophy towards corruption, other countries with weak commitments to rule of law and fighting corruption are ready to step in China's shoes.

The key limitation on the FCPA's ability to fight corruption is jurisdictional: the FCPA does not reach foreign officials.[286] If Chinese companies (or companies from India or elsewhere with similarly lax attitudes toward corruption domestically) are increasingly working with state officials in the African resource space, then both groups are outside the reach of the FCPA unless they are listed on U.S. exchanges.[287] As discussed, a global marketplace where corruption thrives is bad for American businesses and investors in the long run. Second, corruption is bad for the citizens of African countries, hurting more than just their domestic economies, but leading to violations of human rights and limiting the possibility of effective democracies. Corruption undermines foreign aid injections, and defeating corruption is one of the best ways to attack poverty.[288] Alternative statutory or jurisdictional frameworks could reach the same corruption the FCPA is jurisdictionally barred from attacking without the need for unlikely congressional revision.

However, the question that must be asked is why alternative frameworks, which would also require the allocation of state resources, should be undertaken. Before even reaching the jurisdictional and federal interest analysis of using alternative statutory or jurisdictional frameworks, the moral question must be addressed. Although the effects of corruption in Africa seen through a human-rights lens are disastrous, why should the U.S. use other frameworks than the FCPA, engaging in expensive prosecutions and flirting dangerously with paternalism, all while potentially offending a foreign nation's notions of sovereignty? Enveloping this question are two main objections.

First is the argument that the resources spent on alternative frameworks could be better spent domestically. This is a facially legitimate argument. The high expense of foreign prosecutions may be better used to advance domestic interests. However, corruption is not just an economic malady, but implicates human rights, affecting access to food, healthcare, and education. Corruption also facilitates violence, trafficking, and terrorism. To argue against resource allocation to corruption fighting frameworks on this basis is overbroad: disaster aid, military expenses directed at overthrowing rights abusers, and foreign aid would be prima facie unfavorable as well. This argument could be levied against the FCPA itself, and if recent energetic

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[286] *A 'Foreign Official' Fights Back,* FCPA PROFESSOR (Aug. 25, 2011), http://fcpaprofessor.com/a-foreign-official-fights-back/.

[287] JAMES T. PARKINSON & CLANCY GALGAY, UNDERSTANDING THE REACH OF U.S. JURISDICTION UNDER THE FOREIGN CORRUPT PRACTICES ACT (Bloomberg Finance L.P. 2009).

[288] Hanson, *supra* note 183.

enforcement is to be factored, the FCPA is a priority for the current Administration and approved by those who are responsible for their election.

The second is whether resources could be better spent aiding sovereigns in their efforts to fight corruption in their home countries. This argument, the proverbial 'teach a man to fish' angle, certainly makes intuitive sense. However, allocating resources to fight corruption to nations rife with corruption is inefficient. An analogous situation is presented by foreign aid: money directed towards the citizens of poor nations goes through corrupt middlemen. Thus, foreign aid is often wasted, and does not even reach the intended recipients. Though this Note takes no stance on the continued use of foreign aid, hard empirical data informs that it is not as effective as conventional wisdom would suggest,[289] an outcome that investment in sovereign corruption fighting efforts would likely emulate. Given the criticism surrounding foreign aid, some commentators have suggested that the U.S. should invest in medicines and goods that would improve the lives of people in need of aid instead of delivering the aid itself (which again, could be wasted or misused).[290] In this light, allocating resources to an alternative statutory or jurisdictional framework to fight corruption can and should be seen as an export of anti-corruption 'medicine. Though this medicine exists only in the abstract, fighting corruption is a partial cure for the human rights and governance problems which cripple developing countries in Africa. The value of a successful prosecution and extradition doesn't expire after the process is completed, but injects a symbolic message which has the power to transform behavior. Though the cost-benefit incorporates a fair amount of guesswork, given the difficulties of prosecuting corruption cases against entrenched state actors in countries with longstanding cultures of corruption, providing resources for sovereign prosecution is likely inefficacious and therefore unwise.

Addressing the two resource-based objections still leaves the final question: where does the *imperative* to use alternative frameworks actually come from? The first response is that using alternative legal frameworks to fight corruption outside the jurisdictional limits of the FCPA still fulfills the policy goals Congress was seeking to advance through the FPCA. At least one policy concern motivating the FCPA is unimportant for demand-side prosecutions (deterring political contributions by *American* businesses to foreign governments). However, limiting the impact of bribes on the free-enterprise system, the advantages of a global business climate with less bribery, and American leadership in the anti-corruption space are all objectives that can be furthered by using alternative frameworks to the FCPA. As long as these frameworks have broad application and no specifically designated purpose which conflicts with the intent of the FCPA,

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[289] Fred Andrews, *A Surprising Case Against Foreign Aid*, N.Y. TIMES (Oct. 12, 2013), *http://www.nytimes.com/2013/10/13/business/a-surprising-case-against-foreign-aid.html*.

[290] *Id.*

U.S. prosecutors can advance the important policy aims Congress identified when the FCPA was enacted through these alternative frameworks.[291]

A commitment to fight corruption is a moral stance not unlike other state action woven into our national conscious. When the U.S. provides foreign aid, promotes democracy abroad, or unseats rights abusers, state action is viewed as arising from moral obligation. Under a rights-sensitive view of corruption, corruption and human rights harms are inextricable. Fighting corruption confronts terrorism, human trafficking, poverty and human rights abuses while promoting the rule of law and democracy.

A. Parameters for Alternative Frameworks to fight Corruption in the Africa Resource Space

An alternative framework should balance four separate interests. First, is the interest in immediacy. The framework should ideally not be 'pie-in-the-sky'—its substantiation limited to the confines of law review note—but rather implementable under the current state of the law, or without significant delay if global action is required. Second is the interest in efficacy. The framework must be able to bypass the status quo of corruption, keeping power and decision-making away from entrenched political actors who have an interest in perpetuating corruption. Third, the framework must do its best to respect sovereignty least it be rejected or thwarted by the sovereign it touches and offends. Lastly, though this Note attempted to present a moral argument for why the U.S. should fight corruption through an alternative mechanism given the FCPA's limitations, the mechanism should invoke a federal enforcement interest.

Some commentators have proposed fashioning an international anti-corruption court to combat bribery.[292] Modeled after the International Criminal Court, an international anti-corruption court certainly has its advantages. Corruption is difficult to counter when prosecutors have to clash with powerful state actors. It should not be surprising that the federalist system is amenable to corruption prosecutions: a federal prosecutor from Washington, D.C. theoretically remains insulated from the sphere of influence exerted by a corrupt state political leader. Such firewalls are non-existent in cases of corruption in developing countries, cases which often involve grand corruption or corruption involving public officials at the top of the food chain.

An international anti-corruption court would require 'elite corps of investigators' and 'experienced, impartial judges' who enforce basic,

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[291] The FCPA's legislative history suggests that some congressional leaders were concerned about the export of morality, a charge that can also be directed at the choice to use alternative frameworks to reach parties that are excepted by the FCPA. Koehler, *supra* note 21, at 945. However, this contention has little weight: combating corruption is inherently a moral fight, and the U.S.'s leadership in the space was inspired by a commitment to rule of law over the rule of man.

[292] Mark L. Wolfe, *The Case for an International Anti-Corruption Court*, BROOKINGS INST. (2014), http://www.brookings.edu/research/papers/2014/07/international-anti-corruption-court-wolf.

accepted norms of honesty.[293] Courts would be able to hear criminal actions and civil fraud actions modeled after the False Claims Act (private whistleblower lawsuits alleging fraud against the government),[294] and would exercise jurisdiction by treaty. Though these solutions may very well go far in reducing corruption by bypassing the status quo, they lack the immediacy of fighting corruption with existing statutes. Corruption has immediate costs, and the U.S. should do what it can do, now, to combat it. Furthermore, an anti-corruption court proposes a myriad of problems related to sovereignty that limit its substantiation in the near future, some shared by other international criminal courts and some unique to the anti-corruption context.[295] Though these problems are not insurmountable by any means, the benefit of using existing federal statutes cannot be understated when immediate, unilateral action may be available—in contrast to the slow, negotiated process an anti-corruption court would require. Similarly, other commentators have proposed that African countries should reduce foreign aid (which often ends up financing corruption).[296] This course of action is optimistic at best—it is in current leadership's best interest to accept foreign aid, and countries like China have shown their readiness to provide aid with 'no-strings attached.

Finally, using a more robust anti-corruption toolkit in Africa raises questions about the relationship between foreign corruption-fighting efforts and existing sovereign efforts to combat corruption. Although countries like Liberia, Rwanda, and Tanzania have made progress in reducing corruption, African anti-corruption agencies have generally been ineffective and inefficient due to shaky political footing.[297] Furthermore, agencies funded and overseen by executive branches can be entirely eliminated (as in South Africa) or have their leadership exiled (as in Nigeria or Kenya).[298] Although concern for sovereign interests carries significant weight, human rights concerns should trump any fear of trampling sovereign efforts, as those efforts are largely ineffectual in the first place. In passing the Foreign Assistance Act of 1961, Congress declared that 'the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms.'[299] State corruption renders this goal impossible. Thus, any statute or jurisdictional framework that helps to fight corruption should be energetically enforced, both in the interest of

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[293] Wolfe, *supra* note 292.

[294] *Id.*

[295] Matthew Stephenson, *The Case Against an International Anti-Corruption Court*, GLOBAL ANTICORRUPTION BLOG (Jul. 31, 2014), http://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/ (submitting that an international anti-corruption court is an inherently unworkable institution due to concerns of international sovereignty, corrupt nations refusing to sign treaties endowing the court with jurisdiction, the court's neo-imperialist image, and the massive injection of resources the court would require).

[296] Moyo, supra *note* 178.

[297] Hanson, *supra* note 183.

[298] *Id.*

[299] 22 U.S.C. § 2151 (2006) (congressional findings and declaration of policy).

American citizens and businesses, and for the welfare of citizens of demand-side nations.

B. MLCA

One option certainly satisfies the concerns for immediacy, efficacy, and if jurisdiction is satisfied, adequately respecting sovereignty. The Money Laundering Control Act (MLCA) of 1986 was originally intended to combat criminal activities such as drug trafficking which generated large amounts of cash income, or the 'lifeblood of organized crime.'[300] Since then, the MLCA has seen growing interest from DOJ prosecutors to reach overseas activities in place of the FCPA.[301] One reason for its popularity is its broad reach. The MLCA allows jurisdiction over foreign nationals where any of the money laundering activity takes place in the U.S. and the value involved is greater than $10,000.[302]

Money laundering at its core is a financial transaction with property that 'represents the proceeds of some form of unlawful activity.[303] The goal of money laundering is to make illegally-gained assets appear legal.[304] Money laundering is generally framed in three stages.[305] First is the placement stage, or the introduction of assets generated through criminal activity.[306] Next is the layering stage, where the launderer engages in a transaction or series of transactions designed to disguise the origin and trail of the money.[307] The final stage is the integration stage, where the launderer seeks to repossess the funds through what appears to be a legitimate transaction.[308] Money laundering may be worth roughly 2-5% of global GDP (at least hundreds of billions of dollars).[309]

Section 1956 of the MLCA prohibits individuals from engaging in any financial transaction with proceeds generated from 'specified unlawful activities, including bribery of a public official, misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official, fraud, or any scheme or attempt to defraud, by or against a foreign bank.[310]

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[300] PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984) [hereinafter INTERIM REPORT], https://www.ncjrs.gov/pdffiles1/Digitization/166517NCJRS.pdf.

[301] Asheesh Goel et al., *International Anti-Money Laundering Enforcement Trends and Developments*, ROPES & GRAY 1, 4 (2014), https://www.ropesgray.com/~/media/Files/articles/2013/03/International-anti-money-laundering-goel.ashx.

[302] 18 U.S.C. § 1956(f) (2006).

[303] *Id.* at § 1956 (a)(1).

[304] INTERIM REPORT, *supra* note 300.

[305] Goel, *supra* note 301, at 8.

[306] *Id.*

[307] *Id.*

[308] Goel, *supra* note 301, at 8.

[309] *Frequently Asked Questions Relating to Money Laundering*, U.K. FINANCIAL SERVICES AUTHORITY, http://www.fsa.gov.uk/about/what/financial_crime/money_launderi ng/faqs.

[310] 18 U.S.C. § 1956(c).

The MLCA covers more than 250 offenses or 'unlawful activities.'[311] In prosecuting the MLCA the government does not even have to show the capacity to commit the underlying unlawful activity. but rather that the defendant knew the property involved originated from unlawful activity and that the defendant intended to promote the unlawful activity. [312] Though the prosecutor must prove the unlawful activity. the level of proof required functionally is not equivalent to proving the crime independently. and the jury can infer proof of the crime circumstantially.[313]

Section 1956(a)(1) covers domestic money laundering transactions.[314] Section 1956(a)(2) outlaws the interstate or international transportation or transmission of funds, while 1956(a)(3) is a sting section which outlaws transactions that the defendant believes involve the proceeds of a predicate offense and that are intended to promote a predicate offense.[315] Under 1956(a)(1), the prosecutor must show that the defendant knew the property involved proceeds of any felony under state, federal, or foreign law. but need not show the specific crime involved.[316] Under section 1956(a)(2), the prosecutor must show that the defendant knew that the funds represented the proceeds of an unlawful activity. but if the transportation, transmission or transfer is conducted with the intent to promote the carrying on of specified unlawful activity, the prosecutor does not have to show that the funds were derived from any criminal activity.[317] Section 1957 makes spending or depositing tainted money a crime, outlawing otherwise innocent transactions contaminated by the source of the property involved in the transaction.[318] Section 1956 requires an intent standard: (i) intent to promote a specified unlawful activity: (ii) intent to engage in a violation of § 7201 or § 7206 of the Internal Revenue Code; (iii) intent to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity: or (iv) intent to avoid a reporting requirement under state or federal law.[319] Section 1957 of the MLCA covers property exceeding $10,000 which is derived from specified unlawful activities and does not include an element of criminal intent.[320]

Section 1956 of the MLCA covers transactions covering any item of value, and allows U.S. prosecutors to reach public and private conduct

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[311] United States v. Santos, 553 U.S. 507, 516 (2008).

[312] United States. v. Cruz, 993 F.2d 164, 167 (8th Cir. 1993).

[313] *See* United States v. Corchado-Peralta, 318 F.3d 255, 258 (1st Cir. 2003) (upholding jury ruling that the defendant, well-educated and involved in family bookkeeping, knew her husband's income originated from drug activity upon a showing that the defendant knew her husband's income from his legitimate business was far lower than the amount she signed off on her tax records).

[314] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 2101, https://www.justice.gov/usam/criminal-resource-manual-2101-money-laundering-overview, [hereinafter CRIMINAL RESOURCE MANUAL].

[315] Pancho Nagel & Christopher Wieman, *Money Laundering*, 52 AM. CRIM. L. REV. 1357, 1365, 1375 (2015).

[316] 18 U.S.C. § 1956(c)(1) (2012).

[317] CRIMINAL RESOURCE MANUAL, note 248.

[318] 18 U.S.C. § 1957 (2012). *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL 33315, MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. 1956 AND RELATED FEDERAL CRIMINAL LAW J 21 (2012).

[319] Nagel, *supra* note 315, at 1365, 1375.

[320] *See* United States. v. Rutgard, 116 F.3d 1270, 1291 (9th Cir. 1997) (criticizing 18 U.S.C. § 1957 of the MLCA as "draconian").

anywhere in the world.[321] The MLCA's jurisdictional reach was expanded by the USA PATRIOT Act, giving federal district courts jurisdiction over properly served persons not only when a transaction occurs in part or whole in the United States, but when the foreign person 'converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States.'[322] The MLCA is written broadly to cover both simple and complex schemes, as long as there is intent to disguise the source, ownership, location, or control of the money.[323] Because of its scope, the MLCA is used to target a wide range of additional criminal offenses unrelated to drug trafficking and organized crime, such as espionage, prostitution, illegal sales of weapons, human trafficking, fraud, political corruption, terrorism financing, child pornography and tax evasion.[324]

Thus, the MLCA, with its broad jurisdiction and tailored predicate offenses, allows the DOJ to reach areas generally understood as outside the jurisdiction of the FCPA.[325] With the MLCA, the government does not have to hook itself to a law-breaking American or a Chinese company that is listed on an American exchange to prosecute demand-side bribery—the MLCA allows a prosecutor to go straight to the foreign official.[326] The statute, unlike the FCPA, can reach both fund outflows and inflows, and is thus used increasingly by the DOJ to prosecute corruption.[327]

C. The Money Laundering and Corruption Link

Using the MLCA alongside the FCPA or as a standalone to reach bribery related violations is an intuitive use of the MLCA. Money laundering and corruption are inextricably linked. Corruption begets illicit gains, and money laundering is often the only way to keep those gains in a manner that does not raise suspicion.[328] Corrupt public officials who amass sizeable amounts of money through corrupt means are vulnerable in their home countries, facing pressure from political rivals and criminals.[329] Recent criminal prosecutions have emphasized the intertwined relationship between money laundering and bribery.[330] Even though banks have

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[321] Lucinda A. Low, Ethics, *Extraterritorial Anticorruption Laws, and Anti-Money Laundering Laws*, 51 ROCKY MT. MIN. L. INST. 3-1 (2005) § 3.03[1][a] (2005).

[322] Low, *supra* note 321.

[323] *Id.*

[324] Nagel, *supra* note 315, at 1358–59.

[325] FOREIGN CORRUPT PRACTICES ACT, FINANCIAL INDUSTRY REGULATORY AUTHORITY 1 (2011).

[326] Andres Rueda, *International Money Laundering Law Enforcement & the USA PATRIOT Act of 2001*, 10 MICH. ST. U. DET. C. L. J. INT'L L. 141, 151 (2001).

[327] Mike Dearington, *U.S. v. Siriwan Filing Sheds Light on Extradition Relations with Thailand in Pivotal Justice Department Case*, FCPA PROFESSOR (July 31, 2012), http://fcpaprofessor.com/u-s-v-siriwan-filing-sheds-light-on-extradition-relations-with-thailand-in-pivotal-justice-department-case/.

[328] LAUNDERING THE PROCEEDS OF CORRUPTION 6 (Financial Action Task Force 2011).

[329] *Id.*

[330] United States v. Green, 722 F.3d 1146, 1147 (9th Cir. 2013) (charged with violating the FCPA and engaging in money laundering for allegedly conspiring to pay $1.8 million in bribes to a Thai government official); U.S. v. Kozeny, 667 F.3d 122, 128 (2d Cir. 2011) (charged with violations of the

strengthened their anti-money laundering compliance programs, the FBI has noted a trend of individuals buying businesses in the U.S. and using shell companies with established banking histories to avoid opening new bank accounts, dodging bank scrutiny.[331] Launderers will continue to adopt to anti-money laundering programs. Illicit gains serve as engines for criminal activity which in turn harm U.S. citizens and frustrates national policy.[332]

Although the government has used the MLCA to prosecute foreign nationals, the laundering framework has its hurdles. The first arises when a prosecutor must select the underlying unlawful act. Defendants have challenged the use of a bribery scheme as the underlying criminal act for a separate money laundering conviction from an FCPA conviction.[333] *U.S. v. Siriwan* highlights the hurdles the DOJ potentially faces when bringing a money laundering case against a foreign official.[334]

D. Hurdles in Using the MLCA to Prosecute Foreign Corruption

In *Siriwan*, the DOJ targeted foreign national Juthamas Siriwan (former governor of the tourism authority of Thailand) for seeking bribes from two American movie producers in exchange for lucrative tourism contracts.[335] Proceeding *Siriwan*, the two Americans, Gerald and Patricia Green were convicted of violating the FCPA by making over $1.8 m in payments to Siriwan's daughter from 2002 to 2007 for the contracts.[336] Because the Siriwans were foreign officials, prosecuting the Siriwans was limited by the FCPA's reach. Instead, the DOJ brought a money laundering action against Siriwan.[337] The DOJ's choice of 'specified unlawful activity' brought skepticism from District Judge George Wu.[338] The DOJ cited two theories of unlawful activity: (1) aiding and abetting the Green's violation of the FCPA[339] and (2) violations of Thai law.[340] Though not settled, under the

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FCPA and violating anti-money laundering laws in an effort to secure a controlling interest in the state-owned oil company in Azerbaijan); U.S. v. Jefferson, 674 F.3d 332, 335 (4th Cir. 2012) (indicted U.S. Congressman William Jefferson on counts of solicitation of a bribe by a public official and money laundering); U.S. v. Leo Winston Smith, No. SACR 07–69 AG, 208 WL1869674, (C.D. Cal. Apr. 21, 2008) (indicted under for FCPA and money laundering violations by participating in a conspiracy to bribe a United Kingdom official).

[331] Joe Palazzolo, *DOJ's Kleptocracy Unit Unveiled*, WALL ST. J. (Feb. 7, 2011), http://blogs.wsj.com/corruption-currents/2011/02/07/dojs-kleptocracy-unit-unveiled.

[332] Assistant Attorney Gen. Leslie R. Caldwell, Remarks at Duke University School of Law (Oct. 23, 2014) (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law), [hereinafter Assistant Attorney Gen. Remarks].

[333] ASHEESH GOEL, INTERNATIONAL ANTI-MONEY LAUNDERING ENFORCEMENT TRENDS AND DEVELOPMENTS 19 (2013).

[334] Richard L. Cassin, *Judge Mulls Wider Ban on Prosecution of Briber Takers*, FCPA BLOG (Jan. 14, 2013), http://www.fcpablog.com/blog/2013/1/14/judge-mulls-wider-ban-on-prosecution-of-bribe-takers.html.

[335] *Id.*

[336] Richard L. Cassin, *Hollywood Couple Released From Jail*, FCPA BLOG (June 2, 2011), http://www.fcpablog.com/blog/2011/6/2/hollywood-couple-released-from-jail.html.

[337] *Judge Mulls Wider Ban supra* note 334.

[338] *Id.*

[339] FCPA violations expressly constitute specified unlawful under the MLCA. 18 U.S.C. § 1956(c)(7)(D) (2012).

[340] Dearington, *supra* note 327.

MLCA, violations of Thai law may constitute an 'offense against a foreign nation' violating Section 149 of Thailand's penal code.[341]

At a 2012 hearing on Siriwan's motion to dismiss, Judge Wu expressed concern with what he saw was an attempt by DOJ to dodge the jurisdictional limits of the FCPA.[342] Referencing *Castle*,[343] Judge Wu commented that the FCPA's legislative policy meant to keep foreign officials unpunished, and like a conspiracy charge against a foreign official brought under the FCPA (barred under *Castle*), the prosecutors could not circumvent the FCPA's exclusions using the MLCA while targeting essentially the same conduct.[344] Specifically, Judge Wu claimed that the DOJ was using money laundering to get around charging bribery in violation of the *Gebardi* principal.[345] Articulated by the court in *Castle*, the *Gebardi* principle states that where Congress chooses to exclude a class of individuals from liability under a statute, 'the Executive [may not] override the Congressional intent not to prosecute' that party by charging it with conspiring to violate a statute that it could not directly violate.[346] In response, the DOJ argued that the charge was not based on bribery, but a 'misuse of [the] U. S. financial system. '[347] The Americans who received funds for tourism services from the Thai tourism authority had wired a portion of the funds to U.S. banks and then to Siriwan through banks in Singapore, Isle of Jersey, and the UK.[348]

In March 2013, Judge Wu held another hearing to dismiss the DOJ's case.[349] This time, Judge Wu focused on the violations of Thai law as the underlying unlawful activity.[350] Notably, Judge Wu was hesitant to decide the 'ins and outs' of Thai law.[351] Judge Wu also argued that the penalties for violating the MLCA exceeded those for the FCPA, and that Congress was therefore unlikely to allow foreign officials to be prosecuted under the MLCA while exempting them from the FCPA.[352] Unfortunately. Judge Wu never had a chance to rule on the government's novel legal theory. First, the

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[341] Siriwan indictment, (2007), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/01-28-09siriwan-indictment.pdf; See 1956(c)(7)(B) (including "an offense against a foreign nation involving (iv) bribery of a public official" in the statutory definition of "specified unlawful activity").

[342] Miwa Shoda & Andrew G. Sullivan, *Attacking Corruption at its Source: the DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L. L.J. 1, 3 (2015).

[343] The Castle court decided determined that Congress purposefully chose to exempt foreign officials from prosecution under the FCPA. *Castle*, 925 F.2d 831, 833.

[344] Shoda, *supra* note 17.

[345] *Id.*

[346] *Castle*, 925 F.2d at 833.

[347] Shoda, *supra* note 17, at 2.

[348] Siriwan indictment, *supra* note 341.

[349] Mike Dearington, *From Siriwan to Gonzalez: Why the DOJ Altered the Way It Charges Alleged Corrupt Foreign Officials*, FCPA PROFESSOR (August 26, 2013), http://fcpaprofessor.com/from-siriwan-to-gonzalez-why-the-doj-altered-the-way-it-charges-alleged-corrupt-foreign-officials/.

[350] Shoda, *supra* note 17.

[351] *Id.*

[352] *Id.*

prosecution's case was stalled because they could not extradite Siriwan.[353] Then, Thailand instated a criminal case against Siriwan at home,[354] and Judge Wu subsequently stayed the case.[355] Combined with the prosecution in Thailand and the difficulties in extradition, it is likely that the DOJ will not be able to test the reach of the money laundering statutes through *Siriwan.*

Siriwan thus poses challenges related to extradition, foreign law, and the perceived overreach of criminal actions seeking to replicate the force of FCPA. Other judges have balanced the policies underlying the FCPA and the MLCA differently.[356] In *U.S. v. Bodmer*, a case the prosecution referenced in *Siriwan,*[357] the court held that the government's claim that defendant Bodmer allegedly conspired to violate section 1956(a)(2) based on corruption could go forward, even though the district judge dismissed the FCPA count on jurisdictional grounds.[358] Judge Shira Scheindlin warned against dismissing money laundering cases brought under FCPA predicate offenses, as foreign officials exempted from the FCPA could avoid liability even if part of their conduct occurred in the United States, and allowing such conduct would 'contravene Congress's clearly articulated intention to include foreigners within the scope of the money laundering statute.'[359] Judge Scheindlin added that the text of the MLCA penalizes the 'transportation of monetary instruments in promotion of unlawful activity, not the underlying unlawful activity.'[360] In her ruling, Judge Scheindlin relied on section 1956(f) which explicitly refers to extraterritorial jurisdiction over non-U.S. citizens.[361] The *Bodmer* court also noted in a footnote that *Gebardi* had never been applied to dismiss a charge for conspiracy to launder money.[362] Tackling *Bodner.* Judge Wu distinguished *Bodner* on the grounds that the defendant in *Bodner* was not a foreign official.[363]

U.S. v Duperval provides a more positive outlook for the use of money laundering statutes to prosecute corruption barred by the FCPA's jurisdictional limitations.[364] *In Duperval*, two American telecommunications companies paid $500,000 to two companies for what the parties claimed

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[353] Samuel Rubenfeld, *Siriwan Case Hits Snag Over Extradition*, WALL ST. J. (Nov. 19, 2012), http://blogs.wsj.com/corruption-currents/2012/11/19/siriwan-case-hits-snag-over-extradition/.http://www.scribd.com/doc/248122744/U-S-v-Siriwan-Status-Report.

[354] Chinnawat Thongpakdee, *Thai Authorities Announce Siriwan Prosecution*, LEXOLOGY (Nov. 20, 2014), http://www.lexology.com/library/detail.aspx?g=843d8d97-7b27-424c-97b7-bb7a91e7f3eb.

[355] Julia Filip, *Thai Official's Forfeiture Action Stalled in D.C.*, COURTHOUSE NEWS SERVICE (Apr. 10, 2015), http://www.courthousenews.com/2015/04/10/thai-officials-forfeiture-action-stalled-in-d-c.htm.

[356] United States v. Bodmer, 342 F.Supp.2d 176, 191 (S.D.N.Y. 2004); United States v. Duperval, 777 F.3d 1324, 1329, 1331, 1338 (11th Cir. 2015), *cert denied*, 136 S. Ct. 859, 193 L. Ed. 2d 757 (2016).

[357] Shoda *supra* note 17.

[358] *Bodmer*, 342 F.Supp.2d at 190-91.

[359] *Id.* at 191.

[360] *Id.*

[361] *Id.*

[362] *Id.* at n.15.

[363] Shoda, *supra* note 17.

[364] *Duperval*, 777 F.3d at 1329, 1331, 1338.

were consulting services.[365] The bribes were hidden through a series of payments to a shell company established by Jean Rene Duperval, the director of foreign relations for one of the companies.[366] Six defendants were convicted of FCPA-related charges related to the scheme.[367] Like in *Siriwan*, the DOJ could not prosecute Duperval under the FCPA because Duperval was a foreign official.[368] Instead, the DOJ argued that Duperval violated the MLCA.[369] In doing so, the DOJ used evidence from the successful FCPA convictions of defendants involved in the scheme[370]—charging the same underlying unlawful activity that so concerned Judge Wu in *Siriwan*.[371] The indictment alleged that Duperval's transactions involved the proceeds of FCPA violations.[372] Though Duperval never argued that the FCPA charges contravened congressional intent to shield foreign officials under the FCPA, Duperval was sentenced to nine years in prison.[373] Assistant Attorney General Breuer seemed to forecast the DOJ's growing use of money laundering proseuctions to reach officials outside the FCPA's jurisdiction, commenting that '[j]ust as we prosecute corrupt business people under the FCPA, we will hold accountable foreign officials when they seek to launder the proceeds of that bribery through the U.S. financial system.'[374] Duperval had the distinction of being the first foreign official convicted at trial for money laundering based on an underlying FCPA bribery scheme.[375] In addition to *Duperval*, the DOJ has successfully reached three other foreign officials using the MLCA and an underlying FCPA offense.[376] However, in these cases, the court never addressed the 'intent' argument that the defendants brought up in *Siriwan*.[377]

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[365] DEPT. OF JUSTICE, *Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes*, (May 21, 2012), https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes.

[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] DEPT. OF JUSTICE, *supra* note 365.

[371] *Judge Mulls Wider Ban on Prosecution of Briber Takers supra,* note 334.

[372] United States v. Duperval, 777 F.3d 1324, 1329 (11th Cir. 2015), cert. denied, 136 S. Ct. 859, 193 L. Ed. 2d 757 (2016).

[373] *Id.*

[374] U.S. Dep't. of Justice, *Former Haitian Government Official Sentenced to Prison For His Role In Money Laundering Conspiracy Related to Foreign Bribery Scheme,* DOJ (Jun. 2, 2010), https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes.

[375] Charles Duross et al., *Conviction of First Foreign Official at Trial for Money Laundering based on Underlying FCPA Bribery Scheme Upheld*, MORRISON FOERSTER (Feb. 18, 2015), http://www.mofo.com/~/media/Files/ClientAlert/2015/02/150217ConvictionMoneyLaundering.pdf.

[376] U.S. ATTORNEY'S OFFICE OF THE SOUTHERN DIST. OF N.Y, TWO U.S. BROKER-DEALER EMPLOYEES AND VENEZUELAN GOVERNMENT OFFICIAL CHARGED IN MANHATTAN FEDERAL COURT FOR MASSIVE INTERNATIONAL BRIBERY SCHEME (May 7, 2013), http://www.justice.gov/usao/nys/pressreleases/May13/ClarkeetalComplaintPR.php (detailing the guilty plea by Venezuelan official Maria de los Angeles Gonzalez de Hernandez); U.S. DEP'T. OF JUSTICE, FLORIDA TELECOMMUNICATIONS COMPANY, TWO EXECUTIVES, AN INTERMEDIARY AND TWO FORMER HAITIAN GOVERNMENT OFFICIALS INDICTED FOR THEIR ALLEGED PARTICIPATION IN FOREIGN BRIBERY SCHEME (July 13, 2011), http://www.justice.gov/opa/pr/florida-telecommunications-company-two-

E. Judge Wu's Hesitation in Siriwan

Looking forward, one possibility is that courts may accept MLCA prosecutions based on underlying FCPA violations, the latter of which the defendant is not charged and convicted on, as an established norm given *Duperval*. However, the 'intent' argument from *Siriwan* could be raised again in prosecutions of foreign officials, and Duperval never raised the argument at trial or appeal. Thus, Judge Wu's hesitation deserves careful evaluation. There are three thrusts to Judge Wu's argument against MCLA prosecutions based on underlying FCPA violations: (1) that an MLCA charge with an underlying FCPA violation against a foreign official is in tension with the principles set by *Gebardi* (the 'intent' argument), (2) that Congress could not have intended a greater punishment from the MLCA while exempting them from the FPCA, and (3), the difficulties involved for U.S. judges when interpreting foreign law.

F. The 'Intent' Argument Misapplies Gebardi

Judge Wu's first argument relies on an unnecessarily broad reading of *Gebardi*.[378] In *Gebardi*, the government sought to prosecute a woman who agreed to be transported by her lover across state lines through a charge of conspiracy to violate the Mann Act.[379] The Mann Act prohibited transportation of women across state lines for immoral purposes, but did not criminalize the conduct of the woman who was transported.[380] The Supreme Court dismissed the conspiracy charge, arguing that Congress had specifically exempted the woman from the Mann Act, and given Congress's desire to leave women unpunished under the Act, a conspiracy charge based on the same act couldn't go forward.[381] *Castle*'s articulation of *Gebardi* is the lead case in the FCPA space. Recently in *U.S. v. Hoskins*, U.S. District Court Judge Janet Arterton, also referencing *Gebardi*, dismissed a FCPA conspiracy charge against Lawrence Hoskins, a British national and the former vice president of the Asia region of a French firm, reasoning that 'Congress did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability under the FCPA'[382]

executives-intermediary-and-two-former-haitian (press release reporting on the guilty plea by Robert Antoine and Patrick Joseph, directors of Haiti's state-owned telecommunications company).

[377] Mike Shoda & Andrew G. Sullivan, *Attacking Corruption at its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L L. J. 4 (2015), https://jenner.com/system/assets/publications/14373/original/Shoda_Sullivan_California_Int_Law_Journal.pdf?1440539681.

[378] *See Judge Mulls Wider Ban on Prosecution of Briber Takers supra* note 334 (showing Judge Wu's hesitation for prosecuting officials through other means).

[379] Gebardi v. United States., 287 U.S. 112, 116 (1932).

[380] *Id.* at 122.

[381] *Id.*

[382] United States v. Hoskins, 123 F.Supp.3d 316, 323 (D. Conn. 2015)

The bottom line is that the framework of the MLCA distinguishes the statute from a mere conspiracy (or aiding and abetting) charge. Money laundering is a completely separate transaction from the specified unlawful activity. The MLCA was intended by Congress to boast a broad jurisdictional reach to place a tourniquet on the lifeblood of organized and systemic crime: concealing the profits which motivated the crime itself.[383]

Secondly, the Supreme Court has already addressed Judge Wu's concern with MLCA sentencing disparities. In *U.S. v. Santos*, the defendant was convicted of running an illegal gambling business and promotional money laundering under section 1956.[384] Although the key issue before the court was definitional (whether the word 'proceeds' designated profits or receipts), a tangential issue that arose before the Court was the sentencing disparity between operating a gambling business (five years maximum imprisonment) and money laundering (twenty year max). [385]Justice Scalia, writing for the plurality, pointed out that a 'rational Congress could surely have decided that the risk of leveraging one criminal activity into the next poses a greater threat to society than the mere payment of crime-related expenses and justifies the money-laundering statute's harsh penalties.'[386] Thus, the Court presumptively approved of the sentencing disparities which arose from the money laundering charge. Sentencing disparities arising from the MLCA reflect Congress's concern with the wellspring for continued criminal activity money laundering actualizes. Additionally, those sentencing disparities are present in many other MLCA prosecutions. The U.S. Sentencing Commission working group actually examined the disparity between sentences that arose from money laundering convictions versus the sentences provided from the specified unlawful activity, and sent Congress amendments to the MLCA to harmonize sentencing practices.[387] Congress passed legislation, signed by then President Clinton, to disallow the amendments to the MLCA.[388]

G. Judges Are Increasingly Forced to Evaluate Foreign Law

The second underlying unlawful activity from Siriwan, violations of foreign law, would require district court judges to make judgements on potentially complex questions of foreign law. If the hesitation expressed by

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[383] Senator D'Amato, a chief sponsor of the Senate Bill, posited: "Money laundering permits the drug traffickers to evade taxes and to conduct their operations and finance their drug networks behind a veil of secrecy. It allows them to buy more drugs for resale, and to acquire the planes, boats, and front corporations they use to smuggle drugs into the United States." *Drug Money Laundering: Hearing Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 99th Cong., 1st Sess. 7 (1985) (statement of Senator Al D'Amato).

[384] United States v. Santos, 553 U.S. 507, 509 (2008).

[385] *Id.* at 530.

[386] United States v. Santos, 553 U.S. at 515.

[387] MONEY LAUNDERING WORKING GROUP, SUMMARY OF FINDINGS, UNITED STATES SENTENCING COMMISSION (1995), http://www.ussc.gov/research-and-publications/research-projects-and-surveys/miscellaneous/summary-findings.

[388] *Id.*

Judge Wu, a former federal prosecutor, serves as an adequate barometer, then placing violations of foreign law under the 'offense against a foreign nation' theory of unlawful activity will continue to be met with resistance. However, Judge Wu's hesitation shouldn't preclude future MLCA violations under the foreign law offense underlying criminal activity. Federal courts are capable of applying foreign law and routinely apply the law of other sovereigns. Federal courts have applied foreign law for over a century.[389] Applying foreign law has become even more commonplace with the expansion of global commerce. For example, private parties in international commerce regularly insert choice-of-law clauses into their contracts, choosing the application of the law of sovereigns other than the U.S.[390] There is obviously a clear difference between applying foreign law in MCLA prosecution violation for purposes of the specified unlawful activity versus the use of foreign law as precedent.

Granted, applications of foreign law may be difficult. But outweighing this concern, the MLCA represents a *congressional determination* that individuals using the U.S. financial system to conceal the illicit origins of the money should be punished. Criminal activity in an increasingly connected global financial and informational network already requires the DOJ to cooperate with foreign partners, understand foreign law. and navigate foreign procedure.[391] Avoiding the analysis of a statutory claim because of the potential difficulties of foreign law, law which becomes increasingly harmonized due to global corruption and bribery standards (for example, the U.S.'s 1998 compliance with the OECD Anti-Bribery Convention) cuts against congressional intent.

H. Asset Forfeiture: A Powerful Complement to the MLCA and the Fight Against Corruption

Alongside, the MLCA, asset forfeiture provides additional firepower for U.S. prosecutors. Property involved in money laundering is subject to civil forfeiture, and criminal forfeiture is statutorily required under section 1956 and 1957 actions.[392] A criminal case involving forfeiture is bifurcated into two trials: the guilt phase and the forfeiture phase.[393] In the forfeiture phase, the sole issue for the jury is whether the prosecution has established the required nexus between the property and the offense for which the defendant

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[389] *See generally* Nashua Sav. Bank v. Anglo-Am. Land, Mortg. & Agency Co., 189 U.S. 221, 227–29 (1903) (discussing methods of proving foreign law in U.S. courts); Ennis v. Smith, 55 U.S. 400, 426 (1852) (accepting French Civil Code into evidence); Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp. 161 F.3d 314, 319 (5th Cir. 1998) (weighing expert testimony and internal research to decide corporate status under Chinese law).

[390] *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS 5 (2007), http://www.hcch.net/upload/wop/genaff_pd22a2007e.pdf

[391] Assistant Attorney Gen. Remarks, *supra* note 322.

[392] 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1) (2006).

[393] Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in A Criminal Case*, 32 AM. J. CRIM. L. 55, 88 (2004).

has been found guilty.[394] In the case of civil in rem forfeiture no criminal conviction is required, and the prosecutor must establish a lower, civil burden of proof.[395] Civil forfeiture also allows immediate possession pending the resolution of the forfeiture action.[396] Asset forfeiture in the money laundering context has been criticized as aggressive and burdensome.[397] Still, the U.S. has used asset forfeiture alongside money laundering and FCPA claims in high profile prosecutions, reaching the assets of foreign officials who would otherwise escape the FCPA's jurisdiction.

The Department of Justice Kleptocracy Asset Recovery Initiative (KARI) forms the ideal complement to the MLCA framework. Intended to complement enforcement of the FCPA, KARI is led by the Money Laundering Section of the DOJ.[398] A conviction for money laundering, without the threat of underlying seizure of assets, relies on extradition for its punitive force.[399] Another avenue is to use civil and criminal statutes to seize the assets of corruption officials. Aimed at kleptocrats who are largely immune from U.S. prosecution, the goal of DOJ's KARI is to identify the proceeds of official corruption, seize them, and use the seized assets to repay the citizens to which they are owed.[400]

Using civil forfeiture statutes, the DOJ has seized $120 million from kleptocrats.[401] However, even though the assets the DOJ is seeking to seize are located within the U.S. and its territories, the DOJ has had limited success relative to the amount of assets it has targeted. In fact, only 8% of what the DOJ has sought has been taken into federal possession.[402] A number of factors influence this recovery rate. First are the evidentiary difficulties inherent in foreign prosecutions: although the assets the DOJ is looking to seize are located domestically, showing that the assets are related

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[394] *Id.* At this stage it does not matter whether the property really belongs to the defendant or to the third party. *Id.*

[395] DEE R. EDGEWORTH, ASSET FORFEITURE, PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 20 (ABA Criminal Justice Section, 2d ed. 2008). Civil in personam actions are brought against a person, while in rem actions are brought against property rather than the property owner based on the legal fiction that the property is 'guilty.' *Id.* at 2. 218 U.S.C. § 545 provides the only federal civil in personam provision. *Id.* at 21.

[396] *Id.* at 20.

[397] Forfeiture in a civil proceeding can be accomplished prior to the proceedings culmination. *Id.*

[398] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL LORETTA E. LYNCH ANNOUNCES RETURN OF FORFEITED PUBLIC CORRUPTION ASSETS TO KOREAN MINISTER OF JUSTICE KIM HYUN-WOONG (Nov. 9, 2015), https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-announces-return-forfeited-public-corruption-assets-korean.

[399] A conviction can be obtained in abstentia, and many courts have ruled that an in abstentia conviction conclusively establishes probable cause for the purposes of extradition. Roberto Iraola, *Foreign Extradition and In Absentia Convictions*, 39 SETON HALL L. REV. 843, 850 (2009). A conviction gained in abstentia could also serve as the basis for criminal forfeiture.

[400] Steven A. Meyerowtiz, *Kleptocracy, and the Feds' Asset Recovery Initiative*, LEXISNEXIS LEGAL NEWSROOM (May 27, 2011), https://www.lexisnexis.com/legalnewsroom/financial-fraud-law/b/blog/archive/2014/01/06/kleptocracy-and-the-feds-asset-recovery-initiative.aspx?Redirected=true.

[401] Leslie Wayne, *Wanted by U.S. The Stolen Millions of Despots and Crooked Elites*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/17/business/wanted-by-the-us-the-stolen-millions-of-despots-and-crooked-elites.html?_r=0.

[402] *Id.*

to criminal acts in a foreign country involve people and acts in foreign countries.[403] Second, given the political power of kleptocrats, it is also difficult to convince witnesses with legitimate concerns related to retaliation to testify.[404] Finally. the assets are often hidden in a maze of shell corporations, or quickly withdrawn to sovereign territory in violation of U.S. court orders.[405] Global asset recovery initiatives are also performing poorly.[406] The Stolen Asset Recovery Initiative, a World Bank and UN anti-money-laundering effort estimates that only about $5 billion of the $20–40 billion lost to developing countries annually through corruption has been recovered in the last 15 years.[407]

Still, KARI represents a legitimate and important national interest. Noting the demand-side limitations of the FCPA, Special Agent George McEachern, Head of the International Corruption Unit at the FBI, argues that KARI gives prosecutors greater control over the demand-side of the bribe, and investigations into the demand-side sphere may lead to investigations in the supply-side sphere.[408]

I. Success Does Not Require Extradition

Moreover, the fact that Thailand instated a prosecution against Siriwan at home should be considered a success. Many countries with anti-bribery statutes fail to enforce them energetically. perpetuating a culture of corruption that promotes externalities beyond their borders. Thus, whether motivated by concerns of sovereignty, the incentives of rival political actors, or national embarrassment, Thailand's decision is exactly what the U.S. should want in the global fight against corruption: sovereigns that actually prosecute corruption in domestic courts. Furthermore, a criminal conviction can still lead to the seizure of assets gained through the proceeds of bribery. Whether the sovereign is pressured into complying with a growing global consensus towards stopping bribery or the benefits of the laundering activity are seized, the MLCA/FCPA framework offers more than just the threat of potential jail time through the extradition process.

VII. More Compelling Than the Moral Argument: A Strong Federal Interest

A potent criticism still remains: what federal interest underlies the use of the MLCA framework to attack foreign corruption? First, is the jurisdictional element. If money is flowing through U.S. banks, U.S. courts have jurisdiction under the MLCA. By the bare text of the statute,[409]

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[403] *Id.*

[404] *Id.* In one case against the scion of the ruling family from Equatorial Guinea, Teodoro Nguema Obiang Mangue, the prosecution's main witness remained "in an "insect-infested" prison cell subject to "torture including beating and flogging." *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.*

[408] FED. BUREAU OF INVESTIGATION, FBI ESTABLISHES INTERNATIONAL CORRUPTION SQUADS (Mar. 3, 2015), https://www.fbi.gov/news/stories/2015/march/fbi-establishes-international-corruption-squads/fbi-establishes-international-corruption-squads.

[409] 18 U.S.C. § 1956(f).

Congress clearly understood that the MLCA would reach foreigners who use U.S. banks to perpetuate criminal activity and the difficulties involved in securing their convictions. Thus, the concerns of the court in *Castle*, or the 'inherent jurisdictional, enforcement, and diplomatic difficulties' involved in prosecuting foreign officials through the FCPA should not, and do not apply.[410] The MLCA is a standalone statute.

Second, the presence of demand-side corruption undermines the high-level goal of the FCPA and OECD Anti-Corruption Convention: to combat and reduce international corruption. When other nations are willing to transact with kleptocrats and other corrupt foreign officials on terms facilitating corruption, 'progress made over the past thirty years of enforcement will be lost when corrupt officials can simply shift their illicit transactions to other players ready and willing to 'pay to play.'[411] The FCPA's long term goal is to reduce bribery and corruption to create a favorable business environment for American firms while stomaching the short term pains a loss of competitiveness engenders. By actually fighting demand-side corruption through the MLCA, the U.S. can take the teeth out of the argument that FCPA compliance is too demanding when other nations (like China) can push U.S. firms aside. In essence, using the MLCA to fight corruption advances the federal interest behind the FCPA, the ideals of the FPCA, and defends the continued use of the FCPA, a statute which represents manifestation of the Founders' belief in the primacy of the rule of law over the rule of man.[412]

The third arises when we analyze the goals behind DOJ's KARI, one of DOJ's newest asset forfeiture initiatives. The interest articulated by KARI is identical to the one backing the use of the MLCA to attack bribery and corruption. Just because the FCPA cannot reach the actions of foreign officials, it does not mean enforcement efforts should be limited to the supply-side harms of a bribe. Foreign officials are using U.S. banks to perpetuate the harms of corruption, harms that go beyond a bottom line change in public revenue. The interconnectedness of banking institutions is not an excuse for U.S. complacency, but an opportunity to continue its leadership in the foreign corruption space. Corruption and money laundering are intertwined, and tainted money flows through channels that the U.S. facilities and regulates. Anything outside vigorous prosecution of corruption, either through the FCPA or the MLCA, is borderline complicity in the process by which the proceeds of corruption are secured. Thus, the U.S. has a duty to enforce the MLCA to attack corruption even if the FCPA is limited from doing so in certain instances.

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[410] *Castle*, 925 F.2d at 834.
[411] Demas, *supra* note 10, at 348.
[412] The Declaration of Independence para. 2 (U.S. 1776) [hereinafter Declaration]

VIII. Conclusion

Describing the difficulties of DOJ's KARI, Kenneth Hurwitz, senior legal officer with the Open Society Foundations, expressed what many could characterize as at best wistful thinking. Hurwitz conceded that 'no one is confident that' forfeiture 'will work perfectly, but 'that's still better than if the U.S. didn't try. '[413]

Viewing corruption in the African resource space through a rights-sensitive framework, it is clear that the U.S. should try. The fight against corruption is deeply ingrained in the U.S.'s national conscience: the power of the government is derived from the consent of the people, and government should not become destructive towards unalienable rights.[414] The harms of corruption in the African resource space, an area particularly sensitive to bribery, are human rights harms. Under 'no-strings attached,' the U.S.'s most powerful anti-corruption statute is losing its force, hampering the goals Congress envisioned when passing the then idealistic FCPA, the very goals that the world has come to share through expanding anti-corruption treaties and agreements. The use of the MLCA alongside initiatives such as DOJ's KARI are avenues where the high-level policy aims of the FCPA and the OECD Anti-Corruption Convention can be fulfilled. Prosecuting the MCLA where the FCPA falls short balances the concerns of immediacy, efficacy, respect for sovereignty, and the need for a strong federal interest all while satisfying the moral imperative to fight corruption. As this Note has argued, the legal concerns raised in *Siriwan* about the MCLA—an influential hurdle to the MLCA's energetic prosecution—are off-the-mark.

The fight against corruption is truly marred by limitations. Yet corruption's costs to humanity are too high to ignore. Few shoulder its weight more than the innocent citizens suffering perpetually from corruption's effects in the African resource space. The MLCA framework presents a new avenue for federal prosecutors to reach demand-side corruption, and an opportunity to uphold the vision of the Founders, the framers of the FCPA, and those derived generally from a basic concern and respect for human progress and a sense of justice. This Note argues that the U.S. should and must try to fight corruption using the MLCA—if not, the advances the world has made so far towards limiting corruption's debilitating effects will be in vain.

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[413] Wayne, *supra* note 401.
[414] Declaration, *supra* note 412.