

# BARRED FROM BANKRUPTCY: RECENTLY INCARCERATED DEBTORS IN AND OUTSIDE BANKRUPTCY

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## ABSTRACT

Recently incarcerated individuals often have significant amounts of debt, including civil and criminal restitution, child support, taxes, personal loans, and ordinary consumer obligations. However, bankruptcy is often unavailable or unhelpful to these individuals. Many of the debts common among post-incarcerated debtors are nondischargeable in bankruptcy, and the problem is compounded by lack of affordable legal services and an economic culture of interpersonal lending that discourages formal discharge of debt. In response, a number of states have created ways of reducing or discharging such debts at sentencing, upon release from prison, or as part of the collections process. These procedures call into question the nondischargeability of debts common to the post-incarcerated population and suggest that bankruptcy should be made more widely available to recently incarcerated debtors.

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## INTRODUCTION

Many studies have addressed the economic plight of persons with criminal records and their immediate families, focusing primarily on income, employment, education, health, and other forward-looking measures of well-being. Although debt is widespread in this demographic, only a few studies discuss the legal and public policy treatment of the post-incarcerated with respect to debt and bankruptcy.<sup>1</sup> In this article, I examine the U.S. Bankruptcy Code's unfavorable treatment of debts common to the post-incarcerated population, as well as other factors reducing that population's access to bankruptcy. I then discuss potential modifications to the Bankruptcy Code as well as to legal and administrative methods of addressing unpaid debts common to recently

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1. REBEKAH DILLER, JUDITH GREENE & MICHELLE JACOBS, BRENNAN CTR. FOR JUSTICE, MARYLAND'S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY (2009), available at [http://brennan.3cdn.net/fbee4fbc0086ec8804\\_4tm6bp60a.pdf](http://brennan.3cdn.net/fbee4fbc0086ec8804_4tm6bp60a.pdf); RACHEL L. MACLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS (2007), available at [http://reentrypolicy.org/jcpublications/repaying\\_debts\\_full\\_report;file](http://reentrypolicy.org/jcpublications/repaying_debts_full_report;file).

incarcerated individuals. These strategies exist outside bankruptcy court, but apply core ideas of the Bankruptcy Code, demonstrating that in many jurisdictions, bankruptcy-like discharge of debt is considered appropriate even for crime-related debts. This raises the question whether this discharge would be better accomplished through the existing bankruptcy courts, and what changes to bankruptcy law and to the delivery of legal services would facilitate these debtors' use of the bankruptcy system.

Part I of this article introduces the topic by discussing the debts common among the low-income, post-incarcerated population. Bankruptcy is a relatively inaccessible means of economic rehabilitation among this demographic. Incarcerated or indigent debtors may be unable to complete the duties the bankruptcy court requires, and important categories of debt are not dischargeable even if filing is possible. However, the relief provided by filing bankruptcy—an automatic stay of debt collections, discharge of even a small amount of debt, and coordinated, supervised interaction with creditors—may still make filing worthwhile. The appropriateness of bankruptcy for ex-convicts and their families depends on the amount and type of their assets and debts, and on whether they can overcome class- and crime-related barriers to bankruptcy.

Part II adds to the economic picture, briefly describing the post-incarcerated population's income, education, employment, family, and health status, and the financial pressures experienced upon reentry. In Part III, I discuss problems with the Bankruptcy Code's treatment of interpersonal debt. I detail the Code's failure to recognize the importance of informal borrowing and lending among the very poor as an important form of insurance and social capital. I also explain the problems these debtors may experience within their economic communities as a result of filing bankruptcy.

Finally, in Part IV, I describe sentencing judges' discretion when imposing financial penalties, government agencies' ability to write off debt owed to the state, and other alternative methods of dealing with debt outside the bankruptcy system. These methods incorporate core bankruptcy concepts: hierarchies of creditors, which place dependents and crime victims above ordinary transactional creditors; realism about debtors' financial prospects; a focus on returning debtors to financial productivity; and discharge as an economically efficient outcome for creditors and the public. These alternative methods of dealing with debt outside bankruptcy can be inconsistent and unpredictable, and in some ways they duplicate the bankruptcy courts' function. However, these methods may be preferable as a form of discharge that is simpler than traditional bankruptcy. Ultimately, I argue that the government should refrain from creating certain types of debt that are unlikely to be repaid and should more attentively assess the debtor's economic circumstances at

sentencing or release to create more realistic criminal financial penalties. I also argue that bankruptcy law should offer a simpler form of discharge for very modest estates, especially those in which debt owed to the government predominates. The political system may demand that certain debts, especially restitution, be completely nondischargeable. However, that does not necessarily imply political will to exclude post-incarcerated debtors from the bankruptcy system altogether. The existence of the bankruptcy-like procedures described in Part IV demonstrates that judges, governments, and politics do sometimes consider discharge of otherwise nondischargeable debt to be useful and appropriate for the post-incarcerated population.

## I.

### DEBTS AND LEGAL OBSTACLES TO FILING BANKRUPTCY

In principle, bankruptcy offers the debtor an opportunity to discharge or restructure almost all of her debt. A variety of legal obstacles, however, discourage low-income, post-incarcerated debtors from filing bankruptcy. Primary obstacles are the Bankruptcy Code's requirements for debtor participation and the nondischargeability of certain types of debt. However, filing bankruptcy might nevertheless be desirable for low-income, post-incarcerated debtors to discharge debt and stop collections efforts, and to obtain the opportunity to settle or challenge contracts underlying the debts.

#### A. *Bankruptcy Basics*

A brief overview of the bankruptcy process will clarify the arguments to follow. Filing bankruptcy permits a debtor to discharge most types of debt in one of two ways: in Chapter 7, by committing presently held money and other property to repayment;<sup>2</sup> or in Chapter 13, by committing three to five years of future disposable income.<sup>3</sup> Filing bankruptcy triggers an automatic stay preventing most attempts to collect debt.<sup>4</sup> The debtor must disclose all debts, income, expenses, and assets to the bankruptcy court,<sup>5</sup> and creditors have the opportunity to file and contest claims.<sup>6</sup> The bankruptcy trustee, an office created by the court system to manage and ensure the integrity of the bankruptcy process, oversees each case. The bankruptcy trustee fulfills a number of important responsibilities and can challenge debtor and creditor claims as well as move for dismissal of the

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2. 11 U.S.C. § 541 (2006).

3. See 11 U.S.C. § 726 (2006); 11 U.S.C.A. § 1322(a) (West 2009).

4. 11 U.S.C. § 362(a) (2006). For collection that is not stayed, see *infra* notes 112–18 and accompanying text.

5. 11 U.S.C.A. § 521(a) (West 2009).

6. 11 U.S.C. §§ 501–502 (2006).

bankruptcy petition.<sup>7</sup>

In Chapter 7, some of the debtor's property is exempt from inclusion in the bankruptcy estate, meaning that it is not used to pay debts and the debtor may keep it.<sup>8</sup> Exemptions vary by state, but typically include tools of the debtor's trade, medical necessities, one motor vehicle, limited personal items and household furnishings, and a small amount of liquid assets. Some states allow a homestead exemption for the debtor's residence.<sup>9</sup> The debtor turns over the remainder of her property to the trustee to form the bankruptcy estate; this property is ultimately liquidated and paid to creditors according to statutory priorities.<sup>10</sup> In Chapter 13, debtors with sufficient income may keep their property and a certain amount of monthly income deemed minimally necessary, but they must turn over their disposable income to the court, which pays it out to creditors.<sup>11</sup> At the end of the three- to five-year term, the remaining debt is discharged.<sup>12</sup> Because the Bankruptcy Code prioritizes certain creditors above others, low-priority creditors may receive nothing or a very small percentage of what the debtor initially owed. After bankruptcy, the debtor may voluntarily pay debts that were discharged, but that decision must be truly voluntary: creditors may not attempt to collect debt that has been discharged.<sup>13</sup> If the debtor fails to provide the required information and comply with bankruptcy rules throughout the process, or fails to surrender certain property or income to the court, the court can dismiss the petition for bankruptcy relief, or even fine or imprison the debtor.<sup>14</sup>

Certain types of debt—primarily crime-related debt, but also tort and student loan debts—are not dischargeable at all.<sup>15</sup> In general, debts most likely to be nondischargeable are debts to involuntary creditors who did not choose to lend to the debtor, such as the debtor's dependents, and

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7. 11 U.S.C. §§ 307, 323 (2006).

8. 11 U.S.C.A. § 522 (West 2009).

9. States may offer debtors the set of federal exemptions or the state's own set of exemptions plus a few federal additions. § 522(b)(2). Federal exemptions include \$20,200 in property used as a residence, \$3225 of value in one motor vehicle, \$10,775 in household goods, the right to receive social security and veterans' benefits, and other items such as jewelry. § 522(d); Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(b) of the Code, 72 Fed. Reg. 7082 (Judicial Conference of the U.S. Feb. 14, 2007). The Judicial Conference of the United States is tasked to update and publish the dollar amounts in § 522(d) in the *Federal Register* once every three years. 11 U.S.C.A. § 104(b) (West 2009).

10. 11 U.S.C.A. § 507 (West 2009); 11 U.S.C. § 726 (2006).

11. Chapter 13 defines "disposable income" by reference to the state median family income and IRS materials. 11 U.S.C.A. § 1322(a)(4), (d) (West 2009). See 11 U.S.C.A. § 1325(a)–(b) (West 2009).

12. 11 U.S.C. §§ 727, 1328 (2006).

13. This option is known as "reaffirmation." See 11 U.S.C. § 524(a), (c) (2006).

14. 11 U.S.C. § 521(i) (2006); 18 U.S.C. § 152 (2006).

15. 11 U.S.C.A. § 523(a) (West 2009); 11 U.S.C. § 1328(a).

debts designed to punish the debtor.<sup>16</sup> Debtors with significant nondischargeable debt may find bankruptcy less worthwhile.

The benefits of bankruptcy are most obvious for debtors, who are relieved of debt and able to make a “fresh start,” but bankruptcy is also advantageous for creditors who would otherwise expend resources to compete with one another for the debtor’s limited funds. Bankruptcy also allows all contracting parties to better predict financial outcomes in the event of insolvency. Discharge of debt, of course, raises moral and public policy tensions, especially for involuntary creditors who did not choose to become financially involved with the debtor, such as domestic support recipients and those to whom the debtor owes restitution for crimes or torts. These types of debt are singled out for nondischargeability or preferential treatment.<sup>17</sup> Still, bankruptcy can leave these and many other creditors with much less than the debtor owed. More generally, the idea of discharging debt cuts against cultural ideas such as the validity of contracts and the norm of reciprocity. Even in the absence of a firm agreement, the norm of reciprocity encourages people to treat others fairly in order to maintain mutually beneficial relationships. Recognizing that problem, one scholar has described the bankruptcy process as public penance via public disclosure of the debtor’s personal financial information, financial austerity, and submission to court authority, which serves as a performative substitute for payment and acknowledges the legitimacy of the creditors’ interests.<sup>18</sup>

This article acknowledges those tensions and does not argue for an outcome harmful to vulnerable creditors, or for the abandonment of financial restitution for crimes and torts or financial responsibilities such as child support. However, as I will discuss, the current regime of nondischargeability for many types of debt does not necessarily serve creditors’ interests. Bankruptcy’s great economic virtue is that it avoids the collective action problem among creditors who would otherwise compete against one another for the debtor’s funds; it instead benefits creditors by allowing them to recover or write off debt in an orderly, predictable, and cost-effective manner. Facilitating bankruptcy may

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16. See generally § 523(a) (listing types of nondischargeable debt). In contrast, creditors holding contract debts had, at least in theory, the opportunity to decide whether to become creditors, assuming the risk of nonpayment or discharge.

17. 11 U.S.C.A. § 507(a)(1)(A)–(B) (West 2009) (granting domestic support obligations priority); § 523(a)(5)–(6).

18. See, e.g., Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124 (2003) [hereinafter Korobkin, *Bankruptcy Law*] (describing the performative underpinnings of bankruptcy law); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991) (providing a “value based account” for bankruptcy law). See also Kristin Brander Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women*, 71 BROOKLYN L. REV. 1181, 1200–01 (2006) (favorably discussing Korobkin’s performative model in *Bankruptcy Law*).

especially benefit creditors favored by public policy, most commonly restitution and domestic support creditors, because their debts are nondischargeable or are required to be paid first.<sup>19</sup> Without bankruptcy, these creditors must compete against all other creditors, with only limited government assistance. Discharge of low-priority debts and economic rehabilitation of the debtor may work to these creditors' advantage by removing other competing debts.

*B. Types of Debt Problematic for the Low-Income and Post-incarcerated Population*

The incarcerated and post-incarcerated population is sizeable. In 2008, the Bureau of Justice Statistics (BJS) reported an estimated 2.3 million persons in prison or jail (more than one percent of the U.S. adult population) and an additional 5 million persons on parole or probation.<sup>20</sup> Prisoners anticipate and experience difficulty with debt: in a study of Baltimore releasees, sixty-two percent expected paying off their debts to be "pretty hard" or "very hard,"<sup>21</sup> and a similar Chicago study found that seventy-three percent of releasees had struggled to pay off debt.<sup>22</sup> Even inmates who are paid for in-prison employment make little progress against their debts because wages are low and may be garnished for other debts as well.<sup>23</sup>

Involvement with the criminal justice system can create a variety of debts, most of which are nondischargeable in bankruptcy.<sup>24</sup> Restitution can be awarded for most crimes, and the amount can be substantial. For

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19. § 507(a)(1)(A) (listing priority creditors); § 523(a)(5)–(6) (defining domestic support and restitution debts as nondischargeable). See TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 176–77 (2000) (describing the favored status of alimony and child support obligations).

20. Bureau of Justice Statistics, Key Facts at a Glance: Correctional Populations, <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (last visited Apr. 19, 2010). The Bureau of Justice Statistics is operated by the Office of Justice Programs in the Department of Justice. See Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14 (citing THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA (2008)).

21. CHRISTY VISHER, VERA KACHNOWSKI, NANCY LA VIGNE & JEREMY TRAVIS, *THE URBAN INST., BALTIMORE PRISONERS' EXPERIENCES RETURNING HOME 5* (2004), available at [http://www.urban.org/UploadedPDF/310946\\_BaltimorePrisoners.pdf](http://www.urban.org/UploadedPDF/310946_BaltimorePrisoners.pdf).

22. NANCY G. LA VIGNE, CHRISTY VISHER & JENNIFER CASTRO, *THE URBAN INST., CHICAGO PRISONERS' EXPERIENCES RETURNING HOME 10* (2004), available at <http://www.caction.org/rrt/articles/LAVIGNE-CHICAGO%20PRISONERS.pdf>.

23. See Stephen C. Richards & Richard S. Jones, *Beating the Perpetual Incarceration Machine: Overcoming Structural Impediments to Re-entry*, in *AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION* 201, 214 (Shadd Maruna & Russ Immarigeon eds., 2004) (describing a prisoner who reported that maximum daily pay was two dollars at his penitentiary).

24. See *infra* Part I.C.2(a).

some violent and drug-related crimes, federal restitution may be in the full amount of the victim's losses, and judicial discretion to consider the defendant's economic circumstances is limited.<sup>25</sup> Court costs, fines, and surcharges can total hundreds or even thousands of dollars.<sup>26</sup> Some states garnish inmates' present and future wages or seize their assets to pay for the costs of incarceration,<sup>27</sup> and may also attempt to recoup the costs of prosecution, crime investigation, case processing, and certain legal defense services.<sup>28</sup> Parole fees and fines can quickly accumulate,<sup>29</sup> and debtors may owe the government or private bail bond services for bail bonds,

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25. Wendy Heller, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 225 (2006) ("While convicted defendants are required to provide the court with information about their financial situation, the ultimate orders of restitution are made 'in the full amount of each victim's losses . . . and without consideration of the economic circumstances of the defendant.'" (quoting 18 U.S.C. § 3664(f)(1)(A)) (alteration in original)). The restitution order may require nominal payments if a court finds that the defendant will be unable to pay the full amount of the restitution order in the foreseeable future under any reasonable schedule. 18 U.S.C. § 3664(f)(3)(B) (2006).

26. MACLEAN & THOMPSON, *supra* note 1, at 7, 14. In one example, the total for all thirteen separate fines for a New York DWI conviction was \$8975. However, one court administrator anecdotally reported that only twenty-three percent of fines were collected, *id.* at 14, and that no significant collection efforts were made, *id.* at 7. See CARL REYNOLDS, MARY COWHERD, ANDY BARBEE, TONY FABELO, TED WOOD & JAMIE YOON, COUNCIL OF STATE GOV'TS JUSTICE CTR. & TEX. OFFICE OF COURT ADMIN., A FRAMEWORK TO IMPROVE HOW FINES, FEES, RESTITUTION, AND CHILD SUPPORT ARE ASSESSED AND COLLECTED FROM PEOPLE CONVICTED OF CRIMES 7 (2009) (showing court costs of \$362, through fourteen separate fees, for a typical conviction of possession of a controlled substance), available at <http://www.courts.state.tx.us/oca/debts/pdf/TexasFinancialObligationsInterimReport.pdf>.

27. See, e.g., MO. REV. STAT. § 217.829(5) (2000) ("Prior to release of any offender from imprisonment, and again prior to release from the jurisdiction of the department, the department shall request from the offender an assignment of ten percent of any wages, salary, benefits or payments from any source. Such an assignment shall be valid for the longer period of five years from the date of its execution, or five years from the date that the offender is released from the jurisdiction of the department . . . . The assignment shall secure payment of the total cost of care of the offender . . . ."); TEX. CODE CRIM. PROC. ANN. art. 42.031 (Vernon 2006).

28. Heller, *supra* note 25, at 227–28 (describing the dubious constitutionality of requiring probationers and parolees to repay the cost of their court-appointed counsel); Alan Rosenthal & Marsha Weissman, *Sentencing for Dollars: The Financial Consequences of a Criminal Conviction* 26–28 (Feb. 2007) (unpublished manuscript, on file with the Center for Community Alternatives, Syracuse, N.Y.), available at [http://brennan.3cdn.net/b7abb873e6d529a779\\_u9m6bhqjs.pdf](http://brennan.3cdn.net/b7abb873e6d529a779_u9m6bhqjs.pdf). See, e.g., 18 U.S.C.A. § 3006A(f) (West 2009); MD. CODE ANN., CRIM. PROC. § 16-211 (LexisNexis 2008); R.I. GEN. LAWS § 12-21-20 (2002 & Supp. 2008).

29. DILLER, GREENE & JACOBS, *supra* note 1, at 12 ("The mean amount [of supervision fees] was \$743 and the median was \$560. . . . [I]t is not surprising that nine out of ten people on parole will have failed to pay the full amount of supervision fee debt when they exit the parole system."). When debt amounts are transferred to collection at the end of a parole term, a seventeen percent charge is applied for collection costs. *Id.* at 19. See, e.g., Rosenthal & Weissman, *supra* note 28, at 20–21 (stating that there is a low collection rate, likely due to inability to pay).



associated fees, and collateral.<sup>30</sup> Court-related debt can trigger reincarceration. One Rhode Island study found, “Incarceration for court debt is the most common reason to be put in prison in Rhode Island,” accounting for eighteen percent of all commitments in Rhode Island in 2007.<sup>31</sup> Authors including Justice Scalia have cautioned that financial penalties may be inappropriately imposed or inflated because of the revenue they provide.<sup>32</sup>

Debtors may owe child support to dependents and their caregivers or to the government directly, because recipients of Temporary Assistance for Needy Families (TANF) must sign over the right to receive child support to the state.<sup>33</sup> The state may then attempt to recoup from the child support debtor.<sup>34</sup> One study estimated that thirty-two percent of Ohio inmates had child support obligations, as did seventeen percent of Illinois inmates and sixteen percent of Texas inmates.<sup>35</sup> Studies of Colorado and Massachusetts inmates placed the average total child support debt at release around \$16,000.<sup>36</sup> Another Massachusetts study estimated that inmates accrued an average of \$5000 in unpaid child support while incarcerated,<sup>37</sup> and Massachusetts state prisoners’ total monthly child support obligations averaged \$227.<sup>38</sup> In Maryland, a 2005 study estimated average child support arrears for incarcerated and paroled parents at

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30. See, e.g., *Hickman v. Texas* (*In re Hickman*), 260 F.3d 400 (5th Cir. 2001). For a brief overview of commercial bail bonds, see generally Adam Liptak, *World Spurns Bail for Profit, but It’s a Pillar of U.S. Justice*, N.Y. TIMES, Jan. 29, 2008, at A1.

31. R.I. FAMILY LIFE CTR., COURT DEBT AND RELATED INCARCERATION IN RHODE ISLAND FROM 2005 THROUGH 2007, at 4, 6, 11 (2008), available at <http://opendoorsri.org/sites/default/files/CourtDebt.pdf>.

32. See *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (plurality opinion) (“There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue.”). See also DILLER, GREENE & JACOBS, *supra* note 1, at 5; Rosenthal & Weissman, *supra* note 28, at 28.

33. 42 U.S.C.A. § 608(a)(3) (West 2009).

34. *Id.*; 42 U.S.C. § 657(a), (e) (2006).

35. MACLEAN & THOMPSON, *supra* note 1, at 7.

36. JEREMY TRAVIS, ELIZABETH CINCOTTA MCBRIDE & AMY L. SOLOMON, THE URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 8 (2005) (citing Esther Griswold & Jessica Pearson, *Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies*, 65 CORRECTIONS TODAY 87, 87–90 (2003)), available at [http://www.urban.org/UploadedPDF/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf). Some parents owed more than \$20,000 at release. MACLEAN & THOMPSON, *supra* note 1, at 25 (citing ESTHER GRISWOLD, JESSICA PEARSON & LANAE DAVIS, CTR. FOR POLICY RESEARCH, TESTING A MODIFICATION PROCESS FOR INCARCERATED PARENTS (2001)).

37. TRAVIS, MCBRIDE & SOLOMON, *supra* note 36, at 8.

38. Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES J. 4, 5, 7 (2004).

\$15,933 and \$13,472, respectively.<sup>39</sup> A 2001 Colorado study of incarcerated parents found an average monthly child support payment of \$269.<sup>40</sup> Some states suspend or reduce child support during incarceration, considering incarceration to impose an involuntary inability to pay, but in other states treat crime, and thus incarceration as voluntary.<sup>41</sup> Some jurisdictions allow retroactive modification of child support debt reaching back to the date of incarceration, to reflect the permitted suspension of accruals, or allow the state to settle for less than the face value of the debt.<sup>42</sup> However, not all debtors are aware that modification is possible,<sup>43</sup> nor do they have the resources to pursue it.

Ordinary debt to private creditors is also prevalent in the post-incarcerated population, though few empirical studies are available. Utilities, cellular phones, rent, bounced checks, and overdraft fees can all result in debt. Credit card use and corresponding debt is common among low-income people.<sup>44</sup> Some obtain home and small business loans on the market or through low-income housing and urban redevelopment

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39. DILLER, GREENE & JACOBS, *supra* note 1, at 14 (citing PAMELA C. OVWIGHO, CORRENE SAUNDERS & CATHERINE E. BORN, UNIV. OF MD. SCH. OF SOC. WORK, *THE INTERSECTION OF INCARCERATION AND CHILD SUPPORT: A SNAPSHOT OF MARYLAND'S CASELOAD* (2005)).

40. Pearson, *supra* note 38, at 5, 7 (citing GRISWOLD, PEARSON & DAVIS, *supra* note 36, at 9). The \$269 figure included currently accruing amounts as well as payments due towards previous years' debts.

41. GRISWOLD, PEARSON & DAVIS, *supra* note 36, at 2. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-327(D) (2007 & Supp. 2008) ("Notwithstanding any other law, pursuant to a petition filed pursuant to this section the court may suspend the imposition of future interest that accrues on a judgment for support issued pursuant to this article for the period of time that the petitioner is incarcerated . . ."). *See also* Pearson, *supra* note 38, at 5-6 (noting the debate over whether incarceration constitutes voluntary unemployment).

42. CTR. FOR POLICY RESEARCH FOR THE OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., *WORKING WITH INCARCERATED AND RELEASED PARENTS: LESSONS FROM OCSE GRANTS AND STATE PROGRAMS 34-35* (2006) [hereinafter *LESSONS FROM OCSE GRANTS*] (citing 830 MASS. CODE REGS. 119A.6.2(3)), *available at* [http://www.acf.hhs.gov/programs/cse/pubs/2006/guides/working\\_with\\_incarcerated\\_resource\\_guide.pdf](http://www.acf.hhs.gov/programs/cse/pubs/2006/guides/working_with_incarcerated_resource_guide.pdf). *See, e.g.*, D.C. CODE § 46-204(d)(1) (2009) (permitting filing of a child support modification petition after release).

43. GRISWOLD, PEARSON & DAVIS, *supra* note 36, at 2. There are anecdotal reports of inconsistency in the modifications granted to prisoners. Pearson, *supra* note 38, at 8.

44. DEMOS & CTR. FOR RESPONSIBLE LENDING, *THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA 6-8* (finding that the majority of middle- and low-income households surveyed had credit card debt for over a year and for households with income less than \$35,000, the average credit card debt was \$6504), *available at* [http://www.demos.org/pubs/PSN\\_low.pdf](http://www.demos.org/pubs/PSN_low.pdf); Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach & Kevin B. Moore, Fed. Reserve Bd., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, 95 FED. RES. BULL. A1, A39-A41 tbl.13 (2009) (finding that, in 2007, 25.7% of those in the lowest quintile of income had credit card debt), *available at* <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/scf09.pdf>. *See also* Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 463 (2008).

programs.<sup>45</sup> Informal debts to relatives and associates can also be effectively binding, even if not legally enforceable. Interpersonal lending and borrowing in significant amounts is pervasive in low-income communities but is not always recorded in writing or subject to a set repayment schedule.<sup>46</sup> Ex-convicts may have off-the-books debt incurred before or during incarceration by themselves or their relatives; they may also take on new debt to facilitate reentry into the workplace and community. Interest rates may be high and creditors violent. Gang members may owe their gangs membership dues or fines<sup>47</sup> and non-gang members may owe money to gangs for protection or extortion.<sup>48</sup> As I discuss in Part III, *infra*, the Bankruptcy Code treats many of these debts unfavorably and is ill-equipped to address interpersonal lending and its role in the economic lives of the post-incarcerated population.

### C. Obstacles to Filing Bankruptcy

#### 1. Legal Barriers to Filing

Filing bankruptcy may be impossible during incarceration if the debtor cannot perform the required duties from prison. The Bankruptcy Code does not permit courts to waive the debtor's initial meeting with the trustee and creditors, although some courts will permit a telephone appearance or an appearance by a representative of the debtor.<sup>49</sup> Courts

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45. Mortgages or loans could also pre-date conviction or be initiated in others' names, with the ex-convict added later. According to a small survey of low-income business owners:

Only 42 percent have ever received a bank loan to open or sustain a business; and only 6 percent have ever benefited from a government program intended to aid minority and/or small business owners. A small minority (10 percent) of the current proprietors either have a secure line of credit from a financial institution or feel they have the credit history required to obtain a loan.

SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 121 (2006).

46. *Id.* at 136–38.

47. NAT'L GANG CRIME RESEARCH CTR., *ECONOMICS OF GANG LIFE* 53, 109 (1995), available at <http://www.ngcrc.com/ngcrc/page95ec.htm>; SUDHIR ALLADI VENKATESH, *AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO* 158–59 (paperback ed. 2002); VENKATESH, *supra* note 45, at 140–41, 400 n.34 (describing high interest rates and violent creditors); Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang's Finances*, 115 Q.J. ECON. 755, 767 & n.13 (2000) (noting lawyers' fees as among one gang's miscellaneous expenses).

48. NAT'L GANG CRIME RESEARCH CTR., *supra* note 47, at 78.

49. 11 U.S.C. § 341(d) (2006) (requiring that the trustee orally examine the debtor). Bankruptcy rules incorporate Rule 60 of the Federal Rules of Civil Procedure under which courts may relieve parties from judgments or orders for equitable reasons. FED. R. BANKR. P. 9024. See FED. R. CIV. P. 60. However, courts do not always grant such relief. See *In re Moore*, 309 B.R. 725, 727–28 (Bankr. N.D. Tex. 2002) (“Appearance at a Section 341 meeting is mandatory. It is not waivable.” (quoting *In re Keiser*, 204 B.R. 697, 700 (Bankr. W.D. Tex. 1996))); *In re Michael*, 285 B.R. 553, 558 (Bankr. S.D. Ga. 2002) (finding that

may be unwilling to waive the credit counseling requirement on the basis of incarceration.<sup>50</sup> Even when credit counseling is provided over the telephone or internet, it may pose an obstacle for prisoners who cannot pay for it or have limited telephone and internet access.<sup>51</sup> Similarly, not all courts consider incarceration an excuse for missing deadlines, failing to file motions properly, or similar errors.<sup>52</sup> Despite these obstacles, some incarcerated debtors do manage to file bankruptcy,<sup>53</sup> much may depend on the attitudes of the bankruptcy judge and trustee.

Finally, Chapter 13 discharge may be unavailable to those with recently-acquired or crime-related debt. Courts may only grant discharge if there is “no reasonable cause to believe” that the debtor owes debts for crime, intentional tort, willful or reckless misconduct causing serious injury or death to another in the previous five years, or that any proceeding that may give rise to such a debt is pending.<sup>54</sup> Additionally, the requirement that Chapter 13 debtors have a regular income excludes almost all

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there are no constitutional rights in play and that there is no “absolute right” to technological alternatives to an in-person appearance). *But see In re Del Rio*, No. 401CV65, 2001 U.S. Dist. LEXIS 24971, at \*7 (S.D. Ga. Aug. 15, 2001) (“[T]his Court concludes that low-burden alternatives to a live hearing . . . must be explored before summarily dismissing the petition of an incarcerated bankrupt.”); *Tenn. Dep’t of Corr. v. Farnsworth (In re Farnsworth)*, 283 B.R. 503, 505 (Bankr. W.D. Tenn. 2002) (“As a result of the debtor’s incarceration, he was excused without opposition from attending the statutory meeting of creditors . . .”); *In re Vilt*, 56 B.R. 723, 725 (Bankr. N.D. Ill. 1986) (“[A] more equitable result would be reached by allowing the creditors and trustee to direct interrogatories to the debtor at his place of incarceration . . .”).

50. *See* 11 U.S.C.A. § 109(h)(3)(A) (West 2009) (permitting a waiver of the credit counseling requirement); 11 U.S.C.A. § 521(b)(1) (West 2009) (requiring credit counseling); 11 U.S.C. § 1328(g) (2006) (requiring credit counseling). The debtor must formally request a waiver, stating that the debtor requested, but was unable to obtain, counseling services. § 109(h)(3)(A). The court may waive the requirement because of “incapacity [or] disability,” which the statute limits to mental illness, mental deficiency, or physical impairment. § 109(h)(4). But some courts permit other exceptions. *See In re Gates*, No. 07-25755-B-7, 2007 Bankr. LEXIS 4211, at \*2 (Bankr. E.D. Cal. Dec. 11, 2007) (finding the debtor’s incarceration a disability within the meaning of § 109(h)(4)); *In re Vollmer*, 361 B.R. 811, 814–15 (Bankr. E.D. Va. 2007) (finding that the debtor’s incarceration and extremely limited outside communication privileges were a disability within the meaning of § 109(h)(4)); *In re Petit-Louis*, 344 B.R. 696, 700–01 (Bankr. S.D. Fla. 2006) (upholding waiver of credit counseling requirement for non-English-speaking incarcerated debtor because translation services were not available). *See generally* Laura B. Bartell, *From Debtors’ Prisons to Prisoner Debtors: Credit Counseling for the Incarcerated*, 24 EMORY BANKR. DEV. J. 15 (2008).

51. *In re Walton*, No. 07-41086-293, 2007 Bankr. LEXIS 1139, at \*4 (Bankr. E.D. Mo. Mar. 5, 2007) (waiving credit counseling requirement because credit counseling agency placed the prisoner on hold, consuming his permitted telephone time).

52. *See, e.g., Comm’n Express, Inc. v. Hummer (In re Hummer)*, No. 04-14016, 2006 Bankr. LEXIS 1018, at \*4–5 (Bankr. E.D. Va. Mar. 17, 2006).

53. *See, e.g., Rashid v. Powel (In re Rashid)*, 210 F.3d 201 (3d Cir. 2000); *In re Cox*, No. 07-10787, 2007 Bankr. LEXIS 4162 (Bankr. M.D. Ga. Nov. 29, 2007); *In re Scrubo*, No. 87-02875F, 1994 Bankr. LEXIS 229, at \*10 n.8 (Bankr. E.D. Pa. Feb. 17, 1994).

54. 11 U.S.C.A. § 522(q)(1)(B)(iv) (West 2009); § 1328(h)(2).

unemployed and incarcerated debtors.<sup>55</sup> These limitations prevent much of the post-incarcerated population from filing bankruptcy under Chapter 13 at all. Additionally, Chapter 13's requirement that the bankruptcy petition and plan be filed in "good faith" may disqualify debtors perceived to be evading the financial consequences of their crimes through bankruptcy.<sup>56</sup>

## 2. *Reasons Why Filing Bankruptcy Might Be Undesirable*

### a) *Nondischargeability*

Most debts arising from the commission of a crime are not dischargeable. Depending on the bankruptcy chapter, such debts may include criminal restitution, taxes on illegal activity, civil damages for personal injury from drunk driving, willful and malicious injury to others, larceny, court fees, and many other civil and criminal fines, penalties, and forfeitures.<sup>57</sup>

In Chapter 7, state criminal restitution has long been held nondischargeable under the § 523(a)(7) provision making debt for a "fine, penalty, or forfeiture" nondischargeable.<sup>58</sup> This rule is rooted in the Supreme Court's holding in *Kelly v. Robinson* that restitution is part of a criminal sentence rather than simply a debt to the victim, and that bankruptcy courts, as federal courts, must defer to state criminal courts in this area.<sup>59</sup> Chapter 7 also explicitly forbids discharge of restitution debts

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55. § 109(e) (requiring regular income). *See, e.g., In re Johnson*, 2007 Bankr. LEXIS 3513, at \*5 (Bankr. D.D.C. Oct. 11, 2007) (finding debtor ineligible for Chapter 13 relief for lack of a regular income).

56. *See* 11 U.S.C.A. § 1325(a)(3), (7) (West 2009) (requiring good faith). Good faith is typically determined by the totality of the circumstances. *See, e.g., In re Roberts*, 366 B.R. 200, 202–03 (Bankr. N.D. Ala. 2007). Attempts during Chapter 13 proceedings to discharge types of debt that would be nondischargeable under Chapter 7 may also raise a good faith issue. *See, e.g., In re Kazzaz*, 62 B.R. 308, 312 (Bankr. E.D. Va. 1986). The chapters' different treatments of crime-related debts are discussed in Part I.C.2(a), *infra*.

57. 11 U.S.C.A. § 523(a) (West 2009).

58. § 523(a)(7); *Kelly v. Robinson*, 479 U.S. 36, 52 (1986) (“[N]either of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. . . . Although restitution does resemble a judgment ‘for the benefit of’ the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State and the situation of the defendant.”). *Kelly* survived the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). *See, e.g., Troff v. Utah (In re Troff)*, 329 B.R. 85, 98 (D. Utah 2005), *aff’d*, 488 F.3d 1237 (10th Cir. 2007).

59. *Kelly*, 479 U.S. at 47–49 (“[F]ederal bankruptcy courts should not invalidate the results of state criminal proceedings. . . . This Court has emphasized repeatedly ‘the fundamental policy against federal interference with state criminal prosecutions.’” (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971))). *See Woods v. Ritter (In re Ritter)*, No. 05-36150, 2006 Bankr. LEXIS 2962, at \*14 (Bankr. S.D.N.Y. Oct. 27, 2006) (finding the

issued under the federal criminal law.<sup>60</sup> In Chapter 13, debts “for restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime; or . . . for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or . . . death” are nondischargeable.<sup>61</sup> In many circuits, criminal restitution is nondischargeable whether it is paid to the victim or to the government, because it functions as a punishment in either situation.<sup>62</sup> Even if the court-ordered restitution payment plan would not result in the defendant paying the full amount originally owed,<sup>63</sup> for bankruptcy purposes the debt may still be the full amount of the criminal court’s restitution order.<sup>64</sup> If the government has made payments to a person entitled to restitution, the government may be entitled to recoup those payments from the debtor,

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purpose of restitution was not compensation for the victim even when the amount of restitution was determined solely by the victim’s loss).

60. § 523(a)(13) (“[A]n individual debtor [cannot discharge] any debt . . . for any payment of an order of restitution issued under title 18 [Crimes and Criminal Procedure], United States Code . . .”).

61. 11 U.S.C. § 1328(a)(3)–(4) (2006). *Kelly* discussed only Chapter 7 and associated provisions, but Chapter 13 decisions apply similar reasoning. *See, e.g.*, *Ryan v. United States* (*In re Ryan*), No. 03-2133, 2007 Bankr. LEXIS 2603, at \*18 (Bankr. D. Idaho July 31, 2007). The Chapter 13 criteria are not exactly the same as the Chapter 7 criteria for similar debts, which could affect debtors’ choice of chapter. For example, “conviction of a crime” has been interpreted broadly to include a guilty plea followed by probation, without formal conviction. *Wilson v. Cumis Ins. Soc’y, Inc.* (*In re Wilson*), 252 B.R. 739, 742 (B.A.P. 8th Cir. 2000). However, debts arising from juvenile proceedings may fall outside § 1328(a). *See, e.g.*, *Colo. Judicial Dep’t v. Sweeney* (*In re Sweeney*), 341 B.R. 35, 40 (B.A.P. 10th Cir. 2006) (finding that fines from juvenile proceedings under Colorado state law are dischargeable in Chapter 13 because the proceeding is a non-criminal adjudication of status rather than “conviction of a crime”), *aff’d*, 492 F.3d 1189 (10th Cir. 2007).

62. *See Colton v. Verola* (*In re Verola*), 446 F.3d 1206, 1209 (11th Cir. 2006); *In re Thompson*, 418 F.3d 362, 365–66 (3d Cir. 2005); *U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 927–28 (4th Cir. 1995); *United States v. Caddell*, 830 F.2d 36, 39 (5th Cir. 1987); *United States v. Gelb* (*In re Gelb*), 187 B.R. 87, 91–92 (Bankr. E.D.N.Y. 1995), *aff’d*, No. 95-CV-4725, 1998 U.S. Dist. LEXIS 6085 (E.D.N.Y. Apr. 29, 1998). *But see Hughes v. Sanders*, 469 F.3d 475, 478 (6th Cir. 2006) (“[S]ome courts have applied *Kelly* to [criminal] penalties that are not payable to a governmental unit. . . . [W]e are not persuaded by the reasoning of these cases. . . . We therefore hold that *Kelly* applies narrowly to criminal restitution payable to a governmental unit.”). In some courts, the determining factor is whether the relevant criminal statute is state or federal, as the court only applies *Kelly* to state statutes. *See, e.g.*, *Troff v. Utah* (*In re Troff*), 488 F.3d 1237, 1242 (10th Cir. 2007).

63. *See, e.g.*, 18 U.S.C. § 3664(f)(3)–(4) (2006).

64. *See, e.g.*, *United States v. Hawkins*, 392 F. Supp. 2d 757, 759–60 (W.D. Va. 2005); *N. Phila. Fin. P’ship v. Steele* (*In re Steele*), No. 04-14597, 2005 Bankr. LEXIS 1595, at \*15–16 (Bankr. E.D. Pa. Aug. 15, 2005) (“[I]t is clear from the statute that payment according to the fixed schedule does not satisfy the restitution obligation . . . . [T]he court can require the entire amount to be paid immediately upon disclosure of changed circumstances. . . . I hold that the restitution referred to in § 523(a)(13) is the amount of the Criminal Judgment . . . .” (citing 18 U.S.C. § 3664(k))).

creating another debt.<sup>65</sup>

Criminal financial penalties other than restitution are also typically nondischargeable. Under Chapter 7, § 523(a)(7) exempts fines, penalties, and forfeitures “payable to and for the benefit of a governmental unit, and . . . not compensation for actual pecuniary loss,” from dischargeability, whether civil or criminal.<sup>66</sup> This is an important matter for the post-incarcerated population not only because they may have civil penalties for various infractions, but also because of the prevalence of civil fees and fines based on criminal charges and because criminal restitution can be converted to a civil judgment in many states.<sup>67</sup> To determine whether a debt constitutes “compensation for actual pecuniary loss,” courts may consider whether the penalty corresponds to the amount of the creditor’s loss or is otherwise earmarked as compensation, along with the underlying purpose of the statute imposing the penalty.<sup>68</sup> In some courts even penalties that remedy financial loss may still be nondischargeable if compensation is not their primary purpose.<sup>69</sup> Under this reasoning, debts to the government for criminal defense<sup>70</sup> and bills for prison room and board<sup>71</sup> may come under § 523(a)(7). If a debt to the government is

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65. See, e.g., *State Office of Gen. Treasurer v. Olson (In re Olson)*, 262 B.R. 18, 19 (Bankr. D.R.I. 2001).

66. 11 U.S.C.A. § 523(a)(7) (West 2009). However, certain tax penalties are dischargeable. *Id.*

67. See *supra* Part I.B. For the conversion of criminal restitution into a civil judgment, see Jeanne von Ofenheim, *Advising the Small Business Owner About Monetary Recovery in Criminal Cases*, 2 J. SMALL & EMERGING BUS. L. 403, 410–11 (1998). See also, e.g., TENN. CODE ANN. § 40-35-304(h) (2006).

68. See, e.g., *Tennessee v. Hollis (In re Hollis)*, 810 F.2d 106, 108 (6th Cir. 1987); *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985) (“[W]hat a county expends in a criminal prosecution in the fulfillment of its statutory police power responsibilities is not ‘an actual pecuniary loss’ to the county. . . . [T]he county did not undertake the expense expecting to create a debtor-creditor relationship.”); *Consumer Prot. Div. v. Stein (In re Stein)*, No. 05-36427, 2006 Bankr. LEXIS 4361, at \*10 (Bankr. D. Md. June 5, 2006) (considering the underlying purpose of the criminal statute); *United States v. Jones (In re Jones)*, 311 B.R. 647, 651 (Bankr. M.D. Ga. 2004).

69. See, e.g., *U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) (“[S]o long as the government’s interest in enforcing a debt is *penal*, it makes no difference that injured persons may thereby receive compensation for pecuniary loss.”); *Ohio v. Kirby (In re Kirby)*, No. 02-33385, 2007 Bankr. LEXIS 2966, at \*10 (Bankr. N.D. Ohio Aug. 28, 2007) (citing *Kish v. Farmer (In re Kish)*, 238 B.R. 271, 285 (Bankr. D.N.J. 1999)); *In re Donohue*, No. 05-01651, 2006 Bankr. LEXIS 2726, at \*8 (Bankr. N.D. Iowa Oct. 16, 2006); *Attorney Grievance Comm’n v. Smith (In re Smith)*, 317 B.R. 302, 312 (Bankr. D. Md. 2004); *Farmers Ins. Exch. v. Mills (In re Mills)*, 290 B.R. 822, 837–38 (Bankr. D. Colo. 2003).

70. See, e.g., *Ryan v. United States (In re Ryan)*, No. 03-21393, 2007 Bankr. LEXIS 2603, at \*16–18 (Bankr. D. Idaho July 31, 2007).

71. *In re Donohue*, 2006 Bankr. LEXIS 2726, at \*6–7, \*9 (finding that bills for prison room and board are nondischargeable under § 523(a)(7) because the statute directed sixty percent of the funds to related purposes other than direct reimbursement, despite an Iowa Supreme Court opinion holding that the statute’s purpose was “to assist the county in

assessed in separate punitive and pecuniary components, some states allow the pecuniary component to be discharged under Chapter 7.<sup>72</sup> By contrast, under Chapter 13, criminal fines are nondischargeable only if they are included in the sentence itself.<sup>73</sup>

Criminal and civil surcharges are also nondischargeable in Chapter 7 under § 523(a)(7),<sup>74</sup> but the portion of a surcharge dedicated to reimbursement for actual pecuniary loss may be discharged.<sup>75</sup> In Chapter 13 proceedings, surcharges are generally dischargeable.<sup>76</sup> Surcharges payable to non-governmental units, such as state-run insurance funds or governmentally-enforced bond repayment funds may be dischargeable in both chapters.<sup>77</sup> Bail the debtor owes to the government, considered a forfeiture, may not be discharged under Chapter 7 whether the debtor posted it for her own liberty or that of another.<sup>78</sup> Government collection of bail debts is not stayed by the automatic stay.<sup>79</sup> Debt to private bail bond services, including fees and collateral, is generally dischargeable because it is contractual rather than punitive.<sup>80</sup> In Chapter 7, court costs in

recovering the costs incurred for housing and feeding prisoners during jail stays” (quoting *State v. Ohio*, 601 N.W.2d 354, 356 (Iowa 1999)). See also *Carlisle County Fiscal Court v. Maxwell* (*In re Maxwell*), 229 B.R. 400, 404–05 (Bankr. W.D. Ky. 1998); *United States v. Neil* (*In re Neil*), 131 B.R. 142, 143 (Bankr. W.D. Mo. 1991) (holding that fines that include the cost of incarceration are not dischargeable).

72. See, e.g., *In re Stein*, 2006 Bankr. LEXIS 4361, at \*16 (“[T]he \$ 1,000.00 for the Plaintiff’s costs of conducting the claims process and investigation constitutes compensation for pecuniary loss of the government and therefore does not satisfy the third requirement of Section 523(a)(7).”); *Illinois v. Tapper* (*In re Tapper*), 123 B.R. 594, 605 (Bankr. N.D. Ill. 1991).

73. 11 U.S.C. § 1328(a)(3) (2006).

74. *Holder v. Tex. Dep’t of Pub. Safety* (*In re Holder*), 376 B.R. 802, 809 (S.D. Tex. 2007); *Curtin v. New Jersey* (*In re Curtin*), 206 B.R. 694, 698 (Bankr. D.N.J. 1996); *Clayton v. Tenn. Dep’t of Safety* (*In re Clayton*), 199 B.R. 29, 34–35 (Bankr. W.D. Tenn. 1996); *Rosenthal & Weissman*, *supra* note 28, at 24.

75. *In re Curtin*, 206 B.R. at 698; *In re Kent*, 190 B.R. 196, 206 (Bankr. D.N.J. 1995). Cf. *U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) (holding a criminal judgment nondischargeable in Chapter 7 proceeding only insofar as the government’s interest in enforcing the judgment was penal).

76. See § 1328(a) (omitting 11 U.S.C. § 523(a)(7) from the list of nondischargeable types of debt).

77. See, e.g., *Legreide v. Pulley* (*In re Pulley*), 303 B.R. 81, 88 (D.N.J. 2003).

78. See 11 U.S.C. § 362(a)(1), (b)(4) (2006); *City of Philadelphia v. Nam* (*In re Nam*), 273 F.3d 281, 288 (3d Cir. 2001); *Scott v. Alabama* (*In re Scott*), 106 B.R. 698, 700–01 (Bankr. S.D. Ala. 1989).

79. See *United States v. Grooms*, No. 96-00071-C, 1997 U.S. Dist. LEXIS 13991, at \*19 (W.D. Va. Aug. 29, 1997); *In re Scott*, 106 B.R. at 700.

80. See *Hickman v. Texas* (*In re Hickman*), 260 F.3d 400, 407 (5th Cir. 2001); *Two Jinn, Inc. v. Lopez* (*In re Lopez*), No. 07-00863, 2007 Bankr. LEXIS 4381, at \*10 (Bankr. D. Idaho Dec. 24, 2007) (“[W]here the debtor is an indemnitor of a bail bond surety, the cases uniformly hold that none of the elements in § 523(a)(7) are met, and the debt is dischargeable.”). See also *Affordable Bail Bonds, Inc. v. Thompson* (*In re Thompson*), No. 05-15680-R, 2007 Bankr. LEXIS 3195, at \*30 (Bankr. N.D. Okla. Sept. 12, 2007); *Corrales v. Sanchez* (*In re Sanchez*), 365 B.R. 414, 418–21 (Bankr. S.D.N.Y. 2007); *Empire Bonding*



civil cases may be nondischargeable if they are punitive rather than compensatory;<sup>81</sup> Chapter 13 seems to permit discharge of all court costs in civil cases.<sup>82</sup> For currently incarcerated prisoners, filing fees and associated costs are not dischargeable in Chapter 7 for either civil or criminal cases, a reason for prisoners to delay filing until after they are released.<sup>83</sup> Attorneys' fees owed to adverse parties may be dischargeable in Chapter 7 if they are not designed to be punitive.<sup>84</sup>

Tax debt can be the result of crime or of legitimate economic activity. Under Chapter 13, all taxes are nondischargeable.<sup>85</sup> In Chapter 7, most taxes are nondischargeable, and otherwise dischargeable taxes may be treated as nondischargeable fines if there is a punitive purpose.<sup>86</sup> Taxes the debtor tried to evade are not dischargeable;<sup>87</sup> neither are taxes on illegal activity or income.<sup>88</sup> Tax penalties are also nondischargeable unless they originate from transactions occurring more than three years before the bankruptcy.<sup>89</sup> While many prisoners did not have sufficient income to

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Agency v. Lopes (*In re Lopes*), 339 B.R. 82, 88 (Bankr. S.D.N.Y. 2006). *But see* Amwest Surety Ins. Co. v. Contreras (*In re Contreras*), No. 01-41694, 2006 Bankr. LEXIS 4402, at \*3 (Bankr. S.D.N.Y. July 31, 2006) (applying *In re Nam* in the case of a private bailbondsman creditor).

81. *See, e.g.*, Attorney Grievance Comm'n v. Smith (*In re Smith*), 317 B.R. 302, 308-11 (Bankr. D. Md. 2004).

82. 11 U.S.C. § 1328(a) (2006) (omitting 11 U.S.C. § 523(a)(17) from the list of nondischargeable types of debt).

83. *See* 11 U.S.C.A. § 523(a)(17) (West 2009). This section applies only to fees "imposed on a prisoner." *See* Spitz v. Tepfer (*In re Tepfer*), 280 B.R. 628, 632-33 (N.D. Ill. 2002); S. Bend Cmty. Sch. Corp. v. Eggleston, 215 B.R. 1012, 1017-18 (N.D. Ind. 1997); Knight v. Merrill (*In re Knight*), No. BK06-41610, 2007 Bankr. LEXIS 87, at \*2-3 & n.1 (Bankr. D. Neb. Jan. 19, 2007); Vehicle Removal Corp. v. Lopez (*In re Lopez*), 269 B.R. 607, 611 (Bankr. N.D. Tex. 2001). One court has noted that fees incurred by others to whom the debtor has become liable do not generally fall under § 523(a)(17). *Tenn. Dep't of Corr. v. Farnsworth (In re Farnsworth)*, 283 B.R. 503, 510-11 (Bankr. W.D. Tenn. 2002). A few courts have found that only those fees imposed by the in forma pauperis statute are nondischargeable. *See, e.g.*, Hough v. Fry (*In re Hough*), 239 B.R. 412, 416 (B.A.P. 9th Cir. 1999).

84. *In re Hough*, 239 B.R. at 416 (finding that attorneys' fees not imposed under the in forma pauperis statute are not covered by § 523(a)(17)); Suter v. District of Columbia (*In re Suter*), No. Civ.A.2005-2118, 2005 U.S. Dist. LEXIS 26840, at \*26 (D. Md. Nov. 7, 2005) ("[T]here is no evidence in the record that the attorneys' fees are designed to compensate Appellee for a pecuniary loss."), *aff'd*, 182 Fed. App'x 236 (4th Cir. 2006); *Eggleston*, 215 B.R. at 1016; *NLRB v. Fogerty (In re Fogerty)*, 204 B.R. 956, 962-63 (Bankr. N.D. Ill. 1996).

85. § 1328(a)(2) (cross-referencing § 523(a)(1)).

86. § 523(a)(1), (7). *See also, e.g.*, Rinker v. United States (*In re Rinker*), 240 B.R. 917, 920 (Bankr. S.D. Ga. 1999) (citing *Burke v. United States (In re Burke)*, 198 B.R. 412, 415 (Bankr. S.D. Ga. 1996)), *aff'd*, 242 B.R. 763 (S.D. Ga. 1999), *aff'd*, 213 F.3d 648 (11th Cir. 2000).

87. § 523(a)(1)(C).

88. *See, e.g.*, Kirk v. United States (*In re Kirk*), 98 B.R. 51 (Bankr. M.D. Fla. 1989) (holding tax debt on illegal income nondischargeable).

89. § 523(a)(7).

tax either before or during their incarceration, they may owe income taxes from prior years and those who own or inherit property may be liable for property taxes.<sup>90</sup> Incarceration is not necessarily an excuse for late or unfiled taxes, and unpaid taxes can accrue interest and penalties during incarceration.<sup>91</sup>

In addition to taxes and crime-related penalties and costs, some civil debts are nondischargeable as well. Debts for “willful and malicious injury” to persons or property,<sup>92</sup> “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny,”<sup>93</sup> and death or personal injury due to drunk driving<sup>94</sup> are all nondischargeable under Chapter 7. Chapter 13 excepts from discharge only debts for “restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.”<sup>95</sup> In rare circumstances civil restitution payments can fall outside § 523(a)(7) and may therefore be dischargeable in Chapter 7, unless they fit in a different nondischargeable category.<sup>96</sup> Debts for “money, property, services, or . . . credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud,” including punitive damages, are nondischargeable under both chapters.<sup>97</sup>

Domestic support is a major category of debt for ex-convicts.<sup>98</sup> Nondischargeable domestic support debts can include debts owed to the debtor’s spouse, former spouse, child, or child’s parent or guardian “in the nature of alimony, maintenance, or support,”<sup>99</sup> whether they are already

90. See, e.g., *Garcia v. City of Plains*, No. 07-96-0374-CV, 1998 Tex. App. LEXIS 5615, at \*1 (Tex. App. Sept. 1, 1998) (upholding final judgment permitting foreclosure against prisoner who failed to pay his property taxes).

91. Federal tax law imposes penalties for failure to file a return except in cases of “reasonable cause and not . . . willful neglect.” 26 U.S.C.A. § 6651(a) (West 2009). See, e.g., *Thrower v. Comm’r of Internal Revenue*, No. 14625-92, 2003 Tax Ct. Memo LEXIS 138, at \*19 (T.C. May 15, 2003); *Labato v. Comm’r of Internal Revenue*, No. 4781-99, 2001 Tax Ct. Memo LEXIS 280, at \*3-4 (T.C. Sept. 18, 2001) (“The mere fact that petitioner was incarcerated at the time his return was due is not reasonable cause, within the meaning of section 6651(a)(1), for his failure to timely file.”); *Krause v. Comm’r of Internal Revenue*, 61 T.C.M. (CCH) 1670, 1676 (T.C. 1991); *Ademodi v. Comm’r of Revenue*, No. 5998, 1992 Minn. Tax LEXIS 22, at \*2-3 (Minn. T.C. Feb. 10, 1992) (refusing to attribute constructive notice of incarceration to tax authority).

92. 11 U.S.C.A. § 523(a)(6); 11 U.S.C. § 1328(a)(4) (2006).

93. § 523(a)(4).

94. § 523(a)(9).

95. § 1328(a)(4).

96. See, e.g., *Schaffer v. La. State Bd. of Dentistry (In re Schaffer)*, 515 F.3d 424 (5th Cir. 2008); *In re Towers*, 162 F.3d 952, 954-56 (7th Cir. 1998).

97. § 523(a)(2)(A)-(B); § 1328(a)(2) (cross-referencing § 523(a)(2)).

98. See discussion *infra* Part II.A.

99. 11 U.S.C.A. § 101(14A)(A)-(C) (West 2009). See Shanya M. Steinfeld, *The Impact of Changes Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Family Obligations*, 20 J. AM. ACAD. MATRIMONIAL L. 251, 270-81 (2007) (discussing

established or merely viable claims subject to establishment because of a separation or divorce agreement, court order, or other governmental determination.<sup>100</sup> Child support is defined broadly: it can include child-related attorneys' fees, interest, and debts accrued or established after the date the bankruptcy petition is filed;<sup>101</sup> guardian ad litem fees; and expenses in custody and support proceedings.<sup>102</sup> Obligations falling outside the Bankruptcy Code's definition of "domestic support obligation" may be dischargeable,<sup>103</sup> but attempts to discharge them may alienate the creditor and result in a loss of visiting access to the child.<sup>104</sup>

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the history of domestic support nondischargeability in bankruptcy proceedings and the current exceptions to discharge under the Bankruptcy Abuse Prevention and Consumer Protection Act). For examples of spousal support, see, e.g., *Cline v. Cline*, 259 Fed. App'x 127, 131–32 (10th Cir. 2007); *Cummings v. Cummings*, 244 F.3d 1263, 1267 (11th Cir. 2001); *Courtney v. Traut* (*In re Traut*), 2002 Bankr. LEXIS 998, at \*7–9 (Bankr. N.D. Ohio 2002).

100. Debts that are not part of a domestic support order but are incurred in the course of divorce or separation, or as part of an agreement or decree, are nondischargeable in Chapter 7, but are dischargeable in Chapter 13. § 523(a)(15). See § 1328(a) (omitting § 523(a)(15) from the list of nondischargeable types of debt). See, e.g., *In re Dankert*, No. BK07-40109, 2007 Bankr. LEXIS 3632, at \*2, \*7 (Bankr. D. Neb. Sept. 27, 2007); *Procter v. Tulloss* (*In re Procter*), No. R06-40795, 2007 Bankr. LEXIS 1571, at \*4–5 (Bankr. N.D. Ga. Mar. 20, 2007).

101. § 101(14A). See, e.g., *Lowther v. Lowther* (*In re Lowther*), 321 F.3d 946, 948 (10th Cir. 2002) (“[T]he term ‘support’ is to be broadly defined in order to protect the best interests of the child.”). See generally Theresa Sheridan, *In re Lowther: Unusual Circumstances—Dischargeability of Child Support Related Obligations in Bankruptcy*, 6 J.L. & FAM. STUD. 155 (2004) (discussing the history of the unusual circumstances exception to child support nondischargeability).

102. See § 101(14A)(B)–(C); *Beaupied v. Chang* (*In re Chang*), 163 F.3d 1138, 1141–42 (9th Cir. 1998); *Stark v. Bishop* (*In re Bishop*), No. 97-2151, 1998 U.S. App. LEXIS 12900, at \*6–8 (4th Cir. June 18, 1998); *In re Jones*, 9 F.3d at 881; *Nelson, Keys & Keys, P.C. v. Hudson* (*In re Hudson*), No. 06-81745, 2007 Bankr. LEXIS 3943, at \*5–6 (Bankr. N.D. Ill. Nov. 27, 2007); *Jones v. Herbert* (*In re Herbert*), 304 B.R. 67, 78 (Bankr. E.D.N.Y. 2004) (holding attorneys' fees from support proceedings nondischargeable), *aff'd*, 321 B.R. 628 (E.D.N.Y. 2005); *Pino v. Pino* (*In re Pino*), 268 B.R. 483, 491 (Bankr. W.D. Tex. 2001) (finding attorney's fees based on need were in the nature of support and thus nondischargeable); *Ferraro v. Ballard* (*In re Ballard*), No. 00-71225-S, 2001 Bankr. LEXIS 1661, at \*100 n.49 (Bankr. E.D. Va. July 18, 2001) (“[A]ttorneys' fees continue to be governed by section 523(a)(5).” (quoting *Macy v. Macy*, 114 F.3d 1, 3 (1st Cir. 1997))), *aff'd*, 69 Fed. App'x 145 (4th Cir. 2003); *Bower v. Deickler* (*In re Deickler*), No. 98-11502, 1999 Bankr. LEXIS 1877, at \*8–9 (Bankr. D.N.H. July 22, 1999). Some courts hold that awards of fees for reasons other than the best interests of the child may be dischargeable because they are not “in the nature of alimony, maintenance, or support.” See § 101(14A)(B); *Adams v. Zentz*, 963 F.2d 197, 199–200 (8th Cir. 1992). It is irrelevant whether the fees are payable to the spouse or to a third party, such as the attorney or the guardian. *In re Chang*, 163 F.3d at 1141; *Holliday v. Kline* (*In re Kline*), 65 F.3d 749, 751 (8th Cir. 1995). Regarding nondischargeable guardian ad litem fees, see *In re Bishop*, 1998 U.S. App. LEXIS 12900, at \*6–8; *Manzi v. Geenty* (*In re Manzi*), 283 B.R. 103, 110 (Bankr. D. Conn. 2002).

103. See, e.g., *In re De Wakar*, No. 07-12557, 2007 Bankr. LEXIS 4178, at \*2 (Bankr. E.D. Va. Dec. 7, 2007).

104. See FRANK F. FURSTENBERG, JR., KAY E. SHERWOOD & MERCER L. SULLIVAN, MANPOWER DEMONSTRATION RESEARCH CORP., CARING AND PAYING: WHAT FATHERS

Low-income debtors who pursue higher education may have significant student loan debt. Students with certain drug convictions are ineligible for certain federal student loans, which, combined with a lack of income and assets, can result in heavy reliance on more costly private loans for educational funding.<sup>105</sup> Student loans are exempt from discharge in both chapters, except in cases of undue hardship.<sup>106</sup> Some courts have held that a criminal record, because of its negative effect on earning capacity, can help the debtor meet the undue hardship exception; others have emphatically rejected that reasoning.<sup>107</sup> Debtors seeking this discharge face a demanding test of low earning ability and good faith, and only the most sympathetic can qualify.<sup>108</sup>

*b) Other Considerations in Deciding Whether to File Bankruptcy*

Beyond nondischargeability, many other considerations may bear on the decision to file bankruptcy. Even without formal legal obstacles, a debtor with mostly exempt property has little to gain financially from filing bankruptcy. Therefore, filing may not be worth the time and expense, depending on the debtor's sensitivity to collections efforts<sup>109</sup> and a variety

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AND MOTHERS SAY ABOUT CHILD SUPPORT 10, 23 (1992), available at <http://supportinghealthymarriage.org/publications/225/full.pdf>; Kevin Roy, *Low-Income Single Fathers in an African American Community and the Requirements of Welfare Reform*, 20 J. FAM. ISSUES 432, 449 (1999).

105. 20 U.S.C.A. § 1091(r) (West 2010).

106. 11 U.S.C.A. § 523(a)(8) (2009); 11 U.S.C. § 1328(a)(2) (2006) (cross-referencing § 523(a)(8)).

107. See, e.g., *Douglas v. Educ. Credit Mgmt. Corp.* (*In re Douglas*), 366 B.R. 241, 257–59 (Bankr. M.D. Ga. 2007); *Coman v. U.S. Dep't of Educ.* (*In re Coman*), No. 03-70212, 2003 Bankr. LEXIS 1361, at \*3, \*5 (Bankr. C.D. Ill. Oct. 23, 2003). In one particularly unsympathetic case, a debtor serving a life sentence without the possibility of parole was not able to discharge student loans, because goods and services provided by the prison were included in the assessment of the debtor's standard of living and because incarceration is considered a self-imposed condition. *Looper v. U.S. Dep't of Educ.* (*In re Looper*), No. 05-38187, 2007 Bankr. LEXIS 1482, at \*17, \*19–20 (Bankr. E.D. Tenn. Apr. 25, 2007).

108. The generally accepted test for “undue hardship” is found in *Brunner v. New York State Higher Education Services Corp.*:

(1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

831 F.2d 395, 396 (2d Cir. 1987). Criminal conviction usually bears on the second part of the test.

109. In a small survey of consumer bankruptcy lawyers, most thought bankruptcy not worthwhile for debtors who owed less than \$3000 in total, but

[s]everal said they had filed bankruptcies under their usual thresholds where a client was unusually sensitive to collection pressures—for example, for an elderly person, or “if they can't sleep or eat right, if there is stress on the marriage and they can't deal with it” or where a client had a number of small loans (e.g., 10

of other factors. Filing bankruptcy triggers an automatic stay of almost all debt collections and will end collection calls and garnishments that can burden family members and interfere with employment.<sup>110</sup> It also affects utility companies, which may not terminate service after filing solely because of the bankruptcy or the debt, although the utility may discontinue service if the debtor does not provide adequate assurance of payment within twenty days.<sup>111</sup> However, the automatic stay does not affect initiation or prosecution of criminal actions;<sup>112</sup> civil actions for certain domestic support matters;<sup>113</sup> restrictions regarding drivers', professional, and recreational licenses;<sup>114</sup> and certain evictions for drug use.<sup>115</sup> Domestic support obligations may still be collected from property of the debtor that is not property of the estate.<sup>116</sup> Bankruptcy courts have been unsympathetic to allegations of bad faith when prosecutors attempt to circumvent the automatic stay by bringing a criminal proceeding to collect debt.<sup>117</sup> Bankruptcy law cannot stay or discharge, practically

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small loans totaling \$2500) and in addition had no prospect of having income to make repayment (e.g., on public assistance or making minimum wage) and had already been subject to a great deal of collections pressure, such as home visits or, in Ohio, repeated garnishment of wages.

Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 523 (1993).

110. 11 U.S.C. § 362(a) (2006).

111. 11 U.S.C. § 366(a) (2006). Adequate assurance of payment varies, but may mean approximately one month of payments. *See, e.g., Steinebach v. Tucson Elec. Power Co. (In re Steinebach)*, 303 B.R. 634, 645 (Bankr. D. Ariz. 2004). Some courts have held that utilities must reinstate service for those twenty days, unless another reason for denial of service exists. *See, e.g., Citizens Gas & Coke Util. v. Mathews (In re Mathews)*, No. 1:03-CV-2064, 2004 U.S. Dist. LEXIS 19735, at \*21 (S.D. Ind. Sept. 13, 2004). Ongoing payments for post-petition services are required, of course, and if the debtor fails to pay, the utility may terminate service without violating the automatic stay. *See, e.g., Jones v. Boston Gas Co. (In re Jones)*, 369 B.R. 745, 749 (B.A.P. 1st Cir. 2007). In some states certain consumers are already entitled to utility forbearance. *See, e.g., 220 MASS. CODE REGS. 25.03 (2008); VT. STAT. ANN. tit. 24, § 5143(b)(4) (2001).*

112. § 362(b)(1). Some courts will extend the stay to an action that is quasi-criminal. *See, e.g., In re Del Ross*, No. 96-30427, 1998 Bankr. LEXIS 1869, at \*4, \*10 (Bankr. D.N.J. Feb. 27, 1998) (holding that the sweep of the automatic stay is broad and extends to quasi-criminal actions, such as fines for driving with a suspended license).

113. § 362(b)(2)(A)–(C). *See* Judith K. Fitzgerald, *We All Live in a Yellow Submarine: BAPCPA's Impact on Family Law Matters*, 31 S. ILL. U. L.J. 563, 571 (2007).

114. § 362(b)(2)(D). Costs associated with license revocation can be deemed a punishment or a civil surcharge, depending on the purpose. *See, e.g., Talley v. Ala. Dep't of Pub. Safety (In re Talley)*, 347 B.R. 906, 908 (Bankr. N.D. Ala. 2006), *aff'd*, 472 F. Supp. 2d 1323 (N.D. Ala. 2007), *aff'd*, 260 Fed. App'x 177 (11th Cir. 2007); *Clayton v. Tenn. Dep't of Safety (In re Clayton)*, 199 B.R. 29, 33–34 (Bankr. W.D. Tenn. 1996) (allowing the imposition of a reinstatement fee for a driver's license that was revoked).

115. § 362(b)(23).

116. § 362(b)(2)(B).

117. *See, e.g., Simonini v. Bell (In re Simonini)*, 69 Fed. App'x 169, 170 (4th Cir. 2003) (citing *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1085 (9th Cir. 2000)); *In re Byrd*, 256 B.R. 246, 256 (Bankr. E.D.N.C. 2000) (“[P]rosecutors may initiate

speaking, debts to creditors who are willing to violate the law and enforce their debts through violence or other coercion,<sup>118</sup> and, as will be discussed in Part III, *infra*, filing bankruptcy may alienate personal creditors whose goodwill the debtor sorely needs.

Bankruptcy may come at a financial cost for the debtor. Waivers for court costs are difficult to obtain,<sup>119</sup> and the debtor may have to pay for required financial counseling and incur attorney's fees. More third-party debt could be formalized as a result of filing, because creditors may be motivated to assert neglected claims and because bankruptcy courts have jurisdiction to enter financial judgments, including punitive damages, without an independent civil or criminal judgment against the debtor.<sup>120</sup> All non-exempt property must be turned over to the trustee, making it completely unavailable to the debtor, even to pay for a current criminal defense.<sup>121</sup> The trustee can also intercept debtors' tax refunds and in some states may capture the debtor's Earned Income Tax Credit payment.<sup>122</sup> After all of these expenses and burdens, the debtor could still fail to obtain a discharge by missing court dates or filings, missing plan payments, or inadvertently violating bankruptcy rules. Under Chapter 13, a discharge may not be granted unless the debtor has paid all domestic support

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and continue criminal prosecutions without violating the automatic stay even if, as in this case, the primary purpose of the prosecution is to collect a dischargeable debt."); Myron M. Sheinfeld, Teresa L. Maines & Mark W. Wege, *Civil Forfeiture and Bankruptcy: The Conflicting Interests of the Debtor, Its Creditors and the Government*, 69 AM. BANKR. L.J. 87, 112 (1995). *But see* *Finley v. Miss. Dep't of Pub. Safety (In re Finley)*, 237 B.R. 890, 894 (Bankr. N.D. Miss. 1999); *Brown v. Shriver (In re Brown)*, 39 B.R. 820, 829-30 (Bankr. M.D. Tenn. 1984) (finding the state's action to revoke probation for failing to pay restitution violated the automatic stay).

118. *See* VENKATESH, *supra* note 45, at 140-41 (describing creditors who enforce debts through violence).

119. 28 U.S.C.A. § 1930(f) (West 2009); A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 924-25, 944-45 (2006); David S. Yen & Jeana Kim Reinbold, *The New Bankruptcy Law: Challenge and Opportunity*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 418, 425 (2005). Waiver is only available for debtors with incomes below 150% of the poverty line who are unable to pay the fee in installments.

120. *See, e.g., Hixson v. Hixson (In re Hixson)*, 252 B.R. 195, 198 (Bankr. E.D. Okla. 2000). *But see* *First Omni Bank, N.A. v. Thrall (In re Thrall)*, 196 B.R. 959, 962-71 (Bankr. D. Colo. 1996). Bankruptcy courts may also enter civil tax claims if they were not previously litigated in a criminal tax proceeding. *In re Minkoff*, No. 97-22962-11, 1999 Bankr. LEXIS 1721, at \*10-13 (Bankr. D. Kan. Dec. 6, 1999).

121. *See, e.g., In re French*, 139 B.R. 485, 488-89, 491 (Bankr. D.S.D. 1992). The trustee may even recover pre-bankruptcy payments to a criminal defense attorney. *Wootton v. Ravkind (In re Dixon)*, 143 B.R. 671, 675-76 (Bankr. N.D. Tex. 1992), *aff'd*, 85 F.3d 626 (5th Cir. 1996).

122. Some states hold the Earned Income Tax Credit exempt as a public benefit, *see, e.g., In re Longstreet*, 246 B.R. 611, 617 (Bankr. S.D. Iowa 2000), but others consider it a tax overpayment and part of the estate, *see, e.g., Johnston v. Hazlett (In re Johnston)*, 209 F.3d 611, 613 (6th Cir. 2000); *In re Parker*, 352 B.R. 447, 453 (Bankr. N.D. Ohio 2006); *In re Demars*, 279 B.R. 548, 549 (Bankr. W.D. Mo. 2002).

obligations accruing after the date of filing. The debtor might be unable to meet this requirement or might otherwise have more advantageously settled or paid in kind.<sup>123</sup> Discharge under either chapter may be withheld if the debtor has not paid all her court fees in other federal courts.<sup>124</sup>

Nonetheless, discharging even a small amount of debt is advantageous, and the debtor may consider bankruptcy worthwhile for other reasons.<sup>125</sup> Filing bankruptcy may prevent or delay repossession of rent-to-own items such as furniture, appliances, and non-exempt vehicles.<sup>126</sup> Creditors may become more willing to settle after the debtor files bankruptcy, because settlement precludes the debtor from challenging the validity or fairness of her contract in open court. Settling may also be more efficient for the creditor than participating in the bankruptcy. Bankruptcy also simplifies debtors' finances, consolidating debt for child support, taxes, credit cards, medical care, and the like, into one payment plan. Despite the multitude of obstacles, incarcerated and post-incarcerated debtors do sometimes succeed in filing bankruptcy.<sup>127</sup> Ultimately, the decision whether to file will depend on each debtor's circumstances. As I discuss in the sections to follow, the issues of creditor relationships and informal, off-the-books debt are important obstacles to bankruptcy for the post-incarcerated population.

## II.

### ECONOMIC AND DEMOGRAPHIC CHARACTERISTICS

In addition to outright costs and loss of income, prison time and criminal convictions can indirectly result in significant expenses and additional debt. Low income, health problems, poor employment prospects, family obligations, and the financial burdens of reentry all combine to pull returning prisoners and their families into (or further into) debt before they can to gain an economic footing. Compounding the problem, as I discuss in Part III, *infra*, certain demographic factors conducive to debt also present obstacles to filing bankruptcy.

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123. 11 U.S.C. §§ 1307(c)(11), 1328(a) (2006); 11 U.S.C.A. § 1325(a)(8) (West 2009); Dickerson, *supra* note 119, at 948.

124. 11 U.S.C.A. § 707(a)(2) (West 2009); § 1307(c)(2). *See, e.g., In re Domenico*, 364 B.R. 418, 420–23 (Bankr. D.N.M. 2007).

125. For further discussion, see Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 679–82 (1991).

126. If the contract between the debtor and the creditor is found to be a lease rather than a security interest, the trustee has the power to cure any default and allow the debtor to resume the lease. 11 U.S.C. § 365 (2006); Nathaniel C. Nichols, *The Poor Need Not Apply: Moralistic Barriers to Bankruptcy's Fresh Start*, 25 RUTGERS L.J. 329, 356–57 & n.147 (1994).

127. *See, e.g., In re Walton*, No. 07-41086-293, 2007 Bankr. LEXIS 1139 (Bankr. E.D. Mo. Mar. 5, 2007) (waiving credit counseling requirement for an incarcerated debtor and permitting his bankruptcy petition to move forward).

### A. *Income, Health, and Parenthood*

Many inmates had low incomes prior to incarceration. A 1999 BJS study found that about thirty-seven percent of female and twenty-eight percent of male state prison inmates reported pre-arrest incomes below \$600 per month.<sup>128</sup> According to one study, self-reported poverty rates among inmates “fluctuated between 40 and 60 percent in the past thirty years.”<sup>129</sup> Ex-convicts experience a measurable wage penalty: another study estimated that ex-convicts’ earnings are ten to twenty percent lower and that their wage growth over time is reduced by one-third.<sup>130</sup> Unlike employment effects from incarceration, wage effects persisted or even increased over time.<sup>131</sup> Some employers are unwilling to invest in training that could raise wages due to fear of recidivism.<sup>132</sup> Incarceration can cause a significant decrease in productivity by permanently worsening health and instilling psychological problems that interfere with employment,<sup>133</sup> and incarcerated workers cannot improve their earnings potential by gaining seniority, experience, or non-prison training.<sup>134</sup>

Released prisoners of all ages face a daunting array of costly and debilitating health problems.<sup>135</sup> Despite constitutionally-required health care for prisoners,<sup>136</sup> rates of HIV/AIDS,<sup>137</sup> tuberculosis,<sup>138</sup> and hepatitis

128. LAWRENCE A. GREENFIELD & TRACY L. SNELL, U.S. DEP’T OF JUSTICE, WOMEN OFFENDERS 8 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/wo.pdf>.

129. Darren Wheelock & Christopher Uggen, *Race, Poverty and Punishment: The Impact of Criminal Sanctions on Racial, Ethnic, and Socioeconomic Inequality* 13 (Nat’l Poverty Ctr., Working Paper Series No. 06-15, 2006), available at [http://www.npc.umich.edu/publications/workingpaper06/paper15/working\\_paper06-15.pdf](http://www.npc.umich.edu/publications/workingpaper06/paper15/working_paper06-15.pdf).

130. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 526, 537, 541–42 (2002). See also Christopher Uggen, Sara Wakefield & Bruce Western, *Work and Family Perspectives on Reentry*, in PRISONER REENTRY AND CRIME IN AMERICA 209, 229 (Jeremy Travis & Christy Visser eds., 2005); Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration* 20–21 (Princeton Univ. Indus. Relations Section, Working Paper No. 450, 2001), available at <http://www.irs.princeton.edu/pubs/pdfs/450.pdf>.

131. Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-offenders and Non-offenders* 14 (Nat’l Bureau of Econ. Research, Working Paper No. 13935, 2008) (on file with author) (“[A] significant part of the low earnings of ex-convicts is due to wage stagnation among low-income men.”); Western, *supra* note 130, at 526, 538, 540.

132. Western, Kling & Weiman, *supra* note 130, at 6.

133. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 245, 250–52 (2009); Western, Kling & Weiman, *supra* note 130, at 4.

134. Western, *supra* note 130, at 527.

135. See generally KAMALA MALLIK-KANE & CHRISTY A. VISHER, THE URBAN INST., HEALTH AND PRISONER REENTRY: HOW PHYSICAL, MENTAL, AND SUBSTANCE ABUSE CONDITIONS SHAPE THE PROCESS OF REINTEGRATION (2008), available at [http://www.urban.org/UploadedPDF/411617\\_health\\_prisoner\\_reentry.pdf](http://www.urban.org/UploadedPDF/411617_health_prisoner_reentry.pdf).

136. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

137. LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, HIV IN PRISONS, 2005, at 3 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp05.pdf>; Joan Petersilia,



C<sup>139</sup> are elevated, and an estimated one-third of all releasees have some identified chronic illness.<sup>140</sup> In 2005, BJS reported that, although more than half of all prison and jail inmates had a mental health problem, only approximately one-third of that population had received mental health treatment while incarcerated.<sup>141</sup> While numerous prisoners reported drug abuse or dependence, most had not participated in drug treatment programs while incarcerated.<sup>142</sup> Because of the direct costs and the reduction in earning capacity associated with these illnesses, medical problems are a significant economic factor for releasees, as for so many other Americans.<sup>143</sup>

Most prisoners are parents, and their minor children can be a significant source of expenses and debts. In 2007, fifty-two percent of state and sixty-three percent of federal prisoners had at least one child, and an estimated 1.7 million minors had a parent who was in prison.<sup>144</sup> Even during incarceration, the state may bill the parent for the cost of public assistance provided for the child.<sup>145</sup> In the state prison population, two percent of males and eleven percent of females report having a child in foster care, for which parents can also be billed.<sup>146</sup>

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*From Cell to Society: Who Is Returning Home?*, in PRISONER REENTRY AND CRIME IN AMERICA, *supra* note 130, at 15, 35. For a more detailed discussion and methodology, see Theodore M. Hammett, Mary Patricia Harmon & William Rhodes, *The Burden of Infectious Disease Among Inmates of and Releasees from U.S. Correctional Facilities*, 1997, 92 AM. J. PUB. HEALTH 1789, 1789–93 (2002).

138. Hammett, Harmon & Rhodes, *supra* note 137, at 1792–93.

139. NAT'L COMM'N ON CORR. HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS VOLUME 1, at 20 (2002), available at <http://www.ncchc.org/stbr/Volume1/Health%20Status%20%28vol%201%29.pdf>.

140. COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL 64 (2005) [hereinafter RE-ENTRY POLICY COUNCIL REPORT], available at <http://www.reentrypolicy.org/publications/1694;file>.

141. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 9 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf>. See also MALLIK-KANE & VISHER, *supra* note 135, at 33; Julie Bosman, *For 800 Youths Jailed by State, Not One Full-Time Psychiatrist*, N.Y. TIMES, Feb. 11, 2010, at A1.

142. MALLIK-KANE & VISHER, *supra* note 135, at 45–46; CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 2004, at 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf>; Petersilia, *supra* note 137, at 41.

143. See SULLIVAN, WARREN & WESTBROOK, *supra* note 19, at 141–71 (2001) (describing the sizeable impact of medical costs, including lost income, on bankruptcy among middle-class Americans).

144. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>. See TRAVIS, MCBRIDE & SOLOMON, *supra* note 36, at 1.

145. 42 U.S.C.A. § 608(a)(3) (West 2009); Eve A. Stotland, *Resolving the Tension Between Child Support Enforcement and Family Reunification*, 35 CLEARINGHOUSE REV. 317, 324 (2001).

146. GLAZE & MARUSCHAK, *supra* note 144, at 5.

Incarcerated parents may lose child custody, which can be costly to regain.<sup>147</sup> The Adoption and Safe Families Act<sup>148</sup> allows states to waive reasonable efforts to avoid non-relative foster care if the parent has committed certain crimes.<sup>149</sup> Placements must be made in a “timely manner,”<sup>150</sup> so prisoners with longer sentences or those who cannot qualify for custody in time can easily lose custody of their children.<sup>151</sup> Sentencing guidelines provide little opportunity for family-driven adjustments to the length of a sentence,<sup>152</sup> and incarcerated parents have little opportunity to work towards regaining custody because family reunification assistance is rarely provided.<sup>153</sup> Only a few states provide prison visitation assistance.<sup>154</sup>

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147. Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 600 (2006). Incarcerated parents may voluntarily relinquish custody so that relatives or other caretakers can exercise legal custody to the child’s advantage. Custodial relatives who are ineligible to be formal foster caregivers may place children in non-relative foster care to obtain foster care benefits. Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 954 (1993); Stotland, *supra* note 145, at 317–18.

148. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of U.S.C.).

149. 42 U.S.C.A. § 671(a)(15)(B) (West 2009).

150. § 671(a)(15)(C).

151. *Id.*; AMY E. HIRSCH, SHARON M. DIETRICH, RUE LANDAU, PETER D. SCHNEIDER, IRV ACKELSBERG, JUDITH BERNSTEIN-BAKER & JOSEPH HOHENSTEIN, CTR. FOR LAW & SOC. POLICY & CMTY. LEGAL SERVS., INC., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 67, 69 (2002) [hereinafter EVERY DOOR CLOSED], available at [http://www.clasp.org/admin/site/publications\\_archive/files/0092.pdf](http://www.clasp.org/admin/site/publications_archive/files/0092.pdf); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 128 (2005) [hereinafter TRAVIS, BUT THEY ALL COME BACK]; John Hagan & Juleigh Petty Coleman, *Returning Captives of the American War on Drugs: Issues of Community and Family Reentry*, 47 CRIME & DELINQ. 352, 359 (2001). Foster care statistics can be complex because some relatives are also legally recognized as foster parents. *Cf.* Elizabeth I. Johnson & Jane Waldfogel, *Children of Incarcerated Parents: Multiple Risks and Children’s Living Arrangements*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 97 (Mary Pattillo, David Weiman & Bruce Western eds., 2004) (noting that foster care statistics cannot be clearly interpreted). One study estimated that seventy percent of children in foster care have had a parent incarcerated during all or part of that period. Jeremy Travis, *Families and Children*, FED. PROBATION, June 2005, at 31, 36 [hereinafter Travis, *Families and Children*]. Relatives who have criminal records can be ineligible to serve as foster parents, elevating rates of non-relative foster care.

152. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 79, 89 (Mark Mauer & Meda Chesney-Lind eds., 2003); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 141 (1999). For a more detailed discussion, see generally Myrna S. Raeder, *The Forgotten Offender: The Effect of the Sentencing Guidelines and Mandatory Minimums on Women and Their Children*, 8 FED. SENT’G REP. 157 (2002).

153. Hagan & Coleman, *supra* note 151, at 360.

154. EVERY DOOR CLOSED, *supra* note 151, at 60–62. Only a few states provide prison visitation assistance, even where the right to visitation has been formally recognized. *See*,

States may waive the requirement of reasonable efforts to preserve a family because of “aggravating circumstances,” certain crimes, or prior involuntary termination of parental rights.<sup>155</sup>

Regaining custody can be expensive. Doing so involves both time and legal fees, and the parent must provide adequate housing for the child or children. However, without custody, the family may not be eligible for public assistance or public housing that would enable them to obtain a large enough living space to qualify to reassert custody.<sup>156</sup>

### B. Employment

Legal obstacles, lack of employment backgrounds, and criminal records make it difficult for released prisoners to find jobs. Inmates’ pre-incarceration employment records are weak relative to the general population, and one study found that pre-prison employment was a strong predictor of post-prison employment.<sup>157</sup> A 1997 survey found that only fifty-six percent of male prisoners held a full-time job prior to their most recent arrest.<sup>158</sup> One survey of soon-to-be-released prisoners found a pre-arrest unemployment rate of thirty-three percent for state prisoners and twenty-six percent of federal prisoners, compared with seven percent in the general population.<sup>159</sup> Debt can interfere with employment if creditors disrupt the workplace or a poor credit score deters employers,<sup>160</sup> or if

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*e.g.*, *In re C.J.*, 729 A.2d 89 (Pa. Super. Ct. 1999). New York law requires the state to make “suitable arrangements” to develop a meaningful parent-child relationship, and if visitation with an incarcerated parent is not in the best interests of the child, no permanent neglect proceeding may be initiated because of lack of visitation. N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2003 & Supp. 2009).

155. 42 U.S.C.A. § 671(a)(15)(D). See EVERY DOOR CLOSED, *supra* note 151, at 68. See also CAL. WELF. & INST. CODE § 361.5(b)(12) (West 2008 & Supp. 2009); Stephanie S. Franklin, *A Practitioner’s Account of the Impact of the Adoption and Safe Families Act (ASFA) on Incarcerated Persons and Their Families*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 99, 101 (Christopher Mele & Teresa A. Miller eds., 2005).

156. Stotland, *supra* note 145, at 321.

157. William J. Sabol, *Local Labor-Market Conditions and Post-prison Employment Experiences of Offenders Released from Ohio State Prisons*, in BARRIERS TO REENTRY?: THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 257, 298 (Shawn Bushway, Michael A. Stoll & David F. Weiman eds., 2007) (“Ex-prisoners with as little as one-quarter of employment in the year prior to admission into prison exited their initial post-prison unemployment more quickly than offenders with no pre-prison employment during the year prior to admission, and their post-prison employment probabilities were as much as 10 percent higher than those with no pre-prison employment.”)

158. Wheelock & Uggen, *supra* note 129, at 12.

159. Petersilia, *supra* note 137, at 26.

160. MACLEAN & THOMPSON, *supra* note 1, at 25; Rosenthal & Weissman, *supra* note 28, at 24; Ben Arnoldy, *The Spread of the Credit Check as Civil Rights Issue*, CHRISTIAN SCI. MONITOR (Boston, Mass.), Jan. 18, 2007, at 1.

garnishment is a disincentive to on-the-books employment.<sup>161</sup> Many states permanently ban convicted criminals from certain occupations, sometimes by denying an occupational license or imposing a moral character requirement.<sup>162</sup> Some states permit employers and licensing agencies to consider arrests that did not lead to conviction,<sup>163</sup> nolo contendere pleas,<sup>164</sup> and lesser infractions.<sup>165</sup> For example, Colorado may deny or revoke barber and cosmetologist licenses upon proof of felony conviction or a nolo contendere plea.<sup>166</sup> New Jersey may deny an auto body repair facility license to anyone with a “disqualifying criminal record.”<sup>167</sup> Working without proper paperwork can be grounds for a fine, a misdemeanor or felony charge, or constitute a parole violation,<sup>168</sup> and unlicensed operators may be unable to enforce business contracts by law or for fear of legal repercussions.<sup>169</sup> Many states revoke or suspend drivers’ licenses for

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161. FURSTENBERG, SHERWOOD & SULLIVAN, *supra* note 104, at 32. *But see* HARRY J. HOLZER, PAUL OFFNER & ELAINE SORENSEN, DECLINING EMPLOYMENT AMONG YOUNG BLACK LESS-EDUCATED MEN: THE ROLE OF INCARCERATION AND CHILD SUPPORT 26 (2004) (finding inconclusive evidence with respect to men ages sixteen to twenty-four), available at [http://www.2025bmb.org/pdf/employment/declining\\_employment.pdf](http://www.2025bmb.org/pdf/employment/declining_employment.pdf).

162. *See* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY 19 (2004) (criticizing states that bar employment opportunities for convicts), available at [http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf); Miriam J. Aukerman, *Barriers to Reentry: Legal Strategies to Reduce Recidivism and Promote the Success of Ex-offenders*, MICH. CRIM. L. ANN. J., 2003, at 4, available at [http://www.michbar.org/criminal/pdfs/CLA\\_Barriers.pdf](http://www.michbar.org/criminal/pdfs/CLA_Barriers.pdf); Wheelock & Uggem, *supra* note 129, at 20. Federal statutes also limit ex-convicts’ occupations. For example, those convicted of certain crimes may not be employed by any employee benefits plan, and drivers’ and occupational licenses can also be suspended for failure to pay child support. LEGAL ACTION CTR., *supra*, at 10. *See also* Heller, *supra* note 25, at 233.

163. LEGAL ACTION CTR., *supra* note 162, at 10.

164. *See, e.g.*, COLO. REV. STAT. §§ 12-7-105.5, 12-8-132 (2008); N.J. ADMIN. CODE § 13:21-21.15(a)(4) (2006). *See also* 42 U.S.C. § 666(a)(16) (2006); JESSICA PEARSON & LANAE DAVIS, CTR. FOR POLICY RESEARCH, SERVING PARENTS WHO LEAVE PRISON: FINAL REPORT ON THE WORK AND FAMILY CENTER 2 (2001), available at [http://reentrypolicy.org/publications/serving\\_parents\\_who\\_leave\\_prison\\_center\\_for\\_policy\\_research/Serving.pdf](http://reentrypolicy.org/publications/serving_parents_who_leave_prison_center_for_policy_research/Serving.pdf); Roger Roots, *When the Past Is a Prison: The Hardening Plight of the American Ex-convict*, JUST. POL’Y J., Fall 2004, at 3–4, <http://www.cjcrj.org/files/roots.pdf>.

165. *See, e.g.*, N.J. ADMIN. CODE § 13:21-21.15(a)(4).

166. COLO. REV. STAT. § 12-8-132.

167. N.J. ADMIN. CODE § 13:21-21.15(a)(4).

168. Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 191–92 (1995) (citing CAL. BUS. & PROF. CODE § 146 (providing for fines of \$250 to \$1000 for violations of licensing or certification statutes); CAL. BUS. & PROF. CODE § 23301 (making exercising the privileges of a still (liquor) licensee without a license a felony)).

169. *See, e.g.*, *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.*, 115 P.3d 41, 47 (Cal. 2005) (“[The state’s licensing law] will be applied, regardless of equitable considerations, even when the person for whom the work was performed has taken calculated advantage of the contractor’s lack of licensure.”); May, *supra* note 168, at 192–93 (citing *Hydrotech Sys., Ltd. v. Oasis Waterpark*, 803 P.2d 370 (Cal. 1991)). However, there may be a distinction between regulatory licensing and revenue-raising licensing. *See id.* at 192–93 nn.44–45.

certain offenses, creating an additional obstacle to employment.<sup>170</sup>

Employer access to criminal records also hinders post-incarceration employment because of employers' concerns about their businesses' public image, their employees' reliability and trustworthiness, potential negligent hiring suits, and insurance.<sup>171</sup> Employer preference for employees with no criminal record has been clearly documented. In a telephone survey of Los Angeles employers, more than forty percent would definitely not or probably not hire an ex-offender and thirty-six percent replied that it would depend on the crime.<sup>172</sup> A 2003 study of in-person job applicants with criminal records found that a criminal record resulted in half as many job offers.<sup>173</sup> A criminal record has also been found to reduce access to the high-quality jobs that, with higher pay and employee satisfaction, decrease recidivism and better enable ex-convicts to pay their debts.<sup>174</sup> Few states provide for sealing or expungement of criminal records, certificates of rehabilitation, or other means of recovering the right to employment,<sup>175</sup>

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170. LEGAL ACTION CTR., *supra* note 162, at 17. This is motivated in part by federal incentives. 23 U.S.C. § 159(a)(2)–(3) (2006).

171. Shawn Bushway, Shauna Briggs, Faye Taxman, Meridith Thanner & Mischelle Van Brakle, *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in *BARRIERS TO REENTRY?*, *supra* note 157, at 174, 175; Finlay, *supra* note 131, at 3–4. See Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in *IMPRISONING AMERICA*, *supra* note 151, at 205, 207.

172. Holzer, Raphael & Stoll, *supra* note 171, at 122–25. These statements were consistent with actual hiring: only 7.3% of those who would definitely or probably not hire an ex-offender had in fact hired one in the past year. However, the authors cite other studies finding less correlation. See Finlay, *supra* note 131, at 3; Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, FED. PROBATION, June 2001, at 3, 5; Becky Pettit & Christopher J. Lyons, *Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration by Race, Class, and Criminal Involvement*, in *BARRIERS TO REENTRY?*, *supra* note 157, at 203, 209–12.

173. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 956 (2003). Pager notes that outcomes may be affected by the type of offense and that her college student testers' high interpersonal skills may have made them unrepresentative proxies. *Id.* at 964–65. Employers almost never checked references, although they told applicants they would, a disappointing finding for those hoping to overcome a criminal record through references. *Id.* at 954. On the other hand, studies have found that not all employers who check records are less likely to hire applicants with criminal records. Some employers claimed to consider recently incarcerated employees more motivated or more willing to perform unpleasant tasks; much may depend on the tightness of the relevant labor market. *Id.* at 956–57. See also Finlay, *supra* note 131, at 9; Holzer, Raphael & Stoll, *supra* note 171, at 122–27.

174. See Christopher Uggen, *Ex-offenders and the Conformist Alternative: A Job Quality Model of Work and Crime*, 46 SOC. PROBS. 127, 144 (1999) (finding that high-quality jobs can decrease recidivism).

175. LEGAL ACTION CTR., *supra* note 162, at 15; MARGARET COLGATE LOVE, THE SENTENCING PROJECT, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2007), available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>. New Jersey, for example, requires licensing agencies to consider evidence of rehabilitation and allows

and such solutions can be costly and difficult to achieve.

Separation from the extended social network, discussed in more detail in Part III, *infra*, is another important labor market factor affected by incarceration. The alienating effects of the original crime and extended absence from the community can jeopardize relationships that could lead to employment.<sup>176</sup>

### C. Education

The incarcerated population is, for the most part, minimally educated. Data from 2002 showed thirty-six percent of federal prisoners and forty-one percent of state prisoners exiting prison without a GED,<sup>177</sup> and a 2005 study estimated that “roughly half of returning offenders are functionally illiterate.”<sup>178</sup> BJS statistics from 1997 show that only 12.7% of the incarcerated population had any postsecondary education, compared with 48.4% of the general population.<sup>179</sup> Many prisons offer educational programming, but not at every level of instruction.<sup>180</sup> Participation rates hover around forty percent,<sup>181</sup> and studies have found long waiting lists even for “mandatory” programs.<sup>182</sup> Some programs train inmates for

parole authorities to provide a showing of rehabilitation. N.J. STAT. ANN. § 2A:168A-3 (West 1985).

176. Wheelock & Uggen, *supra* note 129, at 24; Christy A. Visher & Vera Kachnowski, *Finding Work on the Outside: Results from the “Returning Home” Project in Chicago*, in BARRIERS TO REENTRY?, *supra* note 157, at 80, 89 (describing a 2001 survey of Chicago releasees where “[m]ost respondents who were currently employed went to former employers, talked to friends, and talked to relatives to find their jobs”). See Sandra Susan Smith, “Don’t Put My Name on It”: Social Capital Activation and Job-Finding Assistance Among the Black Urban Poor, 111 AM. J. SOC. 1, 23–29 (2005) (discussing reputation and reciprocity, and describing people who refused to help those who had poor work history or were perceived as criminally inclined).

177. Petersilia, *supra* note 137, at 24.

178. THOMAS M. MACLELLAN, NGA CTR. FOR BEST PRACTICES, IMPROVING PRISONER REENTRY THROUGH STRATEGIC POLICY INNOVATIONS 5 (2005), available at <http://www.nga.org/Files/pdf/0509PRISONERREENTRY.PDF>.

179. CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf>.

180. *Id.* at 4; JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 94 (2003).

181. HARLOW, *supra* note 179, at 5; PETERSILIA, *supra* note 180, at 95; Petersilia, *supra* note 137, at 38. See also JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, THE URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 32 (2001), available at [http://www.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://www.urban.org/UploadedPDF/from_prison_to_home.pdf).

182. NANCY G. LA VIGNE, VERA KACHNOWSKI, JEREMY TRAVIS, REBECCA NASER & CHRISTY VISHER, THE URBAN INST., A PORTRAIT OF PRISONER REENTRY IN MARYLAND 32 (2003) (“Between 1990 and 2000, Maryland’s prison population grew 54 percent while the number of correctional educators only increased by 4 percent. In 2001, more than 1,500 prisoners were on waiting lists to participate . . .”), available at [http://www.urban.org/UploadedPDF/410655\\_MDPPortraitReentry.pdf](http://www.urban.org/UploadedPDF/410655_MDPPortraitReentry.pdf); Petersilia, *supra* note 137, at 41.

occupations for which they cannot legally be licensed.<sup>183</sup>

Prison education may not significantly improve employment prospects or income. One study found that a prison GED brought a modest earnings premium for only four years after release.<sup>184</sup> A Florida study found little evidence of a prison GED providing any employment benefit, and then only for minority offenders,<sup>185</sup> and an Ohio study found that a prison GED had “no effect” on the probability of employment.<sup>186</sup>

#### D. Collateral Consequences

Legal consequences of a conviction other than the sentence, known as “collateral consequences,” are not always apparent to offenders considering a guilty plea and can be a significant source of financial trouble. *Strickland v. Washington* requires “reasonably effective” assistance of counsel,<sup>187</sup> but this does not necessarily include informing the defendant of the collateral consequences of a guilty plea.<sup>188</sup> Because of the discretion afforded to parole and probation officers, it can be difficult to predict what conditions will be imposed if a defendant pleads guilty.<sup>189</sup> Legal assistance with removing a guilty plea from a defendant’s record can be costly and success is uncertain.<sup>190</sup>

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183. PETERSILIA, *supra* note 180, at 114 (describing a barbering training program).

184. John H. Tyler & Jeffrey R. Kling, *Prison-Based Education and Reentry into the Mainstream Labor Market, in BARRIERS TO REENTRY?*, *supra* note 157, at 227, 243–47.

185. John H. Tyler & Jeffrey R. Kling, *Prison-Based Education and Re-entry into the Mainstream Labor Market* 3–4 (Princeton Univ. Indus. Relations Section, Working Paper No. 489, 2004), available at <http://www.irs.princeton.edu/pubs/pdfs/489.pdf>. However, the study raises the question of self-selection bias in prisoners’ decision to obtain a GED.

186. Sabol, *supra* note 157, at 296–98.

187. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002).

188. Chin & Holmes, *supra* note 187, at 703–09. Under the “collateral consequences rule,” which pre-dates *Strickland*, only the direct consequences, such as the prison term or fine, must be explained to the defendant. Collateral consequences are typically civil penalties such as forfeiture, disenfranchisement, and loss of public benefits, but, the distinction may depend on whether the penalty is imposed clearly by statute, or through exercise of discretion. For example, loss of a driver’s license has been held to be direct, for being “definite, immediate, and largely automatic.” *Barkley v. State*, 724 A.2d 558, 560–61 (Del. 1999). See also *State v. Edwards*, 157 P.3d 56, 64–65 (N.M. Ct. App. 2007) (holding that because the consequences of pleading guilty as a sex offender were “immediate and automatic,” defendants had a right to be informed by their counsel); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, in CIVIL PENALTIES, SOCIAL CONSEQUENCES*, *supra* note 155, at 27, 28; Angela J. Davis, *Incarceration and the Imbalance of Power, in INVISIBLE PUNISHMENT*, *supra* note 152, at 61, 71–75.

189. See generally Heather Barklage, Dane Miller & Gene Bonham, Jr., *Probation Conditions Versus Probation Officer Directives: Where the Twain Shall Meet*, FED. PROBATION, December 2006, at 37.

190. See, e.g., LOVE, *supra* note 175 (providing summaries of the procedures in each

While only certain drug and sex offenders are permanently banned from public housing,<sup>191</sup> applicants with a criminal history may be legally rejected.<sup>192</sup> If a public housing authority determines that a tenant has engaged in prohibited activity, it may evict the tenant, even if the tenant has not been arrested.<sup>193</sup> Many private landlords also prefer not to rent to ex-convicts: in one study, only sixty percent of landlords said they would consider an applicant who demonstrated rehabilitation or lived with her family, and they were less receptive to drug and sex offenders.<sup>194</sup> Some parolees are not allowed to live or associate with others who have criminal records,<sup>195</sup> which further limits their housing options. Poor credit and employment histories, pervasive among the post-release population, can also be an obstacle.<sup>196</sup> Limited transitional housing facilities are available: one study estimated that only 0.5% of inmates participated in such programs.<sup>197</sup> Together, these factors drive up the cost of housing for returning prisoners. Unsurprisingly, rates of homelessness are high.<sup>198</sup>

Some convictions can mean loss of state and federal TANF benefits, as well as other forms of public assistance. States may not provide TANF and food stamps to those convicted of welfare fraud, subject to outstanding warrants, or who are violating probation or parole.<sup>199</sup> Federal benefits are

U.S. jurisdiction for obtaining relief from the collateral consequences of conviction).

191. 42 U.S.C. § 13661(a), (b) (2006); Elizabeth Curtin, *Home Sweet Home for Ex-offenders*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 155, at 111, 115.

192. See generally McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. Tol. L. Rev. 479 (2005). In 1997, public housing authorities reported having denied 19,405 applicants because of their criminal record, forty-three percent of all rejections. CATERINA GOUVIS ROMAN & JEREMY TRAVIS, THE URBAN INST., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY, at viii (2004), available at [http://www.urban.org/UploadedPDF/411096\\_taking\\_stock.pdf](http://www.urban.org/UploadedPDF/411096_taking_stock.pdf). See also DILLER, GREENE & JACOBS, *supra* note 1, at 10.

193. 24 C.F.R. § 982.553(c) (2009); KATHERINE H. BRADLEY, R.B. MICHAEL OLIVER, NOEL C. RICHARDSON & ELSPETH M. SLAYTER, CMTY. RES. FOR JUSTICE, NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER 5 (2001) ("Housing advocates state, however, that when adequately represented in the appeals process, 'people with criminal record[s] or drug and alcohol histories are no more likely to be denied public housing than the general population.'" (alteration in original)), available at [http://www.cjinstitute.org/files/No\\_Place\\_Like\\_Home.pdf](http://www.cjinstitute.org/files/No_Place_Like_Home.pdf); EVERY DOOR CLOSED, *supra* note 151, at 51; ROMAN & TRAVIS, *supra* note 192, at 23; Curtin, *supra* note 191, at 115–16.

194. Curtin, *supra* note 191, at 115–16.

195. ROMAN & TRAVIS, *supra* note 192, at 11.

196. Curtin, *supra* note 191, at 115–16.

197. ROMAN & TRAVIS, *supra* note 192, at 14. Cuts in transitional housing programs have exacerbated this already significant problem. PETERSILIA, *supra* note 180, at 98.

198. BRADLEY, OLIVER, RICHARDSON & SLAYTER, *supra* note 193, at 6; ROMAN & TRAVIS, *supra* note 192, at 11.

199. 42 U.S.C.A. § 608(a)(8), (9)(A) (West 2009); EVERY DOOR CLOSED, *supra* note 151, at 28. Food stamp eligibility is also limited for those with certain convictions. 7 U.S.C.A. § 2015(b) (West 2009); EVERY DOOR CLOSED, *supra* note 151, at 28. Ex-convicts may still be eligible for emergency cash assistance, work subsidies, and the refundable



also denied to those with certain drug convictions, but states may opt out of all or part of this ban.<sup>200</sup> For certain crimes, offenders are also disqualified from federal military benefits,<sup>201</sup> retirement funding,<sup>202</sup> and student loan assistance.<sup>203</sup>

Even arrests that do not lead to prosecution, a guilty plea, or a conviction can cause financial problems. A defendant may need to pay for bail and legal representation, and a time-consuming court process can interfere with work.<sup>204</sup> Fees and fines for errors such as missed court dates can accumulate quickly.<sup>205</sup> Arrests also correlate with a ten-week decrease in employment duration.<sup>206</sup> An arrest record can be unattractive to employers<sup>207</sup> and can be grounds for denial of private employment in some states.<sup>208</sup> Arrests may also precipitate eviction from public housing.<sup>209</sup>

### *E. Debt and Financial Pressure in the Immediate Reentry Period*

The initial reentry period is fraught with financial problems. The ex-convict must meet personal needs for food, housing, and medical care; pay court and parole fees; comply with conditions such as curfews and meetings; make payments of child support, taxes, restitution, and other debt; and search for a job. About two-thirds of corrections departments release inmates with their personal savings and cash known as “gate money,”<sup>210</sup> but often no more than \$200.<sup>211</sup> Inmates’ savings are typically

Earned Income Tax Credit, as well as some forms of non-cash TANF-administered services such as counseling, child care, and transportation. 45 C.F.R. § 260.31 (2009).

200. 21 U.S.C. §§ 862(a), 862a(a), (d)(1) (2006); RE-ENTRY POLICY COUNCIL REPORT, *supra* note 140, at 332. A 2006 study estimated that 92,000 women and approximately 135,000 children are affected by the ban. PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 6 (2002), available at [http://www.sentencingproject.org/doc/publications/women\\_lifesentences.pdf](http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf). See also PETERSILIA, *supra* note 180, at 126.

201. Roots, *supra* note 164, at 4; Wheelock & Uggen, *supra* note 129, at 20.

202. 5 U.S.C. § 8312 (2006).

203. 20 U.S.C.A. § 1091(r) (West 2010).

204. John J. Amman, *Criminal Records of the Poor and Their Effects on Eligibility for Affordable Housing*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 222, 222–24 (2000).

205. *Id.*

206. Shawn D. Bushway, *The Impact of an Arrest on the Job Stability of Young White American Men*, 35 J. RES. CRIME & DELINQ. 454, 475 (1998). In many states, records of arrests not resulting in conviction can be at least partly sealed or expunged, but that strategy is costly and slow. See, e.g., CAL. PENAL CODE § 851.8(a), (f) (West 2008).

207. EVERY DOOR CLOSED, *supra* note 151, at 18.

208. See, e.g., CAL. LAB. CODE § 432.7(f)(1) (West 2003 & Supp. 2009) (“Nothing in this section shall prohibit an employer at a health facility . . . from asking an applicant for employment . . . [w]ith regard to an applicant for a position with regular access to patients, to disclose an arrest . . .”); 18 PA. CONS. STAT. ANN. § 9125(b) (West 2000).

209. See *infra* notes 238–39 and accompanying text.

210. TRAVIS, SOLOMON & WAUL, *supra* note 181, at 18–19; Richards & Jones, *supra*

meager, because any earnings or gifts they receive while incarcerated can be garnished or may be consumed by in-prison expenses.<sup>212</sup> In one Baltimore study, eighty-five percent of those released reported having some money, but hardly enough to restart a life: the median amount was \$40, and the maximum was \$2340.<sup>213</sup> Releasees have reduced access to credit because criminal convictions can appear on credit reports for at least seven years, as may financial penalties that have been converted into civil judgments.<sup>214</sup> Many releasees have no current identification, a barrier to housing, financial services, and employment.<sup>215</sup>

Health problems also add costs to reentry.<sup>216</sup> Many jurisdictions perform little planning for health care during reentry.<sup>217</sup> Medicare and Medicaid are not always resumed immediately after release, despite federal requirements.<sup>218</sup> Numerous releasees have untreated substance

note 23, at 205, 210–11 (describing the practice of issuing “gate money”).

211. TRAVIS, BUT THEY ALL COME BACK, *supra* note 151, at 223; VISHER, KACHNOWSKI, LA VIGNE & TRAVIS, *supra* note 21, at 5; Rosenthal & Weissman, *supra* note 28, at 19 & n.42. *See, e.g.*, N.Y. CORRECT. LAW § 125(2) (McKinney 2003) (“[T]he commissioner shall take such steps as are necessary to ensure that inmates have at least forty dollars available upon release.”).

212. *See, e.g.*, COLO. REV. STAT. § 26-13-122.5 (2008); TEX. CODE CRIM. PROC. ANN. art. 42.031 (Vernon 2006) (permitting the garnishing of inmates’ earnings); *Dean v. Lehman*, 18 P.3d 523, 526 (Wash. 2001) (finding the reduction of an inmate’s accounts by thirty-five percent to pay for incarceration was constitutionally permissible); 28 C.F.R. § 545.11 (2008) (permitting attachment of inmate bank accounts when an inmate owes child support). *See also* DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN AMERICA 152 (2007); LESSONS FROM OCSE GRANTS, *supra* note 42, at 31; DILLER, GREENE & JACOBS, *supra* note 1, at 9; Richards & Jones, *supra* note 23, at 214 (describing extremely low pay for prisoners and their consequent reliance on money sent from home); Rosenthal & Weissman, *supra* note 28, at 19.

213. VISHER, KACHNOWSKI, LA VIGNE & TRAVIS, *supra* note 21, at 5. “Gate money” often does not include work-appropriate clothing, transportation, and other necessities. TRAVIS, SOLOMON & WAUL, *supra* note 181, at 19 (“Most prisoners are released with little more than a bus ticket and a nominal amount of spending money. . . . [O]nly half [of states] report making any transportation arrangements.”).

214. 15 U.S.C. § 1681c(a)(2), (5) (2006); EVERY DOOR CLOSED, *supra* note 151, at 19. *See also* DILLER, GREENE & JACOBS, *supra* note 1, at 20; Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 7, 2009, at A1.

215. RE-ENTRY POLICY COUNCIL REPORT, *supra* note 140, at 332; MACLELLAN, *supra* note 178, at 5 (“[M]any state departments of motor vehicles do not accept prison documents as proof of identification.”); TRAVIS, SOLOMON & WAUL, *supra* note 181, at 19.

216. *See supra* notes 135–43 and accompanying text.

217. *See* Theodore M. Hammett, Cheryl Roberts & Sofia Kennedy, *Health-Related Issues in Prisoner Reentry*, 47 CRIME & DELINQ. 390, 394 (2001) (focusing on HIV/AIDS in the reentry population). In New York City, for example, only after a class action was filed did the City begin providing discharge planning services to inmates who were receiving mental health treatment. *See* Heather Barr, *Transinstitutionalization in the Courts: Brad H. v. City of New York, and the Fight for Discharge Planning for People with Psychiatric Disabilities Leaving Rikers Island*, 49 CRIME & DELINQ. 97 (2003).

218. BAZELON CTR. FOR MENTAL HEALTH LAW, THE EFFECT OF INCARCERATION ON MEDICAID BENEFITS FOR PEOPLE WITH MENTAL ILLNESSES 4 (2009), available at [http://www.bazelon.org/pdf/Medicaid\\_and\\_Incarceration5-09.pdf](http://www.bazelon.org/pdf/Medicaid_and_Incarceration5-09.pdf). *See also* EVERY DOOR

abuse problems,<sup>219</sup> and, even with treatment, rates of relapse are high.<sup>220</sup> Substance abuse can cause further criminal convictions in addition to the major financial burden it may impose. Parole administrators often do not identify or address mental health needs, and other mental health services are poorly coordinated with the criminal justice system.<sup>221</sup> Untreated mental illnesses interfere with employment and reduce compliance with parole conditions such as drug and alcohol abstinence and required meetings.<sup>222</sup>

Parole, probation, and house arrest can also impose direct and indirect economic burdens on releasees. Most releasees are sentenced to some form of post-release supervision; more than five million people in 2006 were on parole or probation.<sup>223</sup> Fees vary by state, but most states require some payments for monitoring, drug and alcohol testing, and counseling services.<sup>224</sup> Court dates and required meetings associated with post-release supervision impose travel costs and take time away from work.<sup>225</sup> Conditions such as curfews,<sup>226</sup> which limit working hours, and restrictions on living with other ex-convicts, which make housing more difficult to find, are also economic burdens.<sup>227</sup> Parolees living in halfway houses can be billed for the program's expenses.<sup>228</sup> House arrest requires telephone availability at certain hours, which can interfere with employment and

CLOSED, *supra* note 151, at 37.

219. *See supra* note 142.

220. RE-ENTRY POLICY COUNCIL REPORT, *supra* note 140, at 291, 375.

221. Petersilia, *supra* note 137, at 32. *See* Arthur J. Lurigio, *Effective Services for Parolees with Mental Illnesses*, 47 CRIME & DELINQ. 446, 457 (2001). Lack of coordination is in part due to medical privacy considerations. RE-ENTRY POLICY COUNCIL REPORT, *supra* note 140, at 374.

222. Lurigio, *supra* note 221, at 457.

223. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2006, at 1 (2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus06.pdf>; TRAVIS, SOLOMON & WAUL, *supra* note 181, at 20; Heller, *supra* note 25, at 219 ("98% of offenders who serve time in prison are also sentenced to a term of supervised release . . . ." (citing WILLIAM J. SABOL, WILLIAM P. ADAMS, BARBARA PARTHASARATHY & YAN YUAN, U.S. DEP'T OF JUSTICE, OFFENDERS RETURNING TO FEDERAL PRISON 1986-97, at 2 (2000))).

224. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 42.035(c) (Vernon 2006 & Supp. 2009). *See also* DILLER, GREENE & JACOBS, *supra* note 1, at 15 ("[I]f an individual was convicted of a drug offense, or has a history of drug use or addiction, he or she may be obliged to pay for urine testing. . . . [Maryland Division of Parole and Probation] data show that testing fees were ordered in 25 percent of the parole supervision cases. For drug testing by schedule, there is a one-time flat fee of \$100. The fee for a random drug test is \$6. . . . The mean average amount [imposed on an individual] was \$91, but the median was \$120.").

225. EVERY DOOR CLOSED, *supra* note 151, at 37; Amman, *supra* note 204, at 222-24.

226. *See, e.g.*, RE-ENTRY POLICY COUNCIL REPORT, *supra* note 140, at 386.

227. *See* Heller, *supra* note 25, at 229.

228. *Woodley v. Dep't of Corr.*, 74 F. Supp. 2d 623, 627-28 (E.D. Va. 1999).

necessitate the expense of a personal phone.<sup>229</sup> Failure to comply with any condition of parole, including child support and restitution nonpayment, can count as a technical violation.<sup>230</sup> One study found that twelve percent of probation revocations were at least partly attributable to financial violations.<sup>231</sup> Homelessness can also lead to parole violations, for failure to maintain a fixed address, or to various minor citations such as loitering.<sup>232</sup>

Inmates' personal lives also create financial hurdles upon release, many of which have been discussed, *supra*. Inmates' long absence from the community, exacerbated by prison policies that make visitation and telephone contact difficult and expensive,<sup>233</sup> can interfere with personal relationships, reducing access to informal lending and interpersonal assistance.<sup>234</sup> The ex-convict may need to invest time and money in repairing relationships by, for example, paying informal child support or off-the-books restitution.<sup>235</sup> Very few returning offenders have enough savings for a security deposit and first month's rent for their own

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229. William G. Staples, *The Everyday World of House Arrest: Collateral Consequence for Families and Others*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 155, at 139, 145–47.

230. TRAVIS, BUT THEY ALL COME BACK, *supra* note 151, at 49. In 2000, about 135,000 parolees (two-thirds of all parole violators) were returned to prison for a violation of a parole condition rather than for new crimes. *Id.*

231. MACLEAN & THOMPSON, *supra* note 1, at 8 (citing ROBYN L. COHEN, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991 (1995)).

232. See NANCY KERRY & SUSAN PENNELL, SAN DIEGO ASS'N OF GOV'TS, SAN DIEGO HOMELESS COURT PROGRAM: A PROCESS AND IMPACT EVALUATION 12 (2001), available at <http://www.courtinfo.ca.gov/programs/collab/documents/2001SANDAGHomelessCourtEvaluation.pdf>; Luis A. Almodovar & Stacy Shor McNally, *Are You Worried About Going to Jail? The Public Defender's Office Homeless Outreach Program*, 36 STETSON L. REV. 183, 183–84 (2006).

233. If families wish to maintain a relationship during incarceration, expensive visits, phone calls, and financial support during and after incarceration may be necessary. Visiting a prison can be prohibitively expensive, especially because prisoners can be placed in distant states. See Hagan & Dinovitzer, *supra* note 152, at 142; Petersilia, *supra* note 172, at 5; Travis, *Families and Children*, *supra* note 151, at 36. Phone calls from prison can cost more than a dollar per minute because of special, highly profitable deals granted to telephone companies. PETERSILIA, *supra* note 180, at 45. A 1998 Florida study found that family members spent, on average, \$69.19 monthly to accept collect calls. Travis, *Families and Children*, *supra* note 151, at 37. As with visitation, only limited state assistance is available even though states receive money from the phone companies; California has received as much as thirty-five million dollars in a single year. *Id.* See also BRAMAN, *supra* note 212, at 131–33, 153; TRAVIS, MCBRIDE & SOLOMON, *supra* note 36, at 6. Some assistance is provided by states and volunteer groups. See, e.g., CAL. WELF. & INST. CODE § 361.5(e)(1)(A) (West 2008 & Supp. 2009) (requiring calls to children to be provided if necessary).

234. BRAMAN, *supra* note 212, at 161–62.

235. *Id.* See, e.g., KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 167 (1997); Staples, *supra* note 229, at 139, 150 (quoting an individual who was unable to assist his grandmother due to house arrest).

apartment,<sup>236</sup> but living with family post-release poses many financial difficulties to the household. Private landlords are sometimes unwilling to rent to a family that includes an ex-convict.<sup>237</sup> Under the federal “one-strike” policy, public housing leases permit termination of the entire family’s tenancy for any criminal activity of a tenant or guest that negatively affects other tenants, or any tenant’s drug-related criminal activity, even off the premises.<sup>238</sup> The entire family can be evicted without a conviction or even an arrest, even if the alleged offender moves out.<sup>239</sup>

### III.

#### THE ROLE OF CULTURE AND CLASS DIFFERENCE IN OBSTRUCTING ACCESS TO BANKRUPTCY

##### A. *Class Differences and Cultural Barriers*

Subtle cultural barriers also restrict low-income, post-incarcerated debtors’ access to bankruptcy. Bankruptcy is often described as a “middle-class phenomenon” because most debtors have the cultural profile and social capital typical of the middle class,<sup>240</sup> and because the Bankruptcy Code contemplates a middle-class debtor in its assumptions about recordkeeping habits,<sup>241</sup> standard of living,<sup>242</sup> and patterns of earnings,

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236. PETERSILIA, *supra* note 180, at 121; TRAVIS, BUT THEY ALL COME BACK, *supra* note 151, at 220 (noting that inmates who leave prison tend to live with their families).

237. Christopher Mele, *The Civil Threat of Eviction and the Regulation and Control of U.S. Public Housing Communities*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 155, at 121, 121–37.

238. 24 C.F.R. § 966.4(l)(5) (2009). See generally Jim Moye, *Can’t Stop the Hustle: The Department of Housing and Urban Development’s “One Strike” Eviction Policy Fails to Get Drugs Out of America’s Projects*, 23 B.C. THIRD WORLD L.J. 275 (2003).

239. § 966.4(l)(5); *City of South S.F. Hous. Auth. v. Guillory*, 49 Cal. Rptr. 2d 367, 372 (App. Dep’t Super. Ct. 1995). The Supreme Court has upheld this policy, including no-fault evictions of families. *U.S. Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002). Crime and drug-related evictions cannot be appealed through the public housing grievance process. 24 C.F.R. § 966.51(a)(2)(iv) (2008). A tenant evicted for drug-related activity is ineligible for readmission for three years unless the housing authority determines that the offender is rehabilitated or that relevant circumstances have changed. 42 U.S.C. § 13661(a) (2006).

240. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 218–20 (2006) (finding in three surveys of bankruptcy filings conducted in 1981, 1991, and 2001: “[D]ebtors were solidly middle class. More than half went into bankruptcy owning their homes, and a large portion had middle-class jobs. . . . Among other things, . . . debtors also had slightly above average educations, placing them even more squarely in the middle of the American population.”).

241. See Nathalie Martin, *Poverty, Culture and the Bankruptcy Code: Narratives from the Money Law Clinic*, 12 CLINICAL L. REV. 203, 234 (2005).

242. 11 U.S.C.A. § 1325(b)(3) (West 2009) (discussing features of an acceptable Chapter 13 payment plan, which permits the debtor to retain approximately the state median income on which to live as “reasonably necessary”); Martin, *supra* note 241, at 206.

consumption, and debt.<sup>243</sup> Disadvantageous provisions in the Bankruptcy Code, potential social repercussions, and lack of affordable legal services can effectively prevent low-income releasees from filing bankruptcy. When released prisoners do file, bias in the Bankruptcy Code against low-income debtors' economic culture makes bankruptcy more burdensome for them than for middle-class debtors. These factors deter bankruptcy in marginal cases by increasing the debtor's perceived cost of filing, depriving debtors, creditors, and society of the benefits the Bankruptcy Code is designed to provide. Bankruptcy can be thought of as a public penance of austerity and submission to court authority that serves as a substitute for payment and acknowledges the legitimacy of the creditors' interests.<sup>244</sup> Under this articulation, a more arduous performance is unfairly being required of lower-income debtors because of their economic status.

### 1. *Cultural Barriers to Filing Bankruptcy*

The effect of bankruptcy on any debtor-creditor relationship depends in part on the way the particular type of debt is treated in the bankruptcy and on the creditor's attitude toward bankruptcy. Little empirical or anecdotal literature addresses the social repercussions of bankruptcy for relationships and future lending; scholarship tends to focus on debtors' internal experiences rather than the attitudes of creditors.<sup>245</sup> Interpersonal consequences may deter bankruptcy entirely or may raise the cost of bankruptcy by motivating the debtor to go beyond what a court would require: debtors may voluntarily reaffirm discharged debts<sup>246</sup> or make a larger payment to unsecured creditors than is necessary for court approval. Thus, interpersonal debtor-creditor relationships can discourage

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243. See SULLIVAN, WARREN & WESTBROOK, *supra* note 19, at 2–6; Korobkin, *Bankruptcy Law*, *supra* note 18, at 2126; Martin, *supra* note 241, at 233–34.

244. See generally Korobkin, *Bankruptcy Law*, *supra* note 18 (describing and interpreting the performative nature of bankruptcy proceedings).

245. See, e.g., Braucher, *supra* note 109, at 569–75; Kathy R. Davis, *Bankruptcy: A Moral Dilemma for Women Debtors*, 22 LAW & PSYCHOL. REV. 235, 240 (1998); Martin, *supra* note 241, at 220–23.

246. Reaffirmation is outlined in 11 U.S.C. § 524(c) (2006). The Bankruptcy Code permits voluntary reaffirmation of selected debts if doing so would not impose “undue hardship” on the debtor. § 524(c)(3)(B). The “undue hardship” standard can prevent creditors from pressuring the debtor into reaffirmation, but both judicial review and the attitudes of debtors' counsel can be inconsistent, so this protection is not always enforced. Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 712–13 (1999); David A. Scholl, “All the Small Things”: How the Bankruptcy Courts Are and Should Be Handling the Many Little Reaffirmation and Like Matters Before Them, 10 TEMP. POL. & CIV. RTS. L. REV. 83, 83 (2000). For secured debts, debtors may also attempt a “ride-through,” in which the debtor continues to make monthly payments on the collateral and the creditor accepts them as if the debtor were not in bankruptcy, instead of filing a claim as a creditor. See, e.g., Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 461–63 (2005).

bankruptcy or push debtors into unrealistic plans that are more likely to fail.<sup>247</sup> Here, the subtle class bias of the bankruptcy system is again apparent. Because the very poor have few sources of income and lack access to credit at reasonable rates,<sup>248</sup> their social network and the income, lending, information, and in-kind assistance it provides are critical. Filing bankruptcy could alienate that community by signaling a disavowal of interpersonal financial obligations. Middle-class creditors are more likely to be aware of the basic premise of bankruptcy and may have priced in this possibility when lending,<sup>249</sup> and so may be better prepared or may not feel that their rights are being violated. They may also be more comfortable with the formal, impersonal role of the creditor and more confident in their ability to succeed. Among the very poor, however, a very low filing rate<sup>250</sup> reduces the expectation of bankruptcy even among creditors who are aware of the possibility, and bankruptcy may not be priced into the loan in advance. Recently incarcerated debtors may struggle with interpersonal relationships due to the alienating effects of the original crime, prolonged absence from the community, or a lack of resources with which to rebuild relationships. Meanwhile, middle-class debtors can more easily earn income and obtain formal credit and insurance, even with a bankruptcy-damaged credit score.<sup>251</sup> They need not rely as heavily on friends and family, and are not living so close to the margin as to make social alienation a catastrophe.

Informal interpersonal lending and assistance among the very poor is

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247. Already, many Chapter 13 plans are not fully carried out (although some debtors may never have intended to finish a plan). ADMIN. OFFICE OF THE U.S. COURTS, OFFICE OF JUSTICE PROGRAMS, 2008 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 64–67 tbl.6 (2009), available at <http://www.uscourts.gov/bnkrpctystats/2008/BAPCPAstats.html>.

248. VENKATESH, *supra* note 45, at 120–21, 140–41. See MICHAEL S. BARR, THE BROOKINGS INST., BANKING THE POOR: POLICIES TO BRING LOW-INCOME AMERICANS INTO THE FINANCIAL MAINSTREAM 4 (2004), available at [http://www.brookings.edu/~media/Files/rc/reports/2004/10childrenfamilies\\_barr/20041001\\_Banking.pdf](http://www.brookings.edu/~media/Files/rc/reports/2004/10childrenfamilies_barr/20041001_Banking.pdf); Deborah B. Goldberg, *Navigating the Shoals: Financial Service Strategies for Low-Income Consumers*, 38 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 138, 140 (2004). See also VENKATESH, *supra* note 45, at 136 (“Even the more successful [local businesspeople and financiers of a low-income neighborhood in Chicago] at times cannot obtain credit with banks and savings and loans. So they, too, use each other informally for loans, whether for as little as \$50 or as much as \$5,000.”).

249. See Sullivan, Warren & Westbrook, *supra* note 240 (finding that the majority of bankruptcy claims are filed by middle-class debtors). Cf. Rafael Efrat, *Bankruptcy Stigma: Plausible Cases for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 500–03, 510 (2006) (discussing the decline of stigma attached to bankruptcy due to media coverage and the increased likelihood of friends or neighbors having gone through bankruptcy).

250. Sullivan, Warren & Westbrook, *supra* note 240. In 2001, only forty-one percent of the people filing bankruptcy had incomes below the poverty line while fifty-three percent had incomes between the poverty line and the median. *Id.* at 223 fig.2.

251. VENKATESH, *supra* note 45, at 120–21, 136, 140–41.

widespread, and plays a role beyond simple financial cooperation.<sup>252</sup> More than borrowing and lending, the activity is social capital: a culture of reciprocity and mutual assistance that is inseparable from social relationships, providing participants with income, insurance, and some measure of stability. Research has shown that it functions to “reinforce . . . interpersonal networks and promote group solidarity.”<sup>253</sup> One 1990 study of mothers found that many of those on public assistance relied on contributions from others for an average of \$208 per month, employed mothers receiving an average of \$291 per month.<sup>254</sup> A 2008 study of fifty low-income women found that ninety-two percent had borrowed from friends and family.<sup>255</sup> Another study found that obligations were, in some cases, deliberately incurred to reinforce the mutual aid relationship.<sup>256</sup> Loans are often not paid off in money; one study found cash repayment rates of around twenty-five percent, sometimes as low as five or ten percent.<sup>257</sup> Instead, obligations can be met by labor,<sup>258</sup> items of property,<sup>259</sup> information, or other favors,<sup>260</sup> and payments back and forth do not necessarily correspond to specific debts.<sup>261</sup> Repeated failure to reciprocate negatively affected relationships, and filing bankruptcy, as a formal disavowal of obligations, may be seen as a significant violation of norms of reciprocity.<sup>262</sup> Even creditors holding nondischargeable, preferred, or

252. See, e.g., EDIN & LEIN, *supra* note 235, at 150; CAROL B. STACK, *ALL OUR KIN* (Basic Books 1997) (1975); VENKATESH, *supra* note 45; Martin, *supra* note 241, at 234–35; Smith, *supra* note 176, at 9–12.

253. VENKATESH, *supra* note 45, at 137. See also BRAMAN, *supra* note 212, at 159–61; STACK, *supra* note 252, at 32–44; VENKATESH, *supra* note 45, at 91–95; Martin, *supra* note 241, at 234.

254. EDIN & LEIN, *supra* note 235, at 150–51. The average income from family and friends, for those receiving it, was \$136 per month. *Id.* These numbers do include some formal child support.

255. Littwin, *supra* note 44, at 454, 460.

256. STACK, *supra* note 252, at 82 (“Temporary child-care services are also a means of obligating kin or friends for future needs. Women may ask to ‘keep’ the child of a friend for no apparent reason. But they are, in fact, building up an investment for future needs.”). See also *id.* at 40–42, 66–67.

257. VENKATESH, *supra* note 45, at 143. See also EDIN & LEIN, *supra* note 235, at 151.

258. VENKATESH, *supra* note 45, at 142–43 (quoting one lender who explained: “I may be out some money, but I always got someone to help me around here and I don’t have to pay no union wages. There’s a lot we get out of the deal so don’t think just ‘cause we giving away money we’re not getting anything in return.”). See also EDIN & LEIN, *supra* note 235, at 153.

259. See, e.g., STACK, *supra* note 252, at 40–42.

260. See, e.g., Smith, *supra* note 176, at 35–37.

261. See, e.g., Martin, *supra* note 241, at 234 (“[E]xtended families are common, and it is also common to help one another out whenever there is a need. This help is not a loan per se, but certainly in some people’s minds it would be incomplete not to at least mention this phenomenon [in bankruptcy.]”).

262. See, e.g., EDIN & LEIN, *supra* note 235, at 152–53; STACK, *supra* note 252, at 34–35; Littwin, *supra* note 44, at 460 (“[T]hese networks can actually exact a toll. The mutual-aid



reaffirmed debts may feel that a debtor filing bankruptcy has violated social norms by discharging debts owed to others. In the absence of other sources of affordable credit, loss of access to interpersonal lending and assistance can be a severe economic blow and a sound reason for debtors to refrain from filing bankruptcy.

Compounding the problem of cultural disapproval of or unfamiliarity with bankruptcy, mistrust of the government and judicial system is also a significant cultural barrier to bankruptcy for the very poor. Debtors' mistrust of government can lead them to consider bankruptcy discharge illegitimate or view any involvement with courts as disadvantageous, especially in the aftermath of trial and incarceration.<sup>263</sup> Mistrust of government may contribute to the views of low-income creditors as well. In addition to their displeasure at the debtor's violation of norms of reciprocal financial assistance, they may doubt their ability to succeed in entering claims,<sup>264</sup> resist even minimal involvement in a court proceeding, or be unable to participate in court at all due to concerns about, for example, outstanding warrants or immigration status. Creditors who consider courts illegitimate may not view bankruptcy as successfully accomplishing a binding discharge of debt or performing the penitential function it is argued to serve, and may continue to pursue payment despite

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networks that many low-income women develop usually require reciprocity . . .”).

263. For discussion of pro se litigants and low-income persons' varying confidence and trust in the legal system, see Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879 (1999); Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants*, 82 JUDICATURE 13, 18 (1998) (“The judges also commented on the feelings they perceived on the part of the pro se litigants. One observed that the ‘pro se person has [a] feeling of isolation—require[s] time to dispel,’ while another noted a ‘sense of unfairness, helplessness and futility by the pro se.’ One judge said that ‘the pro se feels the system is fixed.’ Another explained, ‘The overwhelming [sic] greatest problem is the inability of most pro se litigants to comply with the rules of evidence, which leads to a failure of proof in most cases, and an embittered pro se litigant.’” (first and second alterations in original)); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 307 (2002) (“Court personnel, accustomed to experienced counsel, are rarely trained to address the anger, fear, frustration, and communication barriers that are common hurdles when working with pro se litigants.”); Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373 (2005). See also COLO. ACCESS TO JUSTICE COMM’N, THE JUSTICE CRISIS IN COLORADO: A REPORT ON THE CIVIL LEGAL NEEDS OF THE INDIGENT IN COLORADO, at J-5 (2008) (reporting the testimony of Stephanie Rubenstein, a Magistrate in Mesa County Court, as to the “general mistrust for the court system” displayed by pro se litigants, many of whom are indigent), available at [http://www.cobar.org/repository/Access%20to%20Justice/08ATJ\\_FULL\\_Report.pdf](http://www.cobar.org/repository/Access%20to%20Justice/08ATJ_FULL_Report.pdf).

264. One study of pro se litigants found that bankruptcy claims were among the more complex claims that were attempted pro se. Spencer G. Park, *Providing Equal Access to Equal Justice: A Statistical Study of Non-prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 823 (1997).

the automatic stay.<sup>265</sup> On the other hand, creditors avoiding the courts may fail to enter or contest claims, foregoing their opportunity to obtain payment through the bankruptcy plan. This can reduce the total amount of debt, working to the debtor's advantage. Sensitive creditor relationships will require careful assessment and management by the debtor.

The economic culture of informal lending with little expectation of specific repayment for each individual loan makes poor debtors uniquely vulnerable to a particular legal problem: voidable preferences. The bankruptcy trustee can challenge and reclaim certain transfers of value from the debtor to third parties in the recent past.<sup>266</sup> The trustee may "avoid," or invalidate, transfers "to or for the benefit of a creditor"<sup>267</sup> made up to ninety days before filing bankruptcy. The time limit extends to one year if the creditor is an "insider," i.e., a relative or close friend.<sup>268</sup> The trustee may also avoid post-filing transactions if they are transfers of nonexempt property of the debtor's estate.<sup>269</sup> A challenge to a transfer complicates the bankruptcy, burdening the debtor and increasing the chance of creditor retaliation, demands for further payments, or other adverse consequences when the trustee attempts to reclaim the transfer from the creditor.

A few exceptions to the voidable preferences statute exist, though their complex rules create a minefield for unsophisticated debtors. The first exception applies to transfers that both were and were intended to be "contemporaneous exchange for new value."<sup>270</sup> Contemporaneousness is a fact-sensitive determination, and the time over which the exchange occurs may be several weeks.<sup>271</sup> Bounced and post-dated checks, for example, may or may not be contemporaneous exchanges.<sup>272</sup> "New value" includes

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265. I have personally observed several such cases while working at the WilmerHale Legal Services Center. Cf. Korobkin, *Bankruptcy Law*, *supra* note 18 (highlighting and interpreting the performative nature of bankruptcy proceedings).

266. 11 U.S.C.A § 547(b)-(c) (West 2009); 11 U.S.C. §§ 548, 549 (2006).

267. § 547(b)(1), (4)(A).

268. 11 U.S.C.A. §§ 101(31)(A), 547(b)(4)(B) (West 2009). See also, e.g., *Marchand v. King* (*In re Lopresti*), No. 03-48839, 2006 Bankr. LEXIS 2396, at \*22-23 (Bankr. D.N.J. Sept. 20, 2006) (extending insider definition to "close friends").

269. § 549(a).

270. § 547(c)(1). See, e.g., *Schnittjer v. Pickens* (*In re Pickens*), No. 06-01120, 2008 Bankr. LEXIS 6, at \*6-7 (Bankr. N.D. Iowa Jan. 3, 2008) (detailing three-part test to establish defense of "contemporaneous exchange for new value," including (1) "both parties intended the exchange to be contemporaneous and for new value," (2) "the exchange was contemporaneous in fact," and (3) "the exchange was for new value").

271. § 547(c)(1)(B). See, e.g., *Lindquist v. Dorholt* (*In re Dorholt, Inc.*), 224 F.3d 871, 874 (8th Cir. 2000).

272. See, e.g., *Lichtenstein v. Aspect Computer* (*In re Computer Personalities Sys., Inc.*), No. 01-14231, 2004 Bankr. LEXIS 941, at \*31-32 (Bankr. E.D. Pa. July 2, 2004), *aff'd*, 320 B.R. 812 (E.D. Pa. 2005).

“money or money’s worth in goods, services, or new credit, or release by a transferee of property previously transferred,”<sup>273</sup> but does not include all forms of assistance, such as childcare and other unremunerated domestic services within families.<sup>274</sup> Especially important for impoverished debtors, payments made to obtain new credit can be new value even in the context of an established lending relationship where particular payments do not necessarily correspond to particular debts.<sup>275</sup> However, the debtor may struggle to show new credit rather than forbearance on an existing debt if documentation is lacking.<sup>276</sup> If the creditor later gives the debtor new value, the transfer could come within the exception if the new value is unsecured and the debtor did not pay more for it.<sup>277</sup> This exception may be useful to a debtor in a reciprocal lending relationship where value passes back and forth frequently, or where “new value” can be found in services, in-kind transfers, or an improved relationship with the creditor.<sup>278</sup>

Several other exceptions to the voidable preference statute exist. To the extent that debt was incurred and the transfer was carried out in the parties’ “ordinary course of business,” or made according to ordinary business terms, the transfer is not avoidable.<sup>279</sup> For parties who typically

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273. § 547(a)(2). The definition is broad, but not unlimited, the theory being that new value must “replenish the estate.” See, e.g., *Newhouse v. Trizec Props., Inc.* (*In re Hencie Consulting Servs., Inc.*), No. 03-39402-BJH-7, 2006 Bankr. LEXIS 3562, at \*15–23 (Bankr. N.D. Tex. Dec. 21, 2006) (holding that a reduction in future rent, waiving of an unsecured claim, and permission to reenter the premises were not new value because they did not replenish the estate, by adding more money or money-equivalent gain to it).

274. See, e.g., *Morris v. Vansteinberg* (*In re Vansteinberg*), No. 01-15474, 2003 Bankr. LEXIS 2069, at \*10–12 (Bankr. D. Kan. Nov. 26, 2003) (holding that debtor’s wife’s agreement to become a full-time homemaker was not a quantifiable economic benefit). However, payments to a spouse that are used for household expenses can be for reasonably equivalent value. *United States v. Goforth*, 465 F.3d 730, 736 (6th Cir. 2006).

275. See *Hechinger Inv. Co. of Del. v. Universal Forest Prods.* (*In re Hechinger Inv. Co. of Del., Inc.*), 489 F.3d 568, 575–76 (3d Cir. 2007); *Martin*, *supra* note 241.

276. § 547(a)(2) (“[N]ew value’ . . . does not include an obligation substituted for an existing obligation . . .”). See, e.g., *Lyndon Prop. Ins. Co. v. E. Ky. Univ.*, 200 Fed. App’x 409, 418 (6th Cir. 2006).

277. § 547(c)(4). See, e.g., *Phoenix Rest. Group, Inc. v. Lawson Software, Inc.* (*In re Phoenix Rest. Group, Inc.*), 316 B.R. 681, 687 (Bankr. M.D. Tenn. 2004).

278. Some support for this idea comes from the world of corporate bankruptcy. See, e.g., *Leibowitz v. Parkway Bank & Trust Co.* (*In re Image Worldwide, Ltd.*), 139 F.3d 574, 578–79 (7th Cir. 1998) (“[C]ourts have found other economic benefits to qualify as indirect benefits. . . . The *Mellon* court stated that indirect benefits included intangibles such as goodwill, and an increased ability to borrow working capital. *TeleFest* indicated that indirect benefits to a guarantor exist when ‘the transaction of which the guaranty is a part may safeguard an important source of supply, or an important customer for the guarantor. Or substantial indirect benefits may result from the general relationship’ between affiliates.” (citations omitted)). See also Official Comm. of Unsecured Creditors of Crystal Med. Prods, Inc. v. Pederson & Houpt (*In re Crystal Med. Prods., Inc.*), 240 B.R. 290, 300 (Bankr. N.D. Ill. 1999) (“[I]ndirect benefits may also include intangibles such as goodwill or the relationship between affiliates.”).

279. § 547(c)(2). See, e.g., *In re Hechinger Inv.*, 489 F.3d at 576–77 (“[E]ach fact

do not deal on ordinary business terms, therefore, any change in the parties' established pattern of dealing may make the preference voidable. A preference is only voidable if it provides the creditor with more than the creditor would have received in Chapter 7,<sup>280</sup> so debtors may be able to argue that their total debt to the creditor so dwarfs the amount of the preferential transfer as to make it equivalent to a low-percentage Chapter 7 payment. Transfers that are "bona fide payment of a debt for a domestic support obligation" are also not avoidable.<sup>281</sup> This exception typically applies only to debts established or subject to establishment by agreement or court or government order.<sup>282</sup> Therefore, payments to creditors who hold viable unadjudicated support claims may survive, but payments to dependents without legal entitlements may be avoided. Another exception exists for transfers of aggregate value of less than \$600, although some courts will skirt this exception by combining multiple transfers to a single creditor over time, making the exception less useful.<sup>283</sup> because courts look back an entire year for transfers to relatives,<sup>284</sup> a modest \$50 per month to a particular relative could cross the \$600 limit in such a court.

The trustee may also avoid "fraudulent transfers": transfers made within two years before filing bankruptcy by which the debtor intended to hinder, delay, or defraud any creditor.<sup>285</sup> Transfers can be fraudulent if the debtor received less than reasonably equivalent value and was or became insolvent at the time of the transfer or intended to incur debts or obligations she could not timely pay.<sup>286</sup> However, good faith transferees may keep an amount of the transfer equal to the value they gave, so an alert debtor or creditor may be able to salvage part of the transfer.<sup>287</sup> The definition of "value" for fraudulent transfers is less favorable to the debtor than is the definition for voidable transfers: it excludes new credit, has no small-amount safe harbor, and has no exception for bona fide domestic

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pattern must be examined to assess 'ordinariness' in the context of the relationship of the parties over time.")).

280. § 547(b)(5).

281. § 547(c)(7). "Domestic support obligation" is defined in 11 U.S.C.A. § 101(14A) (West 2009).

282. § 101(14A)(C). See, e.g., *In re De Wakar*, No. 07-12557, 2007 Bankr. LEXIS 4178, at \*6 (Bankr. E.D. Va. Dec. 7, 2007).

283. § 547(c)(8). See, e.g., *Rainsdon v. Action Collection Serv., Inc. (In re Robles)*, No. 05-42369, 2007 Bankr. LEXIS 2112, at \*10-13 (Bankr. D. Idaho June 19, 2007); *Christians v. Am. Express Travel Servs. (In re Djerf)*, 188 B.R. 586, 588 (Bankr. D. Minn. 1995).

284. § 547(b) (referring to "insiders," which includes relatives).

285. 11 U.S.C. § 548(a)(1)(A) (2006).

286. § 548(a)(1)(B). See, e.g., *Coan v. Fleet Credit Servs., Inc. (In re Guerrero)*, 225 B.R. 32, 37 (Bankr. D. Conn. 1998) (holding payment to debtor's sister was properly avoided as a fraudulent transfer because the sister never expected to be repaid).

287. § 548(c).

support.<sup>288</sup>

Without documentation of the expectation of repayment, and given courts' reluctance to interpret domestic services and assistance among relatives as "value," debtors may struggle to establish receipt of value either for voidable preferences or fraudulent transfers.<sup>289</sup> The creditor may have to enter court to stop the trustee from avoiding the transfer<sup>290</sup> and may resent having to do so even if successful. For both types of transfer, the trustee has discretion to decide whether it is worthwhile to attempt recoup the transfer,<sup>291</sup> so some may survive, especially if the transferee is insolvent or cannot be located.

Debtors have few options for managing creditor and transferee displeasure at their filing. Reaffirming and paying debt after discharge<sup>292</sup> may mollify some, but the assertion of dischargeability may be seen as a denial of the obligation in principle, violating the social contract even if the money is eventually paid. Any court action for post-discharge attempts to collect,<sup>293</sup> refusal to deal as a means of collecting,<sup>294</sup> or future discrimination on the basis of bankruptcy is unlikely to repair relationships even if feasible. Debtors undertaking too many reaffirmations or a too-ambitious rate of payments to creditors through the bankruptcy plan may be unable to meet those commitments and may ultimately have their bankruptcy petitions dismissed for failure to make plan payments, or fall into debt anew. Protecting creditors by omitting their debts from the bankruptcy petition would violate the debtor's duties to the bankruptcy court and expose the debtor and debtor's attorney to court discipline or legal liability.<sup>295</sup> In-kind repayment or other methods of repairing

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288. § 548(d)(2)(A). In § 548(d)(2) "value" excludes "an unperformed promise to furnish support to the debtor." *Id.* That exception is limited by its terms to § 548, and is not available for voidable transfers under § 547. *Id.*

289. *See, e.g., In re Guerrero*, 225 B.R. at 37 ("Fleet argues that . . . she also 'borrowed' money from [her sister] Accettullo for rent, food, clothes, and utilities which would collectively constitute reasonably equivalent value. There was no credible evidence that the debtor paid the credit card debt in satisfaction of a legal obligation that she owed to Accettullo. To the contrary, the evidence demonstrated that Accettullo never expected to be repaid." (citations omitted)).

290. *See* § 547(b), (c).

291. §§ 547(b), 548(a)(1). The trustee has the burden of proving avoidability under § 547(b). § 547(g).

292. Reaffirmation is outlined in 11 U.S.C. § 524(c) (2006). *See supra* note 246.

293. § 524(a)(2).

294. Creditors are not compelled to do business with the debtor after bankruptcy, but refusal to deal may be an act to collect a pre-bankruptcy debt under 11 U.S.C. § 362(a)(6) (2006), even if the debt is nondischargeable. *See In re Mu'min*, 374 B.R. 149, 154-61 (Bankr. E.D. Pa. 2007); *Stone v. Vanderbilt Univ. (In re Stone)*, 180 B.R. 499, 502 (Bankr. M.D. Tenn. 1995); Donald Wayne, *Postbankruptcy Refusals to Deal with the Debtor and the Automatic Stay: A Fresh Approach*, 72 WASH. U. L.Q. 507, 507-08 (1994) (discussing the standard for when refusal to deal may be an act to collect).

295. 11 U.S.C.A. § 521(a)(1) (West 2009) ("The debtor shall . . . file . . . a list of

relationships may be possible, but even short-term loss of community support can be problematic for those with few other financial resources.

The cultural pressure against bankruptcy thus places debtors in a difficult position: for low-income debtors who rely on friends and family for support and credit, the economic and personal consequences may be so severe as to make filing bankruptcy nearly impossible. Ultimately, the social problems associated with bankruptcy will vary by the types of debt and the debtor's particular circumstances, and filing bankruptcy may or may not be in the debtor's interest. A debtor with the following characteristics will be better served by filing bankruptcy: more formal creditors; more creditors from whom the debtor does not need personal assistance or fear repercussions; adequate documentation of all income, expenses, and debts; a social environment which accepts the bankruptcy and the court systems as legitimate and is disinclined to punish the debtor for filing; sources of income, credit, and insurance other than personal loans; and a competent and affordable source of legal services or the ability to handle a complex legal process *pro se*. A debtor without those characteristics may well decide not to file bankruptcy. With too much nondischargeable or undocumented debt, the possibility of interpersonal alienation or more severe repercussions such as violence, additional off-the-books debts that could be formalized by the bankruptcy court, and a lack of affordable legal services, filing bankruptcy may not make economic sense even under the assumption that the debtor could see the process through to discharge.

## 2. *Class Bias in the Bankruptcy Code*

Class bias in the Bankruptcy Code is based on different treatment of certain types of assets and debts, and on assumptions about economic behavior which may not hold true for low-income debtors. Disparities are created by the Bankruptcy Code's preference for married debtors,<sup>296</sup> by the homestead exemption,<sup>297</sup> and by the nondischargeability of student

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creditors; and . . . unless the court orders otherwise . . . a schedule of assets and liabilities . . ."). See *infra* notes 319–23 and accompanying text (regarding bankruptcy attorneys' liability for inaccuracies in their clients' petitions).

296. See Dickerson, *supra* note 119, at 926 (discussing how marriage exemptions impact racial groups differently, given lower marriage rates among low-income people). Married debtors may file jointly, while unmarried partners may not, affecting treatment of commonly held property. 11 U.S.C. § 302(a) (2006).

297. Dickerson, *supra* note 119, at 930–31 (describing how an "ideal" debtor would have mostly exempt property, especially a home, in order to keep assets post-bankruptcy); Martin, *supra* note 241, at 232 (discussing how the exemption scheme in bankruptcy favors the middle class). Many states offer unlimited homestead exemptions, permitting homeowners to keep substantial home equity as well as a place to live. See, e.g., FLA. CONST. art. X, § 4; TEX. CONST. art. 16, §§ 50–51. However, few states offer renters any compensatory benefits. See, e.g., ARIZ. REV. STAT. ANN. § 33-1126(C) (2007); FLA. STAT.

loans.<sup>298</sup> Subtler cultural biases exist in the Code's definitions of "relative" and "domestic support," which allow debtors to support only certain types of relatives regardless of actual dependence.<sup>299</sup> Financial documents such as pay stubs are required by the Code<sup>300</sup> and are essential for proving or disproving the validity of claims and transfers by the debtor, as well as for meeting the Chapter 13 means test and avoiding dismissal,<sup>301</sup> but the financial relationships of low-income debtors may not provide or require formal recordkeeping.<sup>302</sup> However, some courts may consider the debtor's level of financial sophistication or other extenuating circumstances.<sup>303</sup> Bankruptcy may be filed in forma pauperis, but the debtor must apply for a fee waiver at the same time as filing her bankruptcy petition, and she must demonstrate an income low enough to prevent her from paying in

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ANN. § 222.25(4) (West Supp. 2009). *See generally* Robert B. Chapman, *The Bankruptcy of Haig-Simons? The Inequity of Equity and the Definition of Income in Consumer Bankruptcy Cases*, 10 AM. BANKR. INST. L. REV. 765 (2002) (discussing problems created by the Bankruptcy Code's treatment of home ownership).

298. 11 U.S.C.A. § 523(a)(8) (West 2009) (defining student loans as nondischargeable except in cases of undue hardship); Dickerson, *supra* note 119, at 935–36. *See also supra* note 108 (discussing the *Brunner* test).

299. *See* Dickerson, *supra* note 119, at 945–46 (discussing the Bankruptcy Abuse Prevention and Consumer Protection Act's impact on untraditional households). "Relative" means only an "individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree." 11 U.S.C.A. § 101(45) (West 2009). The definition of "third degree" varies by state common law, but could easily exclude unmarried partners, cousins, and more distant relations who nonetheless depend on the debtor for support. *See, e.g.,* O'Neal v. Arnold (*In re Gray*), 355 B.R. 777, 779–82 (Bankr. W.D. Mo. 2006) (discussing the "third degree" standard under Missouri law). Ideas about obligations among relatives enter the case law in other ways, such as when determining whether assistance is a permissible expense. *See, e.g., In re Glenn*, 345 B.R. 831, 837 (Bankr. N.D. Ohio 2006) (holding that debtors could not list payments on a debtor's mother's mortgage, which they had cosigned and listed as an unsecured debt, as "reasonably necessary expenses" under 11 U.S.C. § 707(b) in a Chapter 13 case). *See also In re Siemen*, 294 B.R. 276, 279 (Bankr. E.D. Mich. 2003) (concluding that debtor was not permitted to list adult children and grandchildren as dependents on Chapter 13 petition where adult child had some income). Courts may be skeptical about the flexible nature of financial promises within families, which can work for or against the debtor. *See, e.g., In re Banks*, 345 B.R. 328, 334 (Bankr. D. Colo. 2006) ("The Court does not view family loans as a feasible means to fund a Chapter 13 plan.").

300. 11 U.S.C.A. § 521(a)(1)(B)(iv) (requiring pay stubs for the sixty days preceding filing). Section 727(a)(3) requires debtors to "keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained." 11 U.S.C. § 727(a)(3) (2006).

301. *See* 11 U.S.C.A. §§ 521, 547, 1325(b) (West 2009); 11 U.S.C. §§ 548, 1307(c)(10)–(11), (e) (2006).

302. Martin, *supra* note 241, at 234.

303. *See, e.g.,* Damon v. Chadwick (*In re Chadwick*), 335 B.R. 694, 702 (W.D. Wis. 2005) (excusing debtor's loss of records during a move); Pereira v. Young (*In re Young*), 346 B.R. 597, 607–14 (Bankr. E.D.N.Y. 2006) (listing factors for § 727(a)(3) and excusing failure to keep records because of the role of financial control in domestic abuse).

installments.<sup>304</sup> This may be a challenge for debtors with little documentation.

Low-income debtors and debtors with a criminal history may have creditors who are willing to violate the law and ignore the automatic stay.<sup>305</sup> Such debtors may encounter intimidation and violence; they might also violate bankruptcy rules by paying these creditors or omitting their claims from the petition, risking sanctions or dismissal to preserve their own safety.

### *B. Obstacles in Obtaining Legal Services*

Lack of access to legal services is another barrier to bankruptcy. Although some debtors successfully file pro se,<sup>306</sup> debtors with little formal education may struggle, especially with a complex bankruptcy involving voidable transfers or disputes over nondischargeability. As discussed, *infra*, access to legal services is a major problem for previously incarcerated people with complex legal problems. This is perhaps ameliorated by the trend towards holistic legal services, but aggravated by ethical problems bankruptcy attorneys encounter when representing the post-incarcerated and by the recent increase in potential penalties for bankruptcy lawyers. Most bankruptcy courts will not appoint counsel for indigent debtors.<sup>307</sup> Post-incarcerated debtors are unlikely to have the necessary skills to successfully file pro se, so the expense or scarcity of legal services may prevent them from filing.

#### *1. Lack of Access to Bankruptcy Attorneys*

Structural problems within the legal aid system make it difficult for debtors with criminal records to obtain bankruptcy services. Many legal

304. 28 U.S.C.A. § 1930(f) (West 2009). See Otis B. Grant, *Are the Indigent Too Poor for Bankruptcy? A Critical Legal Interpretation of the Theory of Fresh Start Within a Law and Economics Paradigm*, 33 U. TOL. L. REV. 773, 782–84 (2002).

305. See VENKATESH, *supra* note 45, at 134, 136–38, 140–41, 400 n.34; Levitt & Venkatesh, *supra* note 47, at 767 & n.13.

306. Park, *supra* note 264, at 823.

307. The power to appoint counsel arguably comes from 28 U.S.C. § 1915(e) (2006). Most courts do not make use of the provision or find it does not apply to bankruptcy courts. See *In re Ennis*, 178 B.R. 177, 185 (W.D. Mo. 1995) (holding that there is no provision applicable to bankruptcy for the appointment of counsel based on debtor being indigent); *In re Fitzgerald*, 167 B.R. 689, 691–92 (Bankr. N.D. Ga. 1994) (concluding that debtor lacked “exceptional circumstances” necessary for appointment of counsel); Richard H.W. Maloy, *Should Bankruptcy Be Reserved for People Who Have Money? Or Is the Bankruptcy Court a Court of the United States?*, 7 J. BANKR. L. & PRAC. 3, 28 (1997) (finding that only one bankruptcy court has used § 1915(e) to appoint counsel for an indigent debtor). But see *Fisher v. CFC Capital Co. (In re DuPage Boiler Works, Inc.)*, 97 B.R. 437, 438–39 (Bankr. N.D. Ill. 1989) (concluding that § 1915 does apply to bankruptcy courts and that appointing counsel is appropriate where debtor can show inability to pay for counsel and that the case has enough merit to warrant the appointment).



aid organizations provide only civil assistance and have little expertise in criminal law and crime-related civil matters.<sup>308</sup> These organizations may, intentionally or not, weigh criminal records when deciding whether to accept a client, feeling that they are helping a bad actor or that more “deserving” clients should receive priority.<sup>309</sup> Concern that the debtor will not complete bankruptcy due to reincarceration or other legal or financial problems can also deter legal aid organizations and pro bono attorneys from accepting criminally-involved clients.<sup>310</sup> Criminal defense providers may consider related or subsequent civil matters outside their organizational mission, or lack expertise regarding collateral consequences.<sup>311</sup>

Federally-funded Legal Services Centers’ (LSCs) provision of bankruptcy services is limited by statute.<sup>312</sup> Although they may partner

308. The exception rather than the rule, a few organizations provide both criminal and civil services or orient their services around reentry, such as the Bronx Defenders, Community Legal Services of Philadelphia, the Legal Aid Society of New York’s Parole Revocation Defense Unit, and Neighborhood Defender Service of Harlem. See The Bronx Defenders, Holistic Defense, <http://www.bronxdefenders.org/our-practice/holistic-advocacy> (last visited Apr. 19, 2010); Community Legal Services of Philadelphia, People with Criminal Records, <http://www.clsphila.org/Content.aspx?id=178> (last visited Apr. 19, 2010); The Legal Aid Society, Parole Revocation Defense Unit, <http://www.legal-aid.org/en/whatwedo/criminalpractice/parole/revocationdefenseunit.aspx> (last visited Apr. 19, 2010); Neighborhood Defender Service of Harlem, Programs, <http://www.ndsny.org/programs.html> (last visited Apr. 19, 2010). The recent trend towards proactive reentry programs and holistic legal services may begin to ameliorate this problem. See generally JoNel Newman, *Re-conceptualizing Poverty Law Clinical Curriculum and Legal Services Practice: The Need for Generalists*, 34 FORDHAM URB. L.J. 1303 (2007) (calling for more lawyers to take up a generalist approach when providing legal services to the poor); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 675–77 (2006) (discussing the historic separation of criminal and civil legal services and the movement among “certain quarters of the criminal defense community” to a “holistic approach” to reentry); Smyth, *supra* note 192, at 486, 490 (describing the lack of coordination among criminal and civil legal services providers and the “mainstreaming” of a holistic approach to public defense).

309. See, e.g., Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 791–95 (2002) (“[T]he very dichotomy between the deserving and the undeserving poor is suspect. . . . In recent years, the classification of clients into ‘deserving’ and ‘undeserving’ has dominated federal funding decisions for [Legal Services Centers] and has resulted in harsh program eligibility criteria.”). For discussion of the construct of the “deserving” poor, see Juliet M. Brodie, *Post-welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL’Y 201, 213 (2006) (citing WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE* (2003)); Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2495 (1999).

310. Tremblay, *supra* note 309, at 2490 (arguing that legal aid organizations ought to favor clients whose cases are likely to succeed).

311. See Pinard, *supra* note 308, at 674; Pinard & Thompson, *supra* note 147, at 590–92; Smyth, *supra* note 192, at 486–87.

312. 42 U.S.C. § 2996f(b)(2) (2006). These LSCs are authorized by the Legal Services

with other organizations to provide civil services to criminal defendants and their families, LSCs may not provide legal assistance with respect to criminal proceedings other than misdemeanors.<sup>313</sup> This eliminates a category of bankruptcy clients whose petitions would be based on challenging a felony conviction or sentence and associated financial penalties.<sup>314</sup> LSCs are also restricted from representing persons currently incarcerated, even as defendants in other proceedings.<sup>315</sup> These limitations prevent many incarcerated or post-incarcerated debtors from pursuing bankruptcy through an LSC.

## 2. *Attorneys' Ethical Dilemmas When Providing Services*

Bankruptcy can pose an ethical problem for attorneys and legal services organizations because it affects the interests of the client's current or former spouse or partner, as well as any others who have joint responsibility for debts or are creditors. While one spouse may file bankruptcy alone, a conflict of interest exists if a debtor's spouse or dependent is or was a client of the same attorney or legal services provider, because spouses' economic interests in bankruptcy are not always aligned.<sup>316</sup> If the family members become adverse parties in, for example, a divorce or domestic violence prosecution, representing them as an economic unit in a joint bankruptcy raises an obvious problem. One spouse could file bankruptcy alone but may be unable to resolve joint debts, and the ethical problem remains if the bankruptcy resolves joint or dependent-related debts in a manner contrary to other parties' interests. A similar conflict would exist if any creditors or joint obligors are or have been clients of the legal services provider. A referral relationship with another legal services provider could potentially provide a way around the conflict, but few such relationships exist.<sup>317</sup> A civil practice unit within a

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Corporation Act of 1974, 42 U.S.C. §§ 2996–2996f (2006). Some LSCs do provide bankruptcy services. *See, e.g.*, Alaska Legal Services Corporation, 2010 Anchorage Chapter 7 Bankruptcy Clinic, <http://www.alsc-law.org/typesofclinics/ancbankruptcy.html> (last visited Apr. 19, 2010).

313. § 2996f(b)(2).

314. Smyth, *supra* note 192, at 503–04.

315. 45 C.F.R. § 1637.3 (2008).

316. *See* SULLIVAN, WARREN & WESTBROOK, *supra* note 19, at 178 (noting the financial difficulties that bankruptcy can create for ex-spouses). For one example of how courts can impose debt obligations even on divorced spouses, see *Miller v. Walpin (In re Miller)*, 167 B.R. 202 (Bankr. C.D. Cal. 1994). The court in *In re Miller* held that all marital property should be considered community property for purposes of the bankruptcy proceeding despite the fact that the marriage had been dissolved prior to the filing of the bankruptcy petition. *Id.* at 212. The Bankruptcy Code is not entirely without protections for co-debtors. *See, e.g.*, 11 U.S.C. § 1301 (West 2009) (imposing a stay of up to twenty days on the collection of debts from co-debtors).

317. *See* Smyth, *supra* note 192, at 486 (critiquing the lack of communication and coordination among agencies that provide legal services to the post-incarcerated

criminal defense team separated by an ethical wall from the organization's primary civil legal services team is another possibility, but creates an administrative burden.<sup>318</sup>

New ethical requirements in bankruptcy law have increased the risk to attorneys and reduced the availability of bankruptcy services.<sup>319</sup> Since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005,<sup>320</sup> bankruptcy courts may impose court costs on a debtor's attorney if a Chapter 7 petition is dismissed for abuse of the Bankruptcy Code because the attorney is found to have violated the rule against frivolous actions or inappropriate filings.<sup>321</sup> Bankruptcy lawyers have also been held to a higher standard of investigation and factual accuracy in the petitions they sign.<sup>322</sup> Some have responded to this pressure by raising their expenses, and some have passed that expense on to clients via increased fees.<sup>323</sup> This is a particular problem for clients who lack accurate records or are perceived as unsophisticated or unreliable, because even a sympathetic attorney may be unable to bear the increased risk of liability if the attorney cannot adequately verify the claims in the petition.

### 3. Attorneys' Fees

In addition to the increased penalties imposed by BAPCPA, private bankruptcy attorneys must consider their fees. Low-income, post-incarcerated clients may not be able to pay bankruptcy lawyers in advance, so compensation is a concern, especially for debtors who are perceived to have a high risk of dismissal from bankruptcy, continued poverty, or

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population).

318. Cait Clarke & James Neuhard, *"From Day One": Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 46-47 (2004).

319. See 11 U.S.C.A. § 707(b)(4) (West 2009).

320. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

321. § 707(b)(4)(A).

322. Section 707(b)(4)(C) of the Bankruptcy Code now specifies that an attorney's signature on a petition, pleading, or written motion filed during a bankruptcy proceeding certifies that the attorney has "performed a reasonable investigation into the circumstances" that gave rise to the filing and has determined the filing to be both "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." § 707(b)(4)(C).

323. Steve Seidenberg, *Strange New World: Lawyers, Debtors and Creditors Are Struggling to Absorb Sweeping Changes in Bankruptcy Law*, 93 A.B.A. J. 49, 52 (2007); Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 510-11 (2007). See also Dickerson, *supra* note 119, at 942-43 (noting that the new reporting requirements mandated by BAPCPA "force debtors' counsel to conduct more extensive (and expensive) investigations into their clients' financial affairs to ensure that the debtor complies with these new requirements and also to ensure that the lawyer complies with the new ethical requirements BAPCPA imposes").

recidivism. In Chapter 7 proceedings, attorneys' fees may not be paid out of the estate, nor may attorneys suggest that debtors incur more debt to pay their fees.<sup>324</sup> Chapter 13 debtors may pay their attorneys through their plan, but court approval is still required, adding uncertainty and expense.<sup>325</sup> Attorneys may be permitted to take a security interest in an item of the debtor's property,<sup>326</sup> but a low-income, post-incarcerated debtor may have no sufficiently valuable property. Attorneys must also ensure on pain of forfeiture that their fee is not paid with proceeds of criminal activity, a deterrent especially for those who are not used to representing clients with a criminal history.<sup>327</sup>

#### IV.

##### BANKRUPTCY-LIKE PROCEDURES AND PROPOSED LEGAL CHANGES

Alternative procedures for settling or discharging debt outside of bankruptcy are developing in some states, reflecting a willingness among judges, administrators, and legislators to apply certain ideas borrowed from bankruptcy to recently incarcerated debtors, and reflecting a recognition that the existing bankruptcy system is not fully resolving debt and restoring debtors to economic functionality. The existence of alternatives, such as considering ability to pay when assigning restitution and penalties and allowing government agencies to reach settlements with debtors, demonstrates the political feasibility of permanent, legally binding debt reductions—even for crime- and domestic support-related debts, which would be nondischargeable or given priority in bankruptcy. Debt modifications occurring outside bankruptcy courts often resemble bankruptcy in that they construct a hierarchy of creditors, they subject debt to realistic ability to pay, and they view creditor efficiency as a reason for discharge. While providing important methods of clearing bad debt, these procedures are problematic in that they are unpredictable and inconsistent and fulfill a function that the existing bankruptcy system may

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324. *Lamie v. U.S. Tr.*, 540 U.S. 526, 538–39 (2004) (interpreting 11 U.S.C. § 330(a)(1)).

325. 11 U.S.C. § 330(a)(4)(B) (2006).

326. *See In re Martin*, 817 F.2d 175, 181 (1st Cir. 1987) (“§ 327(a) [of the Bankruptcy Code] will not support . . . a bright-line rule precluding an attorney at all times and under all circumstances from taking a security interest to safeguard the payment of his fees.”). *But see In re Escalera*, 171 B.R. 107, 113 (Bankr. E.D. Wash. 1994) (disagreeing with the rule articulated in *In re Martin* and holding instead that “one who holds a lien on property of the estate holds an interest adverse to the estate and is [therefore] ineligible to be employed under § 327(a)”).

327. 21 U.S.C.A. § 853 (West 2009) (stating the forfeiture requirements for violations of federal criminal law). *See also Caplan & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (affirming the constitutionality of the forfeiture requirements as applied to attorneys' fees).

be able to carry out more efficiently.<sup>328</sup> Debtors, creditors, and the public would be better served by modifications to existing law that would codify these alternative procedures, either within the bankruptcy system or through external procedures.

Political and justice-oriented concerns may make the total discharge of certain debts unacceptable. However, there is a strong argument for confronting the problem of pervasive nonpayment. When restitution and domestic support is never paid or enforced, victims are uncompensated and bear the burden of pursuing collection independently. The award and its theoretical nondischargeability or preference give the impression that victims and support recipients are receiving their due, while in practice full payment is unlikely.<sup>329</sup> Making bankruptcy more widely available may ultimately benefit creditors holding nondischargeable or preferred debts by reducing competing claims to the debtor's income and assets and by drawing public attention to the fact that these awards all too often remain unpaid.

#### A. *Bankruptcy-Like Procedures Existing Outside Bankruptcy*

Many states have adopted laws, regulations, or policies to reduce or discharge crime-related debt that is unlikely to be paid. For example, in Washington, sentencing judges must consider the debtor's ability to pay when assigning financial obligations.<sup>330</sup> The payments must be divided among restitution, fines, and other types of assessments, and restitution must be paid before any other account is credited. This parallels bankruptcy in that debts are prioritized and subject to ability to pay, and may be extended for the duration of a Chapter 13 plan (five years).<sup>331</sup> Courts may not reduce the amount owed, but may grant as much as a ten-

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328. While some states provide guidelines judges can use when determining whether a given defendant should receive modification or forgiveness of his legal debts, other states provide almost no guidelines to ensure these decisions are carried out in a reasonably predictable and consistent manner. Compare R.I. GEN. LAWS § 12-20-10 (2002 & Supp. 2008) (listing five prima facie indicators of the "defendant's indigency and limited ability to pay"), with TEX. CODE CRIM. PROC. ANN. art. 42.038(d) (Vernon 2006) (requiring judges to take into account generally "the defendant's employment status, earning ability, and financial resources" as well as "any other special circumstances that may affect the defendant's ability to pay" when determining whether to impose restitution costs). See also REYNOLDS, COWHERD, BARBEE, FABELO, WOOD & YOON, *supra* note 26, at 14-15.

329. DILLER, GREENE & JACOBS, *supra* note 1, at 16; MACLEAN & THOMPSON, *supra* note 1, at 7 (noting the high percentage of post-incarcerated debtors who "have insufficient resources to pay their debts to their children, victims, and the criminal justice system"); Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313, 320 (2006).

330. WASH. REV. CODE ANN. § 9.94A.760 (West 2003 & Supp. 2009).

331. § 9.94A.760(5)-(7). See also MACLEAN & THOMPSON, *supra* note 1, at 18.

year extension.<sup>332</sup> Wisconsin also prioritizes restitution to victims over payments to the government and allows courts to consider legal and moral support obligations as reasons to reduce or waive debt for the cost of incarceration.<sup>333</sup> Rhode Island permits criminal courts to waive or reduce court costs according to the debtor's ability to pay.<sup>334</sup> Judges may also suspend all or part of the defendant's contribution to drug treatment expenses and the state victims' compensation fund if the defendant is unable to pay.<sup>335</sup> While no order of restitution to a particular victim may be waived or suspended, Rhode Island courts are directed to consider an explicit set of factors indicative of poverty, and existing restitution, child support, and court-ordered counseling debts are prima facie evidence of inability to pay court costs.<sup>336</sup> Another code section reinforces this hierarchy of debts: the court receives money from the debtor for multiple debts, and must not disburse prosecution-related payments from those funds until court-ordered restitution has been fully satisfied.<sup>337</sup> In Missouri, courts must consider the defendant's legal and moral obligations to support her spouse and children before entering an order to reimburse the state for any expense.<sup>338</sup> Maryland permits courts to waive parole fees and even restitution upon a finding of indigence.<sup>339</sup> These modifications exist at the federal level as well: in some federal circuits, parole staff may determine the timing of restitution payments, which, due to the time value of money, can substantially affect the total amount paid.<sup>340</sup>

Many states permit modification of child support arrears, and the

332. *See, e.g.*, WASH. REV. CODE ANN. § 9.94A.750(1)–(4) (West Supp. 2010).

333. WIS. STAT. ANN. § 302.373(4) (West 2005) (allowing courts to reduce defendants' incarceration debt in light of their moral and legal obligations to others); WIS. STAT. ANN. § 973.20(6) (West 2007 & Supp. 2009) (requiring restitution be paid before all other debts).

334. R.I. GEN. LAWS § 12-18.1-3(d) (2002 & Supp. 2008).

335. R.I. GEN. LAWS § 12-25-28(b) (2009) (allowing courts to waive costs related to the state violent crime indemnity fund only if the court finds the defendant unable to pay); R.I. GEN. LAWS § 21-28-4.01(c)(3)(iv) (Supp. 2008) (allowing a reduction in drug treatment expenses on the grounds of inability to pay).

336. *See, e.g.*, R.I. GEN. LAWS § 12-20-10 (2009) (allowing judges to take into account defendant's inability to pay when determining whether or not to remit court costs and fees).

337. R.I. GEN. LAWS § 12-19-34(a) (2002 & Supp. 2008).

338. MO. REV. STAT. § 217.835(4) (2000).

339. MD. CODE ANN., CRIM. PROC. § 6-226(d) (LexisNexis 2008) (allowing exemptions from probation fees for offenders who "ha[ve] been unable to obtain employment that provides sufficient income . . . to pay the fee"); MD. CODE ANN., CRIM. PROC. § 11-605 (LexisNexis 2008) (waiving restitution). *See also* DILLER, GREENE & JACOBS, *supra* note 1, at 16.

340. *See* W. Royal Furgeson, Jr., Catharine M. Goodwin & Stephanie Lynn Zucker, *The Perplexing Problem with Criminal Monetary Penalties in Federal Courts*, 19 REV. LITIG. 167, 171–76 (2000) (discussing the different approaches taken by different circuits towards restitution payment scheduling). *See also* United States v. Coates, 178 F.3d 681, 683–64 (3d Cir. 1999); United States v. Kinlock, 174 F.3d 297, 299 (2d Cir. 1999) (holding that under federal law, courts must take into account defendant's indigency when considering the timing of restitution payments).

tension between debt relief and concern for the child support creditor is apparent.<sup>341</sup> In Massachusetts, the Commissioner of Revenue may maximize collections by accepting settlement offers and installment payments when liability or collectability are in doubt, and may make equitable adjustments.<sup>342</sup> In Washington, child support administrators may cancel collection actions or even refund payments based on financial hardship experienced by the paying parent, and may write off or settle child support claims based on the probable cost of enforcement.<sup>343</sup> In Vermont, arrears may be limited based on the financial situation of the noncustodial parent, and the state may not collect arrears owed to itself by reunited families with incomes below 225% of the poverty line.<sup>344</sup> North Carolina, Oregon, and Virginia, among other states, do not assess child support during incarceration if other assets are not available.<sup>345</sup> Some states charge a lower rate of interest, eliminate arrears altogether, or allow retroactive modification to the beginning of incarceration.<sup>346</sup> Other states forgive interest or wipe out old debt as a payment incentive.<sup>347</sup>

These bankruptcy-like procedures have value as learning experiments and provide some financial relief. However, they also contribute to inconsistency and unpredictability because judges and administrators are given great discretion in implementation.<sup>348</sup> Because agency decisions to

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341. See VICKI TURETSKY, CTR. FOR LAW & SOC. POL'Y, REALISTIC CHILD SUPPORT POLICIES FOR LOW INCOME FATHERS 8–9 (2000) (discussing the various strategies adopted by states to manage the problem of uncollectible child support arrears), available at <http://www.clasp.org/admin/site/publications/files/0061.pdf>.

342. 830 MASS. CODE REGS. 119A.6.2(3) (2003).

343. WASH. REV. CODE ANN. § 74.20A.220 (West 2001).

344. VT. STAT. ANN. tit. 15, § 659(a)(6) (2002) (requiring courts to take into consideration “the financial situation and needs of the noncustodial parent” when determining the necessity of adjusting the amount of child support payments); VT. STAT. ANN. tit. 33, § 4106(e) (2001).

345. N.C. GEN. STAT. § 50-13.10(d)(4) (2002 & Supp. 2008) (suspending child support payments “[d]uring any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment”); VA. CODE ANN. § 20-108.2(B) (2008 & Supp. 2009) (exempting “parents unable to pay child support because they lack sufficient assets . . . and who . . . are imprisoned for life with no chance of parole” from the mandated state minimum monthly child support payments of sixty-five dollars); OR. ADMIN. R. § 137-055-3300(4) (2009) (absolving incarcerated obligors whose monthly income is less than \$200 of any obligation to pay child support).

346. See PAULA ROBERTS, CTR. FOR LAW & SOC. POLICY, AN OUNCE OF PREVENTION AND A POUND OF CURE: DEVELOPING STATE POLICY ON THE PAYMENT OF CHILD SUPPORT ARREARS BY LOW INCOME PARENTS 8–13 (2001) (discussing the various strategies adopted by states when dealing with low-income debtors), available at [http://www.clasp.org/publications/an\\_ounce\\_of\\_prevention\\_and\\_a\\_pound.pdf](http://www.clasp.org/publications/an_ounce_of_prevention_and_a_pound.pdf).

347. See ROBERTS, *supra* note 346, at 15 (describing the different debt forgiveness programs implemented in various states).

348. The instructions provided to guide judges in making equitable determinations regarding debt relief in cases involving incarcerated debtors are frequently vague and hence do not allow debtors or creditors to predict outcomes accurately. For example, Wisconsin state law requires courts to consider “any legal obligations of the defendant for support or

settle or abandon debts may be made without advance notification or formal procedures,<sup>349</sup> debtors may be denied opportunity to participate in the determination of their qualifications for financial relief, and there may be little or no opportunity for creditors to contest discharge or otherwise participate. A better solution might be to avoid creating debts that are never realistically expected to be repaid.<sup>350</sup> Legislatures should create effective methods of clearing uncollectible debt, whether by improving access to bankruptcy for very poor and criminally-involved debtors, or by implementing alternative procedures within the administrative collections and criminal justice system.

Discharge of any punitive debts may seem to contravene *Kelly's* holding that restitution is not dischargeable in Chapter 7 bankruptcy.<sup>351</sup> However, *Kelly's* holding turns on legislative intent,<sup>352</sup> so there should be no obstacle if legislative intent to make punitive debt dischargeable is clear. *Kelly* may also be circumvented by structuring restitution as compensation for actual pecuniary loss rather than a punitive debt, making the debt dischargeable under existing bankruptcy law.<sup>353</sup> In Chapter 13, criminal restitution was dischargeable until 1990<sup>354</sup> and civil restitution was dischargeable until BAPCPA became law in 2005, so a reversion would not create significant upheaval in the law.<sup>355</sup> The *Younger* doctrine compels federal bankruptcy courts' deference to state criminal law,<sup>356</sup> so many changes to punitive debt would have to take place at the state level and would, in turn, alter the debts' treatment in federal bankruptcy court.

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maintenance . . . and any moral obligation of the defendant to support dependents" when determining whether or not to reduce the amount of incarceration costs the defendant will be required to repay. WIS. STAT. ANN. § 302.373(4) (West 2005).

349. See, e.g., 830 CODE MASS. REGS. 119A.6.2(3) (2003) (providing no opportunity for creditor participation or notification of settlement or adjustment of child support arrearages).

350. MACLEAN & THOMPSON, *supra* note 1, at 17–18; Rosenthal & Weissman, *supra* note 28, at 33–34. See TURETSKY, *supra* note 341, at 8 (“As a practical matter, [poor fathers’] debt will never be paid, and [the extent of the debt] discourages fathers from even trying.”); Richards & Jones, *supra* note 23, at 224 (arguing that Iowa may save money by ending collection of restitution from prisoners).

351. *Kelly v. Robinson*, 479 U.S. 36 (1986).

352. *Id.* at 50–53 (“In light of the established state of the law—that bankruptcy courts could not discharge criminal judgments—we have serious doubts whether Congress intended to make criminal penalties ‘debts’ within the meaning of § 101(4). . . . In light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress.”).

353. See *supra* Part I.C.2(a).

354. Pa. Dep’t of Pub. Welfare v. Davenport, 495 U.S. 552 (1990), *superseded by statute*, Criminal Victims Protection Act of 1990, Pub. L. 101-581, 104 Stat. 2865, as recognized in *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

355. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 314(b), 11 U.S.C. § 1328(a)(3)–(4) (2006).

356. *Younger v. Harris*, 401 U.S. 37, 46 (1971).



## B. Proposed Changes to Debt and Incarceration Policy

### 1. Changes to How Government-Created Debt Is Created and Enforced

The role of local, state, and federal governments as the ultimate creator or assignee<sup>357</sup> of a large amount of debt burdening impoverished former criminals makes them unique as creditors. Governments, through legislation, regulation, or delegation of decision-making authority to judges or agency officials, determine the amount of the debt and can structure it to be dischargeable or nondischargeable in bankruptcy. The government should assess the economic efficiency of creating and then collecting debts inside or outside bankruptcy versus not creating the debts at all, and create only those debts that are economically efficient or serve an important symbolic or punitive purpose.

Although some debts are based on costs to a particular person, such as the amount of a crime victim's financial loss or the cost of supporting a child, many other amounts are determined by the government based on difficult-to-quantify factors such as the relative seriousness of various crimes, the deterrent power of financial punishments, and, as discussed, *supra*, the debtor's ability to pay. A particular part of the government, such as the parole or child support system, is designated the recipient, creating a "creditor" with a theoretical claim to payment. However, because the government can presumably reallocate funds to account for bad debt, the payment or nonpayment of any debt to the government ultimately affects the general fund, and the tax base can be seen as the ultimate bearer of the unpaid debt. Because the financial impact of discharge is spread over the tax base rather than being borne by a single private creditor, no particular individual will be significantly burdened, so we should have few qualms about allowing discharge where collections efforts are judged inefficient and where the debt is not intended to serve as an important behavioral incentive or punishment. Certain agencies in some states already engage in this type of analysis and discharge,<sup>358</sup> and in many cases, doing so would only formalize the discharge or non-collection of debt that is already occurring. This would create a more consistent and efficient system for managing debts owed to the government.<sup>359</sup>

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357. See, for example, the assignment of child support debt under 42 U.S.C.A. § 671(a)(17) (West 2009).

358. See *supra* notes 341–47 and accompanying text.

359. To enforce nondischargeable debts such as restitution and child support, the government must often collect very small amounts from prisoners and ex-convicts. This raises serious questions about the economic efficiency of the current system. For example, one study found that an Iowa restitution program collected an average of only ten dollars per month from the 3000 prisoners it covered. Richards & Jones, *supra* note 23, at 224. In another study, local child support enforcement administrators in Colorado complained about the economic inefficiency of the child support program. One administrator noted, "It

The government could consolidate debts in a single agency or have a single agency handle all assessments and collections, greatly simplifying the debt collection process. An inter-governmental write-down would be a step closer to the bankruptcy system. Like a bankruptcy involving only governmental creditors, agencies could jointly determine what can realistically be collected and apportion the debtor's income stream according to predetermined priorities.<sup>360</sup> To mimic bankruptcy's income-sensitivity, the total amount of income or property subject to this process could be capped, as it is in bankruptcy through use of exemptions and disposable income guidelines,<sup>361</sup> and as garnishment is already capped under state and federal law.<sup>362</sup> Some states already offer settlement of government debts in exchange for completing certain rehabilitative programs, returning to a regular payment schedule, or for a performative payment such as community service.<sup>363</sup> These elements could be incorporated into a government write-down as well.

## 2. *Changes Within the Bankruptcy Code*

Bankruptcy law should treat the economic circumstances of the very poor and formerly incarcerated more realistically, acknowledging and accepting the relational borrowing that, for the very poor, functions as a form of social capital. The Bankruptcy Code could allow these transfers for the purpose of furthering the debtor's economic rehabilitation. Already, transfers of amounts less than \$600 are excepted from the voidable preference statute,<sup>364</sup> and the trustee can allow debtors to maintain certain contracts and leases<sup>365</sup> and may operate a debtor's

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costs more to process the check than is being collected." GRISWOLD, PEARSON & DAVIS, *supra* note 36, at 20.

360. When debtors owe money to multiple state agencies, the agencies may fail to coordinate their collections efforts. See MACLEAN & THOMPSON, *supra* note 1, at 17 ("Debts often remain unpaid at least partly because staff working for distinct agencies do not have clear guidelines as to how their collection efforts should be prioritized."); REYNOLDS, COWHERD, BARBEE, FABELO, WOOD & YOON, *supra* note 26, at 14 ("There is little coordination among agencies responsible for collecting various debts . . . . Despite the fact that judges can set prioritization schedules, the entities charged with collecting payments often influence the order in which debts are repaid. Debts that are most aggressively pursued tend to have higher collection rates.").

361. See *supra* notes 8–11 and accompanying text.

362. See, e.g., 15 U.S.C. § 1673 (2006).

363. See MACLEAN & THOMPSON, *supra* note 1, at 39–40; ROBERTS, *supra* note 346, at 15–16; Cammett, *supra* note 329, at 334. Reduction of debt in exchange for returning to a regular payment plan is a strategy promoted by OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL CHILD SUPPORT ENFORCEMENT: STRATEGIC PLAN FY 2005-2009, at 10 (2004), available at [http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic\\_Plan\\_FY2005-2009.pdf](http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf).

364. 11 U.S.C.A. § 547(b) (West 2009).

365. See 11 U.S.C. § 365(a) (2006).

business temporarily if doing so would maximize the funds available to creditors.<sup>366</sup> A more realistic attitude towards interpersonal borrowing would be a step further, but still in keeping with these already-existing provisions. States and federal law should create an exemption comparable to the value of the homestead exemption for non-homeowners, as is already offered in some states.<sup>367</sup> Bankruptcy courts should be more sensitive to the lack of financial recordkeeping common among low-income people, recognizing that formal receipts, pay stubs, and the like may be genuinely unavailable to the debtor.<sup>368</sup> A reasonable doctrine of duress should be created so that debtors who are genuinely threatened by creditors can make preferential transfers without their bankruptcy petitions being dismissed. To avoid creating a preference for the threatening creditors, coerced payments could be reclaimed under existing tort and criminal law. This would deter and punish violent creditors without burdening the debtor and without interfering with the bankruptcy.

Bankruptcy law can also be used to reduce the amount of government-created debt in a manner that may be more cost-effective. Decreasing government-created debt at the point of creation, by refraining from assigning debt or assigning smaller amounts of debt, would reduce administrative burdens for the government and the debtor. However, gross revenue could decrease, and the debt might be less effective as a symbolic punishment. To avoid this problem, the government could create the debt but make it dischargeable. This would allow the government to collect only from those who ultimately could pay and to waive the debts only of those who genuinely cannot.

### 3. *Changes to the Criminal Justice System*

Many changes could occur in the federal and state criminal justice systems, although few are politically realistic. Like debts and fines, prisoners' wages are discretionary creations of the government. All costs, fees, and fines, as well as wages and incentives, could be reevaluated for proportionality to income and realistic probability of payment. As is already done in some states, prisoners' imputed wages should be increased and applied directly against their debts, or credit against debts could be given as an incentive for good behavior or educational attainment.<sup>369</sup>

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366. 11 U.S.C. § 721 (2006).

367. See *supra* note 9 and accompanying text.

368. See, e.g., *Pereira v. Young (In re Young)*, 346 B.R. 597, 621 (Bankr. E.D.N.Y. 2006) (excusing the failure of a victim of domestic abuse to keep adequate records given expert testimony that "a person experiencing physical and emotional domestic abuse may lose control of the ability to control or account for her personal financial situation" and given evidence that the debtor acted in "good faith").

369. See, e.g., MACLEAN & THOMPSON, *supra* note 1, at 38 (discussing the federal Prison Industry Enhancement program that allows prisoners to deduct a portion of the

Continuing obligations such as child support could be suspended or reevaluated during incarceration or at release.<sup>370</sup> Prisoners should be released with a full set of identification documents and automatically enrolled in public benefits programs for which they are eligible.<sup>371</sup> Parole officers could be granted more discretion to handle nonpayment of debts or debt-motivated parole violations without triggering a technical violation resulting in reincarceration or extension of supervised release.<sup>372</sup> Parole officers and other reentry administrators could be trained in the importance of debt and debt management during reentry.<sup>373</sup>

#### 4. *Comprehensive Discharge Outside Bankruptcy*

Assessments of economic status outside bankruptcy that take a holistic view of the debtor's income, earning capacity, assets, and debt have great potential to resolve at least some debt in an efficient, consistent, and predictable manner without the expense of a full bankruptcy. Sentencing is an efficient time for a review of the debtor's financial condition because much of the information is already needed for sentencing purposes and because sentencing judges could reject unrealistic fees and penalties before they attach, reducing administrative workload. This idea has already been implemented in Rhode Island, where a statute requires sentencing judges imposing costs of prosecution to assess the defendant's ability to pay such costs by personal interview and by considering certain obligations such as child support.<sup>374</sup> One scholar has proposed the use of a special judge or magistrate, similar to a probation officer, who could review the defendant's financial situation and present an assessment and recommendations to the criminal judge.<sup>375</sup> A step further would be to

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wages they earn while in prison to pay family support, restitution, and other debts and expenses).

370. See MACLEAN & THOMPSON, *supra* note 1, at 26–27; Cammett, *supra* note 329, at 333–34 (discussing state programs which suspend incarcerated parents' debt).

371. ROBERTS, *supra* note 346, at 25. For example, a new program at Rikers Island enrolls inmates in food stamps upon release. See Jason DeParle & Robert Gebeloff, *Food Stamps Finding New Acceptance as Enrollment Surges*, N.Y. TIMES, Feb. 11, 2010, at A22.

372. See PRISONS & CORR. SECTION, STATE BAR OF MICH., STATEMENT REGARDING EXTENDING PAROLE TERMS FOR PAROLEES WHO OWE RESTITUTION (2007) (describing and critiquing Michigan state policy), available at <http://www.michbar.org/prisons/pdfs/statementonrestitution.pdf>. See also Heller, *supra* note 25, at 226 (“While failure to pay a fine or restitution is rarely the sole reason for revoking probation or parole, it is notable how often this technical violation is mentioned as one reason for seeking revocation.”).

373. In one report, most Maryland parole agents interviewed “believed that individualized determinations of ability to pay would improve administration of [Maryland's] parole supervision fee.” DILLER, GREENE & JACOBS, *supra* note 1, at 22.

374. R.I. GEN. LAWS 12-21-20 (2002 & Supp. 2008).

375. 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, 394–97 (2006).

allow sentencing judges to waive many forms of debt owed to the government in addition to having discretion over financial penalties. However, evaluation of the debtor's financial circumstances at release would enable a more up-to-date assessment of the debtor's present earning capacity, age, health status, and number of dependents. Release may also be a more sympathetic time for assessment, especially if the debtor can point to evidence of rehabilitation or good behavior justifying relief.

The breadth of the bankruptcy procedure is also up for debate. In a formal bankruptcy, all creditors must cooperate and are bound by the result. For debtors who have primarily government creditors, a smaller-scale procedure involving only government creditors, leaving debt to private creditors unaltered, may be worthwhile. This would disadvantage government creditors relative to private creditors, but in creating this alternative procedure the government would theoretically consent to such treatment. Such a procedure could be conducted with minimal complexity. Government creditors might consent to discharge in advance, issue regulations permitting courts to discharge debts under certain circumstances, or agree to representation by a single attorney. This would minimize the amount of litigation and the complexity and duration of the proceedings. Cooperation by government creditors would likely reduce the amount of time from filing to discharge, as well as the costs to the debtor of filing bankruptcy. An additional benefit is that alternative procedures can be structured to circumvent creditor and debtor distrust of the court system. Experiments with less intimidating court environments have found some success in other areas of law. For example, the Homeless Court / Caring Court in San Diego, California<sup>376</sup> has successfully resolved minor arrest warrants without the expense of booking and jailing defendants, allowing defendants to clear their records of minor offenses and receive referrals to social services.<sup>377</sup> Similarly, Department of Labor-supported Stand Down events, coordinated social services and intervention directed at military veterans, offer the opportunity to clear minor legal matters in a less formal setting.<sup>378</sup> A simplified bankruptcy could be conducted in a similarly informal setting, achieving the same

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376. See Cal. Courts, Programs, Collaborative Justice, Homeless Courts, <http://www.courtinfo.ca.gov/programs/collab/homeless.htm> (last visited Apr. 19, 2010). See also Am. Bar Ass'n, Commission on Homelessness & Poverty, Homeless Courts [http://www.abanet.org/homeless/homeless\\_courts.shtml](http://www.abanet.org/homeless/homeless_courts.shtml) (last visited Apr. 19, 2010); Veterans Village of San Diego, Stand Down, <http://www.vvvd.net/standdown.htm> (last visited Apr. 19, 2010).

377. Veterans Village of San Diego, *supra* note 376, lists the social services providers that participate in the event.

378. *Id.* In 2008, Stand Down directors reported 608 court cases adjudicated and 1019 cases researched, as well as 92 individuals assisted by IRS. Veterans Village of San Diego, Stand Down 2008 Statistics, [http://www.vvvd.net/stats\\_sd2008.htm](http://www.vvvd.net/stats_sd2008.htm) (last visited Oct. 23, 2009). See also Erik Eckholm, *For Veterans, a Weekend Pass from Homelessness*, N.Y. TIMES, July 26, 2009, at A13.

accessibility and administrative efficiency. Although these programs have been criticized as procedurally inadequate and too settlement focused to provide adequate client advocacy, especially in the criminal context,<sup>379</sup> this criticism is less forceful when the only purpose of the proceeding is discharge of modest debts owed to the government, a lower-stakes civil procedure where an adverse outcome for the debtor is unlikely and the interests of individual creditors are not implicated.

### CONCLUSION

The post-incarcerated population faces a complex set of obstacles to filing bankruptcy, and a multifaceted approach is necessary to resolve the problem. Release from prison is a time of great economic vulnerability, when many ex-convicts must resume significant financial responsibilities while confronting an array of preexisting debts. However, it is also a time when economic rehabilitation can be efficiently carried out: creditors and government agencies are assessing their claims to begin collections efforts, and many debtors already appear before a judicial or administrative authority to determine parole conditions, payment schedules, or other terms of release. The changes discussed in this article could bring more releasees into the bankruptcy courts and improve options for settlement or discharge of debt outside bankruptcy, facilitating post-incarcerated debtors' reintegration into society and providing creditors with a timely resolution of bad debt. Additionally, the Bankruptcy Code could take a more realistic approach to the debt problems of the very poor, in particular, the problems of lack of recordkeeping, payment to creditors under duress, and informal interpersonal lending and borrowing. Obstacles such as nondischargeability of crime-related debt and concern for punitive purpose or for the well-being of creditors are less problematic than they may seem, especially in light of the fact that much of the debt in question is never collected. With the relatively modest changes described in this article, the benefits of economically and socially efficient discharge of debt, inside or outside bankruptcy, could be more accessible to all debtors and creditors.

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379. See, e.g., Clarke & Neuhard, *supra* note 318, at 27–34; Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006).