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NEWS

Debtors' Prisons, Then and Now: FAQ

Congress outlawed them. The Supreme Court ruled them unconstitutional. Yet they live on.

By [ELI HAGER](#)

In 2011, Robin Sanders was driving home when she saw the blue and red lights flashing behind her. She knew she had not fixed her muffler, and believed that was why she was being pulled over. She thought she might get a ticket.

Instead, Sanders, who lives in Illinois, was arrested and taken to jail.

As she was booked and processed, she learned that she had been jailed because she owed debt — \$730 to be precise, related to an unpaid medical bill. Unbeknownst to her, a collection agency had filed a lawsuit against her, and, having never received the notice instructing her to appear, she had missed her date in court.

Debra Shoemaker Ford, a citizen of Harpersville, Ala., spent seven weeks in the county jail without ever appearing in court. Her crime was a failure to pay the monthly fees mailed to her by a private probation company, called Judicial Correction Services. She was on probation because of a traffic violation.

In Benton County, Wash., a quarter of those in jail are there because they owe fines and fees. And in Ferguson, Mo., simmering anger with the police and court system has given rise to a pair of lawsuits aimed at the local practice of imprisoning indigent debtors.

The American tradition of debtors' imprisonment seems to be alive and well. But how could that be? Jailing the indigent for their failure to meet contractual obligations was considered primitive by ancient Greek and Roman politicians, and remains illegal and unheard of in most developed countries. Under the International Covenant of Civil and Political Rights, the practice is listed as a civil-rights violation.



A building in Accomack County, Va., which served as a debtor's prison from 1824 to 1849.

Library of Congress

In the United States, debtors' prisons were banned under federal law in 1833. A century and a half later, in 1983, the Supreme Court affirmed that incarcerating indigent debtors was unconstitutional under the Fourteenth Amendment's Equal Protection clause. Yet, citizens like Sanders and Ford are, to this day, routinely jailed after failing to repay debt. Though *de jure* debtors' prisons are a thing of the past, *de facto* debtors' imprisonment is not. So what do we really know about modern-day debtors' imprisonment – *how* it returned, when, and where? Below, seven frequently asked questions about the history and abolition of debtors' imprisonment, and its **UNDER-THE-RADAR** second act.

UNDER-THE-RADAR Debtor's imprisonment went largely unnoticed until after the financial crisis of 2008, when investigative reporting in the Minneapolis Star Tribune and elsewhere began to expose the trend.

What is a debtors' prison?

A debtors' prison is any prison, jail, or other detention facility in which people are incarcerated for their inability, refusal, or failure to pay debt.

What is the history of debtors' prisons in the United States?

FROM THE LATE 1600S TO THE EARLY 1800S², many cities and states operated actual “debtors’ prisons,” brick-and-mortar facilities that were designed explicitly and exclusively for jailing negligent borrowers – some of whom owed no more than 60 cents. These dungeons, such as Walnut Street Debtors’ Prison in Philadelphia and the New Gaol in downtown Manhattan, were modeled after debtors’ prisons in London, like the “Clink” (the origin of the expression “in the clink”).

FROM THE LATE 1600S TO THE EARLY 1800S²For a more in-depth, historical look at the country's treatment of debtors, read Jill Lepore's reporting in the New Yorker.

Imprisonment for indebtedness was commonplace. Two signatories of the Declaration of Independence, James Wilson, an associate justice of the Supreme Court, and Robert Morris, a close friend of George Washington’s, spent time in jail after neglecting loans.

But for those without friends in high places, debtors’ imprisonment could turn into a life sentence. In many jurisdictions, debtors were not freed until they acquired outside funds to pay what they owed, or else worked off the debt through years of penal labor. As a result, many languished in prison – and died there – for the crime of their indigence.

But that was outlawed, right?

Yes, technically.

After the War of 1812, a costly stalemate, more and more Americans were holding debt, and the notion of imprisoning all these debtors seemed increasingly “feudal.” Moreover, America was seen as a country of immigrants, and many European immigrants had come here to escape debt.

So, in 1833, Congress abolished the practice under federal law. Between 1821 and 1849, twelve states followed suit.

Meanwhile, with the advent of bankruptcy law, individuals were given a way out of insurmountable debt, and creditors were made to share some of the risk inherent in a loan transaction. Legislation passed in 1841, 1867, and 1898 replacing a system that criminalized bankruptcy with one designed to resolve as much debt as the debtor could afford, while absolving the remainder.

During the 20th century, on three separate occasions, the Supreme Court affirmed the unconstitutionality of incarcerating those too poor to repay debt. In 1970, in *Williams v. Illinois*, the high court decided that a maximum prison term could not be extended because the defendant failed to pay court costs or fines. A year later, in *Tate v. Short*, the justices ruled that a defendant may not be jailed solely because he or she is too indigent to pay a fine.

Most importantly, the 1983 decision in *Bearden v. Georgia* compelled local judges to distinguish between debtors who are too poor to pay and those who have the financial ability but “willfully” refuse to do so.

When (and why) did the courts revert to jailing debtors?

Experts say that the trend, though ongoing, coincided with the rise of “mass incarceration.”

Alec Karakatsanis, a lawyer who last year brought one of the only lawsuits to successfully challenge a local court system for jailing indigent debtors, says that the first step was the normalization of incarceration.

“In the 1970s and 1980s,” he says, “we started to imprison more people for lesser crimes. In the process, we were lowering our standards for what constituted an offense deserving of imprisonment, and, more broadly, we were losing our sense of how serious, how truly serious, it is to incarcerate. If we can imprison for possession of marijuana, why can’t we imprison for not paying back a loan?”

As a result of the greater reliance on incarceration, says Karin Martin, a professor at John Jay College and an expert on “criminal justice financial obligations,” there was a dramatic increase in the number of statutes listing a prison term as a possible sentence for failure to repay CRIMINAL-JUSTICE DEBT³.

CRIMINAL-JUSTICE DEBT³For an accounting of state-by-state court fees, see NPR’s series “Guilty and Charged.”

“In the late 80s and early 90s,” she says, “there was a major uptick in the number of rules, at the state level but also in the counties, indicating jail time for failure to pay various fines and fees.”

Next came the fiscal crisis of the 2000s, during which many states were contending with budget deficits and LOOKING FOR WAYS TO SAVE⁴. Many judges, including J. Scott Vowell, a circuit court judge in Alabama, felt pressured to make their courts financially self-sufficient, by using the threat of jail time – established in those statutes – to squeeze cash out of small-time debtors.

LOOKING FOR WAYS TO SAVE⁴According to CBS MoneyWatch and the ACLU, the cost to taxpayers of arresting and incarcerating a debtor is generally more than the amount to be gained by collecting the debt. Finally, in only the last several years, the birth of a new brand of “offender-funded” justice has created a market for private probation companies. Purporting to save taxpayer dollars, these outfits force the offenders themselves to foot the bill for parole, reentry, drug rehab, electronic monitoring, and other services (some of which are not even assigned by a judge). When the offenders can’t pay for all of this, they may be jailed – even if they have already served their time for the offense.

What are some types of debt that people are sent to jail for not paying?

There are two types: private debt, which may lead to involvement in the criminal justice system, and criminal-justice debt, accrued *through* involvement in the criminal justice system.

In the first category are credit card debt, unpaid medical bills and car payments, and payday loans and other high-interest, short-term cash advances, which indigent borrowers rely on but struggle to repay.

In these cases, the creditor – a predatory lender, a landlord, or a utility provider – or a debt collector (hired by the creditor) may bypass bankruptcy court and take the debtor straight to civil court. If the debtor fails to show up, or if the judge deems that the debtor is “willfully” not paying the debt, the judge may write a warrant for the debtor’s arrest on a charge of “contempt of court.” The debtor is then held in jail until he or she posts bond or pays the debt, in a process known as “pay or stay.”

The second category, termed “criminal justice financial obligations,” actually consists of three sub-categories: fines, i.e. monetary penalties imposed as a condition of a sentence, including, say, a traffic ticket; fees, which may include jail book-in fees, **BAIL INVESTIGATION FEES**, public defender application fees, drug testing fees, DNA testing fees, jail per-diems for pretrial detention, court costs, felony surcharges, public defender recoupment fees, and on and on and on; and restitution, made to the victim or victims for personal or property damage. Also in this category are costs of imprisonment (billed to inmates in 41 states), and of parole and probation (44 states).

BAIL INVESTIGATION FEES For more on bail, see The Marshall Project's Alysia Santo's reporting on the [future of the industry](#).

If an offender or ex-offender fails to pay any of this debt, the court will outsource the debt to a private debt collector, and the process of taking the debtor to court, described above, begins all over again.

I’m confused, is this a civil or a criminal matter? Is this debt private or public?

That’s confusing for debtors, too. For indigent people, a civil proceeding regarding private debt – say, an unpaid payday loan – may have criminal ramifications; conversely, involvement in a criminal case may create debt, causing a new civil proceeding.

According to Martin, this ambiguity has grave consequences. For one, indigent debtors do not know whom to negotiate with – the DMV, which mailed the speeding ticket, or the debt collector that now seems to be pursuing the matter. Also, criminal-justice debt affects private creditworthiness and eligibility for a driver’s license, making it harder to get a job, get a home, get a loan, or otherwise find a way to avoid jail, repay the debt and regain solid economic footing.

Most importantly, explains John Pollock, the coordinator of the National Coalition for a Civil Right to Counsel, indigent defendants have a right to counsel in criminal cases, but not in civil ones. Yet, as noted, they may be jailed for failing to show up at a civil hearing or for not resolving civil debt. In other words, poor people with debt face criminal consequences but without the Constitutional protections afforded to criminal defendants.

If debtors' imprisonment is unconstitutional, why does it happen?

It happens for two reasons. The first is that judges may incarcerate debtors who fail to show up at debt-related proceedings.

In these cases, the crime is not failure to pay, but rather “failing to appear in court,” “disobeying a court order,” or “contempt of court.”

The second is that the Supreme Court, in *Bearden*, did not define two key terms: “indigent” and “willful.” How are judges supposed to decide whether a debtor is “indigent” or, rather, is “willfully” refusing to pay?

By leaving this *mens rea* determination to individual judges, rather than providing bright-line criteria as to how to make the distinction, the justices left open the possibility that a local judge with high standards for “indigence” could circumvent the spirit of *Bearden* and send a very, very poor debtor to jail or prison.

In practice, different judges have different criteria for deciphering whether a debtor is “indigent.” Some judges will determine how much money a debtor has by having him or her complete an interview or a short questionnaire. Some judges will rule that the debtor is not “legitimately” indigent and is, instead, “willfully” neglecting the debt – because the debtor showed up to the courtroom wearing a flashy jacket or expensive tattoos.

And other judges will consider all nonpayment to be “willful,” unless or until the debtor can prove that he or she has exhausted absolutely all other sources of income – by quitting smoking, collecting and returning used soda cans and bottles, and asking family and friends for loans.