

PRIVATE PROBATION AND INCARCERATION OF THE POOR

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Fred Robinson was placed on probation for eleven months and twenty-nine days after he was unable to pay a \$2500 fine for misdemeanor marijuana charges.¹ The court in Rutherford County, Tennessee placed his case under the care of a private probation service—a for-profit company managing Mr. Robinson’s probation. Over four years later, Mr. Robinson is still paying back his debt.² He has been unable to pay off the fine and the additional fees and penalties that the private probation companies have levied against him. Moreover, Mr. Robinson suffers from health conditions that make him dependent on a disability public benefits.³ The only violations he committed during his probation were failures to pay these fines, which can lead to jail time.⁴ As such, Mr. Robinson, like so many other indigent probationers, is trapped in a system that ultimately extracts far more than just the initial court-imposed fine and can eventually lead back to incarceration. These private probation practices have come under scrutiny in recent years. Though due process challenges have largely failed, recent cases comparing private probation to unconstitutional debtors’ prisons and bills in state and federal legislatures suggest solutions to ending private probation.

I. PRIVATE PROBATION IN PRACTICE

Private probation refers to the practice of courts contracting with private companies to run their probation services. The private companies collect and often impose additional fines associated with a probation.⁵ Private probation companies have effectively become collection agencies for many courts, regularly threatening arrest to prompt people to pay their fines and debts.⁶ These companies oversee perpetrators of crimes ranging from shoplifting and traffic violations to prostitution and

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¹ *4 Tales of Stresses, Financial Strains of Private Probation*, FOXNEWS.COM (Mar. 12, 2016), <http://www.foxnews.com/us/2016/03/12/4-tales-stresses-financial-strains-private-probation.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtor’s Prisons*, 75 MD. L. REV. 486, 492 (2016).

⁶ Terry Carter, *Probationers’ Prison*, 100 A.B.A. J. 56 (2014).

domestic violence. Private probation companies collect fines, fees, costs, and interest imposed at sentencing or as conditions of parole.⁷ This practice is referred to as “offender-funded” probation, covering the cost of maintaining the oversight and reporting needed for a probation system by charging probationers.⁸ Forty-four states charge offenders for probation services.⁹ All states except Hawaii charge hundreds of dollars monthly for required monitoring devices, and many involve drug tests that can exceed one thousand dollars.¹⁰ Additionally, private probation companies assess monthly supervision fees ranging from \$35 to \$100.¹¹ Many probationers fail to pay these fees since they lack the funds or because courts do not give them notice of summons.¹² As a consequence, probationers often miss their court date, causing judges to enter default judgments against them without giving them the chance to explain their circumstances and potentially mitigate their punishment.

When probationers cannot pay, they are assessed additional fines on top of the penalty for their crime.¹³ If they are unable to make these payments in full at a certain point in time, courts issue arrest warrants and often extend their probation.¹⁴ For example, municipal courts in Ferguson, Missouri issued over 9000 warrants in 2013 for failure to pay these types of fines.¹⁵ Theoretically, courts still wield all punishment authority and supervise private services.¹⁶ Supervision, however, often lacks rigor. An audit of Georgia state courts found that “courts provided limited oversight of providers with contracts that often lack the detail needed to guide provider actions.”¹⁷ Thus, many courts have essentially surrendered their ability to impose fines and collect money from probationers to private parties without strong oversight to avoid corruption or overcharging.

The full extent of private probation is hard to discern since many municipal courts involved in this practice are not courts of record and, as such, do not keep documentation of their probation proceedings.¹⁸

⁷ *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1027 (2016).

⁸ Profiting from Probation, HUM. RTS. WATCH (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>.

⁹ Sobol, *supra* note 5, at 503.

¹⁰ *Id.*

¹¹ *Id.* at 519.

¹² *State Bans on Debtors’ Prisons and Criminal Justice Debt*, *supra* note 7, at 1027.

¹³ *See id.*

¹⁴ *A Juicy Secret*, THE ECONOMIST (Apr. 22, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/04/private-probation>.

¹⁵ *State Bans on Debtors’ Prisons and Criminal Justice Debt*, *supra* note 7, at 1029.

¹⁶ Carter, *supra* note 6, at 59.

¹⁷ *Id.* at 60.

¹⁸ *State Bans on Debtors’ Prisons and Criminal Justice Debt*, *supra* note 7, at 1027.

Collected records indicate that at least a dozen states have authorized the privatization of misdemeanor probation.¹⁹ Hundreds of thousands of people every year are sentenced to probation overseen by a private company, often for minimal offenses such as unpaid parking tickets.²⁰

Furthermore, determining exactly how much money flows through private probation is equally difficult. Though these companies are doing the states' business, they are not subject to government open-records laws or other oversight provisions, clouding information about their potential profits.²¹ Human Rights Watch estimates that in Georgia alone private probation companies take in roughly \$40 million in revenue from probationer fees.²² Though the extent of private probation is hard to discern, the mere existence of the practice presents troubling motivations and impacts on the probation system.

II. PROBLEMATIC MOTIVATIONS AND THEIR IMPACTS

Probation is traditionally used to offer conditional relief from prison sentences, allowing offenders to remain free from incarceration as long as they meet a set of court-mandated benchmarks.²³ Private probation services present courts with an enticing offer to manage probation for certain cases without expending public revenue. In return, the private companies get the right to collect probation fees.²⁴ This outsourcing has become more and more popular in recent years due to state and local budgetary constraints.²⁵ This trend reflects a larger shift towards privatization in the criminal justice system.²⁶ Privatization has coincided with an increase in incarceration, undermining the purpose of the probation system as a whole. The percentage of prisoners in private state prisons grew at double the rate of the entire prison population growth between 1999 and 2010, and more than one thousand courts have privatized their probation systems as well.²⁷ The growth of this practice is troubling when its effects are considered.

Even regardless of private probation companies, offender-funded probation raises concerns about the justification of the practice as an alternative to prison. The impact of offender-funded probation aggravates racial and socioeconomic inequities already present in the

¹⁹ Carter, *supra* note 6, at 59.

²⁰ Sarah Solon, *Preying on the Poor: For-Profit Probation Edition*, ACLU (June 18, 2014), <https://www.aclu.org/blog/preying-poor-profit-probation-edition>.

²¹ *A Juicy Secret*, *supra* note 14.

²² HUM. RTS. WATCH, *supra* note 8.

²³ *Id.*

²⁴ *Id.*

²⁵ Sobol, *supra* note 5, at 449–500.

²⁶ *Id.*

²⁷ *Id.* at 510–11.

criminal justice system. The criminal justice system is overwhelmingly populated by poor and minority individuals, and these disparities carry through to people impacted by private probation.²⁸ Offender-funded probation inherently disadvantages poor probationers, placing pressure on a financially unstable population and encouraging many to use money from their public benefits checks to ward off the threat of imprisonment.²⁹

Tying an offender's freedom to the ability to pay monetary penalties ultimately leads to incarceration for failure to pay fines.³⁰ Some offenders end up in jail while otherwise identical offenders walk free simply because they have greater financial resources. Incarceration for failure to pay occurs at alarming rates throughout the country—half of the arrests and a fourth of the incarcerations in Ohio in 2010 were due to failure to pay fines or other court costs; fifteen percent of the inmates in Washington State and seventeen percent in Rhode Island, are jailed for failure to pay court debts.³¹

Once probation is outsourced to private companies, the motivations behind the system become troubling. These probation services are for-profit, and many of them generate profit solely from the fees collected from probationers they monitor.³² Therefore, they are likely not focused on efficiently getting probationers out of the criminal justice system as “every person who successfully completes probation is a lost source of revenue.”³³ Additionally, the debt accumulated from private probation fees can hamper an offender's ability to rehabilitate and re-enter society. Apart from imprisonment, inability to pay probation debts hurts credit scores, which are necessary to obtain public housing and employment, and can lead to suspension of public benefits and civil rights, such as the right to vote.³⁴ Private probation services' motivation to raise revenue conflicts with the legitimate penological underpinnings of probation as a whole.³⁵

III. LEGAL CHALLENGES AND POTENTIAL LEGISLATIVE SOLUTIONS

Courts are required to hold a hearing and determine an offender's ability to pay probation fees under *Bearden v. Georgia*.³⁶ In *Bearden*, the Court held that an individual could not be jailed solely because he or she

²⁸ *Id.* at 517.

²⁹ *State Bans on Debtors' Prisons and Criminal Justice Debt*, *supra* note 7, at 1025.

³⁰ Sobol, *supra* note 5, at 504.

³¹ *Id.* at 512.

³² *Id.* at 523.

³³ *Id.* at 523.

³⁴ *Id.* at 519.

³⁵ *State Bans on Debtors' Prisons and Criminal Justice Debt*, *supra* note 7, at 1044.

³⁶ 461 U.S. 660, 660–61.

was unable to pay a fine. It also required ability-to-pay hearings to determine people's financial means before potentially incarcerating them.³⁷ According to a 2010 report by the American Civil Liberties Union, however, courts in a handful of states—including Michigan and Georgia, which have implemented private probation services—fail to hold hearings to determine individuals' ability-to-pay altogether.³⁸ Even in states that hold hearings, most ability-to-pay hearings are short and ineffective without the assistance of legal counsel.³⁹ Despite the promise of *Bearden*, advocates against private probation have turned their efforts to suing probation companies themselves.

Challenges to the constitutionality of private probation have been largely unsuccessful. The Georgia case *Sentinel Offender SVCS, LLC v. Glover* provides a common example of these challenges.⁴⁰ Sentinel Offender Services (“SOS”) provides probation services in many states, including Georgia.⁴¹ The plaintiffs in *Glover* had received probated sentences that resulted in them paying fines to SOS.⁴² Plaintiffs alleged the Georgia statute permitting the privatization of probation was a violation of their due process rights both facially and as applied.⁴³ The Georgia Supreme Court rejected both allegations, finding that the delegation of authority to private companies, such as SOS, was constitutionally valid. Additionally, the court dismissed claims that private companies had a conflict of interest that could lead to unnecessarily prolonged sentences.⁴⁴ Since courts still held the authority to probate sentences and determine their condition, the Georgia Supreme Court found any mistreatment to be a result of SOS's actions as supervisor and not a short-coming of the entire privatization practice.⁴⁵

Recent advocacy efforts have tried to portray private probation services as the modern equivalent of debtor's prisons. In 2015, Equal Justice Under Law and Baker Donelson filed a class action suit against Rutherford County, Tennessee's private probation system.⁴⁶ They claimed that Rutherford County violated both the Racketeering Influenced and Corrupt Organizations Act (“RICO”), state and federal

³⁷ *Id.* at 661.

³⁸ *State Bans on Debtors' Prisons and Criminal Justice Debt*, *supra* note 7, at 1029.

³⁹ *Id.*

⁴⁰ *Sentinel Offender SVCS, LLC v. Glover*, 766 S.E.2d 456 (Ga. 2014).

⁴¹ SENTINEL (last visited May 4, 2016), <https://www.sentineladvantage.com/>.

⁴² 766 S.E.2d at 465–67.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 467–48.

⁴⁶ Complaint, *Rodriguez v. Providence Community Corrections, Inc.*, No. 3:15-cv-01048, 2015 WL 9239821 (M.D. Tenn. 2015), *appeal docketed*, No. 16-5057 (6th Cir. Jan. 19, 2016).

constitutional provisions,⁴⁷ and claimed the private provider Providence Community Corrections, Inc. (“PCC”) conspired with the county to “extract as much money as possible from misdemeanor probationers through a pattern of illegal and shocking behavior” that resulted in a “cycle of ever-increasing debts, threats, and imprisonment.”⁴⁸ In December 2015, the federal district court in *Rodriguez v. Providence Community Corrections, Inc.* issued a preliminary injunction against Rutherford County and PCC.⁴⁹ The court found that plaintiffs were likely to succeed in their claim that the failure to inquire into probationers’ indigence before jailing them solely on the basis of non-payment violates the Fourteenth Amendment,⁵⁰ and that plaintiffs would suffer an “unconstitutional liberty deprivation” in the absence of the injunction.⁵¹ This determination is currently on appeal with the Sixth Circuit.⁵² *Rodriguez* has the potential to be a trailblazing challenge to the private probation system.

Another route towards ending private probation may run outside of the courtroom. United States House Representative Mark Takano introduced the “End of Debtor’s Prison Act of 2016” in January, which would make federal justice assistance grants, used to help fund state and local law enforcement agencies, unavailable to governments who contract with companies who collect fees and fines imposed by courts on probationers.⁵³ This explicit ban of private probation has not gained traction in participating states’ legislatures, but in recent years, some states have addressed issues that will lessen the negative impact of private probation. For example, Colorado passed a law in 2014 requiring ability-to-pay hearings on the record before imprisonment for non-payment of debt,⁵⁴ and Missouri limited the practice of raising revenue through traffic fines and prohibited incarceration for traffic violations,⁵⁵ a common violation dealt with by private probation services.

With the potential for success in currently pending litigation like *Rodriguez* and growing legislative support, private probation may soon be significantly limited. Curtailing this practice will provide support to thousands of probationers and refocus this aspect of the criminal justice system on valid penological purposes instead of profits.

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 1–2.

⁴⁹ *Rodriguez*, No. 3:15–cv–01048, 2015 WL 9239821 at *10, *appeal docketed*, No. 16-5057 (6th Cir. Jan. 19, 2016).

⁵⁰ *Id.* at *6–9.

⁵¹ *Id.* at *9.

⁵² Complaint, *supra* note 46.

⁵³ H.R. 4364, 114th Cong. (2016).

⁵⁴ COLO. REV. STAT. ANN. § 18-1.3-702 (West 2014).

⁵⁵ S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015).