

# BEYOND GRADUATION: ECONOMIC SANCTIONS AND STRUCTURAL REFORM

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## ABSTRACT

*In recent years, increased attention is being paid to the dangers of imposing economic sanctions in felony, misdemeanor, juvenile, municipal, and traffic courts because the imposition of unmanageable fines, fees, surcharges, restitution, and forfeitures can be financially devastating for people and their families. One reform that has gained traction is the graduation of economic sanctions to account for their financial effect. To date, considerations of the efficacy of graduated sanctions focus on the individual benefits that would accrue from a properly designed graduation mechanism. In other words, the value of graduation is measured by comparing it to the serious negative consequences for individuals that may result from the imposition of ungraduated sanctions. This Article uses abolitionism as a heuristic because it changes the baseline, measuring graduation against a fundamentally different set of goals: the dismantling of the carceral state and its replacement with systems of “transformative justice.” Doing so indicates that graduation is in some ways consistent with and in other ways in opposition to structural reforms of criminal legal systems writ large. This Article uses those insights to identify potential complementary reforms designed to bring graduation in better alignment with structural reform efforts.*

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## INTRODUCTION

In 2015, police officers pulled over Kisha Snider in the small, central Oklahoma town of Boley.<sup>1</sup> Boley has a venerable history: founded in 1904, it became a prosperous, primarily black, community, boasting the country’s first black-owned electric company and bank and described by Booker T. Washington as “the most interesting and enterprising negro town in the U.S.”<sup>2</sup> But by the time the police stopped Ms. Snider, Boley’s population had shrunk to just over 1,000 people,<sup>3</sup> and with the town’s per capita income at only \$3,255 annually, nearly 62 percent of its residents lived below the federal poverty line.<sup>4</sup> Though the police originally justified stopping Ms. Snider because she violated the town’s traffic laws by putting on her turn signal too early, turning too wide, and having a nonworking light over her license plate, the stop led to a search of Ms. Snider’s vehicle during which the officers uncovered two marijuana joints.<sup>5</sup>

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1. Cary Aspinwall, ‘We’re Going Home!’: More than 500 Oklahoma Inmates Freed in Historic Release, *GUARDIAN* (Nov. 5, 2019, 11:00 AM), <https://www.theguardian.com/us-news/2019/nov/05/oklahoma-inmates-prison-historic-mass-release> [<https://perma.cc/RP7X-M8CY>].

2. Erica Taylor, *Little Known Black History Fact: Boley, Oklahoma*, BLACKAMERICAWEB.COM, <https://blackamericaweb.com/2012/10/30/little-known-black-history-fact-boley-oklahoma> [<https://perma.cc/XL9S-798L>].

3. *Community Facts: Boley Town, Oklahoma*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml?src=bkmm](https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmm) [<https://perma.cc/SRX5-ZF8B>] (search state, county, city, town, or zip code field for “Boley town, Oklahoma”).

4. *Selected Economic Characteristics: 2011-2015 American Community Survey 5-Year Estimates, Boley, Oklahoma*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> [<https://perma.cc/5KWL-84B7>].

5. See Aspinwall, *supra* note 1.

Because she would face years in prison if convicted of marijuana possession, Ms. Snider agreed to a drug-court diversionary program.<sup>6</sup> Oklahoma's program can include a wide array of requirements, including the payment of "court costs, treatment costs, drug testing costs, a program user fee not to exceed Twenty Dollars (\$20.00) per month, and necessary supervision fees."<sup>7</sup> Though a court may waive the fees if it finds a person is indigent,<sup>8</sup> the court ordered Ms. Snider—who made \$8.10 per hour as a nurse's aid from which she supported herself and her four children—to pay.<sup>9</sup> When she proved unable to keep up with the payments, the court removed her from the diversionary program and sent her to state prison.<sup>10</sup>

Several months later and eighty miles away, Muskogee County Sheriff deputies pulled over Eh Wah for having a broken taillight.<sup>11</sup> The deputies would later claim that their K-9 drug-detection dog positively alerted to the car,<sup>12</sup> providing the necessary probable cause for the deputies to search Mr. Wah's vehicle.<sup>13</sup> Mr. Wah, a U.S. citizen who came to America as a refugee from Burma, had been on the road for months volunteering with a Christian rock band; the tour had generated over \$42,000 in ticket and merchandise sales and donations, the bulk of which the band intended to donate to a religious college in Burma and an orphanage in Thailand that served displaced children.<sup>14</sup> Mr. Wah was also carrying an additional \$11,000, most of which had been a gift from one band member's family and friends, as well as monies intended to cover the expenses of the trip.<sup>15</sup> Though no drugs

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6. *Id.*

7. OKLA. STAT. tit. 22, § 471.6(H) (2019).

8. *See id.*

9. *See* Aspinwall, *supra* note 1.

10. *See id.* (explaining that Ms. Snider struggled to make the payments and that "she decided it was just easier to go to prison").

11. *See* Christopher Ingraham, *How Police Took \$53,000 from a Christian Band, an Orphanage and a Church*, WASH. POST (Apr. 25, 2016, 9:18 AM), <https://www.washingtonpost.com/news/wonk/wp/2016/04/25/how-oklahoma-cops-took-53000-from-a-burmese-christian-band-a-church-in-omaha-and-an-orphanage-in-thailand> [<https://perma.cc/X6P5-8MVJ>].

12. Affidavit at 1, *State v. Wah*, No. 2016-2471 (Okla. Dist. Ct. Apr. 5, 2016), [https://www.washingtonpost.com/blogs/wonkblog/files/2016/04/affidavit.pdf?tid=lk\\_inline\\_manual\\_10](https://www.washingtonpost.com/blogs/wonkblog/files/2016/04/affidavit.pdf?tid=lk_inline_manual_10) [<https://perma.cc/8GQ4-F8TA>].

13. *See, e.g., Illinois v. Caballes*, 543 U.S. 405, 407, 410 (2005) (upholding the use of a K-9 during a routine traffic stop in a case in which the dog's alert provided the probable cause necessary to search the vehicle).

14. Ingraham, *supra* note 11.

15. *Id.*

were found in the vehicle, the deputies determined that the K-9 alert, “inconsistent stories” told by Mr. Wah—who had limited English proficiency—and his inability to document the source of the funds on the spot were sufficient evidence that Mr. Wah obtained the money by committing drug crimes, and so the deputies seized the cash as crime proceeds.<sup>16</sup>

In recent years, news reports like these about the dangers of imposing economic sanctions in felony, misdemeanor, juvenile, municipal, and traffic courts have proliferated. These reports have told the stories of people locked in perpetual debt, forced to choose between paying for necessities as basic as toilet paper<sup>17</sup> or paying unmanageable fines, surcharges, fees, and restitution,<sup>18</sup> the nonpayment of which could lead to serious consequences—in Ms. Snider’s case, years of incarceration.<sup>19</sup> Reports also document how people—including those never convicted of a crime—lose houses, cars, and life savings through forfeitures of cash and property.<sup>20</sup>

One reform that has gained traction is the graduation of economic sanctions to account for their real-world consequences. Graduation of fines, fees, surcharges, and restitution would involve an assessment of a person’s sources of income and living expenses to determine her ability to pay and then a reduction of any sanctions to a manageable amount.<sup>21</sup> For forfeitures, graduation would require assessing how the loss of the cash or property at issue would affect a person’s financial and social stability and then the return of a portion of the proceeds from such forfeitures if necessary to avoid unwarranted financial repercussions from the loss.<sup>22</sup> Some jurisdictions have no mechanism for graduation in place, and in some of those that do, the requirement

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16. See Affidavit, *supra* note 12, at 1; Ingraham, *supra* note 11; see also *infra* notes 45, 76–85 and accompanying text.

17. See CHRIS ALBIN-LACKEY, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 34–35 (2014), [https://www.hrw.org/sites/default/files/reports/us0214\\_ForUpload\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf) [https://perma.cc/R5GG-29GB].

18. For a description of these forms of economic sanctions, see *infra* Part I.

19. See *supra* notes 6–10 and accompanying text.

20. E.g., Michael Sallah, Robert O’Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize> [https://perma.cc/VR6S-ALPF].

21. See *infra* notes 97–100 and accompanying text.

22. See *infra* notes 101, 131–33 and accompanying text.

is either ignored or inartfully applied<sup>23</sup>—as apparently was the case for Ms. Snider.<sup>24</sup> Nevertheless, as the electorate and appellate courts have become more aware of the negative consequences of unmanageable economic sanctions, there has been an increase in the number of jurisdictions that require graduation or that have engaged in efforts to improve existing systems to ensure graduation accurately discerns a person’s financial condition.<sup>25</sup>

Graduation is necessarily an individualized inquiry, the efficacy of which has been measured against the baseline of *ungraduated* economic sanctions. It is unsurprising, then, that most discussions of the reform in the literature and the popular press—including in this author’s own work—focus on the benefits that would accrue to people and their families if a properly designed graduation mechanism were adopted.<sup>26</sup>

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23. See, e.g., MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUSTICE, *THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES* 5, 9, 40 (2019), [https://www.brennancenter.org/sites/default/files/2019-11/2019\\_10\\_Fees%26Fines\\_Final3.pdf](https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final3.pdf) [<https://perma.cc/C3M7-KZHR>] (“Judges rarely hold hearings to establish defendants’ ability to pay.”).

24. See *supra* notes 8–10 and accompanying text.

25. See *infra* notes 98–100 and accompanying text. This Article begins from the premise that the mechanism for determining the effect of economic sanctions on a person’s financial and social well-being is designed to rely on objective criteria specifically tied to that person’s circumstances. As others have noted, poorly designed graduation mechanisms risk exacerbating other forms of discrimination. See Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors’ Prisons*, 34 YALE L. & POL’Y REV. 93, 122–23 (2015). For example, if a system allows a judge to discount negative fiscal consequences due to a belief that a person has not tried hard enough to find work, it would fail to account for larger structural issues such as racial or gender discrimination in employment. See, e.g., *id.* at 118–19; Theresa Zhen, *(Color)Blind Reform: How Ability-To-Pay Determinations Are Inadequate To Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 193–200 (2019). For discussions of institutional-design considerations aimed at achieving objectivity in graduation assessments, see generally BETH A. COLGAN, THE HAMILTON PROJECT, *ADDRESSING MODERN DEBTORS’ PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY* (2019), [https://www.brookings.edu/wp-content/uploads/2019/03/Colgan\\_PP\\_201903014.pdf](https://www.brookings.edu/wp-content/uploads/2019/03/Colgan_PP_201903014.pdf) [<https://perma.cc/66FD-UVWQ>] [hereinafter COLGAN, *ADDRESSING MODERN DEBTORS’ PRISONS*] and Beth A. Colgan, *Graduating Economic Sanctions According to Ability To Pay*, 103 IOWA L. REV. 53 (2017) [hereinafter Colgan, *Graduating Economic Sanctions*].

26. I became interested in the concept of graduation through my work regarding the Eighth Amendment’s excessive fines clause. See Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 YALE L.J. F. 253, 253–56 (2020); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 319–37 (2014) [hereinafter Colgan, *Reviving the Excessive Fines Clause*]; Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 46–75 (2018) [hereinafter Colgan, *Challenging the Modern Debtors’ Prison*]. The Supreme Court has rarely interpreted the clause but has indicated that consideration of the

There is reason to believe, however, that graduation may have implications for the broader structure of criminal legal systems that are not apparent if the reform is measured only against that baseline. Take, for example, Oklahoma. Had Ms. Snider the capacity to pay the various fees the court imposed on her for her participation in the diversion program, the revenues would have been divided between “the court clerk for the benefit and administration of the drug court program,” the providers of any treatment, drug testing, or supervision services, and the State Treasury for use by the Department of Mental Health and Substance Abuse Services’ Drug Abuse Education and Treatment Revolving Fund.<sup>27</sup> And if successfully processed as a forfeiture, up to 100 percent of the cash the deputies seized from Mr. Wah would accrue to various funds used to support law enforcement and prosecution, including to Muskogee County to support the very type of drug-enforcement action that had ensnared Mr. Wah.<sup>28</sup> In fact, over the last several years, Oklahoma has generated an average of nearly \$7 million dollars in annual revenue statewide from cash and property forfeitures that can be distributed for those purposes.<sup>29</sup> By looking only at how a reduction in fees or return of cash would be more equitable and fair to Ms. Snider and Mr. Wah, the question of how those same acts affect Oklahoma’s criminal legal system writ large remain unexamined.

In an effort to engage critically with the structural implications of graduation, this Article relies on abolitionism because it “inverts [the] baseline”<sup>30</sup> by measuring reforms not against the status quo but instead against a fundamentally different set of goals: the dismantling of the carceral state and its replacement with systems of “transformative

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financial effect of economic sanctions may be relevant to assessing the constitutionality of the punishment. *See* *Timbs v. Indiana*, 139 S. Ct. 682, 687–88 (2019) (describing Magna Carta as a predecessor of the excessive fines clause and emphasizing its principle that economic sanctions should “not be so large as to deprive [a person] of his livelihood” (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989))). My interest in this constitutional issue led me to consider how a system might fairly and effectively graduate economic sanctions to account for such effects. *See generally* COLGAN, ADDRESSING MODERN DEBTORS’ PRISONS, *supra* note 25; Colgan, *Graduating Economic Sanctions*, *supra* note 25.

27. OKLA. STAT. tit. 22, § 471.6(H) (2019).

28. *See* OKLA. STAT. tit. 63, §§ 2-503, -506, -508 (2019).

29. *See Policing for Profit: Oklahoma*, INST. FOR JUST., <https://ij.org/pfp-state-pages/pfp-oklahoma> [<https://perma.cc/26WC-EPVA>].

30. *See* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 443 (2018) (arguing that scholars should use radical social movements grounded in abolitionism to interrogate crime policy).

justice.”<sup>31</sup> Though more often associated with the abolition of prisons and jails than the use of economic sanctions, abolitionism provides a particularly useful heuristic to address this question because abolitionists distinguish between technocratic reforms that merely improve criminal legal systems and more radical reforms that disrupt those systems.<sup>32</sup> Abolitionism is especially helpful here given that it requires examination of economic and political pressures to provide necessary context for crime policy.<sup>33</sup>

At first glance, because a properly designed system of graduating economic sanctions would allow people to extricate themselves from punishment sooner,<sup>34</sup> it appears to fit well within abolitionist principles as a mechanism for transformative change rather than mere technocratic repair. In fact, early abolitionists cited graduation as a possible remedy to society’s reliance on prisons as a form of punishment. In 1976, the Prison Research Education Action Project (“PREAP”), a collective of abolitionist leaders, released an influential publication, *Instead of Prisons: A Handbook for Abolitionists*.<sup>35</sup> In it, they offered a variety of alternatives to incarceration, including the use of restitution and fines.<sup>36</sup> In doing so, the authors pointed favorably to the European “day-fines” model, under which the amount of a fine imposed is determined by multiplying a person’s daily income—minus

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31. See, e.g., GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE 5 (2007), [http://www.generationfive.org/wp-content/uploads/2013/07/G5\\_Toward\\_Transformative\\_Justice-Documents.pdf](http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Documents.pdf) [https://perma.cc/U7Y6-LJ4U]. Within abolitionism, terminology is contestable. See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1630–31 (2019) (distinguishing “transformative” and “restorative” justice) [hereinafter McLeod, *Envisioning Abolition Democracy*]. For ease of reference, this Article refers to “transformative justice” to describe the overarching approach to replacing the carceral state. “Restorative justice” refers to a particular aspect of that replacement, which involves the manner in which communities could respond to behaviors that cause harm through programs that focus on accountability and community well-being rather than punishment. See *infra* Part II.B.2. As used in this Article, restorative justice programs are totally distinct from and unrelated to carceral systems. See GENERATION FIVE, *supra*, at 21 (rejecting restorative justice programs that have been “co-opted” into traditional criminal legal systems such as post-incarceration reentry programming).

32. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20–21, 103–04 (2003) [hereinafter DAVIS, ARE PRISONS OBSOLETE?].

33. See *id.* at 85 (regarding the importance of “tak[ing] into account economic and political structures and ideologies”).

34. *Infra* notes 125–30 and accompanying text.

35. FAY HONEY KNOPP ET AL., PRISON RESEARCH EDUC. ACTION PROJECT, *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* (Mark Morris ed., 1976).

36. *Id.* at 14, 22, 63, 102, 118–24.

deductions for living expenses and the like—with a penalty unit based on the seriousness of the given offense.<sup>37</sup> The authors deemed the use of graduated economic sanctions transformative because it did not involve incarceration, allowed people to remain and participate in their communities, and presumably decreased the amount of money entering state coffers that would otherwise be used to finance custodial and community supervision.<sup>38</sup>

Yet despite an early embrace of graduating economic sanctions as consistent with abolitionist principles, that understanding may be anachronistic. Though American governments have used economic sanctions as punishment and to recoup system costs since the colonial era,<sup>39</sup> the massive expansion of fees, surcharges, restitution, and forfeitures in effect today had not yet occurred at the time PREAP wrote *Instead of Prisons*.<sup>40</sup> The handbook's authors also placed too much faith in the idea that trial courts would adhere to constitutional restrictions on the conversion of economic sanctions to incarceration,<sup>41</sup> while in reality many courts have flatly ignored the constitutional prohibitions imposed by the U.S. Supreme Court on such practices.<sup>42</sup>

Therefore, to assess the efficacy of graduation anew, this Article proceeds in three parts. Part I provides a brief overview of economic sanctions in the United States—the prevalence of their use, the distribution of revenues to fund criminal legal systems and other public projects, and the push in recent years for the adoption of meaningful graduation mechanisms. Part II then applies abolitionism using its two

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37. *Id.* at 122–24.

38. *See id.* at 123.

39. Colgan, *Reviving the Excessive Fines Clause*, *supra* note 26, at 302–19.

40. *See infra* notes 49–66 and accompanying text.

41. *See* KNOPP ET AL., *supra* note 35, at 122 (citing *Tate v. Short*, 401 U.S. 395 (1971), in which the Court struck down the automatic conversion of economic sanctions to incarceration for those who could not pay).

42. *See, e.g.*, Marsh & Gerrick, *supra* note 25, at 120–21 (discussing evidence that courts have ignored Supreme Court precedent); Don McNay, *Debtor's Prisons in Kentucky and Other Horrors of the Justice System*, HUFFPOST (Dec. 6, 2017, 12:24 AM), [https://www.huffpost.com/entry/debtors-prisons-in-kentuc\\_b\\_5980624](https://www.huffpost.com/entry/debtors-prisons-in-kentuc_b_5980624) [<https://perma.cc/TT3M-NKDW>] (describing the response of a judge in Bullitt County, Kentucky, after an attorney informed him that Supreme Court precedent precluded him from incarcerating a person who could not pay economic sanctions as follows: “Here is the problem. You are not in the United States Supreme Court. You are in my court, and the man is going to jail.”); *see also* CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–62 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/GN36-JXHK>] [hereinafter FERGUSON REPORT] (detailing abuses in Ferguson, Missouri’s municipal courts).

key goals as the baseline against which graduation is assessed: dismantling criminal legal systems and then replacing them with systems of transformative justice. This examination reveals that properly designed graduation mechanisms can be of great value to individuals who would otherwise be subjected to financially crippling economic sanctions that can keep them ensnared in criminal legal systems. It may also shrink funding streams used to prop up such systems, aid in funding other social programs targeted at addressing the root causes of crime, and increase restitution collections as well as better address the nonmonetary needs of crime survivors. At the same time, however, graduation programs risk cementing the status quo by increasing revenue in some cases and thus disincentivizing critical examination of the scope and punitiveness of criminal legal systems, exacerbating inequalities created through mechanisms for distributing economic sanction revenues, and neglecting to force attention to the ways in which current systems of restitution fundamentally fail survivors. In other words, graduation as a reform is incomplete if divorced from broader efforts at structural transformation. Given the limitations of graduation revealed by viewing it through an abolitionist lens, this Article concludes in Part III by briefly identifying additional measures, along with their limitations, that could be adopted in conjunction with the graduation of economic sanctions and which are aimed at better securing structural transformation.

### I. ECONOMIC SANCTIONS AND THE PUSH FOR GRADUATION

Economic sanctions constitute the most common form of punishment in the United States. All levels of courts—traffic and municipal courts, juvenile courts, and misdemeanor and felony courts at the local, state, and federal level—use economic sanctions, including fines, fees, surcharges, and restitution, to punish people<sup>43</sup> found to have violated one or more of a vast network of offenses.<sup>44</sup> State and federal

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43. See, e.g., COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<https://perma.cc/MVH2-STLG>]; JESSICA FEIERMAN WITH NAOMI GOLDSTEIN, EMILY HANEY-CARON & JAYMES FAIRFAX COLUMBO, JUVENILE LAW CTR., DEBTORS' PRISON FOR KIDS?: THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 4–22 (2016), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf> [<https://perma.cc/YJ4H-2BFW>].

44. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–12 (2005) (describing the metastasizing of laws prohibiting a variety of conduct in the United States).

laws—and in some jurisdictions, local laws—also allow for the forfeiture of cash and property.<sup>45</sup> The primary grounds for the government’s retention of forfeited assets is twofold. One basis is that the items in question constitute proceeds of criminal activity or were purchased with crime proceeds.<sup>46</sup> Forfeitures are also allowed for cash or property that served as instrumentalities of an offense, meaning that a person used the property in some way during the commission of a crime,<sup>47</sup> such as a car used during the solicitation of prostitution.<sup>48</sup>

Although economic sanctions have been in use since the colonial era,<sup>49</sup> the imposition of fees and surcharges in particular has boomed in recent decades. Beginning in the 1960s, the federal government began to heavily subsidize the “War on Crime,” distributing funds and equipment that state and local governments used to build up law enforcement and prosecutorial agencies and to expand jail and prison infrastructures.<sup>50</sup> The federal government continues to provide financial assistance for state and local criminal legal systems, but that funding decreased significantly by the early 1980s.<sup>51</sup> And so—eager to avoid tax increases and at times hamstrung from raising tax revenues by newly enacted state restrictions<sup>52</sup>—lawmakers increasingly turned to economic sanctions<sup>53</sup> to fund the systems of mass incarceration, mass supervision, and mass surveillance that began developing in the 1960s

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45. See generally DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS* (2d ed. 2008).

46. See, e.g., 18 U.S.C. § 981(a)(1)(C) (2018) (allowing for the forfeiture of crime proceeds, including property traceable to such proceeds).

47. See, e.g., 21 U.S.C. §§ 853(a)(2), 881(a) (2018) (allowing for the forfeiture of instrumentalities).

48. See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 453 (1996) (holding that the forfeiture of a jointly owned car used by a husband to engage in sexual activity for payment did not violate the wife’s interests under the takings clause despite the state statute’s lack of an innocent owner defense).

49. Colgan, *Reviving the Excessive Fines Clause*, *supra* note 26, at 302–19.

50. See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 94, 143, 150–51, 159, 172–74, 189–91, 281 (2016).

51. See Karin D. Martin, *Monetary Myopia: An Examination of Institutional Response to Revenue from Monetary Sanctions for Misdemeanors*, 29 *CRIM. JUST. POL’Y REV.* 630, 636–39 (2018) (discussing decreases in federal funding that had been provided to states through the Law Enforcement Assistance Administration).

52. See, e.g., *MENENDEZ ET AL.*, *supra* note 23, at 6, 39 (describing restrictions on taxing passed by Oklahoma in 1992 and a 1998 state constitutional amendment in Florida requiring courts to self-fund through fines, fees, and surcharges).

53. See, e.g., *COUNCIL OF ECON. ADVISERS*, *supra* note 43, at 2–3; Martin, *supra* note 51, at 636–39.

and that would continue to flourish during the tough-on-crime boom of the 1980s and 1990s through today.<sup>54</sup> Fines have long been used to fund both criminal legal systems and other public expenditures,<sup>55</sup> but lawmakers additionally began devising an array of administrative fees to be imposed on people accused or convicted of violating the law, which were aimed at recouping system costs, including fees linked to expenditures for law enforcement and prosecutorial efforts, indigent defense services, pre- and post-trial incarceration, probation and parole supervision, court processes, and collection efforts.<sup>56</sup> Lawmakers in many jurisdictions also created an array of surcharges—essentially fines on top of fines—used to fund criminal legal processes,<sup>57</sup> as well as to supplement general coffers and underwrite public works as diverse as infrastructure projects,<sup>58</sup> education services,<sup>59</sup> and election systems.<sup>60</sup>

The use of forfeitures has also skyrocketed in recent years. Between 1970 and 1984, Congress passed a series of statutes that shifted forfeiture revenue from general coffers to direct retention by

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54. See, e.g., JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* 101–11 (2011). Restitution also began to expand during this period, as states moved restitution into criminal sentencing and in some cases subjected the survivor’s losses to multipliers to significantly increase restitution amounts. See generally Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93 (2014) (providing a history of restitution practices in the United States).

55. See, e.g., Colgan, *Reviving the Excessive Fines Clause*, *supra* note 26, at 306, 308, 313–14 (describing the use of fines and forfeitures to pay jury costs, qui tam prosecutors, and law enforcement expenses in the colonies and early American states). Today, the distribution of revenues generated from the imposition of fines varies from place to place, and it may be allocated in whole or in part to the jurisdiction’s general fund or be designated for a specific use. See, e.g., MATT BURRESS & BEN JOHNSON, MINN. HOUSE RESEARCH DEP’T, *TRAFFIC CITATIONS 7–9* (2019), <https://www.house.leg.state.mn.us/hrd/pubs/trafcit.pdf> [<https://perma.cc/J4XU-FDFP>] (detailing Minnesota’s distribution of traffic violation fine revenue under various circumstances to state or local general funds or other designated accounts).

56. See, e.g., MENENDEZ ET AL., *supra* note 23, at 6; Nathan W. Link, *Criminal Justice Debt During the Prisoner Reintegration Process: Who Has It and How Much?*, 46 CRIM. JUST. & BEHAV. 154, 155 (2019).

57. See, e.g., LAWYERS’ COMM. FOR CIVIL RIGHTS ET AL., *NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA* 10, 11 (2015), <https://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf> [<http://perma.cc/8G84-YD4B>].

58. See, e.g., MENENDEZ ET AL., *supra* note 23, at 6; *Prisoners of Debt: Justice System Imposes Steep Fines, Fees*, OKLA. WATCH (Jan. 31, 2015), <https://oklahomawatch.org/2015/01/31/justice-system-steeps-many-offenders-in-debt> [<http://perma.cc/3JXF-2VZE>].

59. See, e.g., *infra* note 162 and accompanying text.

60. See, e.g., ARIZ. REV. STAT. ANN. § 16-954(C) (2019) (funding Arizona’s Clean Elections program).

federal law enforcement and prosecutorial offices.<sup>61</sup> The idea behind this shift was that forfeiture dollars would not only drain resources from people engaged in lawbreaking, but it would also simultaneously fund the expanding criminal legal apparatus, particularly as it related to drug- and organized-crime enforcement.<sup>62</sup> As then-Attorney General Richard Thornburgh explained in 1989: “It is truly satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture-financed prison, after being arrested by agents driving a forfeiture-provided automobile, while working in a forfeiture-funded sting operation.”<sup>63</sup>

Following the expansion of forfeiture at the federal level, local and state lawmakers soon followed suit with their own forfeiture statutes.<sup>64</sup> Additionally, the Comprehensive Crime Control Act of 1984 created what is known as the “Equitable Sharing” Program, which provides two avenues for local and state governments to coordinate with the federal government on forfeiture activities. First, if local and state law enforcement participate in a federal operation, the federal government awards a portion of associated forfeiture revenues to the state or local entity dependent on the extent of its participation.<sup>65</sup> Second, even if the law enforcement activity through which property is seized is unrelated to a federal operation, the federal government can adopt cash and property seized by local and state law enforcement, returning up to 80 percent of the value of the forfeited money directly to the agencies

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61. See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C.); Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (codified in scattered sections of 21 U.S.C.); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801–890, 951–971 (2018)); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961–1968 (2018)).

62. See, e.g., Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2116 (2007); Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 42 (1998).

63. Shawn Kantor, Carl Kitchens & Steven Pawlowski, *Civil Asset Forfeiture, Crime, and Police Incentives: Evidence from the Comprehensive Crime Control Act of 1984*, at 4 (Nat’l Bureau of Econ. Research, Working Paper No. 23873, 2017).

64. See Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> [http://perma.cc/P5RY-XZEB].

65. See, e.g., 18 U.S.C. § 981(e)(2); 21 U.S.C. § 881(e)(1)(A), (e)(3).

involved so long as the alleged offense could have been charged under federal law.<sup>66</sup>

As with other forms of economic sanctions, the distribution of forfeiture revenues is dependent on the jurisdiction and the mechanism through which the forfeiture is processed. Federally retained forfeiture proceeds are typically designated for use by law enforcement and prosecutorial agencies as well as for restitution or to fund victim-compensation programs.<sup>67</sup> Federal law also requires that monies distributed through the Equitable Sharing Program be used solely for law enforcement or prosecutorial purposes.<sup>68</sup> State and local distribution laws, on the other hand, vary to a greater degree. In the majority of jurisdictions, a significant percentage of,<sup>69</sup> and in some cases all,<sup>70</sup> proceeds from forfeitures accrue to law enforcement and prosecutorial agencies. In others, forfeitures must be placed in the jurisdiction's general fund or are otherwise designated for purposes outside of the criminal legal system.<sup>71</sup>

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66. See OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, ORDER NO. 3946-2017, FEDERAL FORFEITURE OF PROPERTY SEIZED BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2017), <https://www.justice.gov/criminal-mlars/file/985631/download> [<https://perma.cc/4KKC-TYFY>]. Originally, the federal government returned up to 90 percent, but the statute was later amended to allow it to retain a higher percentage of the forfeited cash or property's value. See U.S. DEP'T OF JUSTICE & U.S. DEP'T OF THE TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 9 (2018), <https://www.justice.gov/criminal-afmls/file/794696/download> [<http://perma.cc/N37K-TWVS>] [hereinafter GUIDE TO EQUITABLE SHARING].

67. See Stillman, *supra* note 64 (reporting that between January 2012 and August 2013, “the Department of Justice ha[d] turned over more than \$1.5 billion in forfeited assets to four hundred thousand crime victims, often in cases of corporate criminality”); *About: Treasury Executive Office for Asset Forfeiture*, U.S. DEP'T TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/Pages/The-Executive-Office-for-Asset-Forfeiture.aspx> [<http://perma.cc/5N54-Q3KJ>] (explaining that asset forfeiture funds are used for law enforcement and related purposes); *Asset Forfeiture Program: The Fund*, U.S. DEP'T JUST., <https://www.justice.gov/afp/fund> [<http://perma.cc/6BLK-DGHH>] (explaining that forfeiture revenues must be used to cover the costs of forfeiture operations or to “finance certain general investigative expenses”).

68. See GUIDE TO EQUITABLE SHARING, *supra* note 66, at 13–18 (stating that “[s]hared funds must be used to increase or supplement the resources of the receiving state or local law enforcement agency” and providing a list of permissible law enforcement uses). Despite this requirement, at least some local lawmakers appear to offset monies obtained through federal forfeitures by reducing law enforcement budgets. See Baicker & Jacobson, *supra* note 62, at 2115, 2128–29.

69. See, e.g., OR. REV. STAT. § 131A.365 (2019).

70. See, e.g., ALA. CODE § 20-2-93(e) (2019).

71. See, e.g., *infra* note 162 and accompanying text. Just because local or state law designates revenue from economic sanctions for purposes outside of criminal legal systems does not mean that funds are so distributed. In some cases, due to a lack of oversight, law enforcement retains funds even where required to submit the revenues for other purposes. See Michael D. Makowsky,

As a result of the increased variety, scope, and application of economic sanctions, lawmakers have been able to tap into a multibillion-dollar tax-avoidance mechanism that can be used to fund both criminal legal institutions and other public projects. Dependence on economic sanctions varies from place to place,<sup>72</sup> and the net revenue hinges on the resources expended to impose and collect such sanctions.<sup>73</sup> At the federal level, which relies less heavily on economic sanctions, the government collected nearly \$8 billion in fines and restitution in fiscal year 2017 alone.<sup>74</sup> Though transparency and data-collection issues make it impossible to ascertain exact figures, those amounts are dwarfed at the state and local level.<sup>75</sup> Forfeiture revenues have also exploded in large part due to increased uses of civil forfeitures, also known as “civil *in rem*,” “civil asset,” or “administrative” forfeitures. While criminal forfeitures are a component of criminal processes and imposed as a part of a sentence following conviction,<sup>76</sup> civil forfeitures occur when the government files an action against a particular piece of property or cash related in some manner to alleged criminal activity,<sup>77</sup> which it may pursue even without securing a conviction for—or even charging anyone with—a crime.<sup>78</sup> Civil forfeiture processes also often shift the burden of proof, requiring

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Thomas Stratmann & Alex Tabarrok, *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189, 191 n.1 (2019).

72. See *infra* notes 235–38 and accompanying text.

73. In some jurisdictions, gross revenues are substantially offset by costs related to imposition and collections. For example, in-court hearings and jail costs take up \$0.41 per \$1.00 collected from fines and fees in New Mexico and Texas, though those figures do not account for fines and fees imposed in noncriminal traffic cases for which revenues may be higher and costs lower. MENENDEZ ET AL., *supra* note 23, at 5, 9, 19.

74. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2017, at 35 tbl. 8C, <https://www.justice.gov/usao/page/file/1081801/download> [<http://perma.cc/25NE-D3MN>].

75. For example, in fiscal year 2018 Florida courts assessed nearly \$1.2 billion in economic sanctions, not including forfeiture proceeds. See FLA. COURT CLERKS & COMPTROLLERS, CONSOLIDATED SUMMARY: 2018 ANNUAL ASSESSMENTS AND COLLECTIONS REPORT 8, [https://cdn.ymaws.com/www.flclerks.com/resource/resmgr/public\\_documents/\\_1\\_final\\_front\\_matter\\_cover\\_s.pdf](https://cdn.ymaws.com/www.flclerks.com/resource/resmgr/public_documents/_1_final_front_matter_cover_s.pdf) [<http://perma.cc/A2GA-DDXW>].

76. See *Libretti v. United States*, 516 U.S. 29, 39–41 (1995).

77. See, e.g., *United States v. \$124,700*, in *U.S. Currency*, 458 F.3d 822, 823 (8th Cir. 2006). Nebraska, New Mexico, and North Carolina do not allow civil forfeiture. See *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights> [<http://perma.cc/27ZV-Y4BW>].

78. See, e.g., Christopher Zoukis, *Civil Asset Forfeiture: Unfair, Unjust, Un-American*, CRIM. LEGAL NEWS (Feb. 16, 2018), <https://www.criminallegalnews.org/news/2018/feb/16/civil-asset-forfeiture-unfair-unjust-un-american> [<http://perma.cc/VPT9-CTCV>].

people to prove their innocence to succeed in reclaiming their assets.<sup>79</sup> Further, because there is no constitutionally recognized right to counsel in civil forfeiture proceedings,<sup>80</sup> individuals are left with the option of retaining counsel that may be more expensive than the seized cash or property's value.<sup>81</sup> The alternative is to navigate often-Byzantine forfeiture proceedings on their own.<sup>82</sup> Unsurprisingly, many civil forfeitures go unchallenged.<sup>83</sup> With the expansion of civil forfeiture practices, net deposits in federal forfeiture funds reached over \$2.5 billion in fiscal year 2011 and \$4.7 billion the following year,<sup>84</sup> and estimates of revenues from state and local forfeiture programs place annual intake by the mid-2000s at over \$1 billion for drug-related forfeitures alone.<sup>85</sup>

Though a boon to the government, for people of limited means, economic sanctions can have significant, negative short- and long-term consequences. Debt from economic sanctions often begets more debt, particularly from interest, collections costs, and late-payment fees that prevent people from paying down the principal.<sup>86</sup> Aggressive collection practices include the use of property liens, tax intercepts, wage garnishment, driver's license revocation, probation or parole

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79. See, e.g., *id.*

80. See *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding that the Sixth Amendment's right to counsel does not extend to cases that do not result in a term of incarceration). There may be a statutory right to counsel in some cases. For example, federal law allows for the provision of counsel if a person is represented in a related criminal matter and requires the provision of counsel if the property forfeited is the owner's primary residence. 18 U.S.C. § 983(b) (2018).

81. Cf. Brian D. Kelly & Maureen Kole, *The Effects of Asset Forfeiture on Policing: A Panel Approach*, 54 *ECON. INQUIRY* 558, 573 (2016) (“[I]n Maine, for example, median forfeiture ranged from \$1,820 to \$2,630 per year over the course of 5 years, and in Virginia from \$615 to \$1,289 over the course of 12 years.”).

82. See, e.g., Stillman, *supra* note 64 (quoting Louis Rulli, University of Pennsylvania clinical professor and forfeiture defense attorney, regarding complex affirmative defenses available in Philadelphia forfeiture proceedings that are unknown even to most lawyers).

83. See Sallah et al., *supra* note 20 (describing a review of nearly 62,000 seizures and noting that “[o]nly a sixth of the seizures were legally challenged, in part because of the costs of legal action against the government”); Stillman, *supra* note 64 (reporting that 70 percent of forfeitures in Texas are uncontested).

84. See Kelly & Kole, *supra* note 81, at 558, 560 tbl. 1 & n.6 (documenting that deposits in the U.S. Department of Justice's forfeiture fund reached nearly \$1.7 billion in fiscal year 2011 and \$4.2 billion in fiscal year 2012 and the U.S. Treasury Department's forfeiture fund totaled \$868.1 million and \$516.6 million respectively).

85. See *id.* at 560 n.6 (estimating \$934 million in forfeitures at the state and local level in 2007 but noting that the figures are significantly understated because it is based on limited data that does not account for all forfeitures).

86. See, e.g., ALBIN-LACKEY, *supra* note 17, at 24–25.

extensions or revocation, and even incarceration.<sup>87</sup> Therefore, not only do people with unmanageable debt face a decreased ability to pay for basic human needs such as housing, food, and medical care, but governmental collection efforts can also exacerbate that instability. For example, the administrative difficulties caused by wage garnishment processes may make employers reluctant to hire people with ongoing debt,<sup>88</sup> and the revocation of a driver's license can make it difficult, if not impossible, to obtain or maintain employment or meet necessary obligations required for successful completion of probation or parole.<sup>89</sup> Because forfeitures typically involve the seizure of cash or property, they do not create ongoing debt in the same manner as other forms of economic sanctions, but they still bear serious consequences for people whose assets have been seized. The loss of one's home, automobile, business equipment, and more can interfere with a person's ability to participate in the labor market or access educational services, meet basic human needs, maintain family and social stability, and satisfy other legal obligations.<sup>90</sup>

In light of these potential repercussions, there have been increasing calls to graduate economic sanctions to account for a person's financial circumstances. In some jurisdictions, the possibility of graduation has existed for some time, because relevant laws have either required or allowed judges to waive or lower the amount of fines, fees, or surcharges imposed.<sup>91</sup> These laws often provide little guidance,

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87. COLO. OFFICE OF THE STATE AUDITOR, VICTIM'S RESTITUTION: THE JUDICIAL BRANCH & DEPARTMENT OF CORRECTIONS PERFORMANCE AUDIT 8–9, 23–25 (2014), <https://leg.colorado.gov/sites/default/files/documents/audits/2197p-victimsrestitutionapril2014.pdf> [<https://perma.cc/KHJ8-LQ5D>]; CAROLINE HOLLINGSWORTH, ASS'N OF ARK. CTYS., FINE COLLECTION SEMINAR & GUIDEBOOK 6, 11–15, 19–20 (3d ed. 2019), <https://www.arcounties.org/site/assets/files/4985/finecollectionguidebook2019.pdf> [<https://perma.cc/X6UU-AQKC>]; MENENDEZ ET AL., *supra* note 23, at 21.

88. Cf. Julie Farraj, *Here Are the 4 Things Employers Must Know About Wage Garnishment*, WORKFORCE.COM (Feb. 15, 2017), <https://www.workforce.com/2017/02/15/4-things-employers-must-know-wage-garnishment> [<https://perma.cc/K3U6-59C8>] (warning of legal and financial consequences of hiring an employee subject to wage garnishment).

89. See, e.g., ALAN M. VOORHEES TRANSP. CTR. & N.J. MOTOR VEHICLE COMM'N, MOTOR VEHICLES AFFORDABILITY AND FAIRNESS TASK FORCE: FINAL REPORT 38 (2006), [https://www.state.nj.us/mvc/pdf/about/AFTF\\_final\\_02.pdf](https://www.state.nj.us/mvc/pdf/about/AFTF_final_02.pdf) [<https://perma.cc/2EW6-QKJK>] (detailing the implications of driver's license suspensions, including that 42 percent of people lost employment, of whom 45 percent remained unemployed, and of the remaining 55 percent, the vast majority only found employment at reduced-income levels); cf. Colgan & McLean, *supra* note 26, at 431, 446–47 (noting the difficulties that loss of access to transportation can cause for attending probation and parole meetings).

90. Colgan & McLean, *supra* note 26, at 437–47.

91. See, e.g., *supra* note 8 and accompanying text.

however, on how to determine a person's ability to pay, and in some cases may simply be ignored.<sup>92</sup> Further, relevant laws typically prohibit the graduation of one or more types of economic sanctions, including, in most jurisdictions, restitution.<sup>93</sup> Similarly, forfeiture statutes also customarily make no allowances for graduation of cash or property forfeitures.<sup>94</sup> A push to improve graduation mechanisms where they do exist, and to create such systems where they do not, has come from two sources. First, public consternation regarding the poor treatment of people of limited means brought to light by advocates and investigative journalists in recent years has led to successful efforts to reform the law.<sup>95</sup> Second, an increasing number of state and federal courts have found that considering the financial effect of economic sanctions prior to their imposition is constitutionally required.<sup>96</sup>

Graduation mechanisms may vary from location to location, but they share a central goal of ensuring that economic sanctions do not place people and their families in a state of fiscal instability that undermines access to basic human needs and from which it would be difficult to recover. Although graduation mechanisms generally involve a determination of a person's income, if any, offset by a series of deductions for expenses related to basic needs of the person and his or her family,<sup>97</sup> the manner in which such information is used to reduce

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92. See FERGUSON REPORT, *supra* note 42, at 44, 53 (regarding the municipal court's "legally inadequate" failure to consider ability to pay despite a state statutory requirement); *supra* notes 23–24 and accompanying text.

93. See, e.g., ALASKA STAT. § 12.55.051(c) (2019) (allowing reductions in other economic sanctions but not restitution).

94. See, e.g., MICH. COMP. LAWS § 600.4702 (2019).

95. See, e.g., Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt Free Justice Movement*, 98 N.C. L. REV. 401, 403–12 (2020) (describing efforts by advocates to eliminate the use of fees in California's juvenile courts); Stillman, *supra* note 64 (investigating civil forfeiture practices); see also generally THOMAS HARVEY ET AL., ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER (2014), <https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [<https://perma.cc/V76N-G7FZ>].

96. See, e.g., Colo. Dep't of Labor & Emp't v. Dami Hosp., 442 P.3d 94, 102 (Colo. 2019) ("[C]ourts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment."); State v. Timbs, 134 N.E.3d 12, 34–35 (Ind. 2019) (holding that a subjective inquiry into the financial effect of an automobile forfeiture was necessary for application of the Eighth Amendment's excessive fines clause).

97. See, e.g., JUDICIAL COUNCIL OF CAL., SF LOCAL FORM TR-320/CR-320: SAN FRANCISCO SUPERIOR COURT: CAN'T AFFORD TO PAY FINE: TRAFFIC AND OTHER INFRACTIONS (2018), <https://www.sfsuperiorcourt.org/sites/default/files/images/GJ%20Imgs/San%20Francisco%20corrected%20ATP%20Form%20111418.pdf?1573867133300> [<http://perma.cc/R4PD-9PFV>].

economic sanctions may take different forms. For example, in 2018, the City and County of San Francisco adopted a system by which the fines and fees that would otherwise be imposed for traffic offenses are reduced by 80 percent for any person determined to be under 250 percent of the federal poverty level or who receives means-tested public benefits.<sup>98</sup> Rather than using a flat cutoff, lawmakers might also adopt a more granular approach that allows for reduction or waiver of economic sanctions based on a person's specific economic circumstances, as both Kentucky and Texas did in 2017.<sup>99</sup> Another possible approach involves "day-fines," a form of graduation used in some European and Latin American countries under which offenses are assigned a penalty unit based on the seriousness of the offense; that penalty unit is then multiplied by the person's adjusted daily income to reach an amount of economic sanctions that is responsive to both the nature of the offense and the person's financial circumstances.<sup>100</sup> Similar systems could be employed with respect to cash forfeitures. Property forfeitures would likely require a slightly different approach, whereby courts would determine how the loss of the property at issue would affect a person's financial condition. For example, a portion of the proceeds from the government's sale of a forfeited home may need to be returned to ensure a person and his or her family can still maintain stable, alternative housing.<sup>101</sup>

Graduation, therefore, has great potential to make criminal legal systems fairer and more equitable at the individual level. The question that remains, however, is whether graduation supports or undermines the possibility of broader structural reform, particularly given the economic stakes for criminal legal actors and policymakers. This Article turns to that question next, using abolitionism as a lens through which to critically assess graduation.

## II. GRADUATION OF ECONOMIC SANCTIONS THROUGH AN ABOLITIONIST LENS

To understand how abolitionism can operate as a critical lens for assessing the efficacy of graduating economic sanctions, it is essential

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98. See *Can't Afford To Pay*, SUPERIOR CT. CAL., COUNTY S.F., <https://www.sfsuperiorcourt.org/divisions/traffic/cant-afford-pay> [<https://perma.cc/CKN2-X8UJ>].

99. See 2017 KY. ACTS 1166; 2017 TEX. GEN. LAWS 3966; 2017 TEX. GEN. LAWS 4317.

100. See Colgan, *Graduating Economic Sanctions*, *supra* note 25, at 56–57.

101. See Colgan & McLean, *supra* note 26, at 437–38.

to first articulate its bounds.<sup>102</sup> Modern abolitionists intentionally use the word “abolition” as a direct link to the movement in the eighteenth and nineteenth centuries to abolish slavery for two reasons. First, the term is adopted in recognition of the original abolitionists’ audacity of imagining a world without the enslavement of people and the ultimate achievement of that goal in the United States, which provides hope and guidance for attaining the type of fundamental societal transformation modern abolitionists seek.<sup>103</sup> Second, modern abolitionists center their advocacy on the historical relationship between the end of slavery and the modern carceral state<sup>104</sup>—from the Black Codes and convict-leasing systems that effectively reenslaved people in the Reconstruction Era South,<sup>105</sup> to the racialization of crime policy and policing practices in the North and West as African Americans fled Jim Crow laws during the Great Migration,<sup>106</sup> to crime policy leading out of the Civil Rights Era,<sup>107</sup> to the way in which the legacy of generational economic deprivation still leaves African Americans in economically depressed, heavily policed communities today.<sup>108</sup> As Saidiya Hartman has written, understanding that historical relationship is critical “because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is

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102. For a more robust description of abolitionism than can be offered here, see Dorothy E. Roberts, *The Supreme Court 2018 Term: Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 3–49 (2019).

103. See, e.g., DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 22–25; Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1685 (2019).

104. See, e.g., Roberts, *supra* note 102, at 7, 19–42, 48–49.

105. See DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 25–39. For a detailed history of the use of Black Codes and convict leasing, see generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008); SARAH HALEY, *NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY* (2016); and TALITHA L. LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH* (2015). For a historical account of the use of convict leasing in what would become California, see generally KELLY LYTTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965* (2017).

106. See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (documenting racialized social and criminal justice policies beyond the Jim Crow South).

107. See generally HINTON, *supra* note 50 (disproving the idea that the “War on Crime” began in the Reagan Era by documenting policies dating back to the 1960s).

108. See Geoff Ward, *The Square One Project Roundtable on the Future of Justice Policy: Recognition, Reparation, and the Reconstruction of ‘Square One’* (unpublished manuscript at 2–4), <https://static1.squarespace.com/static/5b4cc00c710699c57a454b25/t/5c9296af6e9a7f21d3d95f40/1553110703340/Ward+%281%29.pdf> [<https://perma.cc/3H6U-W5EU>].

the afterlife of slavery—skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment.”<sup>109</sup>

Even with a common grounding in historical abolition efforts, defining the bounds of the modern movement is somewhat fraught because—like all social movements<sup>110</sup>—abolitionism exists on a spectrum.<sup>111</sup> In particular, despite its importance, the link to abolition in the context of slavery—in other words, the total elimination of the institution—does not fully capture the range of positions that people who identify as “abolitionists” embrace today. To be sure, there are abolitionists that believe in the immediate and total elimination of prisons and policing full stop.<sup>112</sup> Others call for “the complete and utter dismantling of prisons, policing, and surveillance *as they currently exist within our culture*,”<sup>113</sup> leaving the door open for intermediate system reforms short of that goal until it can be reached. Still others explicitly accept that there may be circumstances under which people should be subject to *some* form of confinement for a limited time, albeit under conditions that would be unrecognizable when compared to such institutions today.<sup>114</sup>

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109. SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6* (2007).

110. See, e.g., Keeanga-Yamahtta Taylor, *Five Years Later, Do Black Lives Matter?*, JACOBIN (Sept. 30, 2019), <https://www.jacobinmag.com/2019/09/black-lives-matter-laquan-mcdonald-mike-brown-eric-garner> [<https://perma.cc/VZ3E-AM9H>] (documenting the development of the Movement for Black Lives and how “movement participants come to radically different conclusions about what the objective should be”).

111. See Roberts, *supra* note 102, at 6 (“It is hard to pin down what prison abolition means.”).

112. See, e.g., Ward, *supra* note 108, at 3 (noting “growing and compelling calls for a society *without* police or prisons”).

113. See *Episode 29—Mariame Kaba* at 34:30, AIRGO (Feb. 2, 2016), <https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba> (emphasis added) [<https://perma.cc/W9ZS-DETN>]; see also Mariame Kaba, *Take No Prisoners*, VICE (Oct. 5, 2015, 12:00 AM), [https://www.vice.com/en\\_ca/article/vdxxp4/mending-our-ways-0000775-v22n10](https://www.vice.com/en_ca/article/vdxxp4/mending-our-ways-0000775-v22n10) [<https://perma.cc/C6PX-GANB>] (“When I speak of abolition, I don’t demand the immediate closing of all correctional facilities . . . Part of our work, then, must be to create the conditions necessary to ensure the possibility of a world without prisons.”); *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people> [<https://perma.cc/XS8U-CJ2M>] (“Until we achieve a world where cages are no longer used against our people we demand an immediate change in conditions and an end to all jails, detention centers, youth facilities and prisons *as we know them*.” (emphasis added)).

114. See, e.g., KNOPP ET AL., *supra* note 35, at 19–20, 129–30; see also *id.* at 36 (“Tho[ugh] some advocate abolishing the criminal law, for the present most abolitionists advocate limiting criminal law to reduce its discriminatory and arbitrary powers and its extended use as a tool of socialization.” (footnotes omitted)).

Yet, even across this spectrum of beliefs, abolitionists share an insistence on replacing the carceral state—“the country’s vast archipelago of jails and prisons, [and] the far-reaching and growing range of penal punishments and controls that lies in the never-never land between the prison gate and full citizenship”<sup>115</sup>—with interventions that address complex social issues related to inequality including poverty, health, and structural racism.<sup>116</sup> The reach of the carceral state that abolitionists challenge includes abusive practices related to economic sanctions.<sup>117</sup>

Abolitionism’s insistence on reimagining societal structures is what makes it a particularly potent tool for assessing proposed reforms, whether one agrees with abolitionist principles or not.<sup>118</sup> Though the audacity of these goals lead people to discount abolitionists as “utopians and idealists whose ideas are at best unrealistic and impracticable, and, at worst, mystifying and foolish,”<sup>119</sup> it is that very resolve to achieve radical societal transformation that provides a fundamentally different benchmark, the application of which may reveal that a promising reform actually risks “a new round of damaging controls, inflicted upon an even greater number of citizens.”<sup>120</sup>

This Article, therefore, takes two key questions from abolitionism to assess graduation of economic sanctions as a reform, each tethered to the ultimate goal of broad structural change: first, whether graduation aids in dismantling, rather than perpetuating, the carceral state; and second, whether it supports the replacement of current criminal legal processes with systems of “transformative justice.”<sup>121</sup>

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115. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 1 (2015).

116. DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 32, at 107–08; McLeod, *Envisioning Abolition Democracy*, *supra* note 31, at 1616. Some abolitionists understand this shift to represent a rejection of capitalism in favor of other forms of governance such as a socialist democracy. *See, e.g.*, ANGELA Y. DAVIS & EDUARDO MENDIETA, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 21, 68, 99 (2005).

117. *See* Elizabeth Jones, *Racism, Fines and Fees and the US Carceral State*, *RACE & CLASS*, Jan.–Mar. 2018, at 43 (arguing that the carceral state must be understood to include the use of economic sanctions); *End the War on Black People*, *supra* note 113 (calling for a prohibition on “mandatory fines, fees, court surcharges and ‘defendant funded’ court proceedings”).

118. *See infra* notes 309–10 and accompanying text.

119. DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 32, at 9–10.

120. *See* KNOPP ET AL., *supra* note 35, at 20.

121. *See supra* note 31 and accompanying text. Abolitionism could be used to assess ungraduated economic sanctions against the vision of a diminished carceral state and expansion of transformative justice. The analysis here is distinct from such an inquiry, however, due to the way graduation pushes revenue streams up and down, which may then have unique consequences

A. *Goal One: Dismantle the Carceral State*

To assess whether a policy aids in dismantling the carceral state, abolitionists distinguish between reforms that “diminish [the] power and function”<sup>122</sup> of criminal legal systems and mere technocratic reforms that may provide relief in individual cases but also entrench or legitimize such systems.<sup>123</sup> In undertaking such an assessment, abolitionists have insisted on attending to the ways in which criminal legal processes are tied to economic policy, and how policymakers may be influenced by the system’s capacity to “generate huge profits from processes of social destruction.”<sup>124</sup>

By reducing economic sanctions to a manageable amount, graduation certainly provides individual relief. Not only does graduation alleviate the financial burdens of the punishment, it also significantly reduces the likelihood that the negative consequences of nonpayment may accrue.<sup>125</sup> The question is whether that individual relief is consistent with the goal of dismantling the carceral state or in opposition to it.

Decreasing the amount of fines, fees, and surcharges imposed may diminish the scope of the carceral state by limiting the duration of time that people fall under its thumb. For example, a typical condition of probation or parole includes the payment of economic sanctions.<sup>126</sup> Though constitutionally dubious, in many jurisdictions people may be subject to continued supervision because of unsettled economic sanctions they have no meaningful ability to pay.<sup>127</sup> By reducing the economic sanctions imposed to a manageable amount, people are able to satisfy their conditions of supervision more quickly, thereby shrinking the number of people subject to carceral control. Similarly,

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for both abolitionist aims. *See infra* notes 131–36, 160–61 and accompanying text. Graduation also raises specific concerns about how it may be used to legitimize restitution practices that actually do little to aid many crime survivors. *See infra* notes 170–90, 196–209 and accompanying text.

122. KNOPP ET AL., *supra* note 35, at 7; *see also* Roberts, *supra* note 102, at 42–43 (“[R]eforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation.”).

123. *See, e.g.,* About, CRITICAL RESISTANCE, <http://criticalresistance.org/about> [<https://perma.cc/RHW3-LTE7>] (“Because we seek to abolish the [Prison Industrial Complex], we cannot support any work that extends its life or scope.”).

124. DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 88.

125. *See supra* notes 86–90 and accompanying text.

126. *See, e.g.,* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 314 (2016).

127. *See, e.g.,* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 77–79 (2019) [hereinafter Colgan, *Wealth-Based Penal Disenfranchisement*].

eligibility for record sealing and expungement<sup>128</sup>—often critical for one’s ability to obtain housing and employment<sup>129</sup>—as well as restoration of voting rights<sup>130</sup> often hinges on full payment of economic sanctions. Therefore, by making it more feasible for people to complete payment, these individuals can more readily extricate themselves from the grip of the carceral state.

The graduation of forfeitures to account for their effect on fiscal and social well-being, if implemented, would also help diminish criminal legal systems by depleting a source of their funding. As noted above, in the majority of jurisdictions, proceeds from forfeitures accrue in whole or in part to law enforcement and prosecutorial agencies.<sup>131</sup> Graduating forfeitures to account for financial effect, however, disrupts that flow of cash and property. For example, if police in Hawaii seize a vehicle suspected of being used in a drug transaction, lawmakers allow the police to retain one-quarter of the proceeds from the vehicle’s sale, distribute another quarter to the prosecutor, and award the remaining half to the Hawaii Attorney General’s office for law enforcement purposes.<sup>132</sup> Were Hawaii to adopt a program for graduating the forfeiture to account for the owner’s financial and social well-being, the government may be limited to retaining a smaller portion of the vehicle’s value, returning the remainder to the owner to obtain a different vehicle to attend work or school, medical visits, and the like.<sup>133</sup> In so doing, monies available to fund key actors who maintain the carceral state—particularly law enforcement and prosecution—are necessarily reduced.

Other potential outcomes of graduation, however, undermine abolitionist goals by entrenching, or even supporting the expansion of, the carceral apparatus. Perhaps surprisingly—unlike forfeitures—the

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128. See, e.g., Katie Rose Quandt, *The Largest Commutation in U.S. History*, SLATE (Nov. 8, 2019, 3:51 PM), <https://slate.com/news-and-politics/2019/11/oklahoma-clemency-drug-criminal-justice-reform.html> [<https://perma.cc/75LV-WF7R>] (reporting that expungement fees in Oklahoma are approximately \$340 and that expungement is unavailable unless a person pays off all court debt).

129. See, e.g., J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, HARV. L. REV. (forthcoming) (manuscript at 5, 41–53), <https://ssrn.com/abstract=3353620> [<https://perma.cc/DY3F-ELCC>] (finding that criminal record expungement resulted in greater likelihood of being employed at all and of earning greater wages).

130. See Colgan, *Wealth-Based Penal Disenfranchisement*, *supra* note 127, at 65–86.

131. See *supra* notes 67–71 and accompanying text.

132. HAW. REV. STAT. § 712A-16(2)–(4) (2019).

133. See Colgan & McLean, *supra* note 26, at 448.

graduation of fines, fees, and surcharges downward to a manageable amount may actually *bolster* funding for criminal legal systems and therefore support or even expand upon the status quo. Experience with graduation in the United States suggests that when people are faced with unmanageable economic sanctions, they are less likely to pay than if sanctions are graduated.<sup>134</sup> Therefore, even though graduation reduces the amount imposed, collections—and, by extension, funding to support criminal legal systems—are likely to rise. Absent graduation, existing structures for the use of economic sanction revenues do transform people subjected to policing and prosecution “into sources of profit.”<sup>135</sup> With graduation, those same people may become unwilling participants into the system’s continuation and expansion as collections increase.<sup>136</sup>

A key risk of improved collections that may result from graduating fines, fees, and surcharges is that graduation will disincentivize lawmakers from engaging in critical examination of the scope and severity of criminal legal systems, something Karin Martin has described as “monetary myopia.”<sup>137</sup> In other words, if a lawmaker is reliant on those revenues, she may be less like to consider crime policy on a larger scale, including whether a particular type of activity should be legalized, whether sentences should be reduced, how policing should be regulated, or the extent to which managing social problems through criminal legal systems creates harm.

Increasingly, studies suggest that lawmakers and system actors are in fact influenced, at least in part,<sup>138</sup> by the revenue-generating capacity of economic sanctions. For example, researchers have linked increased traffic ticketing to both budgetary shortfalls<sup>139</sup> and statutory limitations

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134. See COLGAN, ADDRESSING MODERN DEBTORS’ PRISONS, *supra* note 25, at 17–18 & box 4; Colgan, *Graduating Economic Sanctions*, *supra* note 25, at 65–69; Tex. Office of Court Admin., *Indicators of Impact of Fines, Fees & Court Costs Legislation*, <https://www.txcourts.gov/media/1442212/ff-indicators.pdf> [<https://perma.cc/M9CY-VEHK>] (presenting data showing that collections per case rose in fiscal years 2017 and 2018 following passage of reforms allowing reduction of fines and fees to account for ability to pay).

135. DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 88.

136. Cf. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059 (2015) (critiquing policy changes that would replace criminal punishments with civil fines because “we risk turning the most vulnerable population into funding fodder for the very institution from which we are trying to protect them”).

137. Martin, *supra* note 51, at 633 (defining “monetary myopia” as “a short-sighted focus on revenue at the expense of considering other important, competing concerns”).

138. See *infra* note 144 and accompanying text.

139. Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 83–87 & tbl.2 (2009); Michael

on other mechanisms for generating revenue such as property tax caps.<sup>140</sup> Lawmakers may even write revenue increases into budget forecasts, leaving solvency dependent on an uptick in offenses—or the policing of offenses—that can lead to the imposition of economic sanctions.<sup>141</sup> The system, therefore, becomes self-perpetuating: reliance on economic sanctions leads to a need for law enforcement to police offenses that are revenue generating, courts to impose such sanctions, and an administrative apparatus to collect revenues, which leads to greater dependence on economic sanctions.<sup>142</sup> In other words, increased revenues resulting from the graduation of economic sanctions may lead to greater entrenchment or expansion of existing systems, to the detriment of critical examination of the breadth and consequences of the criminal law.

Monetary myopia may be particularly difficult to disrupt because people most often subjected to the laws and enforcement practices have reduced political power. For example, a study of traffic ticketing in North Carolina revealed that even though ticketing generally increased in relation to economic downturns, reliance on ticketing could be reduced with even “marginal increases” in a community’s political participation, suggesting that system actors were reticent to engage in revenue-generating practices in communities where they may encounter meaningful political pushback.<sup>143</sup> Stated differently, revenue goals and political economy alone cannot explain current

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D. Makowsky & Thomas Stratmann, *Political Economy at Any Speed: What Determines Traffic Citations?*, 99 AM. ECON. REV. 509, 509, 511 (2009).

140. Makowsky & Stratmann, *supra* note 139, at 510–12, 526.

141. See, e.g., Garrett & Wagner, *supra* note 139, at 72 (describing how Nashville’s mayor “included a 33 percent increase in traffic ticket revenue” in a proposed budget); see also Martin, *supra* note 51, at 643 (quoting Stephen Dahl, President of the Nevada Judges Association, describing a policy by which funding for Nevada’s courts is dependent upon collections from economic sanctions as follows: “The policy subconsciously hopes for more crime. A good year in raising administrative assessment fees is a year when the crime rate goes up; a bad year is when the crime rate goes down. Success in raising administrative assessment fees depends in large part on our failure to prevent crime.”).

142. See Martin, *supra* note 51, at 634–35.

143. Garrett & Wagner, *supra* note 139, at 86; see also William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver’s License Suspension in North Carolina*, 69 DUKE L.J. 1585 (2020). Another recent study suggests that in at least some areas, law enforcement targets out-of-jurisdiction drivers—those who do not vote in the area patrolled—for traffic stops that lead to economic sanctions. Michael D. Makowsky & Thomas Stratmann, *More Tickets, Fewer Accidents: How Cash-Strapped Towns Make for Safer Roads*, 54 J.L. & ECON. 863, 865 (2011) [hereinafter Makowsky & Stratmann, *More Tickets*]; see also Stillman, *supra* note 64 (detailing practices in Tenaha, Texas, by which law enforcement and prosecutors worked together to target out-of-town drivers).

practices; if they did, one would expect law enforcement and prosecutors to focus their efforts toward wealthier communities where the ability to pay economic sanctions is higher and property forfeitures are more lucrative. Instead, it is low-income communities and people of color who are more likely to be heavily policed, including for drug and public-order offenses that carry mandatory fines or where economic sanctions are the primary form of punishment.<sup>144</sup> Such communities face uniquely high barriers to political participation. Not only are people who are directly disenfranchised as the result of a conviction blocked from voting,<sup>145</sup> studies also show that disenfranchisement practices reduce voter turnout in African American communities broadly.<sup>146</sup> There is also significant evidence that mere exposure to criminal legal systems via the arrest or incarceration of family members or from one's own jailing for nondisenfranchising misdemeanor offenses leads to decreased political

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144. See, e.g., MENENDEZ ET AL., *supra* note 23, at 13; U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 72 (2017), [https://www.usccr.gov/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf) [<https://perma.cc/77MS-9BXE>]; Selbin, *supra* note 95, at 407–08 (finding that juveniles of color and their families are more likely to be subject to economic sanctions than their white counterparts); Noli Brazil, *The Unequal Spatial Distribution of City Government Fines: The Case of Parking Tickets in Los Angeles*, URB. AFF. REV., June 2018, at 19–26 (finding that the number of parking tickets issued in Los Angeles is higher in neighborhoods with black residents).

This is not to say that lawmakers do not also have public safety interests in mind. Economic sanctions constitute the primary punishment, for example, for traffic offenses typically designed to protect motorist and pedestrian safety. See, e.g., Marsh & Gerrick, *supra* note 25, at 115–16. But even where such proper motives exist, enforcement may still be disproportionately targeted at politically vulnerable communities. See, e.g., *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> [<https://perma.cc/GXC9-UFV3>] (analyzing nearly 100 million traffic stops and concluding that officers are more likely to stop African American drivers than white drivers, and more likely to issue speeding tickets to African American and Latinx drivers than white drivers). Further, that lawmakers may intend economic sanctions to promote public safety does not mean they do a good job at doing so. For example, although one recent study has found that an increase in traffic tickets reduces the number of traffic accidents, Makowsky & Stratmann, *More Tickets*, *supra* note 143, at 863, 883, a separate study has linked policies that allow law enforcement to retain forfeiture proceeds to increased traffic fatalities, Kantor et al., *supra* note 63, at 34, 36.

145. See, e.g., Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 312, 327–28 (2017); *State-by-State Data: Felony Disenfranchisement Rate*, SENT'G PROJECT (2016), <https://www.sentencingproject.org/the-facts/#map?dataset-option=FDR> [<https://perma.cc/SW6M-98BU>] (comparing, for each state, the disenfranchisement rate of the total population with that of African Americans).

146. See, e.g., Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722, 738, 740 (2009) (finding that disenfranchisement “policies tend to dampen the probability of voting for blacks, but not for non-Hispanic whites”).

participation.<sup>147</sup> Perhaps unsurprisingly, then, a recent study analyzing data on over nine thousand cities found that separate and apart from budgetary needs, municipalities are more likely to rely on revenue from fines and fees as the percentage of black residents increases.<sup>148</sup>

Put simply, shifting the baseline of the analysis from the individual benefits of graduation to focus on the long-term goal of structural transformation reveals that graduation might aid in shrinking the carceral state. However, the contradictory consequence is that increased collections resulting from graduation may make it less likely lawmakers will critically examine the scope and harshness of existing criminal legal systems.

### *B. Goal Two: Create Systems of Transformative Justice*

For abolitionists, it is not enough to merely dismantle the carceral state; it is equally important to replace it with systems of transformative justice. Within this concept of transformative justice are two interrelated goals: building more equitable communities<sup>149</sup> and creating systems to respond to incidents where people commit harm to others or the community that focus on accountability and community well-being rather than punishment.<sup>150</sup>

1. *Build a More Equitable Society.* Within abolitionism, building a more equitable society involves “the creation of an array of social institutions that would begin to solve the social problems that set people on the track to prison, thereby helping to render the prison obsolete.”<sup>151</sup> Over time, access to supportive services in economically fragile communities—particularly chemical dependency and mental health treatment, employment training, and the like—have become intertwined with the carceral state, with such services at times primarily

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147. See, e.g., Hedwig Lee, Lauren C. Porter & Megan Comfort, *Consequences of Family Member Incarceration: Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 53 (2014) (finding that people who experienced the incarceration of a parent during childhood were less likely to vote and more likely to distrust the government); Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. 311, 315–21 (2019) (finding that short jail sentences for misdemeanor offenses depress voting in the next election for black, but not white, voters).

148. Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1091–92 (2017).

149. GENERATION FIVE, *supra* note 31, at 5–6.

150. *Id.*; McLeod, *Envisioning Abolition Democracy*, *supra* note 31, at 1646.

151. DAVIS & MENDIETA, *supra* note 116, at 96.

or exclusively accessible through contact with criminal legal systems.<sup>152</sup> For example, community mental health services are largely unavailable to people of limited means, whereas the three largest mental health systems in the United States are now inside jails.<sup>153</sup> Abolitionists hold that a more rational and moral approach is to replace incarceration and other mechanisms of punishment that do a poor job in deterring crime<sup>154</sup> with structures that improve economic and social well-being and allow people and their communities to flourish. Such programs may include, for example, community-based health services, increased support of public education programs, investments in job training and support, urban redevelopment, and access to affordable housing.<sup>155</sup> This idea is supported by available research, which indicates “that states and countries that spend more on social welfare tend to have lower incarceration rates, and [that] high rates of inequality are associated with higher rates of imprisonment and higher rates of crime.”<sup>156</sup>

Graduation of economic sanctions appears consistent with this goal because it is designed to promote financial stability for people and their families. The basic premise behind graduation is that ensuring that economic sanctions are manageable—meaning payable in a limited time period and at an amount that does not preclude a person from meeting basic needs—can have significant positive benefits for people subjected to criminal legal systems and their families.<sup>157</sup> By reducing or even eliminating failures to pay due to inability, graduation not only improves financial stability in comparison to ungraduated sanctions but also decreases the risk of downstream consequences that further impede a person’s financial and social well-being, such as nonpayment penalties, wage garnishment, and driver’s license

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152. GOTTSCHALK, *supra* note 115, at 46; *see also supra* note 50 and accompanying text.

153. *See, e.g., Kennedy’s Vision for Mental Health Never Realized*, USA TODAY (Oct. 20, 2013, 2:47 PM), <https://www.usatoday.com/story/news/nation/2013/10/20/kennedys-vision-mental-health/3100001> [<https://perma.cc/BWR5-3NKJ>].

154. Mariame Kaba & Kelly Hayes, Opinion, *A Jailbreak of the Imagination: Seeing Prisons for What They Are and Demanding Transformation*, TRUTHOUT (May 3, 2018), <https://truthout.org/articles/a-jailbreak-of-the-imagination-seeing-prisons-for-what-they-are-and-demanding-transformation> [<https://perma.cc/CP8G-8GB4>].

155. *See* DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 20–21, 107–08; DAVIS & MENDIETA, *supra* note 116, at 99; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1158–61 (2015); *see also infra* notes 273–79 and accompanying text.

156. GOTTSCHALK, *supra* note 115, at 279; *see also infra* notes 269–72 and accompanying text.

157. *See* COLGAN, *Addressing Modern Debtors’ Prisons*, *supra* note 25, at 6–12.

revocations.<sup>158</sup> Similarly, attending to the real-world effects of cash and property forfeitures helps ensure that people are not stripped of shelter, transportation, and other property needed to function within society.<sup>159</sup>

In many jurisdictions, graduation may also contribute to this aim if revenues do increase and those funds are used to support social services rather than funding criminal legal systems. Funds generated through payment of economic sanctions are, for example, used to fund schools, infrastructure projects, city parks, and more.<sup>160</sup> Therefore, if more money is generated from graduated economic sanctions, and used exclusively for such programs, the reform would contribute to community development.

Once again, though, graduation may simultaneously cut against abolitionist goals. Graduation will not always result in revenue increases. As noted above, the graduation of forfeitures is a one-way ratchet by which money or property is returned to the owner, thus reducing the amount accruing to the government.<sup>161</sup> In other words, systems for graduating forfeitures reduce the amount of funding that could be diverted to social welfare programs.

Further, graduation does not address a deeper issue of inequity that may exist even when revenues are put toward social welfare spending. In many jurisdictions, funds obtained through economic sanctions, and not used to fund criminal legal processes, are placed into the jurisdiction's general fund to be distributed jurisdiction wide. For example, under New Mexico law, all fines and forfeitures collected pursuant to the state's general laws must be placed in its Current School Fund.<sup>162</sup> In turn, monies from the fund are distributed to public schools under a formula that looks to student enrollment, as well as a series of multipliers related to data such as the number of special education or ESL students in the student body.<sup>163</sup> There is no consideration of what community the funds originated from in the

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158. See *supra* notes 86–90 and accompanying text.

159. See, e.g., Colgan & McLean, *supra* note 26, at 437–47.

160. See, e.g., *Prisoners of Debt: Justice System Imposes Steep Fines, Fees*, *supra* note 58; *supra* notes 58–60 and accompanying text.

161. See *supra* note 131–133 and accompanying text.

162. N.M. STAT. ANN. § 22-8-32(A)(1) (2019).

163. N.M. LEGISLATIVE FIN. COMM., FINANCE FACTS: PUBLIC SCHOOL FUNDING FORMULA 1 (2019), [https://www.nmlegis.gov/Entity/LFC/Documents/Finance\\_Facts/finance%20facts%20public%20school%20funding%20formula.pdf](https://www.nmlegis.gov/Entity/LFC/Documents/Finance_Facts/finance%20facts%20public%20school%20funding%20formula.pdf) [<https://perma.cc/9GGX-LT46>].

distribution scheme.<sup>164</sup> This effectively means that communities that are more heavily policed are subjected to a tax that other communities do not have to bear, thus increasing rather than abating societal inequities.<sup>165</sup>

In sum, graduation may simultaneously raise (by application to fines, fees, and surcharges) and lower (by application to forfeiture) revenues that could be used to fund social welfare programs. It also does nothing to mandate revenue redistribution from criminal legal systems to supportive social services or to reform systems that distribute revenues jurisdiction wide. As with its role in dismantling the carceral state, when its potential effects on the development of a more equitable society are considered, the efficacy of graduation is mixed.

*2. Respond to Violations of the Law by Promoting Accountability and Community Well-Being.* Though abolitionists posit that the development of structures that create more equitable societies will reduce crime, they also acknowledge that at times, people will still engage in acts that harm others or the community. A system of transformative justice would center responses to such transgressions on achieving accountability and community well-being through “reparation and reconciliation rather than retribution and vengeance.”<sup>166</sup>

For those faced with economic sanctions, a well-designed graduation mechanism<sup>167</sup> fits with the transformative justice goal of promoting community well-being. Namely, it protects community members by offering an individualized assessment intended to ensure that the real-world consequences of the sanctions—such as what it would mean for a family to lose a vehicle they depend on to attend work or school or to access child or medical care—are taken into account.<sup>168</sup>

The thornier question is whether graduation promotes the well-being of *all* community members given its potential implications for the availability of monetary restitution for crime survivors. Any

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164. *Id.*

165. See Martin, *supra* note 51, at 645–49 (describing Iowa’s practice of depositing economic sanction revenues in its general fund for state-wide distribution as a hidden form of taxation).

166. DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 107; see also KNOPP ET AL., *supra* note 35, at 22, 114–18; HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181, 186–91 (1990).

167. See *supra* note 25 and accompanying text.

168. See, e.g., Colgan & McLean, *supra* note 26, at 440–47.

meaningful system would require the graduation of restitution to ensure that the entire package of economic sanctions imposed is at a manageable amount in circumstances where a court orders the payment of restitution directly to the survivor (“direct restitution”) and would reduce the availability of forfeiture proceeds for distribution to survivors (“proceeds-based restitution”).<sup>169</sup>

While abolitionism shifts the baseline against which graduation should be measured away from the status quo, understanding the stated rationale for restitution in existing criminal legal systems—making survivors whole<sup>170</sup>—and how that framing pits survivors against those upon whom restitution is imposed provides useful context. Because graduation may reduce monies awarded to survivors, its application to restitution has been a political nonstarter.<sup>171</sup> Though graduation of direct restitution to an affordable amount may lead to increased collections,<sup>172</sup> and thus more money available to pay survivors, graduation necessarily places the sanction imposed below a survivor’s losses. Further, graduation of forfeitures necessarily reduces the amount of revenue available for proceeds-based restitution.<sup>173</sup> Therefore, graduation has either been adopted in situations where restitution would never be awarded, such as for traffic offenses,<sup>174</sup> or where lawmakers have explicitly excluded restitution from graduation programs, treating it as off-limits.<sup>175</sup>

Whether graduation pushes funds available for restitution higher or lower, by treating restitution as sacrosanct within the development of graduation mechanisms, policymakers avoid a greater truth: the claim that restitution makes survivors whole is a lie.<sup>176</sup> It is absolutely the case that having access to money can be critically important to survivors, who may need financial assistance to obtain medical or

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169. See, e.g., *supra* note 67 and accompanying text.

170. Lollar, *supra* note 54, at 97.

171. The graduation of restitution, however, may be constitutionally required. See Colgan, *Challenging the Modern Debtors’ Prison*, *supra* note 26, at 41–46 (describing indications that the Supreme Court may treat restitution as a “fine” for purposes of the Eighth Amendment’s excessive fines clause); see also *supra* note 26.

172. See *supra* note 134 and accompanying text.

173. See *supra* notes 131–33 and accompanying text.

174. See, e.g., *supra* note 98 and accompanying text.

175. See *supra* note 93 and accompanying text.

176. Cf. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 41 (2019) (discussing how pretending that incarceration will help victims is “unethical” in light of the dearth of evidence that incarceration aids in alleviating trauma or in encouraging rehabilitation and safety).

mental health care, move to a safer location, and otherwise address their trauma and safety concerns.<sup>177</sup> The inability to access necessary funds is particularly problematic because survivors are disproportionately low-income individuals, and therefore their financial losses are especially devastating and needs especially acute.<sup>178</sup> But the Supreme Court has recognized what criminal legal system actors know to be true: imposing direct restitution on a person who cannot pay “will not make restitution suddenly forthcoming.”<sup>179</sup> Given rates of indigency for those subjected to prosecution,<sup>180</sup> it is unsurprising that direct restitution arrears are at over \$110 billion at the federal level (\$100 billion of which the government believes is uncollectable),<sup>181</sup> and arrears are likely in the billions more at the local and state level.<sup>182</sup> Further, even when direct restitution is paid it is often at a trickle over time, doing little to help survivors when the loss occurs.<sup>183</sup>

Existing proceeds-based restitution practices fare no better under scrutiny than direct restitution. The federal government uses a portion of forfeiture proceeds to pay survivors of associated crimes<sup>184</sup> and also to finance the national Crime Victims Fund program, which is broken into separate funds managed by all fifty states.<sup>185</sup> State lawmakers,

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177. *See id.* at 28.

178. *See* ALL. FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 4 (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [<https://perma.cc/B94Y-FDEQ>]; ERIKA HARRELL, LYNN LANGTON, MARCUS BERZOFSKY, LANCE COUZENS & HOPE SMILEY-MCDONALD, BUREAU OF JUSTICE STATISTICS, HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008–2012, at 2 (2014), <https://www.bjs.gov/content/pub/pdf/hpnavv0812.pdf> [<https://perma.cc/6LBL-79KP>].

179. *Bearden v. Georgia*, 461 U.S. 660, 670 (1983) (holding that automatic revocation of probation for nonpayment of economic sanctions violates equal protection and due process).

180. ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 5 (2012), <https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf> [<https://perma.cc/2REV-E6EL>] (“Estimates indicate that at least 80 percent of people charged with criminal offenses qualify for indigent defense.”).

181. U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 25 (2018), <https://www.gao.gov/assets/690/689830.pdf> [<https://perma.cc/3MGE-LLL7>].

182. For example, between fiscal years 2009 and 2013, Colorado alone had outstanding restitution in the amount of \$115 million. COLO. OFFICE OF THE STATE AUDITOR, *supra* note 87, at 23.

183. *See, e.g., id.* (discussing restitution payment plans).

184. *See supra* note 67 and accompanying text.

185. *See Crime Victim Compensation: An Overview*, NAT’L ASS’N CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=14> [<https://perma.cc/Z55Q-BLQL>];

however, often cap compensation awards, leaving survivors without the funds to address more significant needs.<sup>186</sup> Lawmakers also may preclude survivors from receiving monies from victim compensation funds if they themselves have a prior criminal conviction.<sup>187</sup> Eligibility for compensation is also dependent on reporting a crime and cooperating with law enforcement,<sup>188</sup> even though many survivors choose not to report. Though there are many reasons why that may be the case, increased attention to the complexity of survivor interests has shown that some do not report out of fear of reprisal, because the person causing the harm is a loved one, or because they do not trust criminal legal system actors to treat them fairly or criminal punishment to improve their circumstances.<sup>189</sup> Further, these compensation programs may limit eligibility to only those who have experienced physical harm, excluding those who experience serious emotional and psychological harms or property losses.<sup>190</sup> This is the reality of restitution practices *without* graduation.

The shift to assessing graduation of restitution through an abolitionist lens affords consideration of a more complex understanding of what it means to make a survivor whole than the often-hollow gesture of imposing a restitution award on a person with limited or no means to pay it allows. Doing so suggests that the interests of survivors and those who cause harm may be better aligned than the standard narrative against graduating restitution indicates.

Abolitionists aim to replace—rather than improve—systems of punishment by establishing restorative justice practices designed to

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*Crime Victims Fund*, OFF. FOR VICTIMS CRIME, <https://www.ovc.gov/pubs/crimevictimsfundfs/intro.html#VictimComp> [<https://perma.cc/PTQ6-82AP>].

186. See Daniel M. Fetsco, *Unpaid Restitution: An Under-Enforced Right of Victims and Suggestions To Improve the Collection of Restitution in Wyoming*, 12 WYO. L. REV. 367, 274, 379, 381 (2012).

187. See, e.g., Sam Levin, *Unfair Punishment Part Two: Sentenced to Poverty*, E. BAY EXPRESS (Mar. 12, 2014), <https://www.eastbayexpress.com/oakland/unfair-punishment-part-two-sentenced-to-poverty/Content?oid=3861802> [<https://perma.cc/MX76-QL83>].

188. See *Eligibility Requirements*, NAT'L ASS'N CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?bid=6> [<https://perma.cc/H4GZ-2RC2>].

189. See, e.g., SERED, *supra* note 176, at 23–35; LYNN LANGTON, MARCUS BERZOFSKY, CHRISTOPHER KREBS & HOPE SMILEY-MCDONALD, BUREAU OF JUSTICE STATISTICS, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/Z5DQ-DQEC>].

190. See, e.g., *Crime Victim Compensation*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/crime-victim-compensation> [<https://perma.cc/U5RE-Z2P4>].

meet the stated interests of many survivors.<sup>191</sup> Abolitionists acknowledge that there are survivors who seek retribution, desiring highly punitive responses be imposed on those who harmed them, and that the current system may satisfy that goal.<sup>192</sup> But because abolitionists reject state-sponsored violence,<sup>193</sup> abolitionists attempt to discern a more nuanced understanding of survivor needs—recognizing anger as a valid response to harm but also capturing other concerns, including the desire to have a meaningful voice in the process.<sup>194</sup> Restorative justice programs are designed to engage people who are harmed and those who commit the harm—as well as members of the greater community in some restorative justice models—in a dialogue to reach an agreement as to what people must do to make amends and how the community can support that rehabilitative process.<sup>195</sup>

At their core, restorative justice programs embody the idea that people who commit harm must be held accountable<sup>196</sup>—including in some cases through the payment of restitution.<sup>197</sup> But these programs also are compatible with the understanding that making restitution the sole responsibility of a person who commits harm may leave survivors empty-handed. As Danielle Sered, Executive Director of Common Justice, a restorative justice program focusing on violent felonies, explains: “Survivors do not want their healing resources tied to the person who hurt them, but they often do want things from that person.”<sup>198</sup> In particular, survivors report wanting the people who

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191. See DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 107; KNOPP ET AL., *supra* note 35, at 11; see also *supra* note 31 (regarding the importance that such programs are totally distinct from carceral systems).

192. See SERED, *supra* note 176, at 20–22.

193. See McLeod, *Envisioning Abolition Democracy*, *supra* note 31, at 1638.

194. See SERED, *supra* note 176, at 22–30.

195. Restorative justice programs take several forms. See generally GORDON BAZEMORE & MARK UMBREIT, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, A COMPARISON OF FOUR RESTORATIVE CONFERENCING MODELS (2001), <https://www.ncjrs.gov/pdffiles1/ojdp/184738.pdf> [<https://perma.cc/8M7N-VL2W>] (comparing four restorative justice models).

196. See, e.g., GENERATION FIVE, *supra* note 31, at 5 (“Transformative Justice seeks to provide people who experience violence with immediate safety and long-term healing and reparations while holding people who commit violence accountable within and by their communities.” (footnote omitted)); Herman Bianchi, *Abolition: Assensus and Sanctuary*, in ABOLITIONISM: TOWARDS A NON-REPRESSIVE APPROACH TO CRIME 113, 117 (Herman Bianchi & René van Swaaningen eds., 1986) (recognizing that a person who commits harm has a “human duty . . . to take responsibility for his or her acts, and to assume the duty of repair”).

197. See, e.g., *infra* notes 286–94 and accompanying text.

198. SERED, *supra* note 176, at 28.

harmed them to live up to the obligations imposed in processes of repair.<sup>199</sup> If restitution is graduated to an amount at which payment is feasible, that need can be satisfied in conjunction with other actions aimed at holding the person who caused the harm accountable.<sup>200</sup>

Along with promoting accountability through the imposition of manageable restitution amounts, graduation may also aid in ensuring the fulfilment of survivors' interest in improving community well-being through assurances that the person who harmed them will not commit further harm.<sup>201</sup> Studies suggest that unmanageable economic sanctions are criminogenic. For example, some people struggling with such debts report committing new offenses, including property offenses against others, to obtain money to pay off unmanageable economic sanctions.<sup>202</sup> Other studies link financial instability—including the loss of access to employment or stable housing that may result from restitution debt or from deprivations through forfeiture—to recidivism.<sup>203</sup> By setting sanctions at a manageable rate, graduation can act as additional reassurance to survivors that those who harmed them will be less likely to recidivate.

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199. *Id.* at 113, 118 (describing the process of setting “action-oriented agreements” that a person who commits harm is required to fulfill and the importance to many survivors that such agreements be fulfilled).

200. *See id.* Though one study found that people who participated in restorative justice programs were significantly more likely to complete payment of restitution, BAZEMORE & UMBREIT, *supra* note 195, at 3, a lack of robustness and mixed results in studies of restorative justice programs generally means that more research on outcomes is needed, *see* DAVID B. WILSON, AJIMA OLAGHERE & CATHERINE S. KIMBRELL, GEO. MASON U., EFFECTIVENESS OF RESTORATIVE JUSTICE PRINCIPLES IN JUVENILE JUSTICE: A META-ANALYSIS 6–7 (2017), <https://www.ncjrs.gov/pdffiles1/ojdp/grants/250872.pdf> [<https://perma.cc/D3VW-RTNG>].

201. *See* SERED, *supra* note 176, at 29–30 (discussing that most survivors worry about their own safety and positing that all survivors want to make sure the person who hurt them will not hurt others).

202. *See* ALA. APPLESEED CTR. FOR LAW & JUSTICE, UNIV. OF ALA. AT BIRMINGHAM TREATMENT ALTS. FOR SAFER CMTYS., GREATER BIRMINGHAM INDUSTRIES & LEGAL SERVS. ALA., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 4 (2018), <http://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf> [<https://perma.cc/YN4N-8R29>]; FOSTER COOK, UNIV. OF ALA. AT BIRMINGHAM TREATMENT ALTS. FOR SAFER CMTYS., THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 12 (2014), [https://www.prisonpolicy.org/scans/uabtasc/the\\_burden\\_of\\_criminal\\_justice\\_debt\\_in\\_alabama-\\_part\\_1\\_main\\_report.pdf](https://www.prisonpolicy.org/scans/uabtasc/the_burden_of_criminal_justice_debt_in_alabama-_part_1_main_report.pdf) [<https://perma.cc/DK4Q-PHX4>]; Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1785 (2010).

203. *See* Colgan & McLean, *supra* note 26, at 436–38; *infra* notes 269–72 and accompanying text.

In addition to potentially lowering recidivism rates, graduation may help promote community well-being by shifting incentives that can pull law enforcement away from attending to crimes that affect survivors. A recent study has shown, for example, that the possibility of accruing revenues pushes law enforcement and prosecutors to focus on offenses more likely to result in the imposition of economic sanctions, to the detriment of solving violent crime.<sup>204</sup> In particular, the study concluded that a 1 percent increase in the percentage of a city's budget generated through economic sanctions "is associated with a statistically and substantively significant 6.1 percentage point decrease in the violent crime clearance rate and 8.3 percentage point decrease in the property crime clearance rate."<sup>205</sup> Interestingly, the study's findings were "driven entirely by cities with populations less than 28,010 (the bottom 80% of the U.S. city population distribution)" in which officers have increased discretion to focus on offenses that are most likely to generate revenue.<sup>206</sup> The study's authors posited that those results are consistent with the notion that in smaller cities and rural areas, law enforcement officers are less likely to be siloed into particular units often found in larger agencies—for example, the homicide unit or traffic enforcement division—and therefore have greater control over what types of cases to direct their efforts toward.<sup>207</sup> That does not mean, however, that the dynamic of prioritizing revenue-generating activities over violent or property crimes cannot occur in larger metropolitan areas. For example, in 2014, the Oakland, California, police department reported that it made *no attempt* to investigate 80 percent of reported robberies and 97 percent of reported burglaries.<sup>208</sup> The department does, however, designate significant resources to traffic enforcement, which generates money through fines.<sup>209</sup>

In brief, a focus on the benefits of graduation to those who commit harm pits their interests against survivor needs in a way that allows for the appearance that lawmakers have acted to protect survivors by

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204. Rebecca Goldstein, Michael W. Sances & Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URB. AFF. REV. 5, 8, 17, 21–22 (2020).

205. *Id.* at 8.

206. *Id.*

207. *See id.*

208. Robert Gammon, *Why Oakland Police Can't Solve Crime*, E. BAY EXPRESS (May 20, 2015), <https://www.eastbayexpress.com/oakland/why-oakland-police-cant-solve-crime/Content?oid=4288948> [<https://perma.cc/U66C-QFQR>].

209. *Id.*

preserving restitution, while in fact current restitution practices do little to meaningfully make survivors whole. When viewed through the more complex understanding of survivor needs recognized by abolitionists, graduation of restitution and other economic sanctions—when combined with other reforms aimed at increasing survivor access to financial support discussed below—may do a better job at meeting survivor needs.

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Examining the reform of graduating economic sanctions to account for financial effect through the lens of abolitionism reveals that graduation aids the abolitionist goal of dismantling the carceral state by helping people extricate themselves from criminal legal systems as payment of economic sanctions is made feasible<sup>210</sup> and by shrinking funding sources that bolster carceral systems in certain circumstances.<sup>211</sup> Graduation also aids in the creation of systems of transformative justice by potentially increasing monies available for social service programs<sup>212</sup> and direct restitution,<sup>213</sup> and otherwise better serving survivor needs.<sup>214</sup> At the same time, because making payment of economic sanctions manageable likely leads to increased collections, graduation simultaneously risks entrenching the status quo by disincentivizing lawmakers from critically examining the scope and severity of criminal laws and processes,<sup>215</sup> exacerbating inequalities related to the distribution of funds for social services,<sup>216</sup> and by disguising the need to address how current restitution mechanisms fail survivors.<sup>217</sup> Possible reforms that may alleviate these problems are addressed next.

### III. ADDITION OF STRUCTURAL REFORMS

This Part turns to how the individual benefits of graduation may still be captured while addressing its structural drawbacks through

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210. *See supra* notes 126–30, 157–59 and accompanying text.

211. *See supra* notes 131–33 and accompanying text.

212. *See supra* note 160 and accompanying text.

213. *See supra* note 172 and accompanying text.

214. *See supra* notes 191–209 and accompanying text.

215. *See supra* notes 134–48 and accompanying text.

216. *See supra* notes 162–65 and accompanying text.

217. *See supra* notes 170–90 and accompanying text.

complementary reforms. These reforms, sketched out in brief below, involve removing revenue incentives that sustain the status quo, as well as reinvestment of those revenues in social services and the development of nonincarcerative responses to violations of the law, including by bolstering access to funds used to make survivors whole. By describing the broad strokes of such reforms and their potential complications, this Article does not mean to claim that any particular policy will create a specific result. To be sure, there are multiple hydraulic pressures in play—swings of the tough-on-crime to smart-on-crime pendulum, the shifting health of any particular jurisdiction's economy, and so on—any one of which may have implications for the political palatability and impact, or lack thereof, of the reforms below. Therefore, as with any structural change, ongoing study is needed to ensure that the desired effects are actually achieved. Rather, these proposals are intended to generate attention to the types of policy responses that may address implications of graduation captured by resetting the baseline from improvements over ungraduated sanctions to a focus on broader structural transformation. Though these complementary reforms are designed to bring graduation in better alignment with abolitionist aims, abolitionists also demand recognition of their limitations,<sup>218</sup> which are addressed in brief in this Part's conclusion.

#### A. *Remove Revenue Incentives*

To address the risk that increased collections resulting from graduation will cement the breadth and punitive nature of current criminal legal systems, a key reform that is complementary to graduation would be a prohibition on using revenues from economic sanctions for the funding of criminal legal system actors, including courts, prosecutors, probation and parole departments, and law enforcement. The general premise of this reform is that requiring lawmakers to rely solely on tax dollars to fund the entirety of the criminal legal apparatus would put the expansiveness and failures of criminal policy in much sharper relief thus relieving the myopia that access to revenues may cause.<sup>219</sup>

One question this proposal raises is whether funding restrictions should extend so far as to prohibit the financing of indigent defense

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218. See, e.g., GENERATION FIVE, *supra* note 31, at 20 (“[I]t is important to . . . name clearly the challenges posed by searches for alternatives”).

219. See *supra* notes 134–48 and accompanying text.

services given that it is a component of criminal legal systems that would otherwise require tax dollars to fund. On the one hand, indigent defense representation is a frontline defense that both limits the number of people subjected to punishment and the severity of those punishments. In this way, it is consistent with the abolitionist aim of shrinking the scope of the carceral state. On the other hand, the decades-long gross underfunding of indigent defense systems too often constrains the ability of attorneys to provide zealous representation,<sup>220</sup> thereby hamstringing defense counsels' ability to meaningfully shrink the carceral state while simultaneously legitimizing the system by appearing constitutionally adequate.<sup>221</sup> Further, funding indigent defense with revenue from economic sanctions creates a symbolic—and perhaps actual—conflict of interest by making the fiscal viability of defense systems dependent upon conviction.<sup>222</sup> Continued reliance on economic sanctions may also leave indigent defense services without adequate revenue streams if ticketing rates decline.<sup>223</sup>

Another question is whether funding for projects consistent with the development of social services but managed by traditional criminal legal system actors should also be restricted. In a handful of jurisdictions, law enforcement and prosecutorial agencies have developed programs by which people who otherwise could have been arrested are instead provided with housing assistance, job training and placement, financial support to meet basic needs, and other supportive services, leading to long-term stability and reduced involvement with criminal legal systems.<sup>224</sup> Economic sanction revenues have, in some

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220. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1039–40, 1051 (2006); Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1783–89 (2016).

221. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2195–97 (2013).

222. See Brandon Buskey, *A Proposal To Stop Tinkering with the Machinery of Debt*, 129 YALE L.J. F. 415, 416–17 (2020) (describing documentation showing Louisiana public defenders “exhorting sheriffs and district attorneys to prosecute more traffic offenses,” which fund indigent defense).

223. See, e.g., John Simerman & Chad Calder, *‘It’s Just Not Working’: Funding Public Defenders with User-Pay System Doesn’t Make Sense, Many Officials Say*, NOLA.COM (Mar. 8, 2016, 7:02 AM), [https://www.nola.com/article\\_8e476bde-b253-5baf-b17f-4c83982af9b2.html](https://www.nola.com/article_8e476bde-b253-5baf-b17f-4c83982af9b2.html) [<https://perma.cc/KX2A-RAXD>] (linking decreased ticketing revenues to shortfalls for indigent defense in Louisiana).

224. See generally Seema L. Clifasefi, Heather S. Lonczak & Susan E. Collins, *Seattle’s Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations with Recidivism*, 63 CRIME & DELINQUENCY 429, 431 (2017) (finding that participants were over twice as likely to have access

places, also been used to move law enforcement toward a public health model to respond to addiction and prevent overdose deaths, such as when Morris County, New Jersey, used drug forfeiture proceeds to convert a SWAT vehicle into a mobile recovery center.<sup>225</sup> It is possible that such services could be funded and managed totally without the involvement of criminal legal system actors, which would be more consistent with the abolitionist goal of dismantling the carceral state. But it is also possible to understand incremental steps toward a less punitive system—even one involving law enforcement and prosecutors—as working toward that same abolitionist objective.

In addition to questions regarding the scope of funding restrictions, a separate concern is that a shift of revenues to government-funded or managed social services may not protect against a recreation of the pathologies—including structural racism and other forms of discrimination—that have plagued criminal legal systems. After all, inequities in social services related to housing,<sup>226</sup> health care,<sup>227</sup> education,<sup>228</sup> and more are long-standing. These pathologies may be less likely to be replicated if community representatives rather than government officials manage these systems, an idea discussed further below.<sup>229</sup> But in any event, ongoing review of any such systems

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to shelter, 89 percent more likely to have permanent housing than they were prior to participation, and 46 percent more likely to be in job training, legally employed, or retired); SUSAN E. COLLINS, HEATHER S. LONCZAK & SEEMA L. CLIFASEFI, UNIV. OF WASH. LEAD EVALUATION TEAM, LEAD PROGRAM EVALUATION: CRIMINAL JUSTICE AND LEGAL SYSTEM UTILIZATION AND ASSOCIATED COSTS 2–5 (2015), [https://56ec6537-6189-4c37-a275-02c6ee23efe0.filesusr.com/ugd/6f124f\\_2f66ef4935c04d37a11b04d1998f61e2.pdf](https://56ec6537-6189-4c37-a275-02c6ee23efe0.filesusr.com/ugd/6f124f_2f66ef4935c04d37a11b04d1998f61e2.pdf) [<https://perma.cc/ZX3C-FA4N>] (finding that recidivism rates for people who were provided case management that included housing services, job training and placement, and financial support were statistically significantly reduced as compared to a control group of people subjected to standard criminal legal system processes).

225. See Albina Sportelli, *Morris County Sheriff's Office Delivering Hope, Naloxone on Decade's Last Day*, MORRISTOWN DAILY REC. (Dec. 30, 2019, 2:48 PM), <https://www.dailyrecord.com/story/news/local/morris-county/2019/12/30/morris-county-sheriffs-office-delivers-hope-naloxone-new-years-eve/2775250001> [<https://perma.cc/N9BC-G5SN>].

226. See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

227. See generally Dorothy E. Roberts, *The Most Shocking and Inhuman Inequality: Thinking Structurally About Poverty, Racism, and Health Inequities*, 49 U. MEM. L. REV. 167 (2018).

228. See, e.g., Linda Darling-Hammond, *Inequality in Teaching and Schooling: How Opportunity Is Rationed to Students of Color in America*, in BRIAN D. SMEDLEY, ADRIENNE Y. STITH, LOIS COLBURN & CLYDE H. EVANS, INST. OF MED., *THE RIGHT THING TO DO, THE SMART THING TO DO: ENHANCING DIVERSITY IN THE HEALTH PROFESSIONS* 208 (Nat'l Acad. Press 2001).

229. See *infra* notes 257–79 and accompanying text.

should be undertaken to guard against the creation of unanticipated inequities.

It is also important to recognize that this proposal may have unintended consequences, as it could push lawmakers to shrink the budgets of other social programs to protect the funding of criminal legal systems as they currently stand. In other words, even a lawmaker who no longer suffers from monetary myopia,<sup>230</sup> may favor the carceral state over social welfare programs and direct a now more limited set of funds to be used accordingly. There is good reason to believe this may be the case. The build-up of the carceral state since the 1960s has long been intertwined with the dismantling of social services, with the funding of the former prized over the societal benefits of the latter.<sup>231</sup> There are also, however, indications that this may not occur. For example, one recent study showed that lawmakers often use forfeiture revenues to offset tax dollars that otherwise would have been expended for law enforcement; yet, in times of budget crises, those same lawmakers are more likely to distribute those funds to bolster social welfare programs.<sup>232</sup>

Further, any attempt to prohibit the expenditure of these revenues will likely be met with virulent opposition by those with interests in maintaining the status quo, including law enforcement and prosecutors as well as private companies that profit from the carceral state. For example, law enforcement and prosecutorial organizations have fought against reforms to civil forfeiture for decades. When complaints about abuses led Congress to consider significant alterations to forfeiture laws, law enforcement and prosecutors engaged in a “‘voracious lobbying’ campaign,” successfully killing the most meaningful aspects of the legislation voted on in 2000<sup>233</sup> thereby preserving the ability to expand forfeiture into the behemoth it is today.<sup>234</sup>

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230. See *supra* notes 134–48 and accompanying text.

231. See *supra* note 50 and accompanying text.

232. See Baicker & Jacobson, *supra* note 62, at 2115, 2128–29. In addition, the combination of this proposal with the redistribution of revenues to the communities from which they are stripped, see *infra* Part III.B.1, may provide some protection against the risk of general defunding. As noted above, in some jurisdictions, revenue from economic sanctions is placed in general funds or funds used for noncarceral purposes for distribution statewide. See *supra* notes 162–65 and accompanying text. If revenues can be distributed only to heavily policed communities, the general defunding of services would primarily affect communities that are less heavily policed. Because those communities have comparatively greater political influence, defunding would be politically costly.

233. See, e.g., Sallah et al., *supra* note 20 (quoting former Representative Barney Frank).

234. See, e.g., Kelly & Kole, *supra* note 81, at 560 & tbl.1.

This reform, however, is more modest than it at first appears. Take its likely effect on law enforcement funding. Though these data do not capture all forfeitures, fees, and surcharges, and thus likely undervalue reliance on monies generated from economic sanctions, data from the U.S. Census Bureau's Census of Governments show that in 2012, only 15 percent of law enforcement budgets nationwide came from such revenues.<sup>235</sup> The extent of that reliance, of course, varies from jurisdiction to jurisdiction and therefore could make a more substantial impact on law enforcement capacity in some locales.<sup>236</sup> One in ten law enforcement agencies saw 32 percent of their budgets come from economic sanctions, and a small fraction of those agencies relied on such revenues for 90 percent or more of their budgets.<sup>237</sup> As reliance increases, however, these reforms may effectively target the very agencies that prize revenues over public safety,<sup>238</sup> and therefore may be particularly important to ensuring that law enforcement priorities align with the public interest.

This reform is also likely to generate more political support than may be expected. Concerns about abuses related to the use of economic sanctions have already led to successful campaigns to limit the use of fees and surcharges<sup>239</sup> as well as forfeitures<sup>240</sup> in some jurisdictions. There is also increasing evidence that the electorate—including survivors of crime—are supportive of shrinking criminal legal systems in favor of building up social services that better address the root causes of crime. A 2016 survey showed that by a three-to-one margin crime survivors “prefer holding people accountable through options beyond prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service.”<sup>241</sup>

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235. MICHAEL MAKOWSKY, THE HAMILTON PROJECT, A PROPOSAL TO END REGRESSIVE TAXATION THROUGH LAW ENFORCEMENT 6 (2019), [https://www.brookings.edu/wp-content/uploads/2019/03/Makowsky\\_PP\\_20190314.pdf](https://www.brookings.edu/wp-content/uploads/2019/03/Makowsky_PP_20190314.pdf) [<https://perma.cc/Z6KF-ZAQC>].

236. It is possible that some jurisdictions merely break even or actually lose money—expending more on imposition and collection than they take in from revenues—particularly if they rely heavily on incarceration in the collections process. See MENENDEZ ET AL., *supra* note 23, at 5, 9–10. In such cases, the redistribution of revenue away from criminal legal systems may have a particularly strong effect because it even more fully undermines the continued use of criminal legal processes as revenue generators.

237. MAKOWSKY, *supra* note 235, at 6.

238. See *supra* notes 138–42, 204–09.

239. See, e.g., Selbin, *supra* note 95, at 408–13.

240. See *Civil Forfeiture Reforms on the State Level*, *supra* note 77.

241. ALL. FOR SAFETY & JUSTICE, *supra* note 178, at 5.

This is not to say that legislation outlawing the use of economic sanctions revenues to fund criminal legal systems is currently realistic—at best, lawmakers may be willing to eliminate some of the most egregious practices that have been occurring in some states.<sup>242</sup> The point of using abolitionism as a heuristic, however, is not to limit oneself to only what is politically palatable in the moment, but rather to imagine what a just and fair system would look like and assess a policy’s consistency with that end. In other words, “[a] prerequisite to seeking any social change is the naming of it,” without which that ultimate goal “will never come.”<sup>243</sup>

In sum, legislation that removes the revenue incentive from economic sanctions by prohibiting its use for funding criminal legal systems may allow the benefits of graduation in individual cases—including poverty reduction and extrication from carceral control—to accrue.<sup>244</sup> At the same time, these reforms still move toward systemic abolitionist goals by making it more likely that lawmakers, left to fund the carceral state through tax dollars or the reduction of other programs, will take seriously the costs and consequences of the system as it currently operates.

### *B. Distribute Funds to Achieve Structural Reform*

In addition to removing revenue incentives for criminal legal system actors, to address the potential inconsistencies between graduation’s possible outcomes and the abolitionist aims detailed above, funds derived from economic sanctions could be redistributed for use in targeted community-reinvestment projects and restorative responses to violations of the law.

1. *Targeted Community Reinvestment.* Redistribution of revenues from graduated economic sanctions to supportive social services that address the root causes of crime would be consistent with the abolitionist goal of building more equitable communities, at least so long as the distribution mechanisms do not promote inequality. Recall, in particular, that in some jurisdictions, revenues from economic sanctions are placed in general funds or other funds for noncarceral

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242. See, e.g., Selbin, *supra* note 95, at 408–13 (pursuing the abolition of juvenile fees).

243. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/Z4F6-CLWZ>] (quoting Rose Braz, cofounder of the abolitionist organization Critical Resistance).

244. See *supra* notes 125–30, 133 and accompanying text.

projects for distribution to jurisdiction-wide government programs, operating as a regressive tax on the most heavily policed communities.<sup>245</sup> To remedy the use of revenues from even graduated economic sanctions as a hidden tax, these funds could instead be returned to the community where the person who was assessed the sanction lives or where the policing occurred, with a prohibition against offsetting those revenues by funding decreases to general distribution programs. Redistributed revenues could then be invested in social services and other community projects, including services for survivors to aid in addressing trauma and safety concerns.<sup>246</sup>

At first glance, this reform appears as if it would have little impact given the prior description of the likely small economic effect of revenue losses that would be incurred by criminal system actors in many jurisdictions.<sup>247</sup> Even if the diminished revenue constitutes an insubstantial loss to those systems, however, it could be a windfall for social services. For example, the police, probation, corrections, and juvenile detention budgets for New York City amount to nearly \$6.6 billion annually.<sup>248</sup> Because New York City has significant transparency problems with respect to its forfeiture practices, it is impossible to discern the exact amount of its budget that comes from economic sanction revenues.<sup>249</sup> Assuming, however, that it runs at the national average of 15 percent,<sup>250</sup> that would result in an infusion of funds for social services of over \$986 million annually, which could, for example, more than double the city's investment of \$863 million in universal Pre-K education programs or nearly match the \$1.3 billion dollars in funding for its Department of Homeless Services.<sup>251</sup> New York City has the largest police force in the country<sup>252</sup> and therefore is

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245. See *supra* notes 162–65 and accompanying text.

246. See *supra* notes 151–56, 177–78 and accompanying text. For an alternative approach by which revenues would be distributed as a direct transfer to low-income community members who qualify for SNAP benefits, see MAKOWSKY, *supra* note 235, at 18–21.

247. See *supra* notes 235–38 and accompanying text.

248. See CTR. FOR POPULAR DEMOCRACY, LAW FOR BLACK LIVES & BLACK YOUTH PROJECT 100, FREEDOM TO THRIVE: REIMAGINING SAFETY & SECURITY IN OUR COMMUNITIES 57 (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf> [<https://perma.cc/B6EF-FM4K>].

249. See C.J. Ciaramella, *NYPD: We Don't Know How Much Cash We Seize, and Our Computers Would Crash If We Tried To Find Out*, REASON (Sept. 16, 2016, 1:40 PM), <https://reason.com/2016/09/16/nypd-we-dont-know-how-much-cash-we-seize> [<https://perma.cc/Y847-SWYH>].

250. See *supra* note 235 and accompanying text.

251. CTR. FOR POPULAR DEMOCRACY ET AL., *supra* note 248, at 57.

252. *Id.* at 58.

an outlier to some extent, but the redistribution of funds even in cities with smaller budgets could be significant. Detroit, for example, has an annual police budget of \$310 million, so at 15 percent would have over \$46 million dollars freed up for social service investment each year, outpacing, for example, the \$43.5 million the city spends on its Housing and Revitalization Department.<sup>253</sup> Budgets in smaller municipalities and rural areas would, of course, be significantly smaller in dollar value. But because a significant percentage of municipal budgets in such areas come from economic sanction revenues,<sup>254</sup> a commitment of that funding for social services could have a dramatic effect, particularly in rural areas that have difficulty reaching economies of scale and therefore often have little-to-no access to social services.<sup>255</sup>

While in most cases redistribution to heavily policed communities would be both a meaningful addition to social service budgets and logistically straightforward,<sup>256</sup> the control of such funding by affected communities—something of critical importance to many abolitionists<sup>257</sup>—raises complex questions about the meaning of “community.” The lack of a precise definition of community has been a critique of abolitionism in general, and restorative justice practices in particular, given that the borders and interests of the relevant community may be fluid and difficult to discern.<sup>258</sup> Additionally, structural inequalities and hierarchies may be so embedded within communities that the very power dynamics abolitionists challenge may

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253. *See id.* at 35 (discussing the breakdown of Detroit’s fiscal years 2017–2020 general fund expenditures).

254. Mike Maciag, *Addicted to Fines*, GOVERNING (Sept. 2019), <https://www.governing.com/topics/finance/gov-addicted-to-fines.html> [<https://perma.cc/UE45-FAG9>].

255. *See, e.g.*, NANCY M. PINDUS, THE URBAN INST., IMPLEMENTING WELFARE REFORM IN RURAL COMMUNITIES 20 (2001), <https://www.urban.org/sites/default/files/publication/61531/410048-Implementing-Welfare-Reform-in-Rural-Communities.PDF> [<https://perma.cc/UNH2-CU4P>].

256. In some cases, it will be difficult to target revenues back to particular communities within a jurisdiction. For example, ticketing and forfeitures on state highways may involve out-of-town drivers rather than local residents. *See* Makowsky & Stratmann, *More Tickets*, *supra* note 143, at 865 (finding that increased ticketing during periods of budget shortfall in Massachusetts focused on out-of-town drivers). In those instances, revenues could be applied to victim compensation funds. *See infra* Part III.B.2.

257. *See Community Control*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/community-control> [<https://perma.cc/SP6Z-SXE4>] (demanding “[p]articipatory budgeting at the local, state and federal level”).

258. *See, e.g.*, Robert Weisberg, *Restorative Justice and the Danger of ‘Community,’* 2003 UTAH L. REV. 343, 349–63 (2003).

be difficult to dislodge.<sup>259</sup> Of course, these are not problems unique to abolitionism. As Jocelyn Simonson has explained, whether appointed or elected, traditional criminal legal systems assume that prosecutors and law enforcement represent the interests of “the People,” as if community sentiment on crime and punishment are monolithic.<sup>260</sup> Further, traditional systems formally exclude some members of the public—for example, barring people with felony convictions from jury service—under the guise that doing so weeds out bias and thus achieves a neutral approach to community adjudication.<sup>261</sup> In other words, the complexities raised by the fact that abolitionists center their approach on the needs of the community does not necessarily mean that abolitionism is inferior to traditional approaches.

Separately, the transfer of revenues to support community-based services—and especially revenues generated through the imposition of economic sanctions—may result in what some abolitionists critique as the “non-profit industrial complex.”<sup>262</sup> This concern centers on the possibility that reliance on such funding may make community-based organizations less likely to push for radical reforms, effectively entrenching the status quo under the guise of progress.<sup>263</sup> It is even possible that the redistribution of such funds would lead community-based organizations, like some carceral actors, to preserve their funding by resisting appropriate limitations on the use of economic sanctions even when such limitations would better serve community needs.<sup>264</sup> Therefore, to protect abolitionist aims, it would be important to periodically assess such systems to ensure that the organization

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259. See GENERATION FIVE, *supra* note 31, at 21 (questioning whether restorative justice “allows for challenges to dominant power hierarchies within any given community” including racism, classism, sexism, and homophobia); Nicolas Carrier & Justin Piché, *Blind Spots of Abolitionist Thought in Academia*, 12 CHAMP PÉNAL 1, 7–9 (2015) (detailing critiques of abolitionism related to the notion of “community”).

260. Jocelyn Simonson, *The Place of ‘The People’ in Criminal Procedure*, 119 COLUM. L. REV. 249, 279–82 (2019).

261. *Id.* at 282–86.

262. See *Beyond the Non-Profit Industrial Complex*, INCITE!, <https://incite-national.org/beyond-the-non-profit-industrial-complex> [https://perma.cc/Y5UU-24CP] (“The non-profit industrial complex (or the NPIC) is a system of relationships between: the State[,] . . . the owning classes[,] foundations and non-profit/NGO social service & social justice organizations that results in the surveillance, control, derailment, and everyday management of political movements.”).

263. See *id.* (discussing the concern that the NPIC structure “[r]edirect[s] activist energies into career-based modes of organizing instead of mass-based organizing capable of actually transforming society”).

264. See *supra* note 222 and accompanying text.

“facilitates collective forms of participation that challenge powerful institutional actors and dominant ideas of justice.”<sup>265</sup>

Another potential issue is that community control of revenues does not necessarily guarantee a move away from carceral systems. As James Forman, Jr. has documented, for example, African American residents and leaders in Washington, D.C., besieged by crime and violence in the 1980s, sought a reinvestment in the social safety net but also pushed for increases in law enforcement activity and more punitive responses to those who broke the law.<sup>266</sup> In other words, abolitionists’ insistence on community control over revenues and responses to crime may ultimately cut against abolitionist goals.<sup>267</sup>

Of course, the ultimate acceptance of noncarceral responses—and thus of abolitionism itself—will rise and fall with how well supportive social services curb crime and improve community well-being.<sup>268</sup> Affected communities, as well as policymakers, may be less likely to call for increased reliance on policing and punishment—and to insist on the use of revenues from economic sanctions to fund the carceral state—if abolitionists are correct that societal conditions will improve by addressing the root causes of crime through investment in supportive programming. And there is evidence that they may be right. An ever-growing body of research shows that supportive social services do a significantly better job at reducing crime than traditional punitive measures, including ungraduated economic sanctions that can be criminogenic.<sup>269</sup> To provide just a few examples, studies have shown that access to stable housing, educational services, employment, and

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265. Simonson, *supra* note 260, at 257.

266. See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 12–13, 272 n.76 (2017) (“For example, African Americans wanted more law enforcement, but they didn’t want *only* law enforcement. . . . On one hand, they supported fighting drugs and crime with every resource at the state’s disposal . . . . On the other hand, they called for jobs, schools, and housing . . .”).

267. Cf. Carrier & Piché, *supra* note 259, at 8 (“[P]enal abolitionism dictates a norm of prohibiting retaliatory harm to which, paradoxically, communities that should be self-governed nevertheless ought to obey.”).

268. Cf. Weisberg, *supra* note 258, at 363–68 (offering the failure to meet the needs of people with mental illness in the community following the movement to reduce reliance on large mental health facilities as a cautionary tale).

269. See, e.g., COLGAN, *ADDRESSING MODERN DEBTORS’ PRISONS*, *supra* note 25, at 9–12 (discussing literature regarding the deterrent effect, or lack thereof, of economic sanctions and other evidence regarding their criminogenic effect); Link, *supra* note 56, at 155–56 (summarizing literature regarding the criminogenic nature of ungraduated economic sanctions); *supra* note 202 and accompanying text.

mental health treatment,<sup>270</sup> or a combination of such services,<sup>271</sup> reduce recidivism. Not only do those services decrease crime, they also make it possible for people who would otherwise be involved in criminal legal systems to obtain and maintain education and employment, attend to basic needs, preserve family bonds, and thus flourish within the community.<sup>272</sup>

A real-world example of what community-based services might look like is offered by a multipronged community-reinvestment initiative that began in Colorado in 2014.<sup>273</sup> In addition to providing significant funding for comprehensive support services provided to people leaving incarceration and managed by the nonprofit Latino Coalition for Community Leadership,<sup>274</sup> Colorado lawmakers also passed legislation that reduced incarceration terms for technical parole violations, reinvested the \$4 million in annual savings to a grant program that provides “direct services and capital for small business lending,” and established local planning teams to engage in community-based priority setting that would steer grantmaking.<sup>275</sup> Additionally, based on findings of a community survey of crime survivors conducted by the Colorado Criminal Justice Reform Coalition, Colorado lawmakers created an additional community grant program to better address the underserved needs of “survivors who are men, people of color and young adults.”<sup>276</sup> In keeping with abolitionist principles, these projects are designed to improve the economic and social well-being of both survivors and people who have violated the law.

Another example can be seen in the work of the Detroit Justice Center, a nonprofit dedicated to ending mass incarceration and

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270. See COLGAN, ADDRESSING MODERN DEBTORS' PRISONS, *supra* note 25, at 11.

271. See *supra* note 224 and accompanying text.

272. See, e.g., *supra* note 224 and accompanying text.

273. COLO. CRIMINAL JUSTICE REFORM COAL., COMMUNITY REINVESTMENT IN COLORADO 1 (2018), <https://www.cjrc.org/wp-content/uploads/2018/10/Oct-2018-Community-Reinvestment-Overview.pdf> [<https://perma.cc/S7NK-XG9E>].

274. *Id.* at 1 (documenting the involvement of the Latino Coalition for Community Leadership beginning in 2015 after the relevant legislation passed the prior year).

275. *Id.* at 1–2; see also Theresa Vargas, *The Hard Pitch: Four Men Who Spent Time in Prison Are Now Hoping To Convince People To Invest in Them*, WASH. POST (Sept. 25, 2019, 3:13 PM), [https://www.washingtonpost.com/local/the-hard-pitch-four-men-who-spent-time-in-prison-are-now-hoping-to-convince-people-to-invest-in-them/2019/09/25/1f57e548-dfa4-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/local/the-hard-pitch-four-men-who-spent-time-in-prison-are-now-hoping-to-convince-people-to-invest-in-them/2019/09/25/1f57e548-dfa4-11e9-8dc8-498eabc129a0_story.html) [<https://perma.cc/UU45-6X7J>] (regarding the need for investment into entrepreneurial enterprises undertaken by people with criminal convictions).

276. COLO. CRIMINAL JUSTICE REFORM COAL., *supra* note 273, at 2.

building more equitable communities.<sup>277</sup> For example, the Center engaged teens in a dialogue about how to spend funds that would otherwise be used toward the building of a local jail; the teens zeroed in on specific areas of intervention, including a need for robust mental health resources, an emergency loan program, affordable housing, and increased educational opportunities.<sup>278</sup> Through these efforts at community engagement, the Center has established an “Economic Equity” program, which includes “support for transformative economic solutions” like “community land trusts, worker cooperatives, and enterprises led by returning citizens,” as well as affordable housing for survivors of gun violence and for people returning from periods of incarceration.<sup>279</sup>

In short, the redistribution of funds away from the carceral state and toward community-based social services raises complicated questions regarding control, but also a real possibility to better address the particular needs of a given community, support social welfare, and allow communities to thrive.

2. *Restorative Responses to Violations of the Law.* An additional reform would be necessary to address inconsistencies between graduation and abolitionist goals given the way graduation may cement inattention to the ineffectiveness of punitive measures, particularly through the failure to meaningfully address survivor needs.<sup>280</sup> Therefore, along with community investments of the kind noted above, funding of community-based programs to be used when transgressions of the law occur would aid in developing systems of transformative justice.

An example of a project that might address offenses resulting in no direct harm is offered by Project Reset, a program used to divert people who have committed certain misdemeanor offenses in

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277. *Our Work*, DETROIT JUST. CTR., <https://www.detroitjustice.org/introduction> [<https://perma.cc/7LNV-6LZW>].

278. John Jay College, *DAY 1: Smart on Crime Innovations Conference 2019*, YOUTUBE (Sept. 24, 2019), <https://www.youtube.com/watch?v=kFUfh1uqF8&list=PLJFqJKO8C-vT-HQMhptARjmWk2CGog4oP&index=1> [<https://perma.cc/XBR7-XVRZ>] (Amanda Alexander, Founding Exec. Dir., Detroit Justice Ctr., Address at Smart on Crime Innovations Conference); see also Akbar, *supra* note 30, at 470 (describing efforts by participants in the L.A. for Youth campaign to secure funding for community-based employment, support centers, and other programs to be funded by an at least 5 percent reduction in law enforcement budgets).

279. Alexander, *supra* note 278.

280. See *supra* notes 170–209 and accompanying text.

Brooklyn, New York.<sup>281</sup> The program requires people to engage in educational programming, such as a two-hour curriculum at a local museum in which a “discussion is led by teaching artists, whose own work centers around themes of social justice and prison reform.”<sup>282</sup> Program participants then create their own artwork “in an effort to learn about accepting responsibility and changing one’s personal narrative while simultaneously being exposed to art and cultural offerings within their community.”<sup>283</sup> Originally devised only for use in cases involving juveniles, the reduced rates of recidivism among program participants was so impressive that Brooklyn soon extended the program to adults.<sup>284</sup>

It is one thing to use restorative justice programs in cases involving low-level offenses, but it may be something else entirely when the offense at issue results in serious harm. Abolitionism is often critiqued for failing to adequately address how to ensure that society is protected from the “dangerous few”—people who may commit acts of violence even in a reformed society.<sup>285</sup>

Interestingly, however, groups like Common Justice are now successfully implementing restorative justice principles in cases involving serious violence. These programs bring together the person who has committed the wrong with both those who are directly harmed and, in some cases, community representatives.<sup>286</sup> Together, participants agree on a nonincarcerative manner of holding “the responsible party accountable in ways meaningful to the person harmed.”<sup>287</sup> For example, one case handled by Common Justice involved a young man named Shawn who had been traumatized after he witnessed the fatal shooting of his friend Kenny.<sup>288</sup> But in this case, it was Shawn who was the responsible party, as a year later he had shot at another young man named Daquan.<sup>289</sup> Though Daquan was not physically injured, he in turn experienced trauma, feeling so unsafe that

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281. *Project Reset: Avoiding Prosecution of Minor Offenses Through Art*, ABC7NY (Oct. 2, 2019), <https://abc7ny.com/project-reset-avoiding-prosecution-of-minor-offenses-through-art/5585160> [<https://perma.cc/K3NB-PKMS>].

282. *Id.*

283. *Id.*

284. *Id.*

285. Carrier & Piché, *supra* note 259, at 3–4.

286. *See, e.g.*, SERED, *supra* note 176, at 136–37.

287. *Id.*

288. *Id.* at 151.

289. *Id.* at 150–51.

he left his home in New York to stay with an older sister in Philadelphia, disrupting the child care he had been providing for his younger sister while his mother worked.<sup>290</sup> After Shawn's arrest, Common Justice convened a restorative justice circle, involving Shawn, Daquan and his family, and the parents of Shawn's friend Kenny as members of the affected community.<sup>291</sup> Common Justice Executive Director Danielle Sered explains:

What they were doing in that circle was in part facing each other and the pain between them. But they were also crafting the response to the harm in the form of the commitments Shawn would have to fulfill. These commitments reflected the group's shared vision of the kind of man Shawn could become and involved college, work, restitution, trauma-focused therapy, apologies, peace offerings, public speaking, and more. They required him to complete a significant number of hours of community service, divided among [Kenny's parents'] church, Daquan's family's church, and a variety of projects happening in honor of Kenny. These projects all held him closer to the community he had damaged through his actions rather than casting him away.<sup>292</sup>

Because Common Justice requires that all commitments be attainable,<sup>293</sup> this case provides an example of how graduated restitution set within Shawn's means, along with other requirements focused on direct survivor and community healing, can be commensurate with restorative justice practices. In Shawn's case, the intervention was a success: he is now employed, engaged in service to nonprofits in his community, and has committed no new crimes.<sup>294</sup> While this approach may not be feasible to ensure community safety and well-being in all cases,<sup>295</sup> it does suggest that even in cases involving serious violence, restorative justice approaches can be feasible.

The use of restorative justice approaches that incorporate graduated restitution, however, does not ensure that survivors have the

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290. *Id.*

291. *Id.* at 151–52. Some abolitionists reject the involvement of community representatives due to concerns similar to those raised above. *See, e.g.,* GENERATION FIVE, *supra* note 32, at 20–21; *supra* notes 257–67 and accompanying text.

292. SERED, *supra* note 176, at 152.

293. *See id.* at 113 (explaining that the agreements reached may be difficult for responsible parties to complete and may initially be “overwhelming” but are designed so that all requirements are achievable because “the completion of these agreements . . . constitutes accountability”).

294. *Id.* at 152.

295. *See supra* note 285 and accompanying text.

financial support necessary to aid in their recovery,<sup>296</sup> and so the expansion of survivor compensation programs is also needed. As noted above, graduated economic sanctions will, in many cases, mean that restitution is set below a survivor's full monetary needs<sup>297</sup> and may not be imposed at all if restorative justice processes result in the imposition of nonmonetary methods of achieving accountability.<sup>298</sup> A structure is already in place nationwide that can aid in solving this issue: the aforementioned national Crime Victims Fund program.<sup>299</sup> There is no reason revenues from graduated economic sanctions cannot continue to help populate those funds. But to ensure that victim compensation programs are consistent with the stories we tell regarding the importance of making survivors whole,<sup>300</sup> available funds must not be capped and must be available to all those who experience harm.<sup>301</sup>

### C. *Limitations of These Reforms*

The additional structural reforms offered herein bring graduation of economic sanctions in better alignment with abolitionist principles by ensuring that revenues cannot be used to bolster criminal legal system budgets and requiring investment in transformative justice mechanisms. Yet it is important to acknowledge that these reforms remain limited. First, these reforms still presume that people will be subject to policing and prosecution with the imposition of economic sanctions to follow. Graduation risks creating a legitimizing effect on these practices by placing an imprimatur of fairness on a system that remains inherently unfair. In other words, though graduation and the additional reforms described herein help reduce the footprint of the carceral state, the additional proposals do not guarantee that the targeting of politically vulnerable people, and particularly people of color, will come to an end.<sup>302</sup> Second, these reforms will affect communities differently, depending not only on how much of a dent redistribution makes in criminal legal system budgets<sup>303</sup> and how much revenue is freed up for reinvestment,<sup>304</sup> but also on broader economic

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296. *See supra* notes 177–78 and accompanying text.

297. *See supra* notes 169–73 and accompanying text.

298. *Cf. supra* note 292 and accompanying text.

299. *See supra* notes 184–85 and accompanying text.

300. *See supra* notes 170–83 and accompanying text.

301. *See supra* notes 185–90 and accompanying text.

302. *See supra* notes 144–48 and accompanying text.

303. *See supra* notes 235–38 and accompanying text.

304. *See supra* notes 247–55 and accompanying text.

and social dynamics, including the existing state of social welfare programs and the progressive or regressive nature of applicable tax structures.<sup>305</sup> Finally, no matter how much of a shift these additional reforms create, they cannot fully undo centuries of economic deprivation and trauma, reaching back to our nation’s earliest hours, that have wrought a “complex and compounding array of injustice this better future would have to negate.”<sup>306</sup> In short, advocates seeking broad structural transformation will not, and should not, be satisfied with the reforms detailed in this Article.

Yet, even with all their deficiencies, the mere fact that these reforms may move us toward a future that is fundamentally transformed comports with the “gradual project of decarceration”<sup>307</sup> that abolitionists have undertaken. Their challenge has been “passionately attending to the needs” of people caught up in criminal legal systems—including those struggling under the weight of ungraduated economic sanctions—while keeping broad structural reform center stage.<sup>308</sup> Assessing the efficacy of graduating economic sanctions through that lens shows that, particularly when complemented with additional reforms that address its shortcomings, graduation can help to achieve the transformational change abolitionists seek.

## CONCLUSION

Perhaps the most daunting aspect of abolitionism is its requirement that we measure crime policy against a baseline that has never existed—an American society “in which punishment itself is no longer the central concern in the making of justice.”<sup>309</sup>

It would be easy to believe that such a society is unattainable and thus abolitionism itself is of little value. But as this Article shows, because abolitionism shifts the baseline from the status quo to that purportedly implausible future, it forces recognition of a much more complex array of consequences—both benefits and drawbacks—

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305. See MEG WIEHE ET AL., INST. ON TAXATION & ECON. POLICY, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 1–25 (6th ed. 2018), <https://itep.org/wp-content/uploads/whopays-ITEP-2018.pdf> [<https://perma.cc/FE9N-J89C>] (assessing “tax fairness by measuring effective state and local tax rates paid by all income groups” and finding highly regressive tax policies in several states).

306. Ward, *supra* note 108, at 7.

307. McLeod, *supra* note 155, at 1161.

308. DAVIS, ARE PRISONS OBSOLETE?, *supra* note 32, at 103–04.

309. *Id.* at 107.

afforded by a given reform. Whether one ultimately agrees with abolitionist goals or not, that exercise has tremendous value.<sup>310</sup>

That this Article has shown that abolitionism informs critical analysis of the graduation of economic sanctions does not, of course, mean that either graduation or the complementary reforms offered herein will be forthcoming. For an example, let us return to Oklahoma, where this Article began. Though press attention and the efforts of pro bono counsel resulted in Muskogee County returning the cash it seized from Mr. Wah,<sup>311</sup> efforts to pass systemic reforms to Oklahoma's forfeiture practices have been beaten back by the state's law enforcement and prosecutors, and there are few signs major reform will take place any time soon.<sup>312</sup>

But despite the lack of movement in Oklahoma and other states on certain crime policies, there are signs that the possibility of meaningful, structural reform to criminal legal systems is within reach in a way it has not been in recent memory. For example, Oklahoma's citizenry approved a ballot initiative in 2016 that reclassified several felonies to misdemeanors, with savings reallocated to fund community-based chemical dependency and mental health programs.<sup>313</sup> The initiative was not retroactive, but a bipartisan bill, passed into law in May 2019, provided Governor Kevin Stitt with greater authority to grant clemency to people who would have received nonincarcerative sentences had they be sentenced after the initiative passed.<sup>314</sup> In November 2019, Governor Stitt approved the largest single-day grant of clemency in U.S. history, resulting in the release of 462 people an average of nearly a year and a half before their sentences were to end.<sup>315</sup> One of those people was Kisha Snider.<sup>316</sup> Had the court properly

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310. See Akbar, *supra* note 30, at 473–79 (calling for legal scholars to engage abolitionism as a meaningful method of inquiry).

311. See Ingraham, *supra* note 11.

312. See Clifton Adcock, *Amount of Cash Seized by, Forfeited to Oklahoma Law Enforcement Nearly Doubled Last Year, Data Shows*, FRONTIER (Jan. 8, 2018), <https://www.readfrontier.org/stories/cash-seized-forfeited-oklahoma-law-enforcement-nearly-doubled-last-year-data> [https://perma.cc/M9A5-33K6] (“Though the main proponent of changing the state’s forfeiture laws is no longer in the Legislature, Baggett said he is not sure whether there will be another effort at amending the law in the upcoming session.”).

313. See Quandt, *supra* note 128.

314. *Id.*

315. *Id.*; Press Release, Office of Governor Kevin Stitt, Oklahoma Pardon and Parole Board Recommends Largest Single-Day Commutation in U.S. History (Nov. 1, 2019), [https://www.governor.ok.gov/articles/press\\_releases/oklahoma-pardon-and-parole-board-recommends](https://www.governor.ok.gov/articles/press_releases/oklahoma-pardon-and-parole-board-recommends) [https://perma.cc/YF3G-TDLU].

316. See Aspinwall, *supra* note 1.

accounted for Ms. Snider's financial circumstances before imposing unmanageable fees, she would never have been imprisoned in the first place.<sup>317</sup> But the fact that Oklahoma's electorate agreed that its criminal legal system should be less punitive—and that the savings from that reform should be reallocated to fund community-based chemical dependency and mental health programs<sup>318</sup>—suggests that abolitionist ideals have begun to take hold.

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317. *See supra* notes 6–10 and accompanying text.

318. *See Quant, supra* note 128.