

Criminal Fines and the New Debt Peonage for Poor Fathers

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Cortney Lollar, *Criminalizing (Poor) Fatherhood*, 70 *Ala. L. Rev.* ___ (forthcoming 2018), available at [SSRN](#).

In the 1980s and 1990s, many scholars and advocates debated the best way to reform our country's welfare system. During those debates, feminists called for increased enforcement of child support orders against "deadbeat dads." Congress enacted the 1996 welfare reform act known as the "[Personal Responsibility Act](#)" at the same time as it promulgated "war on crime" [measures](#) that increased federal penalties for drug-related crimes. Twenty years later, our country is experiencing both a rising gap between the rich and poor and mass incarceration of men of color. Many scholars have discussed the problem of mass incarceration, but there is far too little scholarship on the experience of poor people affected by welfare reforms.

[Cortney Lollar's](#) *Criminalizing (Poor) Fatherhood* shines a welcome spotlight on the role that law plays in increasing the misery of the poor. In this well-written and well-reasoned article inspired by Lollar's experience as a public defender, she shows how the confluence of welfare reform and criminal-enforcement measures result in state child support systems that jail non-custodial fathers who cannot afford to pay their child support. Lollar uses feminist analysis to demonstrate how an approach once advocated by feminists actually perpetuates stereotypes about fathers as providers and undermines their relationship with their children, without aiding the mothers who the reforms were supposed to help. *Criminalizing (Poor) Fatherhood* is a must read for anyone interested in how our criminal justice system perpetuates racial, class, and gender inequality in our society.

Imprisoning a person who is unable to pay his debts conjures up images of Dickensian poor farms and *Oliver Twist*. In the 1983 case of [Bearden v. Georgia](#), the United States Supreme Court held that imprisoning a person for his failure to pay a debt violates due process unless that person could pay the debt yet willfully refused to do so. Although that decision was grounded in the Fourteenth Amendment, forcing people to work to pay off their debts also arguably constitutes involuntary servitude in violation of the Thirteenth Amendment. Nonetheless, debt peonage is alive and well in this country, as people are imprisoned for their failure to pay court-imposed fees and fines. Fathers jailed for failure to pay child support make up a sizable percentage of those caught up in this system. Child support judgments are based on "potential" income, not actual ability to pay. Moreover, *Bearden* notwithstanding, fathers are rarely given a hearing to show that they simply cannot pay the debt that they owe. As a result, according to Lollar, "a father convicted and incarcerated for failing to pay child support will likely cycle in and out of the criminal justice system over his lifetime."

Since the 1700s, states have enacted criminal laws requiring fathers to pay support for their children, but the only people who are affected by these laws are the poor who are unable to pay. The state has more effective means of collecting from wealthier fathers, including garnishing pay checks and tax returns. Current federal law requires custodial parents who file for welfare benefits to assist the state in identifying the father and establishing paternity, and then to assign their rights to collect child support to the state. The state is most aggressive at prosecuting fathers whose children receive welfare benefits.

Supporters of the existing system argue that it furthers the well-being of children and helps to fund the child support-enforcement system. Lollar effectively contests both arguments. First, she points out that the child support payments do not go to children, but to the state. Instead of helping children, jailing their fathers hurts them because it destabilizes the relationship between the child's parents and makes it less likely that fathers will be involved in their children's lives. Says Lollar, "If the welfare of children were truly the concern, the child support system would be designed to

encourage parental involvement, not just paternal income.” Second, the cost of incarcerating fathers is far greater than the amount of the payments collected. It should also be obvious to lawmakers that jailing fathers decreases their ability to pay their debts, by disabling them entirely while they are in jail and saddling them with criminal records that make it hard for them to find good jobs after they are released.

Given the paucity of evidence supporting the policy of criminalizing the non-payment of child support, what could possibly justify this unjust system? Here, Lollar uses feminist analysis to show how a system that is supposed to help support and empower poor mothers actually perpetuates stereotypical gender roles. Says Lollar, “[We] punish fathers because they fail to fit the traditional stereotypical image of a white, heterosexual, able-bodied upper-middle-class father. Very few families conform to this image, yet our laws remain wedded to this deeply entrenched role.” Other aspects of fatherhood, including caretaking and non-cash contributions, simply don’t count. To address this problem, Lollar argues convincingly that child support systems should define child support more broadly and provide incentives for fathers to become more involved in the care of their children.

Criminalizing the failure to pay child support also has racial overtones. African-American men are disproportionately affected by the criminalization approach. At times, our system has tragic effects. Lollar begins her article with the story of Walter Scott, a black man shot in the back by a police officer in South Carolina. Scott fled police because he owed \$18,000 in child support, a debt that he could never afford to pay. National outrage over Scott’s death largely overlooked the role that criminalizing child support played in this tragic incident of racial injustice. *Criminalizing (Poor) Fatherhood* illustrates how criminal sanctions for failure to pay child support have contributed to the mass incarceration of African-American men.

Race also influences the larger context addressed by this article: the increase in the debts of poor people, the role the state plays in that indebtedness, and the rise of modern forms of debt peonage. After the death of Michael Brown in Ferguson, Missouri, anger at the treatment of blacks by local police led to mass [protests](#) and riots. [Investigators](#) discovered that the budget of the Ferguson police force depended on fines levied for minor traffic infractions—fines that were disproportionately imposed on people of color.

For a brief moment, national attention focused on the plight of poor people of color forced to fund a system biased against them. Since then, the nation’s attention has turned to other matters, but a new wave of scholars and activists are now addressing the role that court-imposed fines and fees pay in the carceral state. With *Criminalizing (Poor) Fatherhood*, Cortney Lollar makes an outstanding contribution to this important project.

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