
RECENT LEGISLATION

CRIMINAL PROCEDURE — INDIGENCY TESTS — COLORADO REQUIRES ON-THE-RECORD INDIGENCY PROCEEDINGS PRIOR TO INCARCERATION FOR FAILURE TO PAY FINES. — H.B. 14-1061, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014).

The United States has long viewed debtors' prisons,¹ understood as incarceration for failure to repay commercial debts, as contrary to public policy.² By contrast, debts stemming from criminal proceedings — such as restitution payments, fines, and court costs — present more complex questions.³ But when the debtor is genuinely unable to repay, several reasons support the same nonincarceration policy: punishment for poverty seems unfair, deterrence is less effective when indigence is out of the debtor's control,⁴ smoking out assets is pointless,⁵ and alternatives to incarceration may meet state goals more cost-effectively.⁶

Recently, a number of states have been revisiting their ability-to-pay inquiries in the wake of reports accusing them of jailing indigent debtors.⁷ A series of on-the-ground investigations and impact litiga-

¹ See, e.g., Sarah Dolisca Bellacicco, Note, *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors' Prison System*, 48 GA. L. REV. 227, 234 (2013) (outlining how debtors' prisons "fell into disfavor" in the mid-1800s).

² See, e.g., Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 155 (1982) (distinguishing historic debtors' prisons from penal imprisonment, which is used mainly in criminal proceedings).

³ For one, the "abolishment" of debtors' prisons was often confined to the civil context. See, e.g., MASS. GEN. LAWS ch. 224, § 6 (2012) ("No person shall be arrested on execution in a *civil* action . . .") (emphasis added); *People v. Mendro*, 731 P.2d 704, 707 (Colo. 1987) (en banc) (noting that the Colorado Supreme Court has read "civil" into the state constitution's ban on incarceration for debt, COLO. CONST. art. 2, § 12). Moreover, bringing public force to bear seems more appropriate for debts owed to public entities.

⁴ Without choice, there is no element that the law can deter. Cf. Yvana L.B.H. Mols, Comment, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEV. J. 289, 325–28 (2012) (arguing for tailored bankruptcy provisions based on whether the underlying causes of insolvency were in the debtor's control or not). While the threat of prison cannot deter an indigent debtor from not paying a fine, it may of course deter that individual from committing the underlying crime.

⁵ See Cohen, *supra* note 2, at 157.

⁶ See, e.g., *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) ("[A] sentencing court can often establish a reduced fine or alternative public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence . . ."). An empirical study on this point would be quite enlightening.

⁷ See, e.g., Taylor Gillan, *Ohio Supreme Court Warns Judges to End 'Debtors' Prisons*, JURIST (Feb. 7, 2014, 7:14 AM), <http://jurist.org/paperchase/2014/02/ohio-supreme-court-warns-judges-to-end-debtors-prisons.php> [<http://perma.cc/EV5Q-2YV9>] (discussing guidance document promulgated by the Supreme Court of Ohio to clarify how the state's judges should respond to court-ordered debts).

tion cases⁸ has set off a wave of concern in both academic⁹ and popular media¹⁰ circles, decrying the perceived resurrection of the once-interred “debtors’ prison.” On May 9, 2014, Colorado Governor John W. Hickenlooper signed House Bill 14-1061¹¹ into law, requiring Colorado courts to conduct on-the-record indigency hearings before incarcerating debtors for failing to pay debts owed to the state.¹² Laudably, the new law will prevent many of the more flagrant errors, but it may not shield less obviously indigent debtors from incarceration, as the substantive definition of indigence for the purposes of criminal debt remains unclear. And without clarification, lower-court discretion will still largely govern incarceration decisions. Still, the law will force indigency determinations onto paper, providing the raw legal material necessary for analysis by reviewing courts or legislators.

H.B. 14-1061 came on the heels of a troubling investigation by the American Civil Liberties Union (ACLU) of Colorado,¹³ following scathing investigations of other states’ practices by civil rights organizations.¹⁴ The ACLU discovered that various Colorado municipalities

⁸ For example, in May of 2014, sixteen named plaintiffs filed a class action against the City of Montgomery, Alabama, for jailing indigents for inability to pay debts owed to the city. First Amended Class Action Complaint, *Mitchell v. City of Montgomery*, No. 2:14-cv-186-MEF (M.D. Ala. May 23, 2014).

⁹ See, e.g., Bellacicco, *supra* note 1.

¹⁰ See, e.g., *The Colbert Report* (Comedy Central television broadcast June 11, 2014), <http://thecolbertreport.cc.com/videos/m87g43/the-word---debt-or-prison>.

¹¹ H.B. 14-1061, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014) (codified at COLO. REV. STAT. § 18-1.3-702 (2014)).

¹² *Id.*

¹³ See Letter from Mark Silverstein, Legal Dir., ACLU of Colo., and Rebecca T. Wallace, Staff Att’y, ACLU of Colo., to Chief Justice Michael Bender, Colo. Supreme Court, and Judge John Dailey, Chair, Criminal Procedure Comm. (Oct. 10, 2012), <http://static.aclu-co.org/wp-content/uploads/2013/12/2012-10-10-Bender-Dailey-Wallace.pdf> [<http://perma.cc/PJH6-HHU9>] [hereinafter Letter from ACLU to Bender, C.J.]. In October of 2012, the organization sent a letter to Chief Justice Bender of the Colorado Supreme Court, *id.*, and in late 2013 it sent similar letters to three Colorado municipalities, Letter from Rebecca T. Wallace, Staff Att’y, ACLU of Colo., and Mark Silverstein, Legal Dir., ACLU of Colo., to Herb Atchison, Mayor of Westminster (Dec. 16, 2013), <http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Atchison-ACLU.pdf> [<http://perma.cc/5QH2-N4HF>] [hereinafter Letter from ACLU to Atchison]; Letter from Rebecca T. Wallace, Staff Att’y, ACLU of Colo., and Mark Silverstein, Legal Dir., ACLU of Colo., to Joyce Downing, Mayor of Northglenn, and Woon Ki Lau, Northglenn City Prosecutor (Dec. 16, 2013), <http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Downing-ACLU.pdf> [<http://perma.cc/VY77-PG6N>]; Letter from Rebecca T. Wallace, Staff Att’y, ACLU of Colo., and Mark Silverstein, Legal Dir., ACLU of Colo., to Joyce Jay, Mayor of Wheat Ridge (Dec. 16, 2013), <http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Jay-ACLU.pdf> [<http://perma.cc/K53J-7EFQ>] [hereinafter Letter from ACLU to Jay].

¹⁴ See, e.g., ACLU, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf [<http://perma.cc/4CYJ-LE2X>] (detailing a lack of indigency inquiries in Louisiana, Michigan, Ohio, Georgia, and Washington); ACLU, MODERN-DAY DEBTORS’ PRISONS (2014), <https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf> [<http://perma.cc/KQM5-Z8VM>]; ALICIA BANNON ET AL., BRENNAN CENTER FOR JUSTICE, CRIMINAL

were jailing defendants for contempt of court for failure to pay fines.¹⁵ Under prior Colorado law, courts could jail defendants for failure to pay until a request for a hearing — which, when held, would not have been documented, at least in most municipal courts.¹⁶ Relying on precedent establishing that the Fourteenth Amendment bars states from revoking probation for failure to repay criminal debt if the defendant makes bona fide efforts to do so, unless no other sanction would serve the states' purposes,¹⁷ the ACLU asked Colorado lawmakers to put in place indigency inquiry procedures that would meet minimal constitutional standards.¹⁸

The facts the ACLU uncovered were less than flattering. In one case, the defendant, Jared Thornburg, had pleaded guilty to driving a defective vehicle, a nonjailable offense, and owed the court \$165 in fines and costs.¹⁹ Although a workplace injury and subsequent layoffs had left Mr. Thornburg “penniless and homeless,” he was told he had to pay the debt in full or a warrant would be issued for his arrest.²⁰ Just over a week later, fees related to failure to pay had ballooned the debt to \$245,²¹ and Mr. Thornburg was forced to serve ten days in jail, “without the judge ever having considered whether [his] failure to pay was due to indigence.”²² In another case, Linda Roberts, a disabled woman, was arrested for shoplifting \$21 worth of food from a grocery store.²³ Her income consisted solely of Supplemental Nutrition Assistance Program (SNAP) benefits and a Social Security disability check.²⁴ Ms. Roberts was ordered to pay \$746 in court costs, fines, fees, and restitution, or serve fifteen days in jail, again without any meaningful judicial inquiry into her ability to pay.²⁵ Incarceration for nonpayment was not unusual; one county processed 154 such cases

JUSTICE DEBT: A BARRIER TO REENTRY (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<http://perma.cc/4BQ2-ZTNA>] (surveying questionable “criminal justice debt” practices across fifteen states, from New York to California).

¹⁵ See, e.g., Letter from ACLU to Atchison, *supra* note 13, at 1–2 (detailing the city’s practice of issuing “Writs of Commitment — Failure to Pay” when defendants missed payments).

¹⁶ See Letter from ACLU to Bender, C.J., *supra* note 13, at 3–5; Telephone Interview with Douglas K. Wilson, Colo. State Pub. Defender (Oct. 21, 2014) (notes on file with the Harvard Law School Library).

¹⁷ See *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). The Court emphasized the active role of both the Due Process and the Equal Protection Clauses. See *id.* at 665.

¹⁸ See, e.g., Letter from ACLU to Atchison, *supra* note 13, at 2–4 (arguing that the city’s practices are unconstitutional under the U.S. and Colorado constitutions).

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ See *id.* at 4 n.4.

²² *Id.*

²³ Letter from ACLU to Jay, *supra* note 13, at 4.

²⁴ *Id.*

²⁵ See *id.* Ms. Roberts paid down her debt at the rate of \$50 per day in jail. *Id.*

over a five-month stretch.²⁶ While lack of records precludes full understanding of the previous regime's problems, these examples show that Colorado courts were imprisoning debtors living only on welfare benefits, far below the federal poverty line — results that seem manifestly wrong.²⁷

It was in this context that the Colorado legislature took action, spearheaded by Representative Joseph Salazar and Senate President Pro Tempore Lucía Guzmán.²⁸ “This is the 21st century,” Salazar said. “[T]here is no way in the world we should tolerate this.”²⁹ The bill cleared every legislative hurdle swimmingly, aided by a strategically timed exclusive in *The Denver Post*.³⁰ Both the House Committee on Appropriations³¹ and the Senate Committee on Judiciary³² gave favorable recommendations. The bill passed the Colorado House by a vote of 64–0³³ and the Colorado Senate by a vote of 34–1.³⁴ It was signed by the Governor shortly thereafter.³⁵

The bill made three simple but notable changes to Colorado law. First, it expanded coverage from fines to any “monetary amount” im-

²⁶ See *CO Cities Illegally Jail Poor People for Failure to Pay Fines*, ACLU OF COLORADO, <http://aclu-co.org/co-cities-illegally-jail-poor-people-for-failure-to-pay-fines> (last visited Nov. 23, 2014) [<http://perma.cc/L7Z7-SWFX>]. While some of these defendants may have defaulted willingly, it seems unlikely that a significant percentage of them would have voluntarily faced jail time if they had had the money to pay the fines assessed against them.

²⁷ See sources cited *supra* notes 4–6.

²⁸ See S. JOURNAL, 69th Gen. Assemb., 2d Reg. Sess. 885, 893 (Colo. 2014), <http://www.leg.state.co.us/Clcics/Clcics2014A/csl.nsf/Journals?OpenFrameSet> (click on “Senate Journal”; then select April 23, 2014).

²⁹ Tammy Kranz, *Salazar Pushes for CORA Standardized Fees*, NORTHGLENN THORNTON SENTINEL (Mar. 26, 2014), <http://northglenn-thorntonsentinel.com/stories/Salazar-pushes-for-CORA-standardized-fees,149788> [<http://perma.cc/S7AB-QGAN>].

³⁰ Christopher N. Osher, *Colorado Cities Jail Poor Who Can't Pay Fines for Minor Offenses*, DENVER POST (Dec. 16, 2013, 2:59 PM), http://www.denverpost.com/news/ci_24726701/colorado-cities-jail-poor-who-cant-pay-fines [<http://perma.cc/G42E-XNTV>]; see Telephone Interview with Nathan Woodliff-Stanley, Exec. Dir., ACLU of Colo. (Oct. 25, 2014) (notes on file with the Harvard Law School Library).

³¹ HOUSE COMM. ON APPROPRIATIONS, HOUSE COMMITTEE OF REFERENCE REPORT, 69-HB1061_J.001, 2d Sess., at 1 (Colo. 2014), <http://www.leg.state.co.us/CLICS/CLICS2014A/csl.nsf/BillFoldersHouse> (select bill range from drop-down menu; click on CR2).

³² SENATE COMM. ON JUDICIARY, SENATE COMMITTEE OF REFERENCE REPORT, 69-HB1061_C.002, 2d Sess., at 1 (Colo. 2014), <http://www.leg.state.co.us/CLICS/CLICS2014A/csl.nsf/BillFoldersHouse> (select bill range from drop-down menu; click on CR3).

³³ H. JOURNAL, 69th Gen. Assemb., 2d Reg. Sess. 824–25 (Colo. 2014), <http://www.leg.state.co.us/Clcics/Clcics2014A/csl.nsf/Journals?OpenFrameSet> (click on “House Journal”; then select April 7, 2014).

³⁴ S. JOURNAL, 69th Gen. Assemb., 2d Reg. Sess. 893–94 (Colo. 2014), <http://www.leg.state.co.us/Clcics/Clcics2014A/csl.nsf/Journals?OpenFrameSet> (click on “Senate Journal”; then select April 23, 2014).

³⁵ See H.B. 14-1061, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014) (codified at COLO. REV. STAT. § 18-1.3-702 (2014)).

posed by sentencing,³⁶ a subtle but important fix that captures court costs and fees in addition to fines. Second, it required courts to make a determination that the defendant is not indigent *prior to* incarceration.³⁷ Third, it clarified procedural and substantive standards. Courts must provide notice and a hearing and make “findings on the record” that the defendant can pay “without *undue hardship* to the defendant or the defendant’s dependents” and that “the defendant has not made a good faith effort to comply with the order.”³⁸

The new Colorado legislation has been warmly received by the ACLU³⁹ and the press.⁴⁰ Indeed, it represents a crucial step forward, especially in its mandate for on-the-record hearings. But for those who would see modern-day “debtors’ prisons” dismantled, its protections are likely insufficient to finish the job. For that, state courts and legislatures will ultimately have to clarify the substantive definition of indigence for these purposes. The bill’s “undue hardship” standard remains imprecise, and related law provides little guidance. While it may not fully resolve the issue, H.B. 14-1061 nonetheless sets the ground for the next wave of skirmishes.

To start, forcing reasoning onto the record will likely weed out particularly unsavory results, like those the ACLU highlighted. Transparency, even assuming generous deference from a reviewing court, can indeed be effective in reaching more principled results.⁴¹ But transparency works best when strong underlying social norms help police the results⁴² — and while public outcry might defend another Ms. Roberts, more ambiguous cases may not receive such strident support. An exclusively procedural solution, then, runs the risk of leaving substantive discretion in the hands of the very judges who drew underinclusive lines to begin with.⁴³

³⁶ *Id.* (amending COLO. REV. STAT. ANN. § 18-1.3-702(1)(a) (West 2013)).

³⁷ *See id.* (striking out imprisonment requirement from § 18-1.3-702(2) and substituting with language requiring a hearing).

³⁸ COLO. REV. STAT. § 18-1.3-702(3)(c) (emphasis added).

³⁹ *See Colorado Legislature Approves Ban on Debtors’ Prisons*, ACLU OF COLO., <http://aclu-co.org/colorado-legislature-approves-ban-debtors-prisons> (last visited Nov. 23, 2014) [<http://perma.cc/QR8N-XMXD>].

⁴⁰ *See, e.g.*, Leslie Jorgensen, *Legislature Revokes “Debtors Prison,”* COLO. OBSERVER (Apr. 24, 2014), <http://thecoloradoobserver.com/2014/04/legislature-revokes-go-to-jail-card-for-people-too-poor-to-pay-fines> [<http://perma.cc/GQW9-HTSD>].

⁴¹ *See* Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 961 (2006) (arguing in the context of the criminal law system that “[h]aving to articulate reasons for decisions, even orally and briefly, would discipline prosecutors” by forcing them to “reckon with outsiders’ perspectives, needs, and desires”).

⁴² *Cf. id.* (noting that transparency “is more likely to discipline elected insiders,” as they are susceptible to popular critique).

⁴³ *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013) (critiquing as fallacious theories that “offer deeply pessimistic accounts” of the motives of legal actors while subsequently turning to those same actors to effect solutions).

So a substantive definition of indigency seems appropriate, whether supplied by statute or developed through appellate review. Supreme Court precedent evidently sets some lower bound on that definition, but it has not provided much clarity on what that bound is. The foundational case on point, *Bearden v. Georgia*,⁴⁴ requires the court to determine whether a defendant has made “sufficient bona fide efforts to pay,”⁴⁵ but does not specify what those efforts are, except for a cryptic reference to the relevance of “all reasonable efforts” to “seek employment or borrow money” to repay the debt.⁴⁶

To be sure, H.B. 14-1061 says defendants should not be expected to pay if doing so would create “undue hardship” on them or their dependents.⁴⁷ While not self-interpreting, “undue hardship” is used elsewhere in Colorado law. Those usages suggest that the payment would have to exceed “properly calculated” obligations and “financial inconvenience,”⁴⁸ and that “hardship” is measured only as against the defendant’s “immediate short-term needs.”⁴⁹ Such clarifications are hardly granular enough to warrant enthusiasm.

Nor do analogous areas of Colorado law provide much help. In criminal restitution, for example, the collections investigator must “conduct an investigation into the financial ability of the defendant to pay the restitution ordered by the court.”⁵⁰ But the statute provides no substantive guidance on what “financial ability to pay” actually *means*. Colorado judicial procedure for the collection of fines, fees, and costs is similarly vague: courts may waive such debts only “after making a finding of financial inability to pay . . . based on a review of a financial affidavit or similar supporting documentation.”⁵¹

A more detailed indigency determination obtains for waiving costs in civil matters.⁵² There, a judicial directive mandates specific proce-

⁴⁴ 461 U.S. 660 (1983).

⁴⁵ *Id.* at 662. When a defendant has made such efforts, the sentencing court must look into whether “adequate alternative forms of punishment” are available, *id.*, such as restructuring the debt or requiring public service, *id.* at 672. When no alternatives are adequate, the state may imprison defendants under its traditional mandate to deter and punish criminal behavior. *See id.*

⁴⁶ *Id.* at 668.

⁴⁷ H.B. 14-1061, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014).

⁴⁸ *In re Marriage of Armit*, 878 P.2d 101, 103 (Colo. App. 1994) (defining term in the context of modification of support payments).

⁴⁹ COLO. REV. STAT. § 24-4.1-112(1) (2014) (defining term in the context of granting emergency awards in criminal restitution cases).

⁵⁰ *Id.* § 16-18.5-104(3)(a).

⁵¹ OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLO., DIRECTIVE 85-31 (amended Aug. 19, 2011), http://www.courts.state.co.us/Courts/Supreme_Court/Directives/85-31%20Amended%208-19-11.pdf [<http://perma.cc/ACV5-AZKG>]. As before, the court may employ the services of its collection investigator. *Id.*

⁵² *See* OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLO., DIRECTIVE 98-01 (amended Aug. 19, 2011), <http://www.courts.state.co.us/userfiles/file/98-01.pdf> [<http://perma.cc>

dures that must be followed for a valid determination of indigency.⁵³ One key benchmark for that determination is whether income falls below 125% of the federal poverty line.⁵⁴ Some elements of this definition seem likely to produce fair results: “income” is defined narrowly so as to avoid counting federal welfare dollars.⁵⁵

Yet a definition of indigency that relies on the Department of Health and Human Services (HHS) formula may be problematic.⁵⁶ HHS’s annual “poverty guidelines”⁵⁷ are based on the Census Bureau’s “poverty thresholds” and reflect the annual change in the Consumer Price Index for All Urban Consumers.⁵⁸ But the basic calculation, a formula tracing back to the 1960s,⁵⁹ extrapolates total necessary expenditures from the cost of following certain food plans developed by the Department of Agriculture — plans which assume both a well-stocked kitchen and a competent cook.⁶⁰ Not only is that method

[D62H-67D6]. Indeed, the ACLU had suggested importing this test into the criminal context. *See* Letter from ACLU to Bender, C.J., *supra* note 13, at 6.

⁵³ OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLO., DIRECTIVE 98-01, *supra* note 52, § II, Attach. A. Since even an indigent defendant can receive a waiver only at the discretion of the judge, *see id.* § I (citing COLO. REV. STAT. § 13-16-103 (2014)), this test is actually a one-way ratchet, constraining only the more magnanimous impulses of the judiciary.

⁵⁴ Specifically, an individual or family must have less than \$1,500 in liquid assets and and income that fits into one of two category: (a) income falls below 125% of the poverty level as determined by the Department of Health and Human Services (HHS); or (b) income falls below a slightly higher line (an additional 25%, or about 156% of the HHS poverty level) — but approved expenses for “[j]essential items” equal or outstrip income. *See id.* Attach. A (1)(b)(i)-(ii) (revised Mar. 2014); *id.* Attach. A tbl. Income Eligibility Guidelines (amended Jan. 2014).

⁵⁵ For example, “income” under the scheme does not include Temporary Assistance for Needy Families (TANF) payments, SNAP benefits, subsidized housing, veteran’s benefits, or child support. *Id.* (1)(a)(iii) n.*. Moreover, the definition of “liquid assets” excludes property, like a vehicle, that cannot “readily be converted into cash without jeopardizing the applicant’s ability to maintain home and employment.” *Id.* (1)(a)(iii) n.**. And excluded from “expenses” are such “nonessential[s]” as dining out, cable television, alcohol, and cigarettes. *Id.* (1)(a)(iii) n.**.*.

⁵⁶ *See, e.g.*, JULIET M. BRODIE ET AL., POVERTY LAW, POLICY, AND PRACTICE 6 (2014) (“[T]here is general agreement that the poverty measure being used is out-of-date and a recalibration is necessary . . .”); *see also* PANEL ON POVERTY AND FAMILY ASSISTANCE ET AL., MEASURING POVERTY: A NEW APPROACH xvi (Constance F. Citro & Robert T. Michael eds., 1995) (recommending a “new official poverty measure”).

⁵⁷ HHS publishes its updated numbers in the Federal Register. *See, e.g.*, Annual Update of the HHS Poverty Guidelines, 79 Fed. Reg. 3593 (Jan. 22, 2014).

⁵⁸ 42 U.S.C. § 9902(2) (2012); BRODIE ET AL., *supra* note 56, at 7. This formula is mandated by law. *See* 42 U.S.C. § 9902(2).

⁵⁹ The formula was initially proposed by statistician and economist Mollie Orshansky in Mollie Orshansky, *Children of the Poor*, SOC. SECURITY BULL., July 1963, at 3, *reprinted in* MOLLIE ORSHANSKY, SOC. SEC. ADMIN., THE MEASURE OF POVERTY 5 (1976). *See generally* Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, SOC. SECURITY BULL., Winter 1992, at 3.

⁶⁰ *See* Fisher, *supra* note 59, at 5 (noting that Orshansky had in mind “a hypothetical average (middle-income) family, spending one-third of its income on food”); *see also* Orshansky, *supra* note 59, at 8 (“[T]he housewife will be a careful shopper, a skillful cook, and a good manager who will prepare all the family’s meals at home.”).

painfully outdated in a world where many individuals struggle to find time to cook at home,⁶¹ but also it fails to capture regional differences in cost-of-living expenses⁶² and the role of adverse events, like medical emergencies.⁶³ Indeed, a number of organizations have proposed alternatives to the HHS measure,⁶⁴ including the Census Bureau itself.⁶⁵

Simply importing the bare HHS thresholds from the welfare-benefit context, then, seems both unfair and out-of-touch, as the metric overlooks the hidden costs of poverty. Moreover, the definition of poverty for indigency and welfare purposes need not be the same. But adopting *some* clear rule or proxy — such as SNAP eligibility — has clear advantages, saving both time and resources.⁶⁶

Arriving at a workable definition of indigence for these purposes is, of course, a broad and complex task. Colorado's legislature or its appellate courts will likely have to take another, more detailed look at their substantive definition of indigency. Until they do, the new safeguards may not adequately guarantee the interment of debtors' prisons in the criminal context. Still, the strength of Colorado's bill, and the procedural fix it instated, is that it forces courts' determinations of indigence onto the record. That transparency will undoubtedly help. And, without the bill, it would have been impossible to have the rigorous discussion of the definition of indigence that should — and must — take place.

⁶¹ See SHARE OUR STRENGTH, IT'S DINNERTIME 9 (2012), <http://www.nokidhungry.org/images/cm-study/report-full.pdf> [<http://perma.cc/XD83-XRJY>] (noting that 45% of respondents report "making dinner from scratch" more than four times a week).

⁶² See PANEL ON POVERTY AND FAMILY ASSISTANCE ET AL., *supra* note 56, at 8.

⁶³ See *id.* at 9.

⁶⁴ See BRODIE ET AL., *supra* note 56, at 13–14. Several of the major welfare programs employ some multiple of the guidelines for eligibility purposes. For example, SNAP uses a cutoff of 130% of the HHS poverty guidelines. *Supplemental Nutrition Assistance Program: Eligibility*, USDA, <http://www.fns.usda.gov/snap/eligibility> (last visited Nov. 23, 2014) [<http://perma.cc/Y7P7-7Q6U>]. Yet one helpful aspect of a consistent government definition is the ability to track trends over time. See Kathryn Edin & Rebecca Joyce Kissane, *Poverty and the American Family: A Decade in Review*, 72 J. MARRIAGE & FAM. 460, 462 (2010).

⁶⁵ The Census Bureau developed the new "Supplemental Poverty Measure" (SPM) in an attempt to produce a more accurate read on poverty. See KATHLEEN SHORT, U.S. CENSUS BUREAU, *THE RESEARCH SUPPLEMENTAL POVERTY MEASURE: 2010* (2011), <http://www.census.gov/prod/2011pubs/p60-241.pdf> [<http://perma.cc/AL9K-BTZW>]. The SPM incorporates a number of relevant factors, such as rising health care costs and job expenses, in its analysis of poverty. See *id.* at 1.

⁶⁶ As constitutional rights may mean little apart from the resources deployed to secure them, see, e.g., Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004) ("[S]ystems of indigent defense routinely fail to assure fairness because of under-funding and other problems."), a rule that draws efficiently on court time and resources may actually fare better at securing rights for a class of defendants, even if some individuals are underserved.