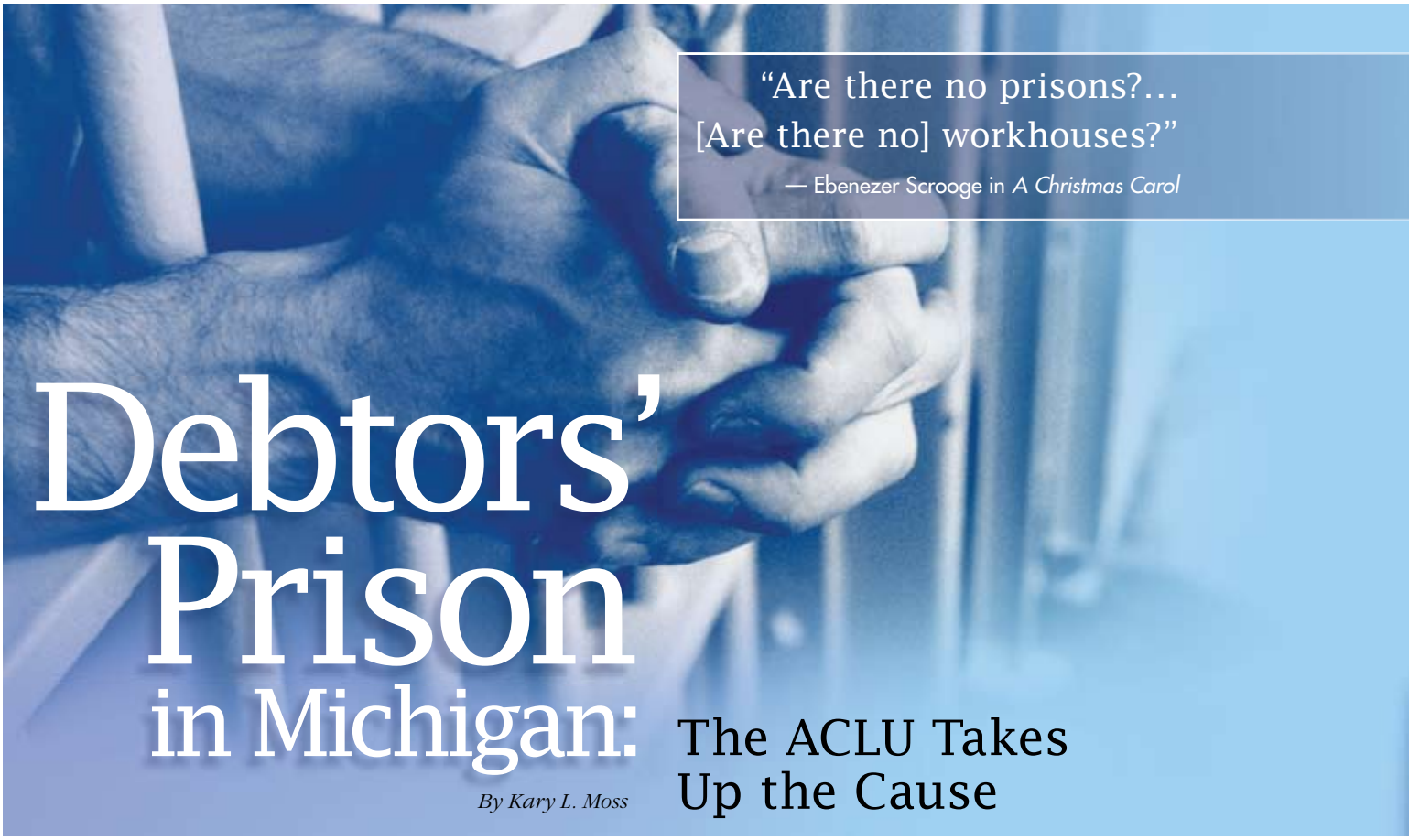

"Are there no prisons?... [Are there no] workhouses?"

— Ebenezer Scrooge in *A Christmas Carol*

Debtors' Prison in Michigan: The ACLU Takes Up the Cause

By Kary L. Moss

Last March, a judge in Escanaba jailed Edwina Nowlin because she couldn't pay a $104 court supervision fee for her 16-year-old son. He had been sentenced a few months earlier to the Bay Pines Center, and the court ordered Nowlin to pay that amount for his lodging. At that time, Nowlin was homeless and working part-time after being laid off from her job. She informed the judge of her inability to pay the required amount, but he found her in contempt. Additionally, he denied her requests for a court-appointed attorney.

Shortly after beginning to serve her 30-day sentence, Nowlin was released for one day to work. She picked up her $178.53 paycheck, believing she could now pay off that $104 and be set free. When she returned to jail that evening, however, the sheriff forced her to sign over the check to cover $120 for "room and board." She also was charged $22 for drug testing, which came back negative, and a booking fee. She was sent back to jail because she still couldn't pay her son's fee, continuing an impossible cycle.

The American Civil Liberties Union (ACLU) of Michigan asked for an emergency hearing in the Delta County Probate Court, arguing that the court had unconstitutionally sentenced her to a debtors' prison without assessing her ability to pay the court and that the court had violated her rights by denying her request for a court-appointed lawyer. She was released.

This story illustrates an increasing problem facing Michiganders suffering from the economic crisis. It also illustrates the tremendous strain on state and local governments already struggling to manage complex budgets, which has pitted well-meaning public servants against each other as services hang in the balance.

Today in Michigan, it is possible to be thrown or remain in prison for debts accrued through child support, alimony, driver's responsibility fees, or other reasons. Thus, the term "debtors' prison" has been revived of late—a term that conjures up a nineteenth century, Dickensian image of hapless, impoverished individuals languishing in dirty, overcrowded jails because they were too poor to pay their debts. As the state hands its expenses to local entities, counties pass these expenses on to individuals, and there is a growing concern that the courts will force more indigent defendants to pay costs and fees and imprison those who cannot.

Our Constitution embodies the value that our system of justice should apply fairly and equally to all, irrespective of the extent of one's individual wealth. This value is at the heart of a democratic system of government, inspiring confidence in our system of justice and making it possible for law enforcement officers to have and retain the trust of the communities in which they work. It encourages reliance by communities on law enforcement and the courts and ensures that they are used. Yet most would agree that wealth continues to significantly influence the quality of justice one may obtain, and its influence appears to be increasing, not diminishing, in this difficult economic period.

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History of Debtors' Prison

In Europe during the Middle Ages, debtors often were locked up until their families paid what was due. Some inmates became indentured servants to work off their debts. In fact, the father of one of history's most celebrated authors, Charles Dickens, was imprisoned in Marshalsea Prison in 1824 because of his debts, thus inspiring some of the greatest novels in modern literature.[1]

Originally, English debtors' prisons meted out different freedoms depending on an individual's ability to pay for extra liberties. Early in the seventeenth century, England enacted the Elizabethan Poor Law, providing for a compulsory poor rate to be levied on each parish, as well as the appointment of overseers of relief and the collection of a poor relief rate from property owners. The law was subsequently amended to set up local houses of corrections in which the impoverished were expected to work. The Debtors Act of 1869 abolished imprisonment for debt, but people who could afford to pay their arrears yet chose not to could be sent to prison for as long as six weeks.

During the early years of the United States, up to the mid-1800s in some states, people were put in prison for not resolving their debts. Not only were they obliged to reimburse creditors, but they also had to cover the costs of their own imprisonment.

In 1833, the United States government eliminated the practice of imprisoning debtors, and most states followed suit. In 1970, the United States Supreme Court ruled that it violated equal protection for inmates to be kept longer in prison because they were too poor to cover their fines or court costs.[2] More recently, it decreed that a defendant's probation cannot be revoked, nor can the defendant be incarcerated, for failing to pay a fine he or she cannot afford.[3] Nevertheless, some states—including Michigan, Florida, and Georgia—still jail certain categories of debtors.

Michigan's Debtors' Prisons and Alternatives Today

The Michigan Constitution provides that "[n]o person shall be imprisoned for debt arising out of or founded on contract, express or implied, except in cases of fraud or breach of trust."[4] While Michigan does not allow jailing those who have failed to pay their court-ordered obligations because they are too poor, courts often do not properly assess indigency. The range of costs that can be imposed include fines, fees for appointed counsel, restitution as part of a sentence,[5] and probation fees,[6] and they must generally be paid when they are assessed unless the court allows the defendant a payment plan for "good cause."[7] But the Michigan Supreme Court has ruled that a defendant "is not entitled to an ability-to-pay assessment until the imposition of the fee is enforced,"[8] as opposed to allowing the defendant an indigency hearing at the time of assessment.[9] This means that indigent defendants are now saddled with the same fines and fees as all other defendants without regard to their inability to pay and cannot demonstrate their inability to pay until the court attempts to collect the debt through "enforcement."

In one case, for example, a court extended David Sutton's probation because he couldn't afford his supervision fees. He had no assets, and his only income was his $262 monthly disability check. Several years before, he'd suffered severe, permanent injuries, leaving him unable to work. In 2003, Sutton was sentenced to probation for one year following a conviction in the Wayne Circuit Court. He performed community service, fulfilling all conditions of his probation except one—he was unable to pay the probation supervision fee. Consequently, a circuit court judge extended his probation year after year. Last February, the ACLU successfully represented him at a hearing after the state moved to revoke his probation again, arguing that both the United States and Michigan constitutions prevent a judge from revoking or extending someone's probation if the failure to pay fees is due to poverty.

And in another case, the Oakland Circuit Court ordered a substantial increase in the amount of child support Selesa Likine had to pay her ex-husband. Likine only received monthly social security benefits and had no other assets. The Friend of the Court, however, mistakenly recommended the larger amount because of a one-time commission Likine received selling real estate. Although it was her only sale because her real estate license lapsed when she couldn't pay for renewal and continuing education costs, the court refused her requests to modify the payment obligation. The court finally convicted Likine of failure to pay child support and sentenced her to probation, even though she has a severe mental disability that had resulted in her losing both her job and the custody of her children. Her efforts to appeal and to secure a new trial were unsuccessful.

Eventually, the Michigan Innocence Clinic and the ACLU entered the picture, arguing that the trial court violated the Michigan Constitution and the binding decision of the Michigan Supreme Court in *Port Huron v Jenkinson*[10] by not letting Likine present evidence that she was unable to pay her assessed child support, not instructing the jury that inability to pay is a defense, and not allowing a new trial on that basis. Exacerbating the situation was the trial court's not granting her a new trial despite her trial counsel's constitutionally ineffective assistance and the state's *ad hominem* attack on defense counsel. The case is still pending.

Most recently, the State Court Administrative Office (SCAO) decided that all criminal defendants must pay the minimum statutory costs—the crime victim rights assessment and restitution—and should not be allowed to perform community service in lieu of paying them.[11] According to SCAO, these assessments cannot be waived, even if a defendant is indigent.

It has been, and will be, a significant challenge to evaluate the full extent of this problem. Although the ACLU has requested data on collections from the Michigan Department of Corrections, the department has replied that no relevant documents exist. Similarly, even though Michigan Supreme Court Administrative Order 1997-10 requires state courts to provide to SCAO their collections plans, annual payment/adjustment information, and outstanding receivables reports, SCAO has refused to provide the information to the ACLU, arguing that it is not public.

Without full transparency, it is very difficult to assess whether courts and counties are actually spending more to collect these funds than they are collecting. It is very difficult to determine the extent to which the truly indigent are being affected. And it is very difficult to identify the extent to which court and county plans vary across jurisdictions and whether they are unconstitutional.

We have extensive anecdotal evidence of potentially problematic practices. For example, SCAO advertised a month-long program instituted by the 67th District Court in Genesee County allowing individuals with warrants to come to court and work out payment plans. After that,

> law enforcement officers began picking people up at home and work. The warrant sweep began at 3 p.m. and courtrooms were kept open as late as 4:30 a.m. the next morning. By 9 p.m., one judge had arraigned 30 people on 42 misdemeanors and felonies and collected $6,000. Then, a lock-up area was kept open at the downtown courtroom so officers could continue to arrest people overnight. The county board approved overtime for the night court, which was intended to show that the courts were serious. An additional 16 people were arraigned on 23 warrants the next morning. By 4:30 a.m., another judge had arraigned 42 people on 61 warrants, collected $7,000, and set bonds totaling $370,000.[12]

Aggravating these problems is the larger systemic challenge Michigan faces with respect to the quality of legal representation that low-income people can access in the state. Since it is the defendant's burden both to raise and prove the issue of indigency, those without adequate legal representation are at a distinct disadvantage. While the Sixth Amendment requires states to provide constitutionally adequate counsel to those accused of criminal wrongdoing and unable to afford private counsel, Michigan is one of a few states that require counties to pay for attorneys and offer no fiscal or administrative oversight to ensure that public defenders provide constitutionally adequate legal representation. There is no state training for public defense attorneys, no performance standards to govern their practice, and no performance review. In other words, there is no statewide public defense system,

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There is no statewide public defense system, and many counties cannot fund adequate legal representation of those accused of crimes who cannot afford an attorney.

The ACLU of Michigan Celebrates Its 50th Anniversary

The ACLU was founded to defend and secure the values enshrined in the Bill of Rights and to extend these rights to people traditionally excluded from their protection—people of color, lesbians, gay men, bisexuals, transgender individuals, students, women, prisoners, people with disabilities, and, of course, the poor. Although our clients may change, the fight for principles is constant. This year, we celebrate our 50th anniversary.

Throughout our history, we have worked in the courts, in the legislature, and at the grassroots level to protect and defend the state and federal constitutions. We are nonpartisan, joining in coalitions with conservatives and progressives alike on a wide and very diverse array of issues. We continue to tackle the most important civil liberties issues confronting Michigan—racism, sexism, homophobia, religious intolerance, and censorship. And we are dedicated to our mission: realizing the promise of the Bill of Rights for all and expanding the reach of its guarantees to new arenas.

In our first years, we fought for the Michigan legislature to repeal the Trucks Act, which was intended to contain members or sympathizers of the Communist Party and other "subversive" groups. Later, we led efforts to establish the Civil Rights Commission and defeat attempts to revive the death penalty. We've tackled racism in adoption policies and housing, while focusing on inequalities in our justice system. Even when others were willing to trade freedom for a measure of security, the ACLU has been steadfast in its commitment to liberty and justice for all.

As we commemorate our 50 years, here are just a few examples of our organization's landmark achievements:

1960: After Grosse Pointe employs a discriminatory system to determine if a buyer is qualified to live in the area, the ACLU successfully lobbies legislators to outlaw systemic discrimination in the field of housing.

1963: The ACLU leads efforts during Michigan's Constitutional Convention to establish a Civil Rights Commission, making Michigan the first state with this type of governmental agency. ACLU of Michigan founder Senator Carl Levin becomes the commission's first general counsel in 1964.

1965: The ACLU begins conducting police responsibility and civil rights programs at the Detroit Police Department.

1973: Attempts to revive Michigan's death penalty fail after the ACLU leads an effort to defeat them in the legislature.

1975: The ACLU successfully represents a woman convicted of "operating a church" in a residential neighborhood because she held private prayer meetings in her home.

1976: The ACLU advocates against the Michigan legislature's attempts to restrict funds to school districts for purchasing buses necessary for the districts to comply with federal orders to integrate schools.

1988: The ACLU partners with the NAACP, successfully challenging a discriminatory Dearborn referendum barring nonresidents from using city parks.

1990: After ACLU intervention, a judge overturns a law denying low-income people the right to counsel in civil proceedings in which imprisonment is possible.

1997: The ACLU helps draft a human rights ordinance making sexual orientation a protected class in Ypsilanti after a local printing shop refuses to do business with a gay and lesbian group at Eastern Michigan University.

1999: The ACLU challenges the Eastpointe Police Department's practice of instructing officers to investigate any black youths riding bikes through Eastpointe. The lawsuit is settled in 2006 on behalf of 21 teenagers and results in an important decision from the United States Court of Appeals for the Sixth Circuit.

2001: The ACLU tells the city of Hamtramck that the Muslim call to prayer is constitutionally permissible if the city treats religious and non-religious speech equally.

2003: The ACLU wins a landmark United States Supreme Court decision upholding affirmative action practices at the University of Michigan Law School. That same year, the ACLU reaches a settlement with the state of Michigan and halts mandatory drug testing for all welfare applicants.

2008: The ACLU successfully challenges the Secretary of State's decision to purge thousands of people from the voting rolls before the November election.

2009: The ACLU sends Freedom of Information Act requests to many school districts to assess the disparate impact of suspension and expulsion policies on students of color and releases a report, *Reclaiming Michigan's Throwaway Kids: Students Trapped in the School to Prison Pipeline,* that launches a statewide effort to reform zero tolerance laws and implement restorative justice practices in schools.

2010: The ACLU represents a young child with cerebral palsy after her school barred her physician-prescribed service dog from coming to kindergarten with her. We informed the school district that it was violating the Americans with Disabilities Act, and she was allowed to attend school with Wonder, her puppy.

Looking ahead to the next 50 years, the ACLU is committed to continue guarding the rights of Michigan's most vulnerable residents. By raising the torch of freedom proudly, we can help ensure that all men, women, and children living in our state are treated with fairness and equality.

and many counties cannot fund adequate legal representation of those accused of crimes who cannot afford an attorney. *Some of these indigent individuals end up in debtors' prison; others become entangled in a legal bottomless pit.*

In 2007, the ACLU of Michigan, the national ACLU, and the law firm of Cravath, Swaine & Moore filed a class action in the Ingham Circuit Court against the state on behalf of all indigent criminal defendants in Berrien, Muskegon, and Genesee counties. The ACLU asked the court to declare the three counties' current public defense systems unconstitutional and compel the state to ensure representation consistent with constitutional requirements. The state moved to dismiss the lawsuit. The trial court denied the motion, and the Court of Appeals affirmed.[13] The Michigan Supreme Court initially granted the state leave to appeal, but ultimately vacated the trial court's order and remanded the case for trial and further consideration of the class action issues in the case. The Supreme Court stated that it was "premature to make a decision on the substantive issues."[14]

With regard to those issues, however, it is worth considering the words of Judge William Murphy, writing for the Court of Appeals majority:

> We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities….[15]

As a matter of public policy, courts should not make it more difficult for indigents to recover financially by placing them in jail or on lengthy probation and imposing overly burdensome fines. While it is hardly surprising that the state and counties are looking for every possible means to bring in revenue, it is not in the best interests of the state to add to the already insurmountable burdens that indigents face.

> "At this festive season of the year, Mr. Scrooge," said the gentleman, taking up a pen, "it is more than usually desirable that we should make some slight provision for the poor and destitute, who suffer greatly at the present time. Many thousands are in want of common necessaries; hundreds of thousands are in want of common comforts, sir."
>
> "Are there no prisons?" asked Scrooge.
>
> "Plenty of prisons," said the gentleman, laying down the pen again.
>
> "And the Union workhouses?" demanded Scrooge. "Are they still in operation?"
>
> "They are. Still," returned the gentleman, "I wish I could say they were not."
>
> "The Treadmill and the Poor Law are in full vigour, then?" said Scrooge.
>
> "Both very busy, sir."
>
> "Oh! I was afraid, from what you said at first, that something had occurred to stop them in their useful course," said Scrooge. "I'm very glad to hear it."[16] ■

Kary L. Moss is the executive director of the ACLU of Michigan. Previously, she was on the ACLU's national staff and clerked in the United States Court of Appeals for the Second Circuit. She has extensive civil rights litigation experience and has published three books. She graduated from James Madison College at Michigan State University, received a master's in international affairs from Columbia University, and earned her juris doctor from CUNY School of Law. *She would like to thank Rana Elmir, Jessie Rossman, Robyn Gorell, Lena Konanova, and the staff at the* Michigan Bar Journal *for their assistance with this article.*

FOOTNOTES

1. See Hibbert, *Charles Dickens: The Making of a Literary Giant* (Palgrave Macmillan, 2009).
2. *Williams v Illinois*, 399 US 235; 90 S Ct 2018; 26 L Ed 2d 586 (1970).
3. *Bearden v Georgia*, 461 US 660, 668–669; 103 S Ct 2064; 76 L Ed 2d 221 (1983).
4. Const 1963, art 1, § 21.
5. MCL 769.1k.
6. MCL 771.3(2)(c).
7. MCR 1.110.
8. *People v Jackson*, 483 Mich 271, 292; 769 NW2d 630 (2009).
9. *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004).
10. *Port Huron v Jenkinson*, 77 Mich 414; 43 NW 923 (1889).
11. See State Court Administrative Office, *Court Collections Program Components and Details*, available at <http://courts.michigan.gov/scao/services/collections/CollectionsComponentsAndDetails.pdf> (accessed June 21, 2010).
12. State Court Administrative Office, *Best Practices and Pilot Programs* (January 2007), available at <http://courts.michigan.gov/scao/services/collections/BestPractices/Best_Practices_and_Pilot_Projects.pdf> (accessed June 21, 2010).
13. *Duncan v Michigan*, 284 Mich App 246; 774 NW2d 89 (2009).
14. *Duncan v Michigan*, 486 Mich 906; 780 NW2d 843 (2010).
15. *Duncan*, 284 Mich App at 255.
16. Dickens, *A Christmas Carol* (London: Chapman & Hall, 1843).