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The New Peonage

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Abstract

Although the Thirteenth Amendment to the Constitution formally abolished slavery and involuntary servitude in 1865, the text created an exception for the punishment of crimes "whereof the party shall have been duly convicted." Two years later, Congress passed The Anti-Peonage Act in an attempt to prohibit the practice of coerced labor for debt. Yet, in the wake of the Civil War, Southern states innovated ways to impose peonage but avoid violations of the law, including criminal surety statutes that allowed employers to pay the court fines for indigent misdemeanants charged with minor offenses in exchange for a commitment to work. Surplus from these payments padded public coffers (as well as the pockets of court officials), and when workers' debt records were subsequently "lost" or there was an allegation of breach, surety contracts were extended, and workers became further indebted to local planters and merchants. Several decades later in Bailey v. Alabama *(1911) and* United States v. Reynolds *(1914), the Supreme Court invalidated laws criminalizing simple contractual breaches, which Southern states had used to skirt the general provisions of the Anti-Peonage Act. Yet, these decisions ultimately had little impact on the "ever-turning wheel of servitude," and the practice persisted under alternative forms until after World War II.*

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This Article examines the phenomenon of what the Author calls "the new peonage." It posits that the reconfiguration of the South's judicial system after the Civil War, which entrapped blacks in a perpetual cycle of coerced labor, has direct parallels to the two-tiered system of justice that exists in our juvenile and criminal courtrooms of today. Across the United States, even seemingly minor criminal charges trigger an array of fees, court costs, and assessments that can create insurmountable debt burdens for already struggling families. Likewise, parents who fall behind on their child support payments face the risk of incarceration, and upon release from jail, they must pay off the arrears that accrued, which hinders the process of reentry. Compounding such scenarios, criminal justice debt can lead to driver's license suspension, bank account or wage garnishment, extended supervision until debts are paid, additional court appearances or warrants related to debt collection and nonpayment, and extra fines and interest for late payment. When low-income parents face such collateral consequences, the very act of meeting the most basic physical and emotional needs of their children becomes a formidable challenge, the failure of which can trigger the intervention of Child Protective Services, potential neglect allegations, and further court hearings and fees. For youth in the juvenile court system, mandatory fees impose a burden that increases the risk of recidivism. In short, for families caught within the state's debt-enforcement regime, the threat of punishment is an ever-present specter, and incarceration always looms. Ironically, rather than having court fees serve as a straightforward revenue source for the state, this hidden regressive tax requires an extensive infrastructure to turn court and correctional officials into collection agents, burdening the system and interfering with the proper administration of justice. Moreover, states frequently divert court fees and assessments to projects that have little connection to the judicial system.

This Article is the first to analyze the ways in which the contemporary justice tax has the same societal impact as post-Civil War peonage: Both function to maintain an economic caste system. The Article opens with two case profiles to illustrate the legal analysis in narrative form, followed by several others presented throughout the piece. The Article then chronicles the legal history of peonage from the passage of the Thirteenth Amendment

through the early twentieth century. It establishes the parallels to the present-day criminal justice system, in which courts incarcerate or re-incarcerate those who cannot pay. It argues that Supreme Court decisions intended to end the use of debtors' prisons ultimately had limited impact. The Article concludes with proposals for legislative and public policy reform of the new peonage, including data collection and impact analysis of fines, restitution, and user fees; ending incarceration and extended supervision for non-willful failure to pay; and establishing the right to counsel in nonpayment hearings.

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I. Introduction

"[He] is thus kept chained to an ever-turning wheel of servitude. . . ."

United States v. Reynolds[1]

In the 1860s, an African-American man whom I will call Marcus[2] was born into slavery on a plantation in Elberton, Georgia.[3] Shortly after the end of the Civil War, Marcus was emancipated, and at age ten, he was hired to work picking cotton for the owner of the plantation, known as the Captain.[4] Although Marcus had no formal education and rarely left the plantation, the conditions under which he lived during his youth were tolerable.[5] When he turned twenty-one, Marcus agreed to enter into a one-year labor contract with the Captain, earning $3.50 each week and living in a one-room log cabin.[6] He married one of the Captain's house-servants, Mandy, and they lived in a two-room shanty.[7]

After several years, during which Marcus renewed his contract annually, the Captain died, and his son—called the Senator after entering elected office in Atlanta—took over the plantation.[8] At the Senator's suggestion, Marcus signed a

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1. 235 U.S. 133, 147–48 (1914).

2. As the source for this case study is an anonymous, autobiographical essay appearing in a magazine published in New York in 1904, a name for the individual has been given for narrative clarity.

3. *See The New Slavery in the South—An Autobiography*, INDEPENDENT, Feb. 25, 1904, at 409, (presenting the autobiographical story of an anonymous African American in the Southern United States during the period following the Civil War), *available at* http://docsouth.unc.edu/fpn/negpeon/negpeon.html.

4. *See id.* (explaining that Marcus' uncle hired him out to the Captain and he worked picking cotton).

5. *See id.* (noting that he had clothes, a place to sleep, ten to fifteen cents per week for "spending change," and that he and everybody who worked there "was happy").

6. *See id.* at 410 ("When I reached twenty-one the Captain told me I was a free man, but he urged me to stay with him. He said he would treat me right, and pay me as much as anybody else would. . . . And I stayed.").

7. *See id.* (describing how Mandy also worked for the Captain, and after Marcus and Mandy married he felt like "the biggest man in Georgia").

8. *See id.* (noting that the Captain died five years after Marcus had started annually renewing his contract, resulting in the Senator taking over the property).

ten-year contract, and not long after, the state began leasing out convicted men to work on the plantation.[9] The Senator paid the state $200 annually for each man's labor, housed them in stockades, and kept them in shackles as they worked under the supervision of armed guards provided by the state.[10] Although Marcus and the other free laborers were frightened by these developments, they understood that they had no choice but to fulfill their ten-year contracts.[11] After Marcus's contract expired, however,the Senator told him that he had incurred $165 worth of debt at the plantation commissary, where free laborers were compelled to buy all their necessities, including food and clothing.[12] Marcus then learned that his contract required that his debt—and that of the other free laborers—had to be paid off by hard labor; he was placed in the stockade with the leased prisoners and forced to work from sunrise to sunset with little food or rest, under the constant threat of physical punishment.[13] Meanwhile, Mandy became a slave "mistress"[14] for one of the

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9. *See id.* (explaining how shortly after Marcus signed a ten-year contract, the Senator built a shanty, which "looked for all the world like stalls for horses" and then brought in "prisoners who had been leased by the Senator from the State of Georgia").

10. *See id.* ("[The prisoners] were quartered in the long, low shanty, afterward called the stockade . . . .leased by the Senator . . . at about $200 each year, the State agreeing to pay for guards and physicians, for necessary inspection . . . and all other incidental camp expenses.").

11. *See id.* at 410–11 (describing how the laborers met with the intention of quitting, but learned that if they did not fulfill their contracts they would face consequences such as being locked in the stockades, "run down by bloodhounds," or "beat[en] brutally").

12. *See id.* at 411 ("[The Senator] had established a large store, which was called the commissary. All of us free laborers were compelled to buy our supplies . . . from that store.").

13. *See id.* at 411–12 ("Really, we had made ourselves lifetime slaves, or peons, as the law called us. But, call it slavery, peonage, or what not, the truth is we lived in a hell on earth what time we spent in the Senator's peon camp.").

14. Using the term "mistress" in this context can be misleading, as Mandy was likely coerced into the role under threat of violence; it is, however, the term used by the author of the essay, *id.* at 412, so it is presented as a direct quote here. *See also* Margaret Sullivan, *Times Regrets 'Slave Mistress' in Julian Bond's Obituary*, N.Y. TIMES (Aug. 20, 2015, 8:00 AM), http://publiceditor.blogs.nytimes.com/2015/08/20/times-regrets-slave-mistress-in-julian-bonds-obituary/ (last visited Nov. 11, 2015) ("Retiring this phrase ['slave mistress'] and expressing regret about using it has nothing to do with political correctness. It's about recognizing the history of slavery in America, at a time

white male supervisors at the camp, and Marcus's nine-year-old son was given away to a black family across the river in South Carolina.[15] After three years, the white man who was now living with Mandy told Marcus that he was being released; he drove Marcus into South Carolina and told him to "git," leaving him penniless, with a pair of overalls as his only possession.[16] Eventually Marcus made his way to Birmingham, Alabama, where he worked in coal mines and smelted iron.[17]

By 1904, when Marcus published his autobiography in a New York magazine, the Captain's convict or "peon" camp was one of six or seven that leased prisoners from the state.[18] Throughout Georgia, blacks as well as whites were held in similar conditions to pay off debts they had allegedly incurred:

> [T]here are hundreds and hundreds of farms all over the State where negroes, and in some cases poor white folks, are held in bondage on the ground that they are working out debts, or where the contracts which they have made hold them in a kind of perpetual bondage, because under those contracts, they may not quit one employer and hire out to another, except by and with the knowledge and consent of the former employer. One of the usual ways to secure laborers for a large peonage camp is for the proprietor to send out an agent to the little courts in the towns and villages, and where a man charged with some petty offense has no friends or money the agent will urge him to plead guilty, with the understanding that the agent will pay his fine, and in that way save him from the disgrace of being sent to jail or the chain-gang! For this high favor, the man must sign beforehand a paper signifying his willingness to go to the farm and work out the amount of the fine imposed. When he reaches the farm, he has to be fed and clothed, to be sure, and these things are charged up to his account. By the

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when race is at the forefront of the nation's consciousness. Language matters.") (on file with the Washington and Lee Law Review).

15. *See The New Slavery in the South—An Autobiography*, *supra* note 3, at 412 ("[M]y wife was still kept for a while in the 'Big House,' but my little boy, who was only nine years old, was given away to a negro family across the river in South Carolina, and I never saw or heard of him after that.").

16. *Id.* at 414.

17. *See id.* (describing how Marcus "begged [his] way to Columbia" and was hired to work in a coal mine in Birmingham, Alabama and "reckon[s] [he'll] die either in a coal mine or an iron furnace" but stated that "[e]ither is better than a Georgia peon camp").

18. *Id.* at 413.

> time he has worked out his first debt, another is hanging over his head, and so on and so on, by a sort of endless chain for an indefinite period, as in every case the indebtedness is arbitrarily arranged by the employer. In many cases it is very evident that the court officials are in collusion with the proprietors or agents, and that they divide the "graft" among themselves.[19]

More than a century later on the opposite coast in Washington State, David Ramirez struggled to cope with the fallout from criminal-justice debt that he had incurred a decade earlier.[20] In 2003, David pled guilty to a single count of residential burglary after entering the home of his ex-wife without her permission.[21] The court ordered him to pay $2,144 in restitution and over $1,147 in penalties and costs.[22] At the time he was earning only $10 per hour, and was also required to pay $500 a month in child support.[23] A couple of years later, because of medical problems and a lax economy, David lost his job and was receiving public assistance when he missed a court-ordered payment, and a warrant was issued for his arrest.[24] To have the warrant lifted, David had to pay the full amount owed plus an additional $100 "warrant fee" for a total of $800.[25] Unable to afford counsel, David lived in fear of arrest for a year until a lawyer from his church helped him negotiate a lower payment; after borrowing money, he was finally able to have the warrant lifted.[26]

Since then, David has resumed a reasonable payment plan and has not missed a payment, but it has not been easy.[27] He

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19. *Id.*

20. *See* ACLU OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 13–14 (2014) (describing the repercussions from criminal-justice debt incurred as a result of a felony after more than a decade).

21. *Id.* at 13.

22. *Id.*

23. *Id.*

24. *See id.* (describing how a warrant was issued for David's arrest in 2008 after he missed a payment due to being unemployed and on public assistance).

25. *Id.*

26. *See id.* ("[David] basically lived in fear of arrest for a year until a lawyer in [his] church agreed to help [him] negotiate a lower payment to quash the warrant.").

27. *See id.* (explaining that David pays $30 per month toward his

supports his four children, and the family relies on $400 a month in public assistance and food stamps.[28] David often must choose between paying his fines and meeting his family's needs, such as paying the utility bills or buying winter coats for his children.[29] His current debt balance of $1,839 is composed solely of interest, which continues to accrue and will take him another five years to pay off.[30] He described his situation in stark terms:

> The message the courts have sent to me over and over again is that if I don't pay in full every month, I'll go to jail and I'll lose everything. I've had judges tell me that they don't care what my other obligations are [because] LFOs [legal financial obligations] come first: first before food and shelter. It doesn't matter what the family suffers, so long as the court gets paid.[31]

Across the United States, even minor criminal charges, such as loitering, littering, and unpaid traffic tickets, trigger an array of fees, court costs, and assessments in both juvenile and criminal courts.[32] These fees can create insurmountable debt burdens for already struggling families.[33] One might think that the Supreme Court had effectively created a barrier against such charges in a series of cases beginning in 1970, when the Court concluded that extending a prison term for an inability to pay criminal-justice debt violated the Fourteenth Amendment's Equal Protection Clause in *Williams v. Illinois*.[34] In 1971, the Court found it

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criminal-justice debt, but because he is unemployed and has four children even the $30 per month can be difficult).

28. *Id.*

29. *See id.* at 14 ("Sometimes, [David] ha[s] to choose between paying the electricity bill and paying [legal financial obligations], or between buying [his] kid a winter coat and paying [legal financial obligations]."

30. *Id.* ("[David] ha[s] a balance of $1,838.74, and that's exactly what [he] owe[s] in interest."

31. *Id.*

32. *See* MITALI NAGRECHA ET AL., WHEN ALL ELSE FAILS, FINING THE FAMILY 4 (2013) ("This debt may range from money owed to a public defender (oxymoronic as this may seem) to fines, surcharges, and fees assessed at the time of sentencing and post-sentencing, such as victim restitution, court costs, and parole fees.").

33. *See id.* ("These fees and fines add up to a significant financial burden for mostly low-income defendants and are administered without much regard for an individual's ability to pay.").

34. *See* Williams v. Illinois, 399 U.S. 235, 240–41 (1970) (finding

unconstitutional to impose a fine as a sentence and automatically convert it into a jail term when the defendant cannot afford to pay the fine in *Tate v. Short*.[35] Then in 1983, the Court barred the revocation of probation for failure to pay a fine without first inquiring into a person's ability to pay in *Bearden v. Georgia*.[36] Yet, jurisdictions continue to ignore or "skirt the edges" of these requirements and consider almost every failure to pay willful.[37] Some courts even impose a "fines or time" alternative sentence that forces defendants to "choose" between jail and immediate payment in full.[38]

For low-income families, criminal-justice debt can lead to driver's license suspension, bank account or wage garnishment, extended supervision until debts are paid, additional court appearances or warrants related to debt collection and nonpayment, and extra fines and interest for late payment.[39]

"impermissible discrimination" where imprisonment exceeds the statutory limit and results due to "involuntary nonpayment of a fine"); *see also infra* Part III.A (discussing the facts and holding of *Williams v. Illinois* as part of an examination of criminal-justice debt and constitutional constraints the Supreme Court has found).

35. *See* Tate v. Short, 401 U.S. 395, 398 (1971) (finding it unconstitutional to "impos[e] a fine as a sentence and then automatically [convert] it into a jail term because the defendant is indigent and cannot forthwith pay the fine in full").

36. *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983) ("We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay."); *see also infra* Part III.A (discussing the facts and holding of *Bearden v. Georgia* as part of an examination of criminal-justice debt case law and related constitutional restraints).

37. *See* ALICIA BANNON ET AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 20 (2010) (examining how interviews with defendants and court personnel showed that many jurisdictions imprison defendants for unpaid debts without inquiring into ability to pay, or wait until after arrest or jail to put forth an inquiry).

38. *See, e.g.*, ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 23–24 (2010) (discussing a municipal court in New Orleans where judges regularly offer defendants one of two choices: either pay a fine or face time in jail).

39. *See, e.g.*, NAGRECHA ET AL., *supra* note 32, at 28–29 ("The frustration of debt obligations is not simply aimed . . . at the [child support] arrears that accumulate in prison that no amount of prison wages at existing levels can reduce; it is also about the continued financial obligations that individuals face once released."); *see also infra* Part III.C (examining how parents with criminal justice debt face unique hardships, from difficulties renting to an increased

When parents face such collateral consequences, the very act of meeting the most basic physical and emotional needs of one's children can become a formidable challenge.[40] Failure to meet those needs can trigger the intervention of Child Protective Services, potential neglect allegations, and further court hearings and fees.[41] For non-custodial parents, failure to pay child support can lead to time in jail, and the debt often continues to accrue during the period of incarceration, making it nearly impossible for the parent to become current.[42]

For youth in the juvenile court system, mandatory attorney fees, detention fees, restitution fines, and supervision fees impose burdens that increase the risk of recidivism.[43] When these circumstances are exacerbated by aggravating factors such as developmental delays, substance abuse, or mental illness,

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likelihood of problems for their children).

40. *See infra* Part III.C (examining how parents with criminal-justice debt face unique hardships, including difficulties renting and affording clothing for their children).

41. *See, e.g.*, Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 1023, 1043–44 (2003) (discussing a case where child services removed two children from their father's care when he could not afford to pay the electric bill, and the subsequent Illinois court case finding that neglect due to impoverishment should not so easily lead to a loss of parental rights); James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 92–96 (2001) (explaining that findings of parental neglect or abuse as well as failing to comply with court orders can lead to the removal of the child from the parent's custody).

42. *See* NAGRECHA ET AL., *supra* note 32, at 4 ("We include child support debt as part of criminal-justice debt because it often accrues while individuals are incarcerated and unable to pay.").

43. *See* Stacy Hoskins Haynes et al., *Juvenile Economic Sanctions: An Analysis of their Imposition, Payment, and Effect on Recidivism*, 13 CRIMINOLOGY & PUB. POL'Y 31, 37–38 (2014) (describing studies showing that burdens imposed by economic sanctions "might interfere with a juvenile's ability to reenter society successfully after a conviction, thereby increasing the risk of recidivism"); R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1796, 1811–12 (2015) (explaining that failure to make payments of court fees, fines, or restitution can lead to probation or incarceration and that the imposition of economic sanctions can make it difficult for offenders, including juveniles, to avoid recidivism); *see also infra* Part III.B (finding that because juveniles often do not have the means to pay fines and their parents lack the resources to assist them (and can face garnishment of wages for their children's fees), it can be difficult if not impossible for juveniles to avoid recidivism).

families without extensive support networks have little chance of succeeding.[44] In short, for children and their parents who are caught within the State's debt-enforcement regime, the threat of punishment is an ever-present specter, and incarceration always looms.[45]

One of the inherent ironies of criminal-justice debt is that rather than serving as a straightforward revenue source for the state, juvenile and criminal justice system fees require an extensive infrastructure to turn court and correctional officials into collection agents.[46] This hidden regressive tax, therefore, burdens the system and actually interferes with the proper administration of justice.[47] Moreover, states frequently divert court fees and assessments to projects that have little connection to the judicial system.[48]

Although the Thirteenth Amendment to the Constitution formally abolished slavery and involuntary servitude in 1865, the text created an exception for the punishment for crimes "whereof the party shall have been duly convicted."[49] It also explicitly provided for enactment of supplemental legislation to enforce the

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44. *See* NAGRECHA ET AL., *supra* note 32, at 19–20 (explaining that individuals must often heavily rely on family and friends for help making payments).

45. *See infra* Part III.B (discussing difficulties imposed on juveniles who face legal financial obligations).

46. *See, e.g.*, ACLU, IN FOR A PENNY, *supra* note 38, at 9 (explaining how utilizing court and correctional officers for collections cost money and may be "cost-ineffective"); *see also infra* Part III.D (explaining that the costs of employing individuals to collect fines and fees and enforce non-payment often results in little to no money flowing into the judiciary).

47. *See* ROOPAL PATEL & MEGHNA PHILIP, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 6 (2012) ("Judges are no longer able to act as impartial adjudicators if they are forced to act as collection agents. . . . As crime rates fluctuate, perverse policy incentives could develop.").

48. *See id.* ("This undermines the separation of powers by forcing courts to act as fundraisers for other programs or agencies created by the legislature or executives."); *see also infra* Part III.D (examining the widespread practice of states putting money obtained through legal financial obligations into general coffers rather than funding programs meant to decrease crime and lower recidivism).

49. U.S. CONST. amend. XIII, § 1; *see also* Ruffin v. Commonwealth, 62 Va. 790, 796 (1871) (describing convicts as "for the time being a slave of the State. He is civiliter mortus; and his estate, if he has any, is administered like that of a dead man").

amendment's substantive provisions.[50] Two years later, Congress passed the Anti-Peonage Act[51] in an attempt to prohibit the practice of coerced labor for debt.[52] Yet, in the wake of the Civil War, Southern states innovated ways to continue to reap many of the economic and labor market benefits of chattel slavery by enacting a network of criminal and penal statutes that effectively turned over convicted defendants—most of them newly freed slaves—to private employers, whether plantation owners or industrial corporations, ostensibly to "pay off" their criminal debts through enforced labor.[53] Among the innovations were criminal surety statutes that allowed employers to pay the court fines for indigent misdemeanants charged with readily manufactured crimes, such as vagrancy, adultery, and use of offensive language, in exchange for a commitment to work.[54] Surplus from these payments padded public coffers (as well as the pockets of court officials), and when workers' debt records were subsequently "lost" or there was an allegation of breach, surety contracts were extended and workers became further indebted to local planters and merchants.[55]

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50. *See* U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

51. *See* 42 U.S.C. § 1994 (2012) (originally enacted as the Peonage Abolition Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546) (providing the civil components of the Anti-Peonage Act); 18 U.S.C. § 1581 (2012) (originally enacted as Criminal Code, § 269) (providing the criminal penalties of the Anti-Peonage Act).

52. Peonage is "a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . Upon this is based a condition of compulsory service." Clyatt v. United States, 197 U.S. 207, 215 (1905).

53. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 921 (1998) (exploring "Black Codes" that were passed in Southern states that maintained "the substance, if not the form, of black bondage"); *see also infra* Part II.A (discussing "Black Codes" in Southern states and failures following the Civil War to dismantle such codes and implement laws that allowed for equal treatment of African Americans).

54. Klarman, *supra* note 53, at 922–23, 927*; see also* United States v. Reynolds, 235 U.S. 133, 146 (1914) ("This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract . . . this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict.").

55. *See Slavery by Another Name*, PBS, http://www.pbs.org/tpt/slavery-by-another-name/themes/peonage/ (last visited Nov. 11, 2015) (examining how "[t]he paperwork and debt record of individual prisoners was often lost" leading

Several decades later, the Supreme Court in *Bailey v. Alabama*[56] and *United States v. Reynolds*[57] finally invalidated laws criminalizing the simple contractual breaches that Southern states had used to skirt the general provisions of the Anti-Peonage Act.[58] Yet, these decisions ultimately had little impact on the "ever-turning wheel of servitude," and the practice persisted under alternative forms until after World War II.[59]

This Article examines the phenomenon of what I call "the new peonage." The Article is the first to analyze how the contemporary "justice tax," faced by people like David Ramirez and thousands like him, ultimately has the same societal impact as the post-Civil War practice of peonage:[60] both function to

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to "inescapable situations" for black men in the South) (on file with the Washington and Lee Law Review).

56. 219 U.S. 219 (1911)*; see also infra* Part II.B (laying out the facts and analysis in *Bailey v. Alabama* as part of a discussion on the history of legal peonage and the path towards findings of unconstitutionality).

57. 235 U.S. 133 (1914)*; see also infra* Part II.B (laying out the facts and analysis in *United States v. Reynolds* as part of a discussion on the history of legal peonage and the path towards findings of unconstitutionality).

58. Klarman, *supra* note 53, at 922–23 (explaining that Southern states would criminalize contract breaches through alternate tactics such as "false pretenses" and "fraudulent intent" laws).

59. *See id* at 926–30 ("[A]fter *Reynolds* in 1914, the [Supreme] Court decided no other peonage cases until World War II, when it finally invalidated laws from . . . recalcitrant states [such as Florida and Georgia]."); *see also infra* Part II.C (explaining how, in "the eight Southern States where more than seventy-five percent of the black population lived" law enforcement and the judiciary were complicit in "effectively nullif[ying] anti-peonage legislation and appellate case decisions").

60. Although a LexisNexis search found no legal scholarship closely analyzing the parallels between the post-Civil War system of peonage and the consequences of contemporary criminal-justice debt, there are a few recently-published law review articles that examine the consequences of debt resulting from economic sanctions issued by courts and that explore potential legal strategies for reform. *See, e.g.*, Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323 (2009) (arguing against court-ordered reimbursement, co-pays, and application fees imposed for indigent criminal defense); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349 (2012) (focusing on bars to voting resulting from unpaid criminal debt); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014) (providing a detailed analysis of colonial and early American statutory and court records regarding fines, and arguing that the Excessive Fines Clause of the Eighth Amendment should be interpreted to provide greater individual protections); Lauren-Brooke Eisen, *Paying for Your*

maintain an economic caste system. Utilizing paradigmatic as well as narrative modes of expression,[61] including case profiles,[62] it posits that the reconfiguration of the South's judicial system after the Civil War, which entrapped African Americans in a

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Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause, 15 LOY. J. PUB. INT. L. 319 (2014) (arguing that fees charged to inmates for room and board, work release, physical examinations, dental visits, medication, medical treatment, and other goods and services may violate the Excessive Fines Clause of the Eighth Amendment, and recommending litigation strategies for advocates); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045 (2006) (exploring the impact of application fees for appointed counsel in criminal cases); *see also* Vern Countryman, *Bankruptcy and the Individual Debtor—and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 826–27 (1983) (comparing changes to the bankruptcy code by the consumer credit industry as the equivalent of a return to post-Civil War peonage practice); Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165 (1990) (assessing whether the bankruptcy laws implicate the Thirteenth Amendment through the peonage laws); Kate Levine, Note, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 202–08 (2007) (discussing the rapid devolution of the right to counsel for indigent defendants once states were able to charge them attorney fees). Beyond the legal academy, sociologists and criminologists have conducted empirical research on the impact of monetary sanctions imposed by courts. *See, e.g.*, Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AMER. J. SOC. 1753 (2010) (finding that monetary sanctions are imposed on a substantial majority of the millions of people convicted of crimes annually, and that this indebtedness reproduces disadvantage by reducing family income and increasing the likelihood of ongoing criminal justice involvement).

61. *See* JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 11–13 (1986) (discussing the two modes of cognitive functioning: the paradigmatic or logico-scientific one that relies on abstract analysis and principled hypotheses, and the narrative one that leads instead to "good stories, gripping drama, believable (though not necessarily 'true') historical accounts"); *see also* Gregory S. Berns et al., *Short- and Long-Term Effects of a Novel on Connectivity in the Brain*, 3 BRAIN CONNECTIVITY 590 (2013) (finding that reading narratives has both a short- and long-term effect on the biology of the brain, and that reading a novel may cause changes in resting-state connectivity of the brain that persists for at least a few days); Paul J. Zak, *Why Your Brain Loves Good Storytelling*, HARV. BUS. REV. BLOG (Oct. 28, 2014), https://hbr.org/2014/10/why-your-brain-loves-good-storytelling/ (last visited Nov. 11, 2015) (finding, based on the neurobiology of storytelling, that character-driven stories with emotional content result in a better understanding of the writer or speaker's thesis) (on file with the Washington and Lee Law Review).

62. *See supra* notes 20–31 and accompanying text (discussing David Ramirez); *infra* notes 255–270, 291–300 and accompanying text (describing case profiles).

perpetual cycle of coerced labor, has direct parallels in the two-tiered system of justice that exists in the juvenile and criminal courtrooms of today. Part II of the Article chronicles the legal history of peonage and the development of alternative mechanisms for coercing black labor after the passage of the Thirteenth Amendment and the Black Codes through the early twentieth century.[63] Part III establishes the parallels to the present-day criminal justice system and argues that contemporary Supreme Court decisions intended to end the use of debtors' prisons ultimately had limited impact.[64] This analysis and the analogy to post-Civil War peonage does not depend upon a demonstration that the legislative motives during these two eras are precisely the same; it is enough to underscore the similar impact of the contemporary system in trapping momentarily errant individuals in an unyielding web of legal strictures. Part III also highlights the collateral consequences of criminal-justice debt for families as well as the fiscal impact and social costs that criminal-justice fees have on states.[65] Part IV advances several commonsense proposals to end the phenomenon of the new peonage, beginning with data collection and impact analysis of fines, restitution, and user fees.[66] It also considers proposals to establish the right to counsel in nonpayment hearings that can lead to incarceration or an extension of probation or parole, and it emphasizes the import of having states focus on rehabilitation through job training and placement, rather than the collection of criminal-justice fees or compulsory community service that interferes with employment. Part V concludes the Article.[67]

II. Legal History of Peonage

With the end of the Civil War and the passage of the Thirteenth Amendment, slavery ceased to be a formal system of labor control, but this dramatic political and legal change did not have much effect on the fundamental attitudes of dispossessed

63. *See infra* Part II (Legal History of Peonage).
64. *See infra* Part III (The New Peonage).
65. *See infra* Part III (The New Peonage).
66. *See infra* Part IV (Proposals for Reform).
67. *See infra* Part V (Conclusion).

slave owners.[68] The subsequent creation of the "Black Codes" and the development of the system of peonage were undergirded by the belief of most Southern whites that they had a "proprietary interest in black labor and that blacks would not work unless coerced to do so."[69] As a result, slavery was replaced by the equally effective system of peonage.[70] Although the latter lacked the extreme brutality and unyielding violence characterized by the former, the degradation that it unleashed upon the individual—at least in economic terms—was comparable.[71] Moreover, neither the federal government nor state legislatures put up much resistance to the shift from one system to another, enabling local court systems to actively "perpetuate the substance, if not the form, of black bondage."[72] As historian Douglas A. Blackmon has explained:

> By 1900, the South's judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans. . . . Sentences were handed down by provincial judges, local mayors, and justices of the peace—often men in the employ of white business owners who relied on the forced labor produced by the judgments. Dockets and trial records were inconsistently maintained. Attorneys were rarely involved on the side of blacks. Revenues from the neo-slavery poured the equivalent of tens of millions of dollars into the treasuries of Alabama, Mississippi, Louisiana, Georgia, Florida, Texas, North Carolina, and South Carolina.[73]

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68. *See* DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 1–3 (1978) (explaining that the South had "no intention of dealing with a truly free black labor force," reflected by legislation that implemented criminal penalties for breach of labor contracts, gave rewards for law enforcement officers who returned black "laborers," and imposed criminal penalties for "enticement of a servant").

69. Klarman, *supra* note 53, at 928.

70. *See* NOVAK, *supra* note 68, at XV ("Without fanfare the freed slave was plunged into a new labor system [peonage] that degraded his value as a worker and made his new freedom a mockery, in economic terms at least.").

71. *See e.g.*, *The New Slavery in the South—An Autobiography*, *supra* note 3 ("Really, we had made ourselves lifetime slaves, or peons, as the law called us. But, call it slavery, peonage, or what not, the truth is we lived in a hell on earth what time we spent in the Senator's peon camp.").

72. Klarman, *supra* note 53, at 921.

73. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 7–8 (2008).

Part II chronicles this legacy.[74]

A. The Black Codes

In 1864, the end of the Civil War meant four million newly freed slaves were released into a struggling economy.[75] The war had disrupted the South's industry and destroyed much of its property, and emancipated men were leaving plantations in droves.[76] From the perspective of white farmers, merchants, and businessman, there was no clear mechanism for maintaining racial control while simultaneously reviving the economy and minimizing opportunities for active resistance or rebellion by former slaves.[77] With the passage of the Thirteenth Amendment in 1865, tensions increased.[78]

During the period of Reconstruction from 1863 to 1877, supervision by the federal government initially increased and then gradually lessened, eventually leaving the South free from interference except for the basic requirement that emancipation occur.[79] While this period brought ostensibly "new" state legislatures and administrators, in reality these were the same men who had run, or at least reflected the values of, the Old South.[80] For example, in its first postwar constitutional

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74. *See infra* Part II (The New Peonage).

75. *See generally, e.g.*, ANTOINETTE G. VAN ZELM, TENNESSEE CIVIL WAR NATIONAL HERITAGE AREA, HOPE WITHIN A WILDERNESS OF SUFFERING: THE TRANSITION FROM SLAVERY TO FREEDOM DURING THE CIVIL WAR AND RECONSTRUCTION IN TENNESSEE, http://www.tn4me.org/pdf/Transition fromSlaverytoFreedom.pdf.

76. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 27 (2010) (laying out the conditions and mindset which existed in the Southern States immediately following the Civil War).

77. *See id.* ("Without the labor of former slaves, the region's economy would surely collapse, and without the institution of slavery, there was no longer a formal mechanism for maintaining racial hierarchy and preventing 'amalgamation' with a group of people considered intrinsically inferior and vile.").

78. *See generally* NOVAK, *supra* note 68.

79. *See* NOVAK, *supra* note 68, at 1 ("Reconstruction left the South relatively free from interference from the federal government, save for the requirement that emancipation take place.").

80. *See id.* at 1–2 ("Therefore, shortly after the end of the war, the

convention, Mississippi was guided by the following articulation of its mission:

> The institution of slavery having been destroyed . . . the legislature at its next session . . . shall provide by law for the protection and security of the person and property of the freedmen of the State, and guard them and the State against any evils that may arise from their sudden emancipation.[81]

As a result, the laws passed during this "reconstructed" period of the Confederacy in 1865 and 1866 clearly reflected the fact that the South had "no intention of dealing with a truly free black labor force."[82] The Black Codes and the subsequent system of peonage or "debt slavery" were designed to fill the gap.[83]

The Black Codes of 1865–1867, although short-lived and characterized by racially discriminatory terminology, presaged the system of peonage as the South's answer to the Thirteenth Amendment.[84] For instance, "An Act to Confer Civil Rights on Freedmen," passed in Mississippi in 1865, barred blacks from renting land and farming on their own outside city limits; required every freedman to enter into a labor contract or face vagrancy charges; mandated arrest for breach of contract "without good cause"; prevented blacks from leaving one employ for another by imposing civil and criminal penalties for attempts to "entice" a laborer from his master; imposed criminal penalties for such malleable offenses as running away, displaying lewd behavior, and being an idle or disorderly person; allowed convicted blacks to be hired out at auctions in order to pay their fines and costs; and authorized a "head" tax on all blacks between the ages of eighteen and sixty, for which failure to pay was evidence of vagrancy, triggering further penalties.[85]

Confederacy had 'constructed' itself with new state legislatures and administrations. It should be made clear, however, that the new legislators were, by and large, the same men who had run the Old South, or at least they reflected its values.").

81. THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 63 (1965).

82. NOVAK, *supra* note 68, at 2.

83. *See id.* (arguing that peonage and the Black Codes oppressed recently emancipated slaves).

84. *See id.* ("With formal slavery barred, a complex of laws setting up a system of peonage or debt slavery was formulated to fill the gap.").

85. *See id.* at 2–3 (describing the Act to Confer Civil Rights on Freedmen).

Similar in intent, an Act to regulate "the Domestic Relations of Persons of Color" was passed in South Carolina in 1865.[86] Under this law, all labor contracts were enforced by sanctions; laborers needed their master's written permission to leave the plantation or have visitors; freedmen could not operate a store or work as a craftsman without permission of the local justice of the peace and a fee payment of up to $100; failure to pay a poll tax was evidence of vagrancy; vagrancy was broadly defined; and a convicted vagrant could be hired out for the length of the sentence.[87]

The leasing of convict labor also began during this period, initially to establish some means of control over prisoners, as most Southern penitentiaries had been destroyed during the war.[88] In the early 1870s, convict leasing became profitable; it was reliable and cheap, and by the 1880s, it had reached its peak.[89] As one Southern senator remarked, "No matter what goes wrong, you have no labor strike."[90] As a result, with no means to pay off their alleged "debts," prisoners were sold as forced laborers to lumber camps, brickyards, railroads, farms, plantations and dozens of corporations throughout the South.[91] During this period, nine Southern states adopted vagrancy laws and eight enacted convict laws to allow for the leasing of county prisoners to plantation owners and private companies.[92]

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86. *Id.* at 4.

87. *See id.* at 4–5 (enumerating the restrictions imposed on blacks by the Domestic Relations of Person of Color Act).

88. *See id.* at 31 (outlining the inception of convict leasing during the Reconstruction period, the first leasings "initiated by army commanders in the South," and the shift in rationale from the desire to establish a temporary means of control over formerly-housed convicts to a profitable system of convict leases).

89. *See id.* at 32 ("By the mid-1880s the convict lease system had reached its peak. Convict labor was lauded as reliable and cheap by the happy exponents of entrepreneurial liberty in the 'Redeemed' South.").

90. *Id.* at 33.

91. *See* ALEXANDER, *supra* note 76, at 31 (describing the custom of selling prisoners with debts as forced laborers to Southern industries).

92. *See* WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861–1915 at 28–33 (1991) (asserting that the main objective of the convict laws was to "replace the labor controls of slavery and to limit the mobility of the black labor force" and that "states sought to control black mobility through the creation of an unobtrusive

It is notable that during Reconstruction, no Southern states passed laws that effectively dismantled the labor restrictions imposed by the Black Codes.[93] Even in those states where what was derisively termed the "carpet-bagger-ignorant Negro coalition" was strong,[94] they failed to establish a minimum wage, provide for oversight of employers' debt calculations, or offer legal review of criminal charges brought against emancipated slaves.[95] Instead of directing their energies to labor rights, the Reconstruction Congress in Washington focused its chief attention on the broadest and most basic interpretation of civil rights: ending slavery with the passage of the Thirteenth Amendment; giving full citizenship to blacks with the Civil Rights Act of 1866;[96] establishing suffrage (at least in theory) for black men with the Fifteenth Amendment; and making interference with voting a federal offense and violent infringement of civil rights a crime within the Ku Klux Klan Acts.[97]

With little Congressional appetite to regulate the coercive systems of labor that developed during the periods of Reconstruction and what Southerners termed "Redemption,"[98]

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legal structure that could be selectively applied").

93. *See id.* at 35 ("If laws did not manifest obvious discrimination against the freedmen, they often survived.").

94. NOVAK, *supra* note 68, at 19.

95. *See id.* at 18 (describing the lack of any legislative efforts resembling those mentioned in the text, which "were just the sort of legislation which ought to have come from [state legislatures]").

96. *See* CIVIL RIGHTS ACT, 14 STAT. 27 (1866) (amended by 42 U.S.C. § 1981 (1991)) (proclaiming that "all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude" shall enjoy equal benefits and burdens of citizenship therein).

97. *See* ENFORCEMENT ACT, 17 STAT. 13 (1871) (as amended by 42 U.S.C. § 1983 (1979)) ("Any person who . . . shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any [constitutional guarantees] shall . . . be liable to the party injured in any action . . . or other proper proceeding for redress . . . ."). Southern legislatures also began to address matters related to the implementation of desegregation and the establishment of public education. NOVAK, *supra* note 68, at 18–19.

98. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 at 587–601 (Harper Perennial 2014) (1988); *see also Freedom: A History of the US, A Failed Revolution*, PBS (2002), http://www.pbs.org/wnet/historyofus/web07/segment5_p.html (last visited Nov. 11, 2015) (describing

sharecropping became the norm for agricultural laborers.[99] After the war, there was a shortage of cash. Former slaves were typically paid half in currency, with the other half to be paid only when the crop was harvested.[100] If basic goods were lent to the former slave, the employer (a planter or merchant) placed a lien on the crops, so that even if the crops were abundant enough to remove the worker's outstanding debts, he would still need to borrow again to survive the winter.[101] Under another scenario, the planter subtracted the costs of food, clothing, and shelter from the worker's wages, but because the planter unilaterally set the value of such goods, the "sentence" could be made to run a year or more.[102] Moreover, emancipated slaves had little bargaining power to negotiate the terms of their labor contracts, and although any breach of contract by the employer was a punishable offense, very few employers were ever prosecuted under the statute.[103] Because of "enticement" laws, employers could not "entice away" another's employees, and most workers lacked the means to relocate either within the South or to the North, the result of Southern white efforts to "circumscribe black freedom of movement."[104] Laborers also found themselves trapped

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Redemption as a movement during the 1860s–1890s by Southern Democrats who used the Black Codes, violence, and voter disenfranchisement laws to keep blacks and Republicans out of power) (on file with the Washington and Lee Law Review).

99. *See* COHEN, *supra* note 92, at 19 ("As the system developed, sharecropping began to emerge as the dominant means of organizing Southern agricultural labor . . . .").

100. *See id*. (explaining that after the Civil War there was "an acute shortage of cash, which led to the rise of an arrangement whereby the workers agreed to accept as wages a portion of the crop to be distributed at the end of the season").

101. *See* NOVAK, *supra* note 68, at 19 (describing the establishment of sharecropping and the rise of the lien instrument as "an instrument by which [black sharecroppers were] bound to the land").

102. *See id.* at 35 ("As the planter set the value of [food, clothing, and shelter], with a little judicious bookkeeping the sentence could easily be made to run a year or more.").

103. *See id.* at 20 ("Theoretically, the fact that the planter was subject to any punishment for breach of contract was an advancement over the provision in the Black Codes. As a practical matter, it had little meaning, since employers were simply not prosecuted under the statute.").

104. *See* COHEN, *supra* note 92, at xiii (explaining that a foundational goal of his book was to tell the story of black mobility "against the background of

within the strictures of the "fine-cost" system, with one study finding that in a single month in a Georgia county, 149 people (almost all blacks) were sentenced to a total of nineteen years of labor for "crimes no more serious than walking on the grass or spitting on the sidewalk."[105]

In short, during Reconstruction, "the newly freed agricultural worker was, by consensus, placed in a position of peonage,"[106] with the laws themselves—affirmed by the local courts—ensuring this result. Because every state had a provision in its constitution barring imprisonment for debt, the validity of these laws relied on the argument that fraudulent intent—or having false pretenses—when entering into the contract was the object of the penalty, rather than the breach itself.[107] In this way, courts asserted that the peonage system was not the equivalent of involuntary servitude because although the employer could not force the worker to stay, the worker could be punished for leaving.[108] This conclusion was supported by the fact that the laws stipulated that the mere failure to adhere to the contract was presumptive evidence of false pretenses or fraud at its inception.[109] Of course, "[t]his assessment ignored the fact that the statute provided that imprisonment did not relieve the debt; punishment could continue indefinitely until the contract provisions had been met."[110]

For decades after the passage of the Thirteenth Amendment, the federal government did nothing to stop the progress of

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southern white efforts to circumscribe black freedom of movement" through the use of labor-control laws).

105. *See* NOVAK, *supra* note 68, at 35 (discussing the findings of Judge Emory Speer, a "bitter opponent of peonage" whose personal survey of the Bibb County, Georgia court records found the results displayed in the accompanying text).

106. *Id.* at 28.

107. *See id.* at 38 ("This interpretation (punishing fraud rather than breach), is absolutely vital to the validity of these laws, for every state had a provision in its constitution barring imprisonment for debt.").

108. *See id.* (detailing the argument by which courts cited the "voluntary" nature of the system in place, claiming that employers could not prevent workers from leaving, and thus all employers and courts could do was punish a worker after the fact).

109. *See id.* ("Failure to perform the services contracted for was presumptive evidence of fraud.").

110. *Id.* at 39.

peonage practices. State laws enforcing peonage were not challenged in the courts, and the Anti-Peonage Act of 1867, aimed originally at the system of peonage that existed in New Mexico while under Spanish rule, was rarely, if ever, invoked.[111] By the early 1900s, however, the Progressive Movement became more interested in the plight of blacks, including those working under debt contracts.[112] With new waves of immigration, whites were brought into the labor pool and made peons, and the U.S. Senate became motivated to examine the practice.[113] After a lone Alabama judge declared one of several peonage laws unconstitutional,[114] the Supreme Court in *United States v. Clyatt*[115] acknowledged that peonage unconstitutionally allows for punishment on the basis of debt.[116] Between 1905 and 1911, *Clyatt* opened the way for lower federal courts to find that the Anti-Peonage Act applied to a wide variety of scenarios.[117] Yet, states vigorously defended their labor laws and continued to uphold their contract and enticement laws as valid exercises of

111. *See id*. at 36, 44 (explaining the origin of the Spanish peonage system in the New Mexico territory, its incorporation into U.S. law in 1846, and the subsequent targeting of it by the first anti-peonage legislation).

112. *See id*. at 46 (explaining the increased interest of the federal government in "the plight of the Southern peon" at the beginning of the twentieth century, the rise of the Progressive Movement and the writings of Ray Stannard Baker, and the "agitation over lynchings of blacks in the South").

113. *See id.* (describing the actions of the Senate in examining the United States Immigration Commission and introducing legislation in favor of immigrants in response to the trend of white immigrants being subjected to peonage).

114. *See id.* at 48–49 (chronicling the holdings of one Judge Thomas G. Jones in his methodical rejection of peonage laws, culminating in a 1903 decision where he declared an Alabama contract-enticement act unconstitutional).

115. 197 U.S. 201 (1905).

116. *See id*. at 215–17 (describing the operation of the peonage system through "contracting to pay [one's] indebtedness through labor or servitude" and discussing the scope of constitutional authority over the system, ultimately determining that such a system is contravenes the Thirteenth and Fourteenth Amendments); *see also* NOVAK, *supra* note 68, at 51 (discussing the unconstitutionality of peonage through the decisions of several courts).

117. *See* NOVAK, *supra* note 68, at 52 (detailing the court's holding that the Anti-Peonage Act applies to cases of debtor coercion, employer bribes and fraud, employer imprisonment and procurement of servants, false accusations of laborers by employers, and magistrate or officer involvement in knowingly-fraudulent arrests and convictions).

state power, setting the stage for the Supreme Court to weigh in, as it did with *Bailey v. Alabama* in 1911.[118]

B. Bailey v. Alabama *and* United States v. Reynolds

In Alabama in December, 1907, Alonzo Bailey, a black man, entered into an annual contract as a farm laborer with the Riverside Company for twelve dollars a month.[119] He received an advance of fifteen dollars to be deducted in monthly installments, but he left after working for six weeks and without returning the advance.[120] The Riverside Company had Bailey arrested under the state's false pretenses law, which allowed for the presumption of fraudulent intent, and an Alabama evidentiary rule prohibited laborers indicted under this law to testify to their "uncommunicated motives."[121] Given these evidentiary roadblocks for defendants, it is unsurprising that Bailey was readily convicted, with the only witness against him being "his white employer with the contract in his hand—which, by the way, was an unacknowledged and unwitnessed contract."[122] Not having the money, Bailey was sentenced to 136 days of hard labor: twenty days for the $30 fine plus 116 days to cover his

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118. 219 U.S. 219 (1911).

119. *See id*. at 229 (describing the initial employment agreement entered into by Bailey).

120. *See Bailey*, 219 U.S. at 229 (describing the events that led to the case); *see also* COHEN, *supra* note 92, at 288 ("[Bailey] was given an advance of fifteen dollars to be taken out of his monthly pay. When after working for just over a month, he left without refunding the advance, the Riverside Company had Bailey arrested . . . .").

121. *See id.* (explaining the "read-in" enforcement of the evidentiary statute, and its practical effect "that the accused, for the purpose of rebutting the statutory presumption, shall not be allowed to testify 'as to his uncommunicated motives, purpose, or intention'" (quoting *Bailey v. State*, 161 Ala. 77, 78 (1909))). The legislatures of Georgia in 1903 and Florida in 1907 passed similar statutes that allowed for breach of contract to be prima facie evidence of the worker's intent to injure or defraud the employer. *See* PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969 at 67 (1972) (detailing the development of Southern legislation that facilitated the peonage system).

122. Ray Stannard Baker, *A Pawn in the Struggle for Freedom*, AM. MAG. 72, Sept. 1911, at 609.

court costs and lawyers' fees.[123] As Booker T. Washington said of the Alabama law at the time:

> This simply means that any white man, who cares to charge that a Colored man has promised to work for him and has not done so, or who has gotten money from him and not paid it back, can have the Colored man sent to the chain gang.[124]

Bailey unsuccessfully appealed his case to the Alabama Supreme Court, and by 1911 the case had reached the U.S. Supreme Court.[125] His lawyers argued that the statute's true intent was "to enable the employer to keep the employee in involuntary servitude by the overhanging menace of prosecution."[126] The lawyers representing Alabama argued that allowing a simple breach of contract to serve as prima facie evidence of fraud did not "overcome" the absolute presumption of innocence for all defendants and the rigorous standard of proof beyond a reasonable doubt.[127] The Court rejected this argument and held in an opinion by Associate Justice Charles Evans Hughes that the state could not punish a servant for failure or refusal to serve out his contract based on the presumption that he had entered the contract under false pretenses.[128] Although the Court refused to acknowledge that the law was racially discriminatory,[129] it recognized that the statute was—in essence—the legal cornerstone of peonage and invalidated it:[130]

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123. *Bailey*, 219 U.S. at 231; COHEN, *supra* note 92, at 288.

124. DANIEL, *supra* note 121, at 67.

125. Bailey v. Alabama, 219 U.S. 219, 231 (1911).

126. COHEN, *supra* note 92, at 288.

127. *See id.* at 289 (describing the argument and labeling it as "disingenuous").

128. *See Bailey,* 219 U.S. 244 ("If [the State] cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment."). *But see Bailey*, 219 U.S. at 246 (Holmes, J., dissenting) ("Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right; it does not make the laborer a slave.").

129. *See Bailey*, 219 U.S. at 244 ("The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho.").

130. *See* COHEN, *supra* note 92, at 289 ("'[A]lthough the statute in terms is to

> It is the *compulsion* of the service that the [Alabama] statute inhibits, for when that occurs the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor.[131]

Three years later in *United States v. Reynolds*,[132] the Court, in an opinion by Associate Justice William R. Day, utilized the same reasoning and strategy to strike down Alabama's criminal-surety statute.[133] Ed Rivers, a black man, was convicted in Alabama of larceny, fined $15 and assessed costs of $43.75.[134] J.A. Reynolds appeared as a surety for him and paid the amount of the fine and costs to the state.[135] On May 4, 1910, Rivers contracted with Reynolds to work as his farmhand for nine months and twenty-eight days at the rate of $6 per month in order to pay off the fines and costs.[136] On June 6th, Rivers quit the job, and was arrested, charged with violation of a "criminal contract," convicted, and fined $87.[137] At this point, Gideon W. Broughton, a neighboring planter, served as the surety and entered into a similar contract with Rivers to work as a farmhand for fourteen months to pay off his fines.[138] Rivers fled from Broughton after a few days, incurring a new fine of $300 dollars plus $112 in costs, and was

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punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt.'" (quoting *Bailey*, 219 U.S. at 231)).

131. Bailey v. Alabama, 219 U.S. 219, 242 (1911) (emphasis added).

132. 235 U.S. 133 (1914).

133. *See id.* at 144 ("'[P]eonage, however created, is compulsory service, involuntary servitude . . . . A clear distinction exists between peonage and the voluntary performance of labor or rendering services in payment of debt.'" (quoting *Clyatt*, 197 U.S. at 215)). *See also id.* at 150 (Holmes, J., concurring)

> There seems to me nothing in the Thirteenth Amendment or the Revised Statutes that prevents a state from making a breach of contract, as well a reasonable contract for labor as for other matters, a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain, even though it will cause greater trouble by and by.

134. *Id.* at 139.

135. *Id.*

136. *Id.* at 140.

137. *Id.*

138. *Id.*

ultimately sentenced to one year on the chain gang, as it was apparent that he would not remain on a farm "even when threatened with continual arrest."[139] The federal district court held that this cycle of entrapping Rivers did not violate the Anti-Peonage Act and that the Alabama Code justified his punitive treatment.[140] The Supreme Court disagreed, holding that under such contracts,

> labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. . . . Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken, may be again prosecuted, and the convict is thus kept chained to an ever-turning wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the State or paid money in his behalf.[141]

Despite these Supreme Court decisions striking down key aspects of the practice, peonage continued—not only in Alabama but throughout the South.[142] The labor contract laws of Georgia and Florida, for instance, remained on the books for another thirty years, as did the legal basis for the practice.[143] In a magazine essay written after *Bailey* was decided in 1911, the author characterized Alonzo Bailey as "a mere pawn in the

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139. DANIEL, *supra* note 121, at 26–27.

140. *See* United States v. Reynolds, 235 U.S. 133, 140–41 (1914) ("The rulings in the court below upon the plea and demurrers were that there was no violation of the Federal statutes, properly construed, and also held that the conduct of the defendants was justified by the provisions of the Alabama Code, upon which they relied.").

141. *Id.* at 146.

142. *See* DANIEL, *supra* note 121, at 79 (discussing the continuation and evolution of Southern peonage after the *Reynolds* and *Bailey* decisions).

143. *See id.* at 80 ("[N]either the Justice Department nor a civil rights or labor group finished what Bailey's supporters began in 1911. Peonage continued to the 1940s and beyond, and the legal basis for the practice endured thirty years after the precedent-setting *Bailey* case had been decided.").

battle," and asserted that the eponymous Supreme Court case "is no final panacea":

> Neither individual men nor races rise merely by decisions or laws. While so many Negroes are . . . poverty stricken, and while so many white men are shortsighted enough to take advantage of this . . . poverty, so long will forms of slavery prevail . . . .[144]

Although there were few thorough investigations or even approximate estimates of the number of blacks who fell prey to peonage, there was little doubt that the practice was prevalent and that it operated to perpetuate black exploitation.[145] A.J. Hoyt, an investigator for the Department of Justice, sarcastically remarked in 1907 that in the three states of Georgia, Alabama, and Mississippi, "investigations will prove that 33 1/3 percent of the planters operating from five to one hundred plows, are holding their Negro employees to a condition of peonage, and arresting and returning those that leave before alleged indebtedness is paid."[146] In the same year, a citizen in Florida remarked, "Slavery is just as much an 'institution' *now* as it was before the war."[147]

Yet, the perpetuation of such a system would not have been possible without the complicity of the judicial system, which kept the wheel of servitude turning. As Langston Hughes wrote in 1931:

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144. Baker, *supra* note 122, at 610.

145. *See* DANIEL, *supra* note 121, at 20 ("Documentary evidence of peonage in the nineteenth century remains sketchy, for few observers were familiar with what constituted peonage. Yet from travelers' accounts, official reports, congressional hearings, and other sources, there is strong evidence that peonage was no twentieth-century invention.").

146. *Id.* at 22, 108–09. Hoyt, of course, was referring to the three-fifths compromise that was reached between delegates from the South and the North during the 1787 U.S. Constitutional Convention over how slaves would be counted when determining a state's total population for legislative representation and taxing purposes. *See* Brooke E. Newborn, *Correcting the Common Misreading of the "Three-Fifths" Clause of the U.S. Constitution: Clarifying the "Hostile Faction"*, 80 PA. B. ASS'N Q. 93, 96–97 (2009) (explaining the process of arriving at the compromise and the meaning of it). The ultimate agreement was that persons who were not free, "including those bound to Service for a Term of Years," would be counted as "three fifths of all other Persons." U.S. CONST. art. 1, § 2, ¶ 3.

147. DANIEL, *supra* note 121, at 22 (emphasis in original).

> That Justice is a blind goddess
> Is a thing to which we poor are wise:
> Her bandage hides two festering sores
> That once, perhaps, were eyes.[148]

The next section explores the central role of the Southern judicial system in sustaining the peonage regime.

C. The Complicity of the Judicial System

By the twentieth century, peonage in the South had developed into a "confusing mass of customs, legalities, and pseudo-legalities,"[149] which the judicial system had enabled to flourish.[150] Despite the Anti-Peonage Act and landmark Supreme Court decisions in *Bailey* and *Reynolds*,[151] most Southerners "acquiesced in or approved of" peonage, either because they did not perceive it to be morally or ethically wrong or because it was "shrouded in overtones of legality and made respectable by the approval of community rules."[152] In this way, "public support for the practice made [criminal] investigations difficult and [peonage] convictions rare."[153]

With the complicity of law enforcement, court administrators, and all-white juries, the South effectively nullified anti-peonage legislation and appellate case decisions,

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148. Langston Hughes, *Justice*, *in* THE NEW MASSES 15 (1931). *See also* ROBERT SHULMAN, THE POWER OF POLITICAL ART: THE 1930S LITERARY LEFT RECONSIDERED 248–50 (2000) (explaining that in the 1923 version of the poem, Hughes had written, " . . . we black are wise . . ." and discussing the possible reasons for the textual change from "black" to "poor" in the later versions).

149. DANIEL, *supra* note 121, at 25.

150. *See id*. at 25–26 (describing how "much peonage stemmed from custom, not law" and giving examples of blacks settling purported contract debts with "no aid from a court" as they became peons—additionally, "court-approved contract with prisoners proved even more vicious" in perpetuating the custom of peonage).

151. *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 708 (1982) (calling *Bailey* and *Reynolds* "landmarks in the slow process of exorcising the vestiges of slavery from American law").

152. DANIEL, *supra* note 121, at 23.

153. *Id*.

replacing them with local custom.[154] Law enforcement officials arrested blacks for manufactured crimes, such as vagrancy or engaging in loud talk with white women, and held them in local jails; judges, mayors, and justices of the peace working for—or getting kickbacks from—the business owners who benefitted from the labor entered sentences comprised of fees and costs; laborers then made informal settlements with the business owners to pay their debts, real or imagined, in exchange for their release; and so on.[155] These "cases" rarely made it into a courtroom, and when they did, attorneys almost never represented blacks, and court dockets and other record-keeping was poor, if not nonexistent.[156] As a result, the eight Southern states, where more than seventy-five percent of the black population lived, had their coffers filled with the bounty extracted from former slaves and their descendants via the peonage system.[157]

While the informal agreements between planters and workers negotiated through the bars of a local jail cell were clearly exploitative, the formal contracts—the breach of which was litigated in court—could be even more punitive.[158] Ed Rivers, for instance, of *United States v. Reynolds*, [159] ultimately served a year on a chain gang for the act of simple breach of contract but would have served only two months in jail if he had opted for that

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154. *See id*. at 25 (describing the norm of corrupt practices among local law enforcement, the similarities between Southern legislation and the Black Codes, the lack of court advisement in the settlement of purported contract debts, and other state and local law regimes that "favored employers").

155. *See* Mae C. Quinn, *In Loco Juvenile Justice: Minors in Munis Cash from Kids, and Adolescent Pro Se Advocacy Ferguson and Beyond*, BYU L. REV. (forthcoming Dec. 2015) (discussing that many justices of the peace received jobs "as a result of political patronage or by offering special treatment to influential community members," and were "paid from fines and fees they were able to collect from litigants, raising questions about their objectivity").

156. BLACKMON, *supra* note 73, at 7–8 (discussing the reconfiguration of the South's court system at the turn of the twentieth century that allowed landowners to coerce African Americans into labor contracts).

157. *See id.* (describing the prevalence of labor contracts that former slaves were forced to accept).

158. *See* DANIEL, *supra* note 121, at 26 (explaining the punitive nature of formal sharecropping contract construction, as well as general court sympathy for that system).

159. *See supra* notes 133–142 and accompanying text (describing the facts and holding of *United States v. Reynolds*, 235 U.S. 133 (1914)).

penalty when he had first pled guilty in court to larceny.[160] Federal employees assigned to investigate allegations of peonage often displayed an "apathy or acquiescence" regarding the system, and Southern juries were notorious for having no sympathy for blacks alleging that they were entrapped by peonage.[161] One Justice Department official in Florida explained his failure to sustain a conviction in a peonage case resulted from the fact that "no white jury will convict a white man for anything he might do to a Negro."[162]

In the decades to follow, despite the migration of thousands of blacks to the North, the growth of the industrial economy during World War I, and the introduction of the mechanization of agriculture, patterns of exploitation continued among Southern laborers.[163] In the 1920s, many planters still considered blacks to be no more than private property.[164] Complaints filed with the NAACP and the Department of Justice confirm that black laborers were not only subjected to peonage but to acts of physical brutality by white employers in an attempt to coerce them to continue working.[165] By 1945, sources suggest that although peonage had diminished, reports of abuses continued—many of them from outside the South.[166] A Senate Subcommittee heard testimony in 1951 that peonage had "yet to be obliterated" in

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160. *See* DANIEL, *supra* note 121, at 27 ("Had Rivers chosen jail when he had first pled guilty to petit larceny, he would have served only about two months.").

161. *See id.* at 32–33 (explaining the dismissal of a case in which the attorney successfully argued for dismissal because the witnesses were "principally negroes," and detailing the notoriety of Southern juries' prejudice against the enforcement of peonage laws through the report of U.S. Attorney William Armbrecht).

162. *Id.* at 33.

163. *See id.* at 132 (discussing the continued exploitation of blacks in the 1900s).

164. *See id.* ("[F]ederal apathy, local customs, and community acquiescence allowed peonage to exist almost unhindered in the 1920s as it had a generation earlier.").

165. *See id.* (discussing that the efforts of the NAACP, U.S. field attorneys, and victims in reporting abuses could not dislodge peonage from its roots in Southern local customs).

166. See *id.* at 186 ("Since 1945, these sources present a picture . . . which suggests that peonage certainly diminished; but to what degree it persisted is impossible to determine. Reports of such abuses continued, and many of the reports came from outside the State.").

Georgia.[167] The 1961 Commission on Civil Rights reported that the Department of Justice had received sixty-seven complaints of peonage or slavery between 1958 and 1960.[168] In 1969, there was evidence that peonage persisted among groups of foreign workers who had emigrated from Central and South America to Southern farms and turpentine camps.[169] As the historian Pete Daniel has written: "Like the Mississippi River floods, the incidence of peonage rose and fell, unpredictable, violent, inexorable."[170]

Such was the judicial system's abandonment of African Americans. Unfortunately, there are disturbing parallels to the legal system of today: we still incarcerate people for debt, and those people are disproportionately people of color.

III. The New Peonage

There are typically two types of debt that lead to court action and the risk of incarceration. The first is private debt resulting from unpaid credit card balances, medical bills, car payments, and payday loans and other high-interest, short-term cash advances relied upon by low-income people; this type of debt can result in the creditor or a debt collector suing the debtor in civil court.[171] If the debtor does not appear or the court decides that the failure to pay is "willful," the court can issue an arrest warrant for criminal contempt and incarcerate the defendant until she posts bond or pays the debt in full.[172]

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167. *Id.*

168. *Id.* at 188.

169. *See id.* at 190 ("[A] 1969 federal anti-poverty pamphlet . . . noted that 'semi-feudal conditions' existed in the turpentine camps of the South. Advances were given and were difficult to pay off, so tenants moved off . . . because they were instructed to remain on the farms until they had paid their debts.").

170. *Id.* at 149.

171. *See* O. Randolph Bragg & Daniel Edelman, *Fair Debt Collection: The Need for Private Enforcement*, 7 LOY. CONSUMER L. REP. 89, 90–93 (1994–1995) (explaining the Fair Debt Collection Practices Act, private debt, and the actions that debt collectors can take to recover the debt).

172. *See* Cammett, *supra* note 60, at 403 (explaining how failure to pay private debt can lead to incarceration in some circumstances, such as defying a court order or failing to show up in court). *See also* Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1527 (2011)

> Any effective debt collection technique relies on coercion: the ability of a

The second type of debt is legal financial obligations (LFOs), which court systems impose upon criminal defendants in three categories: fines or monetary penalties as a condition of the sentence to punish for the commission of the criminal offense itself; restitution to compensate victims for their calculable losses; and user fees to raise revenue for the state.[173] Included within the last group are fees that can be assessed at virtually every stage of the case, beginning with the application fee for a public defender and including some or all of the following: a jail per diem fee for pretrial incarceration; a fine "surcharge"; administrative fees and costs; prosecution reimbursement fees; investigation fees; jail fees for the post-trial or post-plea sentence;[174] probation or parole fees;[175] drug testing fees; vehicle interlock device fees for driving under the influence convictions; fees for mandatory drug, alcohol or mental health treatment; and, of course, interest fees, which can be compounded, on all unpaid legal debts.[176] User fees are increasingly administered by private probation companies that pass on the cost of their services to the offender; the failure to make these payments can result in incarceration that is served in addition to any jail or prison sentence imposed for the offense itself.[177]

> creditor to make credible threats to extract payment from debtors. . . . Courts presiding over in personam actions compel debtors to show up in court and provide information about their assets or to turn over money or property to creditors by threatening to deprive debtors of their liberty.

173. *See* BANNON ET AL., *supra* note 37, at 4, 7–10 (describing the three categories of LFOs).

174. Such costs are billed to inmates in forty-one states. Joseph Shapiro, *As Court Fees Rise, the Poor are Paying the Price*, NPR: ALL THINGS CONSIDERED (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor (last visited Nov. 11, 2015) (on file with the Washington and Lee Law Review).

175. These are billed to inmates in forty-four states. *Id.*; *see also* Paul Peterson, *Supervision Fees: State Policies and Practice*, 76 FED. PROBATION 40, 40 (2012) (noting that in 1997 at least forty states charged supervision fees, which is part of a trend that has increased).

176. *See* BANNON ET AL., *supra* note 37, at 4, 7–10 (displaying a set of graphics that shows which fees may apply at various stages in a State's judicial process).

177. *See, e.g.*, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 1–6 (2014) (finding that over 1,000 courts across the U.S. inflict patterns of abusive collection tactics and financial

The profile of the typical criminal defendant in terms of socioeconomic status, race, and educational attainment, is very different from that of the average U.S citizen. When a middle or upper income person receives a court fee or fine, most can readily pay it, ending their contact with the system; in contrast, empirical data confirms the following regarding the majority of defendants: they are overwhelmingly poor, with most qualifying for indigent defense; large percentages do not have a high school diploma; they function at the lowest literacy levels; and they are disproportionately people of color.[178] Given this reality, for the typical criminal defendant or young person in delinquency court, a single court-imposed fee or fine can trigger a chain reaction that leads inexorably to a whole host of potentially disastrous complications, including, but not limited to, incarceration.[179]

This Part proceeds in five sections. First, it sets out the relevant case law governing criminal-justice debt since the Supreme Court decisions in *Bailey* and *Reynolds*; then it fleshes out the impact of LFOs on juveniles, families, and the state; finally, it concludes with a discussion of the ways in which the peonage system of the post-Civil War era parallels the new peonage of today.

A. Constitutional Protections and Limitations

Although the U.S. Congress abolished debtors' prisons under federal law in the 1830s,[180] with twelve states following suit

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hardship using an "offender-funded" model of privatized probation).

178. *See* ACLU, IN FOR A PENNY, *supra* note 38, at 10 (detailing a Ninth Circuit finding that "African-Americans and Latinos in [Washington] were disproportionately arrested for drug possession and delivery, far more likely to be searched, and less likely to be released than their white counterparts. These same disparities extend to the assessment of LFOs . . . .").

179. *See* Rebecca Vallas & Roopal Patel, *Sentenced to a Life of Criminal Debt: A Barrier to Reentry and Climbing Out of Poverty*, 46 CLEARINGHOUSE REV. J. POVERTY & POL'Y 131, 131 (2012) (emphasizing the damage that can result from criminal-justice debt).

180. *See* Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States,* 3 AM. BANKR. INST. L. REV. 5, 16 (1995) (explaining that the practice of imprisoning people for debt was abolished at the federal level in 1833). *But see* 25 Cong. ch. 35, Feb. 28, 1839, 5 Stat. 321 (1839) (providing in 1839 that federal courts would follow the laws abolishing imprisonment for debt

between 1821 and 1849 and the majority of states discontinuing the practice by the 1870s,[181] the practice has persisted to the present, as state constitutional and statutory bans on imprisonment for debt typically exempt crime from their scope.[182] Therefore, jail time is not prohibited for such noncommercial debts as those stemming from criminal court involvement and those stemming from failure to pay child support or alimony,[183] and it is not prohibited for contractual debts stemming from civil contempt orders.[184] Not surprisingly, these developments have coincided with the rise of mass incarceration. During the 1970s and 1980s, there was a dramatic increase in the number of state statutes allowing for incarceration as a penalty for debt,[185] and in

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within the states in which they sat).

181. *See* Tabb, *supra* note 180, at 16 (noting that many states abolished the practice of imprisoning people for debt during the 1830s and 1840s). For a history of debtors' prisons in the U.S., see generally PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA (1974); BRUCE H. MANN, REPUBLIC OF DEBTORS (2009); DAVID A. SKEEL, JR., DEBT'S DOMINION (2001); CHARLES WARRANT, BANKRUPTCY IN UNITED STATES HISTORY (1935). *See also* MARGOT C. FINN, THE CHARACTER OF CREDIT 109–96 (2003) (providing a history of imprisonment for debt in Europe).

182. *See* Cammett, *supra* note 60, at 382–84 (asserting that "States run afoul of the spirit, if not the constitutional requirements, of *Bearden* [which abolished debtor's prisons] in a variety of ways" including conditional criminal justice debt and programs that allow the reduction of debt through served jail time).

183. *See* Richard E. James, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143, 165–67 (2002) (describing current examples of state court practices that represent a "de facto debtor's prison system" that keeps noncommercial debtors accountable to courts and avoids unconstitutionality). Incarceration is also allowed for such noncommercial debts as those stemming from tort and from tax and licensing fees. *Id.*

184. *See, e.g.*, Press Release, Payday Businesses Unlawfully File 1500 Criminal Complaints Against Borrowers to Collect Money, TEX. APPLESEED (Dec. 17, 2014), https://www.texasappleseed.org/press-releases?field_featured_value=All&field_status_value=All&field_multi_project_association_target_id_entityreference_filter=72&field_status_value_1_op=or&field_status_value_1=All&=Apply (last visited Nov. 11, 2015) (condemning the practice of courts issuing civil contempt orders on behalf of payday loan businesses in order to enforce contractual debt, as it creates a de facto debtors' prison regime) (on file with the Washington and Lee Law Review).

185. *See* BANNON ET AL. *supra note* 37, at 19 (detailing the evolution of Supreme Court precedent holding that "debtor's prison can be used to collect criminal justice debt only when a person has the *ability* to make payments but refuses to do so"); *see also* Arthur J. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205, 221 (1964) ("The 'choice' of paying $100 fine or

the late 1980s and early 1990s, state and county rules increasingly allowed for jail time for failure to pay monies owed to private creditors as well as court fines and fees.[186] With the fiscal crisis of the 2000s, states faced growing budget deficits, and court systems—municipal, county, and state level—were under pressure to be fiscally self-supporting.[187] Using the threat of incarceration to pressure low-income people to pay off their debts has become a common strategy of the criminal justice system.[188]

Since 1970, the U.S. Supreme Court has relied upon the Fourteenth Amendment in three cases to affirm the unconstitutionality of incarcerating those too poor to pay their debts.[189] In *Williams v. Illinois*,[190] the appellant, Willie E. Williams, was convicted of petty theft and received the maximum sentence of one-year incarceration in addition to a $500 fine and $5 in court costs.[191] An Illinois statute provided that a defendant could be forced to remain confined in order to "work off" his monetary obligations at a rate of $5 per day at the conclusion of his sentence.[192] Because Williams could not pay the monies owed,

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spending thirty days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor . . . ."); Derek A. Westen, Comment, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days,"* 57 CAL. L. REV. 778, 806–07 (1969) (discussing imprisonment-for-debt provisions of laws).

186. *See* MO. REV. STAT. § 543.70 (1979) (allowing a judge to imprison someone for not paying their fines); MICH. COMP. LAWS § 780.826 (1985) (allowing incarceration if someone does not comply with the judge's order—including payment of fines); Cammett, *supra* note 60, at 403 (explaining that failure to pay private debt can result in incarceration); *see also* DOUGLAS N. EVANS, THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION, 2–10 (2014), http://justicefellowship.org/sites/defaultfiles/The%20Debt%20Penalty_John%20Jay_August%202014.pdf (describing state statutes allowing incarceration for debt and the court's dependency on these fees).

187. *See* ACLU, IN FOR A PENNY, *supra* note 38, at 8–9 (remarking on courts' increased reliance on LFOs for funding, specifically in Michigan, New Orleans, and Ohio).

188. *See id.* (noting the increased use of incarceration as a punishment for those unable to pay their debts).

189. *See infra* notes 190–196 (summarizing relevant case law).

190. 399 U.S. 235 (1970).

191. *Id.* at 236.

192. *See id.* at 236 n.3 (describing the criminal code section authorizing payment of fines through imprisonment at a rate of $5 a day).

the state determined that he would be confined for 101 days beyond the maximum period of confinement for the offense.[193] The Court held that imprisoning an individual for involuntary nonpayment of a fine or court cost violates the Equal Protection Clause of the Fourteenth Amendment when the aggregate imprisonment exceeds the statutory maximum imprisonment term for the crime.[194] Therefore, "once the state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of incarceration beyond the statutory maximum solely by reason of their indigency."[195]

One year later, *Tate v. Short*[196] involved Preston A. Tate of Houston, Texas, who was committed to a municipal prison farm for eighty-five days to satisfy his accumulated fines of $425 resulting from traffic offenses.[197] The Court extended its reasoning in *Williams* to defendants not facing jail time for the original offense but who are unable to pay fines, ruling that the Equal Protection Clause prohibits states from automatically converting a fine into a jail term when the defendant is indigent and cannot pay the fine in full.[198]

The third in the trio is *Bearden v. Georgia*,[199] involving Danny Bearden, an illiterate man with a ninth grade education who pled guilty to felony burglary and theft and was placed on three years probation.[200] As a condition of probation, he was ordered to pay a $500 fine and $250 in restitution.[201] Although Bearden borrowed money from his parents in order to pay the first two installments of his debt, totaling $200, he was laid off from his job a month later and was unable to pay the remaining

193. *See id.* at 236–37 ("[H]e could not pay the fine and costs of $505.").

194. *Id.* at 240–41.

195. *Id.* at 241–42.

196. 401 U.S. 395 (1971).

197. *Id.* at 396–97.

198. *See id.* at 397–98 ("[P]etitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency.").

199. 461 U.S. 660 (1983).

200. *Id.* at 662.

201. *Id.*

balance.[202] Six months later, the state filed a petition to revoke his probation because he still had not paid.[203] After an evidentiary hearing, the court revoked the probation, entered a conviction, and sentenced him to serve the remaining portion of the probationary period in prison:[204]

> [T]he [sentencing] court curtly rejected counsel's suggestion that the time for making the payments be extended, saying that "the fallacy in that argument" is that the petitioner has long known he had to pay the $550 and yet did not comply with the court's prior order to pay. The sentencing judge declared that "I don't know any way to enforce the prior orders of the Court but one way," which was to sentence him to imprisonment.[205]

The Georgia Court of Appeals rejected Bearden's claim that imprisonment for failure to pay a fine violated the Equal Protection Clause, and the Georgia Supreme Court denied review.[206]

Consistent with *Williams* and *Tate*, but relying instead on the concept of fundamental fairness required under the Due Process Clause of the Fourteenth Amendment,[207] the Court characterized the sentencing court's treatment of Bearden as unconstitutionally depriving him of his freedom:

> The focus of the [sentencing] court's concern, then, was that the petitioner had disobeyed a prior court order to pay the fine, and for that reason must be imprisoned. But this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*. By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or

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202. *See id.* at 662–63 ("Petitioner, who has only a ninth-grade education and cannot read, tried repeatedly to find other work but was unable to do so.").

203. *See id.* at 663 n.3 (explaining that the trial court found that the petitioner violated his parole for failure to report as directed and failure to pay fine and restitution).

204. *Id.*

205. *Id.* at 674 (internal citations omitted).

206. *See id.* at 663 n.5 (citing the earlier Georgia Supreme Court cases supporting decisions to reject claims and deny review).

207. *See id.* at 666 n.8 (explaining the advantages of a due process approach when considering a defendant's financial background or status in sentencing).

> extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.[208]

The Court determined that a sentencing court cannot revoke probation for failure to pay a fine and make restitution absent evidence and findings that the probationer was somehow responsible for the failure, and that alternative forms of punishment would be inadequate to meet the state's interest in punishment and deterrence.[209] It held that sentencing courts must determine two things before imprisoning a defendant for failure to pay court fees and restitution: ability to pay and alternatives to imprisonment.[210] If the defendant willfully refused to pay or make efforts to obtain the resources to pay, he may be imprisoned for this failure.[211] However, even if the defendant is indigent and cannot pay, he may still be imprisoned if there is no alternative to imprisonment that would adequately satisfy the state's interests.[212]

Aside from Fourteenth Amendment cases in which the fact patterns and questions presented have directly mirrored those of *Williams, Tate,* or *Bearden*,[213] subsequent case law has addressed

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208. *Id.* at 674.

209. *See id.* at 672 ("Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.").

210. *Id.*

211. *See id.* ("If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment . . . .").

212. *See id.* ("Only if alternative measures are not adequate to meet the State's interests . . . may the court imprison a probationer who has made sufficient bona fide efforts to pay.").

213. *See, e.g.*, United States v. Stevens, 986 F.2d 283, 284 (8th Cir. 1993) (vacating the judgment revoking probation for non-willful inability to pay under *Bearden* and remanding the case for further proceedings consistent with the Eighth Circuit's opinion); Cleveland v. City of Montgomery, No. 2:13CV732-MHT, 2014 WL 6461900, at *6 (M.D. Ala. Nov. 17, 2014) (declaring that the constitutional principles set out in *Bearden* apply in municipal court proceedings); Johnson v. State, 707 S.E.2d 373, 374 (Ga. Ct. App. 2011) (reversing the revocation of defendant's parole for failure to pay court-ordered fines and fees because the trial court failed to either make a finding of the defendant's willfulness in failure to pay or consider other punishment alternatives if the defendant was not at fault); Wills v. Commonwealth, 396 S.W.3d 319, 326 (Ky. Ct. App. 2013) (finding that the trial court abused its discretion by revoking probation without considering alternatives to

other issues arising from questions regarding the legality of imprisonment for criminal-justice debt.[214] For instance, there have been cases—typically in the context of probation revocations for failure to pay court costs—that have established that the defendant must have the opportunity to present evidence of indigence at a hearing, that the hearing must determine whether the failure to pay was willful, and that there must be written findings of fact regarding ability to pay.[215] Courts have also consistently held that the defendant must be given a reasonable opportunity to discharge the fine, and that alternatives to imprisonment must be considered by the sentencing court when the failure to pay was not willful, including installment plans and reductions of fee amounts.[216] There has been conflicting case law among the lower courts, however, as to whether the defendant or the state bears the burden of proving indigence and willfulness.[217] There is also a conflict among the courts as to whether plea bargains in which the state agrees to—or a statute

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imprisonment when the defendant failed to pay the weekly restitution fee in full despite good faith efforts to make payments).

214. *See infra* notes 216–221 and accompanying text (summarizing case law).

215. *See, e.g.*, Jordan v. State, 939 S.W.2d 255, 257 (Ark. 1997) (requiring written findings of fact regarding ability to pay); Greene v. Dist. Ct. of Polk Cty., 342 N.W.2d 818–21 (Iowa 1983) (requiring a hearing to determine responsibility for failure to pay prior to commitment and finding that jailing defendant without notice or an opportunity to explain why he had not satisfied the conditional order was a denial of due process); Hendrix v. Lark, 482 S.W.2d 427, 431 (Mo. 1972) (remanding indigent defendant to city court for a hearing to determine her ability to pay the fines and costs, and if unable to pay immediately, ordering an opportunity for her to pay in reasonable installments based upon her ability to pay).

216. *See, e.g.*, Gilbert v. State, 669 P.2d 699, 703 (Nev. 1983) ("[B]efore a defendant may be imprisoned for nonpayment of a fine, a hearing must be held to determine his financial condition, and an indigent defendant must be allowed reduction of fine or discharge of fine through installment payments."); State v. Townsend, 536 A.2d 782, 786 (N.J. Super. Ct. App. Div. 1988) (finding that defendant's willful failure to pay restitution obviated the need for sentencing court to consider alternatives).

217. *Compare* State v. Bower, 823 P.2d 1171, 1173 (Wash. Ct. App. 1992) (requiring the defendant to "show cause" why he should not be punished for failure to pay fines), *with* Del Valle v. State, 80 So. 3d 999, 1013 (Fla. 2011) (holding that the state must provide sufficient evidence of ability to pay and willful refusal to pay, after which the burden shifts to the probationer to prove inability to pay to rebut the state's evidence).

mandates—automatic dismissal of the charges upon the payment of court costs should be subject to constitutional protection.[218]

In the years since *Bearden*, courts frequently have either ignored these constitutional protections or developed strategies to skirt their edges. For instance, researchers have found that courts in many states are "either unwilling or unable to waive fees based on indigence, to tailor payment obligations to a person's ability to pay, or to offer meaningful alternatives to payment such as community service."[219] At least fourteen states impose a "poverty penalty," meaning that litigants are assessed additional costs and penalties for being unable to pay off LFOs immediately.[220] Similarly, many states have at least one mandatory sentencing fee that cannot be waived regardless of the defendant's ability to pay, and payment plans are often based not on an individual's actual ability to pay, but on the state's standard collection policies.[221]

Another strategy, utilized by several states, including California and Missouri, is "fines or time" alternative sentencing that allows defendants to "volunteer" to be jailed in lieu of payment.[222] Under this scenario, judges view nonpayment as an implicit request to automatically convert fines to jail time, without engaging in a colloquy with the defendant regarding

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218. *Compare* Moody v. State, 716 So. 2d 562, 565 (Miss. 1998) (holding that a felony statute for writing bad checks that requires an automatic payment of $500 plus restitution in exchange for dismissal violates the Equal Protection Clause of the Fourteenth Amendment, as it is "discriminating to the poor, in that only the poor will face jail time"), *with* People v. Memminger, 469 N.Y.S.2d 323, 325 (N.Y. Sup. Ct. 1983) (finding that defendants' inability to accept plea offer because of indigency did not violate their equal protection or due process rights). "All of these rules apply to the unequal treatment of indigent defendants after conviction and sentencing. They restrict the state's power to increase the stringency of sentences already imposed on convicted indigent defendants. They do not restrict the District Attorney's authority." *Id.*

219. BANNON ET AL., *supra* note 37, at 13. *But see* State v. Blazina, 344 P.3d 680, 685 (Wash. 2015) (holding that a sentencing judge must make "an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs").

220. *See* BANNON ET AL., *supra* note 37, at 13 (criticizing the use of poverty penalties).

221. *See id.* at 13–14 (highlighting the inequality in payment plan minimums and schedules that ignore an individual's ability to pay).

222. *See id.* at 23 (describing debt repayment or forgiveness through incarceration in Missouri, California, and North Carolina).

ability to pay.[223] A variant of the "poverty penalty" is to place those who are unable to immediately pay off their LFOs on supervised probation with a thirty or sixty-day suspended sentence, regardless of ability to pay; when they are found to have willfully violated probation by not keeping up with payments, they are automatically sentenced to part or even the full length of the suspended sentence.[224] Although the Supreme Court barred this practice in *Tate v. Short*,[225] which federal appellate courts have followed,[226] it continues to persist in state and municipal courtrooms across the United States. [227]

In addition to challenging the new peonage premised upon the Fourteenth Amendment's Equal Protection and Due Process Clauses, litigants have a potential avenue for redress in the Eighth Amendment's Excessive Fines Clause.[228] The existing doctrine on excessive fines, however, specifies that the term "fines" is restricted to payments made to a sovereign as punishment for wrongdoing,[229] and that the interpretation of "excessive" is limited to gross disproportionality to the offense, with no examination of the personal impact of a fine on the defendant.[230] Yet, Beth Colgan argues that the historical record supports a broader interpretation than the Supreme Court allows with its conclusion that economic sanctions for people who are

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223. *See id.* (noting a Missouri public defender's successful challenge to a judge's practice of converting unpaid LFOs into jail time).

224. *See* ACLU, IN FOR A PENNY, *supra* note 38, at 22–23 (describing the process of "fine or time" sentences in municipal courts).

225. *See* Tate v. Short, 401 U.S. 395, 399 (1971) (prohibiting the state from converting a fine into a prison term for an indigent defendant without means to pay).

226. *See, e.g.*, Frazier v. Jordan, 457 F.2d 726, 729 (5th Cir. 1972) (holding that courts may not impose a sentence that requires a defendant to choose between paying a fine "forthwith" or incarceration).

227. *See* ACLU, IN FOR A PENNY, *supra* note 38 at 23–24 (reporting on the frequency of "fine or time" sentences in Orleans Parish municipal court).

228. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

229. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 265 n.6 (1989) (finding supportive similarity among definitions of "fine" in Eighteenth and Nineteenth century legal dictionaries).

230. *See* United States v. Bajakajian, 524 U.S. 321, 336 (1998) (explaining the rationale of a gross proportionality standard between the gravity of the offense and the forfeiture).

unable to pay their debts is outside the scope of the Clause regardless of how excessive the debts may be.[231] Colgan provides a detailed analysis of colonial and early American statutory and court records regarding fines to argue that the Court's limitations on the use of historical evidence should be challenged.[232] She then proposes a reinterpretation of the Clause that considers a "fine" as a deprivation of anything of economic value in response to a public offense, regardless of the recipient; and that "excessive" requires individualized consideration of offense and offender characteristics as well as the effect of the fine on the specific defendant or litigant.[233] Colgan's proposed interpretation could gain favor among judges and legislators if they agree that it is "more faithful to the historical record, while allowing for consideration of contemporary practices and understandings,"[234] thus providing greater individual protection to the millions of American adults and children who struggle with LFOs.

Lastly, and not surprisingly given this Article's grounding in the post-Civil War concept of peonage, there is potential for the Thirteenth Amendment's ban on involuntary servitude to be explicitly applied to situations arising out of criminal justice

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231. *See* Colgan, *supra* note 60, at 283 (suggesting that if history is constitutionally relevant to interpretation, the Supreme Court has relied on an incomplete and skewed historical record); s*ee also* LAUREN-BROOKE EISEN, CHARGING INMATES PERPETUATES MASS INCARCERATION 6 (2015) ("Litigation centered on the Eighth Amendment's excessive fines clause offers a unique opportunity to argue that charging inmates fees while incarcerated is unconstitutional."); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 893-94 (2013) (arguing that a narrow conceptualization of the excessive fines clause under the Eighth Amendment is not compelled by Supreme Court jurisprudence, and that the "Anglo-American legal tradition" calls for consideration not only of the proportionality between offense and penalty amount but also the defendant's ability to pay).

232. *See* Colgan, *supra* note 60, at 295–336 (providing historical evidence to refute the Supreme Court's interpretation of "excessive" and "fines").

233. *See id.* at 343 ("[Historical evidence detailed in this article weighs heavily in favor of the notion that a 'fine'—regardless of recipient—is a deprivation of anything of economic value in response to a public offense."); *id.* at 347 (suggesting that historical evidence supports a broad scope of factors in determining proportionality and an explicit bar against fines that would impoverish the defendant).

234. *Id.* at 337.

debt.[235] The Thirteenth Amendment is a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government."[236] As Akhil Amar and Daniel Widawsky argue in the context of contemporary cases of child abuse, the Amendment is "more than a mere nineteenth-century relic, written only to reform a 'peculiar' time and place,"[237] but instead "was designed to challenge longstanding institutions and practices that violated its core values of personhood and dignity."[238]

Admittedly, the text of the Thirteenth Amendment creates an exception for the punishment for crimes "whereof the party shall have been duly convicted."[239] Yet, many people with LFOs find themselves entrapped in the criminal justice system because they lack the tools—such as a lawyer, transportation, or employment—necessary to successfully navigate it.[240] When these individuals are convicted of a crime or adjudicated delinquent of a juvenile offense, it could be argued that they have not, in fact, been "duly convicted," as "duly" is defined as "correctly, fairly, legitimately, as required, or rightfully."[241] They have also not been "duly" sentenced when such punishment includes financial obligations that these individuals have no viable means to meet. Instead, they have been convicted and sentenced in violation of the "more universal, transcendent norm" announced by the Thirteenth Amendment: that slavery in all its forms shall not exist.[242]

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235. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); *cf.* Gross, *supra* note 60, at 181–84 (arguing that the bankruptcy laws implicate the Thirteenth Amendment through the peonage laws).

236. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1873).

237. Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1359 (1992).

238. *Id.* at 1374.

239. U.S. CONST. amend. XIII, § 1.

240. *See supra* notes 171–175 and accompanying text (describing the current criminal justice system's use of LFOs and the system's disparate impact upon the poor).

241. *See* WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS 202 (Brian Burton, ed., 4th ed. 2007) (listing synonyms for "duly").

242. Amar & Widawsky, *supra* note 237, at 1359 (contending that the

An obvious objection to the invocation of the Thirteenth Amendment in this context is that it is too great a conceptual leap to compare the condition of involuntary servitude that the Amendment condemns with the situation confronted by criminal-justice debtors of today. Yet, as Vern Countryman, Karen Gross and others have argued in the context of bankruptcy,[243] unless one is a strict constructionist, the fact that the framers had no conception of modern-day criminal-justice debt "does not eliminate conceptual parallels."[244] Nor does it rule out contemporary situations in which the Thirteenth Amendment, Anti-Peonage Act, or analogous state laws can be implicated, such as the circumstances faced by David Ramirez.[245] In fact, as Gross has pointed out,[246] there has been a growing movement to

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Thirteenth Amendment should be interpreted broadly).

243. *See* Countryman, *supra* note 60, at 826–27 (arguing that involuntary Chapter 13 bankruptcy for individual debtors that includes a payment plan taken from future earnings violates the Thirteenth Amendment); Gross, *supra* note 60, at 177 (calling attention to the potential for situations under federal bankruptcy laws to implicate or violate the Thirteenth Amendment); Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191, 192–93 (arguing that involuntary repayment plans in the Bankruptcy Code's 2005 amendments implicate the Thirteenth Amendment's prohibition of involuntary servitude); Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483, 502 (2005) (arguing that the Bankruptcy Code's 2005 amendments "by paralleling chapter 13 but not prohibiting involuntary cases or forced conversions, and by not providing the option of escape through dismissal or conversion . . . raise genuine Thirteenth Amendment concerns"). *But see* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 579 (2005) (arguing that, although not a frivolous argument, a challenge to chapter 11 based on peonage is likely ultimately to fail because "there is no possibility of contempt or imprisonment for those who fail to make the required payments . . . [resulting] only in denial of the discharge and dismissal of the case"). *See also* S. Elizabeth Gibson, *Constitutional Issues Raised by BAPCPA*, NAT'L BANKR. CONF. 12–15 (June 1, 2007), http://www.national bankruptcyconference.org/pubs.cfm.

244. Gross, *supra* note 60, at 177.

245. *See supra* notes 20–32 and accompanying text (describing the experience of David Ramirez).

246. Gross, *supra* note 60, at 177 n.80 ("There has been a growing movement to apply the [T]hirteenth [A]mendment and [A]nti-[P]eonage laws to a variety of situations (*e.g.*, abortion and surrogate motherhood) that could not have been within the contemplation of the framers." (citing application of the Thirteenth Amendment to abortion, surrogacy, institutionalized labor of the mentally handicapped, religious totalism, education, and migrant labor)).

apply the Thirteenth Amendment and anti-peonage laws to a variety of situations that could not have been within the contemplation of the framers.[247] The Supreme Court itself has addressed the applicability of the Thirteenth Amendment's ban on involuntary servitude to white, mentally-impaired farm laborers, whose circumstances admittedly differ from those existing in 1865, but who arguably share similarities with those entrapped by the two-tiered system of justice that exists in today's U.S. courtrooms.[248] Thus, if nineteenth century peonage is characterized by statutes that require, at a minimum, an individual to work against her will as the result of indebtedness, and if the coercion is made manifest by a threat of physical harm or imprisonment, there are undeniable similarities between the old and new forms of peonage.[249] In sum, constitutional protections against the imprisonment of those too poor to pay their debts are not limited to interpretations of the Fourteenth Amendment[250] but may also be found in the Eighth as well as the Thirteenth Amendments.

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247. *See, e.g.*, Amar and Widawsky, *supra* note 237, at 1359–60 (arguing that child abuse implicates the core concerns of the Thirteenth Amendment, and that the Amendment "provides the best constitutional vehicle to conceptualize and characterize" such cases); Paul R. Friedman, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567, 579–82 (1974) (arguing that under the Fair Labor Standards Act and the Thirteenth Amendment, mentally handicapped residents of public and private institutions who perform work for those institutions must be compensated); Robert L. Misner & John H. Clough, *Arrestees as Informants—A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713 731–34 (1977) (arguing that using arrestees as informants violates the Thirteenth Amendment, as the relationship and imbalance of power amounts to involuntary servitude); Lorraine Stone, *Neoslavery—"Surrogate" Motherhood Contracts v. The Thirteenth Amendment*, 6 L. & INEQUALITY 63, 73 (1988) (declaring that surrogate motherhood contracts represent "baby-selling", a form of "person-selling" that violates the Thirteenth Amendment).

248. See United States v. Kozminski, 487 U.S. 931, 944 (1988) ("The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion. We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.").

249. *See infra* Part III.E (describing parallels between peonage and criminal-justice debt).

250. *See supra* notes 184–207 and accompanying text (outlining case law using the Fourteenth Amendment to protect the indigent from imprisonment).

B. The Cost of Juvenile Court Involvement

On November 24, 2004, a century after Marcus published his chronicle of life in a Georgia "peon camp,"[251] a thirteen-year-old named Taylor M. and several other boys in Ventura County, California, threw rocks at construction equipment owned by J&S Excavating (J&S).[252] After one of the boys threw a firecracker into a bulldozer, Taylor shut its door, and the bulldozer ignited.[253] Damages were estimated at over $170,000, including repair costs, rental expenses, and lost labor,[254] although the estimate failed to account for the amount that J&S ultimately recovered from its insurance company.[255] The state charged Taylor with arson and felony vandalism in juvenile delinquency court, following which he admitted the allegations, and the judge declared a maximum confinement period of three years, eight months.[256] At this time, Taylor was struggling both academically and behaviorally in the sixth grade, having failed several courses and been repeatedly disciplined for misbehavior.[257] In addition, he was diagnosed with a learning disability and Attention Deficit Hyperactivity Disorder, and his peers ridiculed him for attending special education classes.[258]

On April 25, 2006, upon the prosecutor's recommendation, the court placed Taylor in a deferred entry of judgment (DEJ) program with multiple conditions, including monthly restitution payments of $100.[259] Soon thereafter, Taylor's parents, who

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251. *See supra* notes 3–20 and accompanying text (recounting aspects of Marcus's experiences in a peon camp).

252. *In re* Taylor M., Juv. No. B215562, 2010 WL 557271, at *1 (Cal. Ct. App. Feb. 18, 2010).

253. *Id.*

254. *See id.* ("J&S suffered $171,235.55 in damages, including repair costs, rental expenses, and lost labor.").

255. Email from David Andreasen, Appellate Attorney for Taylor M., to author (July 24, 2015, 19:41 EST) (recalling that the company did not ultimately bear the claimed losses) (on file with the Washington and Lee Law Review).

256. *See Taylor M.*, 2010 WL 557271, at *1 (charging defendant with arson and vandalism in excess of $400, in violation of CAL. PENAL CODE §§ 451(d), 594(b)(1)).

257. Brief for Appellant at 12–13, In re Taylor M., Juv. No. B215562, 2010 WL 557271 (Cal. Ct. App. Feb. 18, 2010).

258. *Id.*

259. *See In re* Taylor M., Juv. No. B215562, 2010 WL 557271, at *1 (Feb. 18,

struggled to pay their bills, experienced a series of setbacks; his mother battled cancer and suffered two strokes and his father was disabled.[260] His parents separated, and his father became homeless, as did his older brother.[261] Because of his mother's declining health, Taylor had to assist her with basic tasks of cooking and cleaning, while at the same time he made numerous attempts to find work to pay his restitution.[262] Despite these hurdles, Taylor's grades improved as did his school attendance and behavior, and he managed to complete all eighty hours of court-ordered community service as well as a counseling program.[263] Ultimately, however, Taylor's family was able to pay only $175 toward restitution between 2006 and 2009, at which time Ventura County Probation Officer Monica Gomez recommended revocation of his DEJ placement because "no effort [was] being made . . . at all."[264] The court agreed and revoked Taylor's DEJ placement, putting him on formal probation that left him vulnerable to the three years, eight months, term of incarceration.[265] In 2010, the Court of Appeal of California affirmed the judge's decision, stating the following:

> In January 2008, after hearing appellant's explanation for his failure to comply with the conditions of his DEJ placement, the court provided him another opportunity to do so. It warned him, however, that he must make more than the "terrible effort" that he had made in the prior 18 months. Appellant again failed to make payments on a regular basis, despite

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2010) ("The court placed him in the DEJ program on April 25, 2006 pursuant to section 790, under multiple conditions, including his making monthly restitution payments of $100 toward a total restitution of $171,235.55, with a right to credit for amounts paid by other parties."); *see also* CAL. WELF. & INST. CODE § 791(b) (West 2015) ("[T]he court may summarily grant deferred entry of judgment if the minor admits the charges in the petition and waives time for the pronouncement of judgment.").

260. Brief for Appellant at 13, *Taylor M.*, 2010 WL 557271, at *8–9.

261. *See id.* (describing the significant decline in defendant's family circumstances).

262. *See id.* at 13–14 ("Appellant testified he applied for jobs at Pep Boys, Islands Hamburger, Chili's, Home Depot, Target, Newbury Park Bicycle Shop, and many auto mechanics.").

263. *Id.*

264. *Taylor M.*, 2010 WL 557271, at *5.

265. *In re* Taylor M., Juv. No. B215562, 2010 WL 557271, at *1 (Feb. 18, 2010).

> having been told that [his DEJ placement would not be revoked] if he could only make a small payment. The court neither violated the constitution nor acted unfairly and arbitrarily when it later revoked appellant's DEJ placement and placed him on probation. [266]
>
> Appellant argues that the court abused its discretion in denying his request to reduce the amount of his monthly restitution payment. We disagree. Moreover, the denial of that request did not prejudice appellant. The probation department would not have recommended the revocation of his DEJ placement if he had met with his probation officer on a regular basis and made small payments ($10, $5, or $1). Appellant failed to establish that he tried to do those things.[267]

The chain of events experienced by Taylor and his family is typical of that encountered by many children in juvenile delinquency court, whether the amount owed results from restitution, fines, user fees, or a combination of the three categories. For instance, in approximately twenty states, legislatures have laws requiring the parent or legal guardian to pay the costs of juvenile court fines and fees.[268] In some states, parents have the right to negotiate these fees, but it is not an easy process, and if they fail to pay, wages can be garnished, liens can be placed on homes, and tax refunds can be automatically applied to the court debt.[269] When a juvenile court judge orders a child to be placed outside the home as part of the disposition, twenty-two states have statutes that make it discretionary and twenty-nine make it mandatory to require that the parent pay at least part of these costs.[270] It may convincingly be argued that

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266. *Id.*

267. *Id.* at *4.

268. *See* Myles Bess, *Double Charged: The True Co$t of Juvenile Justice*, YOUTH RADIO (May 8, 2014), https://youthradio.org/news/article/double-charged-fines-and-fees/ (last visited Nov. 11, 2015) (quoting Lauren-Brooke Eisen, legal scholar at New York University's Brennan Center for Justice) (on file with Washington and Lee Law Review). *But see, e.g.,* N.C. GEN. STAT. § 7B-2506 (4) (capping restitution for delinquent juveniles at $500, calling for joint and several liability for all participants, and enabling the court to waive restitution "if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution").

269. *See id.* (describing the potential consequences faced by parents in California whose children fail to pay court fines and fees).

270. *See* Linda A. Syzmanski, *Can Parents Ever be Obligated for the Support of Their Institutionalized Delinquent Children?*, 16 NAT'L CENT. JUV. JUST.

particularly in the context of juvenile court, the assessment of restitution is analytically distinct from the assessment of fines or fees, because the concept of making the victim whole via the payment of restitution is central to progressive notions of restorative justice and to the juvenile court's unique therapeutic purpose. Yet, the consequences of failure to pay restitution for a low-income family can be extreme and excessively punitive. For instance, in thirty-six jurisdictions, statutes explicitly provide for parent liability for restitution if the child is unable to pay or unable to complete an alternative option, such as community service.[271] In at least ten jurisdictions, if the child fails to pay restitution fees or fine, it can result in a youth's probation being extended to age twenty-one.[272] Although the court must first evaluate a family's financial ability to pay LFOs, which usually occurs at a hearing, judges have wide discretion in making such determinations, and there is little oversight and very limited opportunity to challenge the costs imposed.[273]

In Alameda County, California, for example, the total amount of juvenile court fines and fees imposed on children and their families adds up quickly. Upon arrest, the cost of detention in juvenile hall is $25 per day; if the youth is released from detention, the cost of a GPS ankle monitor is $15 per day or $105

SNAPSHOT 4 (Apr. 2011) (allowing that even when payment is mandatory, payment is based on a hearing's determination of the parent's ability to pay).

271. *See Juvenile Restitution Statutes*, NAT'L JUV. DEFENDER CENT. (Mar. 2015) http://njdc.info/juvenile-restitution-statutes (last visited Nov. 11, 2015) (summarizing a national review of state restitution laws compiled by the National Juvenile Defender Center and the University of Michigan Juvenile Justice Clinic) (on file with the Washington and Lee Law Review).

272. *See* POLICY ADVOCACY CLINIC OF EAST BAY COMMUNITY LAW CENTER, FINANCIAL COSTS FOR YOUTH AND THEIR FAMILIES IN THE ALAMEDA COUNTY JUVENILE JUSTICE SYSTEM: A GUIDE FOR ADVOCATES 3 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448484 (describing probation extension procedures in Alameda County, California); *Jurisdictional Boundaries*, OFF. JUV. JUST. & DELINQ. PREVENTION (Dec. 16, 2014), http://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2013&text (last visited Nov. 11, 2015) (displaying the extended age of juvenile court jurisdiction for all states in 2013) (on file with the Washington and Lee Law Review).

273. *See Juvenile Restitution Statutes*, *supra* note 265 (commenting on the availability of alternative options to restitution subject to judicial discretion); POLICY ADVOCACY CLINIC, *supra* note 272, at 6–7 (outlining the procedure for juvenile fee reduction, waiver, and rehearing in Alameda County, California).

per week.[274] For the process of determining whether a formal complaint will issue, there is an investigation fee of $250.[275] If there is an adjudicatory hearing, appointed counsel costs $300.[276] If the youth is found not delinquent, the charge may be dismissed, but the family must still pay investigation and legal fees.[277] If the youth is found delinquent, the judge will impose a sentence and assign additional costs, such as a restitution order paid to the victim and restitution fines paid to the California State Restitution Fund ($25 dollars for a misdemeanor; $100 for a felony).[278] If the youth is placed on probation, informal supervision is $90 per month for an average of fourteen months.[279] Formal probation is also $90 per month but can include the following: regular drug testing at $12 per test; GPS monitoring at $15 per day for an average of forty-five days; and juvenile hall for $25 per day for an average of twenty-three days for probation violations.[280] The family can request a financial rehearing before a judge if the court's financial hearing officer denies a fee deduction or waiver request, but restitution orders and fines can only be waived or reduced under very limited circumstances.[281] If probation is successfully completed and the youth is eighteen or older, the court may seal the juvenile court record, but it will cost an additional $150.[282] In total, for children who are detained for the average period, the bill could approach or even exceed $2000.[283] In short, as in the earlier world of

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274. Teresa Chin, *The Co$t of Juvenile Court Involvement*, YOUTH RADIO (May 8, 2014), https://youthradio.org/news/article/double-charged/ (last visited Nov. 11, 2015) (on file with the Washington and Lee Law Review).

275. *Id.*

276. *Id.*

277. *See id.* (reporting the cost assessed in Alameda County courts even when the case is ultimately dismissed).

278. POLICY ADVOCACY CLINIC, *supra* note 272, at 4.

279. Chin, *supra* note 274.

280. *Id.*

281. *See id.* ("After you complete probation and are at least 18, you may apply to have your juvenile record sealed. $150."); POLICY ADVOCACY CLINIC, *supra* note 266, at 6–7 ("Unfortunately, restitution amounts cannot be reduced or eliminated based on the family's inability to pay, unless the restitution has been ordered for graffiti . . . .").

282. Chin, *supra* note 274.

283. Bess, *supra* note 268.

peonage, the descent into the criminal justice system can impose hidden but inexorable costs that may make extrication from the system difficult if not impossible for lower income children and families—even if a child is not ultimately adjudicated delinquent.

The municipal court systems of our states are another forum that leaves children—typically older teenagers—struggling to pay LFOs. Municipal courts are those that can promulgate local laws relating to the community's health and safety, such as traffic and quality of life infractions, as long as they do not run contrary to state law.[284] Mayors approve the laws, local police enforce them via citation or arrest, and local judges adjudicate them in municipal courtrooms.[285] A number of states preclude juvenile court treatment for those who are older than fifteen or sixteen and are alleged to have violated a state or municipal traffic ordinance or regulation; instead, these matters are handled exclusively by municipal courts.[286] Because these are considered civil proceedings, however, most defendants—including adolescents—are not represented by lawyers, and those who are indigent do not receive appointed counsel.[287] As a result, municipal court defendants fail to appreciate the consequences of pleading guilty and are frequently left with significant user fees, which can lead to incarceration for failure to pay, to appear in court, or to comply with probation.[288] Numerous states, including

284. *See* Quinn, *supra* note 155 (remarking on the range of matters local and municipal ordinances govern).

285. *See id.* (describing the predominant structure and politics of local governments).

286. *See Juvenile Justice System Structure & Process*, OFF. JUV. JUST. & DELINQ. PREVENTION (June 29, 2015), http://www.ojjdp.gov/ojstatbb/structure_process/qa 04102.asp?qaDate=2014 (last visited Nov. 11, 2015) (listing juvenile court age limits across the jurisdictions in the United States) (on file with the Washington and Lee Law Review).

287. *See* Quinn, *supra* note 155 (recounting the juvenile and municipal court procedure in Ferguson, Missouri, where court was once held for hundreds of unrepresented defendants at a local basketball court); *see also* Lewis R. Katz, *Municipal Courts—Another Urban Ill*, 20 CASE W. RE. L. REV. 87, 106–08 (1997) (noting that in a study of 1,034 defendants in municipal court, 770 were without an attorney and 264 were represented by an attorney, likely because the unrepresented defendants did not have the resources to hire a lawyer).

288. *See* Quinn, *supra* note 155 (reasoning that without "meaningful explanation of their options, advice about pleading guilty, or information about . . . consequences" defendants are unlikely to comprehend that an inability to pay fines can and will lead to arrest and jail time).

Missouri, Wyoming, Texas, and Colorado, have municipal courts that run what Elizabeth Angelone termed "shadow juvenile justice systems"[289] that fail to provide specialized due process protections for these young litigants.[290]

In addition to the hardships resulting from economic sanctions, the new peonage brings other, more intangible costs to children and their families that go beyond the fees and fines that are assessed against them.

C. Collateral Consequences for the Family

Kathie is a forty-nine-year-old white woman in Kitsap County, Washington, who has four children, three of whom she supports financially.[291] Although she is divorced, she lives in an apartment with her ex-husband, his father, and three of their children.[292] Kathie has eleven felony convictions for forgery, stolen property, and possession of stolen property, which she says resulted from a long-term drug addiction and living in poverty.[293] Her initial LFOs totaled $11,000, but with twelve percent interest, she now owes $20,000.[294] Kathie is eighty percent deaf and has limited employment opportunities, but she secured a job at a prisoner re-entry program after participating as a client in the program.[295] She earns $3,000 per month.[296]

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289. Elizabeth Angelone, *The Texas Two-Step: The Criminalization of Truancy Under the Texas "Failure to Attend" Statute*, 13 ST. MARY'S L. REV. ON MINORITY ISSUES, 433, 452 (2010) (coining the phrase "shadow juvenile justice system").

290. *See* Quinn, *supra* note 155 ("[M]issouri is not alone in . . . running municipal courts without specialized protections or concerns for youthful litigants. Several other states . . . fail[] to account for youthful vulnerabilities.").

291. ACLU, IN FOR A PENNY, *supra* note 38, at 70.

292. *Id.*

293. *See id.* (explaining how these convictions led to Kathie's subsequent crippling debt).

294. *Id.*

295. *See id.* (explaining Kathie's mixed feelings about her job; while she is grateful for the full time position, it is not enough to support her children financially or to break out of debt).

296. *See id.* (detailing how Kathie now works for the same re-entry program that she once took part in).

As a result of Kathie's failure to keep up with her LFO payments, the court transferred her defaulted legal debt to a collection agency, which would not negotiate a manageable payment schedule with her.[297] Because of the constant financial pressure, Kathie and her children have little choice but to maintain a chaotic living situation: six people—including three adults—renting a small three-bedroom apartment.[298] Her criminal record and poor credit history have made it impossible to find alternate housing.[299] Yet, the hardships for Kathie and her children go beyond merely living under monetary constraints, as she explained:

> It seems like one of those challenges that are insurmountable. It's like a paraplegic trying to climb Mt. Everest. I mean it just seems that impossible. It's like an insurmountable barrier, that seems like, I'm gonna die with this debt hanging over my head. And I'm never gonna be able to have my own little piece of property, my own little something. And it's not even about buying a house. I can't even rent a place.[300]

For many low-income people like Kathie, criminal-justice debt and its resultant destabilization and stigma can pave a path back to reoffending and, often, to prison. It makes probation and parole violations more likely.[301] A suspended driver's license resulting from failure to pay one's LFOs means loss of transportation and the potential loss of employment, and it can also lead to criminal sanctions if the person is caught driving.[302] Damaged credit means difficulty finding employment and

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297. *See id.* (describing the credit company's unrealistic approach to payment schedule negotiation).

298. *See id.* at 71 (explaining that among those six adults, Kathie is forced to uncomfortably reside with her ex-husband and father-in-law as a result of her not being able to afford alternative housing).

299. *See id.* (detailing how Kathie's former criminal convictions sent her into immediate debt, from which she has not been able to recover).

300. *Id.* at 71–72.

301. *See* BANNON ET AL., *supra* note 37, at 20–22 (finding that all fifteen of the states examined make criminal justice debt a condition of probation, parole, or other correctional supervision, and when individuals fail to pay, they may face re-arrest and incarceration); Shapiro, *supra* note 174 (finding that in at least forty-four states, offenders can be billed for their own probation and parole supervision).

302. *See* BANNON ET AL., *supra* note 37, at 24–25 (finding that the suspension of driver's licenses is a common practice that leads to a cycle of re-incarceration).

housing, which makes it harder to meet other financial obligations, resulting in a greater likelihood of recidivism.[303] Failure to provide one's children with basic necessities can trigger the intervention of Child Protective Services, which can lead to neglect allegations and further court hearings and fees.[304] For non-custodial parents like David Ramirez, failure to pay child support can lead to incarceration, during which the debt continues to accrue.[305] Further compounding a family's vulnerability, people who violate probation or parole are ineligible for federal benefits such as Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program benefits (food stamps), low-income housing assistance, and Supplemental Security Income (disability).[306]

In recent decades, social scientists have increasingly studied the impact on children of parental involvement with the criminal justice system.[307] Not surprisingly, there are strong correlations between such involvement and economic strain as well as family instability.[308] Controlling for risk factors that were present prior to incarceration (i.e., parental substance abuse, mental illness, and lack of education), researchers have found that children whose parents have been incarcerated (or placed under house arrest) are eighty percent more likely to live in households with

303. *See id.* at 5 (explaining how the accumulation of debt during incarceration and after court costs leads to more debt).

304. *See* Bullock, *supra* note 41, at 1043–44 (detailing Child Protective Services' tendency to confuse poverty for neglect); DiFonzo, *supra* note 41, at 92–96 (describing the role and powers of the court in a child neglect case).

305. *See* NAGRECHA ET AL., *supra* note 32, at 15 (describing aspects of court ordered child support that make it a serious source of indebtedness for incarcerated men).

306. *See* Barbara Weiner, *Alleged Probation Violations Lead to Automatic Termination of Benefits*, EMPIRE JUST. CTR. (Nov. 2, 2009), http://www.empirejustice.org/issue-areas/disability-benefits/non-disability-issues/fleeing-felons/alleged-probation-violations.html (last visited Nov. 11, 2015) (explaining how parole violations can lead to the termination of benefits) (on file with the Washington and Lee Law Review); *Temporary Assistance for Needy Families (TANF)*, MONT. DEPT. PUB. HEALTH & HUM. SERVS., http://dphhs.mt.gov/hcsd/TANF.aspx (last visited Nov. 11, 2015) (explaining eligibility for TANF) (on file with the Washington and Lee Law Review).

307. *See, e.g.*, Susan D. Phillips et al., *Disentangling the Risks: Parent Criminal Justice Involvement and Children's Exposure to Family Risks*, 5 CRIM. & PUB. POL'Y 677 (2006).

308. *Id.* at 685.

economic strain and 130 percent more likely to experience family instability than those without incarcerated parents.[309] Furthermore, incarceration and other outcomes of arrest were linked to increased likelihood of children developing serious emotional and behavioral problems as well as alcohol and substance abuse and, in turn, of becoming involved with the juvenile or criminal court systems themselves.[310]

Moreover, material deprivation experienced by low-income parents, with or without criminal justice involvement, has also been demonstrated to have both short- and long-term detrimental effects on children.[311] These include aggression, anxiety, and depression, as well as negative academic outcomes, poor health statuses, and diminished future earnings.[312] In short, the intergenerational effects of criminal justice involvement and parental incarceration are exacerbated by LFOs that result from juvenile and criminal court fees, fines, and other costs.

Yet, despite empirical evidence of family adversity resulting from the new peonage, one of the ironies is that the cost to the state of collecting court fees and of incarcerating those who have failed to pay typically results in a net *deficit* for government coffers, as discussed in the next section.

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309. *Id.* at 688, 690.

310. *See id.* at 693 (linking "at-risk" youth to families where parents have been arrested or incarcerated). S*ee generally* PEGGY GIORDANO, LEGACIES OF CRIMES: A FOLLOW-UP OF THE CHILDREN OF HIGHLY DELINQUENT GIRLS AND BOYS (2010) (explaining the dynamics of intergenerational transmission of crime, violence, and drug use among the children of "highly delinquency" boys and girls using quantitative and qualitative data).

311. *See, e.g.*, Afshin Zilanawala & Natasha V. Pilkauskas, *Low-Income Mothers' Material Hardship and Children's Socio-emotional Wellbeing* 22–24 (Fragile Families, Working Paper 2011) (explaining the results of a study that found a strong link between children's socio-emotional outcome and material hardship); *see also* Wesley T. Church et al., *Neighborhood, Poverty, and Delinquency: An Examination of Differential Association and Social Control Theory*, 34 CHILD. & YOUTH SERV. REV. 1035, 1040 (2012) (finding a correlation between family stability, poverty, and availability of resources and negative behavior in children); Ofira Schwartz-Soicher et al., *The Effect of Paternal Incarceration on Material Hardship*, 85 SOC. SERV. REV. 447, 448 (2011) (finding that families suffer increased financial costs as a result of incarceration, including transportation for visits to the facility, collect phone calls from the inmate, and legal representation).

312. Zilanawala & Pilkauskas, *supra* note 311, at 3–4 (documenting the negative effects low-income houses often have on children).

D. Fiscal Impact on the State

In 1986, the Conference of State Court Administrators ("COSCA") adopted a set of standards related to the use of court fines and fees in response to states' growing reliance upon courts to generate revenue to fund themselves as well as other functions of state government.[313] In 2011–2012, COSCA revisited the topic with a restatement of the earlier standards, which it labeled as "principles."[314] In the more recent iteration, the authors—who themselves are retired state court administrators—acknowledged the continuing pressure on courts to generate revenue, yet they also condemned using court fines and fees to fund other state services; warned that such use is nothing less than a regressive tax imposed upon offenders and litigants; and called for fees to be waived for the indigent.[315] The policy paper states:

> In criminal cases, court leaders have a responsibility not only to ensure that judicial orders are enforced—*i.e.*, fees and fines are collected—but also to ensure that the system does not impose unreasonable financial obligations assessed to fund other governmental services. In traffic infractions, whether characterized as criminal or civil, court leaders face the greatest challenge in ensuring that fines, fees, and surcharges are not simply an alternate form of taxation.[316]

COSCA invoked the Supreme Court's 1971 decision in *Boddie v. Connecticut*[317] to assert the basic precept that access to the courts is a fundamental right,[318] and it cited with approval several state court decisions holding that filing fees in civil cases should be

313. *See* CONFERENCE OF STATE COURT ADMIN'RS, STANDARDS RELATING TO COURT COSTS: FEES, MISCELLANEOUS CHARGES AND SURCHARGES AND A NATIONAL SURVEY OF PRACTICE 1–13 (1986) (detailing the process of determining new standards and laying out the new standards).

314. *See* Carl Reynolds & Jeff Hall, *Courts Are Not Revenue Centers*, CONF. ST. CT. ADMIN. (2012), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx (last visited Nov. 11, 2015) (using case law to define the relevant principles of court-generated revenue) (on file with the Washington and Lee Law Review).

315. *See id.* at 1, 8 (examining the affect court fees have on the indigent).

316. *Id.* at 1.

317. 401 U.S. 371 (1971).

318. *See id.* at 380–81 (explaining that due process prohibits denying divorce or other similar legal proceedings to those who cannot afford to pay the court fees and costs).

imposed only to fund programs *directly involving* judicial services.[319] In regard to criminal cases, COSCA reiterated that these court costs should also bear a reasonable relationship to the expense of prosecution, although it acknowledged that determinations of whether court costs are valid in criminal cases rely on state-specific holdings, and that there is no general principle that defines their validity.[320]

Several other recent policy reports and white papers have confirmed that states are increasingly turning to court user fees and surcharges both to underwrite criminal justice costs and also to close general budgetary gaps.[321] Given the evidence, it could be argued that this practice potentially undermines separation of powers by mandating that courts act as fundraising entities for non-judicial programs or agencies created by the legislature or executives. Florida, for example, uses them to such an extent that observers have referred to the court system as "cash register justice."[322] The Sunshine State has added more than twenty new categories of LFOs since 1996 and eliminated most exemptions

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319. *See id.* at 375–76 (asserting that the right to take a case to court is a function of due process because "the judicial proceeding [is] the only effective means of resolving the dispute . . . and denial of a defendant's access to that process raises grave problems for its legitimacy."); Reynolds & Hall, *supra* note 308, at 2–3 (detailing the decisions of other jurisdictions where access to the court was held to be a fundamental right); *see, e.g.*, Safety Net for Abused Persons v. Segura, 692 So. 2d 1038, 1044 (La. 1997) (holding that fees assessed must be for services that bear a "logical connection to the judicial system"); Fent v. State ex. rel. Dept. of Hum. Servs., 236 P.3d 61, 70 (Okla. 2010) (holding that portions of court costs cannot be deposited into accounts to fund non-judicial programs); LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986) (holding that "filing fees that go to state general revenues . . . are unreasonable impositions on the state constitutional right of access to the courts"). *But see* Crist v. Ervin, No. SC10-1317, 2010 Fla. LEXIS 1858, at *4 (Fla. Nov. 4, 2010) (upholding statutes directing portions of civil filing fees to a general revenue fund).

320. *See* Reynolds & Hall, *supra* note 308, at 5–7 (explaining how court costs sought from a defendant in a criminal proceeding vary widely from jurisdiction to jurisdiction).

321. *See, e.g.*, BANNON ET AL., *supra* note 37, at 30–31 (discussing that the overreliance on criminal justice fees undermines the proper roles of courts and correctional agencies); PATEL & PHILIP, *supra* note 47, at 6 ("In some cases, criminal fees are used to support general revenue funds or treasuries unrelated to the administration of criminal law.").

322. Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees*, BRENNAN CTR. FOR JUST., (Mar. 23, 2010), http://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf.

for those unable to pay.[323] Although the state uses monies generated by court fees to subsidize its general revenue funds, the Florida legislature has failed to consider both the cumulative effect on its citizens who are required to pay and the data that criminal-justice debt can lead to recidivism.[324] Furthermore, in many cases these debts are uncollectible, with even employee performance standards reflecting that only nine percent of fees levied in felony cases can expect to be collected.[325]

Yet, states rarely examine the fiscal and personnel costs incurred by courts and municipalities to administer collection mechanisms that fail to exempt the indigent.[326] Just as nineteenth century state legislatures entered into an unholy alliance with private employers or corporations by "leasing out" their incarcerated inmates to raise state funds and creating "crimes" like vagrancy to feed such a system, so too are early twenty-first century state legislatures turning the enforcement of minor criminal justice sanctions into a device to raise revenues, with poor and minority offenders paying the price.

The failure to recognize that LFOs require an extensive infrastructure to turn court and correctional officials into collection agents is, in fact, one of the limitations of the COSCA paper,[327] which is an analytic weakness shared by those who support the continued imposition of court fees and fines upon low-income offenders. It is critical to acknowledge that such a regime requires the following to maintain its operations: court personnel to administer payment plans, driver's license sanctions, electronic fund transfers, liens, and wage and bank account garnishment; specialized collection courts to adjudicate payment plans; law enforcement to issue and serve warrants for failure to pay or appear in court; and, not infrequently, court personnel to themselves act as tax collection agents.[328] As a result, rather than

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323. *See id.* at 1 (explaining that Florida is one of two states, the other being North Carolina, that does not exempt indigent defendants from court cost charges).

324. *See id.* at 7 (discussing the constitutional concerns of sending convicted criminals into debt on top of their convictions).

325. *Id.*

326. *See id.* at 9 (discussing inefficiencies of collection mechanisms).

327. Reynolds & Hall, *supra* note 314.

328. Diller, *supra* note 322, at 13–19 (emphasizing the expense of collecting

serve as a straightforward revenue source for the state, the income generated from this hidden regressive tax often does not exceed the operational costs necessary to facilitate collection.[329] In fact, a recent cost-benefit analysis of court fees in eleven states revealed that the cost of funding sheriffs, local jails and prisons, prosecutors and defense attorneys, and court personnel to administer these twenty-first century debtors' prisons actually comes at a *fiscal loss* to the state.[330] Other studies have confirmed these findings.[331] This dynamic burdens the court system and interferes with the proper administration of justice, as it diverts the resources of courts away from their essential functions, and, "in its most extreme form, threaten[s] the impartiality of judges and other court personnel with institutional, pecuniary incentives."[332] Moreover, the new peonage has the "paradoxical result of engendering *more incarceration* because the poor are unable to pay, and the monetary costs of such punitive jailing is still ultimately borne by the state."[333]

The parallels between the new peonage and the nineteenth century version, which was discussed in Part II, are addressed in the next section.

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criminal justice debt).

329. *See, e.g.*, ACLU, IN FOR A PENNY, *supra* note 38, at 9 (explaining the inefficient nature of criminal-justice debt).

330. RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CENTER 7 (2007) ("An examination of court-ordered obligations in eleven states found an average of $178 million per state in uncollected court costs, fines, fees and restitution . . . . [Additionally,] administrators in one state report that only twenty-three percent of fines are successfully collected, and no action is taken on uncollected payments.").

331. *See, e.g.*, Diller, *supra* note 322, at 18–19, which analyzed the utility of arresting persons for failure to appear in Leon County (Florida) Collections Court and found that the cost of incarceration was over $45,000 for the county and the cost to make 838 arrests plus the cost to execute this many warrants over the course of one year totaled over $62,000. In contrast, the monies generated from the payment of bonds or the original debt were at most $80,000, with the net loss to the county likely to be even greater, as the figures do not include costs of first appearance hearings in court for those who were arrested. *Id; see also* ACLU, IN FOR A PENNY, *supra* note 38, at 23 (quoting a judge who said that the "fine or time" practices in the Orleans Parish municipal court may cost the city more than it collects, as the typical case involved debts of only $100, which were converted into costly thirty-day jail sentences).

332. BANNON ET AL., *supra* note 37, at 30.

333. Cammett, *supra* note 60, at 383 (emphasis added).

E. Parallels Between Old and New

There are certain obvious parallels between the old and new forms of peonage, several of which have been at least implicitly illustrated in earlier sections of this Article.[334] Both systems involve either indebtedness or minor crimes for which fines or collateral fees are imposed.[335] Both are concerned with monetary payments owed by vulnerable individuals to the state or to more powerful private entities.[336] Both involve coercive techniques used against the debtor.[337] There are also less obvious parallels, as well as distinct differences, which will be examined here.

Both the "old" and the "new" forms of peonage[338] share structural similarities. Under the old form, law enforcement arrested emancipated blacks on trumped-up criminal charges, such as vagrancy, and permitted an employer to pay the convicted defendant's fine in exchange for his labor.[339] For some, like Marcus, the employer-mandated hard labor was the equivalent of incarceration;[340] for others, the debt required workers to sacrifice basic life necessities in order to repay the advance to avoid incarceration.[341] The landowners' motivation was to meet the South's need for cheap, reliable labor as well as to intimidate and remind emancipated blacks of their continued

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334. *See, e.g.*, *supra* notes 252–290 and accompanying text (suggesting parallels between peons and defendants who have LFOs).

335. *See* notes 252–290 and accompanying text (noting the similarity between criminal-justice debt and debt owed to former plantation owners by blacks after the Civil War).

336. *See* notes 252–290 and accompanying text (noting LFOs are paid to the State while peons paid debt to former plantation owners).

337. *See* notes 252–290 and accompanying text (suggesting the threat of incarceration for failure to pay LFOs is analogous to the cycle of debt peons endured).

338. For clarity, in this section, the terms "old form" and "new form" will serve as shorthand references to the post-Civil War form of peonage and the twenty-first century form of peonage, respectively.

339. *See infra* Part II (discussing the strategic use of arrests to facilitate cheap labor by emancipated slaves).

340. *See supra* notes 3–17 and accompanying text (noting that Marcus worked in shackles while under the supervision of armed guards).

341. *See infra* Part II (discussing the cycle of coerced labor in the old peonage).

lack of social and political status.[342] Under the new form, low-income people, many of whom are already living at the margins of society, frequently incur criminal-justice debt as a result of minor, nonviolent offenses that in many instances stem from the criminalization of poverty.[343] Whatever the motivation of the state within this new paradigm, the scenario is reminiscent—at least in spirit—of the "welfare reform" initiatives of the 1990s in which the government mandated that the poor work, or at least demonstrate their willingness to work, in order to receive government assistance.[344] When people inevitably failed to comply with the bureaucratic requirements of the welfare reform regime, the government removed them from public benefits rolls, and those with criminal records (or merely with pending criminal charges) automatically lost their subsidized housing, public benefits, and food stamps, with no recourse or opportunity to appeal.[345] This allowed for the federal and state governments to redirect these funds to other government programs and agencies.[346] As with the "welfare-to-work" programs of the 1980s

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342. *See supra* notes 3–17 and accompanying text (emphasizing the harsh conditions endured by black victims of coercive labor practices during the old peonage).

343. *See supra* notes 167–189 and accompanying text (explaining the never-ending cycle of criminal-justice debt).

344. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, 110 Stat. 2105 (1996) (requiring public assistance recipients to begin working within two years of receiving benefits) (codified at 42 U.S.C. § 607).

345. *See* Sharon Dietrich, et al., *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL'Y REV. 53, 54 (1998) (explaining how criminal records, among other factors, can prevent a person from receiving welfare benefits); Joel F. Handler, *Welfare-to-Work: Reform or Rhetoric?*, 50 ADMIN. L. REV. 635, 647–51 (1998) (explaining how technical mistakes and criminal records prevent a number of people from receiving welfare benefits)*; see also* Peter Edelman & Barbara Ehrenreich, Opinion, *Why Welfare Reform has Failed*, WASH. POST (Dec. 6, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120402604.html (last visited Nov. 11, 2015) (arguing that welfare reform was "based on reckless assumptions about the economy, as well as a callous disregard for the realities of sustaining a family") (on file with the Washington and Lee Law Review).

346. *See* DAVID GREENBERG ET AL., WELFARE-TO-WORK BENEFITS AND COSTS: A SYNTHESIS OF RESEARCH 5-6 (2009) (detailing that welfare-to-work programs reduced government expenditure on welfare programs); Handler, *supra* note 345, at 637–41 (explaining the various ways that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allows states to spend

and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[347] under the new peonage, those with criminal justice debt are mandated to pay their LFOs, and if they fall behind, they, too, are removed from public benefits rolls.[348] It is not unusual for debtors like David Ramirez[349] to "sacrifice food, clothing, utilities, sanitary home repairs, and other basic necessities of life in order to scrape together money" to pay off their LFOs in order to avoid imprisonment.[350] And similar to the old peonage, the monies collected from LFOs go toward programs unrelated to the judicial system, including the state's general revenue funds.[351]

Under both the old and the new forms of peonage, the criminal justice system itself is complicit in their continued operation. Under the old, court personnel inconsistently maintained dockets and trial records, and sentences were handed down by "provincial judges, local mayors, and justices of the peace—often men in the employ of the white business owners who relied on the forced labor produced by the judgments."[352] This enabled the coercive labor system to thrive despite anti-peonage legislation and court decisions.[353] Under the new form, court fees and fines are often assessed without consideration of the individual's ability to pay, even in violation of state laws and court decisions.[354] Meanwhile, state employees, operating under little or no supervision, hand down sentences with no incentive to

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significantly less money on welfare).

347. *See* Handler, *supra* note 345, at 637–47 (describing the effects of PRWORA's implementation).

348. *See* ACLU, IN FOR A PENNY, *supra* note 38, at 67–68 (explaining how LFOs can result in difficulties re-entering society as a result of reduced income, worsened credit, difficulty finding work and housing, and potential re-incarceration).

349. *See supra* notes 20–27 and accompanying text (discussing Ramirez).

350. Class Action Complaint at 36, Fant v. City of Ferguson, No. 4:15-cv-00253, 2015 WL 3417420 (E.D. Mo. Feb. 8, 2015).

351. *See supra* notes 30–37 and accompanying text (discussing how these funds are collected and used).

352. BLACKMON, *supra* note 73, at 7; *see also supra* Part II.C (discussing the role of the judicial system in the corrupted system of criminal-justice debt).

353. *See supra* notes 94–98 (discussing the mechanisms of coercive labor that allowed for financial benefit).

354. *See supra* notes 253–290 and accompanying text (discussing the methods by which courts impose crippling fines).

maintain careful data or to engage in impact analysis of fees or costs.[355]

Both the old and the new forms of peonage perpetuate the essence of involuntary servitude. Under the old, the state conspired with planters and merchants to use convict leasing and sharecropping to entrap former slaves in a cycle of coerced labor.[356] Again, their apparent motivation was to support the struggling agrarian economy and to maintain the racial caste system.[357] Under the new peonage, the punishment and incarceration of nonviolent offenders for criminal-justice debt, including at the pretrial stage when they are unable to post bail, has contributed to and sustained the prison industrial complex.[358] With millions of low-level offenders filling U.S. jails and prisons due (both directly and indirectly) to unpaid LFOs, private probation companies and the state and federal corrections agencies to which they supply goods and services have all thrived while the inmate population has expanded.[359] Likewise, private corporations such as Honda, Microsoft, Starbucks, and Target have increasingly relied on prison labor, as it is cheap and virtually liability-free for the employer.[360] Even the privatization

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355. *See supra* Part II.C and accompanying text (explaining how the courts allowed and even encouraged allaying court fines in a racially motivated manner).

356. *See supra* notes 13–19 and accompanying text (providing an example of the coercive techniques used to keep former slaves in a never-ending cycle of debt).

357. *See supra* notes 88–93 and accompanying text (discussing the financial incentives for the entrapment of former slaves by debt).

358. *See* Michael Brickner & Shakyra Diaz, *Prisons for Profits: Incarceration for Sale*, 38 HUM. RTS. 13, 13–14 (2011) (discussing the power of the private prison lobby and arguing that the increase in incarceration rates may be attributed to private prisons); Nick Pinto, *The Bail Trap*, N.Y. TIMES, Aug. 13, 2015, at MM38 (reporting that hundreds of thousands of people are in pretrial detention in the United States, many for non-violent misdemeanor cases, because they cannot pay the bail that has been set).

359. *See* Brickner & Diaz, *supra* note 358 (discussing the status the modern private prison industry); s*ee also* Complaint at 2, Reynolds v. Judicial Corr. Servs. Inc., No. 2:15-cv-161-MHT-CSC (M.D. Ala. Mar. 12, 2015) (alleging that, working together, the City of Clanton, the Clanton Municipal Court, and a probation services company operate a racketeering enterprise that extorts court fines, costs, and fees from impoverished individuals under threat of jail, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and other laws).

360. Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking*

of youth confinement facilities is now widespread in the United States, with almost half of them privately operated, creating a built-in incentive for companies to increase the number of youth confined and lengthen the terms of their incarceration.[361] In short, everyone wins—except the impoverished person unable to pay off her criminal justice debt.

In these ways, an economic caste system is sustained under both the old and the new forms of peonage. Under the old system, state and county governments, large corporations, entrepreneurs, and provincial farmers ran forced labor camps that defeated meaningful freedom.[362] Under the new peonage, the cycle of criminal-justice debt consistently suppresses the aspirations of those among the poor who fall into its remorseless system of fines and penalties.[363] Disenfranchisement laws, both then and now, remove felons from the voting rolls, creating "a caste-like system aimed at keeping blacks out of office and away from the ballot box."[364]

Finally, and perhaps most poignantly, the roles of race and socioeconomic status must be examined. The historical record confirms that peonage and the laws of the 1870s and 1880s were "systematic efforts to reestablish white control over blacks on every front."[365] Although there was also a class struggle in the South during this period, it was conducted separately by whites and blacks, for "[o]n the matter of racial equality, whites, rich

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Crisis, Decline, and Transformation in Postwar American History, 97 J. AM. HIST. 703, 717, 722, 729 n.39 (2010) ("Prison labor was attractive to American employers for more reasons than lower wages; they also did not have to deal with sick days, unemployment insurance, or workman's compensation claims, and they had few liability worries when it came to toxins or accidents in prison workplaces.").

361. *See* NATIONAL JUVENILE JUSTICE NETWORK, POLICY PLATFORM: CONFINING YOUTH FOR PROFIT 2–3 (July 2015), http://www.njjn.org/uploads/digital-library/Confining-Youth-for-Profit_Sept2015FIN.pdf (detailing the moral and fiscal problems of imprisoning youth for profit).

362. *See supra* notes 97–100 (explaining both how the former slaves were forced into labor via debt, and the financial benefits of the plantation owners and farmers as a result).

363. *See supra* notes 261–290 (giving an example of how modern incarceration leads to an impossible-to-escape accumulation of debt).

364. COHEN, *supra* note 92, at XV.

365. *Id.*

and poor, usually possessed a common cultural outlook."[366] It can be argued that this dynamic contrasts with the new peonage, in which court fees and fines serve to oppress low-income individuals of all races and ethnicities. Yet, there is disturbing evidence that implicit racial bias guides the imposition of fees by judges and court administrators. Research confirms, for example, that courts impose a disproportionate burden of LFOs on low-income people of color.[367] For instance, a 2014 study of municipal courts in St. Louis, Missouri, found that a disproportionate percentage of those who are criminally prosecuted and assessed court costs and user fees are African Americans living below the poverty line.[368] The report concluded that "it becomes all too clear that fines and fees are paid disproportionately by the African-American community. In other words, these municipalities' method of financial survival—bringing in revenue via fines and fees—comes primarily at the expense of black citizens."[369]

In general, however, the suggestion that the impact of the new peonage is as much class-based as it is race-based finds support in the fact that disproportionately high percentages of African Americans are serving terms of incarceration that are not necessarily the direct result of an inability to pay court fees.[370] In

366. *Id.* at XIV.

367. *See, e.g.*, BANNON ET AL., *supra* note 37, at 4, 7–10 (analyzing statistics that show a correlation between race and fees imposed by the courts); JESSICA EAGLIN & DANYELLE SOLOMON, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 8 (2015) ("The collection of court costs and other financial obligations from defendants disproportionately burdens African Americans and Hispanics who cannot pay. Aggressive collection practices result in onerous and compounding debt, and even jail stays, for many defendants."); BETTER TOGETHER, PUBLIC SAFETY–MUNICIPAL COURTS 2, 8 (Oct. 2014) (analyzing the data indicating that the St. Louis County, Missouri courts operate as punitive revenue centers); *see also* ACLU, IN FOR A PENNY, *supra* note 38, at 10 (explaining that racial disparity exists at all levels of the criminal justice system).

368. *See* BETTER TOGETHER, *supra* note 367, at 8 (examining the collection and spending of court cost fees in St. Louis, Missouri, and finding that although the population of the county as a whole is 24% black with eleven percent living below the poverty line, the population of the municipalities that generate one third of the county's general operating revenue is 62% black, with 22% living below the poverty line).

369. *Id.* at 3.

370. *See* Fredrick C. Harris & Robert C. Lieberman, *Racial Inequality After*

other words, the population impacted by the new peonage may not be disproportionately composed of people of color, because both adults and youths of color have already been disproportionately stopped by police, arrested, charged, and convicted of criminal offenses—both serious and low-level—which have resulted in incarceration.[371] Yet, this same reasoning suggests the inverse in regard to juvenile delinquency court, and it helps explain why large percentages of low-income juveniles of color *are* particularly vulnerable to criminal-justice debt: they are more likely than white youth to be charged with minor offenses that are merely the function of adolescence, rather than signifying criminality.[372] In an era in which juvenile dispositions have become occasions for imposing court fees, fines, and restitution costs, rather than incarceration,[373] young people of color bear the brunt of this burden.[374] More research is clearly needed, however, as much of the data related to race, socioeconomic status, and criminal justice debt is anecdotal or produces results that are specific to the population studied and are not generalizable.[375]

Racism: How Institutions Hold Back African Americans, 94 FOREIGN AFF. 9, 11–18 (2015) (explaining how implicit structural racism and biases lead to disproportionately high arrest rates for African-Americans).

371. *See* EAGLIN & SOLOMON, *supra* note 367, at 8 (detailing racial disparities in the criminal justice system).

372. *See* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 71 (2012) (discussing the role of race-based criminalization in indebtedness); *see also* U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., SUMMARY OF FINDINGS: ST. LOUIS COUNTY FAMILY COURT 1–2 (July 31, 2015) (finding that the St. Louis Family Court "administration of juvenile justice discriminates against black children" in the areas of intake, pretrial detention, probation violations, and custody after adjudication).

373. *See* CHARLES PUZZANCHERA, ET AL., JUVENILE COURT STATISTICS 2011, 52 (July 2014) (explaining that in 2011 67% of juveniles age fifteen or younger who were adjudicated delinquent were put on probation, as compared to 61% of juveniles age sixteen or over).

374. *See, e.g.,* Editorial, *Children Caught in a Racist System*, N.Y. TIMES, Aug. 7, 2015, at A18 ("In St. Louis County, officials examined 33,000 juvenile court cases over a three-year period and found that the system regularly treats black children more harshly than white children and routinely denies indigent children—no matter their race—basic constitutional rights.").

375. *See, e.g.*, Ed Munoz & Stephen Sapp, *Racial/Ethnic Misdemeanor Sentencing Disparities: Additional Evidence for Contextual Discrimination*, 1 J. ETHNICITY IN CRIM. JUST. 27, 28 (2003) (finding, in a narrow study of misdemeanor sentences in five Nebraska counties, that non-white defendants

While not an exhaustive analysis, the foregoing discussion sets the stage for advancing several proposals for reform of the new peonage.

IV. Proposals for Reform

The proliferation of court fees, and the costs incurred by the state to collect them, has prompted some judges, politicians, and lawmakers to question whether the practice has gone too far.[376] With the increased attention of public policy advocates and think tanks,[377] as well as the recent focus of the media,[378] proposals for reform have been generated, and some states appear to have the will to take action. For instance, New Jersey initiated an amnesty program to encourage thousands of people who owe fines to appear at court sessions of the Fugitive Safe Surrender Program where judges reviewed files and ordered fee reductions.[379] Conducted during four days in November 2013, more than 4,500 people turned themselves in, and hundreds with unpaid court fees and fines were able to gain significant reductions.[380] Safe

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were sentenced to fines more than forty percent higher than those imposed on white defendants for similar offenses).

376. *See, e.g.*, U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 97–102 (2015) (calling for, among other things, reform to the way municipal courts charge and collect fees); LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA (2015) (identifying the damage that municipal court practices in San Francisco can do to the impoverished and calling for change); Maura Dolan & Lee Romney, *State Chief Justice Says Unpaid Traffic Fines Should Get a Day in Court*, L.A. TIMES (May 21, 2015, 7:45 AM), http://www.latimes.com/local/lanow/la-me-ln-ca-chief-justice-unpaid-traffic-fines-20150520-story.html (last visited Nov. 11, 2015) (discussing how California Chief Justice Tani Cantil-Sakauye is calling for change to the way that traffic violation fines are handled) (on file with the Washington and Lee Law Review).

377. *See generally* BANNON ET AL., *supra* note 37; ACLU, IN FOR A PENNY, *supra* note 38.

378. *See, e.g.*, Shaila Dewan, *On Probation, Lives Can Run Far Off Track*, N.Y. TIMES, Aug. 3, 2015, at A1 (reporting on a woman living in Baltimore and struggling with the impact of criminal-justice debt, which led to job loss and more than a month in jail because she fell behind in her payments and could not afford to bail herself out).

379. *See* Shapiro, *supra* note 175 (describing the negative consequences of monetary fees imposed on indigent criminal defendants in multiple states).

380. *Id.*

Surrender programs for people who owe fines and fees are being developed in other parts of the United States, including Milwaukee, Wisconsin.[381] In Colorado, after Denver County Court judges voted to stop issuing arrest warrants for failure to pay fines because of the expenses of tracking debtors down, court time, and imprisonment, Governor John Hickenlooper signed a law that prohibits judges from incarcerating people who cannot afford to pay court costs.[382] The 2014 bill, which adopts the Supreme Court holding in *Bearden v. Georgia*,[383] requires courts to examine a person's ability to pay and to recommend a solution such as community service or a payment plan if the person cannot pay; only if the individual willfully chooses not to pay will she be held in contempt of court.[384] Colorado Republicans and Democrats voted nearly unanimously for the bill,[385] and a similar bill has been signed by the Governor of Illinois.[386] In 2015, the

381. *See* Marge Pitrof, *Plans in Motion for Fugitive Safe Surrender Program in Milwaukee*, WUMR (July 15, 2015), http://wuwm.com/post/plans-motion-fugitive-safe-surrender-program-milwaukee (last visited Nov. 11, 2015) (quoting an organizer of the event as saying, "There are people who have fines and warrants that they think they will never be able to get out from under, so they refuse to try to go get jobs") (on file with the Washington and Lee Law Review).

382. *See Recent Legislation*, 128 HARV. L. REV. 1312, 1313–15 (2015) (describing the nature and impact of the new Colorado law); *see also* 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/ (last visited Nov. 11, 2015) (reporting on the passage of the "Debtors' Prison Bill," which received unanimous, bipartisan support in the Colorado House and Senate) (on file with the Washington and Lee Law Review).

383. *See* Bearden v. Georgia, 461 U.S. 660, 668–69 (1983) (prohibiting a sentencing court from revoking a defendant's probation for the failure to make restitution, absent evidence and findings that he was responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence).

384. *Recent Legislation*, *supra* note 382, at 1315–16 (describing Colorado's "Debtors' Prison Bill," which mandates on-the-record hearings before a court may revoke a defendant's probation for the failure to pay criminal debts); Jorgensen, *supra* note 382 (noting that Colorado's "Debtors' Prison Bill" does not relieve solvent defendants from paying criminal debts).

385. Jorgensen, *supra* note 382.

386. *See Bill Status of HB5434*, ILL. GEN. ASSEMBLY (July 2012), http://www.ilga.gov/legislation/BillStatus.asp?DocNum=5434&GAID=11&DocTypeID=HB&LegId=65695&SessionID=84&GA=97 (last visited Nov. 11, 2015) (explaining the effect of the bill and its legislative history) (on file with the Washington and Lee Law Review).

Georgia legislature passed a bill that allows courts to "waive, modify, or convert" LFOs upon evidence of significant financial hardship, inability to pay, or "any other extenuating factors which prohibit payment or collection."[387]

This Part advances several legislative and public policy reforms that are designed to end the phenomenon of the new peonage.

A. Impact Analysis of Fees

In order to accurately determine whether the imposition of fees increases revenue or lowers recidivism, states are increasingly relying upon evidence-based approaches.[388] Advocacy organizations have conducted their own studies,[389] and state legislatures have formed committees[390] to study the fiscal and social costs of imposing fees and fines. Such an approach objectively demonstrates "whether a policy is fiscally sound, or merely a hypothetical revenue source that will actually cost more to implement than it generates in revenue."[391]

A data-driven approach is also more likely to receive bipartisan support. For instance, in 2011, Governor Steve Beshear of Kentucky signed a bipartisan bill into law, the Public Safety and Offender Accountability Act, which relied upon research-based strategies to "reduce recidivism, hold offenders accountable and maximize the state's limited financial resources."[392] The reforms included strengthening parole and

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387. H.B. 310, 42-8-102(e)(2), 2015–16 Reg. Sess. (Ga. 2015), *available at* http://www. legis.ga.gov/Legislation/20152016/153410.pdf.

388. *See* PATEL & PHILIP, *supra* note 47, at 11 ("Evidence-based practices significantly lower the costs borne by the state, and benefit the people involved in the system, making those practices a popular, bipartisan approach for criminal justice reform.").

389. *See id.* (providing a study that examines the impact of fees and fines).

390. *See id.* (providing examples of committees that examine fees and fines).

391. *Id.*

392. *Pew Applauds Kentucky Leaders for Comprehensive Public Safety Reforms*, PEW CTR. ON THE STATES (Mar. 3, 2011), http://www.prnewswire.com/news-releases/pew-applauds-kentucky-leaders-for-comprehensive-public-safety-reforms-117341178.html (last visited Nov. 11, 2015) (on file with the Washington and Lee Law Review).

probation programs to reduce recidivism and to control costs.[393] Although it was not focused on court fees, the task force assembled to examine the data and develop a reform package included judges, a former prosecutor, and a former public defender, the composition of which can serve as a model for other legislative efforts.[394]

An example of impact analysis in the context of LFOs may be found in the South Carolina Omnibus Crime Reduction and Sentencing Reform Act, passed with bipartisan support in 2010 and drafted by a "multiple stakeholder group" that included community organizations, law enforcement, and practitioners.[395] The Act requires ongoing oversight in the form of annual reporting of all criminal-justice related expenditures, and it established the Sentencing Reform Oversight Committee to handle this reporting as well as the policy adjustments that might follow.[396] In addition, the bill requires that fiscal impact statements accompany any proposed changes to sentencing provisions of criminal offenses.[397] It specifies that the legislative committee examining the proposed legislation "shall not take action . . . until [it] has received the fiscal impact statement."[398] It mandates that state agencies and political subdivisions cooperate with the Revenue and Fiscal Affairs Office (RFAO) in preparing these statements, and that the RFAO request information from nongovernmental agencies and organizations to assist in

393. *See id.* (reporting that the reforms could result in gross savings of $422 million over ten years).

394. *See id.* (alluding to the benefits of consulting numerous stakeholders in the Kentucky criminal justice system to forge a consensus on a series of comprehensive public safety reforms).

395. *See South Carolina Governor Reduces Disparity Between Crack, Powder Cocaine, and Reforms Other Sentencing Policies*, ASSOC. PRESS (June 3, 2010), http://www.sentencingproject.org/detail/news.cfm?news_id=928 (last visited Nov. 11, 2015) (reporting that the new law encompasses a package of criminal justice reforms) (on file with the Washington and Lee Law Review).

396. *See* JUSTICE POLICY INST., DUE SOUTH: SOUTH CAROLINA: JUSTICE SYSTEM OVERHAUL 1–2 (May 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/due_south_-_south_carolina.pdf (describing that the Act "should result in fewer individuals returning to prison and more people having successful lives").

397. *See* S.C. CODE § 2-7-74 (outlining the necessary components of fiscal impact statements following criminal offense changes).

398. *Id.* § 2-7-74(D).

preparing the fiscal impact statement.[399] A section of the Act requires people convicted of drug law violations to pay a "controlled substance offense assessment" that would be directed to drug treatment courts and exempts those who are deemed to be indigent.[400] Advocates, however, have noted that such fees are "still a burden to people who are convicted of drug offenses who are already facing challenges with being involved in the justice system."[401]

In short, evidence-based data analysis is a cost-effective and politically feasible method of revealing the negative fiscal impact that most criminal justice fees have on states, as well as their "anti-rehabilitative impact" on people.[402]

B. Legislative Initiatives

There are a number of legislative proposals that have been advanced by advocates and lawmakers to end the phenomenon of the new peonage.[403] These include requirements that the court create and enforce fee exemptions and petitions for waivers for indigence; that court personnel clearly inform people of the possibility of exemptions; and that the procedure for obtaining them be well-defined and not overly-complex.[404] A comprehensive exemption system includes an evaluation at the time of the criminal complaint or indictment of the individual's ability to pay, before the court imposes any fees or fines. Likewise, there should be statutory protections for those who may initially have had an ability to pay but whose financial circumstances have changed.

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399. *Id.* § 2-7-74(F), (H).

400. *See* JUSTICE POLICY INST., *supra* note 396, at 2 (noting that the reallocation of funds from criminal debt obligations to community-based treatment options that help people before they become involved in the criminal justice system may bring about more positive changes).

401. *Id.*

402. *See* PATEL & PHILIP, *supra* note 47, at 11 (demonstrating that numerous states are turning to evidence-based data analysis to determine the effects of imposing fees in the criminal justice system).

403. *See id.* at 11–18 (describing the success of legislation introduced by Massachusetts, Rhode Island, Maryland, and Washington that is aimed at reducing criminal justice debt).

404. *See, e.g.*, *id.* at 14 (describing legislative proposals).

For people who do not initially qualify for waivers or exemptions, the court should develop personalized payment plans that allow for weekly or monthly payments for those who cannot afford to pay a lump-sum balance. Hawaii, Kansas, Connecticut, and Ohio are among the states that instruct courts to grant full or partial waivers for people who are unable to pay fees or fines.[405] For instance, the Hawaii statute explicitly states in regard to "compensation fees" assessed upon conviction and probation fees assessed upon sentencing that "no fee shall be ordered when the court determines that the defendant is unable to pay the fee."[406]

There also are legislative proposals to eliminate unnecessary interest, late fees, and collateral consequences for defendants.[407] Such protections are necessary, as a number of states charge interest or late fees for late or missing payments even if the reasons for nonpayment are compelling, such as child support obligations.[408] The amount charged for late fees can be exorbitant, such as California's $300 late fee.[409] Proposed

405. *See* H.R. 2668, 2010 Gen. Assemb., Reg. Sess. (Kan. 2010) (concerning crimes, punishment and criminal procedure); 2010 Kan. Sess. Laws Ch. 136 (same); CONN. GEN. STAT. § 53a-30(e) (2012) (requiring courts to waive the costs of electronic monitoring if the court finds that the person subject to electronic monitoring on probation is indigent and unable to pay); OHIO ADMIN. CODE 5120:1-1-02 (2015) (prohibiting the division of parole and community services from imposing a supervision fee if the offender demonstrates that he or she is indigent and unable to procure the fee); HAW. REV. STAT. § 706-605 (2015) (requiring that courts waive the imposition of a compensation fee upon conviction if a defendant is unable to pay); HAW. REV. STAT. § 706-641 (2015) (prohibiting courts from imposing a fee on a criminal defendant during sentencing unless the defendant is or will be able to pay the fine); HAW. REV. STAT. § 706-648 (2015) (prohibiting courts from imposing a probation services fee on a criminal defendant unless the defendant is or will be able to pay the fine).

406. HAW. REV. STAT. § 706-648(1)(b) (2012); § 706-605(6); *cf.* Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 539–42 (2006) (discussing the enactment of new laws to protect uninsured patients from hospital overcharging and aggressive collection practices that lead to the garnishment of wages, imposition of liens on homes, and freezing of bank accounts).

407. *See* PATEL & PHILIP, *supra* note 47, at 17 (noting features of legislative proposals).

408. *See id.* (describing conflicting obligations that may subject those with outstanding criminal debts to additional fees).

409. *See id.* (criticizing California's one-time late fee as well as policies enforced by some Florida counties, which impose an additional ten to twenty dollar fee every time a defendant makes a late payment).

legislation would prohibit the assessment of such charges unless the court first conducts an on-the-record inquiry to determine the ability to pay.[410] Similarly, if the failure to pay is not willful, the court would waive any accrued interest, surcharges, or related criminal-justice debt, and suspend all required payments and interest accrued between the filing of the petition for a hearing and the court hearing on the petition.[411] The State of Washington, for instance, has introduced legislation that waives LFO interest accrual when people are incarcerated.[412] One related proposal is to prohibit the suspension of driver's licenses for failure to pay, as this policy can lead to a lack of transportation and loss of employment, which are particularly pernicious collateral consequences of debt.[413]

Proposals have also been put forward to end the practice of extended probationary supervision for non-willful failure to pay.[414] At least thirteen states have statutes that allow for this counterproductive practice, creating a system in which people who have satisfied all the other conditions of probation are forced to remain on supervision merely as a consequence of debt.[415] Likewise, some states have prohibited the practice of incarcerating people who have committed non-violent technical violations of probation, such as failure to pay fees, fines, or

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410. *See id.* (outlining the procedures necessary to determine an individual's ability to pay).

411. *See id.* at n.80 (noting that although proposed legislation in some states could result in the waiver or abatement of criminal debt obligations, this may not be an option in all jurisdictions).

412. *See* WASH. REV. CODE § 10.82.090(2) (2015) (permitting the courts to reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction); WASH. REV. CODE § 4.56.110(4) (2010) (describing the process by which interest on judgments shall be calculated); WASH. REV. CODE § 19.52.020 (1989) (describing the process by which the maximum possible interest rates for interest on judgments are set).

413. *See* PATEL & PHILIP, *supra* note 47, at 18 (arguing that employment is a major part of the rehabilitative and reentry process, which is jeopardized when and individual loses their ability to legally drive).

414. *See id.* at 20 (describing statutes, regulations, and policies in Ohio and Virginia that prohibit the extension of probation or parole due to failure to pay criminal justice debt).

415. *See* BANNON ET AL., *supra* note 37, at 25 (revealing that Alabama, Arizona, California, Florida, Georgia, Louisiana, Michigan, Missouri, North Carolina, Ohio, Pennsylvania, Texas, and Virginia all continue the practice of extending a defendant's probation for non-willful failure to pay).

costs.[416] The report of a panel in Virginia that recommended such a law stated that if those who owed fees and fines were freed from probation,

> [T]hen probation and parole officers would have more time and resources to supervise more serious and higher-risk offenders. In addition it would reduce the number of technical violators brought back to court and returned to prison.[417]

The argument that onerous debt collection policies and practices place an avoidable resource strain on states and municipalities may be one of the most politically persuasive to lawmakers considering these proposals.[418]

It is critical to keep in mind, however, that although legislative responses to the new peonage are a promising strategy, they raise unanswered questions. For instance, language supplied by statute or developed through appellate review must provide more precise definitions of terms such as "indigence," "undue hardship," "a finding of financial ability to pay," and "sufficient bona fide efforts to pay" if these protections are to be effective in dismantling the modern debtors' prison.[419] Otherwise, courts and individual judges will continue to have unfettered discretion to determine which defendants qualify for relief and which do not.[420] Of course bills such as those developed in Colorado are an improvement on the status quo, as they require courts to make specific determinations related to indigence on the record,[421] but such laws must be carefully

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416. *See, e.g.*, H.R. 2309, 2009 Gen. Assemb., Reg. Sess. (Va. 2009); VA. CODE ANN. § 19.2-305 (West 2012) (requiring fines, costs, restitution for damages, support or community services from probationer).

417. ALTERNATIVES FOR NON-VIOLENT OFFENDERS TASK FORCE, REPORT AND RECOMMENDATIONS 7 (2009), http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD4302009/$file/RD430.pdf.

418. *See* PATEL & PHILIP, *supra* note 47, at 5–6 (arguing that debt collection policies place significant fiscal costs and burdens on states).

419. *See Recent Legislation*, *supra* note 382 at 1316–19 (elaborating on the importance of providing precise definitions and adequate guidance for courts who are tasked with upholding legislative responses to debtors' prisons).

420. *See id.* (noting that while Colorado requires on-the-record indigency hearings before incarcerating debtors for failing to pay debts owed to the state, the legislature's failure to provide substantive guidance may prove problematic).

421. *See supra* notes 402–407 and accompanying text (describing aspects of bills that are designed to combat the problems associated with criminal-justice debt).

drafted and monitored to ensure accountability and effective enforcement.

C. Right to Counsel in Non-Payment Hearings

It is long-settled law that the Sixth Amendment requires that counsel be appointed to indigent criminal defendants who face the risk of the loss of liberty.[422] Most states hold that this right, which derives from the Due Process Clause of the Fourteenth Amendment, also applies to civil proceedings.[423] Most

422. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that the state was not obligated to provide counsel when the conviction did not result in actual imprisonment, despite the fact that imprisonment was a potential penalty); Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (finding that courts must determine whether appointment of counsel is necessary at probation and parole revocation hearings); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that a defendant may not be subject to imprisonment without the aid of counsel, regardless of whether the offense was a misdemeanor or felony, and regardless of whether the offense qualified for a jury trial); *In re* Gault, 387 U.S. 1, 36–37 (1967) (holding that juveniles have the right to counsel in delinquency proceedings); Massiah v. U.S., 377 U.S. 201, 205 (1964) (concluding that the right to counsel attaches when a suspect is indicted); Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (establishing that an indigent defendant in a criminal trial has a right to the assistance of counsel, and that it is a fundamental right essential to a fair trial).

423. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. POV. L. & POL'Y 245, 252–70 (2006) (showing that most states appoint counsel for civil litigants in certain circumstances); William L. Dick, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 627–32 (1989) (applying the Fourteenth Amendment to the right to counsel in civil proceedings); s*ee also* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (establishing that the Due Process Clause does not automatically require the state to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration); Lassiter v. Dept. of Social Servs., 452 U.S. 18, 26–27 (1981) (finding that there is a due process right to appointed counsel when a litigant may lose his physical liberty if he does not prevail in the litigation, and that a balancing test should be used to make this determination, considering the private interests at stake, the risk that the procedures used will lead to erroneous decisions, and the government's interest); Matthews v. Eldridge, 424 U.S. 319, 339–41 (1976) (concluding that the Due Process Clause does not require a hearing prior to the termination of social security disability benefits, based on the balancing private interests and the government's interest); *see also* Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 906–16 (2015) (examining the relative importance assigned to civil and criminal

states also agree with Supreme Court dicta in *Lassiter v. Department of Social Services* that relying on the "civil" or "criminal" label placed on a proceeding when determining whether there is a right to counsel is not particularly helpful in this subset of cases, as the possibility of incarceration is an equally serious restraint on one's liberty interests whether it results from a civil or criminal matter.[424] State courts are split, however, on how best to determine whether the right exists when applied to a given set of facts, with some courts holding that a balancing test should be used on a case-by-case basis,[425] and others holding that the right to counsel should be presumptively guaranteed in all matters that could potentially result in incarceration.[426] Several states have even held that there is no right to counsel in civil fee collection proceedings regardless of whether the defendant could be incarcerated, invoking the civil/criminal distinction to support their holdings, thereby rejecting *Lassiter*.[427]

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counsel, including the fact that civil judgments result in far-reaching collateral consequences, and arguing that the prioritization of criminal over civil counsel reflects a mistaken view of lawyers' primary role as a shield against government power).

424. *See* Lassiter v. Dep't of Social Servs., 452 U.S. 18, 24–25 (1981) (emphasizing that, in determining whether due process requires the appointment of counsel for an indigent litigant, a court must first focus on the potential curtailment of the indigent's personal liberty rather than on the "civil" or "criminal" label placed on the proceeding); s*ee also* McBride v. McBride, 431 S.E.2d 14, 16–17 (N.C. 1993) (citing *Lassiter* for the same proposition).

425. *See, e.g.*, State ex rel. Dept. of Human Servs. v. Rael, 642 P.2d 1099, 1104 (N.M. 1982) (concluding that a balancing test should be used to determine whether an indigent parent should be appointed counsel in a child support case); Duval v. Duval, 322 A.2d 1, 3–4 (N.H. 1974) (holding that a trial court may, in its discretion, appoint counsel to assist an indigent defendant to present his case in a complicated nonsupport contempt hearing in which the defendant faces imprisonment).

426. *See, e.g.*, State v. Stone, 268 P.3d 226, 235 (Wash. Ct. App. 2012) (finding that whether a proceeding is civil or criminal, due process is implicated whenever incarceration is a possibility, and the defendant should be appointed counsel at public expense); *McBride*, 431 S.E.2d at 18 (concluding that due process requires a presumption in favor of an indigent defendant's right to appointed counsel when a proceeding can result in incarceration).

427. *See, e.g.*, Andrews v. Walton, 428 So. 2d 663, 666 (Fla. 1983) (finding that a defendant held in contempt for failure to pay child support and sentenced to thirty days in jail was not entitled to counsel because it is a civil contempt proceeding); Meyer v. Meyer, 414 A.2d 236, 239 (Maine 1980) (finding that a defendant in child support contempt case had no right to counsel because the

An argument that is gaining traction is that there should presumptively be a right to counsel for indigent litigants in nonpayment hearings whenever those hearings can result in incarceration or an extension of probation or parole.[428] In the recent case of *State v. Stone*,[429] James Stone pleaded guilty in 2001 to unlawful possession of a controlled substance (methamphetamine) and second degree theft, and the trial court sentenced him to 105 days in jail and twelve months of community custody with a fine of $2,860.[430] Two years later his supervision was transferred from the Washington Department of Corrections to the superior court clerk's office, as he now owed (adding the interest) $3,179.[431] Two months later, without being told of the right to counsel, he signed an order agreeing to minimum monthly payments of twenty-five dollars, and agreeing that if he failed to pay, an arrest warrant would be issued.[432] For the next twenty-nine months, Stone made the monthly payments, but when he missed a payment and a court appearance, an arrest warrant was issued, and he was sentenced to ten days in jail.[433] This was followed by a period when he once again made payments.[434] This scenario continually repeated itself; yet for three years the court did not inquire as to whether Stone wished

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proceedings were civil and not criminal); Adkins v. Adkins, 248 S.E.2d 646, 646–47 (Ga. 1978) (determining that appointed counsel is not required in a contempt hearing for failure to pay child support, even when the defendant was imprisoned, as it is a civil proceeding); *In re* Calhoun, 350 N.E.2d 665, 666–67 (Ohio 1976) (determining that there is no right to counsel in civil proceedings that can result in incarceration). *But see In re* Miami County Grand Jury Directive to Creager, 82 Ohio App. 3d 269, 272 (Ohio Ct. App. 1992) (concluding that a balancing test should be used when determining whether there is a right to counsel in a civil contempt hearing).

428. *See* PATEL & PHILIP, *supra* note 47, at 22 (illustrating the importance of a defendant's right to counsel at enforcement proceedings for payment obligations arising from his or her criminal sentences).

429. 268 P.3d 226, 227 (Wash. Ct. App. 2012).

430. *Id.* at 228.

431. *Id.*

432. *See id.* (describing the fines and fees comprising Stone's total criminal debt obligation).

433. *See id.* at 228–29 (emphasizing that when the trial court asked Stone if there was anything that he would like to say, Stone replied that "he had been evicted from his home . . . and that he didn't just blatantly want to blow off the Court and not make his payments . . . ." (citation omitted)).

434. *Id.*

to have counsel appointed.[435] After the court finally inquired of him and counsel was appointed, a fact-finding hearing was held one week later, which the appellate court described as follows:

> Stone testified that he was homeless; that he was left handed and limited to twenty-five percent use of that hand; that the Department of Social and Health Services (DSHS) paid his medical bills; that his only source of income was monthly net payments of $339 from a . . . program . . . due to [his] disability with [his] shoulder; and that he spent this money on shelter, cigarettes, and "a few other necessities" like food. He also testified that it cost him approximately $100 to travel to Jefferson County for court appearances.[436]

At the hearing's conclusion, the judge sentenced Stone to forty-five days in jail, with no inquiry as to his income or ability to pay, and without granting a deduction in his LFO debt for either of his two previous periods of incarceration.[437] On review, the Court of Appeals of Washington held that a person has an absolute right to counsel at "ability-to-pay" hearings where incarceration may result, and that Stone's due process rights were violated when he was incarcerated without findings regarding his ability to pay:[438]

> Stone's lack of counsel during these proceedings created an 'asymmetry of representation' because a prosecuting attorney represented the State in this adversarial proceeding. As the United States Supreme Court has observed, "The average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel*."[439]

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435. *See id.* at 228–30 (noting that the record contained an acknowledgment of defendant's rights signed by Stone, but that the trial court never orally advised Stone of a right to counsel and neglected to ask him whether he wished to have an attorney appointed).

436. *Id.* at 230.

437. *See id.* (referencing comments made by the trial judge who determined that Stone's failure to contact the court, by phone or letter, amounted to a willful failure to pay and appear).

438. *See id.* at 233–36 (determining that the County's "policy or placing convicted felons on a pay or appear calendar and requiring them to represent themselves violates fundamental due process rights").

439. *Id.* at 235 (citations omitted).

The federal appellate court clearly recognized that if counsel had represented James Stone at the first enforcement proceeding, it would have made the difference between his maintaining and losing his liberty down the road. Counsel is needed to gather and present evidence regarding the defendant's ability to pay, to assist her in navigating the often-complex procedures for requesting a reduction or waiver of fees, and to ensure that she understands the ramifications of payment orders or commitments.[440] As discussed above, it is likely that early appointment of counsel will ultimately save the jurisdiction monies spent in repeated attempts at collection, issuing and serving arrest warrants, and the costs of incarceration.[441]

Of course it is critical to keep in mind that when counsel *is* appointed, at least forty-three states and the District of Columbia can require defendants to contribute to its cost.[442] This fee is often a significant component of the total debt burden imposed by LFOs, and given the disproportionate representation of low-income defendants and civil litigants struggling under the new peonage, it rests squarely on the backs of those least able to afford it.[443] In Florida and Ohio, individuals must pay defender fees even if they are acquitted or the charges are dismissed.[444] In states that offer hardship waivers of these fees by statute, some fail to provide them in practice.[445] Additionally, defender fees

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440. *See* PATEL & PHILIP, *supra* note 47, at 22 (emphasizing the importance of counsel when courts assess fees or fines).

441. *See supra* Part III.D (explaining that the cost of collecting fines and fees and incarcerating those who cannot pay often exceeds the revenue generated by fines and fees).

442. *See* Shapiro, *supra* note 175 (citing a state-by-state survey conducted by NPR on the number of states in which defendants can be billed for a public defender).

443. *See supra* notes 322–326 and accompanying text (contending that criminal justice debt is a regressive tax).

444. *See* FLA. STAT. § 27.52(1)(b) (2012) (requiring that an applicant pay a fifty dollar application fee to the clerk for each application for court-appointed counsel filed); OHIO REV. CODE § 120.36(A)(1) (2006) (requiring that an applicant pay an "application fee to the clerk of court at the time the person files an affidavit of indigency or a financial disclosure form with the court, a state public defender . . . or any other counsel appointed by the court . . .").

445. *See* BANNON ET AL., *supra* note 37, at 12 (finding that in Arizona, courts order defendants to pay public defense costs in the majority of cases, and that

often serve to discourage low-income people, including children in juvenile court, from exercising their constitutional right to counsel, resulting in systematic waivers of counsel.[446]

Yet, if the right to counsel at nonpayment hearings is implemented in combination with the legislative proposals discussed above,[447] such as the exemption of attorney fees for indigence, these costs should cease to be a significant hardship for low-income defendants.

D. Increase Job Training and Placement

One last proposal that will lessen the harmful impact of criminal-justice fees is to require that states focus on offender rehabilitation through rigorous job training, treatment, and placement programs, rather than by assessing fees or mandating community service hours that interfere with training and employment. Well-designed community service programs can, of course, help those with criminal convictions to develop job skills

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many courts utilize uniform fee structures that do not take into account the ability to pay).

446. *See Juvenile Justice Guide Book for Legislators*, NAT'L CONF. OF ST. LEGISLATURES 4 (2011), www.ncsl.org/documents/cj/jjguidebook-complete.pdf (finding that many states require administrative fees prior to submitting an application to apply for court-appointed counsel in juvenile court, and that "[s]ome consider these fees prohibitive to youths who have very little money"). Of course, even when counsel is appointed and the attorney fees are not overly burdensome, the quality of counsel can be substandard, particularly for juveniles. *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791–800 (2010) (discussing the nature and pervasiveness of substandard legal representation in juvenile court, the negative effects of poor lawyering on youth, and the structural causes and resistance to the empowerment of youth); *see also, e.g.*, U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION, SUMMARY OF FINDINGS: ST. LOUIS COUNTY FAMILY COURT 1–2 (July 31, 2015), http://www.justice.gov/opa/pr/justice-department-releases-findings-constitutional-violations-juvenile-delinquency-matters (last visited Nov. 11, 2015) (finding that the St. Louis Family Court "fails to provide adequate representation for children in delinquency proceedings, in violation of the Due Process Clause of the Fourteenth Amendment") (on file with the Washington and Lee Law Review).

447. *See supra* Part IV.B (discussing legislative proposals that would mitigate criminal-justice debt).

and to gain the training necessary to avoid reoffending.[448] For those with mental illness or developmental disability, however, their participation in such programs may not be possible. Likewise, many states offer only limited community service options in lieu of paying off debt.[449] For instance, in Florida, very few judges agree to convert mandatory criminal debt imposed in felony cases to community service.[450] In North Carolina, the law prohibits this practice altogether.[451]

For those who are able to participate, when community service programs are well-structured and robust, the benefits can be long-lasting.[452] One county in Pennsylvania offers work details in lieu of criminal-justice debt payments at preauthorized, well-functioning sites, such as the Salvation Army or YMCA.[453] It also provides a program for those incarcerated at the county prison to work on county property, such as the local courthouse.[454] In this way, people gain job skills while avoiding debt. As one public defender reflected:

> [T]he work program offers the person a chance to prove to themselves, family and the court that they are serious about reintegrating themselves as a productive, responsible member of the community, building self-esteem and dignity along the way . . . and of course the ultimate goal, reducing recidivism.[455]

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448. *See* PATEL & PHILIP, *supra* note 47, at 23 (noting that, in the alternative, "poor program design can stymie the potential rehabilitative benefits").

449. *See* BANNON ET AL., *supra* note 37, at 15 (describing that even in states that offer community service options in lieu of criminal justice debt, practices vary significantly).

450. *See, e.g.*, Diller *supra* note 322, at 23 ("In a report from court clerks, only [sixteen] of [sixty-seven] counties reported converting any mandatory LFOs imposed in felony cases to community service.").

451. *See* BANNON ET AL., *supra* note 37, at 15 n.69 (noting that "research did not identify any statute authorizing a community service option in North Carolina, and interviewees indicated that no option is available in practice").

452. *See id.* at 17 (describing that such programs allow participants to avoid financial hardships arising from criminal justice debt until they are released from prison or locate gainful employment).

453. *See id.* (reporting that the County also permits participants to seek approval from the work crew supervisor to volunteer at other locations).

454. *Id.*

455. *Id.*

In short, time-limited community service that is directly tied to job training and placement is a useful model for addressing criminal justice debt.

V. Conclusion

There are many parallels between the post-Civil War system of coerced labor for debt and the new form that has developed with the proliferation of economic sanctions in U.S. courts.[456] The most obvious, perhaps, is legalized discrimination. Like peonage in the late nineteenth century, the new peonage marginalizes large segments of the community, segregates them physically in jails, prisons, and ghettos, and then authorizes discrimination against them in the judicial system, with collateral consequences in areas such as employment, voting, and public benefits.[457] As a result, Marcus,[458] a Georgia "peon" in the 1880s, and David Ramirez,[459] living in the 2010s in Washington State, have more in common than their generational, ethnic, and cultural differences would suggest.

Although the U.S. Supreme Court issued decisions in the 1910s, and then again in the 1970s and 1980s, that invalidated laws that perpetuated both forms of peonage, the practice persists.[460] Ironically, at least in the contemporary context, this hidden regressive tax frequently fails to generate state revenue.[461] Instead, it burdens the court system and interferes with the proper administration of justice. It also contributes to extreme family hardship, which increases the risk of recidivism and the intergenerational transmission of poverty.[462]

Proposals to end the phenomenon of the new peonage do exist, and their success has been demonstrated in a variety of

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456. *See supra* Part III.E (comparing the old and new peonage).

457. *See supra* Part III.E (comparing the old and new peonage).

458. *See supra* notes 3–17 and accompanying text (explaining Marcus's life story).

459. *See supra* notes 20–31 and accompanying text (describing David Ramirez's crippling criminal-justice debt).

460. BANNON ET AL., *supra* note 37, at 19.

461. *See supra* Part IV.A (discussing the impact analysis of fees).

462. *See supra* Part III.C (discussing collateral consequences on the family).

laws and programs across the United States.[463] The open question is whether our legislators and judges have the will to end this two-tiered system of justice. As the Court stated in *Bearden v. Georgia*:

> [T]he State argues that its interests in punishing the lawbreaker and deterring others from criminal behavior require it to revoke probation for failure to pay a fine or restitution. The State clearly has an interest in punishment and deterrence, but this interest can often be served fully by alternative means.[464]

For criminal justice advocates, few issues are more pressing than working to ensure that America's current economic caste system will be its last.

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463. *See* PATEL & PHILIP, *supra* note 47, at 11–24 (describing criminal debt reform laws and programs in Massachusetts, Rhode Island, Maryland, Washington, and Florida).

464. 461 U.S. 660, 671–72 (1983).