

THE DEBTORS’ PRISON SCHEME: YET ANOTHER BAR IN THE BIRDCAGE OF MASS INCARCERATION OF COMMUNITIES OF COLOR

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ABSTRACT

Though officially deemed unconstitutional, the debtors’ prison scheme consists of jailing low-income individuals for not being able to pay their legal financial obligations (“LFOs”), also known as criminal justice debt. These LFOs include fines, fees, and assessments—from traffic tickets to public defender fees. Two lawsuits, *Cleveland, et al. v. City of Montgomery* and *Mitchell, et al. v. City of Montgomery*, resulted in settlement agreements promising—among many other things—that anyone below 125% of the Federal Poverty Level would be considered indigent and, thus, would not be jailed for being unable to pay off their LFOs. The highly publicized Department of Justice’s 2014 report of its investigation of the Ferguson Police Department brought further attention to the debtors’ prison lawsuits, unleashing an onslaught of additional complaints exposing debtors’ prison schemes. Though many of the lawsuits filed did not explicitly mention race, most of them were filed in jurisdictions with large communities of color.

This Article argues that the debtors’ prison scheme employed on a national level across the United States functions like the War on Drugs as another “branch” of the race-based mass incarceration described by Michelle Alexander in her book, *The New Jim Crow*. Part II lays out the debtors’ prison scheme, from the causes to the consequences on individuals, and explains why the lack of definition of an individual’s “ability to pay” reinforces the racial disparity of the scheme. Part III demonstrates that the debtors’ prison scheme functions as a form of racialized social control similar to the War on Drugs, using Michelle Alexander’s analysis in *The New Jim Crow*. Part IV questions whether the law can make a difference in dismantling the debtors’ prison scheme through a Critical Race Theory lens.

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[∞] Equal Justice Works Fellow, AARP Legal Counsel for the Elderly. Georgetown University Law Center, J.D. 2016. I would like to thank Professor Paul Butler for his invaluable feedback and guidance in writing this Article, Professor Peter Edelman for giving me the opportunity to research debtors’ prisons for his forthcoming book, and Professor Allegra McLeod for inspiring my interest in the topic. Thank you also to the staff of the *N.Y.U. Review of Law & Social Change* for their thorough editing and helpful comments, particularly Eliza Vasconcellos. A final thank you to my family for their unwavering support. All views and errors are my own.

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I.
INTRODUCTION

The nature of the criminal justice system has changed. It is no longer primarily concerned with the prevention and punishment of crime, but rather with the management and control of the dispossessed.

—Michelle Alexander¹

Alana Cain was a low-income twenty-six-year-old African American woman living in New Orleans, Louisiana.² She was charged with a felony theft offense in 2012 when a ring disappeared from a law firm office she used to clean. She pled guilty to the charge. Cain was indigent, but the judge ordered her to pay \$1,800 in restitution and approximately \$950 in court fines and fees³—\$600 of which were at his discretion to go to the Judicial Expense Fund.⁴ The Collections Department decided that Cain would need to pay \$100 each month despite her indigent status.⁵ Cain did her best to keep up with the monthly payments, borrowing money from her equally poor family and friends while caring for her sick mother.⁶ One month, Cain failed to make her payment on time and asked if she could make a smaller payment to the Collections Department, but the Department refused any payment smaller than \$50 and issued an arrest warrant for her.⁷

On March 11, 2015, a New Orleans police officer pulled over a car due to a broken taillight.⁸ Cain was the passenger. After checking her identification, the officer told Cain he had to take her to jail because of her pending arrest warrant. In fact, Cain had just borrowed \$80 from her friend to put towards paying off her

1. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 188 (2012).

2. First Amended Class Action Complaint at 9, *Cain v. City of New Orleans*, No. 15-4479 (E.D. La. Sept. 21, 2015), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/04/First-Amended-Complaint-9-22-15.pdf> [<https://perma.cc/8HJV-PXAF>].

3. Campbell Robertson, *Suit Alleges 'Scheme' in Criminal Costs Borne by New Orleans's Poor*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleans-poor.html?_r=0 [<https://perma.cc/VAC8-8S4K>].

4. First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2, at 9. A judicial expense fund is a special cost imposed on criminal defendants in Louisiana in order to fund the administration of the criminal justice system. *See* LA. REV. STAT. ANN. § 13:1381.4 (2012); Micah West, *Financial Conflicts of Interest and the Funding of New Orleans's Criminal Courts*, 101 CAL. L. REV. 521, 530, 547 (2013) (highlighting the constitutional conflict of interest for judges who are supposed to remain impartial but yet are incentivized to raise money for court operations).

5. First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2, at 9.

6. *Id.*

7. *Id.* at 10.

8. Robertson, *supra* note 3.

debt,⁹ but the jail staff told her that unless she could pay the standard \$20,000 secured bond, she would have to stay in jail.¹⁰ Cain spent a week in jail before she could see a judge.¹¹

Once in court, Cain explained to the judge that she did not have a job and could not come up with the money.¹² The judge made “no meaningful inquiry into her indigence and, pursuant to policy, neither the lawyers representing the District Attorney nor the Public Defender informed her of her constitutional rights or asked the judge to conduct such an inquiry.”¹³ Instead, the judge told Cain that she would have to spend ninety days in jail if she ever missed another payment again.

Cain did not have a bank account, a car, or other significant assets.¹⁴ She often relied on food stamps and her family for basic human necessities, such as shelter and clothes.¹⁵ Her criminal conviction hindered her job search, and she also suffered from several medical conditions.¹⁶

Along with five other victims of similar treatment, Cain filed a class action suit in the District Court for the Eastern District of Louisiana on September 21, 2015.¹⁷ The complaint stated that judges and court officials were running “a scheme” in which low-income people were indefinitely jailed if they fell behind on paying their court fines, fees, and assessments—also known as legal financial obligations (“LFOs”).¹⁸ The complaint also described how judges imposed LFOs on low-income people without first holding a hearing to determine their ability to pay and how most of the key players in the local criminal justice system—judges, prosecutors, and public defenders—benefitted financially from this scheme.¹⁹

Cain’s class action lawsuit is not the first one of its kind. In fact, civil rights organizations such as Equal Justice Under Law,²⁰ the ACLU in various states,²¹

9. First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2, at 10.

10. *Id.*

11. *Id.* at 11.

12. Robertson, *supra* note 3.

13. First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2, at 11.

14. *Id.*

15. *Id.*

16. *Id.* at 11–12.

17. *Id.* at 1.

18. See Robertson, *supra* note 3; see also *infra* Part II.B.

19. See Robertson, *supra* note 3.

20. See, e.g., First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2; Class Action Complaint, *Bell v. City of Jackson*, No. 3:15-cv-732 TSL-RHW (S.D. Miss. Oct. 9, 2015), http://umlaw.macarthurjusticecenter.org/uploads/rsmjc-oxford/documents/complaint_-_filed_bell_v_jackson.pdf [<https://perma.cc/U8PF-F5UJ>]; Class Action Complaint, *Jenkins v. City of Jennings*, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf> [<https://perma.cc/7RGB-WF3M>].

and the Southern Poverty Law Center (“SPLC”)²² have filed a succession of class action complaints during the past few years. Starting in 2010, the ACLU brought attention to debtors’ prisons when it issued a report recounting the stories of affected people and describing the financial failure of the debtors’ prison scheme.²³ The first complaint, *Cleveland v. City of Montgomery*, was filed by SPLC on November 12, 2013 in Montgomery, Alabama. Equal Justice Under the Law followed suit with *Mitchell v. City of Montgomery* in March 2014. These lawsuits claimed that the City of Montgomery was illegally jailing its residents for being too poor to pay off their criminal justice debt, which often resulted from traffic tickets. Both *Cleveland* and *Mitchell* resulted in settlement agreements promising—among many other things—that anyone earning below the 125% of the Federal Poverty Level would be considered indigent and, thus, would not be jailed for being unable to pay off their debt.²⁴

The true catalyst was the Department of Justice’s report of its investigation of the Ferguson Police Department in Ferguson, Missouri, released on March 4, 2015 (“Ferguson Report”).²⁵ The Ferguson Report revealed that police and municipal court practices focused on generating revenue for the city, rather than public safety, and exacerbated “existing racial bias, including racial

21. *See, e.g.*, Complaint, *Fuentes v. Benton County*, No. 15-2-02976-1 (Wash. Sup. Ct. Oct. 6, 2015), <https://www.aclu.org/legal-document/fuentes-v-benton-county-complaint> [https://perma.cc/4DAW-ST6R].

22. *See, e.g.*, Complaint, *Foster v. City of Alexander*, 3:15-CV-647-WKW (M.D. Ala. Sept. 8, 2015), https://www.splcenter.org/sites/default/files/documents/1_-_complaint_-_file_stamped.pdf [https://perma.cc/C8SJ-NDRU].

23. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [https://perma.cc/MK4S-W7B6]. The debtors’ prison scheme refers to the intentional practice of incarcerating individuals for unpaid fines and criminal justice fees. *See infra* Part II.B.

24. Amended Complaint, *Cleveland v. City of Montgomery*, No. 2:13-cv-00732-MEF-TFM (M.D. Ala. Nov. 12, 2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/amended_complaint_harriet_cleveland_0.pdf [https://perma.cc/PMH7-EX58]; Settlement Agreement, *Cleveland v. City of Montgomery*, No. 2:13-cv-00732-MEF-TFM (M.D. Ala. Sept. 12, 2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/exhibit_a_to_joint_settlement_agreement_-_judicial_procedures-140912.pdf [https://perma.cc/S9BF-HWZL]; First Amended Class Action Complaint, *Mitchell v. City of Montgomery*, No. 2:14-cv-186-MEF (M.D. Ala. May 23, 2014), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Complaint.pdf> [https://perma.cc/HH6S-8PDQ]; Settlement Agreement, *Mitchell v. City of Montgomery*, No. 2:14-cv-186-MEF (M.D. Ala. Nov. 17, 2014), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf>. [https://perma.cc/3V39-ETN8].

25. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP’T (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/LWF4-R5WJ] [hereinafter “FERGUSON REPORT”]. Since the release of the Ferguson Report, the Department of Justice released a “Dear Colleague” letter in March 2016, warning judges and court administrators that incarcerating low-income individuals without assessing their ability-to-pay is unconstitutional. Letter from Vanita Gupta, Principal Deputy Asst. Att’y Gen., Civil Rights Div. & Lisa Foster, Dir., Office for Access to Justice (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download> [https://perma.cc/LSN7-YVSZ].

stereotypes.”²⁶ Shortly before the release of the Ferguson Report, Equal Justice Under Law and ArchCity Defenders filed two class action lawsuits, *Fant, et al. v. City of Ferguson*²⁷ and *Jenkins, et al. v. City of Jennings*,²⁸ alleging that both cities had maintained a flagrant debtors’ prison scheme for years.

The media’s coverage of events in Ferguson, Missouri²⁹ brought attention to these debtors’ prison lawsuits,³⁰ unleashing an onslaught of other complaints exposing debtor prison schemes. On July 9, 2015, the ACLU of Michigan filed a complaint asking Macomb County Circuit Court to order 38th District Judge Carl Gerds III—the only judge in Eastpointe, Michigan—to refrain from implementing his “pay and stay” practice for minor infractions.³¹ On September 8, 2015, SPLC filed a class action complaint against the City of Alexander, Alabama, for arresting and jailing low-income people unable to pay their

26. FERGUSON REPORT, *supra* note 25, at 2.

27. Class Action Complaint, *Fant v. City of Ferguson*, No. 4:15-cv-253 (E.D. Mo. Feb. 2, 2015), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Ferguson-Debtors-Prison-FILE-STAMPED.pdf> [<https://perma.cc/9SZ7-894N>].

28. Class Action Complaint, *Jenkins v. City of Jennings*, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf> [<https://perma.cc/KKT4-BMC3>]. On December 14, 2016, the court approved a settlement agreement in which the City of Jennings agreed to compensate individuals who were incarcerated for failing to pay fines and fees. *See* Settlement Agreement, *Jenkins v. City of Jennings*, No. 4:15-cv-00252 (E.D. Mo. Dec. 14, 2016), <https://secure.dahladmin.com/JENKIN/content/documents/SettlementAgreement.pdf> [<https://perma.cc/3HLK-4YYT>].

29. *See, e.g.*, Mark Berman & Wesley Lowery, *The 12 Key Highlights from the DOJ’s Scathing Ferguson Report*, WASH. POST (Mar. 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/03/04/the-12-key-highlights-from-the-doj-s-scathing-ferguson-report/> [<https://perma.cc/LD7X-YHNT>]; Wilson Andrews, Alicia Desantis & Josh Keller, *Justice Department’s Report on the Ferguson Police Department*, N.Y. TIMES (Mar. 4, 2015), http://www.nytimes.com/interactive/2015/03/04/us/ferguson-police-racial-discrimination.html?_r=0 [<https://perma.cc/7HMJ-5FRC>]; *Scathing DOJ Report Results in Ferguson Police Terminations*, CNN (Mar. 4, 2015), <http://www.cnn.com/videos/tv/2015/03/05/dnt-sidner-ferguson-doj-investigation.cnn> [<https://perma.cc/983W-RY2G>].

30. *See, e.g.*, Eli Hager, *Debtors’ Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq#.Jk9KfKr0W> [<https://perma.cc/MY2H-KW55>]; Jessica Pishko, *Locked Up for Being Poor*, THE ATLANTIC (Feb. 25, 2015), <http://www.theatlantic.com/national/archive/2015/02/locked-up-for-being-poor/386069/> [<https://perma.cc/5G8H-E4XU>]; Tina Rosenberg, *Out of Debtors’ Prison, With Law as the Key*, N.Y. TIMES (Mar. 27, 2015), http://opinionator.blogs.nytimes.com/2015/03/27/shutting-modern-debtors-prisons/?_r=0 [<https://perma.cc/Y9HE-LKUS>].

31. *See* Complaint for Superintending Control, *In Re Anderson*, Circuit Court Case No. 15-2380-AS (County of Macomb, Mich. July 9, 2015), <http://www.aclumich.org/sites/default/files/Complaint%20for%20Superintending%20Control%20with%20exhibits%20FILED.pdf> [<https://perma.cc/7X6W-6RWH>]; *see also* Press Release, ACLU of Michigan, News Advisory: ACLU of Michigan to Press Macomb Circuit Court to End Illegal Pay-or-Stay Sentencing in Eastpointe (Oct. 20, 2015), <http://www.aclumich.org/article/news-advisory-aclu-michigan-press-macomb-circuit-court-end-illegal-pay-or-stay-sentencing> [<https://perma.cc/A2SR-FN62>]. On March 8, 2016, the Macomb County Circuit Court entered a final order requiring Judge Gerds to stop incarcerating indigent defendants who fail to pay court fees and fines before first determining whether they have the ability to pay. *See In Re Anderson*, Circuit Court Case No. 15-2380-AS (County of Macomb, Mich. Mar. 8, 2016), http://www.aclumich.org/sites/default/files/Order%20for%20Superintending%20Control_0.pdf [<https://perma.cc/FZN4-NKXW>].

criminal justice debt.³² Cain's lawsuit came nine days later,³³ followed by *Fuentes, et al. v. Benton County* in Washington on October 6, 2015,³⁴ *Bell, et al. v. City of Jackson* on October 9, 2015 in Mississippi,³⁵ and *Kennedy, et al. v. City of Biloxi* on October 21, 2015 in Mississippi.³⁶ Most recently, the Arkansas Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Law filed a class action lawsuit describing the debtors' prison practices in the City of Sherwood,³⁷ and the ArchCity Defenders filed *Thomas, et al. v. City of Saint Ann, et al.* and *Baker, et al. v. City of Florissant* in 2016.³⁸

32. Complaint, *Foster v. City of Alexander*, *supra* note 22.

33. See First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2.

34. Complaint, *Fuentes v. Benton County*, *supra* note 21. The ACLU came to a settlement agreement with Benton County on June 1, 2016, agreeing to the following: (1) "[t]he County will not issue warrants over noncompliance with LFO payments[;]" (2) "Benton County District Court judges must inquire about a person's ability to pay at any hearing over alleged non-payment of LFOs. Individuals will not be punished if it is determined that they lack the financial means to pay the LFOs[;]" (3) "[i]ndividuals will be entitled to court hearings to seek reductions in the amount of their outstanding LFOs or a waiver of some or all of those LFOs[;]" (4) "[a]ny person facing a hearing over alleged non-payment of LFOs that could lead to incarceration will receive written notice at least 21 days before the hearing[;]" and (5) "Benton County public defenders and prosecutors will participate in training on laws and procedures for the constitutional assessment and collection of LFOs." Press Release, ACLU OF WASHINGTON STATE, Settlement Reached in Lawsuit Ending Benton County's Modern-Day Debtors' Prison (Jun. 1, 2016), <https://aclu-wa.org/node/7451> [<https://perma.cc/49R6-ZM7U>].

35. Class Action Complaint, *Bell v. City of Jackson*, *supra* note 20. Equal Justice Under Law, the MacArthur Justice Center, and the City of Jackson settled the class action lawsuit in June 2016. Press Release, MacArthur Justice Ctr., Univ. of Miss. School of Law, Settlement Ends "Debtors' Prison" System in Jackson, Mississippi (June 20, 2016), <http://umlaw.macarthurjusticecenter.org/news/10498> [<https://perma.cc/HY7G-8N22>]. In the agreement, the City of Jackson "agreed to give indigent defendants the choice of paying off their fines at the rate of \$25 per month or performing community service and receiving credit toward their unpaid fines at the rate of \$9 per hour." *Id.*

36. Class Action Complaint, *Kennedy v. City of Biloxi*, No. 1:2015cv00348 (S.D. Miss. Oct. 21, 2015), https://www.aclu.org/sites/default/files/field_document/kennedy_v._city_of_biloxi_-_complaint.pdf [<https://perma.cc/S4NF-DW7W>];

Stipulated Settlement Agreement and Retention of Jurisdiction, *Kennedy v. City of Biloxi*, No. 1:2015cv00348 (S.D. Miss. Mar. 15, 2016), https://www.aclu.org/sites/default/files/field_document/final_stipulated_settlement_agreement_exhibit_a_exhibit_b_03152016_0.pdf [<https://perma.cc/7DEL-LE9R>] (eliminating use of private probation, adopting "bench cards" listing procedures on how to determine an individual's ability-to-pay, and establishing a full-time public defender's office to represent indigent individuals when fines and fees may be imposed, among other conditions).

37. Class Action Complaint, *Dade v. City of Sherwood*, No. 4:16cv602-JM (E.D. Ark. Aug. 23, 2016), https://www.acluarkansas.org/sites/default/files/field_documents/dade_vs_city_of_sherwood.pdf [<https://perma.cc/6C5R-WQWD>]; see also Ryan J. Reilly, *An Arkansas Judge Sent A Cancer Patient To 'Debtors' Prison' Over A Few Bounced Checks*, HUFFINGTON POST, Aug. 24, 2016, http://www.huffingtonpost.com/entry/debtors-prison-arkansas_us_57bdd1b8e4b0c6301ca0e56c [<https://perma.cc/BL9U-79ZF>].

38. Class Action Complaint, *Thomas v. City of Saint Ann*, No. 4:16-cv-1302 (E.D. Mo. Aug. 9, 2016); Class Action Complaint, *Baker v. City of Florissant*, No. 4:16cv-1693 (E.D. Mo. Oct. 31, 2016).

Few of the lawsuits filed explicitly mention race,³⁹ but most of them are filed in jurisdictions with large communities of color.⁴⁰ This Article argues that the debtors' prison scheme employed on a national level across the United States functions like the War on Drugs as another "branch" of the race-based mass incarceration Michelle Alexander describes.⁴¹ Part II lays out the debtors' prison scheme, from the causes to the consequences on individuals, and explains why the lack of definition of an individual's "ability to pay" reinforces the racial disparity of the scheme. Part III demonstrates that the debtors' prison scheme functions as a form of racialized social control similar to the War on Drugs, using Michelle Alexander's analysis in *The New Jim Crow*. Part IV questions whether the law can make a difference in dismantling the debtors' prison scheme through a Critical Race Theory lens.

II.

THE DEBTORS' PRISON SCHEME AND ITS DISPARATE IMPACT ON PEOPLE OF COLOR

A. *The History of Debtors' Prisons*

Debtors' prisons originated from British common law and were a common practice in Europe from the Middle Ages until the mid-nineteenth century.⁴² Laws like the Law of Merchant in England gave creditors the power to "regain their money from insolvent debtors" in the 1500s.⁴³ The practice soon crossed over to the American colonies, as European debtors settled there.⁴⁴ For instance, in 1682, Pennsylvania stated that "anyone who was in debt and had been arrested would be kept in prison, or 'the debtor [could] satisfy the debt by servitude as the county court shall order, if the creditor desires.'"⁴⁵ In 1641, Massachusetts

39. *Baker v. City of Florissant* and *Thomas v. City of Saint Ann*—both filed by the ArchCity Defenders—are some of the very few complaints that explicitly mention race and the disproportionate impact of criminal justice debt on people of color.

40. *Dade v. Sherwood* is in fact one of the very few complaints that acknowledges the race of its complainants. "Charles Dade is a 58-year old black man . . . Nakita Rochelle Lewis is a 36-year old black woman . . . Lee Andrew Robertson is a 44-year old black man . . ." Class Action Complaint, *Dade v. Sherwood*, *supra* note 37, at 6–8.

41. ALEXANDER, *supra* note 1, at 18. The War on Drugs refers to a set of antidrug policies and initiatives that the federal government enacted in the 1970s to end the use of illegal drugs. These policies and initiatives place an emphasis on incarcerating individuals—notably people and communities of color—for drug-related crimes. *See infra* Part III.

42. ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* 19 (2016).

43. Devon Douglas-Bowers, *The Shackles Return: Why Debtors' Prisons Are Making an American Comeback*, OCCUPY.COM (Oct. 31, 2014), <http://www.occupy.com/article/shackles-return-why-debtors%E2%80%99-prisons-are-making-american-comeback> [https://perma.cc/75N M-DPRR].

44. *See* HARRIS, *supra* note 42, at 19 ("[O]ne scholar has called the early American cities 'Debtors' Asylums' because nearly two-thirds of the Europeans in American colonies were debtors.").

45. Douglas-Bowers, *supra* note 43.

courts held that “anyone who failed to pay a private debt could be kept in jail at his own expense until the debt was paid.”⁴⁶ This holding resulted in people often dying in prison when they did not have the ability to pay off their debts.⁴⁷

In the 1830s, some states were imprisoning three to five times as many individuals for debt as they did for actual crimes.⁴⁸ Reform had begun at the end of the seventeenth century. In 1698, Massachusetts passed the Act for the Relief and Release of Poor Prisoners for Debt to allow debtors, after spending one month in prison, to take an oath swearing that “[they] were unable to pay [their] debts and that [they] had not hidden or transferred title to any property in order to defraud [their] creditors, could apply to be released from jail.”⁴⁹ Federal law abolished debtors’ prisons in 1833, and state laws followed suit shortly after.⁵⁰

Despite their official abolition on the books, debtors’ prisons did not disappear. From the end of the Civil War until the 1930s, many Southern states allowed landowners and companies to “lease” black convicts by paying off criminal justice debt that they could not afford—essentially re-enslaving them.⁵¹ This first began as a state-sanctioned practice, in which county sheriffs and judges leased black men convicted of civil debt and misdemeanors to local farmers and contractors to repair bridges and roads after the Civil War.⁵² However, the practice drastically expanded when private companies became involved,⁵³ as sheriffs lent convicts to high bidding mining and timber companies. The leasing practice became so lucrative that counties sometimes opted to prosecute men accused of felonies for misdemeanors instead so they could lease them to private companies.⁵⁴

The leasing system then expanded into the debt collection realm, allowing white farmers who lent money to black tenants at the beginning of crop seasons to “enforce their debts not by evicting those black men who fell behind, but by swearing out criminal warrants accusing them of fraud.”⁵⁵ Most black tenants

46. *Id.*

47. *Id.*

48. See Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credits*, 55 FLA. L. REV. 807, 846 (2003) (describing debtors’ prisons in Massachusetts, Maryland, New York, and Pennsylvania); see also ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, *THE HIDDEN COSTS OF CRIMINAL JUSTICE DEBT* 19 (2010), https://www.aclu-wa.org/sites/default/files/attachments/Criminal_Justice_Debt_report_V8.pdf [https://perma.cc/Y6YM-MRW2].

49. Douglas-Bowers, *supra* note 43.

50. For more background on the history of debtors’ prisons, see Jill Lepore, *I.O.U.*, THE NEW YORKER, Apr. 13, 2009, <http://www.newyorker.com/magazine/2009/04/13/i-o-u> [https://perma.cc/WSY8-Y8M9].

51. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 63–69 (2008).

52. *Id.* at 64.

53. *Id.* at 64–65.

54. *Id.* at 65.

55. *Id.* at 66. For more on the history of the leasing system and racial exploitation, see Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1041–45 (2010).

agreed to sign a contract to work without compensation for their white landlords for however long it would take to pay back the debt, knowing that white judges would likely convict them.⁵⁶

The “rebirth” of the debtors’ prison scheme occurred in conjunction with the rise in crime rates⁵⁷ and the start of the War on Drugs.⁵⁸ According to an NPR investigation, California was one of the first states to monetarily charge criminal defendants by requiring them to pay restitution to their victims in 1965.⁵⁹ A decade later, states were regularly billing defendants with fees that otherwise would have been paid by taxpayers.⁶⁰ Michigan was the first state to charge offenders for the cost of their imprisonment in 1984.⁶¹ Fees paid by defendants constituted over half of Texas’s probation agencies’ budget by 1990.⁶²

In the 1970s, the Supreme Court, which until then had not addressed imprisonment for debt, started setting constitutional limitations on imprisonment for inability to pay fines, stating that states could not discriminate based on ability to pay. In the 1970 case *Williams v. Illinois*, the Burger Court stated that extending a prison term beyond the maximum set by statute because a person could not afford to pay fines or court costs violated the Equal Protection clause of the Fourteenth Amendment.⁶³ A year later, *Tate v. Short* expanded on *Williams*, holding that states could not jail individuals simply because they were too poor to pay off their debt.⁶⁴ In *Bearden v. Georgia*—the most famous case regarding debtors’ prisons—the Court distinguished between those who did not have the ability to pay (and thus could not be imprisoned), and those who did but willfully chose not to pay, who could be imprisoned.⁶⁵ The defendant in that case, Danny Bearden, broke into a trailer and was sentenced to three years of probation and ordered to pay \$750 in fines and restitution.⁶⁶ He started making partial payments to the court, but he fell behind on his payments when he was laid off from his job and could not find another one.⁶⁷ The court revoked his

56. BLACKMON, *supra* note 51, at 66–67.

57. ALEXANDER, *supra* note 1, at 41 (“Beginning in the 1960s, crime rates rose in the United States for a period of about ten years. Reported street crime quadrupled, and homicide rates nearly doubled.”).

58. *Id.* at 49.

59. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [https://perma.cc/2K7U-DDSR].

60. *Id.*

61. *Id.*

62. *Id.*

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

64. *Tate v. Short*, 401 U.S. 395, 397–98 (1971).

65. *Bearden v. Georgia*, 461 U.S. 660, 668 (1983).

66. *See id.* at 662; Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons> [https://perma.cc/DSD6-GUVF].

67. *See Bearden*, 461 U.S. at 662–63; Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, *supra* note 66.

probation and sentenced him to serve the remainder of his probation term—two years—in prison, without ever looking into his ability to pay.⁶⁸ The Supreme Court held that courts had to first inquire into a person's ability to pay and consider whether there were adequate alternatives to imprisonment before revoking probation for a failure to pay a fine.⁶⁹ However, thirty-three years after *Bearden*, judges and court clerks are still sending low-income individuals, especially those of color like Danny Bearden,⁷⁰ to jail without ever considering their ability to pay—despite the fact that they are indigent.

Though it is hard to ascertain how many people have fallen victim to the debtors' prison scheme, the number of people affected by criminal justice debt is overwhelming. According to Alexes Harris, a professor at the University of Washington, that number has dramatically increased in the past twenty years.⁷¹ For example, in 2011, Philadelphia sent over 320,000 individuals unpaid criminal justice debt bills dating back to the 1970s—representing one in five Philadelphians.⁷² Even more troubling, states have increased the amounts of monetary sanctions. Arizona's felony surcharge—a penalty levied in addition to other LFOs—was set at 57% of the combined total of the other LFOs in 1994.⁷³ By 2012, the felony surcharge had increased to 83%.⁷⁴ More recently, the Ferguson Report shed light on the extent of the problem. Arrest warrants are the natural precursor to debtors' prisons, as an individual begins amassing criminal justice fees the moment he or she is incarcerated. In 2013 alone, the Ferguson municipal court issued nearly 33,000 arrest warrants⁷⁵—including 9,000 warrants on cases stemming in large part from minor violations such as parking infractions, traffic tickets, or housing code violations.⁷⁶ Ferguson only had 21,000 inhabitants in 2013.⁷⁷

68. *See Bearden*, 461 U.S. at 662–63.

69. *Id.* at 672.

70. Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, *supra* note 66. (“[Danny Bearden] sees people—his co-workers, his neighbors, his friends—get charged for things like driving offenses. Only now, he says, fines and fees add up to thousands of dollars. ‘These are poor people, OK? They got families and everything like that,’ he says. ‘They work a job. And even when they get behind in trying to pay, they go to jail.’”).

71. HARRIS, *supra* note 42, at 23 (2016) (“Inmate surveys reveal a swift rise in the number of people who have been sentenced to monetary sanctions: twenty-five percent of inmates reported receiving [legal financial obligations] in 1991, but that number has risen to sixty-six percent by 2004.”).

72. Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, *supra* note 59.

73. HARRIS, *supra* note 42, at 23.

74. *Id.* at 23–24.

75. Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson Over ‘Debtors Prisons’*, NPR (Feb. 8, 2015), <http://www.npr.org/sections/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons> [<https://perma.cc/FL93-7V4Q>].

76. FERGUSON REPORT, *supra* note 25, at 3.

77. *See* Shapiro, *Civil Rights Attorneys Sue Ferguson Over ‘Debtors Prisons’*, *supra* note 75. The 2010 US Census listed Ferguson's population at 21,203, and estimates that the population remained fairly stable for the following five years. *QuickFacts*, U.S. CENSUS, <http://quickfacts.census.gov/qfd/states/29/2923986.html> (search for “Ferguson City, Missouri”).

B. The Reasons Behind the Rebirth of Debtors' Prisons

People can incur LFOs—also known as criminal justice debt—through several ways at different stages of criminal proceedings. One way is by committing public offenses, such as driving with expired plates (and other traffic violations), failing to walk a dog on a leash, or failing to pay child support.⁷⁸ In those cases, individuals are imposed *finer*s, which are monetary penalties that are part of their sentencing condition.⁷⁹

Another way of incurring LFOs happens when a defendant is imposed *fees* due to her involvement in the criminal justice system. These fees can include jail book-in fees, bail investigation fees, public defender application fees, bail investigation fees, drug testing fees, DNA testing fees, jail per-diems for pretrial detention, probation and parole fees, court detention costs, felony surcharges, public defender recoupment fees, alcohol and drug assessment and treatment, domestic violence treatment, Electronic Home Confinement (“EHC”) fees, and DUI classes.⁸⁰ Traditionally, the state paid these fees, but legislators have progressively placed the burden on defendants themselves. A state-by-state survey conducted by NPR in 2014 revealed a troubling situation: defendants can be charged a fee for a constitutionally required public defender in at least forty-three states and the District of Columbia.⁸¹ Defendants held in jail or prison can be billed for room and board in at least forty-one states.⁸² They also have to pay a fee for their own probation and parole supervision in at least forty-four states.⁸³ Individuals can also incur LFOs through restitution, “a monetary sentence assessed to compensate victims for lost wages, hospital bills, or loss of property.”⁸⁴

When added together, these fees can add up to hundreds of dollars and trap low-income individuals in a cycle of unending debt. The troubling question is: if debtors’ prisons are unconstitutional, why are low-income individuals still finding themselves behind bars for being too poor to pay off their criminal justice debt?

78. See, e.g., Rosenberg, *supra* note 30.

79. See Hager, *supra* note 30; HARRIS, *supra* note 42, at 26.

80. HARRIS, *supra* note 42, at 26–46 (describing the different kinds of LFOs used in various states); Hager, *supra* note 30.

81. Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, *supra* note 59. According to Alexes Harris, “Twenty-four states require defendants seeking a public defender to pay up-front fees, which range from application fees for eligibility determination to attorneys’ costs for representation during adjudication or sentence. Arkansas imposes a fee ranging from \$10 to \$100 for a public defender. Some counties in Washington require defendants to pay application fees of \$10 to \$25 and to sign a promissory note for the use of a public defender; in 2007, the felony promissory note was for six monthly payments of \$226.11. In other counties, defendants are charged between \$359 and \$950 for the cost of their public defender.” HARRIS, *supra* note 42, at 42–43.

82. Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, *supra* note 59.

83. See *id.*

84. HARRIS, *supra* note 42, at 26.

1. Mass Incarceration

The re-birth of debtors' prisons occurred in conjunction with mass incarceration, starting with the War on Crime in the 1970s and the War on Drugs in the 1980s.⁸⁵ According to Alec Karakatsanis, who co-founded Equal Justice Under Law, the normalization and the increasing prevalence of mass incarceration in the seventies and eighties contributed to the re-birth of debtors' prisons.⁸⁶ Mass incarceration broadened the number of "crimes" for which individuals could be incarcerated, and states began criminalizing the failure to pay debt.⁸⁷ As Karakatsanis put it, "[i]f we can imprison for possession of marijuana, why can't we imprison for not paying back a loan?"⁸⁸

Today, the United States incarcerates more people than any other country in the world,⁸⁹ roughly imprisoning 750 individuals for every 100,000.⁹⁰ In comparison, Germany incarcerates ninety-three people per every 100,000—eight times less than the United States.⁹¹ In 2014, 1,561,500 prisoners were held in state and federal correctional authorities.⁹² Mass incarceration extends further than the physical locking up of individuals. It is estimated that 7.1 million Americans are currently involved in the criminal justice system through incarceration, probation, or parole,⁹³ prompting sociologist Alexes Harris to use the term "mass conviction" instead of "mass incarceration."⁹⁴

More importantly, mass incarceration is a racialized phenomenon. According to Michelle Alexander, "no other country in the world imprisons a larger percentage of its racial or ethnic minorities."⁹⁵ The United States incarcerates a larger portion of its African American population than South Africa incarcerated its Black population at the height of Apartheid.⁹⁶ Approximately 516,900 of U.S. prisoners in 2014 were African American males, representing thirty-seven percent of the incarcerated male population.⁹⁷ White

85. Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, *supra* note 59; see generally ALEXANDER, *supra* note 1, at 40–58.

86. Hager, *supra* note 30.

87. *Id.*; see also *State by State Court Fees*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees> [<https://perma.cc/H6C8-ZQCA>].

88. Hager, *supra* note 30.

89. See, e.g., ALEXANDER, *supra* note 1, at 6; PAUL BUTLER, *LET'S GET FREE: A HIP HOP THEORY OF JUSTICE* 27 (2009).

90. PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA* 7, 37 (2008), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf [<https://perma.cc/2S2W-E62K>].

91. See *id.*

92. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2014*, 1, <http://www.bjs.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/AE4B-9DHY>].

93. See HARRIS, *supra* note 42, at 5.

94. *Id.* at 5, n.8.

95. ALEXANDER, *supra* note 1, at 6.

96. *Id.*

97. Carson, *supra* note 92, at 15.

males constituted thirty-two percent (453,500), followed by Hispanic males, who made up twenty-two percent (308,700).⁹⁸ While the majority of incarcerated individuals are male, the female rate of incarceration is rising, increasing by just under two percent between 2013 and 2014.⁹⁹ In 2014, African American women were “between 1.6 and 4.1 times more likely to be imprisoned than white females of any age group.”¹⁰⁰

2. Debtors’ Prisons as Revenue Generators & Probation Companies

With the economic recession in the first decade of the twenty-first century, states looked for ways to save money as their budgets decreased. They began enforcing the threat of jail as a way of forcing individuals to make payments towards their criminal justice debt¹⁰¹—similar to the leasing of black convicts earlier in the century.¹⁰² As prison and jail populations began to rise, legislators shifted some of the burden of supporting those institutions from the state and taxpayer to the offender.¹⁰³

Courts traditionally used probation to relieve offenders from a potential jail sentence if they met regularly with their probation officers and complied with court-mandated benchmarks of good behavior.¹⁰⁴ Recently, however, private probation companies, such as Judicial Corrections Services and Sentinel Offender Services, have replaced states in acting as “abusive debt collectors.”¹⁰⁵ They offer probation services in misdemeanor cases to municipalities, courts, and counties in exchange for the right to collect fees from probationers they supervise, including monthly supervision fees, electronic and alcohol

98. *Id.* at 15.

99. *Id.* at 5–6.

100. *Id.* at 15.

101. Hager, *supra* note 30.

102. *See supra* Part II.A, at 8.

103. *See generally* *Emerging Issues on Privatized Prisons*, BUREAU OF JUST. ASSISTANCE, DEP’T OF JUST. 1–2 (Feb. 2011), <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf> [<https://perma.cc/N8X8-7ZK9>] (“In the 1980s, private prisons and jails were seen as part of the solution to meet the increasing pressure for prison bed space at a time when taxpayers were reluctant to pay for correctional services and were not supportive of divestiture of resources from other areas of state responsibilities and services”); Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST. OF JUST. (2012) (detailing the costs of state prison funding); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1194 (2014) (“Experience suggests that fines often figure centrally in budgets, especially for local governments. For instance, there is empirical support for the common anecdotal observation that police departments use traffic fines to generate revenue for local government coffers. Recent controversy has swirled around aggressive towing for parking violations and traffic light cameras that generate automatic citations and large amounts of revenue.”).

104. *See generally* HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY, (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [<https://perma.cc/SXM3-9F2F>].

105. *Id.*

monitoring, and drug testing.¹⁰⁶ If probationers do not pay those fees, they run the risk of being jailed.¹⁰⁷ Today, private companies supervise hundreds of thousands of Americans on probation in over 1,000 courts in the U.S.¹⁰⁸ These companies add fees to the amount of criminal justice debt individuals already owe. For example, individuals can be charged late fees if they fall behind on payments—“even if they lack any resources to make the payments or have conflicting obligations such as child support.”¹⁰⁹

The City of Ferguson illustrates law enforcement and courts' flagrant objective to generate as much revenue as possible. The Ferguson Report states that, “of the \$11.07 million in general fund revenue the City collected in fiscal year 2010, \$1.38 million came from fines and fees collected by the court; similarly, in fiscal year 2011, the City's general fund revenue of \$11.44 million included \$1.41 million for fines and fees.”¹¹⁰ “[F]or fiscal year 2015, the City's budget anticipates fine and fee revenues to account for \$3.09 million of a projected \$13.26 million in general fund revenues.”¹¹¹ According to the Ferguson Report, “[c]ity, police, and court officials for years have worked in concert to maximize revenue at every stage of the enforcement process, beginning with how fines and fine enforcement processes are established.”¹¹² For example, the Finance Director wrote in a 2010 email to the Chief of police that “unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year. What are your thoughts?”¹¹³ Even more alarming is the fact that cities threaten individuals with incarceration in order to force them to come up with the required amount of money by implementing a “pay or stay” scheme, in which individuals were required to either pay their criminal justice debt immediately or to “sit it out” in jail at a fixed daily rate.¹¹⁴

Unfortunately, Ferguson's obsession with raising revenue is not an isolated policy. The complaint for injunctory relief filed against Benton County, Washington stated that the “LFO debt enforcement system is the result of policies and practices that Benton County policymakers—namely, the board of commissioners and district court judges—have created and repeatedly affirmed in order to generate County revenue, despite awareness of the adverse impact it has on some of Benton County's poorest residents.”¹¹⁵ The class action complaint filed against the City of Jackson, Mississippi stated that “[i]t [was] the

106. *Id.*

107. *Id.*

108. *Id.*

109. BANNON, NAGRECHA & DILLER, *supra* note 48, at 17.

110. FERGUSON REPORT, *supra* note 25, at 9.

111. *Id.* at 10.

112. *Id.*

113. *Id.*

114. *See, e.g.*, Complaint, Mitchell v. City of Montgomery, *supra* note 24, at 1.

115. Complaint, Fuentes v. Benton County, *supra* note 21, at 2.

policy and practice of the City to use incarceration, and the threat of incarceration, to coerce payments from impoverished debtors and their family and friends.”¹¹⁶ Similarly, the complaint filed against the City of Biloxi, Mississippi accused the City of “increasingly [relying] on the collection of court fines and fees to generate needed municipal revenue.”¹¹⁷ It further stated that “[t]he City [had] set ambitious annual targets for General Fund revenue . . . which consist almost entirely of fines and fees collected by the Biloxi Municipal Court in cases involving traffic and misdemeanor criminal violations within Biloxi city limits.”¹¹⁸

One of the most disturbing aspects of debtors’ prisons is that they serve as a revenue generator for the courts specifically, including the judges, the prosecutors, and—worst of all—public defenders.¹¹⁹ New Orleans, Louisiana is the most flagrant example of this conflict of interest-filled scheme. Nearly every actor of the local criminal justice system, including the judges, the sheriffs, the prosecutors, and the public defenders, benefit financially from imposing criminal justice debt.¹²⁰ Calvin Johnson, a retired chief judge of the Orleans Parish Criminal District Court, pointed out the inherent unconstitutionality of this funding scheme: “We got all of them in the mix [including those most likely to protest the arrangement], and so they had no interest in saying, ‘Judges, y’all can’t do it.’”¹²¹

3. Ignoring *Bearden* and a Lack of Definition of “Ability to Pay”

While the Supreme Court held in *Bearden* that a debtor could not be incarcerated unless that individual had the “ability to pay,” it never defined the meaning of “ability to pay.” It only stated that “[i]f the probationer [had] willfully refused to pay the fine or restitution when he [had] the resources to pay or [had] failed to make sufficient bona fide efforts to seek employment or borrow money to pay, the State [was] justified in using imprisonment as a sanction to enforce collection.”¹²² This lack of definition has opened up the meaning of “ability to pay” to judges’ subjective interpretations and explicit or implicit bias on what that term concretely means, with results that can vary even within the same state.¹²³ An NPR investigation in Benton County showed the

116. Class Action Complaint, *Bell v. City of Jackson*, *supra* note 20, at 3.

117. Class Action Complaint, *Kennedy v. City of Biloxi*, *supra* note 36, at 10.

118. *Id.*

119. HARRIS, *supra* note 42, at 42–43; Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, *supra* note 59.

120. First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2, at 3.

121. Robertson, *supra* note 3.

122. *Bearden v. Georgia*, 461 U.S. 660, 660 (1983).

123. HARRIS, *supra* note 42, at 100. (“[Not all Washington counties] interpret the legal concepts of ‘mandatory,’ ‘indigent,’ and ‘willful’ in the same way . . . These divergent interpretations of state law bear out the observation that each county’s LFO process is shaped by the local ‘culture of punishment.’ At the end of the punishment continuum are the counties that

wide-ranging inconsistencies in state judges' decisions.¹²⁴ Some judges considered a defendant able to pay if the defendant had phone service or smoked. Others ordered defendants to obtain money from their families or use their public benefits and welfare checks, such as Social Security income, disability income, veterans' benefits, and Temporary Aid to Needy Family checks ("TANF") to pay back their court debts.¹²⁵ One particularly striking example was that of Judge Robert Swisher, a Superior Court judge in Benton County, who told NPR that he determined whether a defendant was indigent based on the defendant's appearance. If the defendant wore expensive-looking clothes or had expensive-looking tattoos, Judge Benton assumed that that defendant was not indigent without inquiring into the defendant's ability to pay.¹²⁶ If defendants told Judge Benton that the clothes or the tattoos were a gift, he told them that they should have asked for cash instead.¹²⁷

Even more alarming are the many judges who blatantly ignore their duty to look into defendants' ability to pay. For example, the class action lawsuit against the City of Jackson, Mississippi stated that "[i]t [was] the policy and practice . . . to incarcerate people when they [could not] afford to pay debts owed to the City for traffic violations and other misdemeanor offenses without conducting any inquiry into the person's ability to pay and without considering alternatives to imprisonment as required by United States and Mississippi law."¹²⁸ Judges in Biloxi, Mississippi have also failed to consider defendants' ability to pay, automatically incarcerating them if they are unable to pay off their debt.¹²⁹ Similarly, during initial court proceedings in Alexander, Alabama, the Municipal Judge does not assess a person's ability to pay.¹³⁰ In Benton County, Washington, "[a]t no point in the process is a defendant's ability pay taken into consideration. Indigent persons who cannot afford the charges are subjected to draconian collection proceedings without a meaningful opportunity to be heard."¹³¹ In a similar vein, municipal courts and procedures in Ferguson, Missouri failed to provide adequate notice of the allegations made against the

impose large monetary sanctions to hold offenders accountable and that employ punitive and restrictive monitoring and sanctioning policies. At the other end of the continuum are the counties that impose smaller LFO assessments and are less punitive in how they sanction people with unpaid LFOs.").

124. Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, *supra* note 66. The ACLU of Washington filed a complaint in Benton County in October 2015. Complaint, *Fuentes v. Benton County*, *supra* note 21.

125. *Id.*

126. *Id.*

127. *Id.*

128. Class Action Complaint, *Bell v. City of Jackson*, *supra* note 20, at 2.

129. Class Action Complaint, *Kennedy v. City of Biloxi*, *supra* note 36, at 4.

130. Complaint, *Foster v. City of Alexander*, *supra* note 22, at 4.

131. Complaint, *Fuentes v. Benton County*, *supra* note 21, at 2.

defendants and a meaningful opportunity to be heard.¹³² Alexes Harris's research in Washington state also found that,

“[m]any court officials told [her] that they found it reasonable to impose fines and fees on almost any defendant regardless of their ability to pay. One judge recognized the unlikelihood of some people ever paying significant LFOs, but she continued to impose them on every defendant, reasoning that even those who live in poverty or were unstably housed might someday be able to make LFO payments. Another judge described cases in which defendants won a legal settlement or inherited money that enabled them to pay. Such a possibility . . . was why they believed that LFOs should always be imposed.”¹³³

Some officials in the justice system even consider homeless individuals as having the “ability to pay” because those individuals can apply for jobs, beg for money on freeway exits and entrances, and pick up aluminum cans.¹³⁴

Judges are not necessarily aware of the LFO mechanism that kicks in after they rule on cases. Alexes Harris's study in Washington state indicated that judges did not even know “how LFOs were implemented by other judges in their own courthouse . . . or how they were monitored and enforced by clerks. When I asked them about how the collection process worked, judges directed me to talk to the clerks. Judges' general lack of knowledge about LFO implementation, monitoring, and sanctioning processes highlights the decoupling of LFOs from the imposition of justice.”¹³⁵

C. *Effects of Debtors' Prisons*

Not only do debtors' prisons criminalize poverty, they also perpetuate it. Criminal justice debt creates additional barriers to re-entry in terms of housing, employment, public benefits, and even civil rights.¹³⁶ Debtors' prisons also foster a “culture of fear” that paralyzes individuals and entire communities.

1. *Housing, Employment, and Public Benefits*

Individuals caught within the debtors' prison scheme face serious obstacles in finding and maintaining housing and employment, as well as receiving public

132. FERGUSON REPORT, *supra* note 25, at 71.

133. HARRIS, *supra* note 42, at 139.

134. *Id.* at 142.

135. *Id.* at 153.

136. BANNON, NAGRECHA & DILLER, *supra* note 48, at 27; *see also* Alexes Harris, *Yes America, We Have Returned to a Debtor's Prison*, L.A. TIMES (June 6, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-harris-criminal-fines-20140608-story.html> [<https://perma.cc/7LVP-MT7H>].

benefits. At least eleven states, including California,¹³⁷ Florida,¹³⁸ and New York,¹³⁹ allow criminal justice debt to be converted into or collected in the same way as civil judgments.¹⁴⁰ Consequently, this debt is treated like any other judgment. It is filed with the county clerk and becomes publicly available information for credit reporting agencies.¹⁴¹

Poor credit scores can present an obstacle for individuals seeking to obtain a loan or a mortgage necessary to purchase a home, as lenders consider credit history.¹⁴² Credit scores are often used as a screening mechanism for individuals applying for public or rental housing.¹⁴³ Criminal justice debt can also bar individuals from access to public housing. One of NPR's stories featured a woman in her sixties who became homeless after losing her subsidized senior housing because she still owed \$500 on a conviction for forging a prescription.¹⁴⁴ She had been convicted decades prior to her eviction.¹⁴⁵

Poor credit scores also affect employment opportunities. Employers look at credit scores when running a prospective employee's background check¹⁴⁶ and use it as a form of "character screening."¹⁴⁷ Credit reports can also indicate an individual's criminal history, even though most legislatures have outlawed this,

137. See CAL. GOV'T CODE § 27712 (fees regarding the cost of legal assistance may be enforced "in the same manner as on a judgment in a civil action").

138. FLA. STAT. § 938.30(6) ("If judgment has not been previously entered on any court-imposed financial obligation, the court may enter judgment thereon and issue any writ necessary to enforce the judgment in the manner allowed in civil cases."); § 960.294(2) ("A civil restitution lien order may be enforced . . . in the same manner as a judgment in a civil action").

139. N.Y. CRIM. PROC. LAW § 420.10(6)(a) ("A fine, restitution or reparation imposed or directed by the court . . . shall be entered by the county clerk in the same manner as a judgment in a civil action.").

140. See BANNON, NAGRECHA & DILLER, *supra* note 48, at 27 n.205.

141. See *id.* at 27.

142. See *100 Questions & Answers About Buying a New Home*, DEP'T OF HOUS. & URBAN DEV., <http://ifhmb.com/wp-content/uploads/2011/01/100-Questions1.pdf> [https://perma.cc/96J7-5AJR] (last visited Jan. 16, 2017).

143. See BANNON, NAGRECHA & DILLER, *supra* note 48, at 27; *Subsidized Housing & Section 8 FAQ*, TENANTS UNION OF WASH. STATE, <http://www.tenantsunion.org/en/rights/faq/subsidized-housing-section-8> [https://perma.cc/LN66-9WE7] (last visited Jan. 16, 2017); *Credit Checks*, MASSLEGALHELP, <http://www.masslegalhelp.org/housing/credit-checks> [https://perma.cc/2T3M-Q7Y7] (last visited Jan. 16, 2017).

144. Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, *supra* note 59.

145. See *id.*

146. Kathy Kristof, *Bad Credit Ratings Sinking Job Hunters*, CBS MONEY WATCH (Feb. 6, 2013), <http://www.cbsnews.com/news/bad-credit-ratings-sinking-job-hunters/> [https://perma.cc/4QRX-7QNL]; Blake Ellis, *Employer Credit Checks Keep Jobless Out of Work Force*, CNN, Mar. 4, 2013, <http://money.cnn.com/2013/03/04/pf/employer-credit-checks/> [https://perma.cc/EL8H-QDZB]; see also BANNON, NAGRECHA & DILLER, *supra* note 48, at 27.

147. BANNON, NAGRECHA & DILLER, *supra* note 48, at 27; *Fact Sheet 16: Employment Background Checks: A Jobseeker's Guide*, PRIVACY RIGHTS CLEARINGHOUSE, <http://www.privacyrights.org/fs/fs16-bck.htm> [https://perma.cc/KGD3-R65U] (last visited Jan. 16, 2017). Some states, however, such as Oregon, prohibit credit checks as part of employment background checks. See OR. REV. STAT. § 659A.885 (2010).

thus informing employers of a candidate's criminal past.¹⁴⁸ Criminal justice debt also prevents debtors from getting to their place of employment when their licenses are suspended if they cannot pay off their traffic fines,¹⁴⁹ further pushing them into the cycle of debt and poverty. Many debtors with suspended licenses risk driving in order to get to work, which often leads to more fines, vehicle seizures, and, eventually, jail.¹⁵⁰ On top of poor credit, debt and collection practices harm housing and employment prospects in terms of wage and tax garnishments, which can discourage individuals from seeking legal employment,¹⁵¹ and driver's licenses suspension.¹⁵²

Ironically, debt can also prevent low-income individuals from accessing their public benefits, further fostering economic insecurity in communities. At least fifteen states, including Alabama,¹⁵³ Louisiana,¹⁵⁴ and Missouri,¹⁵⁵ treat the failure to pay criminal justice debt like a violation of probation or a parole term—¹⁵⁶ a significant fact because probation or parole violations often result in ineligibility for federal Temporary Assistance to Need Families ("TANF") benefits,¹⁵⁷ Food Stamps,¹⁵⁸ public housing and Section 8 vouchers,¹⁵⁹ and

148. See BANNON, NAGRECHA & DILLER, *supra* note 48, at 27; see, e.g., N.Y. CORR. LAW §§ 752–53 (limiting the use of prior convictions in employment decisions and requiring employers to consider "the state's public policy of encouraging employment of previously convicted persons").

149. Joseph Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, NPR (Jan. 5, 2015), <http://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor> [https://perma.cc/SYA4-G9K9].

150. *Id.*

151. RACHEL L. MCLEAN & MICHAEL D. THOMPSON, *REPAYING DEBTS* 8 (2007), https://cdpsdocs.state.co.us/ccjj/Resources/Ref/RepayingDebts_Summary.pdf [https://perma.cc/3K8W-5X25]; see also BANNON, NAGRECHA & DILLER, *supra* note 48, at 27; Rosenberg, *supra* note 30.

152. See, e.g., ALEX BENDER, STEPHAN BINGHAM, MARI CASTALDI, ELISA DELLA PIANA, MEREDITH DESAUTELS, MICHAEL HERALD, ENDRIA RICHARDSON, JESSE STOUT & THERESA ZHEN, *NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA* 6 (2015), <http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf> [https://perma.cc/J6WW-S8PJ] ("These [driver's license suspensions] make it harder for people to get and keep jobs, further impeding their ability to pay their debt . . . [T]hey keep people in long cycles of poverty that are difficult, if not impossible to overcome."); Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, *supra* note 149.

153. See ALA. CODE § 15-22-52 (permitting courts to make fines or costs, or portions of thereof, a condition of probation).

154. See LA. CODE CRIM. PROC. ANN. ART. 895 (providing that supervision fee must be a condition of probation); LA. CODE CRIM. PROC. ANN. ART. 895.1 (providing that restitution must be a condition of probation, and courts may impose court costs and other user fees as a condition of probation).

155. See MO. REV. STAT. § 600.093 (allowing courts to make repayment of all or part of the value of public defender services a condition of probation); MO. REV. STAT. § 550.021(2) ("In addition to such other authority as exists to order conditions of probation, the court may order such conditions as the court believes it will serve to compensate the victim, any dependent of the victim, any statutorily created fund for costs incurred as a result of the offender's actions, or society.").

156. BANNON, NAGRECHA & DILLER, *supra* note 48, at 21 n.131.

157. 42 U.S.C. § 608(a)(9)(A).

Supplemental Security Income for the elderly and disabled. Even more troubling, a simple allegation that a person has violated the terms of his or her probation or parole because the person failed to make payments can prevent him or her from getting public benefits.¹⁶⁰ Therefore, individuals can be deprived of their public benefits even if there has been a mistake regarding their probation or parole status or if the court failed to determine their ability to pay.¹⁶¹

2. *Loss of Civil Rights Amidst a “Culture of Fear”*

The most disturbing consequence of debt is the fact that it can prevent individuals from exercising their civil rights and prevent them from voting, serving on juries, and running for office, among other things.¹⁶² Many states have statutes that deprive individuals with criminal records of some basic civil rights.¹⁶³ In some of those states, individuals cannot vote after a conviction until they pay off their criminal justice debt,¹⁶⁴ functioning as a poll tax. Alabama and Connecticut, for example, only restore the right to vote once individuals have paid all fines, restitution, and court costs.¹⁶⁵ Debtors who cannot pay their LFOs often lose their driver's licenses as a result,¹⁶⁶ which makes it harder for them to

158. 7 U.S.C. § 2015(k)(1)(B).

159. 42 U.S.C. § 1437d(l)(9) (providing that a public housing tenant's violation of a condition of his or her parole or probation is cause for termination of the tenancy); 42 U.S.C. § 1437f(d)(1)(B)(v) (“[I]t shall be cause for termination of the tenancy of a tenant if such tenant . . . is violating a condition of probation or parole imposed under Federal or State law.”).

160. BANNON, NAGRECHA & DILLER, *supra* note 48, at 28.

161. *Id.*

162. *See, e.g.*, R.I. CONST. art. III, § 2 (“An elector shall be disqualified as a candidate for elective or appointive state or local office or from holding such office if such elector has been convicted of or plead nolo contendere to a felony or if such elector has been convicted or plead nolo contendere to a misdemeanor resulting in a jail sentence of six months or more, either suspended or to be served. Such elector shall not, once so convicted, attain or return to any office until three years after the date of completion of such sentence and of probation or parole.”); TEX. ELEC. CODE § 9-46(b) (“No person who has forfeited and not regained such person's privileges as an elector [including payments of all fines in conjunction with the conviction] . . . may be a candidate for or hold public office.”); BANNON, NAGRECHA & DILLER, *supra* note 48, at 29; HARRIS, *supra* note 42, at 8; Allyson Frederickson & Linnea Lassiter, *Disenfranchised by Debt*, ALLIANCE FOR A JUST SOC'Y (Mar. 2016), <http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf> [https://perma.cc/9RE9-NU3U].

163. *See, e.g.*, *Felony Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE (2006), www.brennancenter.org/dynamics/subpages/download_file_47267.pdf.

164. BANNON, NAGRECHA & DILLER, *supra* note 48, at 29.

165. *See* ALA. CODE § 15-22-36.1(a)(3); CONN. GEN. STAT. § 9-46a(a) (“A person who has been convicted of a felony and committed to confinement in a federal or other state correctional institution or facility or community residence shall have such person's electoral privileges restored upon the payment of all fines in conjunction with the conviction and once such person has been discharged from confinement, and, if applicable, parole.”).

166. *See* BENDER, BINGHAM, CASTALDI, DELLA PIANA, DESAUTELS, HERALD, RICHARDSON, STOUT & ZHEN, *supra* note 152, at 6 (“[M]illions of Californians do not have valid driver's licenses because they cannot afford to pay citation fines and fees.”); *see also* Dahlia Lithwick, *Punished for Being Poor*, SLATE (Jul. 16, 2016), http://www.slate.com/articles/news_and_politics/

vote.¹⁶⁷ This practice mostly affects African American men, as thirteen percent of African American men have lost the right to vote—nearly seven times the national average.¹⁶⁸

Debtors' prisons also create a "culture of fear" among low-income communities—especially African American ones. Indeed, the debtors' prison complaints filed by Equal Justice Under the Law all mention how "[t]hese policies and practices have created a culture of fear among . . . [the] poorest residents, who are afraid even to appear in City court to explain their indigence because they know they will be jailed . . . without any meaningful process."¹⁶⁹ The complaint filed by Equal Justice Under Law in New Orleans further adds that "[t]he environment of threats of jail and actual jailing creates a culture of fear among indigent people and their families, who borrow money at high interest rates, divert money from food for their children, and cash their family members' disability checks in a desperate attempt to pay the Collections Department to avoid indefinite confinement."¹⁷⁰

Even more alarming, the "culture of fear" exists due to the fact that low-income individuals often can never pay off their fines because of the structural barriers discussed previously. Therefore, those individuals live in constant fear that court clerks will issue warrants for their arrest—without ever knowing when or even if they will be arrested—simply because they are too poor to pay off the entirety of their criminal justice debt.

Families are also negatively affected by relatives who cannot pay their criminal justice debt. Therefore, they also live in this "culture of fear," as they never know when their loved one will be incarcerated again. Indebted individuals almost always get money from family and friends to put towards their criminal justice debt to avoid incarceration.¹⁷¹ Furthermore, many individuals who owe LFOs have children and other financial dependents. Those with LFOs are therefore forced to choose between caring for their dependents or paying their criminal justice debt.¹⁷²

jurisprudence/2016/07/the_virginia_driver_s_license_scheme_that_punishes_poor_people.html [https://perma.cc/AJG4-KL22].

167. Driver's licenses are one form of a state-issued photo ID which many states require in order to register to vote. *See, e.g.*, Alex Magnin, *Here Are Registration and Voting Instructions for All 50 States*, HUFFINGTON POST (Sept. 19, 2012), http://www.huffingtonpost.com/thought-catalog/millennial-guide-to-voting_b_1897607.html [https://perma.cc/T3VF-E8HP].

168. Erika L. Wood & Neema Trivedi, *Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls*, 41 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 30, 32 (May-June 2007); *see also* Harris, *supra* note 136.

169. Complaint, *Mitchell v. City of Montgomery*, *supra* note 24, at 16.

170. First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2, at 3.

171. Joseph Shapiro, *Study Finds Court Fees Also Punish the Families of Those who Owe*, NPR (Jan. 29, 2015), <http://www.npr.org/sections/thetwo-way/2015/01/29/382380183/study-finds-court-fees-also-punish-the-families-of-those-who-owe> [https://perma.cc/ZR3X-4EKE].

172. MITALI NAGRECHA & MARY FAINSDOT KATZENSTEIN, *WHEN ALL ELSE FAILS, FINING THE FAMILY* 20 (2015), <http://www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf> [https://perma.cc/L4BR-BFPM].

D. The Racialized Debtors' Prison Scheme

Race is almost never explicitly mentioned in the complaints filed against debtors' prisons, likely due to the high strict scrutiny standard race based complaints are subject to and the difficulty of proving intent to discriminate based on race. Alec Karakatsanis stated that he left race out of the debtors' prison complaints Equal Justice Under Law filed because he was unsure of the outcome at first, and wanted to limit the legal claims to clean constitutional allegations.¹⁷³ Despite the lack of mention in these complaints, the criminalization of LFOs primarily affects people and communities of color,¹⁷⁴ in great part due to law enforcement's subjective discretion and bias.¹⁷⁵ The complaints filed against debtors' prisons are primarily in jurisdictions with a high percentage of people of color, particularly high percentages of African Americans. In 2010, 54.7% of the population in Montgomery County, Alabama, where *Cleveland* and *Mitchell* were filed,¹⁷⁶ was Black or African American.¹⁷⁷ In Ferguson, Missouri, 67.4% of the population was Black or African American in 2010.¹⁷⁸ In Jennings, Missouri, it was 89.8%;¹⁷⁹ in New Orleans, Louisiana, 60.2%;¹⁸⁰ and in Jackson, Mississippi, 79.4%.¹⁸¹

Furthermore, the other jurisdictions where complaints were filed also had a large minority population. The population of the City of Alexander, Alabama was 32% Black or African American.¹⁸² In Benton County, Washington, 18.7%

173. Interview with Alec Karakatsanis, Co-Founder, Equal Justice Under Law (Nov. 20, 2015).

174. According to Alexes Harris, debtors "tend to be people of color, African Americans and Latinos." Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, *supra* note 59.

175. Richard G. Greenleaf, Arthur J. Lurigio, Jamie L. Flexon & Teri J. Walker, *Race-Based Decisions: Traffic Citations and Municipal Court Dispositions*, 8 JUST. POL. J. 1, 1 (2011), http://www.cjcj.org/uploads/cjcj/documents/Race-based_decisions.pdf [<https://perma.cc/7NPL-EUVC>].

176. Amended Complaint, *Cleveland v. City of Montgomery*, *supra* note 24; Complaint, *Mitchell v. City of Montgomery*, *supra* note 24.

177. *Montgomery County, Alabama Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/01101,00> [<https://perma.cc/4UJU-ZZT6>] (last visited Jan. 16, 2017). In 2015, 57% of Montgomery, Alabama's population was African American. *Id.*

178. *Ferguson City, Missouri Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/2923986,00> [<https://perma.cc/4ABE-PZNG>] (last visited Jan. 16, 2017).

179. *Jennings City, Missouri Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/2937178,2923986,00> [<https://perma.cc/ZY4E-PGCP>] (last visited Jan. 16, 2017).

180. *New Orleans City, Louisiana Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/2255000,2923986,00> [<https://perma.cc/J7LT-L3QP>] (last visited Jan. 16, 2017).

181. *City of Jackson, Mississippi Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/2836000,0101132,01101,00> [<https://perma.cc/R2E9-SYLU>] (last visited Jan. 16, 2017).

182. *City of Alexander, Alabama Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/0101132,01101,00> [<https://perma.cc/D3VJ-MB9S>] (last visited Jan. 16, 2017).

of the population was Hispanic or Latino/a.¹⁸³ In Biloxi City, Mississippi, 19.6% of the population was Black or African American, and 8.7% was Hispanic or Latino/a.¹⁸⁴ Finally, in Sherwood City, Arkansas, 18.5% of the population was Black or African American.¹⁸⁵ Moreover, most of the plaintiffs named in the complaints against debtors' prisons are people of color, often African American or Latino/a. People of color are more likely to be victims of debtors' prisons because they are more likely to be subjected to stops and arrests, to be convicted, and to be low-income than their white peers. Indeed, Sara Zampierin, an SPLC attorney who worked on the *Cleveland* case, confirmed that “[e]ven if you look at people who walk into court, you see a huge amount of people of color, because the [white] people who can afford to pay off their ticket don’t come to court in the first place.”¹⁸⁶

1. People of Color Are More Likely to Be Subjected to Stops and Arrests and Issued Arrest Warrants

Officers are more likely to stop people of color for misdemeanors and other public offenses, such as traffic violations, than they are white people. Traffic stops constitute the most common police-citizen encounter.¹⁸⁷ Furthermore, law enforcement officers exercise a great deal of discretion when it comes to initiating and resolving traffic stops,¹⁸⁸ and race is often a factor that is considered. When compared to their relative representation in the general population, African Americans are disproportionately arrested compared to their white peers.¹⁸⁹ The most recent publicized example of this is the 2015 DOJ Ferguson report. According to the Ferguson Report, “African Americans [were] disproportionately represented at nearly every stage of Ferguson law enforcement, from initial police contact to final disposition of a case in municipal court.”¹⁹⁰ Between October 2012 and July 2014, African Americans accounted for 85% (9,875) of stops that law enforcement made, despite the fact that the African American community only represented 67% of the total population in Ferguson. Therefore, citations, such as traffic tickets,

183. *Benton County, Washington Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/53005,00> [<https://perma.cc/2TDH-4MJ7>] (last visited Jan. 16, 2017). In 2015, Hispanics and Latino/as constituted 21% of Benton County’s population. *Id.*

184. *Biloxi City, Mississippi Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045214/2806220,00> [<https://perma.cc/AM6C-EUMH>] (last visited Jan. 16, 2017).

185. *Sherwood City, Arkansas Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/0563800,00> (last visited Jan. 16, 2017) [<https://perma.cc/QQK8-TDJZ>].

186. Telephone Interview with Sara Zampierin, Senior Staff Att’y, Southern Poverty Law Ctr. (Nov. 23, 2015).

187. Greenleaf, Lurigio, Flexon & Walker, *supra* note 175, at 2.

188. *Id.*

189. Sharon LaFraniere & Andrew Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/5TW5-P2DV>].

190. See FERGUSON REPORT, *supra* note 25, at 63.

disproportionately affected African Americans. For example, in 2013, more than half of African Americans cited received multiple citations during a single encounter with law enforcement, as compared to 26% of their non-African American peers.¹⁹¹

The table below, compiling data from the Ferguson Report, highlights the drastic racial disparity between African Americans and Whites.

25 Most Common Warrant Charges, Ferguson 2012–14¹⁹²

Offense Description	Total Warrants	N Black Defendant	N White Defendant	% Black
Failure To Appear	91,193	84,496	6,697	92.7
No Proof of Insurance	36,869	34,561	2,308	93.7
Speeding	18,413	15,994	2,419	86.9
Driving While Suspended	16,417	15,570	847	94.8
Failure To Register Vehicle	11,310	10,602	708	93.7
Expired License Plate	10,351	9,470	881	91.5
Stealing Under \$500	9,237	7,922	1,315	85.8
Driving While Revoked	8,837	8,211	626	92.9
No Operators License	6,359	6,091	268	95.8
Failure To Wear Seat Belt	5,134	4,689	445	91.3
Improper License Plates	4,305	4,009	296	93.1
Stop Sign Violation	3,693	3,405	288	92.2
No Inspection Sticker	2,410	2,263	147	93.9
Improper Vehicle Registration	2,311	2,087	224	90.3
Electric Signal Violation	2,080	1,786	294	85.9
Failure To Signal	2,046	1,860	186	90.9
Possession of Marijuana	1,916	1,751	165	91.4

191. *Id.* at 66–67.

192. Symposium, *Jeffrey Fagan Panel*, GEORG. L. J. 104 (Nov. 20, 2015) <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=2829> [<https://perma.cc/XK4J-F3BB>].

Expired Operators License	1,807	1,648	159	91.2
High Grass & Weeds Violation	1,705	962	743	56.4
Possession Drug Paraphernalia	1,687	1,209	478	71.7
Assault	1,643	1,510	133	91.9

Similarly, law enforcement in Jackson, Mississippi—where *Bell* was filed—arrested 145.5 African Americans per 1,000, whereas they only arrested 64.9 per 1,000 non-African Americans in 2011–12.¹⁹³ During that same time span, officers arrested 421.2 of every 1,000 African American and, in contrast, 179.3 of every 1,000 non-African American in Biloxi, Mississippi—where *Kennedy* was filed.¹⁹⁴ This racial disparity in stops and arrests contributes to debtors’ prisons in an important way, as stops and arrests lead to more LFOs, such as traffic tickets and other criminal justice debt.

2. *People of Color Are More Likely to Be Low-Income and Convicted of Harsh Sentences*

The debtors’ prison scheme targets low-income individuals, many of whom are people of color.¹⁹⁵ Between 2007 and 2011, 42.7 million people in the United States, representing 14.3% of the population, lived below the poverty level.¹⁹⁶ The rate of poverty among African Americans is more than ten percentage points higher than the national average. At around 25.8%, this means that one in four African American lives in poverty.¹⁹⁷ The rate of poverty among Latino/as is only slightly lower at 23.2%.¹⁹⁸ The natural implication of these statistics is that people and communities of color are more at risk of falling victim to the debtors’ prison scheme because the latter targets low-income people and communities.

193. *Compare Arrest Rates*, USA TODAY, <http://www.gannett-cdn.com/experiments/usa-today/2014/11/arrests-interactive/> [https://perma.cc/FE6P-E5PC] (last visited Jan. 16, 2017).

194. *Id.*

195. *Poverty Rate by Race/Ethnicity*, THE HENRY J. KAISER FAMILY FOUNDATION (2013), <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> [https://perma.cc/8RR3-8WZQ] (last visited Jan. 16, 2017); *Who Is Poor?*, INSTITUTE FOR RESEARCH ON POVERTY, <http://www.irp.wisc.edu/faqs/faq3.htm> [https://perma.cc/KFX5-KS6C] (last visited Jan. 16, 2017).

196. SUZANNE MACARTNEY, ALEMAYEHU BISHAW & KAYLA FONTENOT, *POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011*, 3 (Feb. 2013), <https://www.census.gov/prod/2013pubs/acsbr11-17.pdf> [https://perma.cc/G979-3JVR].

197. *Id.*

198. *Id.*

People of color are also more likely to be convicted of a crime than their white peers.¹⁹⁹ In 2008, African Americans and Latino/a Americans made up more than half of the incarcerated population, despite only representing a quarter of the U.S. population.²⁰⁰ A number of factors explain this statistic, including the existence of mandatory minimum sentencing for drug crimes, the inequitable access to resources such as defense attorneys,²⁰¹ and judges and prosecutors' explicit and implicit bias against defendants of color.²⁰² According to Alexes Harris, "[d]ata from Washington [state] indicate that Latinos are assessed higher financial sentences than non-Latinos, even when controlling for prior convictions and offense type."²⁰³

3. *People of Color Are Supposed to Be Trapped in the Debtors' Prison Scheme: "The System is Working the Way it is Supposed To"*²⁰⁴

Some individuals have treated Ferguson as an example of "bad apple cops,"²⁰⁵ but instead, Ferguson is an example of the criminal justice system and, therefore, the debtors' prison scheme working the way it is supposed to.²⁰⁶ People of color are not finding themselves trapped in an endless cycle of debt by accident. Rather, that is the *intended* purpose of debtors' prisons.

The fact that debtors' prisons still exist demonstrates the will that exists to *keep* such a scheme alive.²⁰⁷ While reforms around the issue of debtors' prisons have largely focused on what to do *after* an individual is already involved with

199. George Gao, *Chart of the Week: The Black-White Gap in Incarceration Rates*, PEW, Jul. 18, 2014, <http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates/> [https://perma.cc/JA4N-5VWQ].

200. *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> [https://perma.cc/TN6J-7JE8] (last visited Jan. 16, 2017); see *supra* Part II.B.i.

201. In most jurisdictions, public defenders juggle heavily loaded dockets with hundreds of cases and often encourage their clients to make plea deals, regardless of their innocence. See ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 7–28 (Dec. 2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/5CKS-HQEK] (stating that lack of adequate funding, inadequate legal representation, and structural defects in indigent defense systems fail to satisfy the right to counsel under the 6th Amendment).

202. Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2184 n.35 ("Prosecutors are more likely to charge black suspects than whites, even controlling for factors like prior criminal record.").

203. HARRIS, *supra* note 42, at 26.

204. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1456, 1469 (2016) (arguing that the criminal justice system is not broken but rather is working the "way it is supposed to," which is to say, to control African Americans' lives).

205. *Id.* at 1446.

206. *Id.* at 1456, 1469.

207. This beckons to Michelle Alexander's statement on mass incarceration: "If mass incarceration is considered as a system of control—specifically racial control—then the system is a fantastic success." ALEXANDER, *supra* note 1, at 2.

the judicial system, little has been discussed about how to *prevent* people from receiving tickets and having to appear in court in the first place. Indeed, racial profiling such as that in Ferguson, while outrageous, is legal as per *United States v. Whren*²⁰⁸ and *Atwater v. Lago Vista*.²⁰⁹ Moreover, *Bearden* made debtors' prisons unconstitutional in 1983—over thirty years ago.

III.

THE DEBTORS' PRISON SCHEME AS AN OUTGROWTH OF THE WAR ON DRUGS, ANOTHER BAR IN THE BIRDCAGE OF MASS INCARCERATION OF COMMUNITIES OF COLOR

The debtors' prison scheme is an outgrowth of the War on Drugs, which also functioned as a "bar" of racialized social control. In *The New Jim Crow*, Michelle Alexander argues that our American criminal justice system controls communities of color just as the Jim Crow laws did. According to Alexander, if mass incarceration is a birdcage, then the War on Drugs is one of the bars trapping and controlling communities of color.²¹⁰ The debtors' prison scheme functions similarly as another muscle extending from the body of racial mass incarceration. Both the War on Drugs and debtors' prisons share a similar historical trajectory and focus on "colorblindness," allow for a large amount of discretion, lead to communities of color being incarcerated, and present comparable consequences that truncate people of color's civil rights.

First, like debtors' prisons,²¹¹ drug laws have been historically used as a racialized form of social control. The first laws banning drugs in the United States were anti-opium laws in the 1870s, which were primarily directed at Chinese immigrants working on the railroads and mines.²¹² Drugs became a social concern in the South as well, as cocaine became associated with African Americans and violence.²¹³ Anti-cocaine laws passed in the 1900s targeted black men in the South. Laws penalizing the use of marijuana were directed at Mexican migrants in the Midwest and the Southwest in the 1910s and 20s.²¹⁴

The modern War on Drugs officially began in 1971 when President Nixon declared a "total war against dangerous drugs."²¹⁵ In September 1986, President

208. *Whren v. United States*, 517 U.S. 806 (1996) (holding that racial profiling is not unconstitutional).

209. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that an officer can arrest a driver for a seatbelt violation).

210. *Id.*

211. *See supra* Part II.

212. *See* LISA ANNE ZILNEY, DRUGS: POLICY, SOCIAL COSTS, CRIME 148 (2010); *see also* A *Brief History of the Drug War*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> [https://perma.cc/G5RB-7WGD] (last visited Jan. 16, 2017).

213. DRUG POL'Y ALLIANCE, *supra* note 212.

214. *Id.*

215. *See* ZILNEY, *supra* note 212, at 152.

Reagan signed the Anti-Drug Abuse Act, which included mandatory minimum sentences for the distribution of cocaine with far more severe punishment for the distribution of crack cocaine—which was associated with African Americans—than powder cocaine, frequently used by whites.²¹⁶ Of all drug prisoners in state facilities until 2002, fifty-six percent were African American and twenty-three percent were Hispanic.²¹⁷

Second, both debtors' prisons and the War on Drugs allow the "enforcers" to have a huge amount of discretion in deciding who to arrest and/or sentence. Law enforcement has "extraordinary discretion regarding whom to stop, search, arrest, and charge for drug offenses, thus ensuring that conscious and unconscious racial belief and stereotypes will be given free reign."²¹⁸ Alexander explains her point further, distinguishing why drug crimes were different from other crimes:

"Drug-law enforcement is unlike most other types of law enforcement. When a violent crime or a robbery or a trespass occurs, someone usually calls the police. There is a clear victim and perpetrator. Someone is hurt or harmed in some way and wants the offender punished. But with drug crime, neither the purchaser of the drugs nor the seller has any incentive to contact law enforcement. . . . The ubiquity of illegal drug activity . . . requires a far more proactive approach by law enforcement than what is required to address ordinary street crime. It is impossible for law enforcement to identify and arrest every drug criminal. Strategic choices must be made about whom to target and what tactics to employ."²¹⁹

Alexander also adds that "[n]umerous scholars (and many law enforcement officials) attempt to justify the concentration of drug law enforcement resources in ghetto communities on the grounds that it is easier for the police to combat illegal drug activity there."²²⁰ The most frightening part of this discretion is that it can often be justified as legal.²²¹

Debtors' prisons function similar to the War on Drugs. A debtor is not hurting or harming anyone by not paying back criminal justice debt. While it could be argued that the state is a "victim," that argument does not stand, as debtors' prisons represent a larger drain on state funds than the amount of criminal justice debt owed. Like in the War on Drugs, it is impossible for law enforcement to identify and arrest everyone who violates a regulation. Officers

216. ALEXANDER, *supra* note 1, at 53.

217. ZILNEY, *supra* note 212, at 155.

218. ALEXANDER, *supra* note 1, at 103.

219. *Id.* at 104.

220. *Id.* at 125.

221. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *Whren v. United States*, 517 U.S. 806, 819 (1996).

strategically target low-income minority neighborhoods.²²² Law enforcement holds a large amount of discretion in deciding who to arrest for misdemeanors and public safety violations—even when no public safety interest is served—which then triggers fines, fees, and other criminal justice debt.

Similar to drug crimes, officers' discretion in enforcing other types of laws is often legal. The Ferguson Report illustrates this reality through heartbreaking narratives. For example, one woman²²³ living in Ferguson called the police to “report a domestic disturbance.”²²⁴ The boyfriend had already left by the time the officers came to the woman's home, though they saw signs of him living there.²²⁵ Instead of leaving, the officers arrested and jailed the woman for a home occupancy permit violation, as the boyfriend was not listed as a resident.²²⁶ This arrest undoubtedly resulted in criminal justice debt for her. This woman posed no public safety issue—in fact, *she* called the officers for *help*—yet the officers used their discretion to arrest her, likely triggering an unending cycle of debt for her. Additionally, it is easier for police to issue citations and to arrest individuals in low-income communities, because they are more likely to find violations. For example, it costs forty dollars to amend a home residency permit in Ferguson—a cost that many low-income residents of color cannot afford.²²⁷

Both debtors' prisons and the War on Drugs have led to the incarceration of communities of color. According to Alexander, “[t]oday, the War on Drugs has given birth to a system of mass incarceration that governs not just a small fraction of a racial or ethnic minority but entire communities of color.”²²⁸ Alexander also points out that “[m]ore African American adults are under correctional control today—in prison or jail, on probation or parole.”²²⁹ The debtors' prison scheme has led to the same result in parallel. In Ferguson, for example, most of the people charged with misdemeanors and public safety offenses are African American.²³⁰ Beyond mass incarceration, debtors' prison keep communities of color in a cycle of perpetual debt, as individuals are made

222. See FERGUSON REPORT, *supra* note 25, at 62–67.

223. The woman's racial and socio-economic background is not stated, but it is highly likely that she was a low-income woman of color. *Id.* at 81.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Code Enforcement*, CITY OF FERGUSON, <https://www.fergusoncity.com/493/Code-Enforcement> [<https://perma.cc/VN3D-6CXU>] (last visited Jan. 16, 2017); see also Nicole Bolden, *Debtors prisons are illegal in America. Missouri locked me up in one anyway*, THE GUARDIAN (Feb. 12, 2015), <http://www.theguardian.com/commentisfree/2015/feb/12/debtors-prisons-illegal-america-ferguson-missouri-incarcerated> [<https://perma.cc/8XB5-WBDB>] (stating that author was arrested in a town next to Ferguson, Missouri for not registering their car because the author could not afford the inspection fee).

228. ALEXANDER, *supra* note 1, at 188

229. *Id.* at 180.

230. See FERGUSON REPORT, *supra* note 25, at 62.

to “work off” their criminal justice debt—usually in the hundreds or thousands of dollars—for low rates such as \$58 per day or to “sit it out” for \$25 per day.²³¹ Partial payments are not accepted to prevent incarceration,²³² and, even when they are, individuals are put at risk of being arrested and incarcerated multiple times for failing to pay off the debt in its entirety.²³³

For communities of color, the War on Drugs and debtors’ prisons lead to similar penalties.²³⁴ For example, the Anti-Drug Abuse Act allowed public housing authorities to evict tenants who allowed drug-related criminal activity to occur in public housing premises and prevented people with drug convictions from obtaining many federal benefits, including student loans.²³⁵ Drug convictions also limit individuals’ access to public benefits. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, created Temporary Assistance to Needy Families (TANF), which imposed a “five-year lifetime limit on welfare assistance, as well as a permanent, lifetime ban on eligibility for welfare and food stamps for anyone convicted of a felony drug offense—including simple possession of marijuana.”²³⁶ Convicted drug offenders and people who were simply arrested for a drug crime can also be barred from employment. Most states allow private employers to discriminate on the basis of past criminal convictions, such as drug-related crimes.²³⁷ Indeed, only ten states have enacted laws prohibiting employers and licensing agencies from taking arrests into account when hiring.²³⁸ Most disturbing of all, drug convictions—like debt—can strip people of their civil rights, including their right to vote. Inmates in forty-eight states and the District of Columbia are prohibited from voting while incarcerated, and most states deny parolees the right to vote as well.²³⁹ Some states even deny former prisoners the right to vote for a period “ranging from a number of years to the rest of one’s life.”²⁴⁰ Thus, both the War on Drugs and the debtors’ prison scheme perpetuate forms of social control over communities of color.

231. Class Action Complaint, *Bell v. City of Jackson*, *supra* note 20, at 5.

232. *See, e.g.*, Complaint, *Foster v. City of Alexander*, *supra* note 22, at 4 (“Partial payments are not accepted. If [the individuals who owe debt] cannot pay the amount owed in full, they are instructed to sit and wait for an officer to take them to jail.”).

233. *See, e.g.*, First Amended Class Action Complaint, *Cain v. City of New Orleans*, *supra* note 2, at 13–14. Mr. Brown, one of the plaintiffs who lived in “desperate poverty,” had accumulated debt stemming from a theft conviction and drug possession. *Id.* at 12. He could not afford to pay the amount required by the court and was incarcerated until his family managed to “scrape together \$100.” *Id.* at 14. Mr. Brown was released from jail, but the Collections Department warned him that “he would be arrested and jailed again if he [did] not continue to making payments on time.” *Id.*

234. *See supra* Part II.C.

235. ALEXANDER, *supra* note 1, at 56–57.

236. *Id.*

237. *Id.* at 149.

238. *Id.*

239. *Id.* at 158.

240. *Id.*

IV.

CAN THE LAW MAKE A DIFFERENCE?

A. *Changing the Rules: Proposed Reforms and Debtors' Prisons*1. *Proposed Reforms*

Though the debtor prison scheme is complex to dismantle, activists have suggested implementing reforms to eliminate it. One of these reforms is to abolish fines and fees altogether so as not to crush indigent defendants who cannot afford to pay their debts.²⁴¹ Others have suggested assessing LFOs based on an individual's income.²⁴² Clarifying the meaning of "ability to pay" through specific criteria would prevent individuals from being at the mercy of judges' implicit and explicit biases and subjective interpretations to determine whether a defendant is indigent.²⁴³ For example, people living below 125%, 150%, or 200% of the Federal Poverty Level, or people whose income is limited to TANF, should be automatically determined as not having the ability to pay. However, this reform does not capture the full range of individuals affected by the debtors' prison scheme, as people who make a little over that cutoff are left to the discretion of a judge at an "ability to pay" hearing—a problem that is occurring now.²⁴⁴

Another important suggested reform is substituting community service hours for the amount of LFOs owed at the defendant's request.²⁴⁵ Community service programs are more likely to promote re-entry, as individuals would not be incarcerated and segregated from society and their families and would not be placed in an emergency situation of losing their employment.

241. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 519 (2011). Beckett and Harris advocate for the abolition of fines and fees. First, they argue that the monetary sanctions system does not serve the traditional goals of criminal law: incapacitation, rehabilitation, deterrence, and retribution. *See id.* Second, fines and fees are unevenly imposed on defendants. *Id.* at 522. Third, fees and fines fund the salaries of those who impose them, creating conflicts of interests. *Id.* at 528.

242. *See* Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 526 (2016).

243. HARRIS, *supra* note 42, at 160; BANNON, NAGRECHA & DILLER, *supra* note 48, at 32.

244. *See, e.g.*, Joseph Shapiro, *ACLU Sues Benton County, Wash., For Operating 'Modern-Day Debtors Prison'*, NPR (Oct. 7, 2015), <http://www.npr.org/sections/thetwo-way/2015/10/07/446681086/aclu-sues-benton-county-wash-for-operating-modern-day-debtors-prison> [https://perma.cc/6HY7-TZCM].

245. *See* BANNON, NAGRECHA & DILLER, *supra* note 48, at 33. There are, however, critics of this reform. *See, e.g.*, HARRIS, *supra* note 42, at 50–51 ("Community service provisions are problematic, however, given that many defendants are poor, precariously unemployed, unhoused, or have children. Similar to their ability to find the money to make financial payments, they also have difficulty in finding time to meet hundreds of hours of service obligations. Further, many lack transportation to their assigned community service organization.").

The two main ways advocates have tried to implement these reforms has been through litigation, *i.e.*, filing complaints against jurisdictions that are not following *Bearden*, and passing “new” legislation to enforce existing laws.

2. *Enforcing Reforms Through Litigation*

Some of the debtors’ prison complaints have been resolved or settled. *Cleveland v. City of Montgomery* resulted in a five-page settlement agreement. Among other things, the settlement agreement in *Cleveland* provided that: (1) the Montgomery Municipal Court would provide an attorney to all defendants appearing in court at all compliance and indigence/inability to pay hearings; (2) every individual who is unable to pay traffic tickets will be given an Affidavit of Substantial Hardship (a form that state courts already used to determine a person’s indigency status); (3) individuals below 125% of the Federal Poverty Level (approximately less than \$25,000 per year for a family of three, assuming no substantial liquid assets) will be recognized as indigent; (4) indigent defendants will be able to decide between paying \$25 per month or performing community service to pay off their debt; and (5) people who chose the community service option will receive at least \$10’s worth of credit for each hour of community service performed.²⁴⁶

Although it is too early to tell whether the practice of jailing indigent individuals for failure to pay has been eradicated from Montgomery, Alabama, the settlement agreement has been generally viewed as a positive outcome. Alec Karakatsanis, one of the founders of Equal Justice Under Law—which co-filed the complaint with SPLC—stated that “[t]hese new procedures will help ensure that the city of Montgomery never jails someone again simply because they are poor.”²⁴⁷ He also said that the brightline rule for indigency status (125% below the Federal Poverty Level) was a positive outcome, as it protects the poorest of the poor and, while many people above that cutoff are victims of the debtors’ prison scheme, those people have a right to an individualized inquiry of their indigency status.²⁴⁸ According to him, the city of Montgomery has been implementing the settlement agreement thus far.²⁴⁹ David Dinelli, SPLC’s deputy legal director, also viewed the settlement as a victory, saying that “[t]his settlement is a victory for the vulnerable people of Montgomery. Putting someone like Ms. Cleveland behind bars because she is too poor to pay a fine is barbaric. We are happy to see an end to this practice and will remain vigilant to ensure that people in Montgomery and across the state are never again jailed for

246. Settlement Agreement, *Cleveland v. City of Montgomery*, *supra* note 24.

247. Erin Edgemon, *Montgomery Will No Longer Jail Those who Can’t Afford to Pay Fines for Minor Traffic Offenses under Settlement with SPLC*, AL.COM, Aug. 27, 2014, http://www.al.com/news/montgomery/index.ssf/2014/08/montgomery_will_no_longer_jail.html [<https://perma.cc/62RY-XXD5>].

248. See Interview with Alec Karakatsanis, *supra* note 173.

249. *Id.*

the ‘crime’ of being poor.”²⁵⁰ Even the lead plaintiff in the complaint, Harriet Cleveland, who was jailed for failing to pay traffic tickets despite being indigent, said that “[t]his settlement agreement will make things better for a lot of people in Montgomery. It’s not right to have these companies coming in and profiting off of people. I saw plenty of people like me trying to give that company money they didn’t have to give.”²⁵¹

Similarly, Equal Justice Under Law filed a class action lawsuit—*Mitchell et al. v. City of Montgomery*—against the City of Montgomery, Alabama in March 2014.²⁵² The complaint claimed that Montgomery had been operating a local debtors’ prison for several years, illegally jailing hundreds of indigent individuals for unpaid debt, including traffic tickets, despite constitutional provisions protecting people from being jailed simply for being too poor.²⁵³ Montgomery’s debtors’ prisons system implemented the “pay or stay” scheme, in which individuals were required to either pay their criminal justice debt immediately or to “sit it out” in jail at a rate of fifty dollars a day.²⁵⁴ People who were essentially forced to “sit it out” could work off their debt, thus reducing their time in jail, at a rate of twenty-five dollars a day by performing janitorial tasks, such as cleaning city offices, scrubbing feces and blood from jail floors, and wiping the jail bars inside their overcrowded cells.²⁵⁵

On November 17, 2014, the federal court issued a preliminary injunction enforcing a settlement agreement between the plaintiffs in *Mitchell* and the city of Montgomery. According to Equal Justice Under Law, the settlement agreement prohibited the city of Montgomery from incarcerating its poorest residents for their inability to pay LFOs.²⁵⁶ Montgomery is also prohibited from using for-profit probation companies, such as Judicial Corrections System, to collect owed debt—a practice that allowed Montgomery to make a huge profit by charging fees to low-income individuals on top of their debt.²⁵⁷

Although litigation can improve the state of things in the short-term, litigation as a strategy to create lasting reform presents limits. First, the results are strictly limited to the confines of the jurisdiction in which the case is being litigated. Second, litigation is costly in terms of time and resources, preventing it

250. Edgemon, *supra* note 247.

251. *Id.*

252. See Complaint, *Mitchell v. City of Montgomery*, *supra* note 24.

253. See *id.*; see also *Shutting Down Debtors’ Prisons*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/> [https://perma.cc/E8NR-X6C7] (last visited Jan. 16, 2017).

254. See Complaint, *Mitchell v. City of Montgomery*, *supra* note 24.

255. *Id.*

256. See Settlement Agreement at 11, *Mitchell v. City of Montgomery*, No. 2:14-cv-186-MEF (M.D. Ala. Nov. 17, 2014), <http://equaljusticeunderlaw.org/wp/wp-content/uploads/2014/07/Final-Settlement-Agreement.pdf> [https://perma.cc/U6RA-2Q5S] (“No defendant will be incarcerated for inability to pay any court-ordered monies, including fines, court costs or restitution.”).

257. *Id.*; see also EQUAL JUSTICE UNDER LAW, *supra* note 253.

from helping everyone in the affected population. Third, there are no guarantees that these changes will be permanent a few years after the outcome of the litigation, be it a settlement agreement or a court order. Fourth, litigation cannot solve every problem, and short-term successes overshadow the work that is left to be done, causing the general public, judges, etc. to believe that progress has been achieved. For example, while Judicial Corrections Systems was barred in Montgomery, the settlement agreement did not address the revenue that the debtors' prison scheme generates for the *city itself*.²⁵⁸ Moreover, while the changes triggered by the settlement agreement have helped people who *already* owe criminal justice debt and who have *already* become entangled with the criminal justice system, it has not helped people avoid either. Furthermore, although the settlement agreement deems people below 125% of the Federal Poverty Level as indigent, individuals who make even a small amount over that line are still vulnerable to the discretion of the judges.

3. *Enforcing Reforms Through Legislation*

Some states have reformed their laws—including the ability-to-pay inquiries—subsequent to the onslaught of complaints against debtor prison practices,²⁵⁹ but these reforms have not all been successful. In Colorado, the ACLU noticed that courts were jailing individuals for contempt of court for failure to pay fines,²⁶⁰ commonly known as “pay or stay.” In one case, Linda Roberts, a disabled woman living in poverty, was arrested and ordered to either pay \$746 in criminal justice fees, including court costs, fines, fees, and restitution, or to stay in jail for fifteen days.²⁶¹ Her crime? Roberts, whose income consisted in Supplemental Nutrition Assistance Program (“SNAP”) benefits and a monthly Social Security disability check, shoplifted twenty-one dollars' worth of food from a grocery store.²⁶² According to the ACLU of Colorado, the Jefferson County Jail counted at least 154 individuals who were serving time in jail because they could not afford to pay their criminal justice debt.²⁶³

258. See Settlement Agreement, *Mitchell v. City of Montgomery*, *supra* note 256.

259. See *Recent Legislation, H.B. 14-1061, 69th Gen. Assemb., 2d Reg. Sess.* (Colo. 2014), 128 HARV. L. REV. 1312 (2015).

260. See *Recent Legislation, supra* note 259, at 1313 n.13; Letter from Mark Silverstein, Legal Dir., ACLU of Colo. & Rebecca T. Wallace, Staff Att'y, ACLU of Colo., to Chief Justice Michael Bender, Colo. Supreme Court & Judge John Failey, Chair, Criminal Procedure Comm. (Oct. 10, 2012), <http://static.aclu-co.org/wp-content/uploads/2013/12/2012-10-10-Bender-Dailey-Wallace.pdf> [<https://perma.cc/JPT3-SHBW>] [hereinafter ACLU of Colo. Letter to Bender].

261. See Tessa Cheek, *House Judiciary Says No to Colorado Debtors' Prisons*, THE COLO. INDEPENDENT (Feb. 26, 2014), <http://www.coloradoindependent.com/146209/house-judiciary-says-no-to-colorado-debtors-prisons> [<https://perma.cc/KR2M-224P>].

262. See *id.*

263. *Colorado Cities Illegally Jail Poor People for Failure to Pay Fines*, ACLU OF COLO. (Dec. 16, 2013), <https://www.aclu.org/news/colorado-cities-illegally-jail-poor-people-failure-pay-fines> [<https://perma.cc/B4JC-P5AY>].

In 2012 and 2013, the ACLU of Colorado sent letters to the Chief Justice of the Colorado Supreme Court, as well as to the mayors of three Colorado municipalities: the cities of Westminster, Northglenn, and Wheat Ridge. Interestingly enough, all three municipalities have large Hispanic or Latino/a communities. In the 2010 U.S. Census, Latino/as counted for 20.7% of the population in Westminster,²⁶⁴ 30.6% in Northglenn,²⁶⁵ and 16.3% in Wheat Ridge.²⁶⁶ As noted earlier, many communities of color represent a large part of communities living in poverty.²⁶⁷

The ACLU pointed out that the Fourteenth Amendment barred states from revoking probation based solely on failure to repay criminal justice debt if the defendant had made bona fide efforts to do so, unless no other sanction would advance the government's purpose.²⁶⁸ Using that argument, the ACLU asked that the Colorado legislature set up formal procedures to inquire into defendants' "ability to pay" status that would meet minimal constitutional standards.²⁶⁹

As a response to the ACLU's inquiry, Governor John W. Hickenlooper signed House Bill 14-101 into law in May 2014.²⁷⁰ This new law "expanded coverage from fines to any 'monetary amount' imposed by sentencing,"²⁷¹ which is an important distinction as court costs and fees constitute much of criminal justice debt. It also required that courts assess an individual's "ability to pay" in a hearing before incarcerating the individual for failure to pay debts to the state.²⁷² Finally, it mandated that courts provide notice and a hearing, as well as make "findings on the record" that the defendant can pay "without undue hardship to the defendant or the defendant's dependents" and that "the defendant has not made a good faith effort to comply with the order."²⁷³ In short, Colorado's new law merely restates existing law, including *Bearden*.

264. *Westminster City, Colorado Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/0883835,2836000,0101132,01101,00> [https://perma.cc/HC5W-U4DF] (last visited Jan. 16, 2017).

265. *Northglenn City, Colorado Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/0854330,0563800,00> [https://perma.cc/A3VH-FQTP] (last visited Jan. 16, 2017).

266. *Wheat Ridge City, Colorado Quickfacts*, U.S. CENSUS, <http://www.census.gov/quickfacts/table/PST045215/0884440,0854330,0563800,00> [https://perma.cc/K5UR-QSBT] (last visited Jan. 16, 2017).

267. *See supra* Part II.

268. *See Bearden v. Georgia*, 461 U.S. 660, 665, 672 (1983) (emphasizing the importance of the Due Process and Equal Protection Clauses); *see also Recent Legislation, H.B. 14-1061, 69th Gen. Assemb., 2d Reg. Sess.* (Colo. 2014), 128 HARV. L. REV. 1312, 1314 (2015).

269. *See, e.g.*, Letter from Rebecca T. Wallace, Staff Att'y, ACLU of Colo., and Mark Silverstein, Legal Dir. Of Colo., to Herb Atchison, Mayor of Westminster (Dec. 16, 2013), <http://static.aclu-co.org/wp-content/uploads/2014/02/2013-12-16-Atchison-ACLU.pdf> [https://perma.cc/3VN5-2FQB]; *Recent Legislation, supra* note 259, at 1314.

270. COLO. REV. STAT. ANN. § 18-1.3-702 (West 2015).

271. *Recent Legislation, supra* note 259, at 1315-16.

272. *Id.*

273. *Id.*

The ACLU and the press were satisfied with Colorado's new law,²⁷⁴ as it represented a step in the right direction. However, the protections of this new law "[were] likely insufficient to finish the job. For that, state courts and legislatures will ultimately have to clarify the substantive definition of indigence for these purposes."²⁷⁵ Indeed, in October 2015, the ACLU of Colorado sent a letter to another municipality in Colorado—Colorado Springs—that was jailing "hundreds of people because they were too poor to pay court-ordered fines and fees,"²⁷⁶ violating the Colorado law that was passed in 2014.

The limits of enforcing reforms through litigation and legislation call into question the power of the law. More specifically, why is the law so difficult to enforce? Does the law even make a difference, or does it just convey the *appearance* of making a difference?

B. But the Game Remains the Same: The Social Control of Communities of Color

The difficulty of enforcing reforms to the debtors' prison scheme highlights the limits of the law.²⁷⁷ First, the reforms attempt to curb the harmful effects of the debtors' prison scheme—they do not *prevent* individuals from entering the criminal justice system in the first place. Second, most low-income individuals caught in the debtors' prison scheme are people of color, and the reforms do not address this problematic racial disparity. The enforcers of the law—judges, clerks, prosecutors, police officers, public defenders, etc.—share societal biases towards race, and the reforms cannot *remedy* those biases. They can only *work around* those biases. While reform laws can be added on the books, their enforcement is distorted, particularly once advocates stop monitoring.

Even if the proposed reforms advanced by legal advocates and scholars could effectively end the practice of debtors' prisons, they would not eradicate the system that has oppressed and controlled entire communities for decades—even centuries—because these reforms are working within a white supremacist legal framework. In fact, these reforms perpetuate this oppressive system, which sustains itself in cycles. They also hinder the social transformation necessary to dismantle this system because they are contained within a framework that

274. See *Colorado Legislature Approves Ban on Debtors' Prisons*, ACLU OF COLO., <http://aclu-co.org/colorado-legislature-approves-ban-debtors-prisons> [https://perma.cc/Q3SG-RCLJ]; Leslie Jorgensen, *Legislature Revokes "Debtors' Prisons,"* COLO. OBSERVER (Apr. 24, 2014), <http://thecoloradoobserver.com/2014/04/legislature-revokes-go-to-jail-card-for-people-too-poor-to-pay-fines> [https://perma.cc/4ZR4-L6D3].

275. See *Recent Legislation*, *supra* note 259, at 1316.

276. ACLU of Colo., *Colorado Springs Sentences Hundreds of Impoverished People to Debtors' Prison in Violation of U.S. Constitution and State Law* (Oct. 22, 2015), <http://aclu-co.org/colorado-springs-sentences-hundreds-of-impoverished-people-to-debtors-prison-in-violation-of-u-s-constitution-and-state-law/> [https://perma.cc/9DGJ-4XFN].

277. When referring to the law, I am primarily referring to written reform laws and existing litigation efforts within our legal system.

supports white supremacy and the social control of communities of color. While the Constitution is viewed as being colorblind and barely recognizes racial discrimination as relevant,²⁷⁸ Critical Race Theory affirms that the forms of knowledge gained by people who have suffered from oppression and injustice are relevant.²⁷⁹ These experiences demonstrate that race plays a role in determining who will be “hired, fired, detained by a police officer, followed around in a clothing store, or wrongfully accused of a crime.”²⁸⁰ Or, as our focus is, sent to jail for being too poor to pay off criminal justice debt. Most importantly, Critical Race Theory allows people to figure out whether formal neutralities are being used to mask injustice.²⁸¹

According to critical race theorist Professor Kimberlé Crenshaw, fixing one facet of the problem prevents larger problems from being acknowledged and tackled.²⁸² Professor Paul Butler has argued a similar point:

First, does working within the system contribute to the problem? . . . I believe the answer is ‘yes.’ . . . Second, is it possible to make a real difference from inside? If mere ‘reform’ is required, working within the system might accomplish that change. If, on the other hand, a more substantial transformation is necessary, it becomes more evident that the change must come from without. Those who work inside can tinker with the punishment regime, but they probably cannot overhaul it.²⁸³

278. To pass strict scrutiny, the law in question must further a “compelling governmental interest,” and must have narrowly tailored the law to achieve that interest. However, applications of strict scrutiny differ based on whether race is at issue in a case, as the Supreme Court has attempted to downplay any role that race plays in the law. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 916 (1995) (stating that creating minority-majority districts to increase minority congressional representation violated the Fourteenth Amendment because race was the principal driving force behind the redistricting); *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (holding that the Baldus study—a statistical study that showed that the victim’s race and the defendant’s race played a highly influential role in the imposition of the death penalty—did not establish that the death penalty in Georgia violated the Fourteenth Amendment because it did not prove that state legislators intended to discriminate, even if they were aware of their course of action’s consequences). For a more lengthy discussion on strict scrutiny and race, see Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 3 (2010).

279. *See* Rebecca Tsosie, *Forging the Road Ahead: An Essay on Justice and Transformation in Legal Education*, 2 L. J. SOC. JUST. 103, 112 (2011). Though defined in many ways, Critical Race Theory generally is a movement of scholars whose interdisciplinary writings challenge “the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole.” KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii. For a history of and additional background on Critical Race Theory, *see id.*

280. *Id.*

281. *Id.* at 113.

282. *See* Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1315 (2011).

283. BUTLER, LET’S GET FREE: A HIP HOP THEORY OF JUSTICE, *supra* note 89, at 120.

The reforms proposed to “fix” the debtors’ prison scheme, such as setting automatic indigency guidelines and getting rid of private probation companies in debt collection, *tweak* the system but do not dismantle it. Legal advocates and scholars only maneuver the existing framework by attempting to limit the harmful effects of debtors’ prisons.²⁸⁴ However, they are still working within a white supremacist legal framework. According to critical race theorists, the law is not an objective or “neutral force for change,”²⁸⁵ and reforming the law will not result in a larger societal transformation,²⁸⁶ as the law “is not separate from . . . the power of whiteness.”²⁸⁷

First, the means through which activists are trying to implement the reforms (i.e., class action litigation and legislative bills) adopts a post-racial approach to the problem. Race is barely mentioned in the class action complaints or proposed pieces of legislation, though it plays a significant role.²⁸⁸ The law (the strict scrutiny standard and the criminal procedure jurisprudence granting “superpowers” to kill, racially profile, and arrest²⁸⁹) makes it hard to prove racial discrimination²⁹⁰ and prevents race from being the focus of the discussion, limiting any meaningful change. Therefore, advocacy focused on the debtors’ prison scheme should acknowledge race and the role it plays in our legal system, as this acknowledgement is crucial to dismantling the social control exerted on people and communities of color—a goal even worth losing the argument in court.²⁹¹

284. Many Critical Race Theorists have advanced this idea of “reform versus transformation.” See, e.g., Butler, *The System Is Working the Way It Is Supposed To*, *supra* note 204, at 1461 (“Reform does not, however, do the work of transformation. It does not bring about the kind of change that the radical critics are seeking.”); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1331–32 (1988) (explaining how antidiscrimination law “has largely succeeded in eliminating the symbolic manifestations of racial oppression, but has allowed the perpetuation of material subordination of Blacks.”).

285. Margaret Davies, *Legal Theory and Law Reform: Some Mainstream and Critical Approaches*, 28 ALTERNATIVE L.J. 168, 170 (2003).

286. Butler, *The System Is Working the Way It Is Supposed To*, *supra* note 204, 1461–62.

287. Davies, *supra* note 285, at 170.

288. See HARRIS, *supra* note 42 (noting that *Dade v. Sherwood*, filed in August 2016, is one of the very few cases that acknowledges the race of their named complainants). It is important to note that advocates working on abolishing debtors’ prison recognize the role that race plays in the criminal justice system. My criticism focuses on the post-racial nature of their legal (often written) advocacy.

289. Butler, *The System Is Working the Way It Is Supposed To*, *supra* note 204, at 1446–57.

290. Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1611–12 (2011) (discussing how the law makes it difficult to acknowledge race); see also CORNEL WEST, *The Role of Law in Progressive Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 468 (1990) (“[T]he fundamental forms of social misery in American society can neither be adequately addressed nor substantially transformed within the context of existing legal apparatuses.”)

291. See Carbado, *supra* note 290, at 1609 (stating that color consciousness can neutralize and disrupt racial advantages). Though the nature of litigation and legislative documents are different from Supreme Court decisions, it is worthwhile to note that Justice Sonia Sotomayor explicitly mentioned race in her *Utah v. Strieff* dissent. “But it is no secret that people of color are

Second, these micro-level reforms do not get to the root of the problem—the cyclical social control of communities of color. Even if these reforms solve the debtors’ prisons issue (making sure that poor people aren’t imprisoned if they do not have the ability to pay), another form of social control will emerge in the subsequent cycle. Critical Race Theory rejects the mainstream American narrative on race and civil rights as “a history of linear uplift and improvement.”²⁹² Rather, the debtors’ prison scheme falls in line with the “reform/retrenchment” dialectic described by Professors Crenshaw and Carbado.²⁹³ According to Professor Carbado,

[t]he problem with the racial progress narrative . . . is that it elides . . . the ‘reform/ retrenchment dialectic’ that has constituted America’s legal and political history. Consider the following three examples: (1) the end of legalized slavery and the promulgation of the Reconstruction Amendments (the reform) inaugurated legalized Jim Crow and the promulgation of Black Codes (the retrenchment); (2) *Brown v. Board of Education*’s dismantling of separate but equal in the context of K-12 education (the reform) was followed by *Brown II*’s weak ‘with all deliberate speed’ mandate (the retrenchment); (3) Martin Luther King, Jr.’s vision of racial cooperation and responsibility, which helped to secure the passage of the Civil Rights Act of 1964 (the reform), was re-deployed to produce a political and legal discourse that severely restricts racial remediation efforts: colorblindness (the retrenchment). A linear narrative about American racial progress obscures this reform/retrenchment dynamic.²⁹⁴

The debtors’ prison scheme could have been the fourth example in Professor Carbado’s list of historical reform/retrenchment patterns:²⁹⁵ The *Bearden* case, which established that individuals could not be incarcerated for being too poor, (the reform) is being constantly ignored by courts, who fail to conduct

disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children ‘the talk’ . . . all out of fear of how an officer with a gun will react to them. . . . We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.” *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (internal citations omitted).

292. Carbado, *supra* note 290, at 1607; *see also* Derrick A. Bell, Jr., *Racial Realism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 307 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) (“[W]e need to examine what it was about our reliance on racial remedies that may have prevented us from recognizing that these legal rights could do little more than bring about the cessation of one form of discriminatory conduct, which soon appeared in a more subtle though no less discriminatory form.”).

293. Carbado, *supra* note 290, at 1607; *see generally* Crenshaw, *supra* note 282.

294. Carbado, *supra* note 290, at 1607–08.

295. *Id.*

individualized “ability to pay” inquiries (the retrenchment). Like the War on Drugs, the debtors’ prison scheme is not an accident. Rather, it is working the way it is supposed to, in parallel to other bars in the birdcage of the mass incarceration of communities of color. Indeed, though racism is “an integral, permanent, and indestructible component of this society,”²⁹⁶ it is also highly adaptable and can evolve and change as it is challenged.²⁹⁷ Efforts to abolish racial discrimination, such as the Reconstruction Amendments, *Brown v. Board of Education*, and the passage of the Civil Rights Act of 1968 might have brought new rules to the game, but it is the same game: preserving white privilege and the racial hierarchy by exerting control over people of color.²⁹⁸

The proposed legal reforms (and the law more generally) will not halt this “reform/retrenchment” cycle, but rather will empower the white supremacist framework in which the debtors’ prison scheme is inscribed. Indeed, people conflate incremental reforms, such as the ones listed in Part IV.A.i., with signs that the “problem” has been solved. This conflation is reflected in the media. Reforms to the debtors’ prison scheme are greeted with headlines suggesting that the debtors’ prison scheme no longer exist within a particular jurisdiction.²⁹⁹ This conflation, in turn, halts the “massive social transformation” required to dismantle racial oppression,³⁰⁰ as people become more pacified about racial injustice.³⁰¹ The existence of debtors’ prisons illustrates this pacification. *Bearden* has been around since the 1970s, and yet countless low income

296. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* ix (1992).

297. See ALEXANDER, *supra* note 1, at 21.

298. See *id.*

299. See, e.g., ACLU of Washington, *Settlement Ends Debtors’ Prison in Washington County*, HUFFINGTON POST (June 30, 2016), http://www.huffingtonpost.com/aclu-of-washington/settlement-ends-debtors-p_b_10758278.html [<https://perma.cc/LC7X-RHCY>]; Settlement Ends “Debtors’ Prison” System in Jackson, Mississippi, MACARTHUR JUSTICE CTR. (June 20, 2016), <http://umlaw.macarthurjusticecenter.org/Projects/Debtors-Prison.html> [<https://perma.cc/GXM7-8GAZ>].

300. KIMBERLÉ CRENSHAW, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW* 195, 213–14 n.7 (David Kairys ed., 2d ed. 1990); see also Butler, *The System Is Working the Way It Is Supposed To*, *supra* note 204, at 1474 (“To bring racial justice to criminal justice, the police must stop the practices that many black and brown people protest They have to stop arresting so many people. They must stop using violence disproportionately against African Americans and Latinos. One goal of activists has to be making the police stop policing in ways that devalue the lives of people of color.”).

301. Butler, *The System Is Working the Way It Is Supposed To*, *supra* note 204, at 1467 (“One concern about reform is that it has a pacification effect. It calms the natives even when they should not be calm.”); Crenshaw, *supra* note 282, at 1316–17 (“The post-reform trajectory of civil rights discourse has long revealed that modest victories are inevitably appropriated as ammunition by those seeking to limit the scope of racial reform. Often with such advancements comes rhetoric that celebrates the inherent egalitarianism of American society while repudiating the very advocacy work and the long-term struggle that made the breakthrough possible. Indeed, when viewed through this vantage point, such victories point not to the efficacy of race consciousness advocacy but instead to the notion that it is not only unnecessary but is actually counterproductive.”).

individuals—especially people and communities of color—are still being incarcerated for being too poor to pay off their criminal justice debt in 2016.

V.

CONCLUSION: INCREMENTAL REFORMS OR SOCIAL TRANSFORMATION?

The debtors' prison scheme is yet another bar in the mass incarceration birdcage that functions as a form of social control of people and communities of color—the purpose that it was meant for. Operating in parallel with the War on Drugs, debtors' prisons disproportionately affect low-income people and communities of color. Not only do debts contribute to these individuals' incarceration, but they also affect their housing, employment, access to public benefits, and civil rights, following them for the remainder of their lives. Litigation, legislation, and other forms of advocacy have incrementally reformed the debtors' prison scheme to (possibly) eliminate it. As a result, fewer poor individuals will be imprisoned for being too poor to pay their LFOs. However, the overarching white supremacist framework in which the debtors' prison scheme is embedded will reemerge in another cycle, ironically sustained by these incremental reforms and the law. The question then becomes: which to choose?

I am not suggesting that advocates stop their efforts to reform the debtors' prison scheme—their much-needed work is indeed crucial. I am, however, suggesting that they consider alternatives to working within the current white supremacist framework—alternatives that are more likely to halt the cyclical “reform/retrenchment” pattern and bring about social transformation, which is to say, the dismantlement of white supremacy and social forms of racial control and a transformation of societal attitudes towards race.³⁰² These alternatives need to include non-colorblind advocacy that pushes through limits imposed by the law. Activists need to acknowledge the fundamental role that race plays in the debtors' prison scheme within their proposed reforms and *written* advocacy, including class action lawsuits, settlements, and legislative bills, despite the strict scrutiny standard to which the law subjects claims regarding race. Without this acknowledgment, communities of color will keep being disproportionately arrested and ushered behind bars, and the game will remain the same with or without the debtors' prison scheme.

302. I am not certain what these social transformation alternatives implicate in their entirety. However, the uncertainty of what these alternatives are does not take away from their legitimacy. “The ‘unfinished’ quality of . . . alternatives—their partial, aspirational, in-process character—is crucial to their potential to usher in new ways of thinking and speaking about criminal law, and perhaps ultimately a reformed social order that involves less violence than the status quo in criminally-oriented social order maintenance.” Allegra McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 114 (2013).