

(COLOR)BLIND REFORM: HOW ABILITY-TO-PAY DETERMINATIONS ARE INADEQUATE TO TRANSFORM A RACIALIZED SYSTEM OF PENAL DEBT

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ABSTRACT

As economic sanctions imposed with a criminal conviction proliferate nationwide, reformers have fought for and won the institutionalization of ability-to-pay determinations. While often viewed as a victory in the effort to end the criminalization of poverty, there is a substantial risk that ability-to-pay determinations may actually exacerbate the exact problem they seek to address. Drawing on a 50-state survey of codified ability to pay standards, this article problematizes the practice of ability-to-pay determinations. I argue that ability-to-pay determinations at best reduce court debt burdens and at worse represent a neoliberal racial project that serves to redistribute resources from Black families to state governments in a regressive taxation scheme that exacerbates the racial economic divide. While there is growing scholarly discourse on criminal court debt, this article is the first to apply a critical race theory analysis to scrutinize ability-to-pay determinations as a state-based attempt to neutralize calls for more systemic reforms to penal debt. It is through this lens that this article describes the ways in which ability-to-pay determinations require invasive inquiries into a defendant's financial resources, apply under-inclusive criteria to define "indigency," and invoke implicit or explicit racial biases. Moreover, the institutional players who implement ability-to-pay determinations have a vested interest in collection that increases their propensity to assess more rather than less, and the government bureaucracies in which they operate are commonly regarded as racialized structures that both generate and perpetuate race-based outcomes in the criminal justice system. Ultimately, this article cautions reformers to more critically consider the place of ability-to-pay determinations in movements for racial and economic justice.

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I.

INTRODUCTION

A great deal of attention has recently turned to how willful indifference towards the financial hardships of defendants has compromised the integrity of our criminal justice system. It is now widely understood that economic sanctions

imposed with criminal convictions have proliferated nationwide.¹ Courts increasingly impose fees on convicted people to cover basic court expenses, such as the maintenance of court facilities and compensation for court personnel.² Nonpayment often leads to incarceration for people without the resources to pay, in direct contravention of established U.S. Supreme Court precedent.³

Courageous reformers, including academics, advocates, and directly impacted individuals, and reform-driven coalitions have fought back.⁴ The dominant legal attack has been centered on the need for robust “ability-to-pay” determinations. These “ability-to-pay” determinations are judicial (or quasi-judicial) proceedings premised on the ideal that a monetary punishment must take into account a defendant’s financial circumstances—their ability to pay, so to speak. In Mississippi,⁵ Colorado,⁶ and Missouri,⁷ for example, litigator-reformers have successfully asserted that courts impermissibly infringe upon the due process rights of indigent defendants by failing to properly evaluate their ability to pay before

1. U.S. COMM’N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS, 71 (2017), https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2017.pdf [<https://perma.cc/G8G7-S77W>].

2. A study of economic sanctions imposed on convicted felony and misdemeanor offenders in Pennsylvania during 2006-2007 found a staggering total of 2,629 different types of economic sanctions in use across the state at different levels of government. R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 Duq. L. Rev. 751, 761 (2011). See also ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016) (analyzing the rise of monetary sanctions in the criminal justice system and how they permanently penalize and marginalize the poor).

3. See *infra* Section II.A (exploring seminal case law on ability-to-pay determinations).

4. In California, in particular, many rebellious and creative lawyers, activists, and community members are instrumental to ongoing efforts challenging court debt—Brandon Greene, Elisa Della Piana, Michael Herald, Maya Ingram, Stephen Bingham, Devon Porter, Aila Ferguson, Michael Kaufman, Anne Studreher, Christa Brown, Paulina Gonzalez, Lewis Brown, Antionette Dozier, Rebekah Evenson, Rebecca Miller, Ken Theisen, Danica Rodermeil, Kevin Reyes, Matthew Kay, Stephanie Lin, Dehsong Matheu, and many others. It is a privilege to know and work alongside them.

5. Class Action Complaint, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015) [hereinafter *Biloxi Complaint*]; Stipulated Settlement Agreement and Retention of Jurisdiction, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Mar. 15, 2016) [hereinafter *Biloxi Settlement*], <https://www.aclu.org/legal-document/kennedy-v-city-biloxi-stipulated-settlement-agreement-exhibits-b>.

6. DEBTORS’ PRISON SETTLEMENT: AURORA CANCELS DEBT, WITHDRAWS WARRANTS, AND REPAYS JAMES FISHER FOR EXCESSIVE PAYMENTS TO MUNICIPAL COURT, <https://aclu-co.org/debtors-prison-settlement-aurora-cancels-debt-withdraws-warrants-repays-james-fisher-excessive-payments-municipal-court/> [<https://perma.cc/32MF-BF88>].

7. Class Action Complaint, *Jenkins v. City of Jennings*, No. 4:15-cv-00252-CEJ (E.D. Mo. Feb. 8 2015) [hereinafter *Jennings Complaint*]; Permanent Injunction, *Jenkins v. City of Jennings*, Case No. 4:15-cv-252-CEJ, (E.D. Mo. Sept. 16, 2015) [hereinafter *Jennings Permanent Injunction*], <http://www.archcitydefenders.org/wp-content/uploads/2015/06/Doc.-17-Permanent-Injunction.pdf> [<https://perma.cc/7D2J-UM6W>] (requiring Jennings Municipal Court judges to “ask the individual if they can afford to pay the full amount of the fines and costs” at all times when fines and costs are assessed after an individual pleads guilty to an offense or an adjudication of guilt is made by the court).

sentencing them to incarceration or a host of punitive measures. In California,⁸ Tennessee,⁹ Virginia,¹⁰ and Mississippi,¹¹ reformers advanced groundbreaking bipartisan legislation in ability-to-pay determinations in the context of driver's license suspensions. All of the litigation and policy successes are monumental steps towards decarceration and full decriminalization of poverty.

However, as reformers coalesce around strategies to combat modern day debtor's prisons, there is a substantial risk that ability-to-pay determinations may inadvertently jeopardize the otherwise noble goal of these reforms.

Facially, ability-to-pay may advance procedural due process and prevent the incarceration of people who, faultless in their indigence, are unable to pay fines and fees. To mollify government stakeholders, ability-to-pay is billed as maximizing collections rates and decreasing the frequency of default payments.¹² Nonetheless, while reformers explicitly or implicitly indict the racial disparities inherent in the systems they endeavor to reform, ability to pay, as the solution, may be insufficient to achieve the equal racial justice they seek.¹³ Ability-to-pay determinations often happen daily behind closed doors or in unmonitored courtrooms where there is no oversight or regulation. They can occur in front of an audience with no intimate understanding of the devastating conditions of poverty, such as a judge, an employee of the court, a collections agent, or any person authorized by the court or county. In short, faith in ability-to-pay determinations may be misplaced.

Drawing on a 50-state survey of codified ability-to-pay standards¹⁴ and my personal experience as a reformer and direct services lawyer in California, this

8. Cal. Assemb., Reg. Sess. 103 (2017–2018 Reg. Sess.); CAL. R. CT. 4.335.

9. See H.B. 1495, 109th Leg., Reg. Sess. (Tenn. 2016).

10. See H.B. 2386, Reg. Sess. (Va. 2017); S.B. 854, Reg. Sess. (Va. 2017) (bringing payment plans into easier reach for poor people who owe court fines, partly by mandating a 10 percent cap on down payments).

11. SPLC, *MacArthur Justice Center, and Department of Public Safety Announce That Mississippi Will Reinstate Thousands of Driver's Licenses Suspended for Failure to Pay Fines*, UNIV. OF MISS. L. SCH. (Dec. 19, 2017), <https://law.olemiss.edu/splc-macarthur-justice-center-and-department-of-public-safety-announce-that-mississippi-will-reinstate-thousands-of-drivers-licenses-suspended-for-failure-to-pay-fines/> [<https://perma.cc/2ARX-F4RJ>].

12. See Beth Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 66 (2017) (describing the self-efficacy theory, which suggests that the “graduation of economic sanctions to a manageable amount will promote a belief that the debt is surmountable, leading to higher levels of self-efficacy and greater efforts at completing payment.”).

13. This is a criticism that is levied against mainstream reentry solutions as well. See, e.g., Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L. J. 1 (2014).

14. This survey was completed with the research assistance of the 50-State Criminal Justice Debt Reform Builder at the Criminal Justice Policy Program at Harvard Law School. CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCHOOL 50-STATE CRIMINAL JUSTICE DEBT REFORM BUILDER, <https://cjdebtreform.org/> [<https://perma.cc/CW6S-2WRR>]. Because many states do not have statutory language on ability to pay specifically for traffic court, I relied on ability to pay language for other fines and fees that are levied at various stages of the criminal process. This includes

article describes the potential pitfalls of ability-to-pay determinations and how they may undermine movements for racial and economic justice.

This article argues that state-sanctioned policies that assess fines and fees are a neoliberal racial project¹⁵ that serve to redistribute resources from Black families to state governments in a faux-taxation scheme that circumvents the traditional political process and is predicated on racially discriminatory stops.¹⁶ In an expanding criminal justice system, the citations are the batons, the fines the weapons of financial destruction, and the fees the instruments of deprivation. This faux-taxation scheme, couched in a colorblind justification of “personal accountability” and “revenue generation,” exacerbates the racial economic divide, which leads to further entrenchment of lack of mobility and wealth generation in minority communities.¹⁷ Not only do unregulated and ill-devised ability-to-pay determinations threaten to reinforce the legitimacy of this cash register justice system, they stand to enable the reproduction of racial and economic inequality. They are, as Gerald P. López aptly puts it, a mere “status quo +” modification rather than meaningful systemic change.¹⁸

criminal conviction costs, fees for the appointment of indigent counsel, probation, monitoring, jail costs, alcohol and drug assessment and evaluation, costs for educational programs assessed as a condition of probation, among others.

15. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 125 (3rd ed. 2016) (articulating a framework for racial projects, which is described as “simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.”); see *infra* Section III.A.1 for more detail on racial projects.

16. See, e.g., U.S. DEP’T JUSTICE, CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (Mar. 4, 2015) https://www.justice.gov/sites/default/files/crt/legacy/2015/03/04/ferguson_findings_3-4-15.pdf [<https://perma.cc/34C7-XTSD>].

17. See DARRICK HAMILTON, WILLIAM DARITY, JR., ANNE E. PRICE, VISHNU SRIDHARAN & REBECCA TIPPETT, *INSIGHT CENTER ON COMMUNITY ECONOMIC DEVELOPMENT, UMBRELLAS DON’T MAKE IT RAIN: WHY STUDYING AND WORKING HARD ISN’T ENOUGH FOR BLACK AMERICANS* 4 (Apr. 2015) [hereinafter HAMILTON, *UMBRELLAS DON’T MAKE IT RAIN*], https://insightcced.org/wp-content/uploads/2015/08/Umbrellas_Dont_Make_It_Rain_Final.pdf [<https://perma.cc/8UT2-YHJY>] (documenting the wealth gap between Black and white American families); THERESA ZHEN & BRANDON GREENE, *PAY OR PREY: HOW THE ALAMEDA COUNTY CRIMINAL JUSTICE SYSTEM EXTRACTS WEALTH FROM MARGINALIZED COMMUNITIES* 2 (2018) [hereinafter “PAY OR PREY”], https://ebclc.org/wp-content/uploads/2018/10/EBCLC_CrimeJustice_WP_Fnl.pdf [<https://perma.cc/3G4B-MY28>] (documenting harms directly caused by criminal justice fees in Alameda County); FINANCIAL JUSTICE PROJECT, OFFICE OF THE SAN FRANCISCO TREASURER, *CRIMINAL JUSTICE ADMINISTRATIVE FEES: HIGH PAIN FOR PEOPLE, LOW GAIN FOR GOVERNMENT* 9 (2018) [hereinafter “HIGH PAIN, LOW GAIN”], https://sftreasurer.org/sites/default/files/Criminal%20Justice%20Fees_High%20Pain_Low%20Gain%20FINAL.pdf [<https://perma.cc/RWJ8-T8J2>] (concluding that criminal justice administrative fees create barriers to re-entry); POLICY ADVOCACY CLINIC, BERKELEY LAW, *MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA* 1 (2017) [hereinafter “MAKING FAMILIES PAY”], <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf> [<https://perma.cc/C9HW-TR72>] (concluding that juvenile criminal legal fees in California undermine family reunification, cause financial hardship to families, and are disproportionately born by families of color). See also *infra* Section III.A.2.

18. See López, *supra* note 13, at 4.

A strategy too reliant on ability-to-pay determinations has also put reformers in the uncomfortable place of having to negotiate, and concede, criteria for indigency determinations, an unenviable, if not impossible, task because poverty is all too transitory and complex. Furthermore, it fails to account for racialized realities of the criminal justice system. Ability-to-pay neither accounts nor corrects for racialized policing that gives rise to citation patterns. Nor does it account or correct for derivative racial stratifications in wealth accumulation and a deepening racial economic divide.¹⁹ It also fails to compute the compounding effects that derive from existing court debts. In failing to account for all of these components, ability-to-pay determinations may inadvertently legitimize racial inequity.

Such determinations can be at best race neutral, at worst racist, and may have the unintended consequence of perpetuating racial disparities in wealth accumulation. It is through a critical race theory lens that this article describes the ways in which ability-to-pay determinations require invasive inquiries into a defendant's financial resources,²⁰ apply under-inclusive criteria to define "indigency,"²¹ and invoke implicit or explicit racial biases.²² Moreover, the very players that are implementing ability-to-pay determinations have a vested interest in collection that increases their propensity to assess more rather than less,²³ and the

19. See, e.g., MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 97 (2006).

20. The State of Connecticut, for example, has a 6-page financial affidavit requiring a comprehensive reporting of all income and assets, including all the mandatory state and federal deductions for income tax, health insurance, social security, Medicare, Union dues, and court ordered garnishments. STATE OF CONN. SUPERIOR CT., FINANCIAL AFFIDAVIT, JD-FM-6-LONG, <https://www.jud.ct.gov/webforms/forms/fm006-long.pdf> [<https://perma.cc/EG3V-H2XG>]. Alabama's criteria include a catch-all category: "own anything of value—land, house, boat, TV, stereo, jewelry." STATE OF ALA. UNIFIED JUDICIAL SYS., AFFIDAVIT OF SUBSTANTIAL HARDSHIP, Form C-10A, http://dhr.alabama.gov/services/child_support_services/Documents/379031ALAUJS%20C-10%20Affidavit%20of%20Substantial%20Hardship%200295.pdf [<https://perma.cc/P6X7-EHFJ>].

21. Most statutes contain a presumption of indigency when the defendant receives public assistance, which captures the extremely impoverished. See, e.g., N.H. REV. STAT. § 604-A:2-c (LexisNexis 2018); N.H. REV. STAT. § 499:18-b (LexisNexis 2018); WIS. STAT. ANN. § 814.29(1) (West 2018). Some states rely on the federal poverty line as a marker. UTAH CODE ANN. § 77-32-202(2)(a)(ii) (LexisNexis 2018) ("has an income level at or below 150% of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services"); FLA. STAT. ANN. § 27.52(2)(a) (West 2012) ("An applicant, including an applicant who is a minor or an adult tax-dependent person, is indigent if the applicant's income is equal to or below 200 percent of the then-current federal poverty guidelines prescribed for the size of the household of the applicant by the United States Department of Health and Human Services"); VT. STAT. ANN. tit. 13, § 5238(b) (2018) (finding indigency when "the income of the person and cohabiting family members for the past year equaled or exceeded 125 percent of the federal poverty level applicable to their family size").

22. See, e.g., Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

23. *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 655 (E.D. La. 2017) (holding that judges have an "institutional incentive" to find that criminal defendants are able to pay their fines and fees where fines and fees provide approximately 10% of the total Orleans Parish Criminal District Court budget and one quarter of the Judicial Expense Fund). See also *United Church of the Med. Ctr. v.*

bureaucracies in which they operate are racialized structures that both reflect and help to create and maintain race-based outcomes in society.²⁴

At best, the system operates as designed—even when determinations are administered uniformly and no person is incarcerated for failure to pay a court fine or fee, it inflicts incontrovertible harms on people who are found to be “able to pay” and imposes new harms that are racially distributed based on who enters the process in the first place. In pressing for ability-to-pay determinations, reformers should be wary of compounding the state-sanctioned wealth stripping that is rapidly eroding the accumulation of Black wealth.

While scholars have advanced legal attacks on court debt systems²⁵ and examined its harms,²⁶ there has been virtually no analysis rooted in critical race theory about the reforms that courts and mainstream reformers have mutually coalesced around.

This Article endeavors to problematize a conventional criminal justice reform. Part II explains the emergence of a legal right to an “ability-to-pay” determination and how states currently interpret and administer these determinations. Part III deploys a critical race theory analysis as to why ability-to-pay determinations alone may be insufficient to ameliorate racial disparities. Part IV proposes alternative advocacy strategies for reformers that do approach racial equity and justice.

Med. Ctr Comm’n, 689 F.2d 693, 699 (7th Cir. 1982) (“In this case the Commission has a pecuniary interest in the outcome of the reverter proceedings, because if the Commission finds a nonuse or disuse, the property reverts to the Commission . . . This is sufficient . . . to mandate disqualification of the Commission in the reverter proceeding.”).

24. JOHN A. POWELL, RACING TO JUSTICE, TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 9 (2012).

25. Beth Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 343 (2014) (interpreting the Eighth Amendment’s Excessive Fines Clause to apply to all deprivations of economic value in response to a public offense); Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917 (2017) (calling for reform of bankruptcy rules to allow for discharge of criminal debt); Neil L. Sobol, *Fighting Fines and Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841 (2017) (calling for a federal act to combat abuses in debt collection in criminal justice system).

26. Tamar Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1602 (2015); Alexes Harris, Heather Evans, & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOLOGY 6 (2010) [hereinafter Harris, *Drawing Blood from Stones*]; Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, *Criminal Justice Debt: A Barrier To Reentry*, BRENNAN CTR. FOR JUSTICE, (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://perma.cc/GLX8-7TV6>].

II.

LEGAL HISTORY OF "ABILITY TO PAY"

A. *Supreme Court Precedent*

Ability-to-pay determinations formally entered the legal lexicon after a series of appeals from criminal defendants who were denied the freedoms of their wealthier counterparts in lower court proceedings.²⁷

In one of those seminal appeals, probationer *Bearden* asserted an equal protection challenge to a Georgia court's decision to revoke his probation for failure to pay without first considering his ability to pay.²⁸ Writing for the majority in *Bearden v. Georgia*, Justice O'Connor declared that the court "has long been sensitive to the treatment of indigents in our criminal justice system."²⁹ Applying a dual equal protection and substantive due process analysis, the decision broadly speaking invalidated state incarceration that "punish[ed] a person for his poverty."³⁰

The *Bearden* opinion created a procedural stopgap to prevent debtor's prisons—that is, before a court revokes probation for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the inability to pay.³¹ Specifically, the court ruled that "if the state determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it."³² Before resorting to incarceration, the Court held that sentencing courts must consider alternatives to payment.³³

Despite its favorable ruling for the defendant-appellant, the *Bearden* decision is highly deferential to the State and its penological interests. Like in *Williams v. Illinois*,³⁴ the Court explicitly reinforced the State's fundamental interest in

27. See *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Bearden v. Georgia*, 461 U.S. 660 (1983).

28. *Bearden*, 461 U.S. at 663–64.

29. *Id.* at 664.

30. *Id.* at 671. The standard of review teetered between equal protection and due process. Justice O'Connor openly grappled with this in the text of the decision, ultimately conducting a careful substantive due process inquiry into such factors as "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose . . ." *Williams*, 399 U.S. at 260 (Harlan, J., concurring).

31. *Bearden*, 461 U.S. at 674.

32. *Id.* at 667.

33. *Id.* at 662 ("The sentencing court could extend the time for making payments, or reduce the fine, or direct that the probationer perform some form of labor or public service in lieu of the fine.").

34. *Williams*, 399 U.S. at 244 ("The state is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.").

punishing all persons, rich and poor, who commit crimes.³⁵ To ensure that the State retained its discretion to imprison defendants, the Court permitted the State to revoke probation and sentence “if the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources the pay.”³⁶ The court even invited the State “[to] imprison a probationer who has made sufficient bona fide efforts to pay [if] the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State’s interest in punishment and deterrence.”³⁷ Perhaps the most lasting consequence of the *Bearden* decision is the granting of authority to states to conduct extensive and invasive inquiries into a defendant’s circumstances for the purposes of tailoring an appropriate punishment.³⁸

The *Bearden* court does not provide any concrete guidance on how lower courts should operationalize this complicated financial analysis, merely broadly stating that the inquiry may encompass “the entire background of the defendant, including his employment history and financial resources.”³⁹ The court notably expanded the inquiry beyond whether a defendant “lacked the resources to pay it,”⁴⁰ to an assessment of whether the probationer willfully avoided payment. The court vaguely defined willfulness in different ways, from “probationer makes sufficient bona fide efforts,”⁴¹ to “[p]robationer has made reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own.”⁴² The court also denounced the incentive for defendants to obtain funds illegally to pay for their fines.⁴³

Notably, the *Bearden* court was silent on racial disparities. This may be unsurprising to some, given its close temporal proximity to the infamous *McCleskey v. Kemp*, where Justice O’Connor joined the majority in holding that empirical

35. *Bearden*, 461 U.S. at 669 (“A defendant’s poverty in no way immunizes him from punishment.”).

36. *Id.* at 672.

37. *Id.*

38. *See id.* at 670 (“When determining initially whether the State’s penological interests require imposition of a term of imprisonment, the sentencing court can consider the entire background of the defendant, including his employment history and financial resources.”).

39. *Id.*

40. *Id.* at 668.

41. *Id.* at 670.

42. *Id.* at 668.

43. *Id.* at 671 (“[S]uch a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.”). The *Bearden* court likely foresaw the effects of pushing indigent defendants to the brink of their financial capability. Indeed, a number of studies show the devastating results of persistent court-ordered debt, in particular that defendants are increasingly turning to criminal activity to pay. *See Harris, Drawing Blood from Stones, supra* note 26, at 1785 (“[S]everal respondents indicated that [monetary sanctions] encourage them to return to crime.”). Foster Cook, *The Burden of Criminal Justice Debt in Alabama: 2014 Participant Self-Report Survey* 11–12 (reporting that 17% of participants admitted to criminal activity for the purpose of paying economic sanctions).

evidence showing disparate impact is not sufficient to prove intent to discriminate on the basis of race.⁴⁴

B. Modern Day Application

Since *Bearden*, states have increasingly turned to imaginative ways to assess excess monetary penalties on criminal defendants—“surcharges,” “assessments,” “penalties,” and “costs,” among a litany of other state-sanctioned fines and fees. Fines and fees often do not bear recognizable relationship to the seriousness of a person’s crime.⁴⁵

The irrationalities of this system and the inequities it produces are profound.⁴⁶ Across the country, research reveals that there are billions of dollars of uncollected court debt each year, and this amount has steadily risen in recent history.⁴⁷ As these fines and fees balloon to fill government coffers, many indigent defendants find themselves in insurmountable levels of debt. Even more troubling are the collateral consequences that flow from this debt—driver’s license suspensions, civil judgments, and negative impacts on credit—that permanently prevent a person from achieving meaningful financial security.⁴⁸

In light of this urgency, the application of *Bearden* in the lower courts and in state legislatures has been expansive. One prevalent state solution, though

44. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

45. For example, one study shows that drug offenders—especially Latino drug offenders—are assessed greater monetary sanctions than violent offenders. Alexes Harris, Heather Evans, & Katherine Beckett, *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOC. REV. 234, 253–54 (2011); See also Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1758 n.76 (2015).

46. We are in an interesting moment of interest convergence between dominant white people who want to minimize fiscal irresponsibility and long-silenced, overpoliced, politically underrepresented Black people victimized by fiscally irresponsible systems. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites. . . . Racial remedies [may] be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.”).

47. See MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, CRIMINAL FINE AND FEE PROPOSALS 8 fig.3, <https://lao.ca.gov/reports/2017/3600/Criminal-Fine-Fee-030317.pdf> [<https://perma.cc/GD3B-4Y56>] (the balance of outstanding California fines and fees rose every year from 2011 onward, culminating in \$12.3 billion outstanding at the end 2015-2016). See also PAY OR PREY, *supra* note 17, at 13 tbl. 8 (collections revenues in Alameda County have steadily declined from fiscal year 2013-14 to 2017-18). Cf. HIGH PAIN, LOW GAIN, *supra* note 17, at 6–8 (documenting low collection rates for criminal legal fees in San Francisco); MAKING FAMILIES PAY, *supra* note 17, at 17–18 (juvenile criminal fees collected resulted in little net revenue because of the cost of collection).

48. *Driver’s License Suspension Coalition Letter*, DRUG POL’Y ALL., https://www.drugpolicy.org/sites/default/files/Driver_License_Suspension_Coalition_Letter.pdf [<https://perma.cc/7LY6-5CSX>]; *Driver’s License Suspension Reform: The Right Road For Michigan*, REASON FOUND., <https://reason.org/wp-content/uploads/2018/04/michigan-suspended-drivers-license-reform.pdf> [<https://perma.cc/5LEM-DG7Y>].

woefully insufficiently tailored to the magnitude of the problem, are temporary and limited “amnesty” programs for warrants, court debt, and driver’s licenses.⁴⁹ These amnesty programs seek to mitigate the crushing consequences that arise from the imposition of court debt—namely, discharging or reducing debt, or reduction of traffic debt, or the dismissal of warrants associated with those charges. These amnesty programs have proven to be limited inadequate systemic reform.⁵⁰

In the context of probation revocations for failure to pay court costs, state court cases mirroring *Bearden* have proliferated, holding that the defendant must have the opportunity to present evidence of indigence at a hearing, that the hearing must determine whether the failure to pay was “willful”, and that there must be written findings of fact regarding ability to pay.⁵¹ Courts have also required that the defendant be given the opportunity to discharge or reduce the fine if he is

49. U.S. COMM’N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS Table 2 203–08 (2017) (including Alabama (Amnesty Days March 2015); Arkansas (Johnson Amnesty Week Mar. 2015, Rogers Amnesty Week Dec 2015); California (Infractions Amnesty Program Oct 2015-Mar 2017); Florida (Operation Fresh Start March 2016, Operation Green Light October 2014); Georgia (DeKalb County Ticket Amnesty Program Apr 2010, Fulton County Traffic Amnesty Nov 2011, Decatur Amnesty Program Feb 2017-May 2017); Illinois (Chicago Ticket Amnesty Program Nov 2015-Dec 2015, Lake County Amnesty Program Jun 2016-July 2016); Iowa (Davenport Overdue Ticket Amnesty Program Jun 2014-Aug 2014, Court Debt Amnesty Program Sept 2010-Nov 2010); Kansas (Wichita Amnesty Week April 2013, One-Time-Only Three-Day Amnesty Program Oct 2011); Kentucky (Trigg County Amnesty Program Aug 2014); Michigan (Dearborn Traffic Amnesty Program May 2013-Jun 2013); Mississippi (Moss Point Amnesty Period Mar. 2017-May 2017); Missouri (Kansas City Amnesty Program Oct 2003); Nevada (One-Time Amnesty Program Oct 2015-Mar 2017); New York (Forgiving Fines: The NYC Amnesty Program Sept 2016-Dec 2016); Ohio (Toledo Amnesty Program Apr 2015-Jun 2015); Oklahoma (Tulsa and Broken Arrow Amnesty Week (Mar 2014); Pennsylvania (Resolution Applauding Traffic Amnesty Programs); Tennessee (Drive While You Pay Program July 1999); Texas (Sullivan City Warrant and Ticket Amnesty Program Feb 2017-Mar 2017); Vermont (Three-Month Ticket Amnesty Program Sept 2016-Nov 2016); Washington (Statewide Debt Reduction Program May 2009-Jun 2009); Washington D.C. (Ticket Amnesty Program Aug 2011-Jan 2012); Wyoming (Sheridan Amnesty Program (Jan 2011)).

50. Enacted in 2015, California’s 18-month amnesty program, for example, expressly excludes people who owe victim restitution. Cal. Veh. Code § 42008.8. *See also* Theresa Zhen, *Traffic Amnesty Program Highlights the Problem of Temporary Solutions to Systemic Poverty and Racial Bias*, ORANGE COUNTY REGISTER (April 19, 2017), <https://www.oregister.com/2017/04/19/traffic-amnesty-program-highlights-the-problem-of-temporary-solutions-to-systemic-poverty-and-racial-bias/> [https://perma.cc/5UT6-ATV6].

51. *See, e.g.*, *Jordan v. State*, 939 S.W.2d 255, 257 (Ark. 1997) (requiring written findings of fact regarding ability to pay); *Greene v. Dist. Ct. of Polk Cty.*, 342 N.W.2d 818-21 (Iowa 1983) (requiring a hearing to determine responsibility for failure to pay prior to commitment and finding that jailing defendant without notice or an opportunity to explain why he had not satisfied the conditional order was a denial of due process); *Hendrix v. Lark*, 482 S.W.2d 427, 431 (Mo. 1972) (remanding indigent defendant to city court for a hearing to determine her ability to pay the fines and costs, and if unable to pay immediately, ordering an opportunity for her to pay in reasonable installments based upon her ability to pay); *State v. Blazina*, 344 P.3d 680, 685 (Wash. 2015) (holding that a sentencing judge must make “an individualized inquiry into the defendant’s current and future ability to pay before the court imposes [legal financial obligations]”). *See also* Birckhead, *supra* note 26, at 1634.

unable to pay, including the alternatives of installment plans and reductions of fee amounts.⁵²

Though they constitute the largest number of filings in criminal court,⁵³ traffic citations are generally afforded the least process. Only four states consider a person's ability to pay prior to a driver's license suspension (Louisiana, Minnesota, New Hampshire, and Oklahoma).⁵⁴ But the tide is swiftly changing. After Black Lives Matter activists exposed this unconstitutional practice of jailing the poor and the law students and lawyers at ArchCity Defenders broke new ground with their investigation into St. Louis traffic courts,⁵⁵ local courts in Jennings, Missouri implemented ability-to-pay determinations and halted the practice of imprisoning people for their poverty.⁵⁶ Extraordinary advocacy by and on behalf of people whose driver's licenses were suspended for failure to pay tickets led to the successful institutionalization of rules, statutes, bench cards, and other resources that promote robust ability-to-pay assessments.⁵⁷

Despite this faith in ability-to-pay determinations, many jurisdictions have *already* been subject to ability-to-pay requirements under state statutes and case law, as well as under *Bearden v. Georgia*.⁵⁸ Yet, the memorialization of "ability to pay" in case law and statutory authority was *still* not effective to extinguish the persistent disparate treatment of indigent defendants. Those jurisdictions have,

52. *See, e.g.*, *Gilbert v. State*, 669 P.2d 699, 703 (Nev. 1983) ("Before a defendant may be imprisoned for nonpayment of a fine, a hearing must be held to determine the present financial ability of the convict. If the convict is indigent, the sentencing court must permit discharge of the fine through one or more of the alternatives contemplated in NRS 176.085."); *State v. Townsend*, 536 A.2d 782, 786 (N.J. Super. Ct. App. Div. 1988) (finding that defendant's willful failure to pay restitution obviated the need for sentencing court to consider alternatives). *See also* Birkhead, *supra* note 26, at 1634.

53. In California, on average, nearly four million traffic infractions and nearly 300,000 non-traffic infractions are filed annually. JUDICIAL COUNCIL OF CAL., STATEWIDE CASELOAD TRENDS 68 (2017), <http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf> [https://perma.cc/X9B9-FTPC].

54. MARIO SALAS & ANGELA CIOLFI, LEGAL AID JUSTICE CENTER, DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 8 (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf> [https://perma.cc/UDH5-257V].

55. THOMAS HARVEY, JOHN MCANNAR, MICHAEL-JOHN VOSS, MEGAN CONN, SEAN JANDA, & SOPHIA KESKEY, ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER (Nov. 23, 2014), <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [https://perma.cc/8KZX-8XFE].

56. *See* Jennings Permanent Injunction, *supra* note 7 (requiring Jennings Municipal Court judges to "ask the individual if they can afford to pay the full amount of the fines and costs" at all times when fines and costs are assessed after an individual pleads guilty to an offense or an adjudication of guilty is made by the court).

57. CAL. R. CT. 4.335 ("A defendant may request an ability-to-pay determination at adjudication, or while the judgment remains unpaid, including when a case is delinquent or has been referred to a comprehensive collection program"); SUPREME COURT OF OHIO, OFFICE OF JUDICIAL SERVICES, COLLECTION OF FINES AND COURT COSTS (2014), http://www.acluohio.org/wp-content/uploads/2014/02/OhioSupremeCourtBenchCard2014_02.pdf [https://perma.cc/RFA8-KJ6T].

58. 461 U.S. 660 (1983).

until now, successfully evaded sanctions for failing to execute them. The promise of due process is only as good as the enforcement that ensures its vitality. Even with the enforcement, there are inherent barriers to providing true due process.

Studies have shown that courts have creatively skirted the rules or flatly disobeyed them. A 2010 study by the Brennan Center for Justice found that courts in many states were “either unwilling or unable to waive fees based on indigence, to tailor payment obligations to a person’s ability to pay, or to offer meaningful alternatives to payment”⁵⁹ Over the course of a six-month period in 2012, “approximately 22% of the total bookings in the [Ohio] Huron Country Jail were related to failure to pay fines.”⁶⁰ Countless individual and class action lawsuits have been initiated across the county that allege that judges do not hold ability-to-pay hearings prior to incarceration.⁶¹

Whether legal advocates are strengthening ability-to-pay determinations or weighing whether to engage in policy reform to adopt ability-to-pay determinations, they should be keenly aware of the limitations.

III.

CRITIQUES OF “ABILITY TO PAY”

As reformers coalesce around strategies to combat modern day debtor’s prisons, however, they must be wary of starting and ending their advocacy around designing and institutionalizing ability-to-pay determinations for court-ordered debt. Settling on ability-to-pay determinations reaches across both sides of the aisle and, on its face, promotes both court values and the values of indigent people. Certainly, ability-to-pay determinations advance procedural due process and prevent the incarceration of people who, faultless in their indigence, are unable to pay fines and fees. It appears to promote a reasonable proposition—that a person who lacks the ability to pay should not be subject to harsh punishment simply for being poor. To mollify court concerns, court collections may stand to increase because more people will pay an amount tailored to their financial resources.⁶² Moreover, it releases governmental institutions from liability for unlawful imprisonment and, from the perspective of the court-as-debt-collector, promotes accountability for people who are convicted of crimes.

59. See Birkhead, *supra* note 26, at 1635 (quoting ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13 (2010)) (internal quotation mark omitted).

60. See AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO’S DEBTORS’ PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 8 (2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf [<https://perma.cc/9G2A-QWPD>].

61. See, e.g., Biloxi Complaint, *supra* note 5; Fant v. City of Ferguson, No. 4:15-CV-00253-AGF, 2015 WL 4232917 (E.D. Mo. July 13, 2015); Jennings Complaint, *supra* note 7; Graff v. Aberdeen Enterprises II, 4:17-CV-606-CVE-JFJ, 2018 WL 4517468, (N.D. Okla. Sept. 20, 2018).

62. See Colgan, *supra* note 12, at 66 (“The graduation of economic sanctions to a manageable amount . . . should promote a belief that the debt is surmountable, leading to higher levels of self-efficacy and greater efforts at completing payment.”).

Nonetheless, while reformers explicitly or implicitly indict the racial disparities inherent in the systems they endeavor to reform, their reforms can, at times, be insufficient to achieve the equal racial justice they seek. In particular, faith in “ability-to-pay” determinations may be misplaced, especially if those determinations are poorly designed and subtly invoke implicit or explicit racial biases.

First, there is the problem of who gets assessed fines and fees in the first place.⁶³ The modern day racial project of penal debt arising out of traffic citations depends on the functioning of a criminal justice system that is rife with explicit and implicit racial biases and prejudices. Even with an ideal ability-to-pay process, these problems are serious, both because there are incontrovertible harms inflicted on people who are found to be “able to pay” and because the ability-to-pay system/process itself imposes harms on marginalized communities, which are racially distributed based on who enters the process in the first place.

Second, there is the problem with the nature of the determinations themselves and the challenge of accounting for intergenerational modes of state sanctioned wealth stripping.⁶⁴ There is also the problem of a complicated and oftentimes confusing administrative process that channels people through an extremely taxing multi-layered bureaucracy, which is often daunting to people with disabilities, language access issues, childcare needs, among other limitations. The intrusiveness of the determinations themselves and the documentation requirements create enormous burdens for low-income individuals. Moreover, inherent in the determinations themselves is the potential to enable racialized judgments about willfulness.

Third, even if there were successful ability-to-pay determinations, the alternatives that are being contemplated by reformers are too focused on remedies that have vestiges of peonage: an example is community service.⁶⁵ Even the most progressive require behavior-reforming activities, like substance abuse treatment, that would not otherwise be required of people who can afford to pay. Finally, even with a fair and just ability-to-pay determination, the modern ability-to-pay structure does not account for intentional governmental harm⁶⁶ and devalues harmful impacts that occur outside traditional incarceration.⁶⁷ Each of these problems will be discussed in turn below.

A. Problem with Who is Assessed Fines/Fees

Who gets assessed fines and fees in the first place is an important starting point for the critique of ability-to-pay determinations. Advocates for ability-to-pay determinations must be mindful of its incontrovertible harms, which are racially distributed based on who enters the process in the first place. The modern day racial project of penal debt is predicated on a criminal justice system that is

63. *See infra* Section III.A.

64. *See infra* Section III.B.

65. *See infra* Section III.C.1.

66. *See infra* Section III.C.2.

67. *See infra* Section III.C.3.

rife with explicit and implicit racial biases and prejudices. Even an ideal ability-to-pay process will only replicate these racial inequities, as it has no mechanism to control who is targeted by and brought into the process to begin with.

1. *Racial Project of Penal Debt*

In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander writes of a racial caste system, the bedrock of our nation's foundation that has forcefully endured in the course of American history.⁶⁸ This racial project started with the formalized enslavement of Black people, and then, post-emancipation, the racial discrimination and segregation of Jim Crow, and finally, leading up to the modern day, the War on Drugs and the ensuing mass incarceration of a staggering and disproportionate rate of Black men and women.⁶⁹ This article posits that the next frontier of the racial caste system is rolling out in the modern day post-Ferguson era in de-facto debtor's prisons. Like the many incarnations of social control before it, the current system that calculates monetary sanctions, and imposes, collects, and punishes for non-payment is one that is "rooted in racism and nurtured by economic expediency."⁷⁰

A key element to this racial project is the state's power to organize and command it. In their seminal text *Racial Formation in the United States*, Michael Omi and Howard Winant define racial formation as "the sociohistorical process by which racial identities are created, lived out, transformed, and destroyed."⁷¹ They link racial formation to the "evolution of hegemony, the way in which society is organized and ruled."⁷² Racial formation gives rise to hegemony through the operationalization of *racial projects* that gives rise to sociological phenomena like "racial stratification in the labor market or patterns of residential segregation."⁷³ Omi and Winant define a racial project as "simultaneously an interpretation, representation, or explanation of racial identities and meanings, and an effort to reorganize and redistribute resources (economic, political, cultural) along particular racial lines."⁷⁴

Omi and Winant talk about colorblindness as a driver of neoliberalism, the "hegemonic economic project of our time."⁷⁵ They also advance the notion that

68. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

69. *Id.*

70. Douglas Blackmon, *From Alabama's Past, Capitalism Teamed with Racism to Create Cruel Partnership*, WALL STREET J. (Jul. 16, 2001), <https://www.wsj.com/articles/SB995228253461746936?ns=prod/accounts-wsj>.

71. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 109 (3d ed. 2014).

72. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 56 (2d ed. 1994).

73. *Id.*

74. OMI & WINANT, *supra* note 71, at 125.

75. *Id.* at ix.

race *causes* existing economic relationships and should not be interpreted as merely a consequence of economic relationships.⁷⁶ They write, “Neoliberalism was at its core a racial project as much as a capitalist accumulation project. Its central racial component was colorblind racial ideology.”⁷⁷

Omi and Winant further theorize about the “racial state:” “[T]he state *is* inherently racial. Far from intervening in racial conflicts, the state is itself increasingly the preeminent site of racial conflict.”⁷⁸ For Omi and Winant, the state does not stand above the racial fray, but is itself thoroughly immersed in racial contests: “The racial order is equilibrated by the state—encoded in law, organized through policy-making, and enforced by a repressive apparatus.”⁷⁹ Indeed, “[social movements] have been largely neutralized by state-based reaction.”⁸⁰

This type of state action was especially true in the era of the Jim Crow South. Professor Tamar Birckhead writes about how the reconfiguration of the Jim Crow South effectively kept intact a system of black bondage—a post-emancipation economic caste system that was built on racism.⁸¹ Expansion of criminal law (the Black Codes) drove racial exclusion and exploitation via the leasing of convict labor.⁸² Convict leasing is a prominent example of how criminal law was used as a weapon of racial domination; other examples include selective prosecution, increased penalties for minor offenses, and the expansion of the criminal code to cover offenses deemed likely to be committed by freedmen, for instance not being gainfully employed.⁸³ Despite the Anti-Peonage Act and the landmark Supreme Court decisions limiting peonage, the judicial system enabled it to flourish through the complicity of law enforcement, court administrators, and all-white juries.

In applying Omi and Winant’s theory of racial formation, Ian Haney Lopez posits that this theory “illuminates” the state’s “contradictory roles” in the civil rights movement in the 1960s.⁸⁴ By serving as the mediator between the demands of racial justice advocates and privileged whites, the state simultaneously gave into civil rights legislation and advanced modest enhancements in the investments

76. *See id.* at 140.

77. *Id.* at 211.

78. OMI & WINANT, *supra* note 72, at 82.

79. *Id.* at 84.

80. OMI & WINANT, *supra* note 71, at 9. (3d ed. 2014).

81. *See* Birckhead, *supra* note 26, at 1607–08 (“[T]he contemporary “justice tax” . . . ultimately has the same societal impact as the post-Civil War practice of peonage: both function to maintain an economic caste system”).

82. *See* DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* XV, at 31–35 (1978) (“Without fanfare the freed slave was plunged into a new labor system [peonage] that degraded his value as a worker and made his new freedom a mockery, in economic terms at least.”).

83. ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 202 (2005).

84. Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1035 (2010).

and governmental services, all the while enabling the development of a penal system that expanded criminal and welfare policies.

Since 2014, the untimely deaths of men and women of color led to another defining moment in racial formation in the United States.⁸⁵ What started out as minor infractions—Alton Sterling (selling CDs),⁸⁶ Eric Garner (selling loose cigarettes),⁸⁷ Philando Castile (brake lights out),⁸⁸ Walter Scott (faulty brake light),⁸⁹ and Sandra Bland (failure to signal a lane change)⁹⁰—placed them at risk of police overreach, and, as a direct result of that overreach, they were tragically killed. Fueled by a deep sense of multigenerational trauma and outrage, Black Lives Matter in Ferguson forced a national reckoning and exposed a new phase of racialization—the project of increased police exposure through aggressive citation of minor infractions (many of which are byproducts of poverty), followed by repeat compounding acts of financial dispossession and economic deprivation, ultimately deepening (and solidifying) the racial economic divide. The state has been making an effort to reorganize and redistribute resources along racial lines. By negotiating fiscal decisions in a way that left the judiciary to fund itself, the state has been an overseer of an expanding penal system that created offenses borne out of poverty and capitalized on them. By affirmatively balancing the budget on the backs of poor people, the state justified the unprecedented extraction of large amounts of wealth by equating non-payment with non-compliance with the law.

2. Ability-to-Pay in Context of Racial Project

In my representation of clients at the East Bay Community Law Center in Alameda County, CA and at A New Way of Life Reentry Project in South Central Los Angeles, CA,⁹¹ many of my Black and Latino clients vividly recount stories

85. That is not to say men and women of color did not die at the hands of police before this time period. However, the data for police shootings is notoriously inadequate. The need for more accurate data on injuries and deaths that occur at the hands of police is so acute that it drew the attention of the Obama Administration's Attorney General Eric Holder. See Michael S. Schmidt, *A Call to Better Track Police Use of Guns*, N.Y. TIMES (Jan. 15, 2015), <https://nyti.ms/1sCX51G>.

86. Emily Lane, *Alton Sterling and his CD-Selling Made Him a Neighborhood Fixture*, NOLA.COM (Jul. 7, 2016), http://www.nola.com/crime/index.ssf/2016/07/baton_rouge_alton_sterling_cd.html [<https://perma.cc/KQ3R-6YPF>].

87. Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (Jun. 13, 2015), <https://nyti.ms/1QVk0LK>.

88. Traffic Stop Transcript of Conversation Between Jeronimo Yanez and Philando Castile (Jul. 6, 2016), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/Exhibit%201a%20-%20Traffic%20Stop%20Transcript.pdf> [<https://perma.cc/CVP7-UX4T>].

89. Michael Martinez, *South Carolina Cop Shoots Unarmed Man: A Timeline*, CNN.COM (Apr. 8, 2015), <https://www.cnn.com/2015/04/08/us/south-carolina-cop-shoots-black-man-timeline> [<https://perma.cc/3WLM-DSY2>].

90. St. John Banned-Smith, *Waller County Authorities Release More Details in Jail Suicide*, HOUSTON CHRONICLE (Jul. 17, 2015), <https://www.chron.com/news/houston-texas/article/Relatives-question-death-of-woman-found-hanging-6388529.php> [<https://perma.cc/U6XH-92BB>].

91. These stories are chronicled in NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA (2015), <https://ebclc.org/wp-content/uploads/2015/04/Not-Just-a->

of being pulled over for minor violations—expired tags, no license plate—and being roughly commanded to exit their vehicles, thrown on the hood of their vehicles or on the sidewalk, and handcuffed, so that the officers can search for what they broadly defined as “guns and drugs.” When nothing is found in these oftentimes violent and nonconsensual encounters, the officers issued citations. *The citations are their batons, the fines their weapons of financial destruction, the fees their instruments of deprivation.*

a. The Need to Correct for Racial Disparities

Haney Lopez’s cumulative theory of racial stratification suggests that “race may operate on myriad levels, with or without the presence of animus or caste-like structures; and race frequently both produces and is produced by social, political, and market dynamics that often may seem initially to have little bearing on race.”⁹² He posits two theories of colorblindness: one, to remove and strike explicit uses of race, and two, to uphold disparities corresponding to longstanding racial hierarchies with the justification that the drivers of those racial hierarchies is not racism. The modern day racial project of penal debt arising out of traffic citations inherits the legacy of a criminal justice system that is rife with explicit and implicit racial biases and prejudices.

Some scholars may disagree and theorize that there is no “official discrimination” and any inequality derives from an absence of racism and has a race-neutral explanation.⁹³ I refer to this as a “colorblind” argument, in homage to its indifference to color (race).

Defenders of this colorblind theory might argue any racial disparities in police stops and the issuance of citations is “not racism,” and any use of racial stereotypes is justified so long as it is couched in descriptions of cultural or behavioral abnormalities (e.g., he was driving in a high crime area with his music on, he looked suspicious, etc.). For example, law enforcement officials insist that race has nothing to do with their enforcement; they maintain that their stops are not driven by race or ethnicity.⁹⁴

While the colorblind argument is enticing in its simplicity, it ignores the cumulative snowball effects of a police stop. If disparate racial stops are a result of

Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf [https://perma.cc/VE8X-XK4Y]; see also BACK ON THE ROAD, CAL., STOPPED, FINED, ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA (2016), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf [https://perma.cc/X79N-HVNF].

92. Lopez, *supra* note 84, at 1060.

93. See, e.g., William J. Stuntz, Unequal Justice, 121 HARV. L. REV. 1969, 1972–73 (2008) (attributing racial inequality in criminal justice outcomes to a decline in local democratic control).

94. Jeremy B. White, *Report: California Traffic Stops, Arrests Hit Minorities Harder*, SACRAMENTO BEE, Apr. 10, 2016, <http://www.sacbee.com/news/politics-government/capitol-alert/article71054277.html> [https://perma.cc/2ZA6-YR39] (“‘The members of our profession, in doing their work every day, focus on behaviors, not on ethnicity or gender,’ says California Police Chiefs Association President Ken Corney.”).

a natural condition that is truly free of animus and unconscious bias, then surely it should be a concern that people long subject to generations of disadvantage are the ones that suffer the compounding poverty consequences of being unable to pay a ticket. Without acknowledgement or affirmative efforts to correct this discrimination across multiple dimensions (police stop, traffic court, collections agency, wealth accumulation), past discrimination merely begets future discrimination. A world of equal opportunity—one that distributes fines without racial disparities and where deprivations that correlate with race would be “deserved”⁹⁵—is illusory and would be impossible given the intergenerational historical efforts to subvert Black economic self-sufficiency.

b. Why Ability-to-Pay Determinations May Be Inadequate to Correct for Racial Disparities

Ability-to-pay determinations are predicated on the assumption that robust financial assessments will singularly cure the infirmities of the current system—that jailing indigent people of color is merely an aberration caused by lack of notice and due process.⁹⁶ This assumption is flawed. Not only are ability-to-pay determinations vastly inconsistent and hard to monitor, they also, more problematically, leave in place the overarching system that places, at minimum, an incontrovertible harm on a single person, and at most, a wholesale regressive tax on low-income communities of color. As such, ability-to-pay hearings are a political tool masquerading as a technical instrument to reify existing racial structures. There are three salient reasons for why ability-to-pay determinations are inadequate to transform this entrenched and complex racial project: (1) Ability-to-Pay neither accounts nor corrects for racialized policing patterns, (2) Ability-to-pay neither accounts nor corrects for racial stratifications in wealth accumulation and a deepening racial economic divide, and (3) Ability-to-pay neither accounts nor corrects for the compounding effects that derive from inability to pay fines and fees from prior violations. Each of these reasons will be discussed in turn below.

c. Ability-to-Pay Neither Accounts nor Corrects for Racialized Policing Patterns

Traffic citations are used as a modern tool of racial segregation and domination through the use of selective stops, inflated penalties for infraction offenses like moving violations, and the proliferation of vehicle code violations, which target low-income people of color.⁹⁷ Studies reveal a correlation between population of black residents and reliance on fines/fees. In a 2016 Priceonomics analysis,

95. Alan David Freeman, *Legitimizing Discrimination: Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV 1049, 1054 (1978).

96. See, e.g., Biloxi Settlement, *supra* note 5 (correcting the traffic warrant system by improving notice and creating a process for individuals to clear their warrants).

97. See Dan Kopf, *The Fining of Black America*, PRICEONOMICS, (June 24, 2016), <https://priceonomics.com/the-fining-of-black-america/> [<https://perma.cc/GR3C-L8QA>].

author Dan Kopf noted that “[t]he use of fines as a source of revenue is not a socioeconomic problem, but a racial one.”⁹⁸ He found that cities with large Black populations relied more heavily on fines and fees than cities with smaller populations of color.⁹⁹ In a seven year study of Philadelphia, it was found that fees were significantly more likely to be imposed on Black people than on white people.¹⁰⁰

Racial discrimination exists in police stops and citations unrelated to the difference in driving.¹⁰¹ The United States Department of Justice conducted an incisive investigation of Ferguson, which revealed intentional and explicit racial discrimination against Black people.¹⁰² In a recent analysis of more than 60 million police stops in 20 states from 2011 to 2015, researchers from Stanford found that Black drivers are generally stopped at a higher rate than white motorists, and Latinos are stopped at a similar or lower rate than white drivers, after adjusting for age, gender, time and location. Studies done in New Jersey,¹⁰³ Texas,¹⁰⁴ and Maryland¹⁰⁵ corroborate this finding. Supreme Court cases like *United States v. Brignoni-Ponce* all but approve the use of race as a factor in making decisions about which motorists to stop, search, and cite.¹⁰⁶

Even when there is neither conscious nor intentional bias, stereotypes of Black people continue to linger and express themselves in ways that have become commonly known as “implicit bias.” When police officers are primed to think

98. *Id.*

99. *Id.*

100. Jessica Eaglin & Danyelle Solomon, *Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice*, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW (2015), <https://www.brennancenter.org/publication/reducing-racial-and-ethnic-disparities-jailsrecommendations-local-practice> [<https://perma.cc/B632-KED6>].

101. Empirical studies by Jerry Kang, Jennifer Eberhardt, Phillip Goff, Valerie Purdie, and Paul Davies have proven that officers, when primed with Black male faces (as opposed to a white male face, or no prime at all), are more likely to correlate Blackness with criminality. See Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie, & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

102. U.S. DEP’T JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/69VQ-DGLT>].

103. *State v. Soto*, 743 A.2d 350, 352–57, 360–61 (N.J. Super. Ct. Law Div. 1996) (“Here, defendants have proven at least a de facto policy on the part of the State Police out of the Moorestown Station of targeting blacks for investigation and arrest.”).

104. Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities*, HOUSTON CHRONICLE, May 14, 1995, at A1 (“Minority drivers who strayed into the small white enclaves in and around Texas’s major urban areas were twice as likely as whites to be ticketed for traffic violations, according to a Chronicle analysis of more than 16 million Texas driving records.”).

105. DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002).

106. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (“The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor. . . .”). See also Devon Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1453, 1575 (2011) (“*Brignoni-Ponce* authorizes the express utilization of race as a basis for suspicion.”).

about crime by words such as “violent, crime, stop, investigate, arrest,” they more quickly focus on Black male faces than comparable white male faces.¹⁰⁷ In a different study, police officers were confronted with pictures of faces and asked, “who looks criminal?” Police officers more often chose Black faces over white faces, and the results showed a greater disparity when the Black faces were more stereotypically Black.¹⁰⁸

Stopped African Americans were 166% more likely and Hispanic people were 132% more likely to be asked to exit vehicles than stopped white people according to a study looking at drivers in Los Angeles.¹⁰⁹ Stopped African Americans were 127% more likely and Hispanic people were 43% more likely to be frisked or patted down than stopped white drivers, according to the same study.¹¹⁰ A Stanford study using nationwide data showed that Black and Latino drivers are about twice as likely to be searched compared to white drivers.¹¹¹ African Americans are stopped at such high rates, that the unconditional probability of being cited was much higher than that of white drivers although stopped Black drivers were more than 30% less likely to be cited than stopped white drivers.¹¹² In other words, police use their discretion to treat “Driving While Black” like a criminal offense.

African Americans suffer from heavier penalties than their white counterparts upon being stopped. In a racial impact statement¹¹³ by a coalition of California

107. *Transforming Perception: Black Men and Boys*, PERCEPTION.ORG, 9, <http://perception.org/wp-content/uploads/2014/11/Transforming-Perception.pdf> [<https://perma.cc/ZK9X-TAZF>] (citing Eberhardt, et al., 2004).

108. *Id.*

109. Ian Ayres & Jonathan Borowsky, A Study of Racially Disparate Outcomes in the Los Angeles Police Department, AM. CIV. LIBERTIES UNION S. CAL. 6 (Oct. 2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf> [<https://perma.cc/CQV3-CWCS>].

110. *Id.*

111. Richard Winton, *Black and Latino drivers are searched based on less evidence and are more likely to be arrested, Stanford researchers find*, L.A. TIMES (Jun. 19, 2017), <http://www.latimes.com/local/lanow/la-me-ln-stanford-minority-drive-disparities-20170619-story.html> [<https://perma.cc/JF9A-NBJM>].

112. Ayres & Borowsky, *supra* note 109, at 18 (studying racial disparities in stops by the Los Angeles Police Department).

113. One of the unique powerful aspects of a racial impact statement is that it can be developed by impacted communities. William Kennedy, Gillian Sonnad & Sharon Hing, *Putting Race Back on the Table: Racial Impact Statements*, 47 CLEARINGHOUSE REV. J. OF POVERTY L. & POL’Y, 5, 5-6 (2013). Kennedy, Sonnad and Hing make a strong case for community-owned and community-developed racial impact statements. Unlike governments that create racial justice statements in a top-down format, collaborative community-based approaches empower clients directly affected by racial disparities to seek affirmative change in law and policy that will improve their livelihoods. Racial statements by the Legal Services for Northern California have improved county health care disparities, exposed a pattern of heightened environmental burdens placed on a historic African American community, assisted in an allocation of federal property compensation to an underrepresented community, and prevented a county’s general assistance program from discriminating against African American men who could not comply with work program requirements. Kennedy, Sonnad, and Hing argue that Reformers can have a role to play in racial impact statements—including developing

advocacy organizations, it was revealed that license suspension rates are positively correlated with poverty rates and population of Black and Latino residents.¹¹⁴ *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California* and the accompanying “interactive maps” illustrate the prevalence of license suspensions in low-income communities of color.¹¹⁵ Using data from the Department of Motor Vehicles that contained the zip codes of the localities in which the licensee resides,¹¹⁶ the Coalition found that license suspensions occur where the poverty rate is high and where the concentration of people of color—particularly Latinos and African Americans—is high.¹¹⁷ Arrests for driving with a suspended license are disproportionately made of African Americans in comparison to their demographic make-up.

d. Ability-to-Pay Neither Accounts nor Corrects for Racial Stratifications in Wealth Accumulation and a Deepening Racial Economic Divide

When racialization occurs through the daily routinization of financial dispossession on a massive scale, ability-to-pay determinations may have the unintended consequence of perpetuating racial disparities in wealth accumulation. For example, millions of traffic court infractions are filed per year in California, more than five times the amount of misdemeanor and felony filings in criminal court.¹¹⁸ In light of this high volume, the interplay of race and class cannot be disentangled easily.¹¹⁹

Black people have a sizable disadvantage in income when compared to white people. Census data from 2010 reveals that the median income for African American households was \$32,068, compared to \$37,759 for Latino households and \$54,620 for non-Latino white households.¹²⁰

A look at wealth paints an even grimmer picture. The scholarship of Shapiro and Oliver in *Black Wealth, White Wealth* informs us that Black people have \$8

resources and procedures to identify and engage in race equity work, monitoring the activities of government entities and other decision-making bodies, helping to gather data sources to prove the dimension of the disparity, identifying and convening stakeholders, among other supportive activities.

114. See STOPPED, FINED, ARRESTED, *supra* note 91, at 10.

115. *Id.*

116. The DMV does not maintain data on race of licensee.

117. See Driver License Suspensions in California by Zip Code, <http://maps.ebclc.org/backontheroad/> (a visual and interactive illustration that license suspension rates are positively correlated with poverty rates and population of Black and Latino residents).

118. In California, on average, nearly four million traffic and non-traffic infractions are filed annually. Court Statistic Reports, *supra* note 53, at 68.

119. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 1–14 (1993).

120. *Income, Poverty and Health Insurance Coverage in the United States: 2010*, (Sep. 13, 2011), https://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html [<https://perma.cc/S88G-PN8F>].

to \$19 for every \$100 of white people.¹²¹ The Black middle class can most accurately and realistically be characterized as “precarious[], marginal[], and frail[].”¹²² When compared to white people, the economic vulnerability is even more stark. The Black-to-white income ratio is 0.62 and when it comes to assets, Black people owned 15 cents to every dollar owned by white people.¹²³ This lack of assets plays a tangible role in not only the advancement of Black people financially, but in how Black people might fare when confronted with a crisis or emergency. Even the most seemingly secure financial status can be easily dismantled by unforeseen circumstances.¹²⁴ The occupationally defined white middle class could support its present middle-class standard of living for four and one-third months, while the typical Black middle-class household could not make it to the end of the first month.¹²⁵ “[White people’s] reserves allow them to survive at the poverty level (\$968 per month) for over a year, while most [Black people], yet again, would not make it through the first month. . . . At poverty living standards, 35 percent of the [B]lack middle class might last one month, and 27 percent might hold out for three.”¹²⁶ To illustrate the startling difference between white accumulated wealth and Black accumulated wealth, Shapiro’s research reveals that poverty-level white people control nearly as many mean net financial assets as the highest-earning Black people, \$26,683 to \$28,310.¹²⁷ “[L]ongterm life prospects of [B]lack households are substantially poorer than those of whites in similar income brackets.”¹²⁸ Shapiro asserts that government policy and systemic racism has created vast gaps in wealth between white and Black Americans.¹²⁹ Special benefits provided through the tax code,¹³⁰ federal tax subsidies disproportionately benefitting white people (Black people receiving only 3.5 percent of public investments when they are 13.2 percent of the population),¹³¹ distribution of Pell Grants for higher education,¹³² and health insurance¹³³ all contribute to the “cavernous and growing racial wealth gap.”¹³⁴ Moreover, both African Americans and Latinos were victims of federal redlining housing policies that bolstered “growth in white homeownership and wealth-building during the mid-twentieth century,

121. See OLIVER & SHAPIRO, *supra* note 19, at 99.

122. *Id.* at 95.

123. *Id.* at 97.

124. *Id.* at 95.

125. *Id.* at 98–99.

126. *Id.* at 99.

127. *Id.* at 103.

128. *Id.*

129. THOMAS M. SHAPIRO, TOXIC INEQUALITY: HOW AMERICA’S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, & THREATENS OUR FUTURE 179–80 (2017).

130. *Id.* at 154–156 (explaining how federal tax policies favor wealth over earnings and thereby disadvantage middle-income families and contribute to the wealth gap).

131. *Id.* at 169.

132. *Id.* at 175–76.

133. *Id.* at 168.

134. *Id.* at 148.

while stunting similar growth amongst minorities in segregated communities.”¹³⁵ “[W]ealth holding remains very sensitive to the historically sedimenting effects of race.”¹³⁶ Federal and state policies redistribute wealth-amassing opportunities to high-earners and actively disadvantage those without any or much wealth and those who earn a living from paychecks alone. There is meager asset accumulation, and at the same time, enormous debts.

This racial wealth gap continues to persist. Research by Valerie Wilson and William M. Rodgers III shows that this gap has widened since the 1970s. According to the Insight Center on Community Economic Development, the typical Black family now has about six cents for every dollar in wealth held by the typical white family. In 2011, the median Black family had \$7,113 in wealth, while the median white family had \$111,740 in wealth—a Black-white economic divide exceeding \$100,000.¹³⁷ When considering liquid assets—those assets that can readily be converted to cash¹³⁸—the divide is even more stark. “Most Black families have no more than \$25 in non-retirement liquid wealth and the figure rises to only \$200 when retirement savings are included. In contrast, white families typically have over 100 times these amounts with \$3,000 and \$23,000, respectively, in liquid wealth without and with retirement savings included.”¹³⁹

In summary, ability-to-pay determinations fail to acknowledge that this racial project exacerbates economic disparities and reproduces a troubling pattern of racial stratification in wealth accumulation between Black families and white families.

e. Ability-to-Pay Neither Accounts for nor Corrects for the Compounding Negative Effects That Derive from Inability to Pay, Which Disproportionately Affects People of Color

Neither does the ability-to-pay framework problematize and correct for the cascading consequences of traffic tickets—that (1) many statutes create new violations punishing people who do not pay their tickets such that unpaid tickets beget more tickets, and (2) drivers of color are more susceptible to this multiplier effect because, due to immutable characteristics like their race and ethnicity, they are subject to repeat police encounters that place them at risk of incurring new violations.¹⁴⁰ To make matters worse, prior violations are interpreted as willful defiance of the law by judicial officers and those empowered to make indigency

135. Abbeye Atkinson, *Modifying Mortgage Discrimination In Consumer Bankruptcy*, 57 ARIZ. L. REV. 1041, 1070 (2015).

136. See OLIVER & SHAPIRO, *supra* note 19, at 103.

137. See Hamilton, *Umbrellas Don't Make it Rain*, *supra* note 17, at 4.

138. *Id.* at 9 n.10 (defining liquid assets to include assets such as checking and savings accounts and retirement accounts, but “[w]ealth that is linked to a tangible asset, such as home equity, vehicle equity, or business equity is excluded from measures of liquid assets.”).

139. *Id.* at 5.

140. See *supra* discussion at Section III.A.2.b.i.

decisions—yet another example in which racialized outcomes are compounded by judicial discretion in determining the weight of priors.¹⁴¹

It is impossible to ignore the financial consequences of this compounding effect of priors, nearly all of which are assigned to low-income individuals who are victims of this scheme. If someone cannot pay a lump sum total up front, they will be subject to interest that accumulates on the debt. In jurisdictions where the interest rate simply outstrips the monthly amount a defendant can afford to pay, individuals are placed on a never-ending treadmill of paying only the interest that has accrued, never the principal.

Thrown into a labyrinth of bureaucracy and stripped of their tangible assets, many individuals expend time, energy, and money to resolve prior court debts in ways that middle class white people do not (by virtue of their economic and racial privilege)—trying to keep up with extended payment plans, performing countless hours of “community service,” enduring the harassing collections attempts by private collections agencies, forfeiting their driving privileges, and navigating multiple agencies to reinstate their driver’s licenses.

A prime example is the story of Philando Castile, a 32-year old African American father and cafeteria worker. Prior to Philando Castile’s untimely and violent death at the hands of a police officer during a routine traffic stop in St. Paul, Minnesota, Castile was first a victim of excessive and repeated imposition of court fines and fees. Castile was just 18-years-old when he was first stopped by a police officer. After that, he was subject to a cycle of “traffic stops, fines, court appearances, late fees, revocations and reinstatements in various jurisdictions.” Most of his tickets were for driving with a suspended license or driving without insurance. In the course of 46 traffic stops in fourteen years, Castile racked up over \$6,000 in fines and fees. Perpetually suspended because of unpaid fines and fees, Castile’s driver’s license had been reinstated countless times, suggesting that Castile spent nearly half his life paying tickets, going to court, negotiating with the Department of Motor Vehicles, and driving in fear of being stopped and having it all unravel once again.¹⁴²

As an attorney and legal fellow practicing in different parts of California, I consistently see traffic courtrooms teem with minority people who cannot afford to pay their tickets, or who are slapped with a failure to appear or pay. Judges do roll calls, naming the hundreds of people they have to usher out of their courtroom with a case resolution in their morning and afternoon calendars.

141. For example, in California, driving with a suspended license due to unpaid tickets is a misdemeanor offense punishable by up to one year in jail and increasing fines. CAL. VEH. CODE § 14601.1(a)-(b) (Deering 2018).

142. This harrowing journey is chronicled in an outstanding investigative journalism piece by National Public Radio. Eyder Peralta and Cheryl Corley, *The Driving Life and Death of Philando Castile*, NAT’L PUB. RADIO (Jul. 15, 2016) <http://www.npr.org/sections/thetwo-way/2016/07/15/485835272/the-driving-life-and-death-of-philando-castile> [<https://perma.cc/S65H-5WQM>].

The compounding effect of prior court debt infiltrates countless aspects of life. For an indigent person unable to pay their criminal justice debt, driver's licenses suspensions, arrest, jail, conviction, and probation are standard punishment.¹⁴³ In some instances, a person's inability to pay court-ordered debt in full results in incarceration—a modern-day form of debtors' prisons. Time spent incarcerated leads to people losing jobs, cars, and housing.¹⁴⁴ A person may be forced to stay on probation longer than is necessary to justify for public safety reasons because the sole reason for maintaining probation conditions is the inability to pay all outstanding fines and fees. Outstanding traffic tickets prohibit family members from being able to see their loved ones in prison, despite numerous studies that show positive effects of prisoners receiving visits.¹⁴⁵ Family members, particularly mothers and partners, end up shouldering the court-ordered debt of their loved ones.¹⁴⁶ Nefarious collections agencies wrangle money out of low-income people through wage garnishment, harsh debt collection practices, bank levies, and tax intercepts. Many states charge "poverty penalties"—late fees, payment plan fees, fees per payment, and interest, often enriching collections agencies in the process.¹⁴⁷ Court-ordered debt presents a formidable barrier for people released from jail or prison or for people seeking to overcome the collateral consequences of criminal convictions. In fact, many employers require a driver's license in order to qualify for work, including truck driving, construction, and delivery services. People with outstanding court debt for vehicle violations are also uniquely susceptible to unregulated vehicle impounds and the related costs of getting a car back.¹⁴⁸

143. Driver's licenses are a vital aspect of modern day citizenship. They are a prerequisite of employment (especially for construction work), necessary to fulfill the responsibilities of parenting, and required when public transportation is inadequate. For an in-depth analysis of the harm of driver's license suspensions, see Center for Justice, *An Intimate Look into Washington's Policy of Suspending Driver's Licenses for Non-Payment of Traffic Fines: Voices of Suspended Drivers* (Jan. 2013), <https://www.smith-barbieri.com/wp-content/uploads/2013/01/CFJ-Voices-of-Suspended-Drivers.pdf> [<https://perma.cc/J5UH-NN69>].

144. *Id.* at 16.

145. These positive effects include reduced depressive symptoms in women and adolescent prisoners, a decline in recidivism, an increased survival in the community, and sometimes a reduction in rule-breaking behavior. See, e.g., Karen De Claire & Louise Dixon, *The Effects of Prison Visits From Family Members on Prisoners' Well-Being, Prison Rule Breaking, and Recidivism: A Review of Research Since 1991*, 18 TRAUMA, VIOLENCE, & ABUSE 185 (2017).

146. Saneta deVuono-powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CENTER, FORWARD TOGETHER, RESEARCH ACTION DESIGN (2015), <http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> [<https://perma.cc/36GW-RERB>].

147. See ALEXANDER, *supra* note 68, at 155.

148. Farida Jhabvala Romero, *In Menlo Park, Many Lose Cars After Driving with Suspended License*, KQED, (Aug. 5, 2015), <https://ww2.kqed.org/news/2015/08/05/in-menlo-park-many-lose-cars-after-driving-with-suspended-license/> ("Of the suspended license citations in Menlo Park, 71 percent resulted in police officers impounding the driver's vehicle for the statutory 30-day period, according to police data from more than seven years, from 2008 to April 2015.").

In short, ability-to-pay determinations fail to account for the compounding harm that befalls people, particularly Black people, from prior outstanding debt.

B. The Problem with Determining Who Has Ability to Pay

A thorough review of statutory standards for ability-to-pay determinations finds that many states authorize invasive techniques to investigate a defendant's financial resources. Many states then apply underinclusive criteria to determine indigency. Along the way, there is a substantial risk of subjective, and at times racially biased, "willfulness" determinations to root out those who intentionally withhold payment.

1. Invasive Inquiry

Determining an individual's "ability to pay" is, in many circumstances, like trying to hit a moving target. Given the multitude of variables to be accounted for when determining someone's past, present, and future degree of "indigency," the endeavor itself has drawn criticism among scholars. As a recent study notes:

Nothing is simple in assessing an individual's ability to pay. Relying on legislative, judicial, or administrative efforts to determine an individual's financial status or capacity is fraught with complications. To gain an accurate picture of the income position of an individual, whose work record is irregular at best, is constantly changing, and has financial obligations that might extend across multiple institutional arenas (child support, restitution, court, and state obligations in addition to informal or formal loans taken from family and friends) only can be beset by inaccuracies.¹⁴⁹

The nature of the human condition is so nuanced that no finite set of questions can accurately determine a person's past, present, and future circumstances. Neither can it measure the multi-generational layers of exploitation, financial insecurity, and state-sanctioned wealth stripping that has and continues to occur. To expect a meaningful and accurate measure of one's "true" ability to pay, and to demand the requisite documentation without placing an undue burden on indigent people, exceeds that which is possible in a court system that heavily emphasizes expediency and efficiency.

In an effort to comply with *Bearden*, however, many jurisdictions have turned to enshrining "ability-to-pay" determinations in state statutes in an effort to

149. Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 564 (2011).

quantify “the entire background of the defendant.”¹⁵⁰ Ability-to-pay determinations vary by state and locality, and by the type of fine or fee.¹⁵¹

An ability-to-pay inquiry is far from *de minimis*. Many states inquire about categories of income, e.g., public assistance income and wages.¹⁵² Some jurisdictions explicitly consider homelessness.¹⁵³ One jurisdiction (Georgia) considers whether a defendant has been released from confinement within the preceding 12 months and was incarcerated for more than 30 days before his or her release.¹⁵⁴ Other jurisdictions consider liquid assets,¹⁵⁵ property ownership, and other measures of asset building. Alabama’s criteria include a catch-all category: “own anything of value—land, house, boat, TV, stereo, jewelry.”¹⁵⁶ The State of Connecticut has a six-page financial affidavit requiring a listing of all the mandatory state and federal deductions for income tax, health insurance, social security, Medicare, union dues and court ordered garnishments.¹⁵⁷

The ability-to-pay determinations also inquire about one’s expenses, including rent, utilities (gas, electricity, water), food, clothing, health care/medical, insurance, car payments or transportation expenses,¹⁵⁸ loan payments, credit card payments, and educational/employment expenses. It also makes detailed inquiries into child support payments and alimony. Maine will consider the defendant’s “credit standing.”¹⁵⁹

150. *See, e.g.*, 2017 La. Acts 260 (requiring financial hardship determination for economic sanctions), NEB. REV. STAT. ANN. § 29-1823 (LexisNexis 2018) (providing for ability-to-pay hearings at sentencing and during post-sentencing collections processes); TEX. CODE CRIM. PROC. ANN. art. 14.06(b) (West 2017) (requiring an ability-to-pay determination prior to imposing fines for lower-level offenses, allowing judges to lower fines or substitute community service, and prohibiting jail as a response to an inability to pay economic sanctions).

151. For examples of laws in different states, see discussion *infra*. States use various criteria to determine one’s ability to pay for court-appointed counsel, probation fines and fees, or to waive filing fees. In California, for example, California Rule of Court 4.335 mandates an ability-to-pay determination for infractions only. CAL. R. CT. 4.335. Court fees for misdemeanors and felonies are subject to ability-to-pay requirements by statute only. While some statutes make clear that an ability-to-pay determination is required, *see, e.g.*, CAL. PENAL CODE § 1203.1b(a) (West 2015) (probation supervision fees), other statutes are silent on a requirement to conduct an ability-to-pay determination, *see, e.g.*, CAL. GOV’T CODE § 70373 (West 2009) (no ability to pay determination required by statute in order to collect the court operations fee, though the Judicial Council administers the section).

152. *See, e.g.*, N.H. REV. STAT. § 604-A:2-c (LexisNexis 2018); N.H. Rev. Stat. § 499:18-b (LexisNexis 2018).

153. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 875.1 (effective until Aug. 1, 2019); GA. CODE ANN. § 42-8-102 (2018); COLO. REV. STAT. ANN. § 18-1.3-702 (West 2016).

154. GA. CODE ANN. § 42-8-102 (2018).

155. Alabama explicitly lists the following acceptable categories of equity in personal property: “the value of motor vehicles, stereo, VCR, furnishing, jewelry, tools, [and] guns”. *See* ALA. UNIFIED JUDICIAL SYS., *supra* note 20.

156. *Id.*

157. CONN. SUPERIOR CT., *supra* note 20.

158. *Id.*

159. ME. R. UNIFIED CRIM. P. 44(b).

In some instances, a court will take a submission under oath or a declaration under the penalty of perjury.¹⁶⁰ However, for many jurisdictions, ability-to-pay requests require extensive corroborating documentation verifying one's financial information.¹⁶¹ This is often a difficult, if not impossible, task for people who have irregular, seasonal, or temporary employment or for people who perform lawful work outside of the formal economy. It is especially challenging for individuals who are unable to produce a traditional pay stub, tax return, or other cognizable government-issued statement to verify their income. Some jurisdictions will additionally require proof of the existence of dependents, financial responsibility for those dependents, and the income of other members (including dependents) in one's household.¹⁶² This creates an onerous burden on a growing number of people who have non-traditional families and atypical living arrangements.¹⁶³ The practice of seeking information about others who might provide financial assistance has been challenged in at least one court in Pennsylvania, where an appeals court held that the court may consider only the defendant's finances and no one else's.¹⁶⁴

2. Underinclusive Definition of Indigency

There is inconsistency across states in the statutory definition of "indigent." In the 50-state survey of indigency standards,¹⁶⁵ the majority of statutes contained a presumption of indigency if the defendant receives public assistance, which captures the extremely impoverished.¹⁶⁶

Alaska is the only state that has a clause accounting for "adjusted federal poverty guidelines amount," which is "the federal poverty guidelines amount for Alaska increased by the geographic cost-of-living adjustment...for the court location nearest the defendant's residence."¹⁶⁷ This recognition of the variation in

160. *E.g.*, VA. CODE ANN. § 19.2-355 (2018); OR. REV. STAT. § 135.050(1) (2018).

161. *See, e.g.*, ALAMEDA CTY. SUPERIOR CT., ABILITY TO PAY DOCUMENT CHECKLIST FOR APPLICANTS, [http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20to%20Pay%20Document%20Checklist%20amended%2006262018%20\(3\).pdf](http://www.alameda.courts.ca.gov/Resources/Documents/Ability%20to%20Pay%20Document%20Checklist%20amended%2006262018%20(3).pdf) [https://perma.cc/9H83-SF33] (revised June 26, 2018).

162. *E.g., id.*

163. *See* Kameshwari Pothukuchi, *Non-traditional Living Arrangements: Beyond the Nuclear Family*, in *SHELTER, WOMEN AND DEVELOPMENT: FIRST AND THIRD WORLD PERSPECTIVES* 286 (Hemalata C. Dandekar ed., 1993).

164. *See* Commonwealth v. Smetana, 191 A.3d 867, 873 (Pa. Super. Ct. 2018) ("We acknowledge that Section 9730 does not define "defendant" but a common-sense definition of the term would exclude the defendant's family and friends.").

165. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 14.

166. *See, e.g.*, CAL. GOV'T CODE § 68632 (West 2015); WIS. STAT. ANN. § 814.29(1) (West 2018); COLO. REV. STAT. ANN. § 18-1.3-702 (West 2016); Massachusetts Rules of the Supreme Judicial Court, rule 3:10, (2018) <https://www.mass.gov/files/documents/2018/10/02/Massachusetts%20Rules%20of%20the%20Supreme%20Judicial%20Court-%20October%202018.pdf> [https://perma.cc/M5LE-JYWK]; R.I. GEN. LAWS § 12-20-10 (2014).

167. ALASKA R. CRIM P. 39.1(i).

regional costs was rare to nonexistent, in other states. In at least one state, reformers have been advocating for the adoption of the income limits set forth by the Department of Housing and Urban Development that determine eligibility for assisted housing programs including Section 8 Housing.¹⁶⁸

Aside from current income and existing assets, few statutes contemplate a person's earning potential and the limitations on that potential. In particular, not a single ability-to-pay statute considers the numerous collateral consequences that befall a person with a criminal conviction, namely in limiting their future employment prospects.¹⁶⁹ These collateral consequences have a deep and resounding impact on Black and Latino people, who are vastly overrepresented in the criminal justice system in proportion to the rest of the population.¹⁷⁰ In fact, not only do the criteria fail to appreciate the challenges of finding employment with a criminal conviction, many states *require* a person to "diligently" look for a job or to be able to show that, if they have the potential to be employed, to have a good cause explanation for unemployment.¹⁷¹

3. "Punishment Continuum"

After this confidential financial information is collected, the information can go to a number of different players within and outside of the state court system. It can go to a judge, a clerk, a financial hearing officer, a collections agent, or another individual who makes a final decision on whether to grant or to deny a person's ability-to-pay request.

To determine both a person's indigency status and the available alternatives to full payment, the decision-maker synthesizes the information provided by a defendant. The decision-maker more often than not then relies on institutional players like other clerks and collections agents to enforce the decision. The multivariable range of decision points by multiple key players has been termed the "punishment continuum" by notable sociologist Alexes Harris.¹⁷² A "punishment continuum" occurs when the amount of monetary sanctions imposed by judges and the degree of monitoring and sanctioning for nonpayment performed by judges and clerks vary in severity between jurisdictions and even within the same

168. HUD develops income limits based on Median Family Income estimates and Fair Market Rent area definitions for each metropolitan area, parts of some metropolitan areas, and each non-metropolitan county. See *Income Limits*, HUD USER <https://www.huduser.gov/portal/datasets/il.html> [<https://perma.cc/SAH3-L2L5>].

169. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 14.

170. REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1–14 (2013), <https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/> [<https://perma.cc/9SLU-WNSB>].

171. See, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 11.1102(e)(2)(i) (West 2017); WASH. REV. CODE ANN. § 9.94A.780(1)(a) (LexisNexis 2018).

172. See HARRIS, *supra* note 2, at 99.

jurisdiction.¹⁷³ The lack of consistency is so stark that people who have penal debt in neighboring jurisdictions can be concurrently navigating between different punishment continuums and different bureaucratic court hierarchies.

For example, some courts provide extended monthly installment payment plans.¹⁷⁴ Some allow for community service to be performed in lieu of payment.¹⁷⁵ There is little to no transparency about the extent of fine reductions, although some courts will allow individuals to indicate that they are seeking a fine reduction.¹⁷⁶

Punishment continuums can render a defendant vulnerable to a great deal of discretion at various decision points by a number of decision-makers, which can increase the chances of prejudice or bias affecting a decision.

A presumption of willful default when someone falls out of compliance severely disadvantages underemployed, transitory, and economically unstable defendants. If someone misses a single installment payment, the safety net crumbles. Soon, their licenses will be suspended and the government will widen their punitive strikes—more fines, more arrests, more warrants—under the guise of a “lack of accountability.”

4. “Willfulness” as a Pretext for Racial Discrimination

Bearden makes clear that willful failure to pay is sanctionable and is characteristically distinct from non-willful failure to pay, e.g., when a defendant does not have the resources to do so. This sets up a dichotomy not unlike the sociological categories of “deserving” or “good” and “undeserving” or “bad” poor.¹⁷⁷

To be precise, under a *Bearden*-informed ability-to-pay determination, judges have the discretion to determine whether someone has “willfully” failed to pay a fine. Reformers should be wary that “willfulness” may reproduce racialized outcomes, as historically been proven to be true in other contexts like the welfare-to-work debate.¹⁷⁸

173. *Id.* at 99.

174. *See, e.g.*, CAL. VEH. CODE § 40510.5 (Deering 2018); *see also* *What is the Traffic Payment Plan?*, THE SUPERIOR COURT OF CALIFORNIA: COUNTY OF LOS ANGELES, <http://www.lacourt.org/division/traffic/TR0050.aspx> [<https://perma.cc/H7V6-K4KQ>].

175. *See, e.g.*, WASH. REV. CODE ANN. § 10.01.160 (LexisNexis 2018).

176. *See* Can’t Afford to Pay Fine: Traffic and Other Infractions, Form TR-320/CR-320, Judicial Council of California, (April 1, 2018) <http://www.courts.ca.gov/documents/tr320.pdf> [<https://perma.cc/KDK6-WQ3J>].

177. Joel Handler wrote extensively about the deserving/undeserving distinction in his 1972 book, *Reforming the Poor*, which embraces a “more radical view of poverty [that] would rid welfare policy of all notions of deserving versus undeserving; the emphasis would be primarily on lack of income.” JOEL F. HANDLER, *REFORMING THE POOR* 140 (1972). Doing so would “plac[e] all of the poor into the deserving category [and], by removing fault or responsibility as a consideration, make reformation irrelevant as a condition of relief.” *Id.* at 141.

178. *See* Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550 (2012).

This wariness is bolstered by numerous studies documenting that most people believe that poor Black people, specifically, are to blame for their own poverty:

A recent Pew Research Center national survey (2007) reported that “fully two-thirds of all Americans believe personal factors, rather than racial discrimination, explain why many African Americans have difficulty getting ahead in life; just 19% blame discrimination.” Nearly three-fourths of U.S. Whites (71%), a majority of Hispanics (59%), and even a slight majority of African Americans (53%) “believe that blacks who have not gotten ahead in life are mainly responsible for their own situation.”¹⁷⁹

In an article critiquing class-based affirmative action, Professor Khiara Bridges examines the “racialization of deservingness” and notes that the “deserving/undeserving poor dichotomy has always been a racialized, and frequently racist, one”¹⁸⁰ that has historically persisted in “maintain[ing] black people on the undeserving side of the binary.”¹⁸¹ Through a case study of Aid for Families with Dependent Children, or AFDC, and now TANF (Temporary Assistance for Needy Families), Bridges draws upon the scholarship of Angela Onwuachi-Wilig to argue that the programs experienced a pronounced decrease in public support when its beneficiaries were disproportionately women of color, specifically Black women.¹⁸² Whereas an indigent white woman was figured to be a member of the deserving poor, blameless with respect to her indigence and wholly worthy of governmental largess, an indigent nonwhite woman was figured as a member of the undeserving poor—rightfully blamed for her poverty and desperately unworthy of taxpayers’ money. “Indigent black people do not typically get the benefit of having their poverty attributed to shifting economics, illnesses, disabilities, and sheer bad luck.”¹⁸³

In the courtroom, empirical studies have suggested that judges demonstrated biases that prejudice their decisions in setting bail,¹⁸⁴ ruling on the admissibility

179. William Julius Wilson, *Race and Affirming Opportunity in the Barack Obama Era*, 9 DU BOIS REV. 5, 7 (2012) (expressing dread that class-based affirmative action will not function to benefit poor Black people and that opportunities for elite education will be directed towards poor white people).

180. Khiara M. Bridges, *The Deserving Poor, The Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L. J. 1049, 1092 (2017).

181. *Id.*

182. *Id.*

183. *Id.* at 1095–99 (using a historical analogy of the demise of TANF and AFDC to demonstrate potential pitfalls for class-based affirmative action. Bridges ultimately argues that society, even black society, has been willing to see undeservingness in black bodies and to discontinue anti-poverty programs on the basis that poor black people’s poverty is the result of their personal moral and behavioral failures.).

184. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

of evidence,¹⁸⁵ and sentencing.¹⁸⁶ Judges overall showed strong implicit attitudes favoring white faces over Black ones.¹⁸⁷ Probation officers, when primed with words related to African Americans, recommended harsher punishments.¹⁸⁸ In a landmark case in North Carolina (later overturned), Judge Weeks of Cumberland County Superior Court ruled that race was a significant factor in prosecution decisions to strike African American venire members at the time of the defendants' cases.¹⁸⁹ This decision was informed by a number of underlying testimony and evidence, and by "the history of discrimination in jury selection and role of unconscious bias in decision-making."¹⁹⁰ The court apologetically noted that "the criminal justice system, sadly, is not immune from the [] distorting influences," especially in light of trainings sponsored by the North Carolina Conference of District Attorneys where prosecutors learned to "circumvent the constitutional prohibition against race discrimination in jury selection."¹⁹¹

Indeed, this has played out specifically in the context of subjective judicial assessments that low-income individuals are voluntarily failing to pay. Arbitrary decision-making plays out prominently in unfettered and unmonitored "willfulness" proceedings, e.g., a hearing to determine whether a defendant has willfully (intentionally) evaded a court order to pay. For example, a judge in Montgomery, Alabama, found that one defendant willfully failed to pay the court because, despite his subsistence on social security income, he regularly gave money to his

185. See, e.g., Demetria Frank, *The Proof Is In The Prejudice: Implicit Racial Bias, Uncharged Act Evidence & The Colorblind Courtroom*, 132 HARV. J. RACIAL & ETHNIC JUST. 1 (2016) (arguing the overadmission of uncharged act evidence presents unique challenges for non-white defendants).

186. See, e.g., David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 376–77 (2012) (concluding that race plays a role in judicial sentencing decisions).

187. See Rachlinski, *supra* note 22, at 1210 (showing that white judges demonstrate implicit bias on an Implicit Association Test).

188. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 496 (2004).

189. Order Granting Motions for Appropriate Relief, *State v. Golphin*, 97 CRS 47314-15, at 3, (N.C. Sup. Ct. Cumberland Cty. Dec. 13, 2012) <https://www.aclu.org/legal-document/north-carolina-racial-justice-act-order-granting-motions-appropriate-relief>. This decision found its legal authority in the North Carolina Racial Justice Act. North Carolina's Racial Justice Act 2009 N.C. ALS 464, 2009 N.C. Sess. Laws 464, 2009 N.C. Ch. 464, 2009 N.C. SB 461. The groundbreaking law, first in the nation, prohibited seeking or imposing the death penalty on the basis of race. Significantly, it vacated the death sentence and resentenced the defendant to life imprisonment without the possibility of parole if it was found that race was a significant factor in the imposition of the death penalty. It established a hearing process by which relevant evidence could be used to establish that race was a significant factor in seeking or imposing the death penalty within the county, the prosecutorial district, the judicial division, or the state. At this hearing, the defendant bore the burden of proving that race was a significant factor in imposing the death penalty, while the state could offer evidence to rebut the claims. The law explicitly authorized the use of statistical evidence, as well as other evidence the court deemed relevant and material, in considering whether race was a basis for seeking or imposing the death penalty. The law also contained a retroactivity clause and applied to all defendants, whether previously sentenced or currently facing trial on capital charges.

190. Order Granting Motions for Appropriate Relief, *supra* note 189, at 4.

191. *Id.* at 4–5.

church.¹⁹² “Another judge in Benton County, Washington, told reporters that he made his findings about debtor’s ability to pay based on physical appearances.”¹⁹³ Similarly, a municipal judge in Austin, Texas rejected claims of indigence for defendants with manicured nails.¹⁹⁴

Given this salient evidence, there is a strong likelihood that a judge’s implicit bias may permeate their discretionary decisions that a defendant willfully refused to pay. The narrative of personal responsibility as a justification for imprisoning debtors, for example, is fueled by implicit and explicit racism inherent in those who make discretionary decisions.¹⁹⁵ For instance, Alabama’s ability to pay standards (“own anything of value”) gives judges wide latitude to make subjective judgments about the defendant’s (or their family member’s) possessions and can drive further displacement of wealth from low-income communities of color.¹⁹⁶ Michigan’s statute authorizing the imprisonment of a defendant if the court found that the defendant had resources to pay the ordered restitution and has not made a “good faith effort” to do so, may have the unintended effect of being enforced disproportionately upon Black defendants as opposed to white defendants.¹⁹⁷ North Carolina has a clause that excludes a defendant from alternatives to payment if they “fail[ed]... to make a good faith effort to obtain the necessary funds for payment.”¹⁹⁸ Pennsylvania has a similar clause that says, “diligently attempted but has been unable to obtain employment.”¹⁹⁹ Texas law requires that the state prove by a preponderance of evidence that the defendant had the ability to pay and

192. Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors’ Prisons*, 34 YALE L. & POL’Y REV. 93, 102 (2016).

193. *Id.*

194. *Id.*

195. See Birckhead, *supra* note 26, at 54 (concluding that legal standards such as Bearden’s “sufficient bona fide efforts to pay” leaves courts with “unfettered discretion to determine which defendants qualify for relief and which do not.”); Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NAT’L PUB. RADIO (May 23, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/5PD3-AMN7>] (finding large discrepancies across the country in how courts determine whether nonpayment is willful or involuntary, pointing to judges who instructed defendants to give up their phone service or to quit smoking cigarettes in order to pay court debt); see also Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST: THE WATCH (Sept. 3, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/> [<https://perma.cc/RDU4-SL6V>] (quoting Thomas Harvey of ArchCity Defenders: “[Y]ou need people in these [judicial] positions who have some empathy for the people in front of them, who know what it’s like to have to prioritize bills, to at least know someone who knows what it’s like to, say, let your car insurance expire in order to pay a medical bill.”).

196. See Alabama Affidavit of Substantial Hardship, *supra* note 20 (asking defendants to list liquid assets such as cash on hand, equity in real estate, equity in personal property, and “anything else of value”).

197. *Id.*

198. N.C. GEN. STAT. ANN. § 15A-1364(c).

199. 18 PA. STAT. AND CONS. STAT. ANN. § 11.1102 (West 2017).

did not pay, which allows for biased judgments about what the defendant can or cannot pay.²⁰⁰

5. Repeat Players Reproduce Structural Bias

Embedded in the very structures that are deployed to carry out corrective reforms are unshakeable barriers to true eradication of racial and economic oppression. The very players that are implementing ability-to-pay determinations have a vested interest in collection, and the bureaucracies in which they live are racialized structures that both reflect and help to create and maintain race-based outcomes in society. The same people who are perpetrators of the system cannot become the pallbearers of justice overnight or by the fell swoop of a governor's pen. The inherent biases of courtroom repeat players, if unaddressed, will reify past structural inequities and make for new problems.

a. Court Staff and Judicial Officers

One fundamental oftentimes overlooked problem is the reliance on court staff and judicial officers to implement even minute progressive policy reforms.²⁰¹ Like the complicity exemplified by law enforcement, the judiciary, and politicians during the age of peonage and Black bondage in the Jim Crow South,²⁰² assessing traffic fines and fees has become a ubiquitous practice reinforced by a cast of repeat courtroom players tacitly approving of its legalities. In many states, court clerks, who are paid from trial court budgets, stand to materially benefit in finding that defendants can pay.²⁰³ In California, at least one fund (Emergency Medical Air Transport Fund) has explicitly opposed any efforts to ease penalties for those unable to pay fines, citing a reliance on the revenues generated by those sanctions.²⁰⁴ Courts, too, have been vocal about their interest in supporting their daily operations since, by statute, those fines and fees help pay for basic court expenses

200. TEX. CODE CRIM. PROC. ANN. art. 42A.751(i) (West 2017).

201. See, e.g., HARRIS, *supra* note 2, at 101 (“[Court clerks] have tremendous discretion in how they implement state policies on sanctioning people with legal debt.”).

202. PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969* 23–24 (1972) (describing how most Southerners “acquiesced in or approved of” peonage, either because they did not perceive it to be morally or ethically wrong or because it was shrouded in overtones of legality and made respectable by the approval of community rules.”).

203. For example, in California, courts assess a “civil assessment fee” of “up to \$300” that is deposited directly in a fund that supports trial courts. CAL. PENAL CODE § 1214.1 (West 2015) (“This assessment shall be deposited in the Trial Court Trust Fund, as provided in Section 68085.1 of the Government Code”). The Trial Court Trust Fund is used for court operations, including salaries, benefits, and public agency retirement contributions for superior court judges, subordinate judicial officers, and other court staff. CAL. GOV'T CODE § 68085(a)(1)–(2) (West 2013) (referencing CAL. GOV'T CODE § 77003 (West 2013)). See also *Cain v. City of New Orleans*, 281 F.Supp.3d 624, 657 (E.D. La. 2017) (fines and fees provide approximately 10% of the total Orleans Parish Criminal District Court budget and one quarter of the Judicial Expense Fund).

204. Letter lodged in opposition to California Senate Bill 185 (2017) by Emergency Medical Air Transport Fund (on file with author).

such as the maintenance of court facilities, compensation for court personnel, and benefits packages for judicial officers.²⁰⁵ Many courts have held that the mere assessment of the fines does not offend the Constitution.²⁰⁶

In *Cain v. City of New Orleans*, plaintiffs filed affirmative litigation challenging the unlawful arrests for inability to pay court fines and fees contending that the judges' power over fines and fees revenue creates a conflict of interest when those same judges determine (or are supposed to determine) whether criminal defendants are able to pay the fines and fees that were imposed at sentencing.²⁰⁷ Holding that judges have an "institutional incentive to find that criminal defendants are able to pay fines and fees" such that there is a "possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused,"²⁰⁸ the court opined that there was an "inherent defect in the legislative framework" that is "substantial."²⁰⁹ The court relied on U.S. Supreme Court and federal appellate court precedent.²¹⁰

Many defendants are unemployed and indigent, which makes collecting the assessed fees a challenge and an unreliable source of revenue resource for the court's operational needs. For example, OPCDC collects only between 40% and 50% of the fines and fees it assesses.²¹¹ California has over \$12 billion in

205. See, e.g., *supra* note 203 for a discussion on the Trial Court Trust Fund.

206. *United States v. Pagan*, 785 F.2d 378, 381 (2d Cir. 1986) ("The imposition of assessments on an indigent, per se, does not offend the Constitution."); *Ortwein v. Schwab*, 410 U.S. at 660 (1973) (finding Oregon civil appellate filing fee constitutional and stating that the "court system incurs operating costs, and the fee produces some small revenue to assist in offsetting those expenses"); Ca. Penal Code § 1465.8, subd. (a)(1) ("To assist in funding court operations, an assessment of forty dollars (\$40) shall be imposed on every conviction . . .").

207. *Cain v. City of New Orleans*, 81 F.Supp.3d 624, 639 (E.D. La. 2017). See also *United Church of the Med. Ctr v. Med. Ctr Comm'n*, 689 F.2d 693, 699 (7th Cir. 1982) ("In this case the Commission has a pecuniary interest in the outcome of the reverter proceedings, because if the Commission finds a nonuse or disuse, the property reverts to the Commission . . . This is sufficient . . . to mandate disqualification of the Commission in the reverter proceeding.").

208. *Cain*, 281 F.Supp.3d 624 at 655–57 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)).

209. *Id.* at 655 (Where fines and fees provide approximately 10% of the total OPCDC budget and one quarter of the Judicial Expense Fund, the court held that, "This funding structure puts the Judges in the difficult position of not having sufficient funds to staff their offices unless they impose and collect sufficient fines and fees from a largely indigent population of criminal defendants.").

210. *Id.* at 656. See *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212, 219 (1st Cir. 2004) (noting that evidence of actual bias includes "procedural irregularities in the decision to assess [a] fine"); *Ward*, 409 U.S. at 60 (finding a conflict of interest where a mayor's dual role creates a "possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused"); *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (holding that board members, all of whom had a personal interest in revoking the licenses of optometrists employed by corporations, were disqualified from adjudicating charges against such optometrists); *Chrysler*, 755 F.2d at 1199 (finding no impermissible bias where only four out of nine commissioners potentially had a conflict of interest); *DePiero v. City of Macedonia*, 180 F.3d 770, 780–82 (6th Cir. 1999) (finding a due process violation when a maximum of 9% of municipality's general fund derived from mayor's court revenue).

211. *Cain*, 281 F.Supp.3d 624, 658 (E.D. La. 2017).

uncollected court debt.²¹² This increases the likelihood of partisan influence on ability-to-pay determinations.

b. Institutions and Bureaucracies

Beyond the institutional incentives to collect, bureaucracies are slow to adjust to paradigm shifts. The size of a bureaucracy alone contributes to a breakdown in the individual's relationship with the state. For example, finding the right department in a large government agency can be a frustrating, even overwhelming, task.²¹³

This is reinforced by John A. Powell's theory of racialized structural analysis as a lens through which to view institutional interactions as producing racialized outcomes.²¹⁴ Though policies may be neutral in language, they can produce vastly disparate racial outcomes. Powell defines racialized structures as "the set of practices, cultural norms, and institutional arrangements that both reflect and help to create and maintain race-based outcomes in society."²¹⁵ Powell critiques the obsession over design and intent of a policy, rather than the outcomes and results of the policy. The fairness that is contemplated in the policy oftentimes does not actually bear out in practice due to cognitive biases or embedded attitudes that interact to foster racialized outcomes.

"The very institutions set up to solve problems became so complex themselves that new problems were generated."²¹⁶ A single court can be difficult to negotiate even for individuals who are well equipped to deal with them, let alone those with limited education and resources. But it can be taxing to operate within a complex and multi-agency labyrinth of agencies in which a person must broker negotiations, reconcile accounts, and demand transparency. Because the individual utilizing the bureaucracy is also complex, feels ambivalence towards the institutions, and has difficulty in communicating with the players, "breakdowns become almost inevitable."²¹⁷

In the case of penal debt, there are multiple bureaucracies at play—the Department of Motor Vehicles,²¹⁸ superior courts and municipal courts,²¹⁹ third-

212. TAYLOR, *supra* note 47.

213. LAWRENCE SHULMAN, *THE SKILLS OF HELPING INDIVIDUALS, FAMILIES, GROUPS, AND COMMUNITIES* 658 (8th ed. 2015).

214. POWELL, *supra* note 24, at 9.

215. *Id.*

216. *Id.*

217. *See* SHULMAN, *supra* note 213, at 658.

218. *See, e.g.*, CAL. VEH. CODE §§ 40509 and 40509.5 (Deering 2018) (suspending driver's licenses for failure to appear and pay court fines); CAL. VEH. CODE § 12807 (Deering 2018) (withholding driver's licenses for unpaid fines).

219. *See, e.g.*, Judicial Council of California, *About California Courts, Judicial Council of California*, <http://www.courts.ca.gov/2113.htm> [<https://perma.cc/CN5R-CBGU>] ("With approximately 500 court buildings throughout the state, these courts hear both civil and criminal cases as well as family, probate, mental health, juvenile, and traffic cases.").

party collections agencies,²²⁰ state-sanctioned collections authorities,²²¹ banks,²²² and law enforcement agencies, to name a few. Each of these agencies has a direct or indirect relationship with the others²²³ and works collectively and in concert to levy fines, collect delinquent and nondelinquent court debt, and dole out punishment when the debt is not paid in a timely manner. Each agency has its own organizational hierarchy, departments, accounting systems, databases, technological platforms upon which their client information is hosted, and many other complexities. To expect swift change ignores the reality that these highly bureaucratic agencies may have embedded biases that cause racialized outcomes, no matter what the stated design or intentions.

C. Problem with a Fair Ability-to-Pay Determination

Many reformers are no doubt hopeful that ability-to-pay procedures will in effect close racial gaps. This might well be naïve. At best, the system operates as designed: even when determinations are administered uniformly and no person is incarcerated for failure to pay a court fine or fee, it inflicts incontrovertible harms on people who are found to be “able to pay” and imposes new harms that are racially distributed based on who enters the process in the first place. The result is that ability-to-pay determinations address the poverty-causing roots, but obscure the racial underpinnings, and most importantly, divert attention away from the complicity of government actors in perpetuating this racial caste system.²²⁴

220. See, e.g., Participation Agreement Between Superior Court of California, County of Alameda with AllianceOne (on file with author).

221. See Cal. Revenue and Taxation Code § 19280-9282. (For example, the California legislature authorized the Franchise Tax Board (a state debt collections agency) to collect court-ordered debt for participating courts and agencies.)

222. Cal. Revenue and Taxation Code § 18670(c)(1) (financial institutions are required to liquidate assets and remit to the Franchise Tax Board the proceeds of the liquidation in satisfaction of the court-ordered debt.)

223. See Participation Agreement, *supra* note 220, at 2 (describing the transfer of debt from one agency to another).

224. See Dear Colleague letter dated March 14, 2016, from Vanita Gupta and Lisa Foster, Office for Access to Justice, U.S. Dep’t of Justice, at 2, <https://perma.cc/CM79-BVXH> (While the state, federal, and municipal government acknowledges that poverty is implicated, it ignores, and if pressed—flatly denies, the racial disparities in policing. The U.S. Department of Justice, in a historic “Dear Colleague” letter (later rescinded under Attorney General Jeff Sessions), rightly condemned the practice of monetary sanctions that unduly punished poor people, warning that warned courts that “[i]ndividuals may confront escalating debt; face repeated, unnecessary incarceration for non-payment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape.” But the absence of mention of racial disparities spoke louder than these admonishments. This silence enables colorblind policies that do not account for the ways in which race and racism still structure society.)

1. Unworkable Alternatives to Payment

Although reformers rightfully want to prevent incarceration for failure to pay a court fine,²²⁵ the alternatives to incarceration that have been advanced in the era of ability-to-pay determinations are not always workable.

a. Community Service

One of the philosophical implications of community service is the conditioning of freedom from incarceration on the provision of one's free labor. "The threat of incarceration for debt provides the basis to compel and subordinate labor, as when those who cannot pay are required instead to perform unpaid "community service."²²⁶ Community service policies harken back to the days of convict leasing, where former slaves and their descendants were "arrested for minor violations, slapped with heavy fines, and then imprisoned until they could pay their debts."²²⁷ Convict leasing was, by default, slavery, with people working off their debts in perpetuity at low rates and harsh conditions. Although framed as a generous "alternative to incarceration," the choice presented is between working for free and losing your freedom. In Los Angeles, for example, community service volunteers must declare "that they are not employees and have no rights as workers."²²⁸ A federal judge in New York recently held that a similar program had no duty to pay its workers.²²⁹

In *Get to Work or Go to Jail: Workplace Rights Under Threat*, Noah Zatz has highlighted four ways in which this iteration of court-ordered community service undermines workers' rights: (1) depressing labor standards, (2) suppressing workers' voices, (3) evading legal protections, and (4) undermining or displacing other workers. In addition to that, there is a profit-generating mechanism behind community service—people charging sign-up fees ranging from \$20-\$200. Additionally, community service agencies are poorly monitored—many of them require people to do hard manual labor and do not meaningfully accommodate for mental or physical disabilities.

The additional problems inherent with community service are: (1) the crushing number of hours assigned to debtors,²³⁰ (2) no statutory cap on the number of

225. Some states like Tennessee allows judges to "direct that the defendant be imprisoned until the fine, or any portion of it, remaining unpaid or remaining undischarged after a pro rata credit for any time that may already have been served in lieu of payments, is paid." TENN. CODE ANN. § 40-24-104(a) (West 2018).

226. Noah Zatz, *Get to Work or Go to Jail: Free Labor in the Shadow of Mass Incarceration*, Am. Const. Soc'y (Nov. 16, 2015), <https://www.acslaw.org/acsblog/get-to-work-or-go-to-jail-free-labor-in-the-shadow-of-mass-incarceration> [<https://perma.cc/WZ28-WB4G>].

227. See ALEXANDER, *supra* note 68.

228. Zatz, *supra* note 226.

229. *Id.*

230. In *Gonzales v. City of Austin*, Gonzales was ordered to perform 395 hours of community service after she was released from jail in order to satisfy her outstanding court debt. Complaint at 6, *Gonzales v. City of Austin*, No. 1:15-cv-00956 (W.D. Tex. Oct. 27, 2015). Court fees imposed on

hours worked, which can set people up for an inordinate number of hours that are impossible to complete within a specified time period if they have a job, a disability, or childcare needs, and (3) the onerous time and transportation commitments that de facto fall upon the shoulders of the debtor.²³¹

b. Payment Plans

Although hailed as a viable alternative, payment plans offer an illusory assurance of due process. A study in Virginia showed that even after the General Assembly made significant changes to rules governing payment plans, payment plan policies continued to disregard people's individual financial circumstances, resulting in "unrealistic and unaffordable payment plans that often [led] to default."²³² After reforms, many courts still had no community service provisions (or very restrictive community service provisions), charged arbitrarily high down payments to enter plans, failed to mention the statutory right to seek modification of plans, or restricted access to subsequent payment plans for indebted Virginians who default.²³³ This should be unsurprising. As explained in an article on driver's license suspensions, "[w]hen [the county] allocates \$440 per month for a person to live, expecting the recipient to consistently pay \$75 a month to a court payment plan. . . is a bit unrealistic."²³⁴

Some states, like Pennsylvania, only offer payment plans if someone does not have the ability to pay, with no direction on how to calculate how much each

people in Austin can include collection fees, e.g., TEX. CRIM. PROC. CODE ANN. art. 103.0031(b) (West 2017) (though art. 103.0031(d) provides for waiver of collection fees upon a court determination of indigency), payment plan fees, e.g., TEX. GOV'T CODE ANN. § 102.0212(4) (West 2009) and TEX. LOC. GOV'T CODE § 133.103 (West 2013), fees for execution of an arrest warrant, e.g., TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(2) (West 2009), and returned check fees, e.g., TEX. LOC. GOV'T CODE § 118.011(b) (West 2017).

231. See, e.g., HARRIS, *supra* note 2, at 51 ("Similar to their inability to find the money to make financial payments, [defendants] also have difficulty finding time to meet hundreds of hours of service obligations. Further, many lack transportation to their assigned community service organization . . .").

232. LEGAL AID JUSTICE CENTER, DRIVING ON EMPTY: PAYMENT PLAN REFORMS DON'T FIX VIRGINIA'S COURT DEBT CRISIS 1, <https://www.justice4all.org/wp-content/uploads/2018/01/Driving-on-Empty-Payment-Plan-Analysis-FINAL.pdf> [<https://perma.cc/P79L-EKT3>].

233. *Id.* at 16 ("At least 35 general district courts (or 30%) make no reference in their policies to community service as a means of offsetting court costs and fines, or explicitly disallow it in all cases (in Mecklenburg, Newport News-Criminal, and Newport News-Traffic) despite Virginia's law to the contrary."); *Id.* at 19 ("Many of the courts (at least 36, or 31% of the policies reviewed) that do require down payments appear to require the maximum possible down payment allowed."); *Id.* at 19–20 ("The payment plan policies of at least 30 general district courts (or 25%) make no mention of modification whatsoever. . . . Sixty-five courts (or 56%) mention modification but give little or no detail on how to seek modification."); *Id.* at 22 ("A significant percentage of the courts (49, or 42%) place various restrictions on access to subsequent payment plans, either by requiring procedures such as the filing of a petition and hearing, or barring subsequent plans for those who cannot show changed circumstances.").

234. John B. Mitchell and Kelly Kunsch, *Access to Justice: Article: Of Driver's Licenses And Debtor's Prison*, 4 SEATTLE J. SOC. JUST. 439, 463–464 (2005).

installment payment is, how long the defendant has to make payments, and what other alternatives are within the judge's discretion if the person cannot afford his monthly installment payment.²³⁵

c. Sliding Scale Fees or "Day-fines"

One emerging idea, derived from *Bearden*, is the tailoring of the financial penalty to the defendant's resources.²³⁶ The "day-fines" model, which has developed popularity in Europe and Latin America, accordingly aspires to tailor the outstanding fine amounts to a person's income. It allows for extended payment plans or other alternatives to payment if a person cannot afford to pay the fine in full.

Professor Beth Colgan analyzes day-fines pilot projects that took place in the United States in her article titled "Graduated Economic Sanctions According to Ability to Pay."²³⁷ The day-fine model involves a two-step process. First, the criminal offense is assigned a specific penalty unit that increases with crime severity. Second, the court establishes the defendant's adjusted daily income based on self-reported levels of income and expenses. The day-fine amount is calculated by multiplying the penalty units by adjusted daily income. According to Professor Colgan, a properly crafted model would eliminate speculation of a person's financial status and avoids artificial inflation of a person's means,²³⁸ retains flexibility in accommodating people's needs and obligations,²³⁹ and considers "excluding of income that is intended to promote societal benefits, such as education, the support and care of people with disabilities, or other particularized needs."²⁴⁰ There are a number of practical concerns with this model, including that calculating income is a complex task both for people who have irregular, seasonal, or temporary employment and for people who perform lawful work outside of the formal economy and are unable to produce a traditional pay stub, tax return, or other cognizable government-issued statement to verify their income. To design a day-fines project and implement it well requires use of funds that results in an overall loss.²⁴¹ Even in the best case scenario, with courts and collections agencies agreeing to allow people to self-report levels of income and expenses, the algorithm leads to racially skewed results because of the nature of the inputs.²⁴²

235. 18 PA. STAT. AND CONS. STAT. ANN. § 11.1102 (West 2017).

236. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (recognizing that, given a defendant's diminished financial resources, the State can meet its goals of punishment and deterrence through fines tailored to the resources of a defendant).

237. *See* Colgan, *supra* note 12.

238. *Id.* at 78.

239. *Id.*

240. *Id.* at 92.

241. *Id.* at 111.

242. *See supra* Section III.A.

2. No Government Acknowledgment of Racial Prejudice

“Ability to pay” offers no formal recognition of government wrongdoing. It fails to recognize the racial prejudice present at all stages of the process of issuing and adjudicating traffic and criminal violations. In fact, there is a growing trend of courts distancing themselves from collective responsibility.

In recent times, as the flagrant abuses of rights of indigent defendants in Mississippi, Missouri, and Alabama have become more widely known, class action litigation has evolved into a vehicle for reparations for systemic racism.²⁴³ In the context of fines and fees, lawyers have employed class action litigation to redistribute wealth vis-à-vis civil reparations actions for false imprisonment and other deprivations of fundamental liberties as a result of a government entity’s unconstitutional debtor’s prison practices. For example, *Jenkins v. City of Jennings*, a class action brought by residents of a municipality neighboring Ferguson, resulted in a permanent injunction enjoining the City from further incarceration of indigent defendants without proper inquiry into their ability to pay; Plaintiffs also won a \$4.75 million judgment for damages they suffered as a result of the City’s unconstitutional and unlawful conduct.²⁴⁴ The parties settled on monetary damages for 1967 potential class members who collectively served 8,359 days of jail time for warrants issued on the basis of inability to pay court fines and fees.²⁴⁵ The per diem damage award for each day spent in jail was \$416.61.²⁴⁶ The lawsuit also had the result of forgiving all fines and fees assessed by the City of Jennings.²⁴⁷

At best, the damage awards, fine forgiveness, and the prospective mandate to consider alternatives to payment serve as a kind of reparations for racial injustice as conceptualized by Matsuda. They advance a remedy defined by the victims and a commitment to ensuring that the harms do not persist.

243. See City of Colorado Springs Settlement Agreement and Release, 2–3, May 4, 2016, <https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2016/05/ACLU-Settlement-Agreement-and-Release.pdf> [<https://perma.cc/45UG-Y9SB>] (describing the City of Colorado’s reimbursement of \$125 per day of jail time to impoverished residents who were jailed solely for inability to pay court fines and fees, of which \$11,250 was paid to plaintiff Shawn Hardman, \$1,500 to plaintiff Barry Crews, \$125 to plaintiff Danielle Zolna, \$375 to Justin Hamilton, and \$37,625 for persons other than plaintiffs); Settlement Agreement, *Jenkins v. City of Jennings*, No. 4:15-cv-00252-CEJ (E.D. Mo. July 6, 2016), <http://www.archcitydefenders.org/wp-content/uploads/2015/06/Settlement-Agreement.pdf> [<https://perma.cc/2X4S-M6S7>] (creating a Settlement Fund of \$4.75 million for individuals who were incarcerated because they could not afford to pay debts); Southern Poverty Law Center, Alabama Town Agrees in Settlement to Stop Operating Debtors’ Prison, (Mar. 14, 2017) <https://www.splcenter.org/news/2017/03/14/alabama-town-agrees-settlement-stop-operating-debtors%E2%80%99-prison> [<https://perma.cc/UE2Z-4Y34>] (“The class members—190 people who were jailed for nonpayment between September 8, 2013 and September 8, 2015—will be compensated at least \$500 for each day they were illegally jailed”).

244. Jennings Settlement, *supra* note 243, at 7.

245. *Id.* at 8.

246. *Id.* at 9.

247. *Id.* at 10–11.

However, they fall short in failing to acknowledge allegations of discrimination on the basis of race and do not seek formal recognition of this specific harm.

One settlement agreement, for example, explicitly states that the funds are not “intended to be payment for economic damages or for punitive damages,” but instead are limited to damages on account of “alleged personal injuries, including bodily injury, mental and emotional distress, and pain and suffering.”²⁴⁸ Another says that the settlement is “[n]ot a finding or an admission of liability, fault, wrongdoing or responsibility on the part of the parties hereby released.” This release of liability forfeits a valuable opportunity for the state to self-reflect on the role of race and racism in driving certain outcomes. Then, in effect, “ability to pay” is a political tool to further the status quo—a conservative racial project with the twin aims of subjugation and financial exploitation despite its guise as a progressive reform.

3. Devaluation of Non-Incarceration Impacts

For ability-to-pay hearings to be compulsory, courts have thus far indicated that the harms must rise to the level of incarceration to warrant constitutional protection. In fact, opponents (the purveyors of the financial punishment) have argued that constitutional protections do not apply in the absence of incarceration because there is no deprivation of a fundamental right.²⁴⁹ While it is important to prevent unnecessary incarceration, imprisonment is not the only deprivation of liberty that occurs on the spectrum of financial punishment. If reformers are forced to accept that non-incarcerable economic deprivation does not impair defendants’ liberty or denial of access to an integral aspect of the court system, this forecloses the recognition of other, more pervasive, forms of systemic injury and closes the door to repairing the wealth-stripping harm done to scores of indigent litigants.

Many people who are stopped and cited have forfeited homes and other property in order to satisfy their debts. Others have involuntarily had driver’s licenses suspended, wages garnished, bank accounts levied and other assets partially or wholly stripped in order to wipe their slates clean.²⁵⁰ Others have borrowed money from family, friends, and loved ones, who in turn have suffered similar fates of economic disenfranchisement. Even more devastating than the loss of tangible

248. *Id.* at 5.

249. This is an argument that was laid out in an appeal in California challenging the constitutionality of state criminal fees. In its Respondent’s brief before the California Court of Appeals, the City Attorney of Los Angeles argued that the assessments and fine in question do not subject appellant to any unconstitutional deprivation because she would not face incarceration if she is unable to pay. Respondent’s Brief, *People v. Duenas*, Superior Court of California, County of Los Angeles, No. B285645 (filed Dec. 18, 2017).

250. See Sobol, *supra* note 25 (describing the lack of federal legislative and regulatory efforts to address abusive collection of criminal debt); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486 (2016) (describing how the same concerns that led to calls for abolition of debtors’ prisons for civil debt in the eighteenth and nineteenth centuries now exist with regard to the use of incarceration for criminal justice debt).

assets is the loss of opportunity. Many are deprived of wealth that they amass early in life, when careful and strategic investment might have yielded the financial security that could have propelled them out of a cycle of poverty. Some also redistribute their limited resources to pay their tickets and avoid a driver's license suspension or further incarceration when those funds could have gone to food, rent, clothing, transportation, and other basic necessities of life. Many individuals receiving public assistance in an amount predetermined by a state, county, or city agency to be the base amount of money needed for survival use some percentage of their public assistance dollars to pay for court fines and fees. The harm to those individuals is distinct: quantifiable dollars that could have reduced their human suffering and mitigated their conditions of poverty.

IV.

ALTERNATIVES TO ABILITY-TO-PAY THAT ACCOUNT FOR RACE

If racial justice advocates seek meaningful reform, they run the risk of forfeiting true egalitarianism by advancing short-sighted reforms like the institutionalization of ability-to-pay determinations. The reality is that we have a “brutally punitive and phenomenally expensive system of targeted mass incarceration and social control”²⁵¹ that is officially and unofficially funded by the penal debt system. As Professor Gerald López urges, “we must do all within our powers to nullify its effect, informally, and formally, each and every day and over time, through every big collective action and through every individual exercise of informal discretion.”²⁵² We cannot afford anything less.

A. Abolition of Reliance on Court Fees to Fund Judicial System

Fines and fees can have a huge cost to low-income communities of color and actively work against the very purpose of the punishment itself—to advance public safety and accountability. Naturally, a system whereby suspended driver's licenses and economic insecurity flow directly from inability to pay monetary penalties manifestly contravenes the twin purposes of accountability and public safety. Abolition of fines and fees, of course, eliminates a revenue stream for government institutions. However, the low collections rates, the high costs of collecting fees, and the negative financial impact on municipalities are well documented and cannot be ignored.²⁵³

Ending the use of fees to fund the judicial system is no longer a radical or extraordinary remedy. In 2016, California placed a permanent moratorium on the charging of administrative fees to families with youth in the juvenile system.²⁵⁴

251. See López, *supra* note 13, at 109.

252. *Id.*

253. HIGH PAIN, LOW GAIN, *supra* note 17.

254. Press Release, Coalition Hails Governor for Signing Historic Juvenile Justice Reform Bill and Calls for an Immediate End to All Juvenile Fee Assessments and Collections (Oct. 12, 2017),

Jurisdictions like the City and County of San Francisco have discharged all existing debt—upwards of \$32 million—owed by tens of thousands of impacted individuals.²⁵⁵ Through the advocacy of the East Bay Community Law Center, the Alameda County Probation Department, Public Defender, and Sheriff’s Department have all endorsed legislation to repeal criminal justice administrative fees and discharge over \$23 million in outstanding debt.²⁵⁶ In Contra Costa County, the local governing body forgave a total of \$8.5 million in unpaid juvenile fines and fees.²⁵⁷

There is a tension between abolition of fees only and abolition of fees *and* fines. At least one academic scholar contends that while costs and fees should be prohibited, restitution to crime victims should be mandated.²⁵⁸ If there is a preservation of some aspect of penal debt, there should also be back end protections to hedge against any oversights on the front end ability-to-pay determinations. Two such protections have been raised by consumer debt scholars. The first is to authorize the declaration of bankruptcy on criminal court fines and fees.²⁵⁹ The second is to expand debtors’ protections in the collections process.²⁶⁰

B. Reparations for Debtors

Ta-Nehisi Coates argues that financial reparations should be paid to those who have suffered directly or indirectly from slavery and its aftermath, including present day injustices.²⁶¹ That sentiment should inform penal debt policy insofar as it promotes wealth redistribution. Applied to the context of penal debt, this vision is cognizable in two steps: (1) reverse the regressive taxation on communities of color by repealing legal authority assessing the fines and fees, and (2) reverse the damage already done through reimbursement and remittance to persons who

<https://ebclc.org/wp-content/uploads/2017/10/SB-190-Passage-Press-release.pdf>

[<https://perma.cc/TE49-U3ET>].

255. Trisha Thadani, *Criminal Justice Fees for 21,000 Waived*, SAN FRANCISCO CHRONICLE, (last updated Aug. 23, 2018, 6 AM) <https://www.sfchronicle.com/politics/article/Criminal-justice-system-fees-for-21-000-waived-13175850.php> [<https://perma.cc/GCK4-ZRZR>].

256. Letter from Wendy Still, Chief Probation Officer, Gregory J. Ahern, Sheriff/Coroner, Brendon D. Woods, Public Defender & Steve Manning, Auditor-Controller/Clerk Recorder, to Alameda County Board of Supervisors, (Oct. 31, 2018) http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_11_20_18/PUBLIC%20PROTECTION/Regular%20Calendar/Probation_Auditor_PUBDEF_Sheriff_273204.pdf [<https://perma.cc/Q5SD-4WKE>]; see also PAY OR PREY, *supra* note 17, at 2.

257. Diane Aranda, *Righting a Wrong: Contra Costa Refunds Families for Improper Charges*, The California Endowment Blog (January 18, 2018), <http://www.calendow.org/righting-wrong-contra-costa-refunds-families-improper-charges/> [<https://perma.cc/MCT5-U74C>].

258. R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1820 (2015).

259. See Atkinson, *supra* note 25 (calling for reform of bankruptcy rules to allow for discharge of criminal debt).

260. See Sobol, *supra* note 25 (calling for federal act to combat abuses in debt collection in criminal justice system).

261. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC MONTHLY, June 2014, at 54.

have been victims, such as Philando Castile.²⁶² Economically speaking, this two-prong solution will disincentivize future wealth stripping of communities of color by increasing its costs and diminishing its economic expediency.

Coates's bold proposal is akin to Mari Matsuda's theory of reparations. In her 1987 piece "Looking to the Bottom," Matsuda identifies that the theory of reparations is "generated from the bottom. It arises not from abstraction but from experience."²⁶³ She posits a theory of reparations to withstand corruption and to reconcile and repair race relations. Matsuda's reparations are a race conscious attempt to repair race relations in this country. Matsuda "concluded that reparations—the idea of acknowledgment of and payment for past injustice to victims of racism—is a critical legalism."²⁶⁴

Matsuda contends, 'victims must define the remedies, and the obligation of reparations must continue until all vestiges of past injustice are dead and buried.' In this sense, reparations is forward-looking and 'is not ... equivalent to a standard legal judgment. It is the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to [present and future] redress, looking always to victims for guidance.'²⁶⁵

Matsuda's conception of reparations starts with full acknowledgement of government harm. Championed by Alexes Harris and Professor Katherine Beckett, full abolition is one alternative to ability-to-pay provisions. It is not a novel proposal and has been widely accepted among scholars. Indeed, the recent draft of the Model Penal Code (Second) of Sentencing proposes that fees and costs be abolished. "In its first alternative provision on costs, fees, and assessments, the MPC states categorically that "no convicted offender ... shall be held responsible for the payment of costs, fees, and assessments."²⁶⁶ The following definition accompanies the provision: "Costs, fees, and assessments ... include financial obligations imposed by law-enforcement agencies, public-defender agencies, courts, corrections departments, and corrections providers to defray expenses associated with the investigation and prosecution of the offender or correctional services provided to the offender."²⁶⁷

262. See generally Peralta and Corley, *supra* note 142 (describing the haunting repeat cycle of traffic stops and debt assessed on Philando Castile for driving with a suspended license and no insurance).

263. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 362 (1987).

264. Erik K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and The British High Court*, 18 UCLA ASIAN PAC. AM. L.J. 71, 76 (2012-2013).

265. *Id.* at 77.

266. Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1757 (2015) (citing MODEL PENAL CODE: SENTENCING § 6.04D(2), Alternative § 6.04D(1) (AM. LAW INST., Tentative Draft No. 3, 2014)).

267. MODEL PENAL CODE: SENTENCING § 6.04D(2), Alternative § 6.04D(1) (AM. LAW INST., Tentative Draft No. 3, 2014).

Federal law prescribes that a fine not be assessed “where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine” and “[i]n determining the amount of the fine, the court shall consider,” among other things, “any evidence presented as to the defendant’s ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources” and “the burden that the fine places on the defendant and his dependents relative to alternative punishments.”²⁶⁸

In practice, jurisdictions like Colorado have reimbursed individuals per day of wrongful incarceration.²⁶⁹ Contra Costa County has also reimbursed individuals for wrongfully paid debts when individuals were not found guilty for the offense or when criminal charges had not been filed.²⁷⁰

V.

CONCLUSION

The racial project of penal debt arising from traffic and criminal violations is not merely extractive. It punctures the safety net so forcefully that a person is effectively stagnated in all modes of economic possibility. Without being able to pay off fines and fees, the cycle of poverty spins faster, towards an inevitable end of joblessness, criminalization, incarceration, and economic precariousness. In light of this downward spiral, there is a natural instinct to find an immediate bipartisan solution, e.g., ability-to-pay determinations, to stall the endless revolving door between poverty and incarceration. But reformers should heed short-term fixes that can lead to long-term harm.

As our nation moves towards the decriminalization of poverty, reformers should reflect on whether ability-to-pay determinations will actually bring us closer to racial equity and equal justice. Will it tangibly diminish the criminal justice system by minimizing the system of social control over Black bodies, preventing prolonged police stops, and reducing the likelihood of escalated violence with law enforcement? Will it effectively reduce the mass incarceration of indigent people of color? Will it create opportunities for individuals of color to build wealth and reverse the decades of regressive taxation to fund court operations? Will it change the status quo—or will it merely restructure it? At best, it will slow the wealth extraction machine down, but it will never fully eliminate it nor will it eradicate the system’s racialized patterns. And in the worst case scenario, the negative characteristics of the status quo continue, and we are left with an enhanced collections system that is even more burdensome and invasive than the one before

268. U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(a)), (d) (U.S. SENTENCING COMM’N 2016).

269. See City of Colorado Springs Settlement Agreement and Release, *supra* note 243.

270. See Aranda, *supra* note 257.

it. We still “end up balancing the budget on the backs of the poorest people in society.”²⁷¹

There are good reasons to be wary of ability-to-pay determinations. Alexandra Natapoff writes that, “we risk turning the most vulnerable population into funding fodder for the very institution from which we are trying to protect.”²⁷² As the net widens, and individuals are swept into the criminal process for low level violations, we turn increasingly to “supervision and fines as indirect, long-term constraints on defendant behavior,” and in doing so, extend “the informal consequences of a citation or conviction deep into offenders’ social and economic lives.”²⁷³ “The widening net, moreover, is not colorblind: decriminalization risks further racializing the selection process as police are empowered to stop and cite young black men more freely....”²⁷⁴ When unchecked, ability-to-pay determinations also stand to “render the punishment system more expansive, flexible, legitimate, and seemingly cost-effective,” much like the modern-day phenomenon of the rise of the reentry industrial complex.²⁷⁵

We must strive to “creat[e] a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under law.”²⁷⁶ Let us not make ability-to-pay determinations a shortsighted “economic policy masquerading as progressive penal reform.”²⁷⁷ Instead, we should aim for a more meaningful and consequential strategy to restoring dignity and economic freedom to people that have been long disenfranchised by insurmountable court-ordered debt.

271. Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), <https://nyti.ms/2kpDTpr> (quoting Stephen Bright of the Southern Center for Human Rights on the enormous weight of probation fines and fees).

272. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059 (2015).

273. *Id.*

274. *Id.*

275. Renée M. Byrd, “*Punishment’s Twin*”: *Theorizing Prisoner Reentry for a Politics of Abolition* 43 SOC. JUST. 1, 1 (2017); see López, *supra* note 13.

276. Order Granting Motions for Appropriate Relief, *supra* note 189, at 6.

277. Natapoff, *supra* note 272, at 1060.