

## Article

# The Costs of the Punishment Clause

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## INTRODUCTION

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” — Thirteenth Amendment to the U.S. Constitution<sup>1</sup>

Criminal punishment pursuant to a facially valid conviction in a court of law is an uncontested exception to the Thirteenth Amendment’s prohibition on slavery and involuntary servitude.<sup>2</sup> After all, the Constitutional text reads, “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States.”<sup>3</sup> And yet, beginning almost immediately after the Thirteenth Amendment was adopted, states regularly employed criminal statutes to limit the movement and behaviors of those previously enslaved and subject them to slavery-type labor camps in conditions that closely mirrored slavery.<sup>4</sup> Because neither the Amendment nor its history offers much guidance on how to understand the distinction between illegitimate and lawful uses of “slavery” or “involuntary servitude,” the Thirteenth Amendment’s language has permitted the continued enslavement of Black individuals through this carved out exception for criminal convictions.<sup>5</sup> The overlapping history of slavery and the development of the prison system as a site to maintain control over the labor and economic potential of Black individuals makes this unexplored distinction critical, as we see this system undo for individuals the collective rights the Civil War Amendments bestowed on African Americans (if only in the written law).<sup>6</sup>

Ever since Emancipation, and even before, the criminal legal system not only permitted, but affirmatively encouraged the imposition of onerous financial obligations in an effort to keep African

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1. U.S. CONST. amend. XIII, § 1.

2. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist View*, 94 N.Y.U. L. REV. 1465, 1467 (2019).

3. U.S. CONST. amend XIII, § 1 (emphasis added).

4. Pope, *supra* note 2, at 1478–90 (discussing how post ratification attempts were made to skirt the Amendment).

5. *See generally id.*

6. Thank you to Dr. Melynda Price for helping me formulate this framing.

Americans in some form of bondage.<sup>7</sup> A visible thread links the imposition of modern criminal court debts to the financial obligations kangaroo courts inflicted on the recently emancipated convicted of violating the Black Codes, laws criminalizing everyday conduct in Black communities, and facially race-neutral laws enforced heavily against Black individuals.<sup>8</sup> Whites of all economic backgrounds used these laws to arrest and then convict emancipated individuals, forcing them to labor to work off steep, ever-shifting court- and then surety-imposed financial obligations in the very fields and under the command of the same overseers from whom they had recently been liberated.<sup>9</sup> The coercive imposition of criminal court costs on those raced Black as a mechanism to simultaneously keep them under state control and profit financially from their labor continued through the convict labor practices that built much of the infrastructure of the southeastern United States throughout the late 1800s and early 1900s, and then through the forced labor required of those detained throughout the twentieth century.<sup>10</sup>

Still today, legal structures keep people under government surveillance and supervision through the imposition of criminal fines and fees and the incarceration-backed insistence that those with criminal convictions work to pay off these financial obligations or return to jail.<sup>11</sup> State budgets and private coffers have relied on the criminal financial obligations imposed disproportionately on poor Black individuals for more than a century.<sup>12</sup> This form of physical and economic servitude would not have been permissible but for the Punishment Clause<sup>13</sup> in the Thirteenth Amendment. Although invol-

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7. See *infra* Part II.A.

8. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 27–58 (2010) (analyzing the caste system evident in the states following emancipation); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 16, 31–34 (2019) (discussing how Black Codes employed sanctions to consign Black individuals to involuntary labor); see also *Timbs v. Indiana*, 139 S. Ct. 682, 688–89 (2019) (describing how language used in England to levy fines against Black individuals was adopted in various governmental documents in the states).

9. Roberts, *supra* note 8, at 30–58 (describing the Jim Crow era and the birth of mass incarceration as tools to keep Black Americans in the forced labor cycle).

10. *Id.*

11. See *infra* notes 62–74 and accompanying text.

12. See *infra* Part II.A.

13. This Article refers to the language “except as a punishment for crime whereof the party shall have been duly convicted” in the Thirteenth Amendment as the Punishment Clause, but also occasionally as the Except Clause. Both terms refer to this part of the Amendment.

untary servitude is prohibited, it is permitted so long as it is imposed pursuant to a criminal punishment.<sup>14</sup>

Since neither term is defined, courts can interpret the words “slavery” and “involuntary servitude” narrowly, permitting the broad punishment exception to sanctify conduct that many would think falls within the Thirteenth Amendment’s prohibitory scope. Thus, when courts define “slavery” and “involuntary servitude” solely in reference to possession of people as tangible personal property and the forced labor of those individuals, coercive labor practices backed by the threat of incarceration fall outside the definitional ambit.<sup>15</sup> Society, backed by the courts, has used this loophole to permit sheriffs, jails, and even private parties to require work from those convicted of committing a crime.<sup>16</sup> Although the ostensible goal of the work is to pay off the criminal debts the person incurred through the fact of their commission of a crime, the profit motive behind the narrow reading of the Thirteenth Amendment’s terms is ever present.

Criminal financial obligations are a way to conscript the physical bodies of those convicted of crimes into revenue-generating labor that would be impermissible but for the presence of the Punishment Clause. Because the financial obligation is part of the court’s judgment and commitment order, it constitutes “punishment for crime whereof the party shall have been duly convicted.”<sup>17</sup> The inability to pay—the failure to have sufficient means to pay criminal debt—is the critical link between punishment and what amounts to involuntary servitude. Those who can pay court-imposed financial obligations are not subject to the requirement that they either work to pay off their criminal debt or go to jail. Only those who cannot pay are subject to the continued obligation of labor to pay off criminal debt.

Following the abolition of slavery, state legislators passed, and local sheriffs enforced, laws specifically targeted at arresting newly

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14. U.S. CONST. amend. XIII, § 1; *see also* Pope, *supra* note 2, at 1527–50 (discussing how the reading of the Punishment Clause has been used to further mass incarceration).

15. *See infra* Part I.A (discussing the definitional consequences of various interpretations of the terms “slavery” and “involuntary servitude”).

16. *See* Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304, 308–319 (2019) [hereinafter Zatz, *Get to Work*] (providing three contemporary examples of “carceral work mandates”); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 900–03 (2019); Noah D. Zatz, *A New Peonage?: Pay, Work or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 935 (2016) [hereinafter Zatz, *A New Peonage*].

17. U.S. CONST. amend. XIII, § 1; *see* Pope, *supra* note 2, at 1540–49 (discussing how modern courts apply sentencing to ensure that financial obligations apply).

emancipated Black individuals, ordering them to pay a series of debts at conviction they had no chance of being able to pay.<sup>18</sup> In lieu of payment, courts “allowed” defendants to work off the debts.<sup>19</sup> Once the Black Codes were found unconstitutional, “convict leasing,” where the courts leased out people convicted of a crime to private entities for their labor, became the program de jure, until it, too, was found unconstitutional.<sup>20</sup> Although the Supreme Court never explicitly weighed in on hard labor or chain gangs, eventually those practices morphed into what we have now: exponentially expanding fines and fees, imposed at arrest and then again pursuant to conviction, that courts require defendants to pay off pursuant to court order, punishing them with incarceration when they do not or cannot work to meet these financial obligations.<sup>21</sup> Imposing debts that are beyond a person’s ability to pay and then requiring them to work off those debts would ordinarily qualify as involuntary servitude, at least by most definitions. But because these debts are being imposed pursuant to a criminal conviction, the Thirteenth Amendment permits this system to flourish.<sup>22</sup>

As a consequence, public courts around the country have come to rely on the funding stream from court debts to run their court systems and governments.<sup>23</sup> Not surprisingly given the history, municipalities that excessively fine their residents usually have a larger percentage of Black and Latino/a residents than the median municipality.<sup>24</sup> Public companies and even non-profits likewise benefit financially from the labor of those who are incarcerated or under court supervision. Incarcerated persons work for pennies building

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18. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 7, 65–67 (2008).

19. *Id.* at 64; Roberts, *supra* note 8, at 30.

20. See *infra* notes 235–46 and accompanying text.

21. These legal financial obligations are exacerbated for those who are incarcerated by the exorbitant cost of phone calls with family members, stamps for letters, food from the commissary, and other essentials that are marked up in price. Stephen Raheer, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL’Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [<https://perma.cc/RF8T-XM56>].

22. See, e.g., *infra* notes 107–10 and accompanying text.

23. A recent study found that thirty-eight cities received ten percent or more of their revenue from fines and fees. One town relied on fines and fees for a whopping 30.4 percent of its revenue. *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications*, U.S. COMM’N ON CIV. RTS. 21 (Sept. 2017), [https://www.usccr.gov/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf) [<https://perma.cc/6NB7-YDSJ>].

24. *Id.* at 22–23.

furniture for private companies;<sup>25</sup> they make a little more to fight the raging forest fires that cripple California every year;<sup>26</sup> and numerous non-profits benefit from the community service requirements courts place on them.<sup>27</sup>

This Article contests the standard belief that any condition attributable to a criminal conviction is unable to be challenged on Thirteenth Amendment grounds. Highlighting how states have used the lack of a clear distinction between “involuntary servitude” and punishment to create an end-run around the constitutional prohibition, this Article shows how the Thirteenth Amendment has been used to maintain control of those of African descent by treating them more like chattel than citizens.<sup>28</sup> It begins to explore the implications of purportedly carving out a criminal punishment exception through the lens of one specific manifestation—the crippling effects of court debt imposed as part of a criminal conviction.<sup>29</sup> Although Black individuals were and are disproportionately implicated in the criminal legal system, the consequence of a system that allows for involuntary servitude and neoslavery through the imposition of financial obligations is an infection of the entire system, across racial lines. Ideally, courts would operate as a check on prosecutions for these crimes, but courts have largely abdicated their role in serving as a check on criminal financial obligations.<sup>30</sup>

From the initial days after the Amendment’s passage, states have been using the Punishment Clause to skirt the prohibitions of the Amendment. Our current carceral system is the result of the inevitable evolution of the initial manifestations of this constitutional work-around. Abundant evidence, discussed in Part I, reveals how troubling this system was for many of the framers of the Thirteenth

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25. Connor Sheets, *Not Just License Plates: 54 Products Alabama Prisoners Get 25 to 75 Cents an Hour to Make*, AL.COM (May 18, 2019), [http://www.al.com/news/index.ssf/2017/04/not\\_just\\_license\\_plates\\_produc.html](http://www.al.com/news/index.ssf/2017/04/not_just_license_plates_produc.html) [https://perma.cc/3EWY-E9GA] (displaying photos of and discussing the “varied” products made by detainees who participate in the Alabama Correctional Industries prison work program); Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 868 (2008).

26. Goodwin, *supra* note 16.

27. Zatz, *Get to Work*, *supra* note 16, at 326.

28. *Infra* Part I.

29. *Infra* Part II.

30. See, e.g., Cortney E. Lollar, *Eliminating the Criminal Debt Exception for Debtors’ Prisons*, 98 N.C. L. REV. 427, 432–33 (2020); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5–6, 7–12 (1997).

Amendment.<sup>31</sup> We are now more than 150 years past the Amendment's enactment, yet we still have not confronted head on the legacy of these deeply troubling practices. The consequence is a system that relies on primarily indigent criminal defendants to bear substantial portions of the financial costs of running our court systems, our governments, and numerous private industries through the fines and fees that are imposed during the criminal legal process.

One way to alleviate the consequences of this definitional failure would be to strike the language of the Punishment Clause from the Thirteenth Amendment, as the failure to delineate the parameters of "slavery" and "involuntary servitude" becomes problematic primarily when read in conjunction with that clause. Congresswoman Nikema Williams of Georgia and Senator Jeff Merkley of Oregon recently proposed that the Constitution be amended to strike the "slavery clause" from the Thirteenth Amendment.<sup>32</sup> Their joint resolution would add an amendment to the Constitution that says, "Neither slavery nor involuntary servitude may be imposed as punishment for a crime."<sup>33</sup> Their resolution, proposed twice in 2021, was referred to the Judiciary Committee, where it stalled.<sup>34</sup> More than twenty states have provisions similar or identical to the Punishment Clause in their state constitutions.<sup>35</sup> Two other states—Nevada and Colorado—amended their constitutions in recent years to eliminate this language.<sup>36</sup>

Yet even if Congress ratifies this proposed amendment, the need for a definition of "involuntary servitude" remains. Whether Congress chooses to take the important step of ratifying the joint resolution or not, Congress still should define the terminology of the Thirteenth Amendment. Pursuant to Section 2 of the Thirteenth Amendment, Congress has the power to set the metes and bounds of

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31. See, e.g., Pope, *supra* note 2, at 1470–1501 (discussing different perspectives throughout the enactment period). See generally *infra* Part I.

32. Brakkton Booker, *Democrats Push 'Abolition Amendment' to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020), <https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution> [<https://perma.cc/J4AU-6JHM>]; Terry Tang, *Lawmakers Mark Juneteenth by Reviving 'Abolition Amendment'*, AP NEWS (June 18, 2021), <https://apnews.com/article/or-state-wire-race-and-ethnicity-lifestyle-juneteenth-963c58a1a19ba501f5677343b9c786e0> [<https://perma.cc/3L3Y-5QP7>].

33. Proposing an Amendment to the Constitution of the United States to Prohibit the Use of Slavery and Involuntary Servitude as Punishment for a Crime, S.J. Res. 21 117th Cong. (2021).

34. *Id.*

35. Tang, *supra* note 32.

36. *Id.*

the Amendment's parameters.<sup>37</sup> As such, Congress could—and should—take up this challenge and flesh out the definitions of involuntary servitude and slavery in a manner that would prohibit the continued use of fines and fees as a source of revenue-generation for states and private entities. In addition to passing a Constitutional Amendment that abolishes slavery and involuntary servitude when imposed as punishment for a crime, this Article urges Congress to pass legislation that defines “involuntary servitude” in such a way that user fees uncorrelated to any legitimate penological purpose are eliminated; any fines, restitution, or forfeiture are calibrated to a defendant's ability to pay; and any revenue generated from fines, fees, and forfeiture is diverted away from funding the court system or players within that system. Congress needs to clarify that, with or without the Punishment Clause, forcing someone to work to pay for necessities in prison or jail, to raise revenue for the state, or to generate profit for private corporations is a violation of the Thirteenth Amendment's prohibition on involuntary servitude.

This Article proceeds in three parts. Part I discusses the history of the Thirteenth Amendment and the support at the time of the Amendment's passage for the interpretation advocated for by this Article. It also clarifies the definitional parameters of the terms “involuntary servitude,” “slavery,” and “punishment.” Part II traces how, beginning immediately after the Thirteenth Amendment's passage, financial obligations imposed as part of a criminal case circumvented the prohibitions of the Thirteenth Amendment based on the presence and broad interpretations of the *except* clause. This Section lays out how interpretations of the text evolved to allow certain practices to continue to fall under the auspices of constitutionality. And Part III closes by proposing two possible solutions that would bring the Thirteenth Amendment in line with its potential to truly eliminate the state's use of prison labor under the guise of paying off criminal debt.

### I. THE PUNISHMENT CLAUSE'S HISTORY

The text of the Thirteenth Amendment came from a proposal of the Senate Judiciary Committee in 1864.<sup>38</sup> As numerous scholars have noted, the Committee modeled its Thirteenth Amendment after the Northwest Ordinance of 1787,<sup>39</sup> with Section 1 of the constitu-

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37. U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

38. Pope, *supra* note 2, at 1474.

39. *Id.*; see also Lea VanderVelde, The Territorial Origins of “Except as Punish-



tional provision prohibiting “slavery” and “involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.”<sup>40</sup> Neither the terms “slavery” nor “involuntary servitude” are defined, making the Amendment’s scope “ambiguous.”<sup>41</sup> At its narrowest definition, the term “slavery” contemplates chattel slavery.<sup>42</sup> However, scholars and courts have long debated whether these terms were meant to outlaw only chattel slavery and involuntary servitude or something more.<sup>43</sup> As James Pope has queried,

Nobody . . . would disagree that Section 1 banned . . . the master’s rights to possess his slaves, dispose of their labor, and own the offspring of his female slaves. The question is whether it goes further, to encompass . . . race-based (or perhaps even non-race-based) barriers to owning property, making and enforcing contracts, participating in court, marrying, raising one’s children, and obtaining an education.<sup>44</sup>

Other commentators have questioned whether the Thirteenth Amendment “provides a remedy for coercive labor practices, physical confinement, child abuse, prostitution, or other forms of compelled service or physical domination.”<sup>45</sup> The Supreme Court in 1872 suggested a broader approach, remarking that slavery included “the protection . . . from the oppressions of those who had formerly exercised unlimited dominion over [the newly-made freeman and citizen].”<sup>46</sup>

At the time Congress debated the Amendment, “all but the most conservative proponents avoided denying and sometimes affirmed that the Amendment guaranteed a set of ‘natural’ or ‘civil’ rights extending beyond freedom from the physical or legal coercion of la-

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ment for Crime”: From Settler Colonialism to the Reconstruction Congress 3, 6–7 (Feb. 22, 2018) (unpublished manuscript) (on file with author); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1462, 1477–79 (2012).

40. Pope, *supra* note 2, at 1474 n.34 (citing CONG. GLOBE, 38th Cong., 1st Sess. 1313 (1864)).

41. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1313 (2007).

42. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1741 (2012).

43. Carter, *supra* note 41, at 1320–21; James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 428–30 (2018).

44. Pope, *supra* note 43, at 429–30.

45. Carter, *supra* note 41, at 1320–21; *see also* Balkin & Levinson, *supra* note 39, at 1481 (“Looking back to the Founding, one discovers that the word ‘slavery’ actually has a capacious meaning, far outstripping the practices of racialized chattel slavery that the Reconstruction Era framers sought to end in 1864.”).

46. *Slaughter-House Cases*, 83 U.S. 36, 71 (1873).

bor.”<sup>47</sup> Several proponents indicated a belief that Section 1 “outlaw[ed] components of slavery other than forced labor and human property,” including “each and every element of the slave system.”<sup>48</sup> Pope makes a compelling argument that this is the better historical interpretation of the constitutional language.<sup>49</sup> But there were undoubtedly those in the minority, those reluctant about the potentially broad reach of the Amendment’s scope who ultimately agreed to the abolition of chattel slavery, “but treated any additional protection of the former slaves as a matter of legislative grace.”<sup>50</sup> Section 2 specifically delineates that Congress shall have the power to enforce the Amendment “by appropriate legislation,”<sup>51</sup> and today, contrary to what seems to have been the drafters’ intention, courts rely on congressional authorization under Section 2 to define the Amendment’s scope.<sup>52</sup>

#### A. “SLAVERY” AND “INVOLUNTARY SERVITUDE”

The lack of consensus by those who passed the Amendment has had the inevitable result of leaving scholars and courts in a perpetual struggle to define what the terms “slavery” and “involuntary servitude” mean in practice. Given the lack of consensus by the Congressmen who ratified the Amendment, and the multiple possible interpretations of these terms, the likelihood of coming to any agreement seems slim. This Section will discuss the consequences of the failure to elaborate on each of the critical terms in the Amendment and will advocate for a broader conception of the terms “slavery” and “involuntary servitude.”

##### 1. The Consequences of Failing to Define “Slavery” and “Involuntary Servitude”

Nowhere in the Thirteenth Amendment are the words “slavery” and “involuntary servitude” defined. One of the underexplored consequences of the lack of definitional clarity is what that failure

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47. Pope, *supra* note 43, at 434.

48. *Id.* at 435. These proponents labeled these components “badges,” “incidents,” “vestiges,” “roots,” and “features” of slavery. Pope, *supra* note 2, at 1472; *see also* Pope, *supra* note 43, at 430.

49. Pope, *supra* note 2, at 1492–1501; *see also* VanderVelde, *supra* note 39, at 3 (arguing that the Punishment Clause was an attempt to eliminate caste in the U.S. and to establish a “republic of laborers”).

50. Pope, *supra* note 43, at 436.

51. U.S. CONST. amend. XIII, § 2.

52. Pope, *supra* note 43, at 446; Carter, *supra* note 41, at 1344, 1346.

means.<sup>53</sup> Very little debate focused on the Punishment Clause and how it might be circumvented in light of the failure to give more definition to the terms “slavery” and “involuntary servitude.”<sup>54</sup> Yet, as Professor Dorothy Roberts points out, “[t]he historical evidence suggests [the framers] left in the Punishment Clause to permit continuation of the custom of sentencing people convicted of crimes to hard labor.”<sup>55</sup> Unanswered by the constitutional text is a fundamental question: in exactly what circumstances is the punitive use of “slavery” or “involuntary servitude” acceptable and legitimate, and in what circumstances is it constitutionally prohibited?

Immediately after the Amendment’s passage, several Southern states made their interpretation of the text quite clear. As historian Eric Foner explains, “The criminal exception, almost unmentioned in the debates of 1864 and 1865, [took] on baleful significance as a constitutional justification for the exploitation of the labor of convicts.”<sup>56</sup> Using the criminal legal system as a pretext, “thousands of random indigent citizens [were captured and imprisoned], almost always under the thinnest chimera of probable cause or judicial process.”<sup>57</sup> Southern states adopted statutes intended to criminalize routine behaviors.<sup>58</sup> As Douglas Blackmon uncovered, “[T]he original records of county jails indicated thousands of arrests for inconsequential charges or for violations of laws specifically written to intimidate blacks—changing employers without permission, vagrancy, riding freight cars without a ticket, engaging in sexual activity—or loud talk—with white women.”<sup>59</sup> Arrests rose and fell in tandem to the needs of those buying and selling labor, not as crime increased and reduced.<sup>60</sup>

An entire court system, built around a market for prison labor, arose to address the majority of these cases. Whereas state circuit court judges tried and sentenced those charged with serious felony

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53. Pope, *supra* note 2, at 1474 (“Now, unless I err, there is an implication from those words that men may be enslaved as a punishment of crimes whereof they shall have been duly convicted.” (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Sumner))).

54. *Id.* at 68; Pope, *supra* note 2, at 1475.

55. Roberts, *supra* note 8, at 69.

56. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 45 (2019).

57. BLACKMON, *supra* note 18, at 7.

58. *Id.* at 67.

59. *Id.* at 7.

60. *Id.* at 65–66.

crimes, local sheriffs governed the world of misdemeanors.<sup>61</sup> Incarceration was both expensive and impractical.<sup>62</sup> Instead, sheriffs created and controlled a “convict leasing” market; they sold laborers, often large blocks of African Americans who owed a court debt, to the highest bidder.<sup>63</sup> In other words, “black people convicted of petty offenses were ‘sold as punishment for crime’ at public auctions as if they were still enslaved.”<sup>64</sup> As Blackmon noted, “Some counties chose to prosecute men accused of felonies on misdemeanor charges just so the sheriff and other officials could receive the proceeds of the prisoner’s lease.”<sup>65</sup> Sheriffs had a financial motivation to arrest and convict as many people as possible, and to feed them as little as they “could get away with.”<sup>66</sup> Neither the sheriffs nor the employers had much, if any, regard for the physical treatment or health of those plunged into the system, as the laborers were no longer the property of the person requiring the labor.<sup>67</sup> The men leased through this system were seen as disposable; a steady stream of other “convicts” were available through the guise of the criminal legal system.

The legal fee system worked as an additional disincentive for those arrested to take their cases to trial, as each additional act in the judicial process, or appearance of another witness or official, brought a further charge, which would ultimately amount to more time in forced labor.<sup>68</sup> On average, after an arrest, only seventy-two hours passed before the judgment in the case and delivery to a mine or mill for work.<sup>69</sup> The usual penalty was nine months to a year in a slave mine or labor camp.<sup>70</sup> “[I]t was a system driven not by any goal of enforcement or public protection against serious offenses, but purely to generate fees and claim bounties.”<sup>71</sup> Ultimately, the misdemeanor “convict leasing” system “significantly funded the operations of government by converting black forced labor into funds for the counties and states.”<sup>72</sup> In essence, as Dennis Childs has observed,

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61. *Id.* at 63.

62. *Id.* at 62; VanderVelde, *supra* note 39.

63. BLACKMON, *supra* note 18, at 64.

64. Roberts, *supra* note 8, at 30.

65. BLACKMON, *supra* note 18, at 65.

66. *Id.*

67. *Id.* Prior to the Thirteenth Amendment’s passage, this argument was used by slaveholders to criticize abolitionists. See Balkin & Levinson, *supra* note 39, at 1490.

68. BLACKMON, *supra* note 18, at 66.

69. *Id.*

70. *Id.*

71. *Id.* at 66, 100.

72. *Id.* at 68–69.

[T]he *slavery or involuntary servitude as punishment for a crime* exception within the “Emancipation Amendment” allowed courthouses . . . to function as virtual auction blocks in which criminally branded black people were either disappeared to the public profiteering venues of the chain gang, the levee camp, and the state prison plantation, or in which . . . they were submitted to the designs of enterprising white planters and industrialists who could literally purchase, lease, or sublease the bodies of black men, women, and children through the publically [*sic*] brokered “private” machinations of convict leasing, peonage, the “fine/fee system,” and criminal surety.<sup>73</sup>

This move did not go unnoticed by northern members of Congress. As one more conservative member railed, “They have ratified [the Thirteenth Amendment] with a construction that it merely abolishes the infamy of buying, selling, and owning human beings; and under the exceptional clause (‘except as a punishment for crime’) reconstructed North Carolina is now selling black men into slavery for petty larceny.”<sup>74</sup> Simply put, as ratified, the Amendment “provided insufficient protection to black citizens from being exploited, tortured, and killed in the system of bondage that replaced chattel slavery.”<sup>75</sup> But rather than return to the Thirteenth Amendment, anti-slavery legislators opposed to the South’s approach made the decision to pursue challenges to this system through the passage of the Fourteenth Amendment and the Civil Rights Act of 1866.<sup>76</sup>

As a consequence, the meaning of the terms “slavery” and “involuntary servitude” continue to remain uncertain. The constitutional text provides no guidance.<sup>77</sup> The prevailing majority at the time of the Amendment’s passage seemed to embrace a broad definition that allowed for practical freedoms and the general concept of “free labor.”<sup>78</sup> However, a strong minority rejected this notion, hewing to a definition that, when read in conjunction with the Punishment Clause, permitted a steady stream of unfree labor through the use of the criminal legal system.<sup>79</sup> Both sides voted to ratify the same

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73. DENNIS CHILDS, *SLAVES OF THE STATE: BLACK INCARCERATION FROM THE CHAIN GANG TO THE PENITENTIARY* 8 (2015).

74. Pope, *supra* note 2, at 1478 (citing CONG. GLOBE, 39th Cong., 1st Sess. 332 (1866) (statement of Rep. Deming)); *see also id.* (“Under the pretense of [the Punishment Clause] they are taking men . . . for assault and battery . . . and selling them into bondage for ninety-nine years.” (quoting CONG. GLOBE, 39th Cong., 1st Sess. 655 (1866) (statement of Rep. Stevens))).

75. Roberts, *supra* note 8, at 70.

76. Pope, *supra* note 2, at 1484–85; Balkin & Levinson, *supra* note 39, at 1463–64; CHILDS, *supra* note 73, at 75–76.

77. U.S. CONST. amend XIII.

78. Pope, *supra* note 2, at 1472.

79. *Id.* at 1473–74.

Amendment, but without a clarification of the terms, consensus on the Amendment's intended scope eluded supporters.<sup>80</sup>

## 2. Advocating for a Broader Interpretation

This lack of agreement on intent is not the end of the analysis, however. Another line of reasoning compels the conclusion that a broader interpretation of the terms "slavery" and "involuntary servitude" is warranted. In the context of race, our society has evolved and continues to do so, even though the glacial pace of this evolution is not what many of us would choose. This development is visible in the progression of the Supreme Court's interpretation of the Fourteenth Amendment, which, under *Plessy v. Ferguson*, the Court viewed as sanctioning a regime of separate but equal,<sup>81</sup> but later rejected in *Brown v. Board of Education*.<sup>82</sup> In reevaluating its previous interpretations of the Fourteenth Amendment, the *Brown* Court specifically noted, "In approaching this [issue], we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."<sup>83</sup>

The same logic should apply to our current interpretation of the Thirteenth Amendment. In other words, even if the initial intent of the Amendment's framers is murky, there is no compelling reason for courts to continue to embrace a stunted version of the Amendment that only prohibits chattel slavery but not any of the accompanying features of the institution. Although an argument can be made that a narrow reading of the Amendment's prohibitory language is one valid interpretation, courts should not continue to permit an end-run around the prohibition on slavery and involuntary servitude at this point in our history, even if the framers' initial intent was not abundantly clear.<sup>84</sup> "Interpreting the Punishment Clause as negating

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80. James Pope has made a compelling argument that consensus became clearer with the passage of the 1866 Civil Rights Act, *see* Pope, *supra* note 43, at 448–51, but history suggests, with specific regard to the Thirteenth Amendment, that consensus has been unavailing, *see, e.g.*, Carter, *supra* note 41, at 1322 ("[I]t remains an open question as to how courts presented with Thirteenth Amendment claims should determine what constitutes a badge or incident of slavery.").

81. 163 U.S. 537, 543, 548–49 (1896).

82. 347 U.S. 483, 494–95 (1954).

83. *Id.* at 492–93.

84. And, as both James Pope and William Carter have pointed out, "it is too late to limit the Thirteenth Amendment to literal slavery or involuntary servitude unless decades of precedent are to be disregarded." Carter, *supra* note 41, at 1339; *see also*

slavery's abolition ... neglects the explicit opposition by the Amendment's Republican drafters to such an 'absurd construction.'"<sup>85</sup> As Taja-Nia Henderson has articulated, "the Amendment's history, its contemporary milieu, as well as its inherent anti-subordinative principles ought to be construed to extend its applicability to certain forms of offender subordination . . . ."<sup>86</sup>

Jack Balkin and Sanford Levinson have articulated several reasons why Thirteenth Amendment jurisprudence likely has not evolved in a manner more consistent with these anti-subordination principles in the way Fourteenth Amendment jurisprudence has. One of the predominant motivations they identify is that "the Thirteenth Amendment was particularly unhelpful to corporate interests."<sup>87</sup> After all, the Thirteenth Amendment has no requirement of state action like the Fourteenth Amendment does. As a result, "the Amendment might be the source of congressional power to pass laws designed to protect employees from overreaching employers."<sup>88</sup>

Equally important to the shrinking of Thirteenth Amendment protections is "the history of Reconstruction and its subsequent disparagement as the price of political reunion by Northern and Southern whites."<sup>89</sup> White Americans worried that, if taken to its logical extreme, the Thirteenth Amendment "might justify a truly radical transformation of the American social and political order . . . ranging from the way that markets and government actually work to the way that family life is structured."<sup>90</sup> For example, "Northern white elites increasingly feared what they perceived as the threat of 'socialism'—demands by freed blacks and their white sympathizers for redistributive programs."<sup>91</sup> Evidence of a similar aversion to actual equality is manifest in Justice Bradley's 1883 opinion in the *Civil Rights Cases*:

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.<sup>92</sup>

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Pope, *supra* note 43, at 451.

85. Roberts, *supra* note 8, at 67.

86. Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1150 (2013).

87. Balkin & Levinson, *supra* note 39, at 1464 (emphasis omitted).

88. *Id.*

89. *Id.* at 1463.

90. *Id.* at 1470.

91. *Id.* at 1472.

92. 109 U.S. 3, 24–25 (1883).

In his private notes, Justice Bradley opined that “[t]o deprive white people of the right to choosing their own company would be to introduce another kind of slavery.”<sup>93</sup> Whites were far more comfortable with allowing Blacks to have civil equality, “such as the right to make contracts and own property,” than they were with embracing social equality and “the right to associate with whites as equals.”<sup>94</sup> If the Thirteenth Amendment were permitted to truly live up to its full potential, it would “unearth or dig up features of social life that many whites wanted to maintain unquestioned and unchallenged.”<sup>95</sup>

In short, according to Balkin and Levinson, the Thirteenth Amendment has not been given more traction because if domination can exist within markets and welfare states and be reproduced in social systems, a call to eliminate these forms of domination “might undermine market capitalism” as well as threaten the established social order.<sup>96</sup>

William Carter has a similar theory as to why the Thirteenth Amendment has not received greater traction. Drawing on the work of the late Professor Derrick Bell, Carter suggests that a “perceived lack of interest convergence” has played a significant role in limiting the Thirteenth Amendment’s development.<sup>97</sup> According to this theory, “advances in civil rights only occur when such advances . . . also advance the interests of the privileged majority.”<sup>98</sup> Because the Thirteenth Amendment is necessarily linked to the emancipation of enslaved Africans and African Americans, most white elites would think it had little relevance to them.<sup>99</sup>

Even accepting these theories, the question of how to interpret the terms “slavery” and “involuntary servitude” remains open,<sup>100</sup> with courts in recent years making an active choice to apply a narrow reading of these terms, except in the context of the Punishment

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93. Balkin & Levinson, *supra* note 39, at 1473.

94. *Id.* at 1474.

95. *Id.*

96. *Id.* at 1475.

97. William M. Carter, Jr., *The Thirteenth Amendment and Constitutional Change*, 38 N.Y.U. REV. L. & SOC. CHANGE 583, 592 (2014) [hereinafter Carter, *Constitutional Change*]; William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 21 (2011) [hereinafter Carter, *Interest Convergence*].

98. Carter, *Constitutional Change*, *supra* note 97; see also Carter, *Interest Convergence*, *supra* note 97.

99. Carter, *Constitutional Change*, *supra* note 97; Carter, *Interest Convergence*, *supra* note 97.

100. Pope, *supra* note 43, at 459.



Clause, which courts have read broadly.<sup>101</sup> Courts' failure to embrace the broader interpretation of the prohibitory language in the Thirteenth Amendment has significant implications, as relying on the narrow interpretation of the Amendment's prohibitions essentially reinforces a form of chattel slavery and involuntary servitude in a manner that is only slightly less explicit than what occurred when the Black Codes proliferated after the Thirteenth Amendment's passage. This Article highlights one of the many ways a narrow reading of the Thirteenth Amendment's prohibitions, when considered in conjunction with the Amendment's expansive interpretation of the Punishment Clause, has managed to permit many of the troubling aspects of our criminal legal system to go unchallenged on this constitutional ground.

#### B. THE CONSEQUENCES OF FAILING TO DEFINE "PUNISHMENT"

"Slavery" and "involuntary servitude" are not the only critical terms that remain undefined in the Thirteenth Amendment text. "Punishment" likewise has no given definition.<sup>102</sup> In fact, reaching a consensus on what constitutes punishment remains subject to debate.<sup>103</sup> As a case in point, incarceration might seem like an obvious punishment, and yet the Supreme Court has deemed incarceration in certain circumstances not to be punitive.<sup>104</sup> Many philosophers and scholars have grappled with this question over time, but this Article relies on a definition of punishment I laid out in a previous article.<sup>105</sup> As I wrote then, punishment "is a state action subsequent to a criminal allegation, resulting in a substantial deprivation and/or obligation," that "substantially diminish[es] a person's well-being as a result of the...moral condemnation communicated by the state action."<sup>106</sup>

As a starting point, "every requirement imposed on a defendant as part of her criminal sentence" should be considered punishment.<sup>107</sup> That includes any period of incarceration, any criminal fine,

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101. *Id.* at 462; Balkin & Levinson, *supra* note 39, at 1460–62; Pope, *supra* note 2.

102. U.S. CONST. amend. XIII.

103. Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 105 n.34 (2014).

104. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 746–47 (1987) (finding that pretrial detention does not constitute punishment); *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (finding civil commitment as a sex offender to be non-punitive).

105. Lollar, *supra* note 103, at 106–22.

106. *Id.* at 106.

107. *Id.* at 108.

restitution obligation, forfeiture, community service obligation, or fee.<sup>108</sup> Any financial obligation imposed as part of a criminal sentence is “visibly marked as a criminal punishment by its presence on a judge’s Judgment and Commitment Order, and it, in turn, continues to mark the person owing restitution as a ‘criminal.’”<sup>109</sup> The articulation of particular requirements in the court’s sentencing order is the state action pursuant to a criminal allegation<sup>110</sup>—a conviction in this case—that results in either deprivations, such as those caused by incarceration, or obligations, such as financial penalties, or both.<sup>111</sup>

Punishment is more than just a formalistic identification of the technical parts of a criminal sentence, however. Another important component involves the implications of a particular court-imposed obligation or deprivation—the diminishment of a person’s well-being based on a desire on the part of legislatures, courts, and society to communicate moral judgment and condemnation through the state-imposed obligation or deprivation.<sup>112</sup> Courts, legislatures, employers, and others treat financial obligations imposed as part of a judgment and commitment order as punishment, as evidenced by the consequences that attach for failing to comply with these obligations.<sup>113</sup> They are not treated as a simple breach of contract. Turning specifically to the focus of this Article, financial debts imposed as part of a criminal sentence “can remain outstanding even after every other aspect of a criminal sentence has been completed, and [they] alone can be the source of a person’s continued disenfranchisement or failure to obtain certain employment opportunities,” or depriva-

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108. *Id.*

109. *Id.*

110. Financial penalties can also arise from a criminal case even without a criminal conviction. Those charged with crimes can be required to pay costs for using a public defender, *see* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1, 7 (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf) [<https://perma.cc/HN85-KSPL>]; costs of paying for incarceration, *see* Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 70–71 (2013); investigation of the case, *see* Lollar, *supra* note 103, at 142–47; and restitution in cases of acquitted or uncharged conduct, *see* Lollar *supra* note 103, at 131; among other costs. However, these financial penalties do require that a person is at least alleged to have committed a criminal act and often, but not always, the penalties are written into a judgment and commitment order, even if that order is attached to a distinct and separate crime of conviction. Lollar, *supra* note 103, at 108–10.

111. Lollar, *supra* note 103, at 107–09.

112. *Id.* at 109–11.

113. *Id.* at 123–25.

tion of other identified rights most people have.<sup>114</sup> Failure to pay criminal debt can prevent a person from serving on a jury, voting, getting certain employment licenses, and can lead to one's incarceration.<sup>115</sup>

The failure to have sufficient means to pay criminal debt is the critical link between legitimate punishment and what amounts to involuntary servitude. Those who have the ability to pay court-imposed financial obligations are not subject to the requirement that they either work to pay off their criminal debt or go to jail. Only those who have insufficient financial resources are subject to the continued obligation of labor to pay off ever increasing criminal debt, a task akin to Sisyphus perpetually rolling a boulder to the top of a hill, only to have it always fall short of reaching the top.

### 1. Exploring the Types of Financial Punishments

The types of financial penalties that can be found as part of a judge's sentencing order run the gamut: criminal fines owed to the state; fees owed to various governmental entities, usually as part of legislatively determined or court-imposed costs, many of which go toward funding various operations of the court system; restitution, which is owed to those individuals or entities found to have been financially, physically, or emotionally harmed by the criminal act; and forfeiture, the giving up of property or proceeds of a crime to the state.<sup>116</sup> Of that list, only criminal fines have been found by courts indisputably to be punishment.<sup>117</sup> Courts have split on whether restitution is punitive,<sup>118</sup> and the Supreme Court has determined that, in most instances, civil forfeiture is punitive.<sup>119</sup> Fees—more aptly called “user fees”<sup>120</sup>—are the transactional costs of doing business<sup>121</sup> and,

114. *Id.* at 108; *see also, e.g.*, *Jones v. Governor of Florida*, 975 F.3d 1016, 1028 (11th Cir. 2020) (en banc) (finding that Florida's laws requiring those with felony convictions to pay a fee to regain the right to vote do not violate the Twenty-Fourth Amendment).

115. Lollar, *supra* note 103, at 123.

116. *Id.* at 142–43.

117. *See, e.g.*, *S. Union Co. v. United States*, 567 U.S. 343, 349–50 (2012) (finding that fines undeniably are a type of punishment).

118. Lollar, *supra* note 103, at 121–22.

119. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 687–90 (2019) (declining to find in rem forfeitures as punishment); *Austin v. United States*, 509 U.S. 602, 619–22 (1993) (holding that forfeiture is a punishment).

120. *See BANNON ET AL.*, *supra* note 110, at 4–5.

121. *See Sharon Brett & Mitali Nagrecha, Proportionate Financial Sanctions: Policy Prescriptions for Judicial Reform*, CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH. 3 (2019), <https://papers.ssrn.com/abstract=3506268> [<https://perma.cc/W6MN-PEK2>]

applying the *Kennedy v. Mendoza-Martinez* test for ascertaining whether a penalty is civil or criminal,<sup>122</sup> most circuits have found fees are not punishment.<sup>123</sup> Both fines and fees are revenue-generating.

Despite the distinctions when it comes to each financial penalty's aim, the consequence of a failure to pay any one of these financial obligations is equally punitive. One need look no further than the recent *Jones v. Governor of Florida* decision to see how each of these financial obligations operates as punishment. After Florida's citizens voted overwhelmingly to add a constitutional amendment restoring the right to vote to those with felony convictions, the en banc Eleventh Circuit upheld a statutory requirement that only those who completed all the terms of their criminal sentence could have that right restored.<sup>124</sup> Litigation quickly arose contesting the conditioning of restoration of voting rights on the completion of the financial component of the sentence—the “fines, fees, costs, and restitution” portion of the sentence.<sup>125</sup> In upholding the Florida statute, the circuit court relied on the assertion that “requiring felons to complete their sentences is directly related to voting qualifications because imprisonment and parole are imposed as punishment for the crimes by which felons forfeited their right to vote.”<sup>126</sup> According to the

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(breaking down of the distinct financial sanctions in criminal cases).

122. 372 U.S. 144, 168–69 (1963). *Mendoza-Martinez* lays out various factors for courts to consider in determining whether a penalty amounts to punishment or not. They include: (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether it comes into play only on a finding of scienter”; (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”; (5) “whether the behavior to which it applies is already a crime”; (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and (7) “whether it appears excessive in relation to the alternative purpose assigned . . .” *Id.* According to the Court, however, “these factors must be considered in relation to the statute on its face,” *id.* at 169, and only the “clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Hudson v. United States*, 522 U.S. 93, 99–100 (1997) (internal quotations removed).

123. See *Taylor v. Sebelius*, 189 F. App'x 752, 756–57 (10th Cir. 2006); *Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 251–52 (4th Cir. 2005); *Tillman v. Lebanon Cnty. Correctional Facility*, 221 F.3d 410, 419 (3d Cir. 2000); *Taylor v. Rhode Island*, 101 F.3d 780, 782–84 (1st Cir. 1996); *Walp v. Bozarth*, 138 F.3d 951, 951 (5th Cir. 1998) (per curiam). *But see Jones v. Governor of Florida*, 975 F.3d 1016, 1038 (11th Cir. 2020) (“Court fees and costs imposed in a criminal sentence fall within this definition: they are part of the State's punishment for a crime. They are not taxes.”).

124. *Jones*, 975 F.3d at 1049.

125. *Id.* at 1025.

126. *Id.* at 1030.

court, “[m]onetary provisions of a sentence are no less a part of the penalty that society imposes for a crime than terms of imprisonment. Indeed, some felons face substantial monetary penalties but little or no prison time.”<sup>127</sup> The court made no distinction among the “fines, fees, costs, and restitution” that were at issue in the case.

Although the consequences attached to each of the aforementioned financial obligations is similar, fees imposed during the course of a criminal case should be separated out from other financial penalties a court may impose. Despite criminal fees operating as a form of punishment,<sup>128</sup> criminal fees are largely unmoored from any theory of punishment justifying their imposition. While fees arguably serve at least some deterrent and retributive functions, as Justice Scalia remarked with regard to criminal fines, “[t]here is good reason to believe that that fines, uniquely of all punishments, will be imposed in a measure out of accord with the[se] penal goals . . . .”<sup>129</sup> The same is true of fees, which are even more transparently revenue-generating than criminal fines.<sup>130</sup> As previously identified, criminal fees are user fees.<sup>131</sup> They are revenue-generating financial obligations.<sup>132</sup> Fees operate as a tax on those who are unfortunate enough to get charged with anything from a speeding ticket to murder.<sup>133</sup> To the extent they serve a *de minimis* deterrent and retributive aim, the cumulative amount of fees imposed in the average case almost always is “out of accord” with those punitive justifications.

Criminal fines, restitution, and forfeiture are more firmly rooted in retributive, deterrent, rehabilitative, and utilitarian justifications. Yet legislatures and courts have managed to expand even these financial penalties in a manner that is “out of accord” with “penal goals.”<sup>134</sup> However, with fines, restitution, and forfeiture, judges are

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127. *Id.* at 1031.

128. Fees operate as punishment by indebting someone to the court system when they cannot pay these costs and preventing them from exercising fundamental rights until the debt is repaid. *See supra* note 114 and accompanying text.

129. *Harmelin v. Michigan*, 501 U.S. 957, 978–79 n.9 (1991).

130. *See BANNON ET AL.*, *supra* note 110, at 4.

131. *Id.* at 1.

132. *Id.* at 1–2.

133. *See, e.g.*, Brief of Voting Rights Scholars as Amici Curiae Supporting Appellees at 30–31, 35–42, *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020) (en banc) (No. 20-12003), 2020 WL 4501544, at \*9–10, \*14–21 (discussing how requirement to pay all legal financial obligations before being permitted to vote amounts to reimposing a prohibited poll tax).

134. *See, e.g., Harmelin*, 501 U.S. at 978–79 n.9 (observing that fines are often unmoored from theoretical justifications for punishment); *Lollar*, *supra* note 103, at 99–105 (discussing expansion of restitution remedy in criminal context); *Honeycutt*

required to engage in a balancing of these theoretical justifications for punishment when determining the appropriate sentence to impose in a particular case and then to articulate the reasoning for their determination.<sup>135</sup> By contrast, fees are not specifically tailored. They are usually imposed pursuant to a pre-determined schedule, sometimes linked to the type of charge—e.g., felony or misdemeanor—but sometimes wholly unrelated to the type of offense.<sup>136</sup> Surcharges<sup>137</sup> and interest<sup>138</sup> that accrue to each of these financial penalties likewise are disengaged from the motivations that historically justify punishment.<sup>139</sup> Judges impose fees per the fee schedule;<sup>140</sup> rarely do they engage in a discussion as to what might justify them or take any steps to calibrate the fee relative to the offense.<sup>141</sup>

Despite these distinctions, each of these financial penalties operate as punishment and are generally accepted as such.<sup>142</sup> How, then, does one make the link from an authorized punishment, even one somewhat untethered from theoretical justifications, to an allegation that financial penalties are a form of involuntary servitude and slavery, circumventing the goals of the Thirteenth Amendment to abolish these practices? After all, any penalty imposed as a valid part of a criminal sentence is explicitly authorized by the constitutional text's provision that punishment pursuant to a valid criminal conviction is exempt from the preclusion of slavery and involuntary servitude.<sup>143</sup>

## 2. Financial Punishments as Involuntary Servitude

Tracing the imposition of financial penalties from the time of the Thirteenth Amendment's passage through to our current era, one

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v. United States, 137 S. Ct. 1626, 1635 (2017) (overturning circuit court ruling that defendant can be held jointly and severally liable through forfeiture for property his co-conspirator derived from a crime but he did not personally acquire); *cf.* Luis v. United States, 578 U.S. 5, 8–9 (2016) (holding that pre-trial freezing of untainted assets, in attempt to ensure money is available for forfeiture and restitution upon conviction, is a violation of a defendant's Sixth Amendment right to counsel).

135. *See, e.g.*, 18 U.S.C. § 3553(a) (requiring courts to consider multiple factors, including the “nature and circumstances of the offense” and “the need to provide restitution”).

136. BANNON ET AL., *supra* note 110, at 7, 9, 12.

137. *Id.* at 8, 10.

138. *Id.* at 17.

139. *See* Lollar, *supra* note 103, at 99–100.

140. BANNON ET AL., *supra* note 110, at 12.

141. *See* Lollar, *supra* note 103, at 97.

142. *See id.* at 122–23.

143. U.S. CONST. amend. XIII.

observes how our current practice of imposing exorbitant financial penalties on a person convicted of a crime, untailed to the person's ability to pay, is the latest manifestation of a century-and-a-half long end-run around the Thirteenth Amendment's prohibition on slavery and involuntary servitude. One can see the visible connection between the imposition of criminal fines and fees on a newly-freed Black American, arrested on a trumped up charge and quickly sentenced to a financial penalty they could never afford to pay, and the many Americans, disproportionate numbers of whom are Black and Brown, arrested and incarcerated for their failure to pay a financial penalty they, too, cannot afford. Practices then and now end up with the same result: large numbers of people, disproportionately Black, who are punished for failing to pay a financial obligation. Although the punishments have evolved over time—ranging from slavery-like hard labor to probation or parole with a requirement of work as a condition—the punitive element that attaches to nominally criminal conduct, creating a financial debt one is obliged to pay off through physical labor or bodily incapacitation, despite one's lack of means, is markedly similar.

Criminal financial obligations are a way to conscript the physical bodies of those convicted of crimes into physical and other types of labor that would be impermissible under the Thirteenth Amendment but for the presence of the Punishment Clause. Because the financial obligation—whether it be a criminal fine or a court-imposed fee—is part of the court's judgment and commitment order, it constitutes "punishment for crime whereof the party shall have been duly convicted" and thus is constitutionally justified given the lack of substantive meaning attributed to "slavery," "involuntary servitude," and "punishment."<sup>144</sup>

As a consequence of both the history of criminal financial obligations and the tethering of inability to pay criminal debt to either work or incarceration, the slipperiness of the line between financial penalties that have legitimate penological purposes and those that are aimed at revenue generation can seem irrelevant. After all, even legitimate financial penalties have been imposed for more than a hundred and fifty years as a method of getting those classified as criminal to either pay the money or, more often due to the indigence of most people charged with crimes, work off the debt. Revenue generation is not new. But its scope and pervasiveness are. Only by shifting our lens on criminal debt can we eliminate these vestiges of a

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144. U.S. CONST. amend. XIV, § 1.

race- and class-based legal system that punishes people for having little to no income and relies on their already limited resources to finance governmental and court functions.

## II. THE THIRTEENTH AMENDMENT CHALLENGE TO FINES AND FEES

In order to better understand how criminal financial obligations end up circumventing the Thirteenth Amendment's prohibitions, a closer examination of the history subsequent to the amendment's passage is imperative. In the words of Eric Foner,

[T]he Thirteenth Amendment . . . created a loophole that would later allow for the widespread leasing of convict laborers to plantations, mines, and industries in the South. It also allowed their use within prison walls by private contractors, and on chain gangs building roads, clearing land, and working on other public projects. . . . The prison population rose dramatically, and while the laws, on their face, had nothing to do with race, blacks comprised the overwhelming majority of those incarcerated.<sup>145</sup>

The Punishment Clause “reinstated enslavement through criminal sanction.”<sup>146</sup> As noted previously,<sup>147</sup> immediately subsequent to the Thirteenth Amendment's passage, many Southern states passed criminal laws specifically aimed at circumventing the prohibitions on chattel slavery contained in the new constitutional provision. Local sheriffs used those laws to impose unpayable financial obligations on the formerly enslaved which the newly “freed” then had to work to pay off.<sup>148</sup> Although the Black Codes technically fell by the wayside after a short period of time, the vestiges of that system continued to manifest in criminal legal systems throughout the next hundred years and are still prominent today. Over time, the legal structure regarding the imposition of crippling financial sanctions has evolved, but fines and fees imposed pursuant to charges in a criminal case for the financial benefit of either the state or a corporate entity continue to have similar effects. The inability to pay a financial obligation stemming from a criminal charge continues to shackle low-income, primarily Black individuals in a manner quite similar to the Black Codes and the technically race-neutral statutes that followed.

The use of criminal laws to compel labor did not arise with the Black Codes; it has a precedent both in English common law and the early legal landscape of the burgeoning United States.<sup>149</sup> From at

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145. FONER, *supra* note 56, at 50.

146. CHILDS, *supra* note 73, at 66.

147. *See supra* note 16 and accompanying text.

148. *See supra* note 16 and accompanying text.

149. *Timbs v. Indiana*, 139 S. Ct. 682, 682–87 (2019); *id.* at 693–95 (Thomas, J.,



least 1215, however, laws included provisions aimed at limiting the degree to which fines and fees could destroy a person's ability to earn a livelihood.<sup>150</sup> In fact, this concern was an animating feature of the Excessive Fines Clause.<sup>151</sup> Yet whether to factor in a person's ability to pay in determining whether a criminal financial penalty is excessive remains a contested issue in federal and state jurisprudence.<sup>152</sup> Consequently, compelled labor became a regular result of a failure to pay fines and fees.<sup>153</sup> Incarceration—debtors' prisons—was a last step, due to the general recognition that “the gaol will pay no debts.”<sup>154</sup> Nevertheless, both compelled labor and prison remained regularly utilized methods for addressing a person's failure to pay a debt.<sup>155</sup>

Over the course of the 1800s, though, the practice of using criminal laws to ensnare people that Whites deemed threatening increased. Simultaneous with the pre-Emancipation Black Codes, states outside the South began to rely on the criminal legal system as a method of racialized social control and compelled labor. For example, dating back to the 1820s, Native people from in and around what became Los Angeles were arrested on public order charges.<sup>156</sup> In 1836, the city council passed laws ordering “all drunken Indians” to be arrested on Sunday nights and forced to pay a fine or provide la-

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concurring). Likewise, British colonies passed vagrancy laws intended to criminally punish Indian, Chinese, and West African indentured servants who “illegally” left their work on plantations post-emancipation. Jon Connolly, *Indenture as Free Labor: Legal Change in the Era of Emancipation, 1842–75* (2021) (unpublished manuscript) (on file with author).

150. Connolly, *supra* note 149; see also Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin"*, 129 *YALE L.J.F.* 365, 365–68, 408 (2019).

151. *Timbs*, 139 S. Ct. at 687; Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 *CALIF. L. REV.* 277, 280–81, 321–23, 330–35 (2014).

152. See *Timbs*, 139 S. Ct. at 694 (Thomas, J., concurring); *City of Seattle v. Long*, 493 P.3d 94, 103 (Wash. 2021) (en banc); *United States v. Bajakajian*, 524 U.S. 321, 335–36 (1998); Colgan, *supra* note 151, at 319–20.

153. BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 79 (2002) (“[E]very colony north of the Potomac, with the possible exception of New Hampshire, permitted insolvent debtors to be bound to service to their creditors without their consent, typically for as long as seven years, the standard term for indentured servants.”).

154. *Id.*

155. *Id.*; *Timbs*, 139 S. Ct. at 687; cf. Abbye Atkinson, *Consumer Bankruptcy, Non-dischargeability, and Penal Debt*, 70 *VAND. L. REV.* 917, 931–32 (2017) (discussing how initially, subsequent to the 1898 Bankruptcy Act, criminal debts were seen as dischargeable in bankruptcy proceedings).

156. KELLY LYTTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965*, at 29–30 (2017).

bor on a public works project.<sup>157</sup> It amended its law in 1844 to order that “all unemployed Natives were to be arrested and sentenced to labor either on public projects or for private employers.”<sup>158</sup> Some of California’s first laws after it became a state in 1850 “targeted Native peoples for arrest, incarceration, and forms of convict labor.”<sup>159</sup> The state legislature enhanced vagrancy laws in the 1850s and 1860s “with provisions allowing for incarcerated Natives, in particular, to be auctioned to private employers;” some even specified that they could be auctioned “to the highest-bidding white employer.”<sup>160</sup> At one point, nearly twenty percent of Los Angeles’s Native population was arrested in a single night.<sup>161</sup>

The ultimate proliferation of debt slavery throughout the United States was grounded in a growing distrust of laborers, particularly nonwhite laborers, and a racialized view of those in the laboring class. In other words, fundamentally, “slavery and imprisonment for debt were inseparable.”<sup>162</sup> And yet, while the use of debt slavery occurred in different parts of the country leading up to and following Emancipation, the use of race-neutral criminal statutes in the Southern states to arrest Black Americans and funnel them into a cheap, dependable labor force predominated the national and congressional conversations and the legal landscape.<sup>163</sup> The pervasiveness and brutality of how Southern Whites used the criminal legal system to compel the labor of Black Americans captured the national attention, in large part because so many had recently fought and died in a war centered around this issue.<sup>164</sup> Against the backdrop of the Civil War and Emancipation, the focus on Southern neoslavery is not particularly surprising.

This next Section traces the legal path through which states used the Punishment Clause to circumvent the Thirteenth Amendment’s prohibitions. Beginning with the pre-and post-Emancipation Black Codes, this Section tracks the evolution of criminal court debt as a mechanism to force Black Americans and racialized “others” to labor in coercive conditions and keep them under the yoke of the criminal legal system.

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157. *Id.* at 33.

158. *Id.*

159. *Id.* at 36.

160. *Id.* at 38.

161. *Id.* at 39.

162. MANN, *supra* note 153, at 140; *see also id.* at 144.

163. *See infra* Part II.A.

164. *See infra* Part II.A.

## A. THE POST-AMENDMENT IMPOSITION OF FINANCIAL OBLIGATIONS

In the immediate aftermath of the Thirteenth Amendment's passage, many states—and not only the formerly slaveholding ones<sup>165</sup>—took advantage of the Punishment Clause, and the lack of delineation to the terms “slavery” and “involuntary servitude.” What has come to be called the “convict leasing system” persisted largely unchanged into the twentieth century, “embraced by the U.S. economic system and abided at all levels of government.”<sup>166</sup> Although the Black Codes provided the initial gateway for this system to come into being, they were not the only statutes that helped to pave a path forward to less objectionable but explicit forms of servitude, financial and otherwise, through race-neutral criminal laws. As a consequence, “the very amendment to the Constitution that was to have performed the miraculous conversion of ‘chattel into man’ actually facilitated his and her re-chattelization through imprisonment”<sup>167</sup> and the financial obligations that continued to shackle those who entered the criminal legal system.

Some Black Codes pre-dated the passage of the Thirteenth Amendment. For example, Maryland had a statute dating back to 1835 that allowed for the sale or lease of free Black men or women convicted of a crime.<sup>168</sup> A second version of those statutes, passed in 1858, required free Black individuals to be “sentenced to be sold as slaves for the period of not less than to no more than five years” upon their conviction of larceny of five dollars or more.<sup>169</sup> A robbery conviction gave the court discretion to sentence a free Black person “to confinement in the penitentiary, as now provided by law, or be sold either within or beyond the limits of the State, as a slave for the period of ten years.”<sup>170</sup>

After the passage of the Thirteenth Amendment, state legislatures enacted a series of new criminal laws, some of which explicitly relied on racial categories, adjusting the already existent Black Codes in a manner that permitted them to remain constitutional but still explicitly race-based. The new version of the Black Codes “required black persons to enter into wage contracts and prohibited vagrancy.”<sup>171</sup> Consistent with this view, a South Carolina senator declared,

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165. See, e.g., HERNÁNDEZ, *supra* note 156.

166. BLACKMON, *supra* note 18, at 5; see also HERNÁNDEZ, *supra* note 156, at 50–63.

167. CHILDS, *supra* note 73, at 64.

168. *Id.* at 59–60.

169. *Id.* at 60.

170. *Id.*

171. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND

“Freedom does not mean that you are not to work. It means that when you do work you shall have pay for it, to carry home to your wives and the children of your love.”<sup>172</sup> The Black Codes “imposed all sorts of disabilities [on Black Americans], including limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting.”<sup>173</sup>

Shortly after the passage of the Civil Rights Act of 1866, which voided the Black Codes, states began to pass broadly worded, facially neutral criminal laws which undermined attempts of the newly emancipated to establish a life free of compulsory labor.<sup>174</sup> States outside the Southeast took advantage of the permissiveness of vagrancy laws to incarcerate and compel labor from Native Americans, Mexican and Chinese immigrants, and white male itinerant laborers.<sup>175</sup> Thousands of people were arrested every year on vagrancy charges throughout the late nineteenth and early twentieth centuries—not only in Southern states, but in cities such as Chicago, New York City, and Los Angeles.<sup>176</sup> Within twenty years of Emancipation, states throughout the country had passed statutes which required compulsory labor as punishment.<sup>177</sup> Under these laws, “it did not matter . . . whether the genesis of dependency lay in the poor refusing offers of work or having none to accept; for beggars to subsist outside the matrix of contract obligations had become a crime.”<sup>178</sup> In other words, for a person to be unemployed and out of money was a criminal act.<sup>179</sup> Few seemed to see what labor advocate Ira Steward observed at the time, that “[t]here is a closer relationship between poverty and slavery than the average abolitionist ever recognized.”<sup>180</sup>

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THE MARKET IN THE AGE OF SLAVE EMANCIPATION 125–26 (1998).

172. *Id.* at 140.

173. FONER, *supra* note 56, at 48.

174. CHILDS, *supra* note 73, at 77 (“Rather than being blatantly discriminatory, the black codes of 1866, while carefully designed to control the freedmen, were on their face non-discriminatory. Through contract and vagrancy laws that applied [formally] to whites and blacks alike, they gave state and local officials all the authority they need[ed] to provide planters with a cheap and dependable labor force.” (quoting DONALD G. NIEMAN, *TO SET THE LAW IN MOTION* (1979))).

175. HERNÁNDEZ, *supra* note 156, at 36–39, 46–48, 65–66, 147–48.

176. *Id.* at 119, 147–48.

177. STANLEY, *supra* note 171, at 109.

178. *Id.* at 114.

179. *Id.* at 121.

180. *Id.* at 161.

In short, the U.S. economy relied heavily on criminal statutes to build and support both the agrarian economy that immediately followed the passage of the Emancipation Proclamation and the industrial economy that marked the early twentieth century. As Amy Dru Stanley explains, “vagrancy was the most common minor offense after drunkenness, assault, and disorderly conduct, and it was well known that the police easily secured vagrancy commitments when lacking evidence of more serious crimes.”<sup>181</sup> Vagrancy laws “revoked . . . [the] formal right of free choice [to contract] by enlisting punitive state power as an instrument of labor compulsion.”<sup>182</sup>

Although peonage or “debt slavery” became common across the thirty-seven states in the post-Civil War union,<sup>183</sup> the neoslavery that emerged in the Southern states played the biggest role in shaping the legal landscape related to our current system of criminal fines and fees. The harshness and brutality of the labor conditions and the pervasiveness of the efforts to circumvent the Thirteenth Amendment through criminal statutes in an effort to control Black labor and Black lives led to the key cases allowing for the continued use of “fines and penalties . . . for the benefit of the state” in the early twentieth century.<sup>184</sup> As Dorothy Roberts has observed, “today’s carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.”<sup>185</sup>

The Subsections that follow discuss how the criminal legal system has operationalized the criminalization of routine behaviors, encouraged the arrest of Black Americans for engaging in those behaviors, and imposed on them financial penalties they cannot afford to pay. The person convicted must then either work to pay off the criminal debt in a manner that typically financially benefits the state or a private entity, sometimes as part of their incarceration and sometimes with incarceration used as a threat to induce the person to labor. Although the working conditions have evolved over time, the fundamental premise of this system remains the same. These Subsections track that evolution through the surety system and the re-

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181. *Id.* at 119.

182. *Id.* at 121; HERNÁNDEZ, *supra* note 156, at 57–59, 61, 141, 148.

183. Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1611–18 (2015).

184. *Id.* at 1627 (“[F]ines or monetary penalties as [the] condition of the sentence to punish for the commission of the criminal offense itself . . . and user fees to raise revenue for the state.”).

185. Roberts, *supra* note 8, at 7.

quirement of hard labor, chain gangs, and the trilemma of pay/work/jail<sup>186</sup> present in our current system.

### 1. The Surety System and Debt Slavery

After the Civil Rights Act of 1866, Southern states passed legislation “intended to criminalize routine black behaviors” or violations of racial etiquette,<sup>187</sup> including laws making the following activities crimes: miscegenation, homosexuality, illegal voting, false pretense (for leaving the employ of a white farmer before the end of crop season), obscene language, petty theft, selling whisky, violating a contract with a white employer, vagrancy, selling cotton after sunset, carrying a concealed weapon, bastardy, and gambling.<sup>188</sup> As Blackmon has noted, “Blacks who fell into the disfavor of white officials anywhere in the South could be swept into the penal system on the most superficial pretense.”<sup>189</sup> In Mississippi, for example, the crime of grand larceny in the form of hog-stealing, usually committed by those who needed food to eat, became “one of the key ‘color-blind’ statutory pillars for the state’s penal reenslavement and murder of thousands of black people after its passage in 1876.”<sup>190</sup> In short, the law “charts the process by which free black people were converted into commodifiable units of unfree labor and sadistic pleasure through banal courtroom bureaucratic rituals such as the bail or fine/fee hearing.”<sup>191</sup>

Arrests under these statutes were given the “imprimatur of judicial propriety,” even though lower courts often delegated their duties to store owners and large landowners who were designated justices of the peace, notaries, and county magistrates.<sup>192</sup> According to Douglas Blackmon,

So long as whites performed at least the bare rituals of due process and cloaked their actions behind claims of equality, the crudest abuses of blacks and violations of their protections under law would rarely ever be challenged. The neo-slavery of the new century relied on a simple but extraordinary ruse that the Supreme Court’s ruling [in *Plessy v. Ferguson*] implicitly endorsed.<sup>193</sup>

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186. Zatz, *Get to Work*, *supra* note 16, at 325.

187. BLACKMON, *supra* note 18, at 67.

188. *Id.* at 99.

189. *Id.* at 102.

190. CHILDS, *supra* note 73, at 63.

191. *Id.* at 79.

192. BLACKMON, *supra* note 18, at 127.

193. *Id.* at 147.

Many of those arrested confessed judgment in order to avoid a slave mine and suffer the consequences of a labor contract. According to Blackmon, “[t]he records of thousands of prosecutions show it was vastly more likely that an arrested black man—knowing he had no possibility of true due process, or acquittal—agreed to confess judgment specifically to avoid the far more dire alternatives that he knew lay in wait.”<sup>194</sup> As discussed below, however, it was far from clear-cut which option would prove to be more dire.

Those who did choose to fight the charges faced a largely foregone outcome, as the legal system required little for a conviction:

On sight or upon a complaint, officers . . . had a duty to arrest all offenders and carry them to the nearest municipal justice or police court, where, without money for bail, they were locked up until the day of trial. No warrant was required for the arrest, and the suspects were usually tried without a jury . . . . [S]uspects were presumed guilty unless they could rebut police testimony with a “good account of themselves.”<sup>195</sup>

At trial, “[c]ases often took ‘less than a minute.’ Police officers read the charges, and the magistrate delivered verdicts instantly as the prisoners came before him.”<sup>196</sup> If convicted, the defendant could post bond of several hundred dollars, appeal to the lowest state court, and request a jury trial.<sup>197</sup> Few people took advantage of these options and those who did were usually found guilty again.<sup>198</sup>

Courts collected fees for “serving subpoenas, foreclosing on delinquent loans, arresting and testifying against criminal defendants” on top of the imposition and collection of fines.<sup>199</sup> In some places, the sheriff’s entire compensation came from those fees, which were paid into the county fine and forfeiture fund.<sup>200</sup> Moneys imposed and collected also went to almost any white person who played a part in the seizure and conviction of each prisoner, including the court clerk, the town solicitor, jury members, and witnesses.<sup>201</sup> Each were issued redeemable warrants to exchange for money as the prisoner’s labor paid down the fine.<sup>202</sup> They could then cash them in for money accumulated in the “county coffers.”<sup>203</sup> Although this revenue-

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194. *Id.* at 67.

195. STANLEY, *supra* note 171, at 116.

196. *Id.* at 117.

197. *Id.*

198. *Id.*

199. BLACKMON, *supra* note 18, at 306.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

generating criminal legal system was by no means new or unique, the degree to which it was used, and the way in which racial dynamics shaped its usage, highlight how troubling a system it became in the years after Emancipation.

As mentioned previously, two options typically awaited someone who was convicted under this system: the person might be sold into a slave mine, or they could be hired out under private prison labor contracts.<sup>204</sup> The labor contract system “was touted as a ‘humane’ contractual avenue by which criminally branded black subjects could avoid the brutalities of the chain gang and convict lease camp or standing . . . before a local judge facing the possibility of being sent to a ‘hell on earth.’”<sup>205</sup> This surety system

involved a putatively consensual agreement whereby an individual white neoslave buyer, euphemistically described as the “surety,” would post the exorbitant fees and costs associated with the black subject’s alleged petty crime in exchange for his “confession of judgment.” Upon signing a court-approved contract with the white bondholder, the black subject was legally conjured from a would-be public slave into a publicly borne private peon who was forced to supply unfree labor . . . to the surety until the amount posted had been “worked off.”<sup>206</sup>

The men sold into labor contracts became uncompensated laborers, subject to shackles, imprisonment, and lashing.<sup>207</sup> The “contracts” to which these men were bound could last indefinitely, as white farmers would claim that Black laborers were continually incurring additional debts through necessities such as clothing, housing, doctor’s visits, and the like.<sup>208</sup>

While on the surface more appealing than hard labor camps, the labor contracts were equally dangerous. As Professor Childs has observed, “post-1865 law presented virtually no limit to the pain, terror, and physical/psychic rupture the racial state could visit upon the ‘duly’ convicted ‘Negro.’”<sup>209</sup> Although further prosecution and time on a chain gang could await someone accused of violating their penal labor contract, worse fates often accompanied those leased out pursuant to sureties.<sup>210</sup> The Department of Justice received thousands of complaints describing rapes, kidnappings, whippings, and even mur-

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204. STANLEY, *supra* note 171, at 116.

205. CHILDS, *supra* note 73, at 82.

206. *Id.*

207. BLACKMON, *supra* note 18, at 68.

208. *Id.*

209. CHILDS, *supra* note 73, at 91.

210. *Id.* at 87.



ders at the hands of the private sureties.<sup>211</sup> In at least two Southern states, Alabama and Georgia, these surety arrangements were explicitly sanctioned by statutes which guaranteed that

the individual convict-lessee would receive a return on his investment by making the prisoner's breach of contract with the surety a criminal offense. In such cases, the black subject could, at the discretion of the court, either be re-arrested and sent to the chain gang or rebound to a private master for an even longer period than stipulated in the original lease.<sup>212</sup>

The state was far from a disinterested party in these private contracts. Rather, "local municipalities, courts, police, lawyers, and clerks were actually awash in money and power generated at every state of this particular vector of the overall trade in criminalized southern black bodies."<sup>213</sup> The United States acknowledged as much in a brief it filed with the Supreme Court in the early 1900s:

We concede . . . that when a sentence to hard labor has been imposed it is entirely competent for the State either to employ the convict for itself or hire him out for its profit. His time and labor have been confiscated by the State and, within Constitutional limits, it may use them as it sees fit.<sup>214</sup>

Consequently, an organized market for prison labor emerged, primarily consisting of large blocks of African Americans who owed a court debt.<sup>215</sup> The system was predicated "on the absolute defenselessness of black men to the legal system, and the near certainty that most would be unable to bond themselves out of jail or pay fines imposed upon them."<sup>216</sup> Convicted Black laborers were available to the highest bidder.<sup>217</sup> In a manner not unsimilar to today,<sup>218</sup> sheriffs

211. *Id.*; BLACKMON, *supra* note 18, at 299–309.

212. CHILDS, *supra* note 73, at 82.

213. *Id.* at 86.

214. *Id.* at 90–91 (citing Brief for United States at 20, *United States v. Reynolds*, 235 U.S. 133 (1914)) (emphasis omitted).

215. BLACKMON, *supra* note 18, at 64.

216. *Id.* at 66.

217. *Id.* at 64.

218. *Civil Rights Groups Sue 49 Alabama Sheriffs for Access to Public Records Showing How Sheriffs Personally Profit from Funds Allocated for Feeding People in Jail*, ALA. APPLESEED CTR. FOR L. & JUST. (Jan. 8, 2018), <https://www.alabamaappleseed.org/news/advocacy-news/civil-rights-groups-sue-49-alabama-sheriffs-access-public-records-showing-sheriffs-personally-profit-funds-allocated-feeding-people-jail> [<https://perma.cc/7ZQR-S8GX>]; Jay Reeves, *Alabama Sheriff Kept Over \$600k Meant for Inmates' Food, Then He Lost Reelection*, USA TODAY (June 7, 2018), <https://www.usatoday.com/story/news/politics/2018/06/07/alabama-sheriff-kept-thousands-meant-inmates-food-lost-reelection/679929002> [<https://perma.cc/9BV4-JWBT>]; Mary Papenfuss, *Alabama Sheriff Pocketed \$1.5 Million in ICE Funds for Immigrant Food: Report*, HUFFPOST (Jan. 1, 2019), [https://www.huffingtonpost.ca/entry/alabama-sheriff-pocketed-federal-funds-immigrant-inmate-food\\_n\\_5c29a81de4b0407e908400a8](https://www.huffingtonpost.ca/entry/alabama-sheriff-pocketed-federal-funds-immigrant-inmate-food_n_5c29a81de4b0407e908400a8) [<https://perma.cc/C3PX>].

were motivated to arrest and convict as many people as possible, and to feed them “as little as they could get away with,” because sheriffs were permitted to pocket whatever leftover money they had from the daily feeding fees paid for each prisoner by the state.<sup>219</sup>

For example, in Alabama, “[s]ince nearly all the arrests in the county were of black men who were soon shipped to Pratt Mines,” the sheriffs felt the prisoners “required little more than cornmeal mush and pork fat,” prepared by a local sheriff’s wife, to sustain them until they were taken to the mines.<sup>220</sup> Unlike white men who were also detained in the jail, Black prisoners were usually “itinerants with no local families or white landowners to speak for them.”<sup>221</sup> Thus, any complaints they had about the conditions were largely unavailing.<sup>222</sup>

As early as the 1880s, the misdemeanor “convict leasing” system “significantly funded the operations of government by converting black forced labor into funds for the counties and states.”<sup>223</sup> For example, in 1888, “convict leasing” in Alabama generated upwards of \$120,000 for the government; without that income, the tax revenue and state budget was only a little above \$1 million.<sup>224</sup> In states with this system, the number of arrests went up when the “convict leasing” system began, and the criminal legal system became a key source of revenue for these Southern states.<sup>225</sup> A sociologist writing in 1901 “painted a striking picture of a corrupt, vindictive, and racist criminal justice system that tailored its discriminatory laws through the county fee system, the all-white jury, convict leasing, and the prison farm for the purposes of extracting financial profits from the bodies of black men, women, and children.”<sup>226</sup> She estimated that prison profits ranged from \$30,000 to \$150,000 per state.<sup>227</sup>

Eventually, states began to officially abolish state-sponsored forced labor. Tennessee led the way, starting in 1893, and was followed by South Carolina in 1900, Louisiana in 1901, Mississippi in

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219. BLACKMON, *supra* note 18, at 65, 100.

220. *Id.* at 306.

221. *Id.*

222. *Id.*

223. *Id.* at 68–69.

224. *Id.* at 95.

225. *Id.* at 79–81.

226. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 89 (2010) (citing Frances Kellor, *The Criminal Negro: A Sociological Study*, ARENA, Jan.–May 1901, at 60–61).

227. *Id.* at 89 n.10.

1907, Georgia in 1909, and Arkansas and Texas by 1912.<sup>228</sup> Yet the reality was more complex. Georgia and the Carolinas, among other states, prohibited those who were convicted of crimes from being leased to private corporations, but authorized an “improved” system of allowing prisoners to work on chain gangs.<sup>229</sup> The leasing of prisoners by county sheriffs likewise continued unabated.<sup>230</sup> The federal government attempted several prosecutions of Alabama officials for peonage between 1900 and 1909, but every one of them failed.<sup>231</sup>

Consequently, by the late 1920s, increasing numbers of prisoners were “pressed into compelled labor for private contractors” through “local customs and informal arrangements in city and county courts.”<sup>232</sup> As they were in the late 1800s, in the early twentieth century, Black individuals were arrested for possessing or selling alcohol, vagrancy, gaming, leaving the farm of an employer without permission, and interracial adultery.<sup>233</sup>

The move away from compelled labor for third parties came in a series of cases from 1905 to 1944, in which the Supreme Court “consistently found Thirteenth Amendment infirmity when workers faced public or private violence for failing or refusing to work for an employer to whom they owed a debt.”<sup>234</sup> A 1914 case, *United States v. Reynolds*, was the first U.S. Supreme Court case to specifically address the issue of criminal sureties.<sup>235</sup> The facts in *Reynolds* illustrate a common scenario for Black Americans of the time:

Ed Rivers, having been convicted in a court of Alabama of the offense of petit larceny, was fined \$15, and costs, \$43.75. The defendant Reynolds appeared as surety for Rivers, and a judgment by confession was entered up against him for the amount of the fine and costs, which Reynolds afterwards paid to the state. On May 4, 1910, Rivers, the convict, entered into a written contract with Reynolds to work for him as a farmhand for the term of nine months and twenty-four days, at the rate of \$6 per month, to pay the amount of fine and costs. The indictment charges that he entered into the service of Reynolds, and under threats of arrest and imprisonment if he ceased to perform such work and labor, he worked until the 6th day of June, when he refused to labor. Thereupon he was arrested upon a warrant issued at the instance of Reynolds from the county court of Alabama, on the

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228. BLACKMON, *supra* note 18, at 351.

229. *Id.* at 352.

230. *Id.*

231. *Id.* at 355 (discussing that forty-three peonage indictments were served during this period, with all ending in acquittal, dismissal, suspended sentence, or presidential pardon).

232. *Id.* at 375.

233. *Id.*

234. Zatz, *A New Peonage*, *supra* note 16, at 935.

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

charge of violating the contract of service. He was convicted and fined the sum of 1 cent for violating this contract, and additional costs in the amount of \$87.05, for which he again confessed judgment with G. W. Broughton as surety, and entered into a similar contract with Broughton to work for him as a farm hand at the same rate, for a term of fourteen months and fifteen days.<sup>236</sup>

The defendants claimed this was a viable contract, entered into by two private parties and thus not subject to Thirteenth Amendment protections. The Court rejected this argument, making clear that even under the guise of a voluntarily entered contract, the Thirteenth Amendment protects against the threat of additional criminal sanctions for someone unwilling to labor:

When the convict goes to work under this agreement, he is under the direction and control of the surety, and is in fact working for him. If he keeps his agreement with the surety, he is discharged from its obligations without any further action by the state. This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done.<sup>237</sup>

In short, “exposure to criminal prosecution—and ultimately to physical custody—constitutes an alternative insufficient to bless a choice of work as ‘voluntary.’”<sup>238</sup>

Despite a ruling in favor of the prisoners, the case is remarkable for how convincingly the Court “turned a blind eye to the actual circumstances of terror and physical jeopardy faced by the supposedly willful agent whom it unconsciously refers to as ‘the convict.’”<sup>239</sup> As Childs observed, “For the court, the fact that, under the terms of the original contract, Rivers faced a theoretically greater duration of labor at the hands of Reynolds than he would have while chained to other black men . . . qualified the system of surety as decidedly worse than its public counterpart.”<sup>240</sup> The Court nowhere acknowledges the danger, hardship, and pain that were hallmarks of the surety system.

The decision is also notable for its failure to recognize the state’s pecuniary interest in the compelled labor system: “[F]ar from being disinterested referees of the surety arrangement, local municipali-

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236. *Id.* at 139–40.

237. *Id.* at 146.

238. Zatz, *A New Peonage*, *supra* note 16, at 939.

239. CHILDS, *supra* note 73, at 86 (citing SADIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 164–206 (1997)).

240. *Id.* at 87.

ties, courts, police, lawyers, and clerks were actually awash in money and power generated . . . [by] the overall trade in criminalized . . . black bodies.”<sup>241</sup> Rather, the Court obtusely declares,

The terms of that contract are agreed upon by the contracting parties, as the result of their own negotiations. The statute of the state does not prescribe them. It leaves the making of contract to the parties concerned, and this fact is not changed because of the requirement that the judge shall approve of the contract. When the convict goes to work under this agreement, he is under the direction and control of the surety, and is in fact working for him. If he keeps his agreement with the surety, he is discharged from its obligations without any further action by the state.<sup>242</sup>

Thus, although *Reynolds* is significant because it found the surety system unconstitutional, it simultaneously entrenched the state’s right to “publicly reenslave the black population and to make penal enslavement of all bodies stigmatized as ‘criminal’ a matter of public investment to the end of private profits . . . that both corporate interests and putatively disinterested purveyors of the law continue to enjoy.”<sup>243</sup> As the *Reynolds* Court specifically noted in closing,

There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the 13th Amendment, and such punishment expressly excepted from its terms. Of course, the state may impose fines and penalties which must be worked out for the benefit of the state, and in such manner as the state may legitimately prescribe.<sup>244</sup>

Only when the state has “taken the obligation of another for the fines and costs,” “accepted the obligation of the surety,” and permitted the “convict” to be “kept at labor” “under pain of recurring prosecutions,” is the practice unconstitutional.<sup>245</sup>

The exception created by the Thirteenth Amendment’s text, in conjunction with the Court’s reading in *Reynolds* permitting the state to “impose fines and penalties which must be worked out for the benefit of the state . . . in such manner as the state may legitimately prescribe”<sup>246</sup> has allowed governments to continue to require labor of those convicted of crimes as a manner to pay off debts stemming from the criminal case. The only requirement is that the benefit, either directly or indirectly, accrues to the state. *Reynolds*’ language allowing the state to determine in what form those work requirements

241. *Id.* at 86.

242. *Reynolds*, 235 U.S. at 146.

243. CHILDS, *supra* note 73, at 92.

244. *Reynolds*, 235 U.S. at 149 (first citing *Clyatt v. United States*, 197 U.S. 207 (1905); then citing *Bailey v. Alabama*, 219 U.S. 219 (1911)).

245. *Id.* at 149–50.

246. *Id.* at 149 (first citing *Clyatt v. United States*, 197 U.S. 207 (1905); then citing *Bailey v. Alabama*, 219 U.S. 219 (1911)).

manifest has given governments and courts essentially carte blanche to impose financial penalties and then require a person to work those off, to the benefit of third parties as well as the state, so long as the state is making the call. The steps from the unpaid labor of slavery to the “convict leasing” system to the imposition of hard labor to our current system of requiring someone to do sufficient work to pay their criminal debt are incremental, but they can easily be overlooked.

## 2. Chain Gangs

The coercive imposition of criminal court costs on Black Americans as a mechanism to simultaneously keep them under state control and profit financially from their labor continued throughout the twentieth century. The turn of the century and early 1900s marked a transition into an era that began to explicitly rely on crime statistics as a way of associating Blackness with dangerousness. That shift provided continuing justification for the high arrest and conviction rates of Black Americans and, along with legal and technological change, encouraged the evolution from work in the context of “convict leasing” to hard labor in the form of chain gangs. Relying on “arrest rates and prison data,” which were “considered objective, non-partisan, race-neutral, and even post-racial,” “[i]deas about black criminality” quickly became a “part of slavery’s legacy of justifying why black bodies [continued to be] used for white wealth creation.”<sup>247</sup> Against the legacy of slavery and its immediate aftermath, the marshaling of statistics “to prove black inferiority” allowed many to easily accept a view that society was now “free of racism,” and so “African Americans had no excuse for their alleged crimes.”<sup>248</sup> As Khalil Gibran Muhammad meticulously documented, “the statistical discourse on black criminality from the 1890s forward was a modern invention that encapsulated northern and southern ideas about race and crime.”<sup>249</sup>

Several contemporary scholars noted that the supposed crime waves stemming from the Great Migration of Black Americans from southern towns to northern cities related more to “northern policing of public order violations and vice.”<sup>250</sup> Resembling the reality of nearly a half-century earlier, amidst few job prospects for non-

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247. MUHAMMAD, *supra* note 226, at xiv.

248. *Id.* at xiv, xv.

249. *Id.* at 5.

250. *Id.* at 233.

whites,<sup>251</sup> police in cities like Pittsburgh and Cleveland “picked up” Black Americans and “sent [them] to prison on the mere charge of suspicion,” often for “such offenses as suspicious characters, disorderly conduct, drunkenness, keeping and visiting disorderly houses, and violations of city ordinances.”<sup>252</sup> Philadelphia police likewise had a practice of “arresting ‘suspicious characters,’” including people who were waiting on the street because they could not find work and had recently been evicted, a disproportionate number of whom were Black.<sup>253</sup>

In the mid-1920s, the ongoing attempts to challenge the linkage between Blackness and criminality turned a corner, as prominent criminologists finally drew attention to the lack of reliable crime statistics. A prominent set of federal prison reports from that era note: “The high commitment rate shown for Negroes is probably in some degree due to the combination of lower economic status, less frequent use of other forms of penal treatment for Negroes, and unfavorable race attitudes on the part of the white race.”<sup>254</sup>

This public challenge to the long-accepted notion that race played a significant role in producing criminality, combined with the events of World War II a little over a decade later, created some impetus to end the more explicitly coercive practices from the era of “convict leasing.” According to Douglas Blackmon, World War II changed how Americans thought about slavery.<sup>255</sup> In conjunction with the evolution of Supreme Court jurisprudence and agricultural advances lessening the need for manual labor in the cotton, tobacco, and soybean fields, the system of “convict leasing” for mine and agricultural work became less economically profitable.

Chain gangs became emblematic of an evolving way of using “convict labor.” Rather than using sureties in an attempt to get around the Thirteenth Amendment’s prohibitions through “volun-

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251. *Id.* at 166–67.

252. *Id.* at 233.

253. *Id.* at 247.

254. *Id.* at 243 (first citing U.S. DEP’T OF COM., BUREAU OF CENSUS, PRISONERS IN STATE AND FEDERAL PRISONS AND REFORMATORIES 1929 AND 1930, at 31 (1932); then citing U.S. DEP’T OF COM., BUREAU OF CENSUS, PRISONERS IN STATE AND FEDERAL PRISONS AND REFORMATORIES 1931 AND 1932, at 19 (1934)).

255. “Millions of soldiers—black and white—had witnessed the horror of racial ideology exalted to its most violent extremes in Nazi Germany. Thousands of African American men who returned as fighting men, unwilling to capitulate again to the docile state of helplessness that preceded the war, abandoned the South altogether or joined in the agitation that would become the civil rights movement.” BLACKMON, *supra* note 18, at 381.

tary” labor contracts, hard labor that benefitted the municipality or state simply became a normal part of a criminal sentence. Most of the statutes authorizing punishment by work on chain gangs specified that the work was to be on “public roads”<sup>256</sup> or for “public works.”<sup>257</sup> Jailers imposed punishment for failing to work via hitching posts and the withholding of water and food.

Within prison systems that utilized hard labor for the benefit of the state, those incarcerated often were divided into two groups—those who worked on chain gangs and those who were sent to the penitentiary.<sup>258</sup> Justice Douglas recognized the discrepancy between the two groups in a dissenting opinion from a denial of certiorari in 1972:

South Carolina creates two classes of prisoners, those who work on the chain gang, and those who are sent to the penitentiary. The latter are under the Department of Corrections and have counseling, psychiatric service, and educational and vocational programs, although each penitentiary does not have all the programs that are available within the system. Those assigned to the chain gang have none of the rehabilitative services made available by the Corrections Department. As I have said, there are no statutory standards for the County Supervisor to use in determining where each man goes; the decision is entirely within his discretion to treat one type of offender different from another though the two are in the same class, and though each be found guilty of the same crime and sentenced to serve the same number of years.<sup>259</sup>

Not surprisingly, an estimated eighty percent of those sent to work on chain gangs in some Southern states were Black.<sup>260</sup> And, as Justice Douglas averred in his dissent, no theory of punishment justifies the use of chain gangs.<sup>261</sup>

As of 1995, according to the Court writing in 2002, Alabama was the only state that still “followed the practice of chaining inmates to one another in work squads. It was also the only State that handcuffed prisoners to ‘hitching posts’ if they either refused to work or otherwise disrupted work squads.”<sup>262</sup> A lawsuit seems to have temporarily abated the practice in Alabama, but shortly thereafter, Ari-

256. See, e.g., GA. CODE § 27-2506 (1933).

257. See, e.g., *id.*

258. *McLamore v. South Carolina*, 409 U.S. 934, 936 (1972) (Douglas, J., dissenting).

259. *Id.* The plaintiff in this case was challenging the use of chain gangs as cruel and unusual punishment under the Eighth Amendment. *Id.* at 935.

260. Lisa Kelly, *Chain Gangs, Boogeymen and Other Real Prisons of the Imagination*, 5 RACE & ETHNIC ANC. L.J. 1, 1 n.3 (1999).

261. *McLamore*, 409 U.S. at 936.

262. *Hope v. Pelzer*, 536 U.S. 730, 733 (2002).



zona reimplemented chain gangs.<sup>263</sup> Florida, Iowa, Nevada, and Wisconsin all followed, and as of 1999, Tennessee and Oklahoma each had at least one county that still used chain gangs.<sup>264</sup> At least three states—Arizona, Iowa, and Nevada—still authorize chain gangs, Iowa and Nevada through the presence of statutes permitting their use.<sup>265</sup> Nevada’s statute explicitly contemplates that a person will work doing hard labor in a chain gang to pay off financial penalties imposed as a part of a criminal case:

1. Any person upon whom any fine or penalty shall be imposed may, upon the order of the court before whom the conviction is had, be committed to the county jail or the city jail, or to such other place as may be provided by the city for the incarceration of offenders, until such fine or penalty shall be fully paid.

2. The city council shall have power to provide by ordinance that every person committed shall be required to work for the city at such labor as the person’s strength will permit, not exceeding 8 hours each working day; and for such work the person so employed shall be allowed \$4 for each day’s work on account of such fine. The council may provide for the formation of a chain gang for persons convicted of offenses in violation of the ordinances of the city, and for their proper employment for the benefit of the city, and to safeguard and prevent their escape while being so employed.<sup>266</sup>

To this day, the U.S. Supreme Court has not condemned such hard labor on chain gangs,<sup>267</sup> and both it and lower federal courts have only sanctioned such practices in individual cases based on specific facts, and generally on Eighth Amendment grounds. For example, in a 2002 case, the Supreme Court found that the specific conditions to which one particular detainee had been subjected, which included being handcuffed to a hitching post on more than one occasion—once for seven hours with no bathroom breaks and two water breaks in the blazing sun—amounted to an Eighth Amendment violation against “wanton and unnecessary” punishment.<sup>268</sup> Thirteenth Amendment

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263. Louise Boyle, *America’s Only Female Chain Gang: The Women Who Pull Weeds and Bury Unclaimed Bodies in Arizona Desert to Avoid 23 Hours of Lock-Down in Country’s ‘Toughest Jail’*, DAILY MAIL (U.K.), (June 29, 2012), <https://www.dailymail.co.uk/news/article-2166260/Americas-female-chain-gang-pictured-pulling-weeds-burying-unclaimed-bodies-100F-Arizona-desert.html> [<https://perma.cc/K9H2-W5PK>].

264. Kelly, *supra* note 260, at 1 n.2.

265. IOWA CODE ANN. § 904.701(1) (West 1996); NEV. REV. STAT. § 266.590 (1967).

266. NEV. REV. STAT. § 266.590, subdiv. 1–2 (1967).

267. See *McLamore v. South Carolina*, 409 U.S. 934, 936 (1972) (Douglas, J., dissenting).

268. *Hope v. Pelzer*, 536 U.S. 730, 734–35, 738 (2002); see also *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (finding that several forms of corporal punishment violated Eighth Amendment, including “handcuffing inmates to the fence and to cells for long periods of time, . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods”); *Austin v.*

arguments were markedly absent from that case and other similar challenges, unsurprisingly given *Reynolds* and the Punishment Clause.

### 3. Modern Manifestations

The termination of the surety system in the early twentieth century and the broad disintegration of hard labor as a regular part of criminal punishment have given way to a more explicit set of rules imposing financial obligations on those convicted of crimes. Rather than imposing fines and fees that one is required to “pay off” via some type of physical work, as we still see authorized in Nevada, our modern court system has various ways in which work is required, sometimes explicitly and other times implicitly, to pay off financial obligations imposed in a criminal case. Putting aside the incentives detainees have to work while incarcerated—to have funds for basic services such as purchasing soap with which to clean one’s body, making phone calls to loved ones, purchasing stamps for letters or food for substance and flavor, among other necessities—most criminal legal systems still require work in order to pay off the legal financial obligations imposed as part of the sentence in one’s case.<sup>269</sup> Courts and other government agencies still are funded in part by the fines and fees that people with convictions must work off in order to pay. A failure to pay these legal financial obligations often results in incarceration. Consequently, the end-run around the Thirteenth Amendment’s prohibition on slavery and involuntary servitude through reliance on the Punishment Clause has continued fairly unabated since immediately following its passage.

Although forced labor is now less common than it was, being required to work doing hard labor or, as Michele Goodwin has noted, getting paid “cents on the dollar” to do grueling work such as fighting massive fires in California with little training,<sup>270</sup> is not uncommon. Of

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Hopper, 15 F. Supp. 2d 1210, 1215 (M.D. Ala. 1998), *abrogated by* *Hope v. Pelzer*, 240 F.3d 975, 978 n.7 (11th Cir. 2001), *rev’d on other grounds*, 536 U.S. 730 (2002) (finding Department of Corrections’ use of a hitching post unconstitutional under the Eighth Amendment “only as to the *manner* in which the hitching post is generally used”).

269. See, e.g., *State v. Brady*, 2013 UT App 102, ¶ 4–7, 300 P.3d 778, 779–80 (affirming probation revocation for defendant’s failure to make a good faith effort to pay restitution to victims).

270. Goodwin, *supra* note 16; see also Eric Escalante, *California’s Inmate Firefighters: 9 Things to Know*, ABC10 (Oct. 29, 2019), <https://www.abc10.com/article/news/local/wildfire/california-inmate-firefighters/103-0fdca69-2f30-4abe-99a1-838364d395e6> [<https://perma.cc/ER5E-F56V>]; Isabelle Chapman, *Prison Inmates Are Fighting California’s Fires, but Are Often Denied Firefighting Jobs After Their Re-*

course, many of those who volunteer<sup>271</sup> to engage in this labor while incarcerated are electing to do so in order to earn both work experience<sup>272</sup> and to reduce the amount of time left in their sentence.<sup>273</sup> Nevertheless, more than 600,000, and likely closer to one million, detainees nationwide work full time in jails and prisons,<sup>274</sup> and the work these detainees do financially benefits both “private, multi-million and billion-dollar industries” and the state.<sup>275</sup> Fighting massive wildfires, building office furniture,<sup>276</sup> or making body armor for the U.S. military<sup>277</sup> so as to financially benefit third parties and the state is yet another version of the hard labor we have seen in the “convict leasing” system and chain gangs. The courts have validated requirements that those who are incarcerated engage in labor as part of a criminal sentence.<sup>278</sup> Thus, as Goodwin points out, a “substantive quality of slavery [is] embedded in the prison economy”<sup>279</sup>

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*lease*, CNN (Oct. 31, 2019), <https://www.cnn.com/2019/10/31/us/prison-inmates-fight-california-fires-trnd/index.html> [<https://perma.cc/TZ2L-G8CU>].

271. Many states have laws requiring incarcerated persons to work, but these laws are not always enforced. See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 21 (Earl Lewis, George Lipsitz, Peggy Pascoe, George Sanchez & Dana Takagi, eds., 2007). As Aaron Littman has observed,

Although the Constitution permits governments to compel convicted prisoners to work for little or no money . . . it does not require them to do so. Nor does it require that pretrial detainees who work be paid a pittance, which is the result of a further carve-out from modern labor law. Given evidence of a strong correlation between poverty and recidivism, such policies may avoid expenditures by incarcerating jurisdictions at the front end, but they impose significant underappreciated downstream costs on public safety and future carceral budgets.

Aaron Littman, *Free-World Law Behind Bars*, 131 *YALE L.J.* (forthcoming 2022) (manuscript at 35) (on file with author) (footnotes omitted). However, as Lea VanderVelde has observed, those who are compelled to work for capitalist reasons—for profit generation of the prison or jail or a third party—certainly seem to be engaged in a version of involuntary servitude. VanderVelde, *supra* note 39, at 20.

272. See, e.g., Mihir Zaveri, *As Inmates, They Fight California’s Fires. As Ex-Convicts, Their Firefighting Prospects Wilt*, *N.Y. TIMES* (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/california-paying-inmates-fight-fires.html> [<https://perma.cc/2EWN-5B43>].

273. Escalante, *supra* note 270.

274. Zatz, *supra* note 25.

275. Goodwin, *supra* note 16, at 905.

276. Zatz, *supra* note 25.

277. *Id.*

278. See, e.g., *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) (holding that “whether [a prisoner] is being held in the state penitentiary or the county jail, he may be required to work in accordance with institution rules”).

279. Goodwin, *supra* note 16, at 907.

via the inherently coerced labor, the disturbingly low wages, little training, and risks involved in much prison labor.<sup>280</sup>

Because of the “choice” involved in deciding whether to work while serving a sentence of imprisonment, many dispute that providing detainees with the “opportunity” to work a far below-market job is akin to involuntary servitude.<sup>281</sup> However, in-prison work that generates profit for the prison, jail, or a third party is not the only way that governments profit from those involved in the criminal legal system. “[C]ontemporary prison labor operates on a relatively small scale and focusing on it leaves untouched the swath of precarious work performed outside custodial contexts . . . .”<sup>282</sup>

“[S]tate power has expanded massively through the criminal legal system,”<sup>283</sup> according to Noah Zatz, and as numerous scholars and advocates have documented, those caught up in this system fund large portions of the system through the fines and fees that courts and legislators impose.<sup>284</sup> “Private probation, bail fees, translation fees, indigent representation fees, dismissal fees, high interest rates, jail and prison costs, court fines, and community service charges . . . have turned criminal process into a booming source of revenue for state courts and corrections departments.”<sup>285</sup> A look at our country’s Reconstruction era history highlights that this reliance on criminal fines and fees, while perhaps new in its scope, has been a well-established practice since at least the late 1860s, if not before.<sup>286</sup>

After *Reynolds*, when unpaid labor is imposed as punishment for a crime and inures to the benefit of the state, such labor is constitutional, whether it takes place within a carceral setting or not.<sup>287</sup>

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280. It is worth noting that, in another way, those who are incarcerated benefit the labor market. “[U]nemployed black men, along with increasing numbers of black women, constitute an unending supply of raw material for the prison industrial complex, a ‘surplus population’ available for profit not principally through labor but through the business of incarceration.” Zatz, *Get to Work*, *supra* note 16, at 307–08 (citation omitted).

281. GILMORE, *supra* note 271.

282. Zatz, *Get to Work*, *supra* note 16, at 306–07 (citation omitted).

283. *Id.* at 307.

284. See BANNON ET AL., *supra* note 110, at 7; Lauren-Brooke Eisen, *Curbing Cash Register Style Justice*, BRENNAN CTR. FOR JUST. (Oct. 26, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/curbing-cash-register-style-justice> [<https://perma.cc/DC7U-3DTA>]; Laura I. Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1485 (2016).

285. Appleman, *supra* note 284.

286. See, e.g., Zachary Newkirk, *A Brief Moment in the Sun: The Reconstruction-Era Courts of the Freedmen’s Bureau*, 101 JUDICATURE 49, 49 (2017).

287. *United States v. Reynolds*, 235 U.S. 133, 149–50 (1914).

When a third party pays the imposed fines and fees consequent to a criminal conviction and requires the person with a conviction to perform unpaid labor in return, that labor is not constitutional.<sup>288</sup> *Reynolds* did not address the question of what happens when, for example, a third party like a private probation company takes over the supervision of a person from the state and requires that person to work under threat of criminal sanction or be subject to incarceration. Instead of the private party paying the state for a person's labor, and then requiring the person to work off that debt, often in our modern era, the state pays a third party to "keep" the person convicted "at labor," "under pain of recurring" incarceration or further prosecution when they are unable to pay the costs of their supervision, fines and fees.<sup>289</sup> The trilemma, as Zatz has called it, is the same—work, pay, or incarceration<sup>290</sup>—but the roles have shifted.

This work/pay/incarceration mechanism, or "the trilemma of pay, work, or jail,"<sup>291</sup> operates in the following way. As part of the criminal legal process, the threat of incarceration is placed over a person. This threat could come in the form of pre-trial diversion: complete all the requirements of this diversion program or else face the possibility of a conviction and incarceration. It could come in the form of a criminal sentence: a probationary sentence or a period of supervised release or parole subsequent to incarceration. It could come in the form of a prosecution for failure to pay child support.<sup>292</sup> It could come in any number of other ways. But in each instance, the threat of incarceration is present. It is, in Zatz's words, "*prospective and conditional.*"<sup>293</sup>

In order to avoid incarceration, one must work.<sup>294</sup> The requirement of work can come in the form of a condition to "seek[] and maintain[] employment," a "ubiquitous" requirement of those on probation or parole;<sup>295</sup> it can come indirectly in the form of fines and fees that one would have no prospect of paying off but for the income generated by work; it can come in the form of community service ob-

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288. *Id.*

289. Zatz, *A New Peonage*, *supra* note 16, at 951.

290. Zatz, *Get to Work*, *supra* note 16, at 325.

291. *Id.*

292. *Id.* at 310–13; *see also* Courtney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 136–39 (2018) (explaining how, among other negative consequences, a parent can face incarceration for failing to pay child support, which tends to perpetuate that parent's failure to pay child support into the future).

293. Zatz, *Get to Work*, *supra* note 16, at 309.

294. *Id.*; Zatz, *A New Peonage*, *supra* note 16, at 948.

295. Zatz, *Get to Work*, *supra* note 16, at 317.

ligations.<sup>296</sup> But fundamentally, “the worker [does not] have the option of withdrawing from the labor market.”<sup>297</sup> A failure to work, and thus to have the financial capital to pay off the fines and fees imposed as part of one’s criminal case, invokes the prospective threat of incarceration. That threat is present when a person desires to work but cannot find a job, perhaps because of the existence of a criminal conviction on their record; or when a person is working in whatever short-term, low-pay jobs they can get, even though those jobs do not pay enough to permit a person to cover the bare costs of living and the minimum payments on their criminal debt. Only occasionally is the failure to find and keep work excused by the criminal legal system, even if one has legitimate and very real reasons that work opportunities simply are not available.

In the context of the non-payment of a legal financial obligation that is part of a condition of probation or parole, the Supreme Court has found that incarceration is a constitutionally-valid sanction if a lower court holds a hearing and finds a person’s failure to pay is “willful.”<sup>298</sup> Numerous studies and articles have highlighted how courts continue to creatively skirt their obligations to inquire into the willfulness of someone’s ability to pay, despite this constitutional requirement.<sup>299</sup> But even when the Court does undertake the requisite inquiry, usually in response to a person claiming an inability to pay due to a lack of consistent employment, courts inevitably engage in a determination of whether a person’s efforts to obtain work are sufficient to pass this constitutional threshold.<sup>300</sup> Harkening back to the nineteenth century laws aimed at criminalizing vagrancy and dependency, these inquiries carry the unwritten presumption that

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296. *Id.* at 316.

297. Zatz, *A New Peonage*, *supra* note 16, at 951.

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

299. See, e.g., Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 186–87 (2019) (collecting and summarizing some of these studies); Lollar, *supra* note 30, at 432 (describing the methods courts have used to skirt the rules).

300. ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* 137 (2016) (explaining this evaluation in terms of “personal responsibility, meritocracy, and paternalism”); Zatz, *Get to Work*, *supra* note 16, at 314–15 (describing the low expectation for individualized assessment of ability to pay before proceeding to incarceration); Zhen, *supra* note 299, at 201–03 (describing the “underinclusive criteria” used to evaluate indigency in individual cases); cf. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 53 (2018) (analyzing the objective standard of determining ability to pay).

someone not working is not working by choice, hoping to get something for nothing and live off the charity of the state.<sup>301</sup>

Any consideration of the starting point of one's financial resources, even prior to a criminal conviction, is not part of the equation.<sup>302</sup> In other words, "[p]overty status is separated from economic conduct."<sup>303</sup> As the Council of Economic Advisers noted, "These monetary penalties often place a disproportionate burden on poor individuals who have fewer resources available to manage debt . . . . High fines and fee payments may force the indigent formerly incarcerated to make difficult trade-offs between paying court debt and other necessary purchases."<sup>304</sup>

Likewise, most courts make no distinction between fines, restitution, and forfeiture, which at least purport to serve a penological purpose, and fees and surcharges, which are primarily revenue generating and not specifically calibrated to any theory of punishment.<sup>305</sup> Each are treated as equivalent by the courts. A failure to pay any part of the financial penalty—whether fines or fees—is a failure to complete the imposed sentence.

Similar to the system implemented immediately post-slavery, a significant portion of the fines and fees imposed in criminal cases benefit the state. In the 1980s, the Conference of State Court Administrators acknowledged what they termed a "burgeoning reliance upon courts to generate revenue to fund both the courts and other functions of government."<sup>306</sup> Researchers have identified the 2008 recession as escalating the use of monetary sanctions in the criminal

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301. See *supra* Part II.A.

302. Zhen, *supra* note 299, at 196–201 (discussing how racial wealth gap and prior court debt impact ability-to-pay determinations); Colgan, *supra* note 300, at 53–54 (examining the debate over whether courts should look at objective measurements of well-being, such as income and basic living expenses, in determining financial sanctions).

303. Zatz, *Get to Work*, *supra* note 16, at 314.

304. Council of Econ. Advisers, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor*, EXEC. OFF. PRESIDENT 1, 3–4 (2015) (citation omitted), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<https://perma.cc/7D78-AVBE>] (confirming that in some jurisdictions, twenty percent of those in jail are incarcerated for failure to pay their criminal justice debts).

305. See, e.g., *Wilcox v. State*, 2021 Ark. App. 244, at 4–5, 624 S.W.3d 353, 356; *Commonwealth v. Keeno*, 237 A.3d 471 (Pa. Super. Ct. 2020) (unpublished table decision).

306. *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications*, *supra* note 23, at 8 (quoting CARL REYNOLDS & JEFF HALL, 2011–2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS 1 (2012)).

legal system to make up for the lost revenue from other sources.<sup>307</sup> For example, in filings from a recent case out of Doraville, Georgia, plaintiffs alleged that approximately twenty-seven percent of the town's general revenues came from municipal court fines and forfeitures.<sup>308</sup>

A Louisiana case, *Cain v. City of New Orleans*,<sup>309</sup> documents a similar phenomenon. Plaintiffs, who were individuals convicted of a crime but ultimately unable to pay the fines, fees, and costs imposed by the court at sentencing,<sup>310</sup> challenged New Orleans' post-conviction debt collection measures. At sentencing, judges imposed various court fines, fees, and costs.<sup>311</sup> Judges typically impose four types of financial obligations in a criminal case at the time of sentencing: a fine, which is divided between the court's operating budget and the district attorney's office; restitution, which goes to a crime victim; fees, including a mandatory \$5 fee, a fee whose amount is determined by whether the crime of conviction was a misdemeanor or a felony, up to \$100 in court costs, a \$14 fee to pay court reporters, all of which goes into the court's operating budget; and "court costs," which fund the public defender's office, the prosecutor's office, and the Supreme Court.<sup>312</sup> Approximately \$1,000,000 of the court's annual general operating budget each year comes from bail bond fees, and another \$1,000,000 from fines and other fees.<sup>313</sup>

These examples are not unusual. A recent study relying on the Census's Survey of Local and State Finances found that thirty-eight cities received ten percent or more of their revenue from fines and fees.<sup>314</sup> One town relied on fines and fees for a whopping 30.4 percent of its revenue.<sup>315</sup> Particularly relevant here is the demographic data from the top fifty municipalities.

Municipalities that most excessively fine their residents have a larger percentage of Black and Latinx residents than the median mu-

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307. *Id.* at 10.

308. Plaintiffs' Complaint for Declaratory and Injunctive Relief at 10, *Brucker v. City of Doraville*, 391 F. Supp. 3d 1207 (N.D. Ga. 2018) (No. 18-CV-02375), 2018 WL 2364078.

309. 184 F. Supp. 3d 349 (E.D. La. 2016).

310. *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 629–32 (E.D. La. 2017).

311. *Id.* at 628–29.

312. *Id.*

313. *Id.* at 630.

314. *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications*, *supra* note 23.

315. *Id.*



nicipality.<sup>316</sup> As the study's author noted, "[a]mong the fifty cities with the highest proportion of revenues from fines, the median size of African American population—on a percentage basis—is more than five times greater than the national median."<sup>317</sup> Tellingly, the study found no correlation "between a municipality's poverty rate and [its] reliance on fines and fees for revenue."<sup>318</sup>

The revenue from criminal financial legal obligations is a prime source of funds for judicial budgets, jails, law enforcement, and schools. In North Carolina, criminal fees fund half the budget for each of these entities.<sup>319</sup> Colorado has used the funds to replace and update public buildings, including a museum.<sup>320</sup> Approximately eighty percent of probationers in Georgia are supervised by private companies,<sup>321</sup> leading Human Rights Watch to estimate that probation companies in Georgia collect approximately \$40 million annually from the people they supervise.<sup>322</sup> It is estimated that a private probation company collected more than \$1 million in fees from individuals in one Georgia court alone.<sup>323</sup>

As a consequence of the expanding reliance on criminal fines and fees to undergird court, government, and private budgets, criminal debt has ballooned in recent decades. As of 2016, approximately ten million Americans owed \$50 billion in criminal legal debt.<sup>324</sup> A recent survey found that in twenty-five states, at least \$27.6 billion in fines and fees remains outstanding; the other twenty-five states ei-

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316. *Id.* at 22–23. "[O]ne demographic that was most characteristic of cities that levy large amounts of fines on their citizens: a large African American population." *Id.* at 23 (quoting Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016) <https://priceonomics.com/the-fining-of-black-america> [https://perma.cc/M7WL-DK7B]).

317. *Id.* at 23 (quoting Kopf, *supra* note 316).

318. *Id.* at 24.

319. Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNEN CTR. FOR JUST. 6 (2019), [https://www.brennancenter.org/sites/default/files/2020-07/2019\\_10\\_Fees%26Fines\\_Final.pdf](https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf) [https://perma.cc/5KNK-8LQW].

320. *Id.*

321. *Private Probation*, S. CTR. FOR HUM. RTS., <https://www.schr.org/criminalization-of-poverty/private-probation> [https://perma.cc/Z5JP-9AR5].

322. *Profiting from Probation: America's "Offender-Funded" Probation Industry*, HUM. RTS. WATCH (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> [https://perma.cc/P38B-3DL9].

323. *Id.*

324. *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications*, *supra* note 23, at 10.

ther declined to provide data or don't track the data, suggesting that the amount owed is far greater.<sup>325</sup> At the federal level, more than \$17 billion in criminal debt remains outstanding, a number that balloons to nearly \$120 billion when factoring in those who have finished the supervisory portion of their criminal sentence but still owe financial penalties.<sup>326</sup>

The debt remains outstanding because of the challenges so many people with criminal convictions face in obtaining and maintaining employment:

It is not uncommon for criminal defendants to lose the jobs they had subsequent to their conviction and sentencing, even if they do not receive a sentence of jail time. Finding employers who will hire an individual with a criminal conviction and an outstanding financial obligation is also a challenge. In addition to criminal background checks, employers increasingly use credit reports in their hiring decisions, and criminal financial obligations show up on such reports. Further, any difficulties in keeping up with criminal-debt payments can add another hurdle to securing employment, while also risking disqualification from food stamps, low-income housing, housing assistance, federal Temporary Assistance to Needy Families ("TANF") funds, and other benefits.<sup>327</sup>

The inability to obtain work due to a criminal conviction is not the sole source of the problem, however. In one study, of the 1200 cases where a person on probation or parole was subsequently incarcerated solely for failing to work, two-thirds of those people reported they were working full-time in the month before their incarceration.<sup>328</sup> Their work "appears to have been intermittent and/or very low-wage, suggesting that work enforcement was regulating the nature and intensity of employment, not bare labor market participation."<sup>329</sup> Incarceration for failing to meet the work requirements can exacerbate preexisting disparities in rates of probation and parole incarceration.<sup>330</sup>

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325. Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUST. CTR. 4 (2021), [https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg\\_Criminal\\_Justice\\_Debt\\_BH1.pdf](https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf) [<https://perma.cc/2M23-PTK6>].

326. *Courts, Justice Department Join Forces to Collect Offenders' Debts*, U.S. CTS. (Mar. 31, 2017), <https://www.uscourts.gov/news/2017/03/23/courts-justice-department-join-forces-collect-offenders-debts> [<https://perma.cc/S9VY-Y286>].

327. Lollar, *supra* note 30, at 431 (footnotes omitted).

328. Zatz, *Get to Work*, *supra* note 16, at 318.

329. *Id.*

330. An estimated forty-two percent of those revoked from probation were Black, as were sixty-seven percent of those revoked from parole. *Id.* (citing Michelle S. Phelps, *Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation*, in 2 ASC DIV. ON CORR. & SENT'G HANDBOOK ON PUNISHMENT DECISIONS 43-65 (Jeffery T. Ulmer & Mindy S. Bradley eds., 2018)).

Recently released prisoners work at rates above their pre-incarceration levels, according to several studies.<sup>331</sup> And yet their wage rates decrease.<sup>332</sup> Consequently, as this data suggests, the majority of employed individuals under community supervision probably fall into a low-wage earning group.<sup>333</sup> On average, formerly incarcerated white, Latino, and Black men owe approximately 103%, 69% and 222% of their annual incomes to legal debt,<sup>334</sup> and even if someone with a felony conviction “consistently pay[s] \$50 a month,” the average person on supervision “will still possess legal debt after 30 years of regular monthly payments.”<sup>335</sup>

Community service is often touted as an alternative to ordering people to pay financial penalties they cannot afford. “[C]ourt-ordered community service ‘opportunities’ enable[] all nonpayment to be characterized as voluntary insofar as the defendant has ‘chosen’ not to work off his debt,” essentially putting people back in the same work/pay/incarceration trilemma as before, with the only difference being that this work is monetarily uncompensated.<sup>336</sup> Working off criminal debt by providing work to a non-profit or community organization becomes a “payment alternative,”<sup>337</sup> equivalent to other work but with no financial remuneration to the worker, other than as a virtual payment toward the criminal debt.

Courts justify all of this work as rehabilitative and for legitimate penological purposes.<sup>338</sup> And yet, as we’ve seen, much of this implic-

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331. *Id.*

332. *Id.*

333. A majority of individuals sentenced on felony and misdemeanor charges receive monetary sanctions, with those defendants who receive probationary sentences more likely to receive such penalties at sentencing. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1770–71, 1786 (2010). Unfortunately, only a small percentage of federal and state parole and probation agencies report employment data, and those agencies that do report the data reveal a widely varying range of employment statistics. See John Rakis, *Improving the Employment Rates of Ex-Prisoners Under Parole*, 69 FED. PROB. 7, 10 (2005).

334. Harris et al., *supra* note 333, at 1776.

335. *Id.*

336. Zatz, *Get to Work*, *supra* note 16, at 316.

337. See, e.g., LA. CODE CRIM. PROC. ANN. art.875.1(D)(2)(c) (2021) (“During any periods of unemployment, homelessness, or other circumstances in which the defendant is unable to make the monthly payment, the court or the defendant’s probation and parole officer is authorized to impose a payment alternative, including but not limited to any of the following: substance abuse treatment, education, job training, or community service.”).

338. Zatz, *supra* note 25, at 863–64, 889 (citing *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992)).

itly and explicitly mandated work is to pay off user fees for the court system, fees whose primary purpose is revenue generation for the court system, the state, agencies within the state, and even third parties. When interest rates, surcharges, and penalties for non-payment continue to accrue, the ultimate amount owed is an ever-changing target, resembling the practices that occurred during the Black Codes and the “convict leasing” system, when costs of clothing, meals, and medical care were perpetually added to the amount owed, thereby extending the time for which the convicted person had to continue working. These practices are permitted because when the state benefits financially from the labor of someone convicted of a crime, courts presume the constitutionality of the practice. After all, courts starting with *Reynolds* read the Punishment Clause as rendering constitutional any coerced labor that flows from a criminal conviction, whether that coerced labor is included as part of the official sentence in the Judgment and Commitment order, whether it is imposed by a judge or jury, or inflicted for purposes having nothing to do with punishment, such as profit.

### III. INVALIDATING OR GIVING DEFINITION TO THE THIRTEENTH AMENDMENT’S PUNISHMENT CLAUSE

Upon closer inspection of the historical record, what becomes apparent is how little has changed since the Reconstruction era. In the immediate aftermath of the Thirteenth Amendment’s passage, those who preferred a narrow interpretation of the terms “slavery” and “involuntary servitude” used the Amendment’s Punishment Clause as a way to circumvent the Amendment’s prohibition. A justification for permitting slavery and involuntary servitude emerged—first through the Black Codes and then, ultimately, through the criminal legal system more broadly—so long as it could be called a punishment for a crime. In other words, the Punishment Clause has circumvented the prohibitions on slavery and involuntary servitude. The financial benefit to both government coffers and private entities has been, and remains, a primary motivation for maintaining such a system; in conjunction with racial animus and prejudice, this system has been and continues to be a win-win for white elites.

As previously mentioned, the Thirteenth Amendment has not had much of a presence in the litigation challenging the more recent manifestations of slavery and involuntary servitude in our criminal legal system. In large part, the Thirteenth Amendment silence is due to the long-standing presumption that those convicted of a crime and sentenced via a lawful court proceeding do not maintain their Thir-

teenth Amendment rights, due to the existence of the Punishment Clause.<sup>339</sup> A more liberal reading of the constitutional text would suggest that those convicted of a crime maintain their Thirteenth Amendment rights unless they are explicitly sentenced to hard labor.<sup>340</sup> As James Pope explains the logic,

The text excepts not persons convicted of crime, but instances of slavery or involuntary servitude that exist “as a punishment for crime whereof the party shall have been duly convicted.” It would appear, then, that convicted offenders retain protection against slavery or involuntary servitude unless it has been imposed as a punishment for the specific crime whereof they have been duly convicted. Under this reading, any particular instance of prison slavery or [involuntary] servitude could be challenged if, on the facts, it fell outside the exception.<sup>341</sup>

In addition to permitting hard labor if ordered explicitly by a court as part of a criminal sentence, applying this logic:

Prisoners might allege, for example, that they had been forced to work not as a punishment for crime, but as a means for achieving any number of other possible ends, for example raising revenue for the state, generating private profit, or socializing inmates to accept an inferior status as civilly dead outcasts from society.<sup>342</sup>

This Article takes an even more permissive view than Pope’s, but one that starts from the ideas in this last sentence. *Even if* individuals are sentenced to a punishment that explicitly includes hard labor as part of the sentence, the fact that someone is being forced, as part of their punishment, to work in order to pay for necessities in the prison or jail, to raise revenue for the state, or to generate profit for private corporations should be interpreted as a violation of the Thirteenth Amendment’s explicit prohibition on involuntary servitude, notwithstanding the Punishment Clause.

The argument that the person chose to commit a crime and therefore voluntarily put themselves in that position is unavailing. Just as in the context of peonage, where the purported voluntariness of the contract has no bearing on a person’s decision not to continue performing work to pay off a debt, the fact of a criminal conviction should have no bearing on whether a person is required to raise money in order to pay a government or privately owned company for the costs of their supervision or raise funds that will support or sustain a government or corporation as part of their punishment. If a person is unwilling to labor for the benefit of the government or a company, they should not be compelled to just because they have

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339. Pope, *supra* note 2.

340. *Id.* at 1468.

341. *Id.* (citation omitted).

342. *Id.*

been convicted of a crime. As the Court said in *Reynolds*, “[c]ompulsion of such service by the constant fear” of further punishment “renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that to be done.”<sup>343</sup> This is but a logical extension of the holdings in the peonage cases from the early twentieth century,<sup>344</sup> and is consistent with the majority view of the framers, although quite inconsistent with precedent.<sup>345</sup>

Consequently, this Part advocates for two complementary methods of truly eliminating involuntary servitude. The first, discussed in Section A, involves amending the Constitution to eliminate the Punishment Clause. But, for the reasons just articulated, solely changing the Constitution to prohibit involuntary servitude as punishment for a crime does not ultimately accomplish the aim of truly ending involuntary servitude. Our current system of fines and fees compels people to work in payment of criminal debts, threatening to incarcerate and further punish them if they do not either perform the work or pay the debts. When the monetary remuneration is not justified by tailored, penological purposes, but rather is aimed at revenue-generation, this is the very conduct the framers intended to outlaw through the passage of the Thirteenth Amendment.<sup>346</sup> Being compelled to labor to generate profit for the state or a private corporation, with incarceration as the threat, is precisely what the majority of the framers aimed to prohibit through the Amendment’s prohibitions.<sup>347</sup> Thus, under existing precedent, our current system of fines and fees constitutes constitutionally prohibited peonage and falls outside the Punishment Clause and within the parameters of involuntary servitude itself. As such, Section B argues for Congress to carefully define the metes and bounds of “slavery” and “involuntary servitude” to ensure that punishments that are aimed at revenue-generation and serve little to no legitimate penological purpose are not permitted.

#### A. ELIMINATE THE PUNISHMENT CLAUSE

Compulsory labor and social control via the profit-generating machine of the criminal legal system can be challenged in one of two ways, both of which are likely necessary to effectuate the goal of tru-

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343. *United States v. Reynolds*, 235 U.S. 133, 146 (1914).

344. *See supra* notes 233–37 and accompanying text.

345. *Pope, supra* note 2, at 1476–77.

346. *Id.*

347. *Id.*

ly eliminating slavery and involuntary servitude. The first method is to pass a constitutional amendment eliminating the Punishment Clause. Two members of Congress have put forward such a proposal. Representative Nikema Williams of Georgia and Senator Jeff Merkley of Oregon's proposal involves amending the Constitution to strike what they call the "Slavery Clause" from the Thirteenth Amendment.<sup>348</sup> Their joint resolution would do so by adding an amendment to the Constitution that says, "Neither slavery nor involuntary servitude may be imposed as punishment for a crime."<sup>349</sup> Their resolution stalled before the Judiciary Committee in mid-June 2021.<sup>350</sup> Whether Congress passes the joint resolution proposed by Representative Williams and Senator Merkley or a different amendment that effectuates the same end, the goal should be to eliminate or nullify the Punishment Clause through another constitutional amendment.

At least two states with parallel constitutional language have pursued a version of this proposal in recent years. Nevada and Colorado both have amended their constitutions to eliminate the provision allowing for an exception to the prohibition on slavery and involuntary servitude.<sup>351</sup> In 2019, Nevada changed its constitutional language to delete the words "otherwise than for punishment of crime, whereof the party shall have been duly convicted" after the text stating "There shall be neither slavery nor involuntary servitude in this state."<sup>352</sup> In 2018, Colorado removed almost identical lan-

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348. Booker, *supra* note 32; Tang, *supra* note 32; *see also* Press Release, Senator Jeff Merkley, Ahead of Juneteenth, Merkley, Williams Propose Constitutional Amendment to Close Slavery Loophole in 13th Amendment (June 18, 2021), <https://www.merkley.senate.gov/news/press-releases/ahead-of-juneteenth-merkley-williams-propose-constitutional-amendment-to-close-slavery-loophole-in-13th-amendment-2021> [<https://perma.cc/R9W4-CZSR>] (referring to the clause specifically as the "Slavery Clause").

349. A Joint Resolution Proposing an Amendment to the Constitution of the United States to Prohibit the Use of Slavery and Involuntary Servitude as Punishment for a Crime, S.J. Res. 21, 117th Cong. (2021).

350. *All Actions S.J. Res. 21*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-joint-resolution/21/all-actions> [<https://perma.cc/BW5H-DP6C>].

351. Tang, *supra* note 32 (referencing Colorado's 2018 amendment in a discussion of state efforts to remove clauses "involving human bondage or prison labor"); Leg. Res. 1CA, 116th Leg., 1st Sess. (Neb. 2019). Voters approved the Nevada Amendment on November 3, 2020. *Nebraska Amendment 1, Remove Slavery as Punishment for Crime from Constitution Amendment (2020)*, BALLOTPEdia, [https://ballotpedia.org/Nebraska\\_Amendment\\_1\\_Remove\\_Slavery\\_as\\_Punishment\\_for\\_Crime\\_from\\_Constitution\\_Amendment\\_\(2020\)](https://ballotpedia.org/Nebraska_Amendment_1_Remove_Slavery_as_Punishment_for_Crime_from_Constitution_Amendment_(2020)) [<https://perma.cc/TJT3-3ZMK>].

352. *Compare* NEB. CONST. art. I, §2 (2019), *with* NEB. CONST. of 1875, art. I, §2.

guage from its constitution, resulting in an across-the-board prohibition of slavery and involuntary servitude.<sup>353</sup>

In light of the abundant evidence Pope and others<sup>354</sup> have marshalled showing the discontent of a majority of the framers with using the Punishment Clause as a way to circumvent the Amendment's prohibitions, a decision that slavery and involuntary servitude are simply never permissible at this point in our history, even pursuant to a validly authorized punishment, would effectuate more soundly the goals the framers intended. From the initial days after the Amendment's passage, states have been using the Punishment Clause as a way to skirt the prohibitions of the Amendment.<sup>355</sup> Our current carceral system is the result of the inevitable evolution of the initial manifestations of this constitutional work-around. We are now more than 150 years past the Amendment's enactment, yet we still have not confronted head-on the legacy of these deeply disquieting practices.

The consequence is a system that relies on primarily indigent criminal defendants to bear substantial portions of the financial costs of running our court systems, our governments, and numerous private industries through the work they do while incarcerated and the fines and fees that are imposed during the criminal legal process.<sup>356</sup> Often an option remains to "work off" the financial obligations, just as there was back in the late 1860s.<sup>357</sup> But a fairly explicit racial component is also present, illustrating that our current system remains as much about racial control as it was in the 1860s. In Lea VanderVelde's words, "the current racialized carceral state has less to do with creating a captive unpaid work force than it does with maintaining racialized social control."<sup>358</sup> After more than a century

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353. Compare COLO. CONST. art. 2, § 26 (2018), with COLO. CONST. of 1876, art. 2, § 26.

354. See, e.g., Pope, *supra* note 2, at 1476–78; Henderson, *supra* note 86, at 1173 ("Contemporary public meaning of its terms, the ratification debates, and Congress's pronouncements regarding the Amendment's scope in the Civil Rights Act of 1866 suggest that the Reconstruction Congress held an expansive understanding of the Amendment's relevance to the subordinative effects of contractual exclusion and discrimination." (footnote omitted)).

355. See, e.g., Pope, *supra* note 2, at 1501–04 (discussing the continued use of "convict leasing" and subsequent justification under the Thirteenth Amendment in the immediate aftermath of its enactment).

356. Gene B. Sperling, Opinion, *The New Debt Prisons*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/opinion/politics/debt-america.html> [<https://perma.cc/CT7G-JPVP>].

357. *Id.*

358. VanderVelde, *supra* note 39, at 5.



and a half of a system that continues to dehumanize and physically control primarily, but by no means solely, Black individuals, the only way to truly eliminate “slavery” and “involuntary servitude” in the sense that the broader definition captures, is to amend the Constitution to eliminate the loophole permitting these practices so long as they are part of a lawful punishment imposed by a court.<sup>359</sup>

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359. Eliminating the Punishment Clause from the U.S. Constitution arguably could mean that incarceration is no longer permissible because the government exercises fairly unlimited dominion over the bodies of people in its custody. As courts have recognized, prisoners are “slaves of the State.” Henderson, *supra* note 86, at 1184; *see also, e.g.*, Van Hoorelbeke v. Hawk, No. 95-2291, 1995 WL 676041, at \*4 (7th Cir. 1995); Wendt v. Lynaugh, 841 F.2d 619, 620–21 (5th Cir. 1988); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963). According to constitutional scholars Akhil Reed Amar and Daniel Widawsky, slavery within the Thirteenth Amendment is a “power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons.” Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1365 (1992). Very few would not describe our current incarceration system in this way. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1173 (2015); Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1, 1–2 (2019); Eyal Press, *A Fight to Expose the Hidden Human Costs of Incarceration*, NEW YORKER (Aug. 16, 2021), <https://www.newyorker.com/magazine/2021/08/23/a-fight-to-expose-the-hidden-human-costs-of-incarceration> [<https://perma.cc/5WA5-C9XM>].

Some may reject the comparison between slavery and our current carceral system. They likely would assert that the level, degree, and frequency of physical violence is markedly different than that experienced by those who were enslaved. They would note that those who are incarcerated, once released and out from under court supervision, have a freedom from ownership that those who were enslaved did not. They would say that those in prison are not treated as property, even if they are not treated well. While the pervasiveness, degree of public acceptance, and legality of the violence may be somewhat different, much goes on behind prison and jail walls that remains elusive to outsiders and that more closely resembles the brutality of slavery. Press, *supra*. As Andrea Armstrong observed, jails and prisons “are involuntary homes for millions of people without meaningful public oversight, transparency, or accountability.” Armstrong, *supra*, at 1.

Thus, abolishing slavery with no exception for cases when it is imposed as punishment for a crime would seem to require embracing the call for prison abolition. *See, e.g.*, McLeod, *supra*; ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); Mariame Kaba, *So You’re Thinking About Becoming An Abolitionist?*, MEDIUM: LEVEL (Oct. 30, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> [<https://perma.cc/C47C-7CUW>]. Engaging in a robust discussion of prison abolition goes beyond the scope of the financial and labor focus of this Article. However, it is worth noting that, as Dorothy E. Roberts illuminates, “[l]ike antebellum abolitionist theorizing, prison abolitionism can craft an approach to engaging with the Constitution that furthers radical change.” Roberts, *supra* note 8, at 108.

### 1. Ending Involuntary Servitude Even as Punishment for a Crime

The implications of eliminating the Punishment Clause and prohibiting involuntary servitude *even* as a part of punishment would be a dramatic change, even—or especially—in the carceral setting. The Supreme Court noted in a 1911 case, *Bailey v. Alabama*, that “[t]he words involuntary servitude have a ‘larger meaning than slavery.’”<sup>360</sup> Involuntary servitude under the Thirteenth Amendment occurs when “criminal sanctions [are] available for holding unwilling persons to labor.”<sup>361</sup> According to *Reynolds*, when “labor is performed under the constant coercion and threat of another possible arrest and prosecution . . . this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict.”<sup>362</sup>

According to James Pope, “[t]wo central features of involuntary servitude” emerge from the prominent Supreme Court cases in this area: “domination (‘control,’ ‘harsh overlordship’) and exploitation (the disposal of one person’s labor for ‘another’s benefit,’ ‘unwholesome conditions’).”<sup>363</sup> The use of uncompensated hard labor and chain gangs would certainly be prohibited as involuntary servitude under this definition. The elements of domination and exploitation seem uncontested in these circumstances. Other uncompensated labor that inures to the benefit of the state or the for-profit prison industry also would likely fall under this definition, as the element of domination and control is ever-present in a prison setting, regardless of the type of work a person is doing, and any uncompensated labor not related to the upkeep of one’s space and person, and whose benefit goes to the state or some other entity, should be classified as exploitative in that setting.

More complicated are the situations where someone elects to work while incarcerated. The presumption is such chosen work is voluntary—whether it be day-to-day upkeep or work for nominal pay inside and outside the prison walls—thereby placing it outside the confines of “involuntary” actions. Yet when contemplating involuntary servitude within the carceral setting, the definitions of “involuntary” and “voluntary” must not be overlooked. The lines between coercion and voluntariness are blurred and complicated in that setting. In the context of analyzing the labor and compensation rights of

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360. 219 U.S. 219, 241 (1911).

361. *Pollock v. Williams*, 322 U.S. 4, 18 (1944).

362. *United States v. Reynolds*, 235 U.S. 133, 146 (1914).

363. James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude”*, 119 YALE L.J. 1474, 1503 (2010).

someone who is incarcerated, courts have recognized that the conception of “voluntariness” in the prison setting “ceases to do analytical work of its own.”<sup>364</sup>

The question then is whether the severely undercompensated labor that we regularly see within jails and prisons counts as “involuntary servitude.” While the element of domination or control is inherent to the prison setting and is present in any work under the supervision of prison staff, the issue of who the labor benefits raises the question of voluntariness discussed above. Although the labor is exploitative in many ways—it benefits others; some of it, like fire-fighting, certainly occurs in “unwholesome conditions”—the prison laborers are compensated, which complicates the analysis. The benefits of their labor do not just go to the benefit of others; the laborers receive income, just not at minimum or competitive wages. Courts have fought mightily against recognizing people who labor in prisons as the equivalent of workers outside of prison, and mostly have prohibited these workers from obtaining the protections and benefits of those on the outside.<sup>365</sup> Yet despite the purportedly “voluntary” aspect of the work, it is hard to conceive, for example, that anyone outside the prison setting would accept seventy-five cents an hour in pay for asbestos abatement—a pay rate at the high end of the prison pay scale in most states<sup>366</sup>—or that they would not seek certain protections unavailable to prison workers in the course of their jobs. These facts suggest, then, that there *is* something inherently coercive and involuntary about the conditions under which those who are incarcerated do their work, that there *is* an element of exploitation involved, even when such work is chosen.

Beyond the carceral walls, when a person is sentenced to pay financial remuneration to the state in the form of fines, fees, surcharges, or interest, and the person does not have the ability to pay those debts, threatening “another possible arrest and prosecution” if the person does not come up with a way to pay them equates to “holding unwilling persons to labor,” which “is as potent as” if the person was

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364. Zatz, *supra* note 25, at 888 & n.129.

365. *Id.* at 887–88.

366. Pa. Dep’t of Corr., Policy Statement: Inmate Compensation, Policy No. DC-ADM 816 (eff. May 5, 2008), <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/816%20Inmate%20Compensation.pdf> [<https://perma.cc/5LED-N8Y7>]. This rate is capped at one dollar an hour during an active abatement project. See *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), [https://www.prisonpolicy.org/reports/wage\\_policies.html](https://www.prisonpolicy.org/reports/wage_policies.html) [<https://perma.cc/CM5D-BUCY>].

“seiz[ed] and [held for] compulsory service.”<sup>367</sup> In sum, under the peonage cases, “exposure to criminal prosecution—and ultimately to physical custody—constitutes an alternative insufficient to bless a choice to work as ‘voluntary.’”<sup>368</sup>

Thus, to eliminate involuntary servitude imposed as punishment for a crime would entail eliminating hard labor and un-/under-compensated labor within prisons and jails; eliminating any financial penalties or user fees that are not sufficiently tailored to established theories of punishment such as deterrence or rehabilitation; and for the remaining fines, restitution, and forfeiture, calibrating those financial penalties based on an accurate assessment of a person’s ability to pay. Although state governments, courts, and private corporations that currently benefit from this labor and financial compensation will inevitably fight against such a change, eliminating the Punishment Clause remains the most promising avenue to effectuate the changes necessary to address the coerced labor practices engrained in our criminal legal system.

Although banning involuntary servitude in and out of the carceral setting might be a palatable proposal for many legislators and courts, the two terms—slavery and involuntary servitude—are linked in the clause; one cannot abolish involuntary servitude unconditionally without abolishing slavery unconditionally, too. Truly abolishing slavery—the capturing of bodies to use as chattel and for labor—likely means abolishing prisons, too,<sup>369</sup> a proposal most legislators would find unpalatable.<sup>370</sup> Thus, whatever the appeal of this solution, it remains an unlikely one at this point. Even the most committed of abolitionists does not expect “all prison walls to come tumbling down at once.”<sup>371</sup>

#### B. DECOUPLING PUNISHMENT FROM PROFIT

A second, complementary option—one likely more palatable for many elected leaders—returns us to Section 2 of the Thirteenth Amendment and relies on the empowerment of Congress to effectu-

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367. *Reynolds*, 235 U.S. at 146; *Pollock v. Williams*, 322 U.S. 4, 18 (1944).

368. *Zatz*, *A New Peonage*, *supra* note 16, at 939.

369. *See supra* note 359.

370. *See, e.g.*, German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You*, VOX (Sept. 7, 2016), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll> [<https://perma.cc/V4EU-9DXQ>] (detailing Americans’ mixed views on reducing incarceration).

371. *Roberts*, *supra* note 8, at 114.

ate Section 1's prohibitions "by appropriate legislation."<sup>372</sup> Congress should take this step whether or not they choose to eliminate the Punishment Clause, but especially if they elect not to. This option, which remains consistent with the framers' view of the Thirteenth Amendment as outlawing race-based "convict leasing" because it did not serve valid penological purposes, would use Section 2 to only permit the use of a person's labor for valid, carefully-tailored penological purposes and not for revenue-generating purposes.<sup>373</sup> From this view, "the objectionable point is not that prisoners duly convicted of crime are compelled to do tasks, it is the exploitation of that labor for capitalist reasons that is the objectionable element."<sup>374</sup>

The *Civil Rights Cases* of 1883 established that Congress has the authority "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."<sup>375</sup> However, beginning with the passage of the Civil Rights Act of 1866, Congress has continued to carve out those with criminal convictions as excluded from the protections of the Thirteenth Amendment and the Act's own purview.<sup>376</sup> As Professor Henderson has pointed out, "Section 2 of the 1866 Act, with its seemingly perpetual license for denigrating the rights and privileges of convicted persons, is the antecedent for modern collateral sanctions and private discrimination against this class."<sup>377</sup> State and federal legislatures, as well as courts, have continued to regard prisoners as "slaves of the State,"<sup>378</sup> subject to compelled labor as an unremarkable part of their punishment,<sup>379</sup> with no consideration of the racial animus or financial incentives and motivations that might be underlying this system. Thus, as Henderson ob-

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372. U.S. CONST. amend. XIII, § 2.

373. Pope, *supra* note 2, at 1476–77.

374. VanderVelde, *supra* note 39, at 20.

375. The Civil Rights Cases, 109 U.S. 3, 20 (1883).

376. Henderson, *supra* note 86, at 1182–83.

377. *Id.* at 1183.

378. *Id.* at 1184; *see also, e.g.,* Van Hoorelbeke v. Hawk, No. 95-2291 1995 WL 676041, at \*4 (7th Cir. 1995) ("[P]risoners are explicitly excepted from [the Thirteenth A]mendment's protection."); *Wendt v. Lynaugh*, 841 F.2d 619, 620–21 (5th Cir. 1988) (affirming those convicted of a crime and serving a prison sentence are "excepted from the application of the Thirteenth Amendment"); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963) ("Prison rules may require appellant to work.").

379. *See, e.g.,* *Ali v. Johnson*, 259 F.3d 317, 317–18 (5th Cir. 2001) ("[I]nmates sentenced to incarceration cannot state a viable Thirteenth Amendment claim if the prison system requires them to work."); *Morales v. Schmidt*, 489 F.2d 1335, 1338 (7th Cir. 1973); *Mitchell v. San Jose Immig. & Customs Enf't Dir.*, No. C 07-3843 SI (pr), 2007 WL 2746745, at \*2 (N.D. Cal. Sept. 20, 2007).

served, “the Thirteenth Amendment remains an unlikely source of law for the legislative action advocated here.”<sup>380</sup>

And yet, Congressional action pursuant to Section 2 remains the most likely source of reform for the problems identified in this Article. Although Section 1 is “self-enforcing, and . . . the judiciary is empowered to interpret and apply it,”<sup>381</sup> Professor William Carter notes that “lower courts have uniformly held that the judicial power to enforce the Amendment is limited to conditions of literal slavery or involuntary servitude.”<sup>382</sup> This Article asserts that our current fines and fees system amounts to involuntary servitude, which should give the judiciary the unquestionable authority to set limits on it, pursuant to their Section 1 authority.

In the peonage cases, the Court held that Section 1 established the right to quit work without reference to the badges and incidents of slavery.<sup>383</sup> As such, it seems courts could interpret the term “involuntary servitude” in a manner that prohibits the work/pay/jail trilemma. In other words, without the presence of the Punishment Clause, the use of financial penalties to keep Black and other-raced Americans in a condition of slavery and involuntary servitude, as laid out in the previous Sections of this piece, would fall within this definition. Yet history makes clear that courts will not act. Courts continue to defer to Congress, likely for numerous reasons Carter articulates.<sup>384</sup> The fact that courts continue to view the Punishment Clause as precluding consideration of such practices from falling under the auspices of the Thirteenth Amendment’s broader prohibition further solidifies the unlikelihood of court action here.

Consequently, when it comes to how to interpret the parameters of the Thirteenth Amendment—what is permitted by it and what is prohibited as “slavery” or “involuntary servitude”—congressional action through Section 2 seems the most viable vehicle through which to parse that out. As Pope has noted, “what constitutes ‘appropriate’ legislation [under Section 2], would seem to involve the choice of means to ensure that no component of slavery that is pro-

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380. Henderson, *supra* note 86, at 1180.

381. Pope, *supra* note 43, at 431.

382. Carter, *supra* note 41, at 1315.

383. Pollock v. Williams, 322 U.S. 4, 17–18 (1944); Bailey v. Alabama, 219 U.S. 219, 241 (1911).

384. Carter, *supra* note 41, at 1351–55 (noting “judicial reluctance to delve into the history of slavery,” discomfort with judicial remedies that could address “systemic vestiges of slavery,” and other rationales).

hibited by Section 1 ‘shall exist.’”<sup>385</sup> In other words, the so-called “badges and incidents” of slavery “are *components* of the slavery and servitude outlawed by Section 1.”<sup>386</sup> “When Justice Bradley introduced the phrase ‘badges and incidents of slavery . . .,’ he included among the ‘inseparable’ or ‘necessary incidents of slavery’ both core features like the ‘[c]ompulsory service of the slave for the benefit of the master’ and arguably more peripheral ones.”<sup>387</sup> With this understanding, therefore, “it was clear from the outset that Section 1 directly outlawed at least some incidents of slavery; the question was which ones and in what combinations.”<sup>388</sup>

To be clear, the argument here is not that fines and fees are a badge and incident of slavery, although they certainly may be that. My argument is that with “slavery” and “involuntary servitude” undefined, the presence of the Punishment Clause permits these practices to continue under the guise that they are legitimate forms of punishment, when at their core, the pay/work/jail trilemma amounts to a form of constitutionally prohibited involuntary servitude untethered from legitimate penological purposes and with a primary aim of revenue generation.<sup>389</sup> Thus, short of—or alongside—eliminating the Punishment Clause altogether, only by giving definition to the terms in Section 1 of the Thirteenth Amendment can this obvious form of involuntary servitude be prohibited. The Civil Rights Act and precedent permitting Congress to pass laws necessary and proper for abolishing any practice that is a badge and incident of slavery likewise gives it the ability to define the parameters of the basic terminology from which the badges and incidents conceptions proceed.<sup>390</sup>

#### 1. Congress Should Act Under Section 2

Even if Congress chooses not to eliminate the Punishment Clause through a constitutional amendment, nothing prevents Congress from passing legislation under Section 2 that would effectuate Section 1’s general purposes of prohibiting slavery and involuntary

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385. Pope, *supra* note 43, at 467.

386. *Id.* at 428.

387. *Id.* at 429 (citing *The Civil Rights Cases*, 109 U.S. 3, 22 (1883)).

388. Pope, *supra* note 43, at 429.

389. See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 244–45 (1911) (“The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt.”).

390. See Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 596–97 (2012).

servitude by defining the metes and bounds of the Punishment Clause. As Justice Hughes noted in 1911 in *Bailey*,

[t]he exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.<sup>391</sup>

The punishment exception has “destroy[ed] the prohibition” since the Thirteenth Amendment’s passage. Congress must act to flesh out the definitions of “slavery” and “involuntary servitude” so as to clarify which punishments serve legitimate penological purposes and which amount to an end-run around the Thirteenth Amendment’s prohibitions. To the extent certain profit-generating practices within and outside the physical carceral walls have for 150 years disproportionately kept Black Americans intertwined with the criminal legal system, stemming from a postbellum desire to continue using primarily Black people as cheap or free labor—as chattel—this is a quintessential circumvention of the prohibition on involuntary servitude. Congress must act pursuant to Section 2 to eliminate them in order to ensure that Section 1 is enforced.

The Thirteenth Amendment was envisioned more broadly than the other Reconstruction Amendments.<sup>392</sup> The Amendment’s prohibition on slavery or involuntary servitude applies both to the state and to private entities. As Foner observes, “the amendment’s language lacks any reference to state action,” but “its latent power has almost never been invoked as a weapon against the racism that forms so powerful a legacy of American slavery.”<sup>393</sup> And yet the Amendment’s potential remains. In Foner’s words, “[t]here is no reason why the Thirteenth Amendment cannot be reinvigorated as a weapon against enduring inequalities rooted in slavery.”<sup>394</sup>

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391. *Bailey*, 219 U.S. at 244.

392. “By 1865, the war had vindicated the social vision of free labor essential to the Republican party’s outlook since its founding. No phrase was repeated more often in discussions of the amendment than one Lincoln himself had long emphasized—the right to the fruits of one’s labor, an essential distinction between slavery and freedom. . . . Republicans believed that the Thirteenth Amendment prevented states or individuals from denying freed slaves these opportunities.” FONER, *supra* note 56, at 42.

393. *Id.* at 170.

394. *Id.* at 175.



The following Sections advocate for the Thirteenth Amendment to take on precisely such a “reinvigorated” role as a “weapon against enduring inequalities rooted in slavery.” They look more closely at how Congress might delineate the boundaries of “slavery” and “involuntary servitude” in order to address the inequities identified in the previous Sections of this Article.

## 2. Pay Prison Laborers a Fair Market Wage

One of the most deep-rooted and fundamental issues with the criminal legal system—its reliance on indigent, disproportionately Black individuals to generate profits for court systems, state governments, and private corporations—can be addressed through legislation enacted under Section 2 of the Thirteenth Amendment that gives effect to Section 1. Within the context of prisons and jails, outside the context of everyday upkeep and maintenance, Congress should pass legislation permitting incarcerated individuals to engage in labor and revenue-generating work only under the same conditions as those outside the prison setting, and only if they truly elect to do so. Those conditions include working for fair market wages<sup>395</sup> and under the protections provided by state and national labor laws. Prison workers should not be exempted from these protections. Enacting provisions consistent with this approach is the only way to protect those who are incarcerated from being subject to “involuntary servitude.”

Under these strictures, hard labor would rarely if ever be permitted, and if so, only under appropriate conditions—with consistent, designated bathroom and food breaks, for discrete periods of time, and with protective treatment in inclement weather. Chain gangs and hitching posts would be prohibited. With regard to work such as firefighting, building armor or furniture, making license plates or notebooks, this work would be compensated at a fair market wage and, again, the hours and conditions would be consistent with the Fair Labor Standards Act and the Occupational Safety and Health Act. Of course, voluntariness remains a perpetual issue, even if work is adequately compensated in safe conditions. Many of the voluntariness concerns can be addressed, however, if the fines and fees owed to the court also are brought into compliance with the Thirteenth Amendment. Certainly, the issue of whether work in a carceral setting is voluntary will never entirely be eliminated, but

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395. Notably, Allegheny County, Pennsylvania, raised the minimum wage for its employees, clarifying that the change applied “regardless of incarceration status.” Littman, *supra* note 271, at 46.

these changes will go a long way toward bringing everyday practices into compliance.

One likely barrier to implementing these changes is the reduction in revenue generated when those who are incarcerated have to be paid a fair wage and work reasonable hours. Undoubtedly the numerous governments and private companies benefiting from prison labor would raise incredible opposition to this proposal. And as mentioned, courts have expressed extreme reluctance to treat prison work the same as non-prison work.<sup>396</sup> For the reasons that Balkin, Levinson, and Carter articulate—the objection corporations will have to reading the Thirteenth Amendment broadly, a remaining reluctance to have social norms challenged, the lack of interest convergence<sup>397</sup>—the pushback against such changes is likely to overwhelm any attempts to implement this proposal. Recent cultural shifts, however, may lead private corporations to evolve.

Some argue that an exception should also be carved out for everyday maintenance within the prison setting since the profit motive arguably is removed from the daily chores of keeping one's personal and shared space clean. Lea VanderVelde has pointed out, in the context of the time period in which the Amendment was passed, that "[t]he punishment exception was intended to provide a means to compel duly convicted prisoners to earn their own keep, in a society where sitting aimlessly in jail was a luxury that the society could not afford."<sup>398</sup> Those who work in the kitchen or cleaning the hallways or any number of methods of upkeep of the incarceration space certainly seem to be subject to involuntary servitude, yet the benefit goes to the individual herself and her fellow detainees. From this view, "labor is a virtue to be encouraged, not a commodity to be exploited."<sup>399</sup> Although VanderVelde does not suggest applying this approach in the present day, certainly one can imagine an argument that "work that can be compelled should be limited to work that supports the prisoner's maintenance according to ordinary standards."<sup>400</sup>

However, several questions of implementation arise. First, how do we ensure this limitation is enforced? Certainly, our prisons and

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396. See, e.g., Zatz, *supra* note 25 ("Most courts agreed that there were differences between prison labor and ordinary employment—and among forms of inmate labor—that sometimes indicated that no employment relationship existed, even though there was sufficient control and no applicable statutory exception.").

397. See *supra* notes 86–97 and accompanying text.

398. VanderVelde, *supra* note 39, at 3.

399. *Id.* at 20.

400. *Id.* at 3.

jails are full of examples of compelled labor that might meet the definition of day-to-day maintenance but that most would nevertheless find deeply troubling. Angola, a prison in Louisiana which was designed to be self-sufficient,<sup>401</sup> is a prime example. Prisoners at Angola operated a dairy, a small ranch, a metal shop, and a sugar mill; they raised food staples and cash crops.<sup>402</sup> Angola remains a working farm to this day. The prison has 2,000 head of cattle, and detainees raise about four million pounds of vegetables every year, including corn, cotton, wheat, and soybeans.<sup>403</sup> The food they harvest feeds not only the people incarcerated at Angola, but those incarcerated at other state prisons as well.<sup>404</sup> Indisputably, the prison was, and is, largely self-sufficient. But Angola is far from a prison anyone would want to hold up as an example to emulate. Detainees often are compelled to work from dusk until dawn in dastardly conditions.<sup>405</sup> The punishments for objecting to work or for not working hard enough are severe.<sup>406</sup>

Another question that arises from envisioning this carve out is how to prevent prisons and jails from expanding what qualifies as “maintenance” in yet another circumvention of the prohibition on involuntary servitude. One possible way to cabin the work to that

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401. Joanne Ryan & Stephanie L. Perrault, *Angola: Plantation to Penitentiary*, 5 PRESERVING LA.’S HERITAGE 12 (2007), [https://www.crt.state.la.us/Assets/OCD/archaeology/discoverarchaeology/virtual-books/PDFs/Angola\\_Pop.pdf](https://www.crt.state.la.us/Assets/OCD/archaeology/discoverarchaeology/virtual-books/PDFs/Angola_Pop.pdf) [<https://perma.cc/R2QB-6B8W>].

402. *Id.* at 10–17.

403. Josh Auzenne, *Louisiana State Penitentiary at Angola*, WAFB9 (Jan. 7, 2011), <https://www.wafb.com/story/12481475/louisiana-state-penitentiary-at-angola> [<https://perma.cc/C62U-5DRQ>].

404. *Id.*

405. See, e.g., Daniele Selby, *‘The Dungeon Was the Last Place I Wanted to Go’: An Exoneree’s Story of Survival at Angola Prison*, INNOCENCE PROJECT (Sept. 17, 2021), <https://innocenceproject.org/henry-james-angola-prison-labor> [<https://perma.cc/HT2Z-LANM>] (“Henry and others also endured humiliation and poor treatment in the fields, where they were often deprived of water. ‘When you would finally get to the water bucket—which was at the other end of the field—they would move it farther away. And if you stopped working to walk closer, you’d be written up for a work offense,’ Henry recalled. ‘At the end of the day, they’d dump out the water bucket as you were getting there, and, if you say something, you get punished.’”).

406. See, e.g., Daniele Selby, *A Mistaken Identification Sent Him to Prison for 38 Years, but He Never Gave Up Fighting for Freedom*, INNOCENCE PROJECT (Sept. 17, 2021), <https://innocenceproject.org/malcolm-alexander-wrongful-conviction-angola> [<https://perma.cc/KLQ9-BE5L>] (“During cotton season, prisoners had to fill a 36-by-80-inch sack that sometimes weighed as much as 70 pounds, ‘if the cotton was dewy that day.’ If the sack wasn’t sufficiently full by day’s end, they’d be written up, which meant losing out on weekend privileges like leisure time and access to the law library, or even being sent to solitary confinement.”).

which supports prisoner maintenance is to limit the possible punishments for violations of this type of labor. Yet, the problems presented by this option are fairly apparent. Prison discipline systems are pervasive and largely hidden. One recent study found that almost half of all state and federal detainees have been found guilty of a disciplinary infraction,<sup>407</sup> and significant evidence suggests that race plays a substantial role in prison discipline.<sup>408</sup> Disciplinary codes cover such minor behaviors as disrespect and dress code violations to actual criminal acts such as assault and arson.<sup>409</sup> When those incarcerated are so bold as to contest their violations in courts, courts do not often provide the relief sought, as they extend tremendous deference to prison administrative decisions.<sup>410</sup> Given the large numbers of jails and prisons in this country, run by thousands of different entities, the ability to monitor and enforce such a system would be virtually impossible, and the prevailing precedent means prisons would be granted substantial deference in their conclusions.

Although we might reject the everyday maintenance exception, perhaps, as some believe, incremental progress is better than none at all. If implemented, these proposals to change the working conditions of those who are incarcerated with a perpetually vigilant eye toward the problems of exploitation inherent in the carceral setting could go some distance toward eliminating the coercive involuntary servitude that happens behind prison walls. Creating the proper framework for enforcement of this constitutionally-based statute should be included as part of the law's parameters.

### 3. Eliminate Revenue-Generating Financial Penalties

Outside the prison walls, Congress could, under Section 2 of the Thirteenth Amendment, prohibit the imposition of any fines and fees that are solely revenue-generating without serving any penological purpose. For those financial penalties that are more closely tied to deterrence, rehabilitation, and other theories of punishment, such as restitution and criminal forfeiture, implementing a payment structure that carefully calibrates the amount of the penalty with a person's ability to pay could eliminate many of the excesses associated with using criminal financial obligations.

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407. Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 769 (2015).

408. *Id.* at 764–65.

409. *Id.* at 768–69.

410. *See id.* at 780–81 (discussing the deferential “some evidence” standard used to review claims that a prison disciplinary conviction violated due process).

The first step is to eliminate any “user fees” within the criminal legal system. These fees, surcharges, interest, payment plan charges, and any other financial penalties that are not fines, restitution, or forfeiture must be eliminated. As discussed earlier, they rarely serve a purpose related to theories of punishment; they are simply fees that accrue because of the very fact that a person was arrested and came into contact with the criminal legal system. They are a primary source of the revenue on which courts, state governments, government agencies, and private corporations have come to rely. And yet they keep thousands of people under the thumb of the criminal legal system, subject to the work/pay/jail trilemma and skirting the holdings in *Bailey* and *Reynolds*, every year.

Fines, restitution, and forfeiture are legitimate financial penalties, in their inception carefully keyed to particular penological goals. Although these financial obligations have expanded in problematic ways,<sup>411</sup> they remain sound starting points for preventing the end-run around the Thirteenth Amendment. This theoretical grounding is essential to ensure that fees are not eliminated only to be backdoored into ever-increasing fine amounts. The Excessive Fines Clause can play a key role in keeping these fines calibrated to the harm and to one’s ability to pay.<sup>412</sup>

One method of preventing criminal debt from continuing to be a life-long yoke tying someone in perpetuity to a work/pay/jail trilemma, is to calibrate any fines, restitution, or forfeiture to the person’s true ability to pay. Professor Beth Colgan has discussed this type of graduated economic sanctions system, called a “day-fine model,” in depth. As she explains it,

The day-fine model involve[s] a two-step process. First, criminal offenses [a]re assigned a specific penalty unit or range of penalty units that increase[] with crime severity and [a]re set without any consideration of a defendant’s ability to pay. Second, the court would establish the defendant’s adjusted daily income, in which income [i]s adjusted downward to account for personal and familial living expenses. The final day-fine amount [i]s calculated by multiplying the penalty units by adjusted daily income. By setting penalty units according to crime seriousness, day-fines attend[] to the

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411. See *supra* notes 128–33 and accompanying text.

412. See *Timbs v. Indiana*, 139 S. Ct. 682, 694 (2019) (Thomas, J., concurring) (discussing how the rules of justice and equity require such balancing); *City of Seattle v. Long*, 493 P.3d 94, 114 (Wash. 2021) (en banc) (stating that including an inquiry into a defendant’s ability to pay in an excessive fines claim analysis allows courts to scrutinize governmental action more closely when the state stands to benefit); *United States v. Bajakajian*, 524 U.S. 321, 335–36 (1998) (discussing how fines were proportioned to the offense under English common law); Colgan, *supra* note 151, at 319–20 (discussing the Supreme Court’s interpretation of “excessive”).

desire for offender accountability and deterrence. At the same time, day-fines [a]re understood to be more equitable because they account[] for the defendant's finances. In addition, day-fines offer[] the possibilities of improving the administration of court systems overburdened by ineffective collections processes and reducing the use of incarceration.<sup>413</sup>

Although the application of this method is relatively straightforward with regard to fines, restitution and forfeiture operate differently. Those differences should not prevent their inclusion in the day-fine system. Maricopa County, Arizona, for example, included restitution in its day-fine model.<sup>414</sup> They included all economic sanctions in a single package which was then distributed to satisfy the various monetary penalties imposed in the case.<sup>415</sup> If mandatory restitution amounts owed were greater than the calculated day-fine, however, the person owing the restitution was not permitted to utilize the day-fine system.<sup>416</sup> This is more a problem with restitution than with the day-fine model. Restitution is intended to be a disgorgement of unlawful gain.<sup>417</sup> By federal statute and in many state statutes as well, restitution has expanded to include compensation for often intangible emotional and psychological losses a victim experiences.<sup>418</sup> Because restitution in its current manifestation has become so unmoored from its doctrinal roots, no longer is the amount carefully calibrated to the unlawful gains a person experiences. As a consequence, it seems likely that restitution, and probably forfeiture amounts, might regularly run up against the parameters of a day-fine model, suggesting the need for a cap on restitution awards, in addition to a reframing of the laws governing criminal restitution and forfeiture.

Reforming restitution statutes could benefit the restitution system across the board. Restitution remains one of the most unpaid criminal penalties. According to a 2018 report from the U.S. Government Accountability Office, at the end of fiscal year 2016, \$110 billion in restitution debt remained outstanding, and U.S. Attorneys' Offices nationwide identified \$100 billion of that debt uncollectible due to the indigence of those ordered to pay it.<sup>419</sup> And that's just in the

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413. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 56-57 (2017).

414. *Id.* at 105.

415. *Id.*

416. *Id.*

417. Lollar, *supra* note 103, at 100-05.

418. *Id.* at 102.

419. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 25 (2018).

federal system. Studies have shown that victims are more satisfied by receiving some portion of the restitution than waiting for the full amount of the restitution owed, knowing they are unlikely to receive it.<sup>420</sup> When they expect full payment of a restitution award and do not receive it, this exacerbates feelings of pain, anger, and resentment toward the person charged and the criminal legal system as a whole.<sup>421</sup>

Restitution is distinct from forfeiture in that the beneficiary of the financial payments is the victim of the crime as opposed to the government. Consequently, although forfeiture is also more closely aligned with a particular item or amount of money, if the person convicted no longer has the item in their possession or the money ordered to be forfeited, calibrating the amount of payment to a person's ability to pay will be the most effective method of ensuring some payment without saddling that person with a criminal debt they will never be able to pay.

Another fundamental challenge for which the day-fine model cannot account is the limits to employment opportunities for those who have a criminal conviction, often entrenching racial disparities already woven throughout the criminal system. As Theresa Zhen points out,

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.<sup>422</sup>

The pervasiveness of structural racism likewise permeates any ability-to-pay or income assessment, as “[e]ven in the best case scenario,” the results are “racially skewed.”<sup>423</sup> Not only do “[t]he very players that are implementing ability-to-pay determinations have a vested interest in collection,” but “the bureaucracies in which they live are racialized structures that both reflect and help to create and maintain race-based outcomes in society.”<sup>424</sup> In Zhen’s analysis, ability-to-pay hearings and day-fine assessments, “are [] political tool[s] masquerading as a technical instrument to reify existing racial struc-

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420. Courtney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 398–99 (2013).

421. *Id.*

422. Zhen, *supra* note 299, at 215.

423. *Id.*

424. *Id.* at 209.

tures.”<sup>425</sup> They do not account for racialized policing patterns, racial wealth stratifications, or “the compounding effects that derive from inability to pay fines and fees from prior violations.”<sup>426</sup> Day-fine models also do not account for the reliance on the wealth of family or friends to help alleviate continued entrenchment in the criminal legal system.

Certainly, eliminating financial penalties altogether would go a significant distance toward addressing some of these concerns. But as Zhen acknowledges, so would ending the use of fines and fees to fund the judicial system,<sup>427</sup> a critical part of the proposal advocated for here. Nevertheless, Zhen’s critiques are well-taken and short of eliminating all financial penalties, the proposals advocated for here will not cure these deeply engrained racial aspects of the criminal system.

A second critical step is to prohibit any revenues generated from economic sanctions from being used to fund criminal legal system actors, such as courts, prosecutors, probation and parole departments, and law enforcement.<sup>428</sup> After all, economic incentives were the primary drivers of the massive over-prosecution and high conviction rate of Black laborers during the “convict leasing” era. If user fees are eliminated, only the profits seized from fines and forfeitures and untethered restitution amounts would be at issue, an already much more limited pool of resources than currently exists. The revenues generated for the state through fines and forfeiture should be used to strengthen the alternative social programs through targeted reinvestment and restorative justice programs.<sup>429</sup>

In an ideal world, the third step would be to eliminate the possibility of incarceration for anyone based on their failure to pay a criminal debt.<sup>430</sup> After all, incarceration is the critical piece of the end-run around the prohibition in Thirteenth Amendment, as recognized in

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425. *Id.* at 193.

426. *Id.*

427. *Id.* at 218.

428. Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1566 (2020).

429. *See id.* at 1571–80 (discussing ways in which funds derived from economic sanctions could be redistributed to community-based social services to better address particular needs of communities as well as funding restorative justice initiatives).

430. *See* Lollar, *supra* note 30, at 428–37 (arguing that incarceration for failure to pay criminal debt should be prohibited because it is morally troubling, has disparate impacts on low-wage earners and communities of color, and is ineffective and inefficient).



*Bailey*<sup>431</sup> and *Reynolds*.<sup>432</sup> As previously discussed, most people ordered to pay criminal financial debt do not have the ability to pay the debt they owe and will not have that ability even if they continued to pay over the course of their entire lifetime. Approximately eighty-two percent of individuals at the state level<sup>433</sup> and approximately seventy-three percent at the federal level<sup>434</sup> were indigent before they were arrested and charged with a crime. For those who have the ability to pay, garnishment of wages and seizures of property are effective methods of ensuring payment.<sup>435</sup> Incarceration solely for failing to pay a debt, even a criminal debt, returns us to an era of debtors' prisons that we should be long past.

Of course, if incarceration were to be eliminated for failure to pay a criminal legal debt, this might sever the Thirteenth Amendment from the system of fines and fees outlined throughout this Article. Removing the "jail" pillar of the trilemma leaves solely a non-

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431. *Bailey v. Alabama*, 219 U.S. 219, 244 (1911).

432. *United States v. Reynolds*, 235 U.S. 130, 146 (1914).

433. *U.S. Dep't of Justice, Fact Sheet*, OFF. JUST. PROGRAMS (Dec. 2011), [https://ojp.gov/newsroom/factsheets/ojpfis\\_indigentdefense.html](https://ojp.gov/newsroom/factsheets/ojpfis_indigentdefense.html) [<https://perma.cc/8MB8-85US>].

434. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel*, 34 tbl.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13187, 2007); see also *Defender Services*, U.S. CTS., <http://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/998T-RUNJ>] (noting that appointed counsel represent the "vast majority" of individuals prosecuted in federal courts).

435. See, e.g., Lollar, *supra* note 292, at 170 (highlighting wage garnishment as an effective method for child support debt collection); Exec. Off. for U.S. Att'ys, *United States Attorneys' Annual Statistical Report: Fiscal Year 2017*, U.S. DEP'T JUST. 64 tbl. 16 (2018), <https://www.justice.gov/usao/page/file/1081801/download> [<https://perma.cc/XPL7-SL6B>] (noting more than \$847 million seized in federal criminal forfeiture proceedings in fiscal year 2017). These are still far from perfect solutions, however. Often, the impact of wage garnishment and property seizures falls disproportionately on low-wage earners, creating cascading problems. See, e.g., Faith Mullen, *Another Day Older and Deeper in Debt: Mitigating the Deleterious Effects of Wage Garnishments on Appalachia's Low-Wage Workers*, 120 W.VA. L. REV. 973, 974-95 (2018) ("High interest rates on judgments exacerbate the problem of garnishments for low-wage workers . . . . The combination of wage garnishment and high post-judgment interest rates makes it impossible for low-wage workers to get out of debt and can drive some workers out of the job market. This is particularly problematic in states with a high percentage of people living in poverty." (footnotes omitted)); Steven L. Willborn, *Indirect Threats to the Wages of Low-Income Workers: Garnishment and Payday Loans*, 45 STETSON L. REV. 35, 38 (2015) (calculating that more than five million workers have their wages garnished each year, and noting that "[w]orkers earning between \$25,000 and \$40,000 annually have the highest garnishment rate by income"); Zhen, *supra* note 299, at 200 ("Nefarious collections agencies wrangle money out of low-income people through wage garnishment, harsh debt collection practices, bank levies, and tax intercepts.").

incarceration method of enforcing non-payment, although work requirements inevitably would still be present. Wage garnishment and property seizures in lieu of incarceration indubitably reduce the degree to which labor is forced, but these financial threats are still a lesser form of coercion. Yet they are a type of coercion that are distinct in nature from work or pay that is compelled by the threat of incarceration. Whether this compulsion amounted to “involuntary servitude” under the Thirteenth Amendment would likely turn on the degree to which the threatened financial penalty for non-payment would subject a person to financial “ruin,”<sup>436</sup> or prevent them from being able to make a livelihood.<sup>437</sup> The analysis would be distinct from the one here, however, as the incarceration pillar is fundamental to the analysis discussed herein.

### CONCLUSION

It is long past time for this country to address the criminal legal practices which are rooted in slavery and postbellum practices intended to lawfully replicate slavery and involuntary servitude. The tentacles of the past are entwined with the pervasive use of criminal financial obligations as a method of keeping people, disproportionately Black individuals, but people of all races, enmeshed in the criminal legal system. The trilemma of work/pay/jail must be eliminated, and governmental agencies must be prohibited from continuing to fund the criminal legal system on the backs of those convicted of crimes, most of whom were indigent before they came into contact with the criminal system. We must rid ourselves of the debtors' prisons of old by either nullifying the effects of the Punishment Clause, or at the very least, removing its bite by recognizing and addressing directly how it significantly undermines the prohibitions on slavery and involuntary servitude. Pursuant to Section 2 of the Amendment, Congress must act to prevent the continued use of fines and fees as a method of enslaving and requiring work from those convicted of crimes.

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436. Resnik, *supra* note 150, at 368 (citing *Timbs v. Indiana*, 139 S. Ct. 682, 694 (2019) (Thomas, J., concurring)).

437. *Timbs*, 139 S. Ct. at 687–89; *City of Seattle v. Long*, 493 P.3d 94, 168–77 (Wash. 2021) (en banc).