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CIVIL RIGHTS/CONSTITUTIONAL LAW—INDEBTED TO THE STATE: HOW THE THIRTEENTH AMENDMENT'S PROMISE OF ABOLITION HOLDS PROTECTIONS AGAINST THE MODERN DEBTORS' PRISONS

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Cash-starved municipalities regularly impose criminal justice debt on individuals too poor to pay. Local courts deny criminal debtors' a meaningful inquiry into their ability to pay prior to being assessed sky-high fees, often predictably resulting in default on their payments. Nonpayment under these municipal schemes is enforced through imprisonment solely for the purpose of compelling repayment. Under these circumstances, criminal debtors find themselves in modern debtors' prisons, a conceptual cycle of debt and imprisonment nearly impossible to escape. This Note will argue the modern debtors' prison is peonage, coerced labor for the repayment of debt, which is prohibited under the Thirteenth Amendment and enforced through the Anti-Peonage Act of 1867. This Note will consider the current remedial scheme under the Anti-Peonage Act as a potential remedy to the modern debtors' prison and argue this scheme is insufficient to protect low-income criminal debtors from insidious municipal revenue collection practices. Further, it will propose Congress should utilize its enforcement powers within section two of the Thirteenth Amendment to enhance existing private remedies under the Peonage Act, and effectively dismantle the modern debtors' prison.

INTRODUCTION

Set aside your image of a post-Obama color-blind America.[1]

* Candidate for J.D., 2017, Western New England University School of Law. I appreciate the thoughtful and painstaking work of my colleagues on the *Western New England Law Review* for their contributions to this Note. Additional thanks to Professor Bruce Miller, for supervising the Note's development, and Professors Erin Buzuvis and Harris Freeman for their endless guidance. Finally, I am deeply grateful for my ever-supportive loves, Kevin and Arden, who fulfil my life in myriad fun, silly, and happy ways.

1. *See generally* Daniel Schorr, *A New, 'Post-Racial' Political Era in America*,

Wipe clean your impression that the Civil Rights Movement of the 1960's solved the "race problem."[2] And above all, suspend your disbelief that the Emancipation Proclamation[3] abolished slavery.[4] For today's social, political, and especially economic subjugation of people of color flies in the face of America's gauzy, race-neutral ideations.[5] Racism prevails, taking on new forms as implicit and explicit biases against poor people of color, in the minds and hearts of our political and judicial figures.[6] And, as this Note will argue, slavery continues in its new manifestation of the debtors' prison, although, absolutely none of this is truly "new."

It begins with a minor offense: a moving violation, a citation for jaywalking, or a parking ticket.[7] Before a hearing for the offense has even commenced, booking fees, bail, and defense counsel application fees are attached.[8] In other instances, it arises post-conviction: monthly probation payments, installation costs for an automobile interlock device, or required contribution for court-appointed counsel.[9] To anyone with a steady income, a deep savings account, or a financially prosperous personal network,

NPR (Jan. 28, 2008, 4:00 PM), http://www.npr.org/templates/story/story.php?storyId=18489466 [https://perma.cc/T2PZ-C599] (acknowledging the public discourse surrounding President Obama's 2008 election as potentially marking a new "era" in race relations).

2. ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 10–11 (Princeton U. Press 2009) (defining the modern race problem—post-Civil Rights Movement—as racial inequality and disparate resource allocation, distinct from the post-Jim-Crow era race problem which was marked by clunky attempts at equality and integration).

3. *The Emancipation Proclamation*, NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/ [http://perma.cc/D84H-TZG7].

4. Ta-Nehisi Coates, *The Wholly Misunderstood Emancipation Proclamation*, THE ATLANTIC (Jan. 2, 2013) (describing Emancipation as a process of "integrating African American as citizens of equal standing[,]" which "continues even today.").

5. *See, e.g.*, Nikole Hannah-Jones, *The End of the Postracial Myth*, N.Y. TIMES MAG. (Nov. 15, 2016), https://www.nytimes.com/interactive/2016/11/20/magazine/donald-trumps-america-iowa-race.html [https://perma.cc/N7DN-3V9N].

6. NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: FREQUENTLY ASKED QUESTIONS (2012), http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx [https://perma.cc/TM32-64L7].

7. *See* Christopher D. Hampson, *The New American Debtors' Prisons*, AM. J. CRIM. L. (forthcoming 2017), http://nrs.harvard.edu/urn-3:HUL.InstRepos:17840773 [http://perma.cc/AHZ5-ESKB].

8. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1186–90 (2014).

9. *Id.* at 1190–96.

these legal financial obligations[10] ("LFOs") represent nothing more than a momentary hardship—write one check and all returns to normal.[11] For everyone else, the inability to scrounge up sums of cash on the spot could result in an indefinite stay in the county jail, for which additional fines and fees are compounded onto a growing bill.[12] This cycle, from the imposition of LFOs for non-violent minor offenses to indefinite incarceration, repeats in municipalities across the country in a conceptual confine known as the modern debtors' prison.[13]

This Note will argue that the modern debtors' prison is unconstitutional under the Thirteenth Amendment's prohibition against involuntary servitude and peonage.[14] Section II.A. will argue that, in keeping with the expansive spirit of the Thirteenth Amendment, the modern debtors' prison is a violation of the prohibition against peonage.[15] Section II.B. will demonstrate that the modern debtors' prison is not exempt from the protections of the Thirteenth Amendment, because the practices which give rise to it do not constitute "punishment" as used in contemporary legal discussion.[16] Therefore, the Thirteenth Amendment provides a source of constitutionally-guaranteed rights from being subjected to the modern debtors' prison.

Section II.C. will explore the remedies available for violations of constitutionally guaranteed rights to not be held to conditions of peonage. In Section II.D., the Note will assert Congress should take advantage of its broad enforcement powers under section two of the Thirteenth Amendment and enact a prohibition against the modern debtors' prison, providing enhanced civil remedies for imprisonment for criminal debts.[17] Finally, Section II.D. will address anticipated counterarguments: first, it will argue that *City*

10. Eric Balaban, *Shining a Light into Dark Corners: A Practitioner's Guide to Successful Advocacy to Curb Debtor's Prisons*, 15 LOY. J. PUB. INT. L. 275, 275 (2014). Legal financial obligations, or LFO's, include "the fines and court costs associated with a criminal conviction." *Id.*

11. *Id.* at 276.

12. Logan & Wright, *supra* note 8 at 1192.

13. AM. C.L. UNION, *In for a Penny: The Rise of America's New Debtors' Prisons*, AM. C.L. UNION 1, 10 (2010), https://www.aclu.org/files/assets/InForAPenny_web.pdf [https://perma.cc/PVF6-PZ5P] [hereinafter *In for a Penny*].

14. *See* U.S. CONST. amend. XIII.

15. *See* 42 U.S.C. § 1994.

16. *See* U.S. CONST. amend. XIII.

17. *See id.*

of Boerne v. Flores[18] does not restrict Congress's Thirteenth Amendment enforcement powers, and; second, it will demonstrate how federalism concerns do not preclude a remedial statute based on the Thirteenth Amendment.

I. DEBTORS' PRISONS IN THE HISTORICAL AND CONTEMPORARY CONTEXT

Since the early days of this country, courts have operated as revenue systems, squeezing precious dollars from the pockets of the poorest individuals and imprisoning them for failure to pay.[19] Existing judicial and legislative protections fail to prevent this practice[20]—and, as this Note will argue, the time has come for a new strategy. In 1865, Congress passed the Thirteenth Amendment as one of three Reconstruction Amendments.[21] Its purpose was to prohibit all forms of slavery and involuntary servitude.[22] One hundred fifty-one years and countless interpretive challenges later, the Thirteenth Amendment remains a relevant source of civil rights protection.[23] It provides a source of constitutionally-guaranteed rights which are immediately enforceable against the modern debtors' prison and has the power to institutionalize long-term prohibition.[24]

18. 521 U.S. 507 (1997).

19. *See* Logan & Wright, *supra* note 8, at 1180–85.

20. *See generally* Bearden v. Georgia, 461 U.S. 660 (1983) (holding unconstitutional the practice of imprisoning defendants too poor to pay a fine); *see also* Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014, 5:01 AM), http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons [http://perma.cc/F2WY-NZTT]; *In for a Penny*, *supra* note 13, at 5 (2010).

21. *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; *see also* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U.L. REV. 77, 85–86 (2010) [hereinafter McAward 2010].

22. Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1338–39 (2009) [hereinafter Tsesis 2009].

23. *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 92–93 (N.Y. U. Press, 2004) (arguing the Thirteenth Amendment is currently underutilized as both a source of individual rights and for Congressional authority, and thus, "the full wisdom of the Thirteenth Amendment's humanistic principles is yet to be tapped.") [hereinafter TSESIS 2004].

24. Some scholars have argued the Thirteenth Amendment provides a source of constitutional rights against debtors' prisons as they arise out of *civil* debt, which is not the focus of this Note. *See* materials *infra* note 52.

A. *Historical Debtors' Prisons*

Debtors' prisons seen in the early days of the nation, carried over from Britain, imprisoned a large population of colonial Americans for their civil debts.[25] Under this practice at common law, a creditor first "stripped the debtor of his property," and, "if any portion of the claim remained unsatisfied, [threw] him into prison and [kept] him there for life without food or clothing unless he found means to discharge the obligation."[26] Faulty logic plagued this institution, since, "if a debtor is unable to earn a sufficient amount to pay his debts when at liberty to work, he certainly cannot with such liberty withheld."[27] Creditors of civil debts had the law, and the remedies it provided, on their side.[28] The same was true for criminal debts owed to the government—law enforcement and court administrators had self-serving financial incentives to draw people into the courts and collect fines and fees from them.[29]

In the 1750s, a movement against debtors' prisons emerged, drawing parallels between imprisonment for debt and African American slavery.[30] Additionally, federal bankruptcy reform eased some of the strain on struggling debtors.[31] The federal backlash against the debtors' prisons spurred state constitutional and statutory measures.[32] Among their limitations, many of the state constitutional provisions carved out exceptions for debts arising out of crime, thereby limiting the protections only to those debts arising out of contracts.[33] Today's de facto debtors' prisons[34] are called such for their striking similarities to their institutionalized

25. Hampson, *supra* note 7, at 15–17. For an interesting article describing English debtors' prisons, *see* Philip Woodfine, *Debtors, Prisons, and Petitions in Eighteenth-Century England*, *in* 30 EIGHTEENTH-CENTURY LIFE 1 (2006), https://muse.jhu.edu/journals/eighteenth-century_life/v030/30.2woodfine.pdf [https://perma.cc/R63S-UTWL].

26. S. F. Kneeland, *The American Marshalsea*, 1 COUNSELLOR 216, 217 (1891).

27. *Id.*

28. *See* Woodfine, *supra* note 25, at 4.

29. Logan & Wright, *supra* note 8, at 1182.

30. Hampson, *supra* note 7, at 20.

31. *Id.* at 22–23.

32. *Id.* For a detailed analysis of utilizing state debtors' prison bans to combat the modern debtors' prison, see HARVARD LAW REVIEW ASS'N, *State Bans on Debtors' Prison and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016).

33. Hampson, *supra* note 7, at 27–28.

34. *See infra* Section II.B.

predecessors.[35] However, as this Note will argue, the modern debtors' prison more closely resembles another prohibited practice: the unconstitutional institution of peonage.[36]

B. *Modern Debtors' Prisons*

The practice of employing courts as revenue generators has a long history in both England and the United States.[37] Likewise, today, municipalities are focused heavily on their ever-depleting coffers and use imprisonment for nonpayment of criminal debt to enforce their fee schedules.[38] Municipal courts around the country impose fines, fees, or legal financial obligations ("LFOs") on people too poor to pay.[39] These policies sweep poor people into a cycle of indebtedness and imprisonment—the conceptual "modern debtors' prison"—that cannot be easily escaped.[40] Unlike the debtors' prisons of yore, today's debtors' prisons bear a marked distinction; rather than being standalone physical institutions within which civil debtors of all races are held, those seen today invisibly snare low-income individuals, primarily people of color, in their grasp.

Alabama resident Ms. Gina Ray is one such individual who was thrust into the modern debtors' prison when, in 2009, she was fined $179 for speeding.[41] Next, her license was revoked when she failed to appear in court after a miscommunication regarding her court date.[42] The next time Ms. Ray was pulled over, she was

35. *See, e.g.*, Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 202 (2016).

36. *See* United States v. Nelson, 277 F.3d 164, 176 (2d Cir. 2002).

37. Logan & Wright, *supra* note 8, at 1179–85; *see supra* Section I.A.

38. *In for a Penny*, *supra* note 13, at 8–9.

39. *See* AM. C.L. UNION, *Louisiana's Debtors' Prisons: An Appeal to Justice*, AM. C.L. UNION 5, 7 (2015), http://www.laaclu.org/resources/LADebtorsPrisons_2015.pdf [https://perma.cc/96NZ-279T] [hereinafter *Louisiana's DP*]; *In for a Penny*, *supra* note 13; *see generally* Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CENTER FOR JUSTICE (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [https://perma.cc/G6CB-PDJW] (investigating the widespread use of municipal court fines and fees).

40. Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES (July 2, 2012), http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?pagewanted=all&_r=1 [http://perma.cc/CTQ5-M4P2].

41. *Id.*

42. *Id.*

driving with a suspended license and assessed fees over $1,500.[43] Unable to pay, she was jailed, charged for each day she spent behind bars, and her debt was turned over to a private probation company for collection.[44] For a single speeding ticket, Ms. Ray spent forty days in jail and accrued $3,170 in criminal justice debt owed to a private corporation.[45]

Ms. Ray's story is one of many around the country that demonstrate the variety of ways the modern debtors' prison incapacitates individuals.[46] This Section will describe several salient features, which emerge across these stories, to define distinct characteristics of the modern debtors' prison.[47] Often, an individual is arrested or ticketed for a minor underlying offense that would ordinarily carry no threat of imprisonment,[48] for which legal financial obligations are imposed without inquiry into the

43. *Id.* Municipalities that employ these practices may have no public transportation, or it may be unreliable or inaccessible. For individuals with these sky-high court fees, driving without a license is sometimes unavoidable. *Id.*

44. Dozens of these for-profit corporations "operate in hundreds of courts" in Georgia. *Id.*

45. *See id.*

46. *See generally* Bannon, *supra* note 39; *In for a Penny*, *supra* note 13. As of this writing, municipalities around the country face civil rights suits for these practices, including Ferguson and Jennings, Missouri; Jackson, Mississippi; New Orleans, Louisiana; Rutherford County, Tennessee; Alexander City, Alabama; DeKalb County, Georgia; and Biloxi, Missouri; more suits are filed on an almost weekly basis. *See generally* Class Action Complaint, Kennedy v. City of Biloxi, No. 1:15-cv-00348-HSO-JCG (S.D. Miss. Oct. 21, 2015), https://www.aclu.org/sites/default/files/field_document/kennedy_v._city_of_biloxi__complaint.pdf [https://perma.cc/4YS3-RB69]; Class Action Complaint, Bell v. City of Jackson, No. 3:15-cv-732, 2015 WL 5949208 (S.D. Miss. Oct. 9, 2015); Class Action Complaint, Rodriguez v. Providence Cmty. Corrs., Inc., No. 3:15-cv-01048, 2015 WL 5754498, (M.D. Tenn. Oct. 1, 2015); First Amended Class Action Complaint, Cain v. City of New Orleans, No. 15-cv-4479 (E.D. La. Sept. 21, 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/04/First-Amended-Complaint-9-22-15.pdf [https://perma.cc/2EAV-WGBN]; Complaint, Foster v. City of Alexander City, No. 3:15-cv-00647-WKW-SRW, 2015 WL 5256630, (M.D. Ala Sept. 8, 2015); Class Action Complaint, Fant v. City of Ferguson, No. 15-cv-253, 2015 WL 510270 (E.D. Mo. Feb. 8, 2015); Class Action Complaint, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [https://perma.cc/YA58-QVQP]; Complaint, Thompson v. DeKalb Cty., No. 1:15-mi-99999-UNA (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/assets/2015.01.29_filed_thompson_complaint.pdf [https://perma.cc/F5W8-BN58].

47. *See, e.g.*, Bannon, *supra* note 39.

48. Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1655 (2015).

defendant's ability to pay.[49] Next, a low-income defendant is typically jailed for the purpose of repaying their debt.[50] Finally, the modern debtors' prison often has health, economic, community, and racial impacts wider than the individual defendant.[51]

1. The Specifics about Court-Imposed LFOs and Their Revenue Generating Purpose

The criminal justice costs, and LFOs, for which individuals are jailed fall into several categories: fines, fees, and restitution.[52] Fines are statutorily-established monetary penalties imposed on defendants as a condition of their sentence.[53] Fines, combined with fees,[54] constitute large percentages of municipal government budgets;[55] aggressive law enforcement tactics are often employed to garner arrests for petty offenses to meet the demand for revenue.[56] "[A] government that can fob off costs on criminals has an incentive to find criminals everywhere," making the link between

49. *See infra* Sections I.B.1., I.B.2.

50. *See infra* Section I.B.3.

51. *See infra* Section I.B.4.

52. Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), https:// www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq [http://perma.cc/Q6R9-SDY9]. In addition to the criminal justice LFOs, a second broad category of debts for which poor people are imprisoned are civil "consumer" debts, "which indigent borrowers rely on but struggle to repay." *Id.* These debts are the worthy subject of study, but are outside the scope of this Note. The focus here is criminal "legal debt [which] is particularly injurious," since, unlike civil debt, criminal debtors cannot discharge their LFO debt in bankruptcy, and nonpayment "may trigger an arrest warrant, arrest, or incarceration." Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1763 (2010), http://faculty.washington.edu/kbeckett/articles/AJS.pdf [https://perma.cc/K7CF-985A]. For more information about the role civil debts play in the modern debtors' prison, see generally Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165 (1990); Richard E. James, Note, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System*, 42 WASHBURN L.J. 143 (2002); Zoë Elizabeth Lees, Note, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR 63 (2012); Ian Liberty, Note, *From Debt Collection to Debt Slavery: How the Modern Practice of Debt Collection is a Violation of the 13th Amendment's Prohibition on Involuntary Servitude*, 15 RUTGERS RACE & L. REV. 281 (2014).

53. Hager, *supra* note 52.

54. *See infra* Section I.B.1.

55. *See infra* text accompanying notes 77 and 78; *In for a Penny*, *supra* note 13, at 8–9.

56. Logan & Wright, *supra* note 8, at 1194. Such tactics include "aggressive towing for parking violations" and other traffic enforcement offenses. *Id.*

these policing tactics and revenue collection more than apparent.[57]

The second category of costs involves a court's "user fees" assessed to defendants either pre- or post-judgment.[58] Before an individual even appears in court,[59] he may incur booking fees,[60] probation-like deferred prosecutorial program fees,[61] pre-trial abatement,[62] bail,[63] and defense counsel fees.[64]

Fees assessed post-judgment include such costs as prosecution fees,[65] the per-diem cost of incarceration,[66] and parole and

57. *Id.* at 1178. Perhaps not coincidentally, one of the first debtors' prison suits filed against many municipalities was in Ferguson, Missouri. Class Action Complaint, Fant v. City of Ferguson, No. 4:15-cv-253, 2015 WL 510270 (E.D. Mo. 2015). It was in Ferguson where a police officer encountered eighteen year-old Michael Brown jaywalking in his neighborhood, which resulted in Brown being fatally shot. Jake Halpern, *The Cop*, NEW YORKER (Aug. 10, 2015), http://www.newyorker.com/magazine/2015/08/10/the-cop [http://perma.cc/E5S3-9QA7]. This shooting sparked nationwide riots and prompted the Department of Justice to investigate the Ferguson police, which found Ferguson law enforcement prioritizes revenue generation at "every stage of the enforcement process." CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEP'T 9–10 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/TGU5-AAR8] [hereinafter FERGUSON REPORT].

58. *See* Hager, *supra* note 52; Logan & Wright, *supra* note 8, at 1193.

59. The deliberate use of the pronoun 'he' in this context represents the overwhelming gender disparity in the criminal justice system. "[M]ales have made up at least 85% of the total jail population" in the United States since 2000. BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014 (2015), http://www.bjs.gov/content/pub/pdf/jim14_sum.pdf [https://perma.cc/5VAT-R6DV]. *See* Harris, *supra* note 52, at 1760.

60. Logan & Wright, *supra* note 8, at 1186.

61. *Id.* at 1187. These fees arise when a defendant agrees to complete a program that the prosecutor recommends in return for deferred filing of charges against the defendant—sometimes seen in "pre-trial diversion." *Id.*

62. *Id.* at 1188. These payments are sometimes paid to police or courts to stop the prosecution from proceeding, resulting in the charges being dropped and hidden from a defendant's criminal record. *Id.*

63. *Id.* at 1189. "Bail" is a money payment made to the court in exchange for pre-trial release, which may be imposed in the discretion of the court and serves as a promise to return for a later hearing. *Id.*

64. *Id.* Often defendants who qualify for court-appointed counsel must still pay "an up-front 'application' fee or 'co-payment' for appointed counsel, in an amount tied to the severity . . . of the charge." *Id.* That is, if they are provided the opportunity to apply for a defender. *See Louisiana's DP*, *supra* note 39, at 8. *See generally* Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014).

65. Logan & Wright, *supra* note 8, at 1190–92. State and local governments attempt to recoup, from defendants, the costs of maintaining the system itself, such as security personnel, court administration, laboratory costs, state pension funds, or inmate medical facilities (regardless of whether the particular individual made use of

probation costs.[67] Many governments contract with for-profit corporations, like Judicial Corrections Services[68] and Sentinel Offender Services,[69] to provide private probation services (as is the case in Ms. Ray's hometown of Childersburg, Alabama).[70] Through these arrangements, the probation company provides probation services at no cost to the municipality; those services are instead charged to defendants.[71] When a defendant is unable to pay up-front, probation companies will often enter into a long-term payment arrangement, whereby the offender becomes indebted to the company, rather than the municipality.[72] The companies may then add additional fees for supervisory services, which may change on a whim since they are not subject to governmental oversight.[73]

such treatment). *Id.*

66. Forty-one states bill the cost of incarceration to inmates themselves. Hager, *supra* note 52 (citing *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees [https://perma.cc/VB8X-NQFU]. *See also* Logan & Wright, *supra* note 8, at 1192; Bill P., *Letter to the Editor*, THE MARSHALL PROJECT (Feb. 24, 2015, 11:49 AM), https://www.themarshallproject.org/letters/242-bill-p-letter-i-was-also-charged-approximately-80-per-day [http://perma.cc/AK88-6X7A].

67. Forty-four states bill the cost of parole and probation to the offender. Bronner, *supra* note 40; Hager, *supra* note 52 (citing *State-by-State Court Fees*, *supra* note 66). *See also* Logan & Wright, *supra* note 8, at 1192.

68. *About Us*, JUDICIAL CORR. SERVS., https://www.judicialservices.com/about-us/ [http://perma.cc/HA8Y-R5LY].

69. *Partnering with Courts*, SENTINEL, https://www.sentineladvantage.com/partnering-with-courts/ [http://perma.cc/SR9D-N5YQ].

70. Logan & Wright, *supra* note 8, at 1193. *See also* Bronner, *supra* note 40. "The practice is particularly robust in the South—in Florida, Georgia, Alabama, Tennessee and Mississippi—but has spread as far as Montana, Washington and Utah." Tierney Sneed, *Private Misdemeanor Probation Industry Faces New Scrutiny*, U.S. NEWS (Feb. 6, 2015, 11:30 AM), http:/www.usnews.com/news/articles/2015/02/06/private-misdemeanor-probation-industry-faces-new-scrutiny [http://perma.cc/K4UQ-P2R8].

71. HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 2–3 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [https://perma.cc/7TNW-4MSW].

72. Sneed, *supra* note 70. This arrangement relieves cash-strapped municipalities who no longer need to expend public revenue for probation services—making this transaction highly rewarding with little risk to the municipality. *See* HUMAN RIGHTS WATCH, *supra* note 71, at 2–3. Because payment of fees remains a condition of probation, the debtor, and indeed the debt itself, remains tied to the underlying criminal offense, even though keeping up with payments of the "supervision" fee is often the only thing keeping them from jail. *Id.*

73. *Id. See also* Bill Kimber, *Lawsuit Against Childersburg May Go to Trial in February 2016*, DAILY HOME (Sept. 13, 2014), http://www.annistonstar.com/the_daily_home/dh_home_lead/article_5f7eef72-3afe-11e4-a1e6-dfeb5520806f.html

Restitution, the third category of LFOs, is the defendant's payment to the victim of the offense for personal or property damage,[74] as a form of "making the victim whole" in the criminal context.[75] This Note does not focus on restitution, since it is inherently connected to an individual's offense, and is therefore a component of their "punishment."[76]

Fines and court user fees, identified previously as the "first" and "second" category of LFOs, create the foundation of the modern debtors' prison. State and local governments, eager to relieve taxpayers of burgeoning criminal justice costs, increasingly turn to monetary penalties to satisfy the operational costs of their criminal justice systems.[77] Revenue collected from these fines and fees constitutes massive portions of municipal budgets; for example, in Austin, Texas, traffic fines comprised forty-five percent of the city's Municipal Court budget.[78] A National Public Radio ("NPR") investigation into this practice found that nearly all states have increased their court fees since 2010.[79] Many of the fifteen states identified in the NPR study imposed additional fees when individuals failed to make payments toward their payment plans, without considering the individuals' financial status.[80]

[http:// perma.cc/2RZX-N8UY].

74. Hager, *supra* note 52.

75. *See, e.g.*, CATHARINE M. GOODWIN, FEDERAL CRIMINAL RESTITUTION § 6:21 GOAL IS TO RESTORE THE VICTIM (2016) (citing United States v. Ferdman, 779 F.3d 1129, 1132 (10th Cir. 2015) ("Thus, the principal aim of such restitution is to ensure that crime victims, to the extent possible, are made whole for their losses.")).

76. That is, for the purpose of a Thirteenth Amendment analysis. *See infra* Section II.B.

77. COUNCIL OF ECON. ADVISERS ISSUE BRIEF, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [https://perma.cc/5RLW-2YPV]; *see supra* text accompanying notes 65–67.

78. ALLYSON FREDERICKSEN & LINNEA LASSITER, ALL. FOR A JUST SOC'Y, DEBTORS' PRISONS REDUX: HOW LEGAL LOOPHOLES LET COURTS ACROSS THE COUNTRY CRIMINALIZE POVERTY 2 (2015), http://allianceforajustsociety.org/wp-content/uploads/2015/11/Debtors-Prisons-Redux-FINAL.pdf [https://perma.cc/F8AE-PJ37].

79. *State-by-State Court Fees*, *supra* note 66. Only three governments have not shown an increase since 2010: Alaska, the District of Columbia, and North Dakota. *Id.* Conversely, Florida added twenty new categories of LFOs and increased existing fees in both 2008 and 2009. Bannon, *supra* note 39, at 7.

80. Bannon, *supra* note 39, at 17–18. The Brennan Center terms these fees—late payment fees, collection fees the states authorize private collection agencies to recover, and fees for *entering into* a payment plan—"poverty penalties," because they

Compounding the issue, many municipal courts fail to keep adequate records of these collection schemes.[81] This lack of transparency makes it difficult for defendants to defend themselves in court and for advocates to access the information they need to evaluate the extent of the modern debtors' prisons.[82]

2. Assessment of Fees Without a Meaningful Inquiry into a Defendant's Inability to Pay

Typically, in the modern debtors' prison, courts impose LFOs without assessing a defendant's ability to pay.[83] The Supreme Court sought to curb the practice of incarcerating people for their inability to pay criminal debts in the early eighties.[84] In *Bearden v. Georgia*,[85] the defendant's parole was revoked for failure to pay a fine. The Court held that due process under the Fourteenth Amendment requires courts to take into consideration a defendant's inability to pay.[86] When bona fide efforts toward repayment have been made, the state must seek other penal methods[87] and can only imprison a defendant who has shown a willful refusal to pay.[88] Combined with earlier holdings in *Williams v. Illinois*[89] and *Tate v. Short*,[90] the Court has precluded lower courts from discriminating against criminal defendants for their inability to pay LFOs.[91] These Fourteenth Amendment due process protections, however, have failed to prevent the modern

"effectively penalize people solely for being poor." *Id.*

81. *Id.* at 10–11.

82. *In for a Penny*, *supra* note 13, at 40–41.

83. Logan & Wright, *supra* note 8, at 1186–89; Bannon, *supra* note 39, at 13.

84. Logan & Wright, *supra* note 8, at 1200.

85. 461 U.S. 660 (1983).

86. Bearden v. Georgia, 461 U.S. 660, 668–69 (1983).

87. Despite this constitutional guarantee for meaningful alternatives to imprisoning indigent defendants, the Brennan Center found that only twelve out of fifteen states studied offered community service alternatives. Bannon, *supra* note 39, at 15. Some courts rarely converted LFOs into community service. *Id.*

88. *Bearden*, 461 U.S. at 672–73.

89. 399 U.S. 235, 241–42 (1970) (holding the State may not imprison people longer than the outer limits of incarceration it needs to "satisfy its penological interests and policies" simply due to a defendant's indigency).

90. 401 U.S. 395 (1971) (holding a State cannot convert a monetary sentence into jail time simply because the defendant is indigent and cannot pay; the State must choose an alternative enforcement method).

91. Balaban, *supra* note 10 at 275–76.

debtors' prison from emerging in many municipalities.[92]

For example, in the Superior Court of Benton County, Washington, "the average LFO is $2540 [sic] per case," which is imposed without taking into account an individual's ability to pay.[93] The county offers community service as an alternative to incarceration, but work crew participants are required to pay a daily $5 participation fee up front—not a meaningful alternative.[94] Additionally, the debtor can be thrown into jail for missing work crew or even one payment.[95]

3. Imprisonment for Nonpayment—or Something Like That

Once fees are imposed on an individual unable to pay, he usually defaults on his debt.[96] Individuals who fall behind on payment plans to private probation companies have their "freedom contingent on paying those fees."[97] Courts have developed other legal, although objectionable, means of navigating around *Bearden* to permit imprisoning individuals for nonpayment.[98] The most egregious circumvention of Fourteenth Amendment guarantee is a practice called "pay-or-stay."[99] Criminal debtors in these jurisdictions are offered the option of either paying their debt in full at the time of their hearing or "serv[ing] jail time to satisfy debts."[100] Essentially, an indigent offender "volunteers" for jail time as a means of repayment, where imprisonment for his failure to pay would normally be prohibited on Equal Protection

92. *See* Shapiro, *supra* note 20; Balaban, *supra* note 10 at 275–76.

93. AM. C.L. UNION OF WASH., *Modern-Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor*, AM. C.L. UNION 4 (2014), https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf [https://perma.cc/2SZZ-GYXG] [hereinafter *Washington's DP*]. Once assessed, the total LFO debt increases rapidly "due to a 12% interest rate and added collection fees of $100 per year. A person making $20 payments per month on an average case may be unable to pay off his LFO debt even after decades of regular payment." *Id.*

94. *Id.* at 9; Bannon, *supra* note 39, at 15.

95. *Washington's DP*, *supra* note 93.

96. *Id.* at 9–10.

97. HUMAN RIGHTS WATCH, *supra* note 71, at 2–3.

98. For a discussion about the other three circumventions around the Fourteenth Amendment prohibition—imprisonment for driving with a suspended license, failure to appear, and contempt of court—see FREDERICKSEN & LASSITER, *supra* note 78, at 4–6.

99. *Id.* at 6.

100. *Id.*

grounds.[101] For example, in Washington State, defendants are told if they are unable to pay the full amount up front, each day they sit in jail earns them credits toward their outstanding balance.[102] Unfortunately, Washington is not alone in this practice.[103]

4. Racial and Economic Impacts of the Modern Debtors' Prison

This unfortunate cycle has severe impacts on an individual's well-being, his family, and his community, which fall disproportionately on individuals of color. For some individuals, the modern debtors' prison can exacerbate pre-existing mental and physical health issues.[104] Modern debtors' prisons financially burden whole families already struggling in economically underdeveloped communities.[105] This cycle also deprives

101. *Id.*

102. *Id.* S*ee also In for a Penny*, *supra* note 13, at 10. That is, unless the offender is imprisoned for nonpayment of superior court LFO's. *Washington's DP*, *supra* note 93, at 9. Some states impose additional per diem incarceration fees, which add to the individual's overall balance. *See supra* Bannon, *supra* note 39, at 23; *supra* text accompanying note 66.

103. Kainaz Amaria et al., *Profiles of Those Forced to 'Pay or Stay'*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/310710716/profiles-of-those-forced-to-pay-or-stay [https://perma.cc/WQ4Y-UGLB]; *In for a Penny*, *supra* note 13, at 9–10.

104. Lillian Thomas, *Poor Health: Poverty and Scarce Resources in U.S. Cities; Part One: The Problem*, POST-GAZETTE.COM, http://newsinteractive.post-gazette.com/longform/stories/poorhealth/1/ [http://perma.cc/C2UH-VMC9]. In Jennings, Missouri, another target of a debtors' prison suit, jail conditions cause psychological and physical damage. *See* Class Action Complaint at ¶ 3, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015), http://://equaljusticeunderlaw.org/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [https://perma.cc/YA58-QVQP]. Inmates have committed, and attempted, suicide in the Jennings jail "after being confined solely because they did not have enough money to buy their freedom." *Id.*; *see also* Margaret Gillerman & Joel Currier, *Jennings Hanging Attempt is Latest in Series of Area Jail Incidents*, ST. LOUIS POST-DISPATCH (Oct. 6, 2014), http://www.stltoday.com/news/local/crime-and-courts/jennings-hanging-attempt-is-latest-in-series-of-area-jail/article_a62642ad-141b-5b5c-9881-6ec2a67290f8.html [http://perma.cc/XL2X-NRKK]; Joseph Shapiro, *Jail Time for Unpaid Court Fines and Fees Can Create Cycle of Poverty*, NPR (Feb. 9, 2015, 5:38 PM), http://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty [http://perma.cc/KC8A-ZEKS]; Jessica Pishko, *Locked Up for Being Poor*, THE ATLANTIC (Feb. 25, 2015), http://www.theatlantic.com/national/archive/2015/02/locked-up-for-being-poor/386069/ [http://perma.cc/8NEC-HHHC].

105. When LFOs are imposed on individuals who are unable to pay, his or her family faces a difficult choice: "[m]any poor defendants and their families prioritize paying a fine in order to avoid incarceration, and to do so must forgo paying for essentials such as rent or food." *Louisiana's DP*, *supra* note 39 at 6; *see also* Roopal

communities of economic contributions to the labor market as imprisonment disrupts an individual's time spent in, or searching for, gainful employment.[106] Even with stable employment, legal debt drains an individual's long-term finances for decades to come.[107] Thus, the debtors' prison undercuts criminal debtors' abilities to work toward repayment and cripples their opportunities for advancement.[108] As a result, some individuals may turn, or return, if the case may be, to engaging in criminal behavior as a way to support themselves, their families, and to repay their LFOs.[109]

Municipalities focused entirely on generating revenue often employ their police forces and court operations to collect from the most vulnerable citizens, often poor people of color.[110] In Ferguson, Missouri, a 2015 Department of Justice investigation[111] uncovered that African Americans were disproportionately more likely to be ticketed and arrested for minor offenses, for which they were sixty-eight percent less likely to have their charges dismissed.[112] The Ferguson debtors' prison[113] reflects the City's "unlawful bias against and stereotypes about African Americans,"[114] which demonstrates an unconstitutional violation of their equal protection rights.[115] This racial disparity characterizes the modern debtors' prison and, in essence, creates a "two-tiered

Patel & Meghna Philip, *Criminal Justice Debt: A Toolkit for Action*, BRENNAN CENTER FOR JUST. AT N.Y.U. 7 (2012), https://csgjusticecenter.org/wp-content/uploads/2013/07/2012-Brennan-Toolkit.pdf [https://perma.cc/PBF6-APB4].

106. Patel, *supra* note 105, at 6; *see also* Meredith Kleykamp et al., *Wasting Money, Wasting Lives: Calculating the Hidden Costs of Incarceration in New Jersey*, DRUG POL'Y ALLIANCE 9 (2008), http://www.drugpolicy.org/sites/default/files/WMWL_Final_2012.pdf [https://perma.cc/N6WL-RHU2]. Further, having an arrest, conviction, or jail stay on a person's record makes finding employment difficult. Harris, *supra* note 52, at 1777–78. Only 48% of the Washington individuals involved in this study were employed at the time. *Id.*

107. Harris, *supra* note 52, at 1776. Incarceration, even for three or four days, forces already economically disadvantaged individuals to miss shifts at work or changes their reputation in the workplace.

108. THOMAS HARVEY ET AL., ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER 25–26 (2014), http://03a5010.netsolhost.com/WordPress/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf [https://perma.cc/QP97-WCDP].

109. Harris, *supra* note 52, at 1785.

110. *See* FERGUSON REPORT, *supra* note 57, at 2–4.

111. *See* materials *supra* note 57 and accompanying text.

112. FERGUSON REPORT, *supra* note 57, at 4–5.

113. *Id.* at 8–9.

114. *Id.* at 5.

115. *Id.* at 63.

system of justice" along racial lines.[116]

5. Reform Efforts: Litigation and Proposed Legislation

Civil rights advocates such as the American Civil Liberties Union ("ACLU"), the Southern Poverty Law Center ("SPLC"), and Equal Justice Under Law ("EJUL") have seen some successes in challenging the modern debtors' prison on the basis of the Fourteenth Amendment violations.[117] In Montgomery, Alabama, for example, EJUL obtained an injunction, and later, a settlement with the City, which reformed the entire criminal justice system and altered the City's approach to criminal debtors.[118]

Following the publication of its Ferguson report,[119] the Department of Justice under the Obama administration announced a package of resources to aid local reform efforts, including $2.5 million in competitive grants to "restructure the assessment and enforcement of fines and fees."[120] The department also proposed reform strategies founded on due process and equal protection principles, including adhering to the *Bearden* rule and developing meaningful alternatives to incarceration.[121] However, reiteration of

116. *In for a Penny*, *supra* note 13, at 10; FREDERICKSEN & LASSITER, *supra* note 78, at 1.

117. *See, e.g.*, *SPLC Lawsuit Closes Debtors' Prison in Alabama Capital*, SPLC: NEWS (Aug. 25, 2014), https://www.splcenter.org/news/2014/08/26/splc-lawsuit-closes-debtors'-prison-alabama-capital [http://perma.cc/G8SA-Z2NM].

118. *See Shutting Down Debtors' Prisons*, EQUAL JUST. UNDER L., http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/ [http:// perma.cc/PV9B-HVXP.

119. *See supra* note 57 and accompanying text.

120. *Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices*, DEP'T OF JUST. (Mar. 14, 2016), https://www.justice.gov/opa/pr/justice-department-announces-resources-assist-state-and-local-reform-fine-and-fee-practices [http://perma.cc/45UW-7DCS]; *see also* Matt Apuzzo, *Justice Dept. Condemns Profit-Minded Court Policies Targeting the Poor*, N.Y. TIMES (Mar. 14, 2016), http://www.nytimes.com/2016/03/15/us/politics/justice-dept-condemns-profit-minded-court-policies-targeting-the-poor.html?_r=0 [http://perma.cc/7CS5-QF3L].

121. *See generally* Vanita Gupta & Lisa Foster, *Dear Colleague*, DEP'T OF JUST. (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download [https://perma.cc/7EYH-2YFQ]. The state of these efforts remains unclear in the early days of the Trump administration, although on March 17, 2017, the U.S. Commission on Civil Rights held a briefing assessing state and local fine and fee practices since the Obama-era Dear Colleague letter. *See* U.S. COMM'N ON CIVIL RIGHTS, NOTICE OF COMMISSION BRIEFING AND BUSINESS MEETING (Mar. 17, 2017), http://www.usccr.gov/press/2017/03-17-Sunshine-Act-Notice.pdf [https://perma.cc/D2RF-XBXV].

pre-existing Fourteenth Amendment safeguards, which have failed to prevent modern debtors' prisons from emerging,[122] provides no guarantees of adequate protection from desperately underfunded municipalities with deep-seated racial biases.[123] As Congress's authority under the Fourteenth Amendment and the Commerce Clause[124] continue to be restricted through regressive Supreme Court decisions, they will likely soon be unavailable as sources of remedies for future violations.[125]

In January, 2016, Representative Mark Takano and civil rights organizations such as the ACLU, SPLC, and the National Association for the Advancement of Colored People ("NAACP"), advanced a bill called the "End of Debtor's Prison Act of 2016," which died in committee.[126] If it had been enacted, the bill would have withdrawn federal funding from states or municipalities that contract with private probation companies[127] as a means of collecting unpaid fines and fees from "pay-only" probationers.[128] This was a meaningful effort, which was the result of consistent investigation and advocacy.[129] However, this bill isolated only one particular practice—states' contracting with private probation companies—that gives rise to the modern debtors' prison, and, as this Note argues, such attempts will not effectively dismantle the full range of this complex institution.

The roots of the modern debtors' prison are extensive and require dynamic strategies capable of achieving systemic change.[130] The Thirteenth Amendment, albeit currently underutilized in the movement against the modern debtors' prison, holds powerful promises as a source of substantive rights and protections for

122. Shapiro, *supra* note 20.

123. FREDERICKSEN & LASSITER, *supra* note 78, at 4–7.

124. *See infra* note 150.

125. *See infra* Section II.D.3.

126. *See generally* End of Debtor's Prisons Act of 2016, H.R. 4364, 114th Cong. (2016); *Letter of Support for the "End of Debtor's Prison Act of 2016"*, SPLC (Mar. 16, 2016), https://www.splcenter.org/sites/default/files/final_letter_of_support_for_the_end_of_debtors_prison_act_of_2016.pdf [https:// perma.cc/P3Y5-H85J].

127. *See supra* Section I.B.1.

128. Defined as "an individual who is placed on probation due to the failure of the individual to pay any part of a fine or fee imposed by a State or local court." End of Debtor's Prisons Act of 2016, H.R. 4364, 114th Cong. § 2(h)(2) (2016).

129. *See generally Letter of Support for the "End of Debtor's Prison Act of 2016," supra* note 126.

130. *See* Atkinson, *supra* note 35, at 202.

criminal debtors.[131] The next Section will delve more deeply into the law governing rights under the Thirteenth Amendment.

II. THE HISTORY, PROMISES, AND IMPACT OF THE THIRTEENTH AMENDMENT

> Section 1. 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. Section 2. Congress shall have power to enforce this article by appropriate legislation.[132]

Slavery in Confederate states was abolished on January 1, 1863, when President Lincoln issued the Emancipation Proclamation.[133] Ratified in 1865, section one of the Thirteenth Amendment implemented emancipation throughout the United States, and section two gave Congress powers to enforce section one "by appropriate legislation."[134] The Thirteenth Amendment's immediate *and* prospective purpose was to uproot slavery, in all its forms.[135] The Framers of the Thirteenth Amendment included slavery and involuntary servitude, both terms in need of interpretation, allowing the Amendment to adapt and remain flexible to new and unforeseen factual scenarios.[136] Each independent element of the Thirteenth Amendment—the promises held within section one and section two's grant of enforcement powers—requires separate analyses.

A. *Slavery under Thirteenth Amendment Jurisprudence*

The "traditional form" of slavery, as it has existed in this country, was the institution of chattel slavery perpetrated against African American people.[137] It was a characteristically brutal,

131. *See* TSESIS 2004, *supra* note 23.

132. U.S. CONST. amend. XIII.

133. *The Emancipation Proclamation*, *supra* note 3; McAward 2010, *supra* note 21, at 85.

134. U.S. CONST. amend. XIII.

135. Tsesis 2009, *supra* note 22, at 1337–38; Joseph W. Mark, Comment, United States v. Hatch: *The Significance of the Thirteenth Amendment in Contemporary American Jurisprudence*, 91 DENV. U. L. REV. 693, 697 (2014).

136. Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 374 (1995).

137. Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 883 (2012).

dehumanizing status of legal ownership that attached to a person for life.[138] Most notably, slavery effectuated the forced laborer's social death, meaning "the alienation or exclusion of the slave from the community at large justified by the general unworthiness of the slave."[139] Interpretations of "slavery" within the context of the Thirteenth Amendment, however, struggled to determine whether the legal institution of chattel slavery was a starting point for applying the prohibition, or a limiting factor on what practices could be prohibited as "slavery."[140] Early Supreme Court interpretations, the *Slaughter-House Cases*[141] and the *Civil Rights Cases*,[142] for example, rendered Congress's section two enforcement power under the Amendment weak and insufficient.[143] Under these interpretations, Congress could determine the "badges and incidents of slavery,"[144] but only as they emerge through State action perpetuating slavery.[145]

However, in *Jones v. Alfred H. Mayer Co.*, the Court restored Congress's expansive power to "rationally . . . determine what are

138. *Id.* at 883–85.

139. *Id.* at 886 (arguing legal and social forces accomplish this consequence of slavery—removing slaves from the community at large and imposing upon them a badge of inferiority).

140. In other words, the debate has surrounded whether the practice at issue must resemble "traditional" chattel slavery in order to trigger Thirteenth Amendment protections, or if the Framers would have permitted Congress to consider practices which radically differ from, albeit are analogous to, chattel slavery. *See id.* at 883.

141. 83 U.S. 36 (1873) (considering whether compelling butchers to work in slaughterhouses was a violation of the Thirteenth Amendment; concluding that it was not). Here, the Court defines slavery as a "'legalized social relation' and just as quickly found that slavery was over following the Civil War." Armstrong, *supra* note 137, at 878.

142. 109 U.S. 3 (1883). The Court in *Civil Rights Cases* decided neither the Thirteenth nor the Fourteenth Amendment justified Congress's enactment of section one of the Civil Rights Act of 1875. This provision entitled all persons, "regardless of any previous condition of servitude," the "full and equal enjoyment of" public sites of amusement. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 582–84 (2012) [hereinafter McAward 2012].

143. *See* TSESIS 2004, *supra* note 23, at 74.

144. *Civil Rights Cases*, 109 U.S. at 20.

145. *See* McAward 2012, *supra* note 142, at 582–83. Justice Harlan's scalding dissent demonstrated a much broader view of Congressional authority. He argued Congress is "not necessarily restricted to legislation against slavery as an institution upheld by positive law, but may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race." *Civil Rights Cases*, 109 U.S. at 37 (Harlan, J., dissenting); *see also* Tsesis 2009, *supra* note 22 at 1342; McAward 2012, *supra* note 142, at 586–88.

the badges and the incidents of slavery, and [conferred] the authority to translate that determination into effective legislation."[146] Under *Jones*, courts should simply defer to Congress's rational determination of the "badges and incidents of slavery,"[147] which, in practicality, extended Congress's section two enforcement power to bar "badges and incidents" of slavery in public *and* private instances of racial discrimination.[148] The *Jones* rule has largely governed Thirteenth Amendment jurisprudence to this day,[149] despite calls for more definitive guidance from the Supreme Court.[150]

146. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

147. *Id.* S*ee also* Mark, *supra* note 135, at 699.

148. *Jones*, 392 U.S. at 442–43 ("[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.").

149. In United States v. Nelson, 277 F.3d 164 (2d. Cir. 2002), the court interpreted *Jones* as allowing Congress to extend Thirteenth Amendment protections to a broader range of activities than race-based slavery or involuntary servitude. In *Nelson*, the defendants in a Jewish hate crime case questioned Congress's authority to enact 18 U.S.C. § 245(b)(2)(B) of the Hate Crimes Act. This section "makes it a federal crime for a person (even if acting in a purely private capacity) to injure someone else because of the victim's race or religion and because the victim was enjoying a public facility provided by any State or local government." *Nelson*, 277 F.3d at 174. The Court upheld the statute; it reasoned that the essential quality of slavery or involuntary servitude, "the subjugation of one person to another by coercive means," can be effectuated on individuals irrespective of their race. *Id.* at 179.

150. The Tenth Circuit, in United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013) condoned targeted racial *violence* as a rational determination of "badges and incidents" of slavery within Congress's power to regulate. *See* Mark, *supra* note 135, at 705. Specifically, the court upheld the Hate Crimes Act of 2009, which added racial violence as an offense under 18 U.S.C. § 249. However, the court implored the Supreme Court "to bring Thirteenth Amendment jurisprudence in line with the structural concerns that prompted limits . . . announced in *City of Boerne*, *Lopez*, and *Morrison*," all cases restraining Constitutionally-created Congressional enforcement power. Mark, *supra* note 135, at 706. *See generally* United States v. Morrison, 529 U.S. 598 (2000) (holding Congress was not permitted to enact the Violence Against Women Act under either the Commerce Clause or the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act, passed under section five of the Fourteenth Amendment, exceeded Congress's enforcement powers under the Amendment); United States v. Lopez, 514 U.S. 549 (1995) (holding that passage of the Gun-Free School Zones Act was an impermissible reach of Congress under its Commerce Clause authority). At least two other Circuits and one District Court have also upheld the racial violence provision of 18 U.S.C. § 249 under *Jones*, while echoing *Hatch*'s call for restrained Thirteenth Amendment enforcement power. *See* United States v. Cannon, 750 F.3d 492 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 709 (2014); United States v. Maybee, 687 F.3d 1026 (8th Cir. 2012); United States v. Henery, 60 F. Supp. 3d 1126 (D. Idaho 2014).

B. *Involuntary Servitude under Thirteenth Amendment Jurisprudence*

The Thirteenth Amendment's prohibition against involuntary servitude has also undergone interpretive challenges.[151] Often conflated, courts have long recognized that "[t]he words involuntary servitude have a 'larger meaning than slavery.'"[152] Courts have attempted to define involuntary servitude primarily in the criminal, rather than the civil context.[153] The Supreme Court held, in *United States v. Kozminski*,[154]

> [a]bsent change by Congress, . . . for purposes of criminal prosecution under § 241 or § 1584,[155] the term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process.[156]

151. *See* Kares, *supra* note 136, at 386–92.

152. Bailey v. Alabama, 219 U.S. 219, 241 (1911) (quoting Slaughter-House Cases, 83 U.S. 36, 69 (1872)); Milwaukee v. Horvath, 143 N.W.2d 446, 448 (1966). Although slavery and involuntary servitude are often conflated, involuntary servitude, subtly distinguished from slavery, is "forced labor for the benefit of another." *See* Armstrong, *supra* note 137 (citing Bailey v. Alabama, 219 U.S. 219, 241 (1911)). In other words, involuntary servitude originates out of extralegal methods—either physical force or legal coercion—whereas the compulsion to labor in slavery originates from and is reinforced by a legal framework. *Id.* at 882–86.

153. This is because statutes enforcing this Thirteenth Amendment prohibition have criminalized activity that returns individuals to conditions of involuntary servitude. *See* 18 U.S.C. §§ 1581–88; *see also* Kares, *supra* note 136, at 384–85. Courts proclaim that the necessity of providing a criminal definition is because due process requires notice of activities that carry criminal sanctions. United States v. Kozminski, 487 U.S. 931, 949–50 (1988); Kares, *supra* note 136, at 388.

154. *Kozminski*, 487 U.S. at 952.

155. 18 U.S.C. § 241 prohibits conspiracies to interfere with constitutionally-guaranteed rights, including those provided in the Thirteenth Amendment, whereas § 1584 is intended to narrowly criminalize the holding of a person to involuntary servitude. *Kozminski*, 487 U.S. at 940.

156. *Kozminski*, 487 U.S. at 952 (reversing convictions for involuntary servitude where defendants held two mentally handicapped farmworkers laboring "in poor health, in squalid conditions, and in relative isolation" using psychological coercion). This definition of involuntary servitude drew criticism from Justices Brennan and Marshall, who would have preferred a definition of servitude focusing on the "slavelike condition[s]" imposed, rather than the method of coercion. *Kozminski*, 487 U.S. at 964 (Brennan, J., concurring); *see* William M. Carter, Jr., *Race, Rights, and the Thirteenth*

The *Kozminski* rule allows courts to determine whether the conduct at issue imposes "'slavelike' conditions of servitude" through "physical or *legal* coercion."[157] While this narrow definition for purposes of criminal sanctions was not intended to "define involuntary servitude in its constitutional sense,"[158] lower courts nevertheless regularly apply it in the civil context.[159] This involves considering whether the victim only had the choice between performing the labor, or receiving physical or legal sanctions.[160]

C. *The Thirteenth Amendment's Exception for "Crimes Duly Convicted"*

The Thirteenth Amendment is not an absolute prohibition; its exception allows for involuntary servitude or slavery "as a punishment for crime whereof the party shall have been duly convicted."[161] The Supreme Court has held that this exception does not apply to laws that have regulatory, or non-punitive purposes.[162] For example, collateral consequence laws, or regulatory sanctions, which attach to criminal convictions[163] and arguably effectuate a similar social death as experienced in slavery[164]—such as sex offender registration—do not constitute punishment.[165] Simply

Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. DAVIS L. REV. 1311, 1337 (2007); Kares, *supra* note 136, at 389.

157. *Kozminski*, 487 U.S. at 951 (emphasis added). A court cannot find non-"slavelike" conditions so intolerable as to constitute involuntary servitude, as this would impermissibly substitute the court's "value judgment" for that of Congress. *Id.* at 950. Nor does the rule allow for psychological coercion, which would hinge its meaning "entirely upon the victim's state of mind." *Id.* at 949.

158. Kares, *supra* note 136, at 389 (emphasis omitted).

159. *Id.*

160. Steirer v. Bethlehem Area School District, 987 F.2d 989, 999 (3d Cir. 1993).

161. U.S. CONST. amend. XIII.

162. Smith v. Doe, 538 U.S. 84, 102 (2003); *see* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1808 (2012).

163. *See generally* Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT'L INST. OF JUST. J. 25 (2013), https://www.ncjrs.gov/pdffiles1/nij/241927.pdf [https://perma.cc/VAV4-6MJS].

164. *See supra* note 139 and accompanying text.

165. *Smith*, 538 U.S. at 102 (holding registration systems for convicted sex offenders is purely regulatory, not punitive, for purposes of the constitution's prohibition against retroactive punishment); Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1180 (2013).

having the mere presence of a deterrent purpose does not render the sanctions criminal, since "[a]ny number of governmental programs might deter crime without imposing punishment."[166] Therefore, it is unconstitutional if the State imposes slavery or involuntary servitude on a defendant for a primary purpose other than to further its punitive goals.[167]

D. *The Practice of Peonage and the Anti-Peonage Act of 1867*

Following the Thirteenth Amendment's abolition of slavery, wealthy white plantation (and former slave) owners faced, among others, an economic dilemma: how would they continue to maintain their expansive farming enterprises, which designedly required the exploitation of black labor?[168] Under the vague Thirteenth Amendment prohibition against involuntary servitude, the institution of peonage arose as a means of sidestepping the Amendment's prohibition.[169] Peonage is the voluntary or involuntary arrangement to engage in compulsory service to another for the repayment of debt.[170]

1. The Conduct of Peonage: Compulsory Labor

One solution to Southern plantation owners' economic dilemma[171] was to coerce freed slaves into signing "lifetime" labor contracts by the threat of torture and death.[172] These labor arrangements were flush with provisions nearly identical to those conditions inherent in the institution of slavery.[173] Freed Blacks in

166. *Smith*, 538 U.S. at 102.

167. *See* Chin, *supra* note 162.

168. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 26–27 (Doubleday, 2008).

169. For a particularly thorough description of the historical and legal background of peonage, see Birckhead, *supra* note 48, at 1609–26.

170. Clyatt v. United States, 197 U.S. 207, 215 (1905).

171. *See* Birckhead, *supra* note 48, at 1609–26.

172. *See* BLACKMON, *supra* note 168. A seedier intention may have existed; "[b]ecause of the tremendous upheaval after freedom, both Southern planters and the federal government believed that blacks needed close supervision." PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969 19 (U. Ill. Press 1972).

173. *See* BLACKMON, *supra* note 168, at 27. Although many of these contracts were dissolved, they helped to form a tactical strategy of southern whites seeking to regain their slave-labor base, and thus to return to their tremendous prosperity and comfort of pre-war life. *See id.*

the South—especially formerly enslaved agricultural workers[174]—hardly had another alternative than to agree to such contracts, since Southern states passed vagrancy laws which required them to prove their employment or risk imprisonment.[175] Once convicted and labeled a 'criminal,' the Thirteenth Amendment rights of African Americans were essentially nullified, as involuntary servitude was permissible "for crime[s] . . . duly convicted."[176] Submitting to these labor contracts voluntarily might have appeared preferable compared to the cruel system of convict leasing to which African Americans were subjected once imprisoned.[177] If not imprisoned and sold into forced labor to private companies,[178] black defendants facing fines for petty offenses would agree to work for sureties, or, private employers who satisfied their criminal debts.[179]

The prohibition against compulsory labor under the Thirteenth Amendment, and as implemented by the Peonage Act, indicated Congress sought to "maintain a system of completely free and voluntary labor."[180] While some instances of forced labor were constitutionally acceptable, such as penal labor,[181] Congress precluded a State from making joblessness an element of any

174. *See* DANIEL, *supra* note 172, at 19–20. This particular class of former slaves, following Emancipation, had no land or capital with which to create their own livelihoods. *Id.* at 20. Therefore, becoming indebted to a landowner from whom they rented land for crops, or sharecropping contracts, became a prime opportunity for economic prosperity. *Id.* Sharecropping contracts allowed a former slave to work a parcel of land, and in return, would share portions of the crop with the supply merchant or planter. *Id.* A sharecropper who received advances for his work would become indebted to the landowner, which was considered a breach of his contract—a criminal act at that time. *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 651 (1982).

175. Between the late 1860s and 1877, vagrancy laws sprung up in every Southern state. BLACKMON, *supra* note 168, at 53. As an example, in Mississippi, an 1865 statute "required African American workers to enter into labor contracts with white farmers by January 1 of every year or risk arrest." *Id.* at 53; *see also* Birckhead, *supra* note 48, at 1611 (chronicling the rise and breadth of these Black Codes).

176. U.S. CONST. amend. XIII; *see* Schmidt, *supra* note 174, at 649.

177. Schmidt, *supra* note 174, at 653.

178. BLACKMON, *supra* note 168, at 51–53.

179. Schmidt, *supra* note 174, at 653; DANIEL, *supra* note 172, at 19–20; *see also* Peonage Cases, 123 F. 671, 674–75 (M.D. Ala. 1903). Even child defendants processed in probate court could be judicially returned to their former masters. Schmidt, *supra* note 174, at 650.

180. Pollock v. Williams, 322 U.S. 4, 17 (1944).

181. *See infra* Section III.A.1.

crime.[182] Essentially, it is "beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service" by virtue of these two federal laws.[183]

2. The Purpose of Peonage: Repayment of Debt

> One fact existed universally: all were indebted to their masters. This was the cord by which they seemed bound to their masters' service . . . . Upon entering the new service, or while continuing therein, the peon was held rigorously to fulfill his pledge and render his labor so long as his debts remained, or an additional one was incurred.[184]

Once indebted to these private employers, either by virtue of voluntarily undertaking a labor contract[185] or being involuntarily thrust into a surety contract,[186] the peon was compelled to labor until his debt was liquidated—a task which often became impossible due to endless additional debts tacked onto the peon's growing tab.[187]

3. The Enforcement of Peonage: Through Custom and Law

Although "true crime was almost trivial in most places,"[188] Black Codes, and by extension, peonage, emerged during a southern conservative "redemption" campaign, which sought to reverse the movement toward equality.[189] The campaign was bolstered by the belief southern whites had in their proprietary interest in their former slaves.[190]

Once created, peonage enlisted southern officers of the law, at nearly every level, to replicate and enforce this system of pseudo-enslavement.[191] State legislatures in the South created laws permitting arrest, fines, and imprisonment for petty misdemeanors or breaches of labor contracts.[192] Local sheriffs and justices of the

182. *Pollock*, 322 U.S. at 18; *see* Schmidt, *supra* note 174, at 649.
183. *Id.*
184. Jaremillo v. Romero, 1 N.M. 190, 194 (1857).
185. *See supra* text related to labor contracts accompanying note 172–73.
186. *See supra* text related to surety contracts accompanying note 179.
187. *See* Schmidt, *supra* note 174, at 653.
188. BLACKMON, *supra* note 168, at 69.
189. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 30–31 (The New Press, 2010).
190. Birckhead, *supra* note 48, at 1610.
191. Schmidt, *supra* note 174, at 650.
192. *See* Birckhead, *supra* note 48, at 1606.

peace, entitled to partial payments of fees collected from defendants, also implicated themselves in this system of perverse incentives.[193] Much more involved in debt enforcement than public safety, law enforcement and judges operated as a team to provide private companies with a supply of labor by way of surety contracts, or convict leasing,[194] and fill their coffers "with the bounty extracted" from freed slaves-turned-peons.[195] "Swift, uncomplicated adjudication was the key to the system," since, revenue increased when defendants had limited, or no, access to lawyers or information related to their debts.[196]

Additionally, once a person became a peon either voluntarily or involuntarily, the law functioned as a trap, holding him to labor until he satisfied the debt.[197] Courts recognized the peon "could not abandon the service and if he did, his master pursued, reclaimed, and reduced him to obedience and labor again;" returning peons to their creditors was encoded within state statutes that criminalized the breach of these labor contracts.[198]

4. Backlash against Peonage: The Anti-Peonage Act of 1867

The institution of peonage, as assessed in 1846, trapped "a large class of persons . . . who were not 'of any particular color, race, or caste.'"[199] The Thirteenth Amendment, on its own, had little teeth to curb this extensive practice.[200] In response, the Thirty-Ninth Congress, despite the Thirteenth Amendment

193. BLACKMON, *supra* note 168, at 61–69.

194. *Id.* at 65–66 ("Increasingly, it was a system driven not by any goal of enforcement or public protection against serious offenses, but purely to generate fees and claim bounties.").

195. Birckhead, *supra* note 48, at 1624.

196. BLACKMON, *supra* note 168, at 66.

197. Peonage Cases, 123 F. 671, 676 (M.D. Ala. 1903).

198. Jaremillo v. Romero, 1 N.M. 190, 194 (1857).

199. DANIEL, *supra* note 172, at 15. The system of peonage was not restricted to former slaves, nor was it defined along racial lines. Peonage, developed in Spain, was first practiced in the United States territory of New Mexico. *Peonage Cases*, 123 F. at 673–74. Freed slaves in the "cotton belt" were especially vulnerable to the practice due to the "enduring plantation system" and the persistence of "[p]overty, illiteracy," and oppression within the southern states. DANIEL, *supra* note 172 at 21. *See also* Hampson, *supra* note 7, at 30.

200. *See* Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1618 (2012).

containing no reference to peonage,[201] harnessed its section two enforcement powers to pass the Anti-Peonage Act of 1867.[202] The civil provision forbids "[t]he holding of any person to service or labor" and "declared null and void" any State laws that "establish[ed], maintain[ed], or enforce[d], directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation."[203] This civil component was intended to prohibit, without any exception[204] (unlike the Thirteenth Amendment), voluntary *or* involuntary peonage.[205] The criminal provision penalized individuals found "hold[ing] or return[ing] any person to a condition of peonage, or arrest[ing] any person with the intent of placing him in or returning him to a condition of peonage."[206] Since the Peonage Act forbids any compulsory labor for the purpose of repayment of debt, even following a criminal conviction—in fact, raising a violation of the Peonage Act was a valid defense to a state conviction for contract breach[207]—under no circumstances may an individual be held in a condition of peonage.[208]

III. MODERN DEBTORS' PRISONS—MODERN VIOLATIONS OF THE THIRTEENTH AMENDMENT AND THE ANTI-PEONAGE ACT

> Imprisonment to compel payment of costs is involuntary servitude and repugnant to the Thirteenth Amendment to the

201. Some interpretations call peonage a "classic example" of involuntary servitude "whereby the poor were forced to labor until their debt was satisfied," which is therefore encompassed *within* the Thirteenth Amendment's prohibition on involuntary servitude. *See*, *e.g.*, Armstrong, *supra* note 137, at 883–84; 45 AM. JUR 2D *Involuntary Servitude* § 15 (2016); *see also* Taylor v. Georgia, 315 U.S. 25, 29 (1942); Gross, *supra* note 52, at 178. Others conclude peonage is the condition of involuntary servitude with the *added element* of performance for liquidation of debt. United States v. Shackney, 333 F.2d 475, 481 n.9 (2d Cir. 1964). In any case, the Peonage Act, in both its criminal and civil provisions, has been widely held as a valid Congressional Act under the Thirteenth Amendment.

202. *See* 42 U.S.C. § 1994 (2015). *See also* Soifer, *supra* note 200, at 1616–17; McAward 2010, *supra* note 21, at 86–87.

203. 42 U.S.C. § 1994 (2015).

204. *Peonage Cases*, 123 F. at 676.

205. *See* Soifer, *supra* note 200, at 1618–19 ("The Peonage Act's protections even stretched beyond the traditional definition of peonage anchored in debt or obligation; the new statute would also reach obligations 'otherwise' imposed."). *Id.*

206. 18 U.S.C. § 1581(a) (2015).

207. Schmidt, *supra* note 174, at 654. For other Peonage Act remedies, see *infra* Section III.C.

208. *See Peonage Cases*, 123 F. at 676.

> United States Constitution and thus is, in my considered opinion, illegal. The lack of money, in and of itself, should never be the cause of imprisonment in our humane society.[209]

The modern debtors' prison forces individuals into a creditor-debtor relationship with a municipality or a private probation corporation that purchases the debt.[210] Forced to repay their indebtedness by any means necessary, criminal debtors are offered no alternative but to satisfy their debt in state-prescribed forms of labor. Failure to do so results in imprisonment. This is an unconstitutional condition of peonage that is prohibited by the Thirteenth Amendment and enforced through the Anti-Peonage Act. Together, these laws promise a federally-guaranteed right to be free from compulsory labor, and they must be called upon to provide immediate remedies and a source of congressional action to create lasting reform.

A. *The Modern Debtors' Prison is Peonage in Violation of the Thirteenth Amendment and the Anti-Peonage Act*

As explored in Section II.B., the modern debtors' prison arises in a multiplicity of ways that differ between each municipality in which they exist. However, when considering the salient features of each, it becomes clear that the modern debtors' prison is an impermissible and unconstitutional form of modern-day peonage.[211]

1. Individuals Caught in the Modern Debtors' Prison are Forced into Compulsory Labor

Compulsory labor[212] in the modern debtors prison is performed in several ways.[213] For individuals in a "pay-or-stay"

209. Wilson v. Sloan, 438 S.W.2d 75, 78 (Tenn. Crim. App. 1968).

210. *See supra* Section I.B.

211. *See Peonage Cases*, 123 F. at 676; Birckhead, *supra* note 48, at 1655–62 (drawing parallels between the modern day debtors' prison and the old form of peonage in both the criminal justice and juvenile justice realm).

212. *See supra* Section I.C.4.a.; *see also* Jaremillo v. Romero, 1 N.M. 190, 194 (1857); DANIEL, *supra* note 172, at 15–16.

213. This is distinguished from labor required of inmates in prison ("penal labor"), where imprisonment is the statutorily imposed punishment for a crime—labor being a component of that punishment. *See, e.g.*, Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963). Penal labor is a constitutionally permitted form of involuntary servitude under the Thirteenth Amendment's exception. *See id.* Alternatively, the modern debtors' prison presents a unique scenario where debt is imposed by virtue of appearing as a criminal defendant for a minor municipal offense, and imprisonment or

jurisdiction,[214] the labor is a criminal debtor's imprisonment (i.e., "sitting" off their debt), if they are unable to pay up front, which essentially earns their freedom over time.[215] In other municipalities, jail time arbitrarily decreases fines and fees over time.[216] For example, in Jennings, Missouri, Ms. Allison Nelson was put on a payment plan of $100 per month for fines and costs from traffic tickets assessed with no meaningful inquiry into her ability to pay;[217] when she missed payments, she was imprisoned an unspecified number of times between 2011 and 2013.[218] On one of these occasions, in November of 2013, jail staff told her she would not be released unless she paid $1,000, which she told them she could not pay.[219] After four days, she was informed that her release amount would be lowered to $100—the guard apparently felt generous because it was Thanksgiving.[220] Seeing "release amounts" decrease over time indicates these individuals essentially buy themselves closer to freedom the longer they stay in jail.[221]

For other individuals, being required to complete a mandatory number of community service hours is a form of compulsory "working off" LFO debt; failure to complete these hours, even if they were imposed without regard to the likelihood they could be completed, results in imprisonment.[222] A particularly striking parallel to earlier forms of peonage exists in Jackson, Mississippi,

community service is ordered as a form of repayment of that debt. *See* Atkinson, *supra* note 35, at 202, 207.

214. *See* FREDERICKSEN & LASSITER, *supra* note 78, at 6; *supra* text accompanying note 99.

215. *See* Complaint at 9–10, Foster v. City of Alexander City, No. 3:15-cv-00647-WKW (M.D. Ala Sept. 8, 2015), 2015 WL 5256630; Complaint, Thompson v. DeKalb Cty., No. 1:15-mi-99999-UNA (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/assets/2015.01.29_filed_thompson_complaint.pdf [https://perma.cc/F5W8-BN58].

216. *See* Class Action Complaint at 7–9, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [https://perma.cc/YA58-QVQP].

217. *See supra* Section I.B.2.

218. Class Action Complaint at 26–28, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [https://perma.cc/YA58-QVQP].

219. *Id.* at 27.

220. *Id.*

221. *See supra* Section I.B.3.

222. *In for a Penny*, *supra* note 13, at 8–9; *see supra* Section I.B.2.

where criminal debtors perform agricultural labor at the Penal Farm to repay their LFOs.[223] Criminal debtors there have the "choice" to "sit out" their debt in the Hinds County Jail for twenty-five dollars per day, or "work off" their debts at the Penal Farm for fifty-eight dollars per day.[224]

Other criminal debtors are on payment plans and must work to repay their debts to either the municipality or a private probation corporation; falling behind by even one payment results in threats of, or actual, imprisonment.[225] One such individual, Mr. Reynaud Variste in New Orleans, Louisiana, managed to pay down his $1600 court fees to $700 over several years, but when his construction work slowed and he fell behind, police officers armed with assault rifles raided his family home and arrested him for overdue court fees.[226] For three days he sat in jail until his girlfriend relinquished his entire paycheck to the Collections Department to pay his LFO balance.[227]

Criminal debtors are offered no alternative *but* repayment of LFO debt by one of these various forms of "labor." They are not afforded an opportunity to waive fees due to their indigency;[228] they are not offered reasonable community service alternatives to incarceration;[229] no opportunity exists to create a reasonable payment plan based on their income.[230] Clearly municipalities engaging in these practices have violated the heart of criminal debtors' right to be free from compulsory labor. Labor is required to satisfy LFO debts; failure to do so is a criminal act.[231]

It may be tempting to identify elements of "choice" in the aforementioned stories. For example, in Jackson, individuals may choose to "sit off" their fees in jail or work at the Penal Farm, opt

223. *See generally* Class Action Complaint, Bell v. City of Jackson, No. 3:15-cv-732-TSL-RHW (S.D. Miss. Oct. 9, 2015), 2015 WL 5949208.

224. *Id.* at 2–3.

225. *See, e.g.*, *SPLC Lawsuit Closes Debtors' Prison in Alabama Capital*, *supra* note 117.

226. First Amended Class Action Complaint, Cain v. City of New Orleans at 14–15, No. 2:15-cv-04479-SSV-JCW (E.D. La. Sept. 21, 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/04/First-Amended-Complaint-9-22-15.pdf [https://perma.cc/2EAV-WGBN].

227. *Id.*

228. Bannon, *supra* note 39, at 13.

229. *Id.* at 15–17.

230. *Id.* at 14–15.

231. *See* Pollock v. Williams, 322 U.S. 4, 18 (1944); *see supra* Section I.B.3.

to receive 500 hours of community service, or set up a payment plan to satisfy LFO debt incrementally over time.[232] Faced with insurmountable fees and endless threats of being jailed for nonpayment, the choice to pay court fees, by any means necessary, over basic necessities is no choice at all.[233] Under the prohibition against peonage, however, whether compulsory labor is voluntary or involuntary is of no consequence; *any* compulsory labor to liquidate debt is exhaustively prohibited.[234]

2. The Purpose of Compulsory Labor in the Modern Debtors' Prison is Repayment of Debt

The purpose of labor in the modern debtors' prison scheme, as discussed above, is to satisfy the indebtedness to the creditor.[235] Starved-for-cash, municipalities exploit low-income people through their criminal justice fine and fee schedules. The underlying basis of the fine and fee schedules is to fill drained local coffers, not to enforce its criminal provisions or to serve a legitimate purpose of punishment.[236]

Imprisonment is *not* imposed in the debtors' prison because it fulfills the municipality's need to punish citizens for their crimes, which would be constitutional.[237] Instead, the imprisonment is intended to satisfy the debt or to compel the debtor to seek his outside resources to repay the debt.[238] Under this system, serving time takes on a new meaning—rather than repaying one's debt to society, a valid form of punishment,[239] the criminal debtor serves his time for the economic benefit of the municipal body to which he

232. *See generally* Class Action Complaint at 6, Bell v. City of Jackson, No. 3:15-cv-732-TSL-RHW (S.D. Miss. Oct. 9, 2015), 2015 WL 5949208.

233. "I've had judges tell me that they don't care what my other obligations are, LFOs come first. First before anything. First before food and shelter," stated David Ramirez, a father of four supporting his family on his sole income from public assistance. *Washington's DP*, *supra* note 93, at 13.

234. *See supra* Section II.D.4.

235. *See Washington's DP*, *supra* note 93, at 8–9.

236. *See* Bronner, *supra* note 40.

237. *Id.*; U.S. CONST. amend. XIII.

238. For example, Ms. Samantha Jenkins, a forty-seven-year-old mother of six relied on her family to borrow and raise $300 from "friends and relatives to buy her out of jail." Class Action Complaint at 8, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [https://perma.cc/YA58-QVQP].

239. *See, e.g.*, Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963).

is indebted.[240] Community service, rather than providing an alternative to repayment, serves essentially the same function of repaying debt solely intended to fill local coffers.[241] Whether the municipality retains the debt or a private probation corporation has purchased it, failure to repay the creditor results in imprisonment until it is "paid off."[242] The prohibition against peonage forbids compulsory labor to satisfy indebtedness, and thus prohibits municipalities from relying on criminal debtors for their labor.[243]

3. The Enforcement of the Modern Debtors' Prison through Custom and Law

The criminal debtor's status as a peon is enforced by the full force of the municipal legal system, which takes no accounting of his ability to repay his debt.[244] Salient throughout these stories is a recurring theme, and one which is characteristic of the modern debtors' prison:[245] criminal debtors in these municipalities are denied basic due process rights, including the opportunity to be heard on their inability to pay.[246] Similar to the original system of peonage,[247] in the modern debtors' prison, municipalities maximize their revenue collection when defendants are not provided an attorney or cost prohibits them from obtaining counsel.[248]

240. *In for a Penny*, *supra* note 13, at 9. Municipalities persist in this practice despite the cost of incarcerating criminal debtors in the modern debtors' prison outweighing the revenue generated. In Pennsylvania, inmates "who are eligible for release but are kept in prison based on their inability to pay a $60 fee" cost "nearly $100 per day" to confine. Patel, *supra* note 105, at 6. One county in North Carolina "arrested 564 people because they fell behind on debt; the County jailed 246 debtors who did not pay for an average of 4 days. The county collected $33,476 while the jail term itself cost $40,000—a loss for the county of $6,524." *Id.*

241. *See Washington's DP*, *supra* note 93, at 9.

242. *In for a Penny*, *supra* note 13, at 10; *see supra* Part I.B.3.

243. *See supra* Section II.D.4.

244. *See supra* Section II.D.3.

245. *See supra* Section I.B.2.

246. *See* Class Action Complaint at 27, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015), http://equaljusticeunderlaw.org/wp/wp-content/uploads/2015/02/Complaint-Jennings-Debtors-Prisons-FILE-STAMPED.pdf [https://perma.cc/YA58-QVQP]; Complaint, Foster v. City of Alexander City at 9–10, No. 3:15-cv-647-WKW (M.D. Ala Sept. 8, 2015), 2015 WL 5256630; Complaint, Thompson v. DeKalb Cty., No. 1:15-mi-99999-UNA (N.D. Ga. Jan. 29, 2015), https://www.aclu.org/sites/default/files/assets/2015.01.29_filed_thompson_complaint.pdf [https://perma.cc/F5W8-BN58]; *see generally* Class Action Complaint, Bell v. City of Jackson, No. 3:15-cv-732-TSL-RHW (S.D. Miss. Oct. 9, 2015), 2015 WL 5949208.

247. *See supra* Section I.C.4.c.

248. *See* Patel, *supra* note 105, at 6; *supra* text accompanying note 64.

The institution of peonage did not exist in a vacuum; it emerged from the Southern white conservatives' reaction to the perceived threat emancipation and Reconstruction posed their power and affluence.[249] Likewise, the modern debtors' prison cannot be separated from the contemporary context in which it arose.[250] The system of mass incarceration of primarily African American men, to which the modern debtors' prison contributes,[251] has become a palatable reality for many Americans partly because of anti-black sentiment,[252] which, if not created, was reinforced by a highly effective media campaign in the 1980s.[253] Mass incarceration has normalized jailing millions of people,[254] primarily low-income African American men,[255] and supported public opinion that is both highly punitive and highly racialized.[256] As fear and anxiety about drug crime grew, so too did the prison population.[257] With this as its contemporary backdrop, the modern debtors' prison is highly racialized, targets indigent defendants, and seems to exist in many, albeit not exclusively, Southern states where peonage previously thrived.[258] These noticeable parallels aside, the practice of peonage as prohibited under the Thirteenth Amendment and the Peonage Act does not depend on racial discrimination or disproportionate impacts.[259] As such, the modern debtors' prison is impermissible under these prohibitions.

B. *The Modern Debtors' Prison is Not Exempt from Thirteenth Amendment Protection*

The Peonage Act on its own prohibits *any* compulsory labor for the purpose of repayment of debt.[260] The practice of peonage,

249. *See supra* Section I.B.4.c.

250. *See* Hager, *supra* note 52.

251. ALEXANDER, *supra* note 189, at 154–57.

252. Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment*, *in* DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY 349 (Hazel R. Markus & Paula Moya, eds., New York: Norton 2010), http://scholar.harvard.edu/files/bobo/files/2010_racialized_mass_incarceration_doing_race.pdf [https://perma.cc/HH2U-NRMT].

253. ALEXANDER, *supra* note 189, at 52–53.

254. *Id.* at 178–80.

255. FREDERICKSEN & LASSITER, *supra* note 78, at 7; *see supra* note 57.

256. Bobo, *supra* note 252, at 349.

257. ALEXANDER, *supra* note 189, at 105–06.

258. *See* DANIEL, *supra* note 172, at 15–16.

259. *See supra* Section II.A.

260. Peonage Cases, 123 F. 671, 676 (M.D. Ala. 1903).

however, is often considered a subset of involuntary servitude under the Thirteenth Amendment, subject to its punishment exemption.[261] Imprisonment for nonpayment of LFOs, rather than as punishment for the underlying offense, does not serve a punitive purpose and is therefore not exempt from protection under the Amendment.[262] The Department of Justice has acknowledged, generally, that the concerted practices of police and courts "are geared not toward addressing public safety, but rather toward raising"[263] and maximizing revenue at every stage of the criminal justice process, as in Ferguson.[264] Since States have non-punitive purposes for these practices, they are constitutionally prohibited from imprisoning individuals for nonpayment of LFO debt.

Several state courts have agreed with this reasoning. In 1969, the Tennessee District Court voided a Tennessee statute, which permitted imprisonment for nonpayment of debt as a Thirteenth Amendment violation.[265] It found that "costs are treated both substantively and procedurally in a manner inconsistent with the

261. Clyatt v. United States, 197 U.S. 207, 215 (1905); *see supra* text accompanying note 206. This means that it is necessary to demonstrate how debtors' prisons are not exempt from Thirteenth Amendment protections.

262. *See* Henderson, *supra* note 165, at 1180 (arguing the "Punishment Clause provides an exception only 'as a punishment for crime,' and not for civil, regulatory, or private discriminatory treatment of formerly convicted people."). Professor Birckhead in *The New Peonage* has also argued that practices underpinning the modern debtors' prison do not fit within the exception because criminal debtors "have not, in fact, been 'duly convicted,' as 'duly' is defined as 'correctly, fairly, legitimately, as required, or rightfully." Birckhead, *supra* note 48, at 1638. Likewise, the meaning of "duly" could derive from "due process," meaning the labor could only be coerced if the defendant were convicted of a "crime *duly proved and adjudged*." Slaughter-House Cases, 83 U.S. 36, 50 (1872) (emphasis added). Since *Bearden* and its progeny establish due process protections which require courts provide a hearing on the defendant's ability to pay, another argument that poor criminal defendants are not "duly convicted" for their inability to pay is the lack of due process afforded to them by the municipal court. *See* Section I.B.2.

263. Gupta & Foster, *supra* note 121, at 2.

264. FERGUSON REPORT, *supra* note 57, at 13.

265. *See generally* Anderson v. Ellington, 300 F. Supp. 789 (M.D. Tenn. 1969) (finding defendant's imprisonment for failure to pay $892.38 court costs—spent working off costs for an additional eleven months after completing his sentence for three criminal convictions—involuntary servitude prohibited by the Thirteenth Amendment). Shortly after this ruling, combined with a previous decision from the same court, Dillehay v. White, 264 F. Supp. 164 (M.D. Tenn. 1966), prompted the state legislature to forbid imprisonment for nonpayment of LFO's. Walter Kurtz, *Pay or Stay: Incarceration of Minor Criminal Offenders for Nonpayment of Fines and Fees*, 51 TENN. B.J. 16, 18 (2015), http://www.tba.org/sites/default/files/journal_archives/2015/TBJ0715.pdf [https://perma.cc/X8SK-LURG].

punishment theory."[266] Similarly, the Supreme Court of Appeals of Virginia reasoned that "costs assessed against a person who has been convicted of a crime *are not part of his punishment* for the crime,"[267] and rejected its comparable state law in 1968.

These cases additionally demonstrate the power of challenging the modern debtors' prisons under the Thirteenth Amendment.[268] The Fourteenth Amendment protections under *Bearden* have failed to adequately protect against the emergence of modern debtors' prison.[269] Since the practice is peonage and is not imposed for punishment, the time has come for a new challenge to a very old practice—one the Thirteenth Amendment prohibits, if not by *design*, then within its foresight.

C. *Remedies Available for Violations of Rights under the Thirteenth Amendment and the Anti-Peonage Act*

The modern debtors' prison is peonage as prohibited by the Thirteenth Amendment and the Peonage Act; therefore, remedies for violations of those rights exist.[270] Prior to the passage of the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA"),[271] plaintiffs attempting to plead their case under the Thirteenth Amendment or the Anti-Peonage Act faced difficulty convincing courts they provided an implied right of action.[272]

266. *Anderson*, 300 F. Supp. at 792.

267. Wright v. Matthews, 163 S.E.2d 158, 160 (Va. 1968) (emphasis added). For other states in agreement, see State ex rel. Hobbs v. Murrell, 93 S.W.2d 628 (Tenn. 1935) (determining that after entering nolle prosequi, the defendant stood uncharged with any crime and therefore any imprisonment was unlawful unless he consented—even consenting to involuntary servitude without a conviction is forbidden by Thirteenth Amendment.). *But see* Milwaukee v. Horvath, 143 N.W.2d 446 (Wis. 1966) (holding that imprisonment for failure to pay a fine does not constitute involuntary servitude because imprisonment alone is not servitude; further, adopting defendant's reasoning would mean that anyone who qualifies as indigent could violate city ordinances with impunity).

268. *See generally Anderson*, 300 F. Supp. at 789; *Wright*, 163 S.E.2d 158.

269. *See generally* Bearden v. Georgia, 461 U.S. 660 (1983); Birckhead, *supra* note 48, at 1635 ("In the years since *Bearden*, courts frequently have either ignored these constitutional protections or developed strategies to skirt their edges.").

270. *See* Kares, *supra* note 136, at 380–85.

271. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended in scattered sections of 1, 18, 22 U.S.C.).

272. Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1663 (2007).

Neither the civil[273]—which invalidated State laws permitting peonage—nor the criminal[274] provision of the Peonage Act mentioned remedies. Courts generally followed the guidance of *Turner v. Unification Church*[275]to find no implied right of action for violations of either the criminal prohibition against involuntary servitude or peonage.[276] With TVPRA's passage, Congress made a private right of action available for the various sections of criminal provisions in Chapter 77 of Title 18, such as peonage,[277] sale into involuntary servitude,[278] seizure, detention, transportation or sale of slaves,[279] and trafficking with respect to peonage, slavery, involuntary servitude, or forced labor.[280] The private right of action, codified in 18 U.S.C. § 1595, now allows victims to recover damages and attorneys' fees against "the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter)."[281] A plaintiff is also entitled to mandatory restitution for the full amount of his or her losses.[282]

Congress signaled its intent to provide a remedy for victims of peonage and involuntary servitude with the passage of the TVPRA.[283] This relieved a plaintiff from having to prove an

273. 42 U.S.C. § 1994 (2015); *see supra* note 199 and accompanying text. Prior to the TVPRA, the civil remedies portion only offered remedies for limited provisions within the civil code; the anti-peonage section was not included.

274. 18 U.S.C. § 1581 (2015).

275. 473 F.Supp. 367 (D.R.I. 1978); *see* Nam, *supra* note 272, at 1663 n.47.

276. Turner v. Unification Church, 473 F.Supp. 367, 374 (D.R.I. 1978) (refusing to apply the rationale of Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), to the Thirteenth Amendment and the criminal anti-peonage provision, for which state tort law provided adequate remedies); *see also* Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 26–29 (2004).

277. 18 U.S.C. § 1581 (2015).

278. 18 U.S.C. § 1584 (2015).

279. 18 U.S.C. § 1585 (2015).

280. 18 U.S.C. § 1590 (2015).

281. 18 U.S.C. § 1595(a) (2015).

282. 18 U.S.C. § 1593 (2015).

283. Judicial interpretations of federal law will assess whether Congress intended "to create not just a private right but a private remedy." Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (citing Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979)). Where Congress includes an "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 290. The TVPRA expressly provides for a civil action, for which a plaintiff can receive monetary

implied private right of action for violations of involuntary servitude or peonage.[284] Since the remedy is provided in the statutory scheme, Congress has foreclosed other remedies for such violations.[285] This includes bringing a civil action for deprivation of "rights, privileges, or immunities secured by the Constitution and laws" under 42 U.S.C. § 1983.[286] Therefore, the sole remedy available for victims of peonage and involuntary servitude exists within the criminal anti-involuntary servitude and peonage statute.[287]

D. *Congressional Enforcement Power of Thirteenth Amendment Must Be Harnessed as a Remedy Against the Modern Debtors' Prison*

The 1867 Congress thought it prudent to harness its newly granted Thirteenth Amendment powers to curb the practice of peonage where it emerged, in passing the Peonage Act.[288] Likewise, this source of authority provides Congress with an important tool it could use to expand the remedial scheme under the Anti-Peonage Act and thoroughly abolish the modern debtors' prison.[289] To enact this systemic change, Congress should use its enforcement authority, under section two of the Thirteenth Amendment, to pass remedial legislation prohibiting imprisonment for nonpayment of debt as a violation of the prohibition against peonage and involuntary servitude.[290]

Congress has the means to define practices that violate the provisions against involuntary servitude and peonage in the

damages, attorney's fees, and restitution. *See* 18 U.S.C. § 1595 (2015); Nam, *supra* note 272, at 1665.

284. Hernandez v. Attisha, No. 09-CV-2257-IEG (WMC), 2010 WL 816160, at *2–3 (S.D. Cal. Mar. 4, 2010); Nam, *supra* note 272, at 1663.

285. *See Alexander*, 532 U.S. at 290.

286. *See* Suter v. Artist M., 503 U.S. 347, 365 (1992) ("[Section] 1983 is not available to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself . . . .'") (Blackmun J., dissenting) (quoting Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418, 423 (1987)).

287. Typically, there can be no private causes of action inferred from a criminal statute, but "that is irrelevant where Congress" has expressly provided for one. *Hernandez*, 2010 WL 816160, at *3.

288. *See* Soifer, *supra* note 200, at 1616–17.

289. *See In for a Penny*, *supra* note 13, at 5.

290. *See* TSESIS 2004, *supra* note 23, at 92–93.

Thirteenth Amendment and legislate to prohibit such practices.[291] Unlike the Fourteenth Amendment[292] and the Commerce Clause,[293] which have each justified civil rights statutes, the Thirteenth Amendment's scope has not been subject to recent restrictions.[294] Therefore, the Thirteenth Amendment holds a uniquely far-reaching enforcement power and should be harnessed to prevent the modern debtors' prisons from trapping individuals in a modern system of peonage.[295]

1. The *City of Boerne* "Congruence and Proportionality" Rule Does Not Apply to the Thirteenth Amendment

Thirteenth Amendment scholars debate as to what, exactly, the Thirteenth Amendment and *Jones* permit Congress to do in interpreting the "badges and incidents" of slavery.[296] Concern is especially heightened since the Supreme Court's restriction of Congress's enforcement authority under the Fourteenth Amendment, a sister Reconstruction amendment.[297] In *City of Boerne v. Flores*, the Court limited the Fourteenth Amendment "remedial" powers of Congress only to "'enforc[ing]' the provisions" it has been given, "not the power to determine what constitutes a constitutional violation."[298] When Congress passes preventative remedial measures, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[299]

The Court has avoided resolving the question of whether *City*

291. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

292. U.S. CONST. amend. XIV.

293. U.S. CONST. art. I, § 8, cl. 3.

294. *See* United States v. Morrison, 529 U.S. 598, 608 (2000) (reaffirming that Congress's Commerce Clause authority is "not without effective bounds") (citing United States v. Lopez, 514 U.S. 549, 557 (1995)); City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (restricting Congress's power to legislate under the Fourteenth Amendment to enforce only those rights the Court determined are within its scope).

295. *See* Clyatt v. United States, 197 U.S. 207, 216–17 (1905) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)) ("Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by [the Thirteenth Amendment].").

296. Carter, *supra* note 156, at 1314.

297. *See generally* McAward 2010, *supra* note 21, at 77.

298. City of Boerne v. Flores, 521 U.S. 507, 518–19 (1997).

299. *Id.* at 520. In other words, Congress cannot enact Fourteenth Amendment legislation that creates a new source of substantive rights the Court has not read the Amendment to provide. *See* McAward 2010, *supra* note 21, at 80–81.

of Boerne applies to the Thirteenth Amendment.[300] However, lower courts that have interpreted *City of Boerne* have reasoned that since the Court made no mention of *Jones* and its precedent for Thirteenth Amendment interpretation, *City of Boerne* stands.[301] Further, the *City of Boerne* rationale does not limit the Thirteenth Amendment because the Thirteenth Amendment is different from the other Reconstruction Amendments. Although the three Reconstruction Amendments have a singular "unity of purpose"[302]—to establish and expand civil rights, especially but not exclusively, for African Americans—each Amendment provided different means to achieve this purpose.[303] The Court, as early as 1883, declared this to be true, even while it sought to limit the scope of Congress's Thirteenth Amendment enforcement powers.[304]

> We must not forget that the province and scope of the Thirteenth and Fourteenth amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States . . . . The amendments are different, and the powers of Congress under them are different.[305]

These Amendments also differ in the nature of their targeted action. The Fifteenth Amendment specifically provided African Americans the right to vote.[306] Further, whereas "[t]he prohibitions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the states," the Thirteenth Amendment "names no party or authority," in either section one or section two.[307] The Court went further to pronounce that "[t]he differences between the [Amendments] have been so fully considered by this [C]ourt that it is enough to refer to the decisions."[308]

300. McAward 2010, *supra* note 21, at 102.

301. United States v. Beebe, 807 F. Supp. 2d 1045, 1048–49 (D.N.M. 2011) (upholding defendants' conviction under the Hate Crimes Act for harassing and assaulting a young disabled Navajo man).

302. *Slaughter-House Cases*, 83 U.S. 36, 67 (1873).

303. *See* Clyatt v. United States, 197 U.S. 207 (1905).

304. United States v. Stanley, 109 U.S. 3, 23 (1883).

305. *Id.* Much of this reasoning has been expanded since 1883, as previously mentioned, however it stands as a powerful signal of the distinctions between the Thirteenth Amendment and its companion Reconstruction Amendments.

306. U.S. CONST. amend. XV. *See Slaughter-House Cases*, 83 U.S. at 71.

307. *Clyatt*, 197 U.S. at 216.

308. *Id.* (citing *Civil Rights Cases*, 109 U.S. at 20, 23, 27).

Even among modern scholars who fiercely debate *Boerne*'s relevancy to the Thirteenth Amendment's section two powers, there remains agreement that the Thirteenth and Fourteenth Amendments differ with respect to their diverging focuses on state versus private action.[309] However, this debate only becomes necessary to delve into, if the subject of Congressional action falls outside the categories of "slavery" or "involuntary servitude." Certainly there is no disagreement that Congress may act in the face of the Thirteenth Amendment's direct prohibitions.[310] When this is the case, Congress is entitled, even compelled, to act under its Thirteenth Amendment enforcement powers:

> This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances . . . . Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.[311]

Unless and until *Jones* is overturned, the judiciary *has* defined, in section one of the Thirteenth Amendment, the boundaries of substantive rights that Congress is entitled to legislate against: its rational determinations of its "badges and incidents" of slavery.[312]

309. *See* Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 MD. L. REV. 60, 75 (2011) [hereinafter McAward 2011]; Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40, 55 (2011) [hereinafter Tsesis 2011].

310. "Enslavement, involuntary servitude, or their modern equivalents [which] are not 'badges and incidents' of slavery: they are slavery. The question of whether a person suffers slavery's lingering effects . . . is a different question from whether that person is literally enslaved or compelled to labor on behalf of another." Carter, *supra* note 156, at 1365.

311. *Civil Rights Cases*, 109 U.S. at 20.

312. Mark, *supra* note 135, at 712–13. Professor McAward, in her article, argued that the *Jones* precedent does leave to Congress the opportunity to alter the landscape of section one's grant of substantive rights. McAward 2010, *supra* note 21, at 137–38. Professor McAward advocates for a more (but not the most) restrictive interpretation, which would "revise *Jones* by clarifying that Congress's discretion is limited to identifying which badges and incidents of slavery it will address—not defining them outright—and then determining how it will address them." *Id.* at 142.

However, since the modern debtors' prison *is* peonage,[313] prohibited as a form of involuntary servitude under the Thirteenth Amendment, Congress is compelled to legislate against the practice.[314]

2. Federalism Issues Do Not Stand Up Against Violations of the Thirteenth Amendment

Concerns about an expansive growth of federal power will naturally arise following a proposal that Congress enact remedial legislation prohibiting the modern debtors' prison.[315] Like the Fourteenth and Fifteenth Amendments, the Thirteenth Amendment transformed the balance of power between the federal government and the states, preempting state laws that create conditions of slavery and involuntary servitude.[316] Each Amendment limited a state's power to inhibit the civil rights of, primarily African American, citizens.[317] In passing the Thirteenth Amendment, the Supremacy Clause[318] took effect to shift the power to acquiesce or invalidate slavery into the purview of the federal government.[319] Congress debated the federalism issue at great length, but, ultimately passed the Thirteenth Amendment, since, "[t]he principles of federalism had to yield to the moral demands of abolition."[320] Therefore, in keeping with this purpose, state and local policies which imprison individuals for nonpayment of debt violate the Thirteenth Amendment and should be invalidated over any countervailing federalism concerns.[321]

CONCLUSION

The existence of debtors' prisons has plagued this nation since its infancy. This new form of debt slavery, in which indigent

313. *See supra* Section II.A.

314. Clyatt v. United States, 197 U.S. 207, 216–17 (1905) (quoting *Civil Rights Cases*, 109 U.S. at 20).

315. *See* Kares, *supra* note 136, at 408–09.

316. George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1380–81 (2008).

317. *Id.*

318. U.S. CONST. art. VI, cl. 2.

319. Rutherglen, *supra* note 316, at 1380–81; *see* Kares, *supra* note 136, at 408–09.

320. Rutherglen, *supra* note 316, at 1382; *see* Kares, *supra* note 136, at 382–84.

321. *See generally* Anderson v. Ellington, 300 F. Supp. 789 (M.D. Tenn. 1969); Wright v. Matthews, 163 S.E.2d 158 (Va. 1968).

criminal defendants become inescapably indebted to the state, defies the most basic values of human decency. While the Supreme Court requires additional due process for indigent defendants, these protections have failed to stem the tide of this epidemic. However, it is precisely this institution the Thirteenth Amendment was designed to prevent: a system that exploits the labor of poor people, while the financially fortunate walk free. Congress, in the face of such disparity, is compelled to act to enforce the Thirteenth Amendment, and prove once and for all that today's debtors' prisons, an impermissible form of slavery and involuntary servitude, have no place in a humane society.