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## YALE LAW & POLICY REVIEW

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### Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons

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#### INTRODUCTION

The protests in Ferguson, Missouri that followed the shooting death of unarmed Black teenager Michael Brown by a White police officer triggered national scrutiny of the city's justice system. The ensuing media coverage,<sup>1</sup> along with a comprehensive white paper by the ArchCity Defenders<sup>2</sup> and a scathing civil rights report by the U.S. Department of Justice,<sup>3</sup> uncovered a modern-day debtors' prison, the existence of which helped fuel the community response to Brown's death and widespread distrust of law enforcement officials.<sup>4</sup>

Recent attention to how jurisdictions such as Ferguson impose and seek to collect fines and costs for minor offenses has raised public awareness of a truth long known to many criminal justice advocates: courts across the country rou-

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1. See, e.g., Radley Balko, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST: THE WATCH (Sept. 3, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>.

2. THOMAS HARVEY ET AL., ARCHCITY DEFENDERS, ARCHCITY DEFENDERS: MUNICIPAL COURTS WHITE PAPER (Nov. 23, 2014), <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [hereinafter *ArchCity White Paper*].

3. U.S. DEP'T JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [hereinafter DOJ *Ferguson Report*].

4. See, e.g., *id.* at 79-80 (finding that distrust between Ferguson's Black community and the city is caused by years of unfair and unlawful police and municipal court conduct).

tinely jail low-income people who cannot pay in full fines and costs stemming from criminal cases.<sup>5</sup> Most people would agree that debtors' prisons such as these are immoral, and the U.S. Supreme Court has repeatedly condemned many of the practices that produce them.<sup>6</sup> Why then do these practices persist?

So far, our national conversation about modern debtors' prisons has placed the blame for their existence almost exclusively on municipalities' interest in maximizing the revenue generated by their courts on the backs of disenfranchised communities.<sup>7</sup> Revenue generation is a relatively straightforward and easy-to-grasp explanation for what is otherwise confounding, widespread illegality on the part of law enforcement and court officials. This focus on revenue generation has led to policy responses premised on the notion that modern debtors' prisons can be eliminated if the revenue-generation motive is disrupted or controlled.

While acknowledging revenue generation as one strong motive for the practices that produce modern debtors' prisons, this Essay argues that it is an incomplete explanation. Incarceration for debt is fiscally irrational in most individual cases, because governments are effectively doubling their losses by adding incarceration and other enforcement costs to accumulated criminal justice debts that can never be collected. The limitations of the revenue-generation motive suggest other factors play a role in sustaining modern debtors' prisons and merit greater attention than they have received.

Part I of this Essay briefly discusses common components of criminal justice debt and constitutional limitations on incarceration for criminal justice debt. It then gives a national overview of practices that produce modern debtors' prisons. In Part II, we analyze the strengths and weaknesses of revenue generation as the driving explanation for modern debtors' prisons and propose additional motivations that may contribute to their existence. Part III argues that all motives must be considered if we are to design effective policies to end modern debtors' prisons, and considers the policy implications of a more complex understanding of why debtors' prisons continue to exist across the country.

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5. Although this Essay focuses on how Ferguson and local governments across the country jail individuals for fines and costs arising from minor offenses, we recognize that incarceration for debt also is common in more serious criminal cases, particularly when an individual is on probation or parole. The constitutional limitations on incarceration for debt apply to all of these scenarios, *see infra* Part I.A.2, and most of our analysis is applicable to nonpayment of fines and costs in more serious cases.

6. *See infra* Part I.A.1.

7. *See infra* Parts II.A-B. In Ferguson, the city's Black community was particularly impacted. *See infra* note 156, and accompanying text. Debtors' prisons directly impact low-income communities consisting of people who do not have resources to pay criminal fines and fees as well.

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### I. LEGAL FRAMEWORK AND OVERVIEW OF MODERN DEBTORS' PRISONS

#### A. Legal Framework

##### 1. Legal Financial Obligations Arising From Criminal Cases: Fines and Costs

Debts arising from criminal offenses usually break down into two basic categories: fines and costs. A fine is the prescribed punishment for the offense.<sup>8</sup> Costs are “user-fees” that are legally permissible when they reimburse the government for expenses incurred in prosecuting a person.<sup>9</sup>

Although proponents of costs justify them by claiming they make “criminals . . . pick up part of the tab” for the justice system,<sup>10</sup> costs often are used as general revenue available for any public purpose, or as dedicated revenue for specific purposes unrelated to the justice system. The municipal code of Joplin, Missouri, for example, states that all costs shall be “paid into the city treasury for the use and benefit of the city.”<sup>11</sup> In Texas, money collected from the consolidated court cost, which is supposed to fund only judicial functions, instead is remitted in large part to the state general revenue fund or to unrelated dedicated revenue funds, such as the “Rehabilitative Services for Texans with Disabilities Fund.”<sup>12</sup>

The costs arising from an offense frequently end up totaling more than the fine for the offense and, despite the fact that they are theoretically non-punitive in nature,<sup>13</sup> often are converted into jail sentences in the same way as fines. For

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8. See, e.g., *Gipson v. State*, 428 S.W.3d 107, 110 (Tex. Crim. App. 2014) (stating that fines are “characteristically different” from court costs because they are assessed in order to punish the defendant).
  9. See, e.g., *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009) (clarifying that court costs are “nonpunitive ‘recoupment[s] of the costs of judicial resources expended in connection with the trial of the case’”) (citation omitted); *Strattman v. Studt*, 253 N.E.2d 749, 754 (Ohio 1969) (“As we view it, statutory provisions for payment of court costs were not enacted to serve a punitive, retributive, or rehabilitative purpose, as are fines.”).
  10. James Pinkerton, *Harris County Has Access to Millions in Discretionary Funds*, HOUSTON CHRON. (June 9, 2012), <http://www.chron.com/news/houston-texas/article/Harris-County-has-access-to-millions-in-3622279.php>.
  11. JOPLIN, MO., CODE OF ORDINANCES § 9.03 (“All costs, fines and forfeitures imposed by the municipal court, or collected under authority thereof, and all other receipts so collected, shall be regularly accounted for and paid into the city treasury for the use and benefit of the city.”).
  12. Brief of Amicus Curiae Tex. Fair Def. Project in Support of Appellant Orlando Salinas at 3-4, *Salinas v. State*, 369 S.W.3d 176 (Tex. Crim. App. 2015) (No. PD-0419-14).
  13. See, e.g., *Weir*, 278 S.W.3d at 366.

example, a traffic offense in California with a base fine of \$100 can end up costing a total of \$470 with the addition of costs such as a \$40 security fee to defray court security expenditures and a \$10 license fee to defray the costs of recording and maintaining records of vehicle violations.<sup>14</sup> In Austin, Texas, the base fine for driving five miles over the speed limit is \$41.90,<sup>15</sup> with costs bringing the total amount due up to \$145. Even if an individual pays the portion of the total that corresponds to the fine, under Texas statute she still may be committed to jail if she fails to pay the balance that is allocable to the costs assessment.<sup>16</sup>

## 2. Constitutional Limitations on Incarceration for Nonpayment of Criminal Fines and Costs

The U.S. Supreme Court repeatedly has held that the Fourteenth Amendment constrains governments from incarcerating an individual for failure to pay a criminal fine or cost if the person is unable to pay.<sup>17</sup> In *Williams v. Illinois*, the Court ruled that involuntary nonpayment of a fine or cost cannot justify imprisoning a person beyond the maximum period authorized by statute.<sup>18</sup> Soon thereafter, the Court held, in the case of a traffic offense punishable only by a fine, that upon nonpayment, it is unconstitutional to convert a fine into a prison term if the defendant is indigent and without the means to pay.<sup>19</sup> Most recently, the Court held in *Bearden v. Georgia* that states cannot automatically revoke probation for nonpayment of a fine or cost, without consideration of a person's ability to pay.<sup>20</sup>

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14. *Where the Money Goes*, SUPERIOR CT. OF CAL., CTY. OF KERN 2, [https://www.kern.courts.ca.gov/pdf/where\\_money\\_goes.pdf](https://www.kern.courts.ca.gov/pdf/where_money_goes.pdf) (last visited Feb. 16, 2016).

15. Tyler Whitson & Joy Diaz, *Why Your Speeding Ticket Doesn't Pay for What You Think It Does*, KUT (Apr. 22, 2015), <http://kut.org/post/why-your-speeding-ticket-doesn-t-pay-what-you-think-it-does>.

16. See TEX. CODE CRIM. PROC. art. 45.046(a) (allowing commitment for failure to pay both fines and costs).

17. See *Bearden v. Georgia*, 461 U.S. 660, 664-66 (1983); *Tate v. Short*, 401 U.S. 395, 398-99 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970). The Court decided *Tate* and *Williams* under the Equal Protection Clause. See *Tate*, 401 U.S. at 399; *Williams*, 399 U.S. at 244. More recently, the *Bearden* Court discussed how due process and equal protection principles converge in this line of cases and suggested that a due process approach was more appropriate for confronting the role an individual's relative poverty should play in the assessment and enforcement of a criminal sentence. See *Bearden*, 461 U.S. at 665, 666 n.8. The Court has rejected poverty as a suspect classification in civil cases decided subsequent to *Williams* and *Tate*. See, e.g., *Harris v. McRae*, 448 U.S. 297, 323 (1980) (citations omitted).

18. *Williams*, 399 U.S. at 241-42.

19. *Tate*, 401 U.S. at 399.

20. *Bearden*, 461 U.S. at 672. In addition to these limitations, the Fourteenth Amendment also requires the State to afford individuals with criminal debt the

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While these three cases commonly are understood as prohibiting debtors' prisons, they do not create an absolute bar to incarcerating individuals for nonpayment of criminal fines and costs. The Court consistently has limited its rulings in this area to cases of involuntary nonpayment, and has disclaimed any intent to prevent the incarceration of individuals who willfully refuse to pay a fine or cost.<sup>21</sup> The limitations on the constitutional protections afforded to criminal court debtors are stated most explicitly in *Bearden*. In that case, the Court reiterated that an individual cannot be automatically incarcerated for nonpayment, and that instead a court first must inquire into the reasons the individual has failed to pay.<sup>22</sup> However, when conducting that inquiry, a court may consider not only whether a person presently is able to pay, but also whether the person has made "sufficient bona fide efforts legally to acquire the resources to pay."<sup>23</sup> If a person does not make these "sufficient bona fide efforts," she may be deemed "responsible for" or "at fault" for the nonpayment, and thus may be lawfully incarcerated for *voluntary* nonpayment even if there is no question that the person does not possess the funds required to pay the fine or cost.<sup>24</sup>

The *Bearden* Court also recognized that the State has a fundamental interest in punishing individuals who violate its criminal laws even if those individuals are, in the Court's framework, truly, involuntarily poor.<sup>25</sup> Because of that interest, a court may imprison an individual even for involuntary nonpayment if alternative measures—such as payment plans, community service, and fine reductions—are not adequate to meet the State's interests in punishment and deterrence.<sup>26</sup> The determination that alternative measures are not adequate cannot be made at the legislative level, however, but instead must be based on individualized, case-specific facts.<sup>27</sup> The Court's reasoning in *Bearden* suggests that alternative measures will be adequate in most cases of involuntary nonpayment.<sup>28</sup>

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same protections that are afforded to civil judgment debtors, at least when the debt is enforced through a civil judgment process. *James v. Strange*, 407 U.S. 128, 139-40 (1972).

21. *Tate*, 401 U.S. at 400; *Williams*, 399 U.S. at 242 n.19.

22. *Bearden*, 461 U.S. at 672.

23. *Id.*

24. *Id.* at 665, 668.

25. *Id.* at 699 ("A defendant's poverty in no way immunizes him from punishment.").

26. *Id.* at 672.

27. *Id.*

28. *Id.*; see *Tate v. Short*, 401 U.S. 395, 399-401 (1971); *Williams v. Illinois*, 399 U.S. 235, 244-45 (1970).

B. *Modern Debtors' Prisons in Ferguson and Beyond*

Although some advocates,<sup>29</sup> academics,<sup>30</sup> and journalists<sup>31</sup> had focused their attention on the prevalence and consequences of criminal justice debt before 2014, there is little question that the public protests that followed Michael Brown's death in Ferguson in August of that year put a national spotlight on the existence of modern debtors' prisons. Ferguson triggered much broader societal awareness of this phenomenon, and has played a large role in shaping public understanding of how modern debtors' prisons operate.

Investigations that sought to illuminate the causes and scope of community resentment and unrest in Ferguson revealed that a largely White police force issued numerous minor citations to the city's majority Black residents.<sup>32</sup> Citations carried steep costs that would grow quickly over time if an individual did not pay promptly—such that a single ticket with a \$151 fine could balloon to a debt of more than \$1,000.<sup>33</sup> The Ferguson municipal court automatically issued arrest warrants for debtors who missed court appearances or payments on their tickets, in the latter situation without any consideration of whether an individual had an ability to pay.<sup>34</sup> In 2013 alone, the city issued arrest warrants for more

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29. See, e.g., ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>; ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 12-13* (2012), <http://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf>.
30. See, e.g., Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 335-39 (2009); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PA. ST. L. REV. 349, 381-84 (2012).
31. See, e.g., Eric Dexheimer, *Hard-up Defendants Pay as State Siphons Court Fees for Unrelated Uses*, AUSTIN AM.-STATSMAN (Mar. 3, 2012), <http://www.statesman.com/news/news/special-reports/hard-up-defendants-pay-as-state-siphons-court-fe-1/nRkxj/>; Brian Rogers, *Hit with a DWI, Many Pick Jail over Probation*, HOUSTON CHRON. (Sept. 24, 2006), <http://www.chron.com/news/houston-texas/article/Hit-with-a-DWI-many-pick-jail-over-probation-1856857.php>.
32. Ferguson, a city of approximately 21,000 residents, DOJ *Ferguson Report*, *supra* note 3, at 6, issued approximately 90,000 citations and summonses for municipal violations over a four-year period beginning in July 2010, *id.* at 7. "Ferguson's law enforcement practices overwhelmingly impact African-Americans." *Id.* at 4. While over half of Ferguson's population is Black, only four of its fifty-four sworn police officers are Black. *Id.* at 6-7.
33. See *id.* at 4.
34. Class Action Complaint at 4, *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016 (E.D. Mo. Feb. 8, 2015) (No. 4:15-cv-00253) [hereinafter *Ferguson Complaint*].

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than forty percent of its residents.<sup>35</sup> Once arrested, debtors were “instructed to call everybody [they] could think of who might have money to pay [the] fine—with the promise of three or four days in jail if [they] could not find somebody with enough money.”<sup>36</sup> In one six-month period, 256 people, ninety-six percent of whom were Black, could not come up with the money and were jailed.<sup>37</sup> Collections from residents who did manage to pay their municipal fines and costs provided Ferguson with twelve percent of its general revenue in 2011.<sup>38</sup>

In the wake of Ferguson, a steady stream of news stories,<sup>39</sup> advocacy reports,<sup>40</sup> and lawsuits<sup>41</sup> has documented that the practice of jailing low-income debtors who cannot afford to pay criminal fines and costs is both a regional and nationwide problem that affects low-income communities well beyond Ferguson. Ferguson is one of ninety municipalities in St. Louis County, many of which have limited tax bases and are highly dependent on their municipal courts for revenue.<sup>42</sup> Like Ferguson, many of these municipalities issue very large numbers of citations relative to their population size<sup>43</sup> and routinely execute arrest warrants for nonpayment.<sup>44</sup> Ferguson is only one of several St. Louis County municipalities that have been sued for operating debtors’ prisons.<sup>45</sup>

35. See DOJ *Ferguson Report*, supra note 3, at 6, 55 (noting that the population of Ferguson is roughly 21,000 people and stating that arrest warrants were issued against 9,007 people in fiscal year 2013).

36. *ArchCity White Paper*, supra note 2, at 16.

37. DOJ *Ferguson Report*, supra note 3, at 56.

38. See *id.* at 9. The fact that these individuals did pay does not mean that all of them possessed the money to do so. Arrested individuals were encouraged to seek funds from third parties in order to make payments and avoid incarceration. See *supra* text accompanying note 36.

39. *E.g.*, Balko, supra note 1.

40. *E.g.*, ARCHCITY DEFENDERS, IT’S NOT JUST FERGUSON: MISSOURI SUPREME COURT SHOULD CONSOLIDATE THE MUNICIPAL COURT SYSTEM (2015) <http://www.archcitydefenders.org/wp-content/uploads/2014/07/Its-Not-Just-Ferguson-Consolidate-the-Municipal-Courts.pdf> [hereinafter *It’s Not Just Ferguson*].

41. *E.g.*, Class Action Complaint, *Jenkins v. City of Jennings*, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015) [hereinafter *Jennings Complaint*].

42. Twenty-one of the ninety municipalities in St. Louis County derive twenty percent or more of their general budget from municipal fines and fees. BETTER TOGETHER, PUBLIC SAFETY - MUNICIPAL COURTS 2 (Oct. 2014), <http://www.bettertogetherstl.com/wp-content/uploads/2014/10/BT-Municipal-Courts-Report-Full-Report1.pdf>. Fines and fees represent the largest source of revenue in fourteen municipalities. *Id.* at 7.

43. *It’s Not Just Ferguson*, supra note 40, at 31-32, 38.

44. *Id.* at 16.

45. *Jennings Complaint*, supra note 41; see also Civil Rights Class Action Complaint at 7-8, *Whitner v. City of Pagedale*, No. 4:15-cv-01655 (E.D. Mo. Nov. 4, 2015)

High-profile civil rights claims also have been filed against jurisdictions in the South that operate debtors' prisons in collaboration with private probation companies that contract with the jurisdictions to handle collections. The probation companies typically offer their services to municipalities at no charge, in exchange for the right to collect probation fees from the individuals they supervise, many of whom are on probation solely because they need time to pay their fees and costs.<sup>46</sup> For example, the Southern Center for Human Rights filed a lawsuit in April 2015 against Red Hills Community Probation and two Georgia municipalities that contracted with Red Hills.<sup>47</sup> The municipalities would place indigent defendants on probation with Red Hills if they could not afford to pay their fines immediately and in full.<sup>48</sup> One disabled, indigent plaintiff received a ticket for burning leaves in his yard without a permit, and was ordered to pay a \$500 fine, spend twelve months on probation, and pay Red Hills \$44 per month in fees. When he failed to pay, he was arrested and jailed until a friend brought \$250 to buy his release.<sup>49</sup> Similar litigation challenging practices that produce debtors' prisons has been commenced in other private probation jurisdictions, including Alabama,<sup>50</sup> Georgia,<sup>51</sup> Mississippi,<sup>52</sup> and Tennessee.<sup>53</sup>

Beyond Missouri and private probation jurisdictions, news reports and litigation have identified low-income debtors who have been incarcerated for nonpayment of criminal fines and fees in states as diverse as Colorado,<sup>54</sup> Louisi-

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(alleging arrest warrants are issued against individuals who cannot pay fines for municipal violations in Pagedale).

46. *Profiting from Probation: America's "Offender-Funded" Probation Industry*, HUMAN RIGHTS WATCH 2-3 (2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> [hereinafter *Profiting from Probation*].
47. See Complaint, *Edwards v. Red Hill Cmty. Prob. LLC*, No. 1:15-cv-00067 (M.D. Ga. Apr. 10, 2015).
48. *Id.* at 22-24.
49. *Id.* at 22-23.
50. E.g., Complaint, *Reynolds v. Judicial Corr. Servs. Inc.*, No. 2:15-cv-00161 (M.D. Ala. Oct. 21, 2015).
51. E.g., Complaint, *Thompson v. DeKalb Cty.*, No. 1:15-mi-99999-UNA (N.D. Ga. Jan. 29, 2015) [hereinafter *DeKalb Complaint*].
52. E.g., Class Action Complaint, *Kennedy v. City of Biloxi*, No. 1:15-cv-00348 (S.D. Miss. Oct. 21, 2015) [hereinafter *Biloxi Complaint*].
53. E.g., *Rodriguez v. Providence Cmty. Corr., Inc.*, No. 3:15-cv-01048 (M.D. Tenn. Oct. 1, 2015).
54. See, e.g., Letter from Mark Silverstein, Legal Dir., Am. Civil Liberties Union of Colo. & Rebecca Wallace, Staff Att'y, Am. Civil Liberties Union of Colo., to Wynetta Massey, City Att'y, Colo. Springs (Sept. 14 2015), <http://static.aclu-co.org/wp-content/uploads/2015/09/2015-09-14-Massey-ACLU2.pdf>; see also Press Release, Am. Civil Liberties Union of Colo., Colorado Springs Sentences Hundreds of Impoverished People to Debtors' Prison in Violation of U.S.



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ana,<sup>55</sup> Michigan,<sup>56</sup> Ohio,<sup>57</sup> Washington,<sup>58</sup> and our own state of Texas.<sup>59</sup> For example, in October 2015 the Texas Fair Defense Project (TFDP) filed a class action lawsuit against the City of Austin in which the court had ordered the lead plaintiff to either pay thousands of dollars or perform hundreds of hours of community service for unpaid tickets.<sup>60</sup> Because she was a single mother of five disabled children living below the poverty line, she could not hope to comply with the court's demands and eventually was arrested and ordered to spend forty-five days in jail.<sup>61</sup> In the twelve months leading up to the lawsuit, the city jailed about 900 other debtors.<sup>62</sup> As in Ferguson, people of color were disproportionately affected by debtors' prison practices, with Black residents being over six times as likely to be jailed as White residents.<sup>63</sup>

While Ferguson and private probation have provided the dominant narratives of modern-day debtors' prisons, observed conditions in Texas and other jurisdictions can help identify common practices that produce debtors' prisons even in the absence of local idiosyncrasies such as private probation and St. Louis County's municipal fragmentation:

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Constitution and State Law (Oct. 22, 2015), <http://aclu-co.org/colorado-springs-sentences-hundreds-of-impooverished-people-to-debtors-prison-in-violation-of-u-s-constitution-and-state-law/>.

55. See, e.g., Campbell Robertson, *Suit Alleges 'Scheme' in Criminal Costs Borne by New Orleans's Poor*, N.Y. TIMES (Sept. 17, 2015), <http://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleans-poor.html>.
56. See, e.g., Joseph Shapiro, *Supreme Court Ruling Not Enough To Prevent Debtors Prisons*, NAT'L PUB. RADIO (Jan. 8, 2015), <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons>.
57. See, e.g., AM. CIVIL LIBERTIES UNION OF OHIO, *THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES* (Apr. 2013), [http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013\\_04.pdf](http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf).
58. Shapiro, *supra* note 56.
59. Alex Campbell & Kendall Taggart, *Lawsuit Claims Austin Illegally Jails Poor People*, BUZZFEED (Oct. 27, 2015), <http://www.buzzfeed.com/alexcampbell/austin-illegally-jails-poor-people-lawsuit-claims>; Kendall Taggart & Alex Campbell, *Their Crime: Being Poor. Their Sentence: Jail.*, BUZZFEED (Oct. 7, 2015), <http://www.buzzfeed.com/kendalltaggart/in-texas-its-a-crime-to-be-poor>.
60. Class Action Complaint, *Gonzales v. City of Austin*, No. 1:15-cv-00956 (W.D. Tex. Oct. 27, 2015) [hereinafter *Austin Complaint*].
61. *Id.* at 5.
62. Email Attachment from John Walker, Admin. Specialist, Austin Mun. Court, to author (Dec. 15, 2015) (on file with author).
63. Data from Open Records Requests to Austin Municipal Court for month of July. TFDP requested all commitment orders and all associated tickets, which for the most part indicate race. This estimate assumes that the debtors with the surnames Montemayor and Hernandez are Hispanic.

Failure to consider an individual's ability to pay. Although *Bearden* and related cases prohibit courts from automatically converting debt into jail time and require courts to inquire into the reasons for an individual's nonpayment,<sup>64</sup> courts across the country disregard these constitutional requirements. Through the City of Austin lawsuit, TFDP discovered that municipal judges rarely, if ever, ask about ability to pay before jailing people for nonpayment. In Bastrop, Texas<sup>65</sup> and Biloxi, Mississippi,<sup>66</sup> debtors have been jailed immediately after arrest without even seeing a judge, let alone having an ability-to-pay hearing.

Subjective judicial determinations that objectively low-income individuals are guilty of voluntary nonpayment. Judges who do conduct ability-to-pay determinations often make findings that an individual is able to pay based on subjective and arguably inappropriate criteria, and as a result do not offer alternatives to payment before ordering the individual jailed. For example, a judge in Montgomery, Alabama, found that one debtor whose sole income consisted of social security payments that were legally exempt from criminal fines nevertheless was guilty of voluntary nonpayment because he regularly gave money to his church.<sup>67</sup> Another judge in Benton County, Washington, told reporters that he made his findings about debtors' ability to pay based on physical appearances. When debtors come before him with expensive-looking clothing or tattoos, the judge finds they are able to pay without considering any other available evidence about their income.<sup>68</sup> Similarly, a municipal judge in Austin, Texas rejects debtors' claims of indigence if they have manicured nails.<sup>69</sup>

Requirements that individuals "sit out" their fines and costs. When a court automatically issues a warrant without considering ability to pay, or determines that nonpayment is voluntary after a hearing, courts often require debtors to pay their fines and costs immediately or "sit out" their debts in jail. Although in some places debtors who are incarcerated for nonpayment can end up owing more money due to the imposition of jail fees,<sup>70</sup> in many jurisdictions debtors

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64. See *supra* text accompanying notes 19-22.

65. TFDP visited two detainees who were jailed by the City of Bastrop for several days, neither of whom saw a judge prior to incarceration.

66. Biloxi Complaint, *supra* note 52, at 15.

67. Brian Lyman, *Federal Judge Blocks Collection of Fines from Indigent*, MONTGOMERY ADVERTISER (May 1, 2014), <http://www.montgomeryadvertiser.com/story/news/local/2014/05/01/federal-judge-blocks-collection-of-fines-from-indigent-in-montgomery/8563643/>.

68. See Shapiro, *supra* note 56.

69. Court observation notes from Aug. 26, 2015 (on file with authors). Another TFDP client who had been living in his car was told he did not qualify for community service because he could not "prove" he was homeless.

70. For example, the city of Jennings in Missouri adds extra jail fees onto old debts while debtors are incarcerated for nonpayment. Jennings Complaint, *supra* note 41, at 8-9.

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pay their fines and costs with “jail credit” awarded at a specified rate. In Montgomery, Alabama, for example, criminal debtors earn \$50 to \$75 in jail credit toward unpaid court debt per day, depending on whether or not the debtor works while incarcerated.<sup>71</sup> In Texas, the jail credit rate usually is \$50 to \$100 a day and “pay or stay” practices are so common that municipal and justice courts resolved more than 700,000 cases at least in part through jail credit in 2013.<sup>72</sup> Some Texas courts appear to “collect” more debt in jail credit than in actual money.<sup>73</sup>

*Limited or nonexistent alternatives to payment.* Although *Bearden* and other cases require courts to offer indigent criminal debtors alternatives to full payment,<sup>74</sup> in practice these alternatives are not available or are very difficult to access in many jurisdictions. Many cities, including Ferguson, Missouri, do not offer community service as an alternative to payment.<sup>75</sup> The city of Biloxi, Mississippi explicitly states that fines are due in full the same day they are assessed, and that release on a payment plan is a privilege rather than a right.<sup>76</sup>

In Texas, some courts require detailed applications and documentation before debtors may enter into a payment plan,<sup>77</sup> requirements that may make it difficult or impossible for non-citizens to qualify. Other courts condition the

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71. First Amended Class Action Complaint at 1-2, *Mitchell v. City of Montgomery*, No. 2:14-cv-00186 (M.D. Ala. May 23, 2014) [hereinafter *Montgomery Complaint*].
  72. Texas Office of Court Admin. data (on file with authors).
  73. Texas Office of Court Admin. studies on court collections in Houston and Waco (on file with authors).
  74. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (“Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State’s interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.”).
  75. See DOJ *Ferguson Report*, *supra* note 3, at 54 (noting only juveniles eligible for community service in lieu of payment). In Montgomery, Alabama, community service was not available as an alternative to payment prior to 2014, see *Montgomery Complaint*, *supra* note 71, at 2, and only became available in response to civil rights litigation, see Press Release, S. Poverty Law Ctr., SPLC Lawsuit Closes Debtors’ Prison in Alabama Capital (Aug. 25, 2014), <http://www.splcenter.org/news/2014/08/26/splc-lawsuit-closes-debtors%E2%80%99-prison-alabama-capital>.
  76. Biloxi Complaint, *supra* note 52, at 4.
  77. See, e.g., *Time Payment Plans*, CITY OF BURLESON, TEX., <https://burlesontx.com/555/Time-Payment-Plans> (last visited Feb. 16, 2016) (allowing only state-issued drivers licenses and identification cards); Judge Wayne L. Mack, *Payment Plan Application & Financial Statement Form*, MONTGOMERY CTY., TEX., [http://www.mctx.org/courts/justices\\_of\\_the\\_peace/justice\\_of\\_the\\_peace\\_pct\\_1/docs/Online\\_Payment\\_Plan\\_Docs.pdf](http://www.mctx.org/courts/justices_of_the_peace/justice_of_the_peace_pct_1/docs/Online_Payment_Plan_Docs.pdf) (last visited Feb. 16, 2016) (allowing state-issued drivers licenses and identification cards, school identification cards, and birth certificates).

availability of payment plans on a large down payment,<sup>78</sup> shutting out many low-income debtors. A number of courts do not offer community service options to some or all adult debtors.<sup>79</sup> And although waivers of fines and costs are statutorily authorized when a low-income debtor cannot afford to pay or complete community service without undue hardship,<sup>80</sup> in practice courts rarely grant these waivers. For example, in 2013, Houston granted indigence waivers in only ten cases, while jailing people for nonpayment in 71,692 cases.<sup>81</sup>

## II. EXPLAINING THE PERSISTENCE OF DEBTORS' PRISONS

### A. *Why We Care About Why*

In our current public conversation about the prevalence and consequences of criminal justice debt and modern debtors' prisons, the topic soon turns to motive. More than a hundred years after prohibitions on imprisonment for debt were incorporated into almost every state constitution,<sup>82</sup> why is the threat of incarceration for failure to pay criminal fines and fees seemingly ubiquitous? More than thirty years after the U.S. Supreme Court ruled that ability to pay must be considered before someone can be confined for nonpayment,<sup>83</sup> why do

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78. See, e.g., *Court & Detention Services*, CITY OF DALLAS, <http://dallascityhall.com/departments/courtdetentionservices/pages/payment-plan.aspx> (last visited Feb. 16, 2016) (requiring a thirty percent down payment); *Time Payment Plans*, *supra* note 77 (noting that people applying for payment plans must “[p]ay \$125 or 20%, whichever is greater, for the initial payment at the time of request”).

79. See, e.g., Taggart & Campbell, *supra* note 59 (no community service offered in El Paso); *Community Service*, CITY OF BURLESON, TEX., <https://burlesontx.com/1436/Community-Service> (last visited Feb. 16, 2016) (offering community service only to juveniles in Burleson). Even when Texas jurisdictions do offer payment plans and community service, criminal debtors may have difficulty obtaining information about these options before they face a warrant and arrest. See, e.g., Press Release, San Antonio, City Offers Opportunities for Payment Before Warrant Roundup (Feb. 20, 2015), <https://www.sanantonio.gov/Pre-K4SanAntonio/pressrelease/TabId/936/ArtMID/2752/ArticleID/2845/City-offers-opportunities-for-payment-before-Warrant-Roundup.aspx> (implying that payment is the only option to clear arrest warrants).

80. TEX CODE CRIM. PROC. ANN. arts. 45.046, 45.049.

81. 2013 data from the Texas Office of Court Admin. (on file with author).

82. Christopher Hampson, *The New American Debtors' Prisons* 20, 23 (Aug. 15, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2639709](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2639709). Although most of these constitutional provisions narrowly apply to contractual debt, and thus not to criminal justice debt, they were adopted in an environment that rejected incarceration for debt as overly punitive and insufficiently modern. *Id.* at 26-27.

83. See *supra* Part I.A.2.

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so many courts jail criminal justice debtors without first examining whether the individual before them is able to pay the owed economic sanction?

One motive has been endorsed almost unanimously as the dominant explanation for what drives courts to assess and collect economic sanctions without regard for individual rights: revenue generation.<sup>84</sup>

Revenue generation is both obvious and powerful as a proffered motive for why courts impose and enforce monetary penalties in criminal cases in a manner that produces debtors' prisons—after all, we are talking about judges collecting money that funds their own courts' operations, in whole or in part,<sup>85</sup> and that in many instances contributes additional revenue to the local governments that employ them.<sup>86</sup> Revenue generation provides such a compelling account of why modern debtors' prisons exist that many of its proponents categorically reject suggestions that other traditional justifications for the imposition and enforcement of economic sanctions for minor offenses contribute to, and complicate, the problem.<sup>87</sup>

The focus on the motive of revenue generation also has dominated the policy response to debtors' prisons in the Ferguson era. Many efforts to end the imprisonment of poor people for unpaid criminal justice debt have targeted local governments' incentives and ability to raise revenue through the courts. In

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84. See, e.g., *ArchCity White Paper*, *supra* note 2, at 4-5; BETTER TOGETHER, *supra* note 42, at 1; DOJ *Ferguson Report*, *supra* note 3, at 42; *Profiting from Probation*, *supra* note 46; Balko, *supra* note 1; Jeremy Kohler et al., *Municipal Courts Are Well-Oiled Money Machine*, ST. LOUIS POST-DISPATCH (Mar. 15, 2015), [http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-are-well-oiled-money-machine/article\\_2f45bafb-6e0d-5e9e-8fe1-0ab9a794fcdc.html](http://www.stltoday.com/news/local/crime-and-courts/municipal-courts-are-well-oiled-money-machine/article_2f45bafb-6e0d-5e9e-8fe1-0ab9a794fcdc.html); Sophie Quinton, *After Ferguson, States Struggle to Limit Crippling Court Debt*, GOVERNING (Aug. 26, 2015), <http://www.governing.com/topics/finance/sl-ferguson-court-debt-states.html>; see also Brief for LaMarcus Pruiett as Amicus Curiae Supporting Respondent at 25, *Mo. Municipal League v. Missouri*, 465 S.W.3d 904 (Mo. Mar. 18, 2015) (No. SC94493) [hereinafter MML Amicus Brief]; Jennings Complaint, *supra* note 41, at 36; DeKalb Complaint, *supra* note 51, at 1.
85. See, e.g., *ArchCity White Paper*, *supra* note 2, at 33 (noting that judges' status as municipal employee creates incentive for them to collect enough fines to cover their own and their peers' salaries).
86. See, e.g., BETTER TOGETHER, *supra* note 42, at 2 (noting that in 2013, seventy-three of eighty-one municipal courts in St. Louis County brought in more revenue than they needed to operate); *It's Not Just Ferguson*, *supra* note 40, at 6 (noting that municipal courts in Florissant, Missouri produce \$1.5 million in net revenue for city's general fund).
87. BETTER TOGETHER, *supra* note 42, at 9 (rejecting public safety as a contributing factor); DOJ *Ferguson Report*, *supra* note 3, at 3, 5 (rejecting public safety and personal responsibility); Kohler et al., *supra* note 84 (rejecting personal responsibility concerns as an explanation for municipal court practices in Ferguson); *Ferguson Forward Ep. 311*, STAY TUNED (Dec. 18, 2014), <http://staytuned.ninenet.org/episodes/ferguson-forward/> (featuring Thomas Harvey of ArchCity Defenders in St. Louis rejecting personal responsibility).

March 2015, shortly after the Department of Justice released the report on its investigation into the Ferguson police department and municipal court,<sup>88</sup> U.S. Representative Emanuel Cleaver II (Mo.-5) announced his intent to introduce legislation to ban law enforcement activities motivated solely by revenue generation,<sup>89</sup> or “taxation by citation.”<sup>90</sup> The Missouri Legislature aimed to do something similar, passing legislation in 2015 that limited the funds a municipality can take from traffic tickets and fines to 12.5 percent of its general revenue in St. Louis County and to twenty percent of general revenue in the rest of the state.<sup>91</sup> In signing the bill, Missouri Governor Jay Nixon remarked that, “Under this bill, cops will stop being revenue agents and go back to being cops.”<sup>92</sup> Ongoing advocacy to replace St. Louis County’s eighty-one municipal courts with regional or county courts also targets revenue incentives, under the rationale that judges employed directly by a single municipality are too vulnerable to pressure to raise municipal revenue.<sup>93</sup>

The effectiveness of these policy responses at ending unconstitutional incarceration for criminal justice debt will be determined in large part by the extent to which that incarceration is driven by the revenue incentives the policies are designed to disrupt.<sup>94</sup> Even the effectiveness of policy responses that do not

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88. DOJ *Ferguson Report*, *supra* note 3.

89. Press Release, Emanuel Cleaver, II, Rep., U.S. House of Representatives, Congressman Cleaver Announces Introduction of The Fair Justice Act (Mar. 9, 2015), <http://cleaver.house.gov/media-center/press-releases/congressman-cleaver-announces-introduction-of-the-fair-justice-act>

90. Press Release, Emanuel Cleaver, II, Rep., U.S. House of Representatives, Congressman Cleaver Urges Immediate Congressional Action on Policing Reform (Apr. 29, 2015), <http://cleaver.house.gov/media-center/press-releases/congressman-cleaver-urges-immediate-congressional-action-on-policing>. Representative Cleaver’s proposed bill eventually was refined to bar a municipality from generating more than thirty percent of its general revenue from traffic tickets and fines. *Id.*

91. Mike Lear, *Missouri Governor Signs Municipal Court Reform Bill with “Real Teeth,”* MISSOURINET (July 9, 2015), <http://www.missourinet.com/2015/07/09/missouri-governor-signs-municipal-court-reform-bill-with-real-teeth/>.

92. Robert Patrick, *Almost a Year After Ferguson, Missouri Passes Court Reforms,* GOVERNING, (July 13, 2015), <http://www.governing.com/topics/public-justice-safety/tns-missouri-court-reform-law.html>.

93. BETTER TOGETHER, *supra* note 42, at 4, 12; *It’s Not Just Ferguson*, *supra* note 40, at 2; FERGUSON COMM’N, STL POSITIVE CHANGE, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY 76 (Sept. 14, 2015) [hereinafter *Ferguson Commission Report*], <http://apps.stlpublicradio.org/ferguson-commission-priorities/assets/report.pdf>.

94. Other factors directly related to *how well* these policy responses disrupt revenue incentives also will influence the effectiveness of the responses. For example, Missouri had revenue caps prior to the 2015 legislation but monitoring and enforcement of the caps was minimal. See BETTER TOGETHER, *supra* note 42, at 2-3.

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specifically target revenue generation as a motive, but instead aim to control the practices through which courts maximize collection of revenue in individual cases—policy responses that consist primarily of restating and reinforcing long-standing procedural protections for criminal justice debtors in constitutional law<sup>95</sup>—may be impaired if we do not confront other, unexamined motives that also underlie those practices. Accordingly, we will briefly examine the strengths and limitations of revenue generation as the controlling motive behind modern debtors’ prisons, as well as other possible contributing motivations.

#### *B. The Case for Revenue Generation as the Controlling Motive Behind Debtors’ Prisons*

In addition to the obvious relationship between the collection of municipal economic sanctions and the generation of municipal revenue, the two primary narratives that launched recent attention to modern debtors’ prisons—Ferguson, broadly defined to encompass municipal court practices in St. Louis County, and private probation as it exists in some parts of the South—provide significant support for the claim that revenue generation is behind the practices that result in debtors’ prisons.

The Department of Justice’s Ferguson Report documented that the number of citations and summonses issued annually for municipal violations in Ferguson increased by fifty percent over a four-year period beginning in July 2010.<sup>96</sup> While revenue from municipal violations represented over twelve percent of Ferguson’s total general revenue in fiscal years 2010 and 2011, Ferguson budgeted for a thirty percent increase in that revenue in fiscal year 2012.<sup>97</sup> Law enforcement and the courts were able to exceed that target.<sup>98</sup> After several consecutive cycles of budgeting for significant increases in municipal violation revenue and exceeding those budget targets, revenue from municipal violations was projected to constitute over twenty-three percent of the City’s general revenue in fiscal year 2015.<sup>99</sup>

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Moreover, the new revenue caps approved by the Missouri Legislature apply only to revenue from traffic violations, leaving municipalities free to raise unlimited revenue from tickets for other municipal offenses, such as offenses related to property maintenance. Monica Davey, *Lawsuit Accuses Missouri City of Fining Homeowners to Raise Revenue*, N.Y. TIMES (Nov. 4, 2015), <http://www.nytimes.com/2015/11/05/us/lawsuit-accuses-missouri-city-of-fining-homeowners-to-raise-revenue.html>. Nevertheless, if policy reforms that specifically target revenue generation are targeting the wrong thing, or only part of the problem, they will not be effective no matter how well enforced or how free of loopholes they are.

95. See *infra* text accompanying notes 169-171.

96. DOJ *Ferguson Report*, *supra* note 3, at 7.

97. *Id.* at 9.

98. *Id.*

99. See *id.* at 9-10.

Any ambiguity over whether Ferguson's steady increase in revenue from municipal violations was the uncalculated result of public safety priorities rather than a calculated quest for revenue was removed by emails from municipal officials that were released to the DOJ. In March 2010, Ferguson's City Finance Director wrote to Chief of Police Thomas Jackson that "unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year . . . . Given that we are looking at a substantial sales tax shortfall, it's not an insignificant issue."<sup>100</sup> In March 2013, the Finance Director again focused on increasing revenue from municipal violations, this time writing to City Manager John Shaw that "[c]ourt fees are anticipated to rise about 7.5%. I did ask the Chief if he thought the PD could deliver 10% increase. He indicated they could try."<sup>101</sup>

Like Ferguson, other municipalities in St. Louis County that rely on court fines and fees to fund a significant portion of their general expenses<sup>102</sup> also increased their revenue from fines and fees at the same time tax revenue was declining.<sup>103</sup> At least one city effectively held debtors hostage, reducing the amount of bail demanded as ransom for their release on a daily basis, in search of the maximum amount an individual's family and friends could pay.<sup>104</sup> A mayor in the county sent an email to his city's police department, reminding officers that increasing the number of tickets issued would directly add to municipal revenue and "affect pay adjustments at budget time."<sup>105</sup>

Revenue generation also plays a prominent role in jurisdictions with private probation companies—companies that emphasize their ability to increase collection of municipal fines and fees when advertising their services to potential customers.<sup>106</sup> Although the practices that exist in private probation systems are

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100. *Id.* at 2. The City Finance Director is not named in the DOJ Report.

101. *Id.*

102. *See supra* notes 42-45 and accompanying text.

103. BETTER TOGETHER, *supra* note 42, at 2.

104. Jennings Complaint, *supra* note 41, at 37-38.

105. Tony Messenger, *Welfare of the People Should Drive Court Reform*, ST. LOUIS POST-DISPATCH (Jan. 23, 2015), [http://www.stltoday.com/news/opinion/columns/tony-messenger/messenger-welfare-of-the-people-should-drive-court-reform/article\\_e278e88a-51cb-5e31-842a-d77de0acfe41.html](http://www.stltoday.com/news/opinion/columns/tony-messenger/messenger-welfare-of-the-people-should-drive-court-reform/article_e278e88a-51cb-5e31-842a-d77de0acfe41.html) (quoting email from Mayor John Gwaltney of Edmundson, Missouri).

106. Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>. For example, Georgia-based Freedom Probation tells potential municipal customers, "If your municipality is looking . . . to increase the collection of fines and court costs in the municipal court, please give our office a call today." *Id.*



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troubling,<sup>107</sup> and some of them are undoubtedly illegal,<sup>108</sup> it is the involvement of for-profit private companies that really fuels suspicion that these practices are motivated entirely by the goal of maximizing revenue. Probation fees paid by low-income debtors “make up most [private] probation companies’ entire stream of revenue and profits.”<sup>109</sup> These revenues and profits were enough to put one private probation company, Judicial Correction Services, on *Inc.* magazine’s list of “the fastest growing private companies in America” in 2010.<sup>110</sup>

Ferguson and private probation systems do not provide the only evidence in support of the revenue generation motive. As we have noted, there is great intuitive appeal to the idea that municipalities that use oppressive tactics to collect fines and costs for the municipal treasury are motivated to do so by the goal of maximizing municipal revenue. Moreover, the fact that forty-eight states have increased criminal and civil court fees, added new fees, or both since the onset of the recent recession<sup>111</sup> suggests that revenue generation plays a role in communities beyond St. Louis County and private probation industry strongholds.

### C. Limitations on the Explanatory Power of Revenue Generation

We now turn to examining evidence that cuts against the revenue generation motive as a complete explanation for the continued existence of debtors’ prisons. This evidence calls into question the extent to which policy responses to revenue-maximizing practices in St. Louis County and to private probation systems can be generalized effectively to the many other jurisdictions in which debtors’ prisons exist, including many municipalities in our home state of Texas.

Limitations on the power of revenue generation to explain the persistence of debtors’ prisons immediately become apparent upon examination of specific cases in which individuals have been jailed for failure to pay fines and fees. For

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107. For example, the poorer a person is, the more time she will need to pay off her fines and fees in full, and the more of her limited income will be captured by monthly probation fees. *Profiting from Probation*, *supra* note 46, at 3.

108. See Order on Plaintiff’s Motion for Preliminary Injunction at 2, *Burdette v. Harpersville*, No. CV-2010-900183 (Shelby Cty., Ala. Cir. Ct. July 11, 2012) (“Defendants’ depositions present virtually undisputed evidence that criminal defendants appearing before the Harpersville Municipal Court have been subjected to repeated and ongoing violations of almost every safeguard afforded by the United States Constitution, the laws of the State of Alabama, and the Rules of Criminal Procedure.”).

109. *Profiting from Probation*, *supra* note 46, at 2-3.

110. Stillman, *supra* note 106.

111. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NAT’L PUB. RADIO (May 23, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

example, a National Public Radio story on criminal justice debt profiled Jared Thornburg, who was assessed \$165 in fines and fees for a traffic offense in Westminster, Colorado.<sup>112</sup> Thornburg was homeless and unemployed, and could not afford to pay the ticket. His fines and fees increased to \$306 when he did not meet the initial payment deadline, and he eventually was jailed for failure to pay that amount. Thornburg spent ten days in jail, at a daily cost to the city of approximately \$70.<sup>113</sup> Westminster was not content merely to lose \$306 in uncollected revenue; it (more than) doubled down and incurred \$700 in actual expenses on top of that, for a net loss to the municipality of \$1,006. Similarly, after Tom Barrett stole a \$2 beer in Augusta, Georgia, the city jailed him for two months because he could not afford to pay \$400 per month in court costs, including fees for electronic monitoring that would have allowed the city to supervise him at a much lower cost than incarceration.<sup>114</sup> Even at a conservative estimated incarceration cost of \$50 per day, Augusta spent approximately \$3,000 in a fruitless attempt to collect \$800, for a net loss of \$3,800.<sup>115</sup> These cases do not appear to reflect a revenue generation strategy,<sup>116</sup> at least not one that is effective or rational.<sup>117</sup>

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112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.* The daily cost to jail one individual varies by jurisdiction. The average cost to jail someone in Texas is \$59 per day. *Solutions for Safely Reducing Incarceration: Basic Facts*, TEX. CRIMINAL JUST. COAL., <http://www.texascjc.org/basic-facts-1> (last visited Feb. 17, 2016). In New Hampshire, the daily cost is \$110. AM. CIVIL LIBERTIES UNION OF N.H., *DEBTORS' PRISONS IN NEW HAMPSHIRE* 7 (Sept. 23, 2015), <http://aclu-nh.org/wp-content/uploads/2015/09/Final-ACLU-Debtors-Prisons-Report-9.23.15.pdf>. These net losses in individual cases add up. For example, in 2013, New Hampshire incurred approximately \$166,870 in jail costs in an attempt to collect an estimated \$75,850 in unpaid fines that ultimately were never collected. *Id.*

116. Whether a jurisdiction charges jail fees (“pay to stay”) or instead awards jail credit (“pay or stay”) for this incarceration, *see supra* notes 70-73 and accompanying text, does not fundamentally change the math. At best, a jurisdiction that charges jail fees will have a bigger judgment against an indigent debtor who is extremely unlikely to ever pay in full; at worst, the jurisdiction will pay to jail the individual for more and longer periods of time for the same uncollectable debt. For example, Dana Burdette was jailed in Harpersville, Alabama for her inability to pay \$2,000 in debt arising from traffic tickets. Hannah Rappleye & Lisa Riordan Seville, *The Town that Turned Poverty into a Prison Sentence*, NATION (Mar. 14, 2014), <http://www.thenation.com/article/town-turned-poverty-prison-sentence/>. As a result of the accumulation of a \$31 per night jail fee, the amount of her debt grew to about \$5,000. *Id.* Because Burdette could not pay the new total, she remained in jail for a total of 113 days before she was released without payment and without explanation. *Id.* In contrast, in jurisdictions that offer it, jail credit is, within the unkind world of debtors’ prisons, a relative kindness to the debtor—having “sat out” her fines and fees, she at least can walk out of jail free from criminal justice debt. It also serves as a release valve of sorts for the jurisdiction: the fact that it shuts the door

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Irrationality is not a satisfying explanation for practices that result in thousands of people across the country serving jail time in payment for municipal fines and fees each year.<sup>118</sup> Some of this “irrationality” is almost certainly a consequence of the fact that in some cases the financial incentives between the collector and jailer are not properly aligned—i.e., the entity that is seeking to collect the economic sanction is not the same entity that pays the cost of incarceration. For example, the cost of a private probation company’s decision to jail often is borne by the municipality that runs the jail.<sup>119</sup> Similarly, a Texas county operating a jail may pay the price for a municipal judge’s decision to incarcerate a debtor.<sup>120</sup> However, the occasional disconnect between the entity that is seeking to collect a debt and the entity that is paying the jail tab only gets us so far, not the least because the perfectly aligned incentives that exist in St. Louis County and other locations get us to the same debtors’ prison outcome.<sup>121</sup>

Some judges feel that the threat of jail is the only way to accurately identify which debtors are able to pay and to scare payment out of those who can pay but have not.<sup>122</sup> In these judges’ mental calculations, the cost of carrying out

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on any chance of future collections is offset to at least some extent by the fact that it also avoids the expense of repeat incarcerations.

117. This strategy is rendered even less effective by the fact that jailing a debtor often disrupts her employment, housing, family life, and/or child care arrangements, in a manner that makes it even less likely that she can pay the debt. For example, Jared Thornburg, *see supra* text accompanying notes 112-113, was about to start a new job after a period of unemployment when he was jailed for nonpayment of criminal fines and fees. Shapiro, *supra* note 111. While he was in jail, he lost the new job before he ever started it. *Id.*
118. Although 700,000 citations are resolved at least in part through jail credit in Texas each year, *see supra* text accompanying note 72, some individuals may have multiple citations; the number of unique individuals affected is unknown. “Thousands” is a conservative estimate of the number of individuals affected nationally, in light of the much larger number of citations involved in our state alone.
119. *Profiting from Probation*, *supra* note 46, at 53.
120. For example, the City of Austin, located in Travis County, Texas, provides magistrations services for detainees arrested on county charges in exchange for using the county’s booking services for its own debtors. Interlocal Agreement Between Travis Cty. & City of Austin for Booking & Related Services, at §§ 3.05, 4.01 (2011) (on file with authors). The City does not pay for the actual costs of incarcerating their debtors. *Id.*
121. *See supra* text accompanying note 93 (discussing advocates’ proposal to consolidate St. Louis County’s municipal courts at the county level in order to decrease incentives for municipal judges to raise revenue for the municipality that employs them).
122. *See, e.g.*, Shaila Dewan, *Court Conundrum: Offenders Who Can’t Pay, or Won’t*, N.Y. TIMES (Sept. 26, 2015), <http://www.nytimes.com/2015/09/27/us/court-conundrum-offenders-who-cant-pay-or-wont.html> (describing a judge who uses

that threat in cases where the debtor cannot pay may be offset by the amount collected from those who pay up when faced with the threat—in other words, it is a price that must be paid to make the threat effective. And it is a price that is further offset when family members and friends, who have no legal obligation to pay the court debt, in some cases come up with funds to get their loved ones out of jail.<sup>123</sup> However, available data does not appear to support the claim that debtors' prisons and related collection policies produce a net financial benefit for municipalities, despite their human cost. In Pennsylvania, for example, local governments must spend \$7,000 to collect \$4,000 in fines and court costs.<sup>124</sup> Data from Texas shows that the vast majority of fines and costs are paid within thirty days, without any threats of incarceration,<sup>125</sup> and suggests that any increases in collections that are later obtained with the aid of threats are marginal. There is no evidence to suggest that collection practices that are premised on the threat of incarceration for nonpayment are more necessary or cost-effective elsewhere.<sup>126</sup>

Finally, many of the characteristics that provide primary support for the revenue generation motive in Ferguson and private probation systems are not present in other jurisdictions that nevertheless routinely incarcerate individuals for failure to pay criminal fines and court costs. While there is widespread consensus that municipal fragmentation in St. Louis County drives the quest for municipal revenue there, and many proposals to address debtors' prisons in St. Louis focus on municipal court consolidation,<sup>127</sup> fragmentation has not been raised as an issue in the many other jurisdictions that operate debtors' prisons.<sup>128</sup> Moreover, debtors' prisons also exist in municipalities that, unlike those

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threats of jail to determine whether debtor can pay or not and who believes that other ways of screening for ability to pay are impractical).

123. See, e.g., Jennings Complaint, *supra* note 41, at 4-5 (alleging that Jennings, Missouri has a policy of bargaining with family and friends of incarcerated debtors on the amount of money city will accept for release).
124. Reginald T. Shuford, *The Overincarceration of America's Poor: The Return of Debtor's Prisons*, 1 *IMPACT* 57, 62 (2015).
125. Tex. Office of Court Admin. studies on court collections in the cities of Abilene, Amarillo, Austin, Corpus Christi, El Paso, Garland, Pasadena, and Waco (on file with authors).
126. See MML Amicus Brief, *supra* note 84, at 26 (asserting that practices that produce debtors' prisons cost exorbitant amounts of money and are inefficient); Tamar R. Birkhead, *The New Peonage*, 72 *WASH. & LEE L. REV.* (forthcoming 2015) (manuscript at 48), <http://ssrn.com/abstract=2652557> (operating modern debtors' prisons results in fiscal loss to state); R. Barry Ruback, *The Abolition of Fines and Fees: Not Proven and Not Compelling*, 10 *CRIMINOLOGY & PUB. POL'Y* 569, 575 (2011) (questioning cost-effectiveness of economic sanctions for the poor at current high levels).
127. See *supra* note 93 and accompanying text.
128. See generally *supra* Part I.B.

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in St. Louis County, are not dependent on ticket revenue for a significant portion of their budget. Bowden, Georgia, where a municipal judge was videotaped threatening to jail individuals who did not pay their fines and fees, receives only 3.8 percent of its revenue from fines and fees.<sup>129</sup> Austin, Texas jails hundreds of people a year for unpaid debt but derives even less of its municipal revenue from court fines and fees—only 0.5 percent.<sup>130</sup> Courts also are perfectly capable of jailing individuals for failure to pay fines and fees without any assistance from private probation companies. Ferguson and Austin are just two examples of municipalities without private probation where that practice is common.

#### *D. Other Potential Factors Contributing to the Existence of Modern Debtors' Prisons*

Although there is compelling, direct evidence that revenue generation is a motivating factor for the practices that sustain debtors' prisons,<sup>131</sup> it is not a completely satisfying explanation for those practices. Courts may generate revenue when payments made by all offenders are taken into consideration,<sup>132</sup> but municipalities are losing money in their interactions with individuals who do not promptly pay fines and fees, many of whom become the people who end up in debtors' prisons. Debtors' prisons do not make sense solely in terms of revenue. Other factors must be contributing to their existence.<sup>133</sup> We will consider possible candidates.

Public safety. Public safety often is the first motivation municipalities claim when challenged for their ticketing and collection practices.<sup>134</sup> Municipalities

129. Shaila Dewan, *A Surreptitious Courtroom Video Prompts Changes in a Georgia Town*, N.Y. TIMES (Sept. 4, 2015), <http://www.nytimes.com/2015/09/05/us/a-surreptitious-courtroom-video-prompts-changes-in-a-georgia-town.html>.

130. See CITY OF AUSTIN, TEX., AUSTIN, TEXAS 2013-2014 APPROVED BUDGE VOLUME ONE (2013) [https://assets.austintexas.gov/budget/13-14/downloads/fy14\\_approved\\_volume\\_I.pdf](https://assets.austintexas.gov/budget/13-14/downloads/fy14_approved_volume_I.pdf).

131. See *supra* text accompanying notes 100-101.

132. See *e.g.*, BETTER TOGETHER, *supra* note 42, at 2, 9 (finding that municipal courts in St. Louis County have an average net revenue of \$488,357).

133. See also Erika L. Wood, *Their Debt to Society*, 1 IMPACT 52, 54 (2015) (“A closer look at these paths to debtors’ prisons reveals that there is something motivating these enforcement tactics besides just money.”).

134. See, *e.g.*, Jason Rosenbaum, *St. Ann Administration Pushes Back Against Schweich—And Movement to Revamp Municipal Courts*, ST. LOUIS PUB. RADIO (Oct. 13, 2014), <http://news.stlpublicradio.org/post/st-ann-administrator-pushes-back-against-schweich-and-movement-revamp-municipal-courts> (describing a municipal administrator’s defense of ticketing campaign directed at speeders by citing decrease in traffic accidents from 140 in 2008 to only twelve in 2014 through October).

assert they must stop speeders to keep their residents safe;<sup>135</sup> they need to enforce property codes to maintain the safety and livability of their communities.<sup>136</sup>

The DOJ roundly rejected public safety as a motive for the ticketing and policing practices documented in Ferguson.<sup>137</sup> Certainly many of the practices there, such as regularly issuing multiple citations with cumulative fines for a single traffic incident,<sup>138</sup> do not clearly enhance public safety. Other practices, such as issuing warrants for nonpayment of fines and fees that will result in the incarceration of individuals whose underlying offenses were not deemed to justify a jail sentence,<sup>139</sup> are common in many jurisdictions and highly dubious as a matter of public safety.<sup>140</sup> Claims that certain offenses—such as “contempt of cop” offenses<sup>141</sup> or those that often result from poverty, such as for cars<sup>142</sup> or

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135. *Id.*

136. See, e.g., Jennifer S. Mann, *Municipalities Ticket for Trees and Toys, as Traffic Revenue Declines*, ST. LOUIS POST-DISPATCH (May 24, 2015), [http://www.stltoday.com/news/local/crime-and-courts/municipalities-ticket-for-trees-and-toys-as-traffic-revenue-declines/article\\_42739be7-afd1-5f66-b325-e1f654ba9625.html](http://www.stltoday.com/news/local/crime-and-courts/municipalities-ticket-for-trees-and-toys-as-traffic-revenue-declines/article_42739be7-afd1-5f66-b325-e1f654ba9625.html) (quoting Calverton Park Mayor Jim Paunovich stating, “We are an older neighborhood and once that cancer hits, you can’t get rid of it”).

137. DOJ *Ferguson Report*, *supra* note 3, at 2-3, 10-12, 43, 56.

138. *Id.* at 11.

139. *Id.* at 56.

140. In its debtors’ prison cases, see *supra* Part I.A.2, the U.S. Supreme Court has been deeply skeptical of claims that the state has any penological interest in using incarceration to enforce a criminal judgment if the state did not originally impose a sentence of jail for the underlying offense. This skepticism was evident whether the jail term for debt resulted in a penalty that exceeded the statutory maximum, see *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970), or whether the state chose not to impose an available jail penalty at the time of initial adjudication, see *Bearden v. Georgia*, 461 U.S. 660 (1983). However, it did not go so far as to find that the state never had a penological interest in these situations. See, e.g., *Bearden*, 461 U.S. at 670 (“The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State’s penological interests do not require imprisonment. A probationer’s failure to make reasonable efforts to repay his debt to society may indicate that this original determination needs reevaluation, and imprisonment may now be required to satisfy the State’s interests.”) (citations omitted).

141. See DOJ *Ferguson Report*, *supra* note 3, at 25 (discussing prevalence of arrests in Ferguson for “contempt of cop” offenses such as Failure to Comply).

142. See *id.* at 12 (discussing ticketing for broken headlights and other equipment that requires money to repair); see also *ArchCity White Paper*, *supra* note 2, at 3-4 (discussing relationship between poverty and offenses such as expired vehicle registration and outdated inspections).

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houses<sup>143</sup> needing repair—serve legitimate public safety interests should be viewed very skeptically.<sup>144</sup> And emails focused entirely on revenue rather than public safety do not lend credibility to Ferguson officials' public safety assertions.<sup>145</sup>

The significance of public safety as a complicating motive will vary by offense, and to a lesser degree by how else, beyond ticketing and issuing warrants, a municipality responds to that offense.<sup>146</sup> At a general level, we do not think public safety can be rejected as categorically as the DOJ rejected it in Ferguson. Putting aside contempt of cop and poverty offenses, there is some number of municipal offenses that have undisputed public safety implications, and jurisdictions have “a fundamental interest in appropriately punishing persons—rich and poor—who violate” those laws.<sup>147</sup> For example, speeding, the archetypal traffic offense, presents a legitimate public safety concern, at least at certain speeds.<sup>148</sup> Municipalities' legitimate interest in controlling and deterring this type of dangerous behavior, regardless of the offending individual's income, must be taken seriously as a factor contributing to the ticketing and collections practices associated with debtors' prisons.<sup>149</sup> As St. Louis County court person-

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143. See Davey, *supra* note 94; Mann, *supra* note 136.

144. Cf. Statement of Interest of the United States at 13-16, *Bell v. Boise*, 993 F. Supp. 2d 1237 (D. Idaho Aug. 6, 2015) (No. 1:09-cv-00540) (asserting, in case involving Eighth Amendment challenge to municipal anti-camping ordinance, that the court should consider whether conforming one's conduct to an ordinance is possible for people who are homeless, and that ordinances that amount to the criminalization of homelessness are unconstitutional) .

145. See *supra* text accompanying notes 100-101.

146. See, e.g., DOJ *Ferguson Report*, *supra* note 3, at 12, 91 (suggesting that if the city has public safety concerns arising from disrepair of cars on the road, it could address that interest by issuing “fix-it” tickets dismissed without charge upon the completion of repairs, thereby allowing low-income drivers to use their limited income to address the public safety concern through repairs).

147. *Bearden v. Georgia*, 461 U.S. 660, 669 (1983).

148. Even municipalities that receive a very high proportion of municipal revenue from speeding tickets allegedly have policies of writing tickets only to “extreme” speeders who exceed a range of common, *de minimis* speeding. See, e.g., Rosenbaum, *supra* note 134 (noting that St. Ann only writes tickets for drivers going 11 miles or more over speed limit); Katie Wilcox, *A Handful of Towns Rely Heavily on Money from Traffic Tickets*, ROCKY MOUNTAIN PBS NEWS (Apr. 29, 2015), <http://inewsnetwork.org/2015/04/29/a-handful-of-colorado-towns-rely-heavily-on-money-from-traffic-tickets/> (describing how Morrison, Colorado, which gets 52 percent of its revenue from fines, only writes tickets for speeders going 15 miles or more over limit).

149. This position does not concede that collections practices that lead to debtors' prisons are necessary for public safety. Alternative approaches to the enforcement of legitimate public safety offenses are discussed in Part III. Rather, we contend that arguments that reject public safety as a factor that influences the existence and

nel noted, “just because an individual cannot pay the fine or fee for a traffic violation does not make them less of a safety risk on the road.”<sup>150</sup>

*Fairness.* A regime in which one person is punished for certain prohibited behavior while another person who engages in the same behavior evades punishment is likely to be viewed as unfair. Even while imposing limitations on incarceration for nonpayment of fines and fees, the U.S. Supreme Court recognized that “[t]he State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and the imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.”<sup>151</sup>

This conception of fairness can create resistance to policies that would result in the widespread waiver of fines and fees for individuals who cannot afford to pay them, notwithstanding statutory authority for waiver in many jurisdictions.<sup>152</sup> The resistance to waiver may be particularly strong when an offense is punishable solely or primarily with fines, as are many municipal violations.<sup>153</sup>

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scale of debtors’ prisons, by focusing on questionable practices such as stacking citations, etc., downplay real public safety interests that must be engaged in order to develop an effective policy response to debtors’ prisons.

150. Rachel Lippman, *Advocacy Group Proposes Municipal Court Reforms, How Do They Compare?*, ST. LOUIS PUB. RADIO (Feb. 2, 2015), <http://news.stlpublicradio.org/post/advocacy-group-proposes-municipal-court-reforms-how-do-they-compare> (citing unnamed St. Louis County court personnel).
151. *Williams v. Illinois*, 399 U.S. 235, 244 (1970).
152. See, e.g., Shapiro, *supra* note 111 (noting that courts are more likely to put low-income individuals on payment plans than to exercise statutory authority to waive fees). Even in the midst of all of the attention to illegal practices that produced debtors’ prisons in Ferguson and other municipalities in St. Louis County, many local “amnesty” programs were limited to recalling arrest warrants without reducing the amount of underlying debt, Camille Phillips, *More Than 50 St. Louis Municipalities Participate in Better Family Life Warrant Amnesty Project*, ST. LOUIS PUB. RADIO (Aug. 2, 2015), <http://news.stlpublicradio.org/post/more-50-st-louis-municipalities-participate-better-family-life-warrant-amnesty-project>, and advocacy directed at urging courts to exercise their waiver authority to forgive underlying debt was focused on cleaning the slate of old debts, MISSOURIANS ORG. FOR REFORM & EMPOWERMENT, *TRANSFORMING ST. LOUIS COUNTY’S RACIST MUNICIPAL COURTS 1* (2015), [http://populardemocracy.org/sites/default/files/publications/Transforming%20St.%20Louis%20County’s%20Racist%20Municipal%20Courts%20\(2\).pdf](http://populardemocracy.org/sites/default/files/publications/Transforming%20St.%20Louis%20County’s%20Racist%20Municipal%20Courts%20(2).pdf). When it came to addressing how to deal with inability to pay in future cases, prospective policy reforms involved converting unpaid debts to civil judgments rather than waiver. See, e.g., Order at 3, *Jenkins v. Jennings*, No. 4:15-cv-00252 (E.D. Mo., Aug. 26, 2015) (agreed court order in settlement of litigation initiated by Jennings Complaint, *supra* note 41) [hereinafter *Jennings Agreed Order*].
153. For example, municipal courts in Texas have jurisdiction within the territorial limits of the municipality over offenses that arise under the ordinances of the



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The absence of another readily available punishment for the ‘privileged’ group—here, used atypically to describe low-income individuals who would be candidates for waiver—makes the law feel toothless. Michigan District Court Judge Raymond Voet captured this concept of fairness perfectly when sentencing a man to three days in jail for failure to pay \$155: “[A]m I supposed to tell the rest of the world, the rest of the law-abiding citizens, that they’re chumps and fools for having respected the law[?]”<sup>154</sup>

*Personal Responsibility.* Personal responsibility is closely related to fairness, in that it is premised on the belief that individuals should take responsibility for their actions by facing the consequences of those actions. If a person chooses to engage in prohibited behavior and, as a result, incurs a punishment, she should pay the price—literally, in the case of fines and fees for municipal violations.

Personal responsibility is a particularly controversial potential motive for practices that produce debtors’ prisons. The rhetoric of personal responsibility invokes the convict leasing system of the Reconstruction and Jim Crow eras, in which former slaves and their descendants were forced by southern states to demonstrate “responsibility” for alleged, often spurious, debts by paying off those debts through forced labor.<sup>155</sup> Modern debtors’ prisons can appear to be a merely re-branded system for limiting the physical liberty and economic mobility of Black Americans, when in communities such as Ferguson, Blacks are stopped more frequently than Whites, searched more frequently than Whites, ticketed more frequently than Whites, and jailed for failure to pay fines and costs more frequently than Whites.<sup>156</sup> In this context, the rhetoric of personal

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municipality and that are punishable by a fine not to exceed \$2,000 (for ordinances that govern fire safety, zoning, or public health and sanitation) or \$500 (all other ordinances). TEX. CODE CRIM. PROC. art. 4.14(a). Texas municipalities also have jurisdiction over fine-only offenses arising under state law. *Id.* art. 4.14(b).

154. Shapiro, *supra* note 56. Another municipal court judge, Frank Vatterot in St. Louis County, suggested that reducing fines and costs for low-income criminal court debtors may pose an Equal Protection Problem: “Equal protection works both ways. In it a violation of the Equal Protection Clause to say when you don’t have the money you go to jail. The question is the flip side, whether you can have two people with the same charge—say assault—and the person who has money pays a fine but the one who doesn’t pays nothing.” William Freivogel, *Two Visions of Municipal Court Reform*, ST. LOUIS PUB. RADIO (Nov. 12, 2014), <http://news.stlpublicradio.org/post/two-visions-municipal-court-reform>.
155. See Birkhead, *supra* note 126, at 12-19 (outlining the legal history of peonage starting at end of U.S. Civil War).
156. For example, Black people, who make up 67 percent of Ferguson’s population, account for 85 percent of the Ferguson Police Department’s traffic stops, 90 percent of its citations, and 96 percent of known arrests made exclusively because of an outstanding municipal warrant. DOJ *Ferguson Report*, *supra* note 3, at 62-63. Black people are 2.07 times more likely to be searched during a traffic stop. *Id.* at 62; see also Birkhead, *supra* note 126, at 53 (discussing evidence that courts impose higher discretionary fines and costs on people of color than on Whites);

responsibility rings of barely disguised,<sup>157</sup> and at times undisguised,<sup>158</sup> racism. This, in turn, has led some challengers of modern debtors' prisons to deny personal responsibility legitimacy by dismissing it out of hand as a factor that must be engaged on the merits in policy responses to debtors' prisons.<sup>159</sup>

We are aware of how professed commitment to personal responsibility has been used to provide cover for racial bias, and we empathize with the instinct to dismiss it merely as a façade. However, we do not think it can be so easily dispensed with if we are to address the prevalence and persistence of modern debtors' prisons effectively. If for no other reason, we cannot ignore personal responsibility's influence on debtors' prisons because personal responsibility is built into the foundations of constitutional limitations on incarceration for debt. *Bearden* and related cases do not provide relief to individuals whose failure to pay fines and fees is "willful."<sup>160</sup> To the *Bearden* Court, even an indigent person's failure to pay could be willful if she fails to make "sufficient bona fide efforts" to seek employment because lack of effort "may reflect an insufficient concern for paying the debt [s]he owes to society for [her] crime."<sup>161</sup> In such circumstances, the Court wrote, imprisonment could be justified.<sup>162</sup> This standard leaves it to the discretion of individual judges—applying their own life experiences, values, and biases, both explicit and implicit—to determine who is being responsible despite financial hardship and who is being irresponsible and thus can be jailed.<sup>163</sup> To the extent that racism is embedded in notions of per-

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*It's Not Just Ferguson*, *supra* note 40, at 14 (finding that, holding poverty rates constant, St. Louis County municipalities with a higher percentage of Black residents have statistically significant higher court fees per resident).

157. Birkhead, *supra* note 126, at 10, 53; Ta-Nahesi Coates, *The Gangsters of Ferguson*, ATLANTIC (Mar. 5, 2015), <http://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/>.
158. The DOJ published a number of emails involving police and court supervisors in Ferguson that voiced ugly and time-tested racial stereotypes. DOJ *Ferguson Report*, *supra* note 3, at 72. The DOJ cited this naked racial bias on the part of Ferguson officials as a reason for discounting appeals to personal responsibility as a justification for municipal court enforcement efforts: "[T]he City's personal-responsibility refrain is telling; it reflects many of the same racial stereotypes found in the emails between police and court supervisors." *Id.* at 5.
159. See *supra* sources cited note 87.
160. 461 U.S. 660, 672 (1983). See generally *infra* Part I.A.2.
161. *Id.* at 668.
162. *Id.*
163. See Katherine Beckett & Alexes Harris, *Of Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 525 (2011) ("'Willful' is a highly elastic concept, one that fails to create a meaningful barrier to the incarceration of indigent debtors."); Birkhead, *supra* note 126, at 54 (concluding that legal standards such as *Bearden*'s "sufficient bona fide efforts to pay" leaves courts with "unfettered discretion to determine which defendants qualify for relief

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sonal responsibility, it also is embedded in *Bearden*. To the extent that we concede that incarceration may be appropriate when someone is able to pay criminal fines and fees without hardship but refuses to do so,<sup>164</sup> we are conceding that personal responsibility must be grappled with when we confront modern debtors' prisons.

### III. POLICY IMPLICATIONS

We now turn to what this more complicated view of the factors that contribute to the existence of modern debtors' prisons suggests for the direction of continued efforts for policy change in this area.

First, incorporating motivations beyond revenue generation into our understanding of debtors' prisons raises significant questions about the potential effectiveness of policy reforms that already have been adopted in Ferguson's wake. Legislation requiring greater transparency and placing other limitations on private probation systems, such as legislation recently passed in Georgia,<sup>165</sup> is too grounded in the specific context of local practices to provide a roadmap for policy reform in the many jurisdictions without private probation that nevertheless have debtors' prisons. If generally applied, revenue caps such as the 12.5 percent cap the Missouri General Assembly recently imposed on municipalities in St. Louis County<sup>166</sup> will not affect many of the worst municipal actors<sup>167</sup>—including Ferguson itself, which is close to complying with the cap even with the abusive practices roundly condemned in the DOJ report.<sup>168</sup>

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and which do not.”); Shapiro, *supra* note 111 (finding large discrepancies across the country in how courts determine whether nonpayment is willful or involuntary); *see also* Balko, *supra* note 1 (quoting Thomas Harvey of ArchCity Defenders: “[Y]ou need people in these [judicial] positions who have some empathy for the people in front of them, who know what it’s like to have to prioritize bills, to at least know someone who knows what it’s like to, say, let your car insurance expire in order to pay a medical bill.”).

164. *See, e.g.*, Shapiro, *supra* note 56 (quoting Miriam Aukerman of the American Civil Liberties Union of Michigan: “It’s not that it’s wrong to charge people money as a way to punish them. But there have to be alternatives *for people who can’t pay.*” (emphasis added)); Shuford, *supra* note 124, at 64 (“No one is suggestion that those who willfully avoid paying fines and fees should get off scot-free. The concern is for those who genuinely cannot pay these costs.”).

165. H.B. 310, R.S. (Ga. 2015).

166. *See supra* text accompanying note 91.

167. *See supra* text accompanying notes 129-130.

168. Jason Rosenbaum, *On the Trail: Five Takeaways from SB5, the Sweeping, Significant, and Complex Municipal Courts Bill*, ST. LOUIS PUB. RADIO (Aug. 26, 2015), <http://news.stlpublicradio.org/post/trail-five-takeaways-sb5-sweeping-significant-and-complex-municipal-courts-bill>.

These complicating motivations also cast doubt on reform strategies that hew literally to *Bearden's* procedural protections. Advocates recently have inserted language restating *Bearden's* procedural requirements into state statutes,<sup>169</sup> court settlements,<sup>170</sup> and judicial resources.<sup>171</sup> This approach often is pursued in combination with other reforms that aim to disrupt revenue generation;<sup>172</sup> because revenue incentives cannot be removed from municipal ticketing entirely, the accompanying procedural reforms are intended to limit the practices that judges can use to collect revenue in individual cases.

Although it is possible that on the margins some judges may be inspired to comply with *Bearden* even at this late date because the state legislature or another court effectively says “We really *really* mean it,” or because a bench card reminds them of the law’s requirements,<sup>173</sup> there is little reason to be confident that a sufficient number of the judges who have ignored *Bearden* entirely or construed its protections narrowly for over thirty years will change their ways.<sup>174</sup>

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169. H.B. 14-1061, 69th Leg., 2d R.S. (Co. 2014) (barring incarceration for nonpayment unless willful).

170. *E.g.*, Agreement to Settle Injunctive and Declaratory Relief Claims, Mitchell v. Montgomery, No. 2:14-cv-00186 (M.D. Ala. Nov. 17, 2014) (incorporating judicial procedures that include prohibition on incarcerating individuals who are unable to pay fines and fees).

171. See Tina Rosenberg, *Out of Debtors' Prison, With Law as the Key*, N.Y. TIMES: OPINIONATOR BLOG (Mar. 27, 2015), <http://opinionator.blogs.nytimes.com/2015/03/27/shutting-modern-debtors-prisons/> (discussing new bench card language in Ohio that lists steps for determining ability to pay, and acceptable and unacceptable methods for collecting fines and costs).

172. For example, in St. Louis County, advocates pushed for municipal court consolidation, *see supra* text accompanying note 93, at the same time they sued municipalities in the county for violating *Bearden* and related cases, *see* Ferguson Complaint, *supra* note 34; Jennings Complaint, *supra* note 41, eventually resulting in a settlement agreement in Jennings that included protections against incarceration for debt contained in existing case law, *see* Jennings Agreed Order, *supra* note 152.

173. See Austin Complaint, *supra* note 60 (alleging existence of practices that violate *Bearden*, despite the existence of bench card provisions that lay out *Bearden's* requirements); Taggart & Campbell, *supra* note 59 (providing data and numerous examples of *Bearden* violations in Texas, despite existence of same bench card). *But see* Rosenberg, *supra* note 171 (noting that complaints about incarceration for debt fell precipitously in Ohio when bench card was amended to address *Bearden*).

174. Our skepticism about the possibility that increased education about and awareness of *Bearden's* requirements alone will significantly change judicial behavior in this area is reinforced by the fact that many jurisdictions continued to violate *Bearden* even after the Ferguson protests brought sustained media attention to this issue and the continued existence of debtors' prisons. For example, over a year after Ferguson, the City of Austin continued to incarcerate individuals who could not afford to pay their traffic ticket debt. See Austin Complaint, *supra* note 60.

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On the contrary, the fact that deeply held, if sometimes unacknowledged, attitudes about personal responsibility are embedded in *Bearden's* procedural framework gives us every reason to doubt it.<sup>175</sup> Debtors' prisons exist even where ability-to-pay hearings and other procedural protections required under *Bearden* are in place.<sup>176</sup> In these jurisdictions, judges simply find individuals' nonpayment to be willful based on the clothes they wear, the tattoos they have, or because they are able-bodied and therefore must not have looked for a job hard enough.<sup>177</sup> At best, these experiences suggest that judges are uncomfortable with, and ill equipped to make, the quasi-moral judgments about responsibility that *Bearden* requires of them.<sup>178</sup> At worst, they suggest that racism acting under cover of personal responsibility will influence judicial decisions that sort debtors who make good faith efforts to pay their fines from willful scofflaws, the deserving poor from the undeserving, and the free from those who may remain in debtors' prisons even under *Bearden*.<sup>179</sup>

Other commentators also have recognized the limitations of these first-wave responses to modern debtors' prisons.<sup>180</sup> We conclude with an examination of a handful of policy reforms put forth by those commentators and by advocates working to end modern debtors' prisons. We specifically consider what our multi-factor explanation for the persistence of debtors' prisons suggests about the viability and effectiveness of various proposed reforms.

*Eliminating poverty penalties and offenses that target disenfranchised communities.* One proposed policy response to modern debtors' prisons is the elimination of "poverty penalties" in the form of extra fees imposed on individuals who cannot immediately afford to pay fines and costs,<sup>181</sup> or even placing significant restrictions on the prosecution of "contempt of cop" and poverty offenses to reduce the total burden of criminal fines and costs on minority and low-income communities.<sup>182</sup> These proposals have obvious appeal. Eliminating these penalties and offenses would not compromise public safety,<sup>183</sup> and would promote

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175. See *supra* notes 160-163 and accompanying text.

176. See *supra* text accompanying notes 67-69.

177. *Id.*; see also Taggart & Campbell, *supra* note 59 (citing judge who in hearings has found at least eight homeless individuals able to pay).

178. See, e.g., Dewan, *supra* note 122; see also *supra* note 163 and accompanying text.

179. See *supra* notes 155-159 and accompanying text.

180. See, e.g., Beckett & Harris, *supra* note 163, at 524-25; Birckhead, *supra* note 126, at 54.

181. E.g., Birckhead, *supra* note 126, at 33, 55-56.

182. E.g., DOJ *Ferguson Report*, *supra* note 3, at 91 (recommending that documented supervisory approval be required for arrests for "contempt of cop" violations and that violations for needed car repairs be treated as correctable violations for which officers should issue "fix-it" tickets that do not result in any fines or costs).

183. See *supra* notes 138-144 and accompanying text.

fairness by removing penalties for offenses for which only minority and low-income communities are punished.<sup>184</sup> These proposals are consistent with personal responsibility because they target status offenses rather than behavior over which individuals have control. And while eliminating these penalties entirely would have a negative financial impact, that impact would be mitigated by the fact that the penalties already are assessed primarily against people who cannot afford to pay them.<sup>185</sup>

However, even if these reforms are implemented, we still will face the problem of what to do when someone ticketed for an offense that poses legitimate public safety concerns, such as extreme speeding, cannot afford to pay assessed fines and costs. With this in mind, we turn to more broadly applicable proposals.

*Establishing objective financial standards for willful nonpayment.* In order to avoid the risk that debtors' prisons will continue to exist even if *Bearden's* procedural protections are in place,<sup>186</sup> advocates have built objective criteria for determining who is able to pay into some of the recent settlement agreements reached in debtors' prison litigation.<sup>187</sup> This approach mitigates concern that subjective judgments about a debtor's personal responsibility, and all of the potential for bias that comes with those judgments, will limit the debtor's access to alternative punishments and relief from incarceration for debt.

However, it is difficult to adopt a simple, objective test for ability to pay that also captures the relational aspect of the ability-to-pay inquiry—i.e., the fact that whether a person is able to pay a debt depends not only on the amount of her income but also on the amount of her debt.<sup>188</sup> In practice, and presuma-

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184. See *supra* notes 141-144 and accompanying text.

185. In our consideration of proposed policy reforms, we will consider the potential revenue implications of proposed reforms. This approach is consistent with our belief that a policy response is likely to be more effective if it is developed with a full consideration of the multiple motives that underlie the practices we are trying to change. Specifically with respect to revenue, different policy responses could be reconciled with *Bearden*, and we have little doubt policymakers will consider the projected revenue implications of various options when evaluating how to bring their jurisdictions into compliance with the law. However, this is not to suggest that a negative revenue impact means that a policy response should not be adopted if it is necessary to bring a jurisdiction into compliance with *Bearden*, or that a negative revenue impact may not be outweighed by other considerations. By necessity, our consideration of the potential revenue impact of various reforms is speculative and, because any negative revenue impact would be offset to at least some extent by reduced enforcement costs, indeterminate.

186. See *supra* notes 67-69, 176 and accompanying text.

187. See, e.g., Jennings Agreed Order, *supra* note 152, at 2.

188. Cf. TEX. INDIGENT DEF. COMM'N, ORDERS FOR REPAYMENT OF APPOINTED ATTORNEY COSTS UNDER CODE CRIMINAL PROCEDURE ART. 26.05(G), [http://r.search.yahoo.com/\\_ylt=AoLEVvpboMRWnicAfXcnnIIQ;\\_ylu=X3oDMTEybXBraWQ4BGNvbG8DYmYxBHBvcwMxBHZoaWQDQjE2MzhfMQRzZWMDc3I-/RV=2/RE](http://r.search.yahoo.com/_ylt=AoLEVvpboMRWnicAfXcnnIIQ;_ylu=X3oDMTEybXBraWQ4BGNvbG8DYmYxBHBvcwMxBHZoaWQDQjE2MzhfMQRzZWMDc3I-/RV=2/RE)

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bly in an attempt to achieve a negotiated resolution to pending litigation, the objective standards for ability to pay that have been adopted post-Ferguson, such as having income at or below 125 percent of the federal poverty guidelines,<sup>189</sup> are almost certainly under-inclusive. If the standard were applied strictly, a single individual who makes \$14,700 a year would be deemed able to pay any amount of criminal justice debt and would be subject to incarceration for willful nonpayment.<sup>190</sup> If the objective criteria only acts as a presumption and floor, the objective criteria would benefit the most destitute debtors but would leave many low-income debtors exposed to the familiar challenges posed by the personal responsibility considerations embedded in *Bearden*.

*Increasing access to alternative measures for discharging offenses: Eliminating financial eligibility barriers to alternative measures.* Municipalities including Philadelphia and San Diego allow all individuals ticketed for municipal offenses to discharge liability for those offenses through specified alternative measures such as community service.<sup>191</sup> This policy solution neatly sidesteps the personal responsibility landmines that render *Bearden* ineffective as a practical limitation on modern debtors' prisons. It also largely satisfies fairness concerns, because all individuals who commit municipal offenses could elect alternative measures. An offender with financial resources may choose to pay a fine over community service because that is less of a burden on her, but the fact that she *could* have

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=1455755483/RO=10/RU=http%3a%2f%2ftidc.texas.gov%2fmedia%2f16676%2fAttorney-Fee-Recoupment-Procedures-and-Orders.docx/RK=o/RS=5t.9bdI\_87zfxcewnNyPlxZfK34- (last visited Feb. 17, 2016) (downloadable file) (noting that an individual who is "indigent" for purposes of appointment of counsel because she cannot afford to hire a private lawyer may nevertheless have the "ability to pay" all or part of the government's expenses for appointment of counsel, because the government's expenses are less than a private lawyer's fee).

189. Jennings Agreed Order, *supra* note 152, at 2.
190. Income Levels for Individuals Eligible for Assistance, 80 Fed. Reg. 5485-6 (Feb. 2, 2015).
191. See CALIFORNIANS FOR SAFETY & JUSTICE & LOCAL SAFETY SOLUTIONS PROJECT, BREAKING THE CYCLE OF LOW-LEVEL CRIME: PUBLIC SAFETY INNOVATIONS DURING AN ERA OF CHANGE, (2015), [http://libcloud.s3.amazonaws.com/211/aa/1/617/StoppingLowLevelCrimeBrief\\_7.10.15.pdf](http://libcloud.s3.amazonaws.com/211/aa/1/617/StoppingLowLevelCrimeBrief_7.10.15.pdf). In Philadelphia, participants in the city's Accelerated Misdemeanor Programs have the opportunity to discharge their liability for specific low-level offenses through community service, regardless of their income level. *Id.* at 15. Twenty to twenty-five percent of all misdemeanor cases in Philadelphia are disposed of through these programs, which have saved the city millions of dollars through decreases in recidivism and court and police costs. *Id.* In San Diego, all defendants in community court can have their charge dismissed if they elect to perform sixteen hours of community service. *Id.* at 16. While defendants with financial resources have to pay a program fee of \$120 to the city's community service provider, indigent slots are available at no cost. *Id.*

chosen community service means that community service will not feel like non-punitive “special treatment” available only to low-income communities.<sup>192</sup>

The revenue implications of this policy approach are difficult to predict, and would depend on whether individuals who have the resources to pay the fine and costs in full choose available alternative measures instead. At the very least, any revenue loss would be offset at least in part by avoiding the administrative costs associated with conducting ability-to-pay hearings, and the costs that governments incur to incarcerate individuals for nonpayment when courts get the ability-to-pay finding wrong.<sup>193</sup>

*Identifying acceptable alternative measures for discharging offenses: Waivers, sliding scale fines, and community service.* Even if policies aimed at providing more people the *opportunity* to discharge their liability for offenses using alternative measures are successful, whether or not those policies will prove effective at ending debtors’ prisons will depend in large part on what specific alternative measures are available—whether there is community consensus that they are appropriate, and whether with them it is any more possible for low-income individuals to comply with court judgments.

For example, after Ferguson many advocates in the region pushed for the widespread waiver of criminal fines and fees.<sup>194</sup> A similar approach, involving drastic reductions in fines and fees, has succeeded in clearing large warrant and debt backlogs in a small number of jurisdictions.<sup>195</sup> However, even though the Ferguson proposal was limited to the waiver of past debts accumulated under practices that violated the U.S. Constitution, it met great resistance.<sup>196</sup> Concerns about the public safety, fairness, and personal responsibility implications of waiver of fines and costs likely doom it to play a minor, backward-looking role in ending debtors’ prisons, despite the fact that it is an acceptable alternative measure in case law<sup>197</sup> and often under state statute.<sup>198</sup> It is easily perceived as

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192. On the other hand, the fact that an individual with financial resources can discharge liability for the offense with what may be, for her, a very minor financial inconvenience, while that option is effectively unavailable to low-income individuals who commit the same offense, itself is arguably unfair. *See, e.g.,* Beckett & Harris, *supra* note 163, at 521 (“The imposition of monetary sanctions absent consideration of defendants income is inherently class biased, as these sanctions post a disproportionate challenge to, and burden on, the poor.”).

193. *See supra* notes 112-115 and accompanying text.

194. *See supra* sources cited note 152.

195. *See* Shapiro, *supra* note 111 (describing New Jersey’s Fugitive Safe Surrender program, through which 4,500 individuals with outstanding tickets turned themselves in and had their warrants cleared after making payments of, for example, \$199 to discharge what was originally a \$10,000 debt).

196. *See supra* sources cited note 152.

197. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

198. *See, e.g., supra* note 80 and accompanying text.



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letting an individual off the hook without any punishment, in a manner that does not deter behavior that endangers public safety and that is not fair to others who are held accountable for the same behavior.

Of course, one possible way to overcome resistance to a complete waiver of fines and fees is to identify one or more alternative punishments that would prevent a low-income individual from getting off entirely. One solution put forth by advocates is to have “sliding scale” fines, where the less money a person has, the less she would be charged.<sup>199</sup> This policy proposal engages a perspective on fairness that provides a counterbalance to the impulse that underlies resistance to waivers. There is no question that fines and costs have a disproportionate impact on people who lack the income to quickly pay them.<sup>200</sup> A municipal citation that is a brief inconvenience or that necessitates a temporary sacrifice for a person with resources can trigger months and even years of criminal supervision and penury for those who are already starting off with insufficient income to pay their fines and costs.<sup>201</sup> Sliding scale fines are fair and consistent with public safety in the sense that people are punished, but in a manner proportionate to their financial situation: for example, a \$20 fine for a homeless single mother may impose as much pain as a \$400 fine for a moneyed person.<sup>202</sup>

In theory, lowering the fines and costs for some debtors via a sliding scale may seem like it would reduce the amount of money courts would collect. However, courts would no longer have to spend money on jail beds for debtors who cannot afford to pay existing, uniform fines, and may in fact increase collections from low-income individuals by assessing realistic fines that debtors actually can pay. Practically, having any sort of sliding scale would be difficult. In Finland, for example, which has sliding scale fines for ticketing and other offenses, police officers can look up income tax returns on the side of the road for all residents.<sup>203</sup> Things are not as straightforward in the United States, where income information is not readily available to local officials.<sup>204</sup> Moreover, calcu-

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199. See, e.g., *ArchCity White Paper*, *supra* note 2, at 40-41; DOJ *Ferguson Report*, *supra* note 3, at 98.

200. See *supra* note 192 and accompanying text.

201. See Birkhead, *supra* note 126, at 23; *ArchCity White Paper*, *supra* note 2, at 3; *Profiting from Probation*, *supra* note 46, at 3.

202. See Suzanne Daley, *Speeding in Finland Can Cost a Fortune*, N.Y. TIMES (Apr. 25, 2015), <http://www.nytimes.com/2015/04/26/world/europe/speeding-in-finland-can-cost-a-fortune-if-you-already-have-one.html> (stating, in describing Finland’s sliding scale system for traffic fines, that “[t]he thinking here is that if it stings for the little guy, it should sting for the big guy too”); cf. *Bearden*, 461 U.S. at 672 (recognizing that, given a defendant’s diminished financial resources, the State can meet its goals of punishment and deterrence through fines tailored to the resources of a defendant).

203. Daley, *supra* note 202.

204. *Id.*

lating income often is complex, particularly for poor people who often have irregular and shifting employment.

Community service likely is the alternative measure with the most popular appeal, and the most widespread availability under current practice. It requires a concrete “payment” from an individual, and while its availability may decrease direct collections, in theory localities still benefit by receiving unpaid labor.

However, expanded access to community service options will not stop modern debtors’ prisons by itself. Some courts already frequently offer community service as an alternative to payment, but still end up jailing hundreds of debtors.<sup>205</sup> One significant reason for this is that many debtors end up being assigned hundreds of hours of community service that they cannot hope to complete.<sup>206</sup> Therefore, there must be a reasonable cap on the number of hours that can be assigned to one person.

Other individuals have disabilities, transportation difficulties, or work and child care obligations that make it impossible for them to discharge more than a small amount of their criminal justice debt through community service.<sup>207</sup> There must be some other option to act as a backstop for poor people who cannot complete community service. Identifying what this backstop should be is one of the greatest theoretical challenges in developing policies that will end debtors’ prisons: when debtors cannot comply with alternative measures without substantial hardship, a resolution to those cases that will be perceived as fair can be difficult to identify even when a court faithfully considers debtors’ ability to pay and offers alternative measures.

Transforming the framework: community courts. Community courts have been put forward by advocates in Ferguson and by the Ferguson Commission itself as an avenue of “true municipal court reform,” that would go beyond the “remediation of problems, inequities, and inefficiencies” represented by the revenue caps and restatement of *Bearden* incorporated into Missouri state law

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205. See, e.g., *supra* notes 60-62 and accompanying text.

206. The lead plaintiff in the Austin Complaint, *supra* note 60, at 6, was ordered to perform 395 hours of community service after she was released from jail. Low-income debtors are assigned so many hours because they owe large debts from fees that usually apply only to poor people. These include collection fees, e.g., TEX. CRIM. PROC. CODE ANN. § art. 103.0031(b), payment plan fees, e.g., TEX. GOV. CODE § 102.0212(4); TEX. LOC. GOV. CODE § 133.103, warrants for nonpayment fees, e.g., TEX. CODE CRIM. P. 102.011(a)(2), and returned check fees, e.g., Austin Municipal Court Rules 5.9(b). In addition, many debtors lose their drivers licenses due to not paying tickets, e.g., TEX. TRANSP. CODE ANN. § 706.002, which carries an additional fee and often results in more tickets for driving without a valid license.

207. See, e.g., Dewan, *supra* note 122 (community service “can be a heavy burden for people who work and have family duties”). As a result, judges claim that many poor people would rather sit out their debts in jail than do community service. Taggart & Campbell, *supra* note 59.

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in the summer of 2015.<sup>208</sup> These courts would divert municipal offenders to a community justice center where they could access case management and social work services, and be considered for alternative punishments including social services, group counseling, community restitution, and community service.<sup>209</sup>

The revenue impact of community courts is difficult to ascertain without more information about who would be eligible to participate. Because most of the proposed sanctions in the court are non-monetary, the court could have a significant negative revenue impact if it were open to all, including to individuals who are able to pay their fines and fees. Limiting access to community courts to low-income individuals from whom the municipality is unlikely to collect would mitigate or even eliminate the revenue impact, but also would create the same personal-responsibility barriers to participation that currently render *Bearden* ineffective.

Some of the alternative sanctions proposed for a community court, such as community service, satisfy public safety and fairness concerns; others, such as group therapy, do not look like punishment at all and officials may be unlikely to perceive them as having enough of a deterrent effect to protect public safety. And while community courts could be very effective at addressing the underlying causes of crime deeply tied to poverty,<sup>210</sup> they can be viewed as unfairly pathologizing poverty when applied to a public safety crime such as speeding. We question whether offenses like speeding require a community treatment response or criminal justice supervision just because they are committed by a poor person. We also are deeply skeptical of requiring criminal charges as the price of access to general anti-poverty support services that may be provided in a community court.

*Transforming the framework: civil judgment.* Civil judgment, or converting criminal justice debt into a civil judgment against the debtor, at which point only civil debt enforcement mechanisms may be used and all civil debt protections will apply, is the last policy reform we consider. This policy was included in the recent settlement agreement against the city of Jennings in Missouri.<sup>211</sup> Going forward, if debtors in Jennings do not satisfy their debts within six months, the municipal court automatically will convert the debt into a civil

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208. Karen Tokarz & Steve Stragand, *Community Justice Courts Can Be an Innovative Reform*, ST. LOUIS POST-DISPATCH (May 5, 2015), [http://www.stltoday.com/news/opinion/community-justice-courts-can-be-an-innovative-reform/article\\_96a59f74-f1cd-5aff-802e-014955831e69.html](http://www.stltoday.com/news/opinion/community-justice-courts-can-be-an-innovative-reform/article_96a59f74-f1cd-5aff-802e-014955831e69.html); see also *Ferguson Commission Report*, *supra* note 93, at 101-02.

209. See Tokarz & Stragand, *supra* note 208.

210. Thomas Harvey, *Six Months Later: ArchCity Defenders' Municipal Courts White Paper*, HARV. J. AFR. AM. PUB. POL'Y (Apr. 26, 2015), <http://hjaap.org/six-months-later-archcity-defenders-municipal-courts-white-paper/>.

211. See Jennings Agreed Order, *supra* note 152, at 3.

judgment and “refer the debt to a civil debt collector and take no further action in the municipal court.”<sup>212</sup>

From a revenue perspective, civil judgments can be helpful because they leave the option open for future collections. It also seems fair to treat a debt owed to the courts the same as any other debt, and to require all the same legal protections that have been established as fair for debt collection by state legislatures.

However, judges and prosecutors may balk at the civil judgment solution because of a belief that poor debtors will not care if they get calls from collectors or have bad credit. Criminal justice advocates also may have concerns about the fairness of the civil judgment solution. Though debtors would avoid jail, they still will be left with debts that are disproportionate to their income and that they may never be able to pay off. This could affect their ability to find housing and employment for the rest of their lives, while rich people can simply send a check for what is to them a trivial sum.

#### CONCLUSION

Revenue generation is undeniably a powerful force behind modern debtors’ prisons and a relatively easy-to-grasp explanation for why something as anachronistic as debtors’ prisons still exists. This is especially true in small jurisdictions that rely heavily on court collections, as well as in jurisdictions that employ private probation companies.

However, policy makers and advocates must look beyond revenue generation to effectively combat modern debtors’ prisons nationwide. Revenue generation does not fully account for the persistence of debtors’ prisons, and in many ways the practices that lead to debtors’ prisons are fiscally irrational. Therefore, policies that only target the revenue generation motive cannot by themselves end debtors’ prisons.

Because of this, we must take seriously the more traditional rationales—as discussed here, public safety, fairness, and personal responsibility—that governments use to take punitive action against people who break the law. It is necessary to view possible reforms with an eye to these motives, even though we recognize that many of the offenses that land debtors in jail are poverty crimes and that in many instances these rationales for punishment may act as a cover for racism.

Courts, law enforcement, and the public will always be concerned about offenses like extreme speeding, and only by fully addressing the concerns that motivate enforcement of those offenses can we finally put an end to modern debtors’ prisons.

In order to end debtors’ prisons, we also must develop policy responses that look beyond the constitutional protections extended in *Bearden*, and therefore beyond reforms readily achievable in litigation. Those constitutional protections are limited in significant ways, and by focusing so heavily on personal re-

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212. *Id.*

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sponsibility, leave an opening for subjective and biased decision making that will continue to feed debtors' prisons.

An important way to limit the influence of bias in municipal ticketing and collections, while keeping real accountability in the system, is to make alternative measures for compliance available to all individuals, instead of only to individuals that judges deem responsible and worthy. However, while we recommend adoption of this approach, we recognize that it is an incomplete response to debtors' prisons because there are limitations and drawbacks to all of the discussed alternative measures that could be built into such a system.

Certainly, those alternative measures should include community service, but we must grapple with how to provide accountability for individuals who can neither pay monetary penalties nor perform community service without substantial hardship. That problem will not be easily resolved. Alternative approaches to accountability for municipal offenses such as community courts and converting criminal justice debt into a civil judgment offer possible responses to this challenge, but risk extending and deepening low-income individual's involvement with a coercive justice system. Additional work to expand the menu of alternative measures, with a focus on identifying measures that provide accountability without imposing extended justice system involvement on low-income individuals who commit minor offenses, is needed to round out a comprehensive policy response to modern debtors' prisons.