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RESPONSE

HIDDEN LAWS OF THE TIME OF FERGUSON[†]

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Every society is really governed by hidden laws, by unspoken but profound assumptions on the part of the people, and ours is no exception. It is up to the American writer to find out what these laws and assumptions are. In a society much given to smashing taboos without thereby managing to be liberated from them, it will be no easy matter.

— James Baldwin, *Nobody Knows My Name*¹

I begin with James Baldwin, as does Professor Fred O. Smith, Jr. in his innovative and important article, *Abstention in the Time of Ferguson*. Smith quotes Baldwin to introduce the concept of economic victimization but never exactly explains how readers should interpret his reference to Baldwin, nor his references to *A Raisin in the Sun* or *I Know Why the Caged Bird Sings*.

Contemporary black writers and scholars perpetually rely on Baldwin not because his words remain persuasive and relevant to current social conditions — though they do — but because of what Baldwin represents: a stunningly free black truth-teller, unafraid to express himself, directly and damningly, about the American racial hierarchy. When Baldwin writes about poverty, he is also writing about race. When Baldwin writes of the “hidden laws” structuring American society, one can surmise that white supremacy is one of them.

We who invoke Baldwin are reminding ourselves and signaling to others that we are not naïve. Pulitzer Prize-winning essayist Rachel Kaadzi Ghansah explains as much in a recent piece, part of the Baldwin-referent anthology *The Fire This Time*:

[†] Responding to Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018).

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¹ JAMES BALDWIN, *The Discovery of What It Means to Be an American*, in *NOBODY KNOWS MY NAME* 3, 11 (1961).

And this is how his memory is carried. On the scent of wild lavender like the kind in his yard, in the mouths of a new generation that once again feels compelled to march in the streets of Harlem, Ferguson, and Baltimore. What Baldwin knew is that he left no heirs, he left spares, and that is why we carry him with us.²

We are spares, barely. But invoking Baldwin to write *prescriptively about law* is composing in code. We know that there is only so much reforming doctrine or policy can do. We advocate for these changes because they could improve conditions at the margins, but we understand that the root issues that remain to be addressed are bound up in culture, ideology, and deep structure — knots that may have loosened but will take generations to unravel. Our condemnation of white supremacy might at times be less blistering and direct than Baldwin’s, but our work sits on a lower, feebler branch of the same tree.

It was in this light that I read Smith’s *Abstention in the Time of Ferguson*, a rich exploration of *Younger* abstention³ as applied to “criminalization of poverty” cases.⁴ Although Smith does not fully acknowledge or interrogate how deployment of abstention and other jurisdictional and procedural doctrines in so-called “criminalization of poverty” cases is bound up in a long-term project of race-class subjugation via the carceral state, Smith’s jurisdictional proposal has the potential to carve out space in the federal courts for marginalized litigants to fight subjugation, and to create economic and racial justice. I suspect that Smith’s ultimate goal is to chip away at the litany of jurisdictional and procedural devices that courts use in this way,⁵ so that, in the end,

² Rachel Kaadzi Ghansah, *The Weight, in* THE FIRE THIS TIME: A NEW GENERATION SPEAKS ABOUT RACE 19, 32 (Jesmyn Ward ed., 2016).

³ See *Younger v. Harris*, 401 U.S. 37, 45 (1971) (establishing a doctrine that a federal court should decline jurisdiction when its ruling would interfere with an ongoing state proceeding, unless it must do so to prevent “great and immediate” irreparable injury).

⁴ Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2287–88 (2018).

⁵ As Smith himself notes, abstention is only one of a massive set of doctrines that are regularly invoked when poor people challenge oppressive laws in federal court. *Id.* at 2287. Others include standing, sovereign immunity, mootness, and so on. *Id.*; see also Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 180–82 (2012); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 322–29 (2002); Michele C. Nielsen, Comment, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. REV. 760, 771–73 (2016). In the abstention cases Smith describes, such as *Burks v. Scott County*, No. 14-cv-00745, slip op. at 15–27 (S.D. Miss. Sept. 30, 2015), we see judges contorting themselves to distinguish cases in which other courts ruled that abstention was inappropriate in order to apply *Younger*. We have seen this with similar doctrines. For example, a district judge in Virginia recently dismissed *Stinnie v. Holcomb*, No. 16-cv-00044, (W.D. Va. Mar. 13, 2017), a case in which indigent defendants challenged a Virginia statute that calls for automatic, nondiscretionary suspension of the driver’s license of anyone who does not pay their court debts. *Id.*, slip op. at 4–8. The court ruled, *inter alia*, that the claim is barred under the *Rooker-Feldman* doctrine, under which federal courts cannot hear challenges to state court orders. *Id.*, slip op. at 18–25. Setting aside questions as to whether *Rooker-Feldman* is applicable here, it is notable that

federal judges have fewer legitimated reasons to turn their eyes away from the plights of disadvantaged litigants who have no meaningful recourse in state courts. This is admirable work.

On Smith's account, *Younger* abstention is a formidable barrier to the federal courts at a moment when poor (and often black) people are entering them in order to challenge certain practices that criminalize poverty — nondiscretionary bail schedules, particular court fee regimes, incarceration for inability to pay money judgments such as those associated with traffic tickets, and more. At first blush, it might be tempting to criticize the article because it focuses so heavily on the doctrine surrounding access to the federal courts, giving little attention to the context surrounding these claims. That is — the article focuses too much on abstention, but not enough on the time of Ferguson. In order to believe that carving out an exception to *Younger* abstention will make a difference for poor people challenging state-level criminal law, one has to believe that "Our Federalism"⁶ is a significant reason that these challenges sometimes do not go forward. Smith may be more inclined to believe that than I am.

However, I would urge readers with similar orientations to mine not to discount Smith's work in a broad rejection of doctrinal approaches to deeply ideological and structurally embedded problems like the "criminalization of poverty." There are likely many judges who have an earnest belief that *Younger* abstention is a requirement of "Our Federalism," and they are an important audience to reach. Lawyers representing indigent clients might also benefit from Smith's roadmap for navigating around *Younger*-based arguments.

And remember, Smith begins with Baldwin. He might share my view of the relevance of *Younger* abstention doctrine, which is that its fuzziness makes it a particularly effective tool for maintaining the status quo, and that it allows federal courts to punt on potentially disruptive issues of justice under the cloak of federalism.

While Smith claims to be writing a doctrine-focused article that is largely about *Younger* abstention, he also exposes the situational contingency in when federal courts care about federalism and when they are

the doctrine is so marginalized that one federal courts scholar wrote a mock obituary for it in 2006. See Samuel Bray, *Rooker Feldman (1923-2006)*, 9 GREEN BAG 2d 317 (2006); see also *Lance v. Dennis*, 546 U.S. 459, 465-67 (2006) (curtailing the scope and applicability of *Rooker-Feldman*). Even the dissenter in *Lance v. Dennis*, Justice Stevens, opined that "the Court quite properly disapproves of the District Court's resuscitation of a doctrine that has produced nothing but mischief for 23 years." *Id.* at 468 (Stevens, J., dissenting). Yet it is sporadically resurrected. This is to say, Smith could spend the rest of his career analyzing the myriad procedural and jurisdictional techniques federal courts use to avoid hearing the claims of indigent litigants.

⁶ *Younger*, 401 U.S. at 44-45. "Our Federalism" is the Court's romantic way of capturing the principle of comity between the federal government and the states. Although the federal government is supreme in the domains where it has power — see, for example, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) — federal courts might not use all of the power they possess out of respect for the states.

willing to prioritize other interests. In this Response, I focus on the nature of that contingency from a sociological perspective. In doing so, I attempt to engage with a few of the hidden laws (or what sociologists would call social facts) that make Smith's doctrinal intervention particularly important *in the time of Ferguson*, hopefully adding richness to Smith's already impressive work.

I. THE JURIDICAL FIELD IN THE TIME OF FERGUSON

A background presumption in Smith's article is that "Our Federalism" has real content and is very important to some number of federal judges. At the same time, there have been moments when federal judges, particularly the "Fifth Circuit Four,"⁷ have set aside federalism concerns out of concerns about justice. From a sociological perspective, one might treat courts' reliance on *Younger* abstention and similar doctrines as narratives or discursive representations that are meant to reflect but also construct reality; they are not necessarily direct reports of judges' deep motivations and modes of reasoning.⁸ This is not the same as saying that judges are lying when they claim to rely upon abstention doctrine or that they are intentionally hiding some real, perverse interest in oppressing poor people. They may not be acting in bad faith or attempting to obfuscate.⁹ However, the discourse of federalism has a sanctified social meaning in American law, so much so that judges may offer federalism as a legitimated justification for their behavior, even when federalism is not at the core of their decisionmaking process.¹⁰

⁷ Smith, *supra* note 4, at 2296 (citing DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 11–24, 40–41, 55–61 (1988); JACK BASS, UNLIKELY HEROES 23–26 (1981)) (explaining the nicknames behind "civil rights-oriented judges . . . John Minor Wisdom of Louisiana; Richard Rives of Alabama; John Robert Brown of Texas; and Elbert Tuttle of Georgia").

⁸ See, e.g., Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 AM. J. SOC. 1328, 1340–41 (2003).

⁹ *But cf.* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 934–36 (2016) (explaining "Sartrean Bad Faith," which involves turning bad faith "inward," thus "hid[ing] the truth from [oneself]").

¹⁰ Cultural sociologists often refer to this issue as the problem of motivation and justification. Motivations are the real reasons people act, while justifications are the reasons people *articulate* for acting. Stephen Vaisey, *Motivation and Justification: A Dual-Process Model of Culture in Action*, 114 AM. J. SOC. 1675, 1676–80 (2009). It is important to examine justifications (or "vocabularies of motive"). See generally, e.g., C. Wright Mills, *Situated Actions and Vocabularies of Motive*, 5 AM. SOC. REV. 904 (1940); LUC BOLTANSKI & LAURENT THÉVENOT, *ON JUSTIFICATION: ECONOMIES OF WORTH* (Catherine Porter trans., 2006). In other words, it is a deeply significant social fact that some lawyers and judges reference "Our Federalism" to justify closing off the federal courts to particular indigent clients, even if there are numerous competing motives behind their rulings.

Judges, like all of us, are situated actors operating within strategic action fields.¹¹ On the “juridical field,” — or “the site of a competition for monopoly of the right to determine the law”¹² — judges, lawyers, police, court officers, legal scholars, litigants, and other actors wield various tools to produce legal decisions. They use legal language, create documents, apply procedural rules, present individual and group interests, invoke constitutions, and appeal to preconstitutional values. Long-established doctrines such as *Younger* abstention are tools wielded by different actors to win the spoils. Power relations tinge the success or failure of certain tools, even when no one present has intentionally decided to disadvantage the dominated¹³ — and even, at times, when legal actors aim to counteract domination.¹⁴ These dynamics are present across disciplinary cultures, but vary in the precise techniques used.¹⁵ Each case is a war by other means. The “law” of power relations within fields, and their relationship to public sentiment and social movements, is one of the (barely) hidden laws that surely lurks behind the occasional invocation of *Younger* abstention and other jurisdiction-related doctrines in these cases.

Without deeper research, we cannot know precisely how the distribution of power and the use of legal apparatuses are driving outcomes in the cases Smith discusses. But we *can* ascertain that abstention is only part of the story, and perhaps not even the major story. The bigger story is *the time of Ferguson* — the cultural moment in which judges are making decisions about *Younger* abstention.

A line of scholarship on judicial decisionmaking has noted the influence of public opinion, social movements, and other shapers of cultural dynamics.¹⁶ It would have been fruitful for Smith to discuss how current events might be constructing how judges see the indigent litigants

¹¹ See generally NEIL FLIGSTEIN & DOUG MCADAM, A THEORY OF FIELDS (2012) (defining strategic action fields as “mesolevel social orders,” *id.* at 3, that are “the fundamental units of collective action in society,” *id.* at 9).

¹² Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 817 (1987).

¹³ See, e.g., Quintin Hoare, *Introduction* to ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 57–59 (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1999); see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350–52 (1988); Camille A. Gear, Note, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473, 2480–83 (1998).

¹⁴ See Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1628 (2017).

¹⁵ See, e.g., MICHÈLE LAMONT, HOW PROFESSORS THINK: INSIDE THE CURIOUS WORLD OF ACADEMIC JUDGMENT 146–51 (2009) (on power dynamics within academic peer review).

¹⁶ See, e.g., MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 165–67 (2013); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1405 (2000); Robert Post & Reva Siegel, *Roe Rage:*

before them and the trustworthiness and salience of these litigants' claims. I suspect that part of the confusion over whether to apply *Younger* abstention in some of these cases arises in part because of the shifting social meaning of the criminal justice system over roughly the past decade. At least two dynamics seem important. First, since 2007 or so, there has been an uneasy but productive convergence between certain people on the right and the left in support of criminal justice reform.¹⁷ While recent decarceration efforts fall short of the deep structural change needed to release the grip of the carceral state on marginalized communities,¹⁸ changes in law, policy, and culture have produced a slight decline in the United States' uniquely high incarceration rate for the first time in more than four decades — perhaps gently loosening the grip.¹⁹ Second, more recently, people across the nation have roundly critiqued police for excessive and unjustified uses of force, primarily but not exclusively against African Americans. The movement against police violence similarly alters the cultural milieu in which judges are making decisions.²⁰

Certain officials in all branches and at all levels of government have resisted attempts to scale back the carceral state and improve police-community interactions. For a prominent example, President Donald Trump, speaking before police officers in Suffolk County, New York, encouraged officers not to be “too nice” to suspects (or in his words, “thugs”).²¹ Attorney General Jeff Sessions recently issued guidance that reasserted the federal government's interest in marijuana enforcement, rescinding Obama-era guidance that gave states more leeway to decide

Democratic Constitutionalism and Backlash, 42 HARV. C.R.-C.L. L. REV. 373, 383–84, 395 (2007). See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

¹⁷ David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 266, 267–70 (2014).

¹⁸ See, e.g., MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 1–2, 4, 121–22, 258 (2015); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1589–90 (2012).

¹⁹ E.g., TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* 29 (2014); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 51–52 (2013).

²⁰ See Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 353–54 (2016).

²¹ Meghan Keneally, *Trump to Police: “Please Don’t Be Too Nice” to Suspects*, ABC NEWS (July 28, 2017, 6:39 PM), <http://abcnews.go.com/Politics/trump-police-nice-suspects/story?id=48914504> [<https://perma.cc/CCX5-K9JP>]. Trump's communications staff later claimed that he was joking. Dan Merica, *Spokeswoman: Trump “Joking” When He Told Police to Be “Rough” on Suspects*, CNN (July 31, 2017, 9:19 PM), <https://cnn.com/2017/07/31/politics/white-house-police-tough-suspects/index.html> [<https://perma.cc/PYD6-SZ3V>].

whether and how to punish marijuana use.²² In this way, judges are faced with competing messages about the desired ends of the carceral state, and federal judges might understandably be unsure of their proper place in the regulation of criminal punishment.

We are in the midst of an unsettled cultural moment when it comes to criminal justice. In unsettled times like these, new research and public understandings of the carceral system can expand judges' repertoires and either weaken or fortify jurisdictional and procedural barriers to the courts. Unsettlement gives opportunities for reimagining current forms of domination, such as poverty criminalization, within the carceral state.²³ Cultural sociologists argue that in unsettled contexts, culture (such as judges' shared understandings of what constitutes acceptable legal reasoning) matters for how people behave,²⁴ including how judges might rule in unclear cases.²⁵

What new frames, scripts, narratives, and strategies are part of these expanded judicial repertoires? More research is needed to explore this question, but it is certainly true that "the time of Ferguson" has demanded that courts and other players on the juridical field become more aware of the distinction between punishment and blameworthiness. Ferguson revealed that many people who are caught up in the system

²² Charlie Savage & Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES (Jan. 4, 2018), <https://nyti.ms/2E6rxbE> [<https://perma.cc/F5RD-RDPW>].

²³ Cf. Christopher A. Bail, *The Fringe Effect: Civil Society Organizations and the Evolution of Media Discourse About Islam Since the September 11th Attacks*, 77 AM. SOC. REV. 855, 856–57 (2012).

²⁴ See ANN SWIDLER, TALK OF LOVE 103 (2001) ("Culture has independent causal influence in unsettled cultural periods because it makes possible new strategies of action."); see also CHRISTOPHER A. BAIL, TERRIFIED: HOW ANTI-MUSLIM FRINGE ORGANIZATIONS BECAME MAINSTREAM 5 (2015). This is not to say that situations are *fully* determinative of the role of culture in action, only that they occupy a larger role than more formalist commentators on judicial decisionmaking would generally acknowledge. See generally Stephen Vaisey, *Socrates, Skinner, and Aristotle: Three Ways of Thinking About Culture in Action*, 23 SOC. F. 603 (2008) (critiquing an overly situational perspective on culture).

²⁵ This perspective is not too distinct from that of Judge Posner, who explains that while seemingly straightforward legal reasoning might prevail in routine cases, in nonroutine cases, judges may engage in "legal pragmatism," or a mode of reasoning that is based on their own policy preferences. RICHARD A. POSNER, HOW JUDGES THINK 238–39 (2008). Judge Posner also describes a "sociological theory of judicial behavior" that incorporates many of the concerns of interest to sociologists who would think about judging through the lens of a strategic action field, but he does not include *habitus* — how judges are structurally and culturally situated — which is a deeper inquiry than attitudes, emotions, and so forth. See *id.* at 34–35; see also PIERRE BOURDIEU, THE LOGIC OF PRACTICE 53, 56 (Richard Nice trans., 1990) (describing *habitus* as systems that are "structured structures predisposed to function as structuring structures," *id.* at 53, and "embodied history, . . . the active presence of the whole past of which it is the product," *id.* at 56). In part for this reason, one might be skeptical that so-called "pragmatic" concerns can be adequately explained using an economic framework.

lack the level of blameworthiness that the public likes to believe underlies criminal punishment. Ferguson and incidents of police violence have caused onlookers to question the explosion of criminal law, the standards we apply to law enforcement officials, the presumption of proportionality in punishment, and more.²⁶ These moments have demanded that many of us rethink virtually everything we once believed about the system. These new revelations, and the movements that have risen up to challenge them, may be shifting the power dynamics and organizational culture within the juridical field, at least in certain courts, for certain judges, in ways that could give Smith's argument room to affect judicial reasoning.

Through his proposed exception to *Younger*, Smith indirectly deals with the problem of how to find legitimated legal language that would permit judges to set aside "Our Federalism" to deal with "Our Ferguson." Smith's doctrinal carve-out would give space for judges to draw upon expanded cultural toolkits that have emerged from this moment in thinking about whether the federal courts may exercise their jurisdiction over so-called "criminalization of poverty" cases.

II. "CRIMINALIZATION OF POVERTY" IN THE TIME OF FERGUSON

"No one should be in jail or punished because she is poor," Smith asserts.²⁷ He makes this declaration as if it is an irrefutable maxim on which there is wide consensus. But another hidden law with which reformers must reckon is that the overwhelming majority of people under penal control — people who are not contemplated in the litigation surrounding rights to counsel and fines and fees — are punished because they are poor. They may not be incarcerated because they cannot pay a fine or bail, but they are still punished because they are poor.²⁸ While

²⁶ See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 417–20 (2018); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1424–26 (2016); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1502–05 (2016); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 872–75 (2015).

²⁷ Smith, *supra* note 4, at 2284.

²⁸ A long line of theoretical and empirical scholarship in criminology demonstrates that poverty is one of many background conditions of criminal behavior. *E.g.*, W.E. Burghardt Du Bois, *Causes of Negro Crime*, in *SOME NOTES ON NEGRO CRIME, PARTICULARLY IN GEORGIA* 55, 56–57 (W.E. Burghardt Du Bois ed., 1904); see sources cited *infra* note 39. A corresponding body of work shows that criminal punishment levels (which do not necessarily correlate with crime rates) often rise as part of political projects that shuffle greater numbers of poor and black people into prison. See, *e.g.*, BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 52, 55 (2006). The particular spatial patterning of incarceration — heavily concentrated in the poorest neighborhoods — underscores this point. *E.g.*, SPATIAL INFO. DESIGN LAB, COLUMBIA UNIV. GRADUATE SCH. OF ARCHITECTURE, PLANNING & PRES., *THE PATTERN* 6 (2008), http://c4sr.columbia.edu/sites/default/files/publication_pdfs/ThePattern.pdf

these numbers cannot support a direct causal link on their own, it is likely no coincidence that, as of 2014, 57% of incarcerated men aged 27–42 and 72% of same-aged incarcerated women had preincarceration annual incomes less than \$22,500 in 2014 dollars, compared to 23% of nonincarcerated men and 48% of nonincarcerated women with such a low income.²⁹ The current “criminalization of poverty” framework tends to focus on jail incarceration due to bail, fines, and fees, but prison and poverty (and race) are also inextricably linked. This is true in part because prison is the frontline response to many problems associated with deprivation and deep poverty.³⁰

The “criminalization of poverty” framework is helpful at points because it sheds light on a set of carceral processes of which many people are unaware.³¹ Before Ferguson, there was no widespread recognition that financially struggling cities might try to fund their survival by charging residents steep fines and fees and incarcerating them when they could not pay. These processes may need particular labeling to be understood, and this framing might arouse certain empathies that are frequently withheld from persons incarcerated for drug crime or violent crime, for example.

Yet I worry that centering particular forms of the “criminalization of poverty” obscures the myriad pathways through which poverty and involvement in the carceral state are linked. “Criminalization of poverty”

[<https://perma.cc/MBG7-CV9F>]. Even when neighborhood crime rates are taken into account, neighborhoods with high levels of concentrated disadvantage have higher incarceration rates than more advantaged neighborhoods. Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS, Summer 2010, at 20, 28.

²⁹ BERNADETTE RABUY & DANIEL KOPE, PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED (2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/8JFF-ATJB>]. These are men and women in state prison; those housed in federal prisons and local jails were not included. Of course, there are numerous potential correlates that these statistics do not take into account, such as education level — the overwhelming majority of nonincarcerated American young adults have not dropped out of high school, while more than half of incarcerated American young adults (as of 2008) do not have a high school diploma. BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 15–16, 58–60 (2012). The key point is that, descriptively, poor people are going to prison on a regular basis, and sufficient research identifies various processes that send poor people into prison. Cf. WESTERN, *supra* note 28, at 100 & fig.4.6 (demonstrating substantial differences in the wages of employed, nonincarcerated men and those of incarcerated men before their incarceration).

³⁰ E.g., LOÏC WACQUANT, PRISONS OF POVERTY 58 (expanded ed., 2009); BRUCE WESTERN, HOMEWARD: LIFE IN THE YEAR AFTER PRISON 60–61 (2018).

³¹ See generally, e.g., ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016). It is worth noting that in the time before Ferguson, criminalization of poverty did not focus so heavily on monetary sanctions for violating, or being accused of violating, criminal law. For example, Professor Kaaryn Gustafson has produced important work highlighting the introduction of criminal justice and surveillance paradigms into the distribution of means-tested benefits such as cash welfare. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 n.12 (2009).

in the current framework is reminiscent of the emphasis on decarceration for the class of offenders who Professor Marie Gottschalk calls the “non, non, nons” — “nonviolent, nonserious, and nonsexual offenders.”³² As others have explained, in order to significantly reduce mass punishment, reformers will have to wrestle with the blameworthiness of violence, noting that violent acts often emerge out of morally complex situations for which there are few easily identifiable culprits.³³ Social welfare policy, which has long implicitly distinguished between the “deserving” and “undeserving” poor,³⁴ provides another analogy. “Criminalization of poverty” reformers must be careful not to rely too heavily on implicit distinctions between the blameless and blameworthy incarcerated poor, and should instead take a more systemic and institutional approach to framing the issue of poverty criminalization.

To step back, what does poverty mean from Smith’s perspective? It seems obvious that when Smith discusses poverty, he does not just mean the state of having an income below the federally determined threshold.³⁵ Smith also means something beyond low income,³⁶ as indicated

³² GOTTSCHALK, *supra* note 18, at 165.

³³ See, e.g., Bruce Western, *Lifetimes of Violence in a Sample of Released Prisoners*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 14, 28 (2015) (“In these contexts, violence is not simply a rare episode of disorder or a random shock that upsets a well-ordered life. Violence is a type of deprivation that systematically engulfs poor contexts and the people who populate them.”).

³⁴ Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1075–79 (2017); see also, e.g., MARTIN GILENS, WHY AMERICANS HATE WELFARE 60–67 (1999); MICHAEL B. KATZ, THE UNDESERVING POOR (2d ed. 2013); Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 537 (1995); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 810–16 (2007); Max Rose & Frank R. Baumgartner, *Framing the Poor: Media Coverage and U.S. Poverty Policy, 1960–2008*, 41 POL’Y STUD. J. 22, 25 (2013); David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2034–82 (2004). But see Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550, 552 (2012).

³⁵ From a technocratic perspective, “poverty” means having an annual income below the federal poverty line for your family size. *How Is Poverty Measured in the United States?*, CTR. FOR POVERTY RESEARCH, UNIV. OF CAL., DAVIS, <https://poverty.ucdavis.edu/faq/how-poverty-measured-united-states> [<https://perma.cc/RXV3-PCRB>] (last updated Dec. 18, 2017). There has been much debate over the official poverty line since its inception, in part because it is based on decades-old survey data and questionable calculations. See, e.g., SARAH HALPERN-MEEKIN ET AL., IT’S NOT LIKE I’M POOR: HOW WORKING FAMILIES MAKE ENDS MEET IN A POST-WELFARE WORLD 23–24 (2015); NAT’L ACAD. OF SCIS., MEASURING POVERTY: A NEW APPROACH 24–31 (1995); Rebecca M. Blank, *Presidential Address: How to Improve Poverty Measurement in the United States*, 27 J. POL’Y ANALYSIS & MGMT. 233, 233–38 (2008).

³⁶ Sometimes social welfare law scholars prefer to use “low-income” rather than “poor” because of the potential moralistic and racialized connotations of that term. See Zatz, *supra* note 34, at 562. I prefer precision with respect to the terms. I use low-income to describe a low annual income or low wages. More often, I use “poverty” because, in a sociological sense, it captures a specific set of social situations that include (at least) deprivation, structural adversity, lack of wealth, and marginality.

in the quote from Baldwin, which describes a *perpetual* state of economic victimization,³⁷ and from Lorraine Hansberry, featuring Walter Lee's lament about "always getting 'tooken.'"³⁸ Smith's understanding seems more similar to that of many sociologists: poverty is a social condition that reflects not only reduced income, but also low status, minimal political power, distinctive and sometimes fragile social networks,³⁹ and (more controversially) "culture" — or heterogeneous and dynamic modes of engaging in the world that emerge in part in response to entrenched segregation, discrimination, and other characteristics of social structure.⁴⁰

If Smith merely means technocratic poverty or "low income," he is right to center state laws that send indigent defendants to jail or prison because they are unable to pay bail, fines, or fees. On the other hand, sociologists and criminologists have long examined economic victimization and feelings of "getting 'tooken'" as potential basic explanations of many types of criminal behavior.⁴¹ On this view, crime occurs in part because of the gap between the goals that society has set forth (in many Western nations, the capitalist "American Dream") and its failure to provide equal opportunity to fulfill those goals.⁴² To respond to the criminalization of *poverty*, and not merely the criminalization of low income, would require a deeper shift in juridical understandings of the relationship between poverty, criminal behavior, and criminal punishment.

Researchers have detected complex relationships between poverty and involvement in the carceral state at multiple *levels of analysis* (individual, neighborhood, municipal, state, and federal), *types of offense*

³⁷ Smith, *supra* note 4, at 2284–85 (quoting JAMES BALDWIN, *Fifth Avenue, Uptown, in THE PRICE OF THE TICKET* 205, 208 (1985)).

³⁸ *Id.* at 2322 (quoting LORRAINE HANSBERRY, *A RAISIN IN THE SUN* 141 (1959)).

³⁹ See, e.g., SANDRA SUSAN SMITH, *LONE PURSUIT: DISTRUST AND DEFENSIVE INDIVIDUALISM AMONG THE BLACK POOR* 27–54 (2007); Matthew Desmond, *Disposable Ties and the Urban Poor*, 117 *AM. J. SOC.* 1295, 1322 (2012); cf. MARIO LUIS SMALL, *UNANTICIPATED GAINS: ORIGINS OF NETWORK INEQUALITY IN EVERYDAY LIFE* 159 (2009).

⁴⁰ E.g., WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 14–17 (2009); Michèle Lamont & Mario Luis Small, *How Culture Matters: Enriching Our Understanding of Poverty*, in *THE COLORS OF POVERTY: WHY RACIAL AND ETHNIC DISPARITIES PERSIST* 76, 81 (Ann Chih Lin & David R. Harris eds., 2008).

⁴¹ ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 190–92 (rev. and enlarged ed. 1957). This concept, in revised form, is widely known as "general strain theory." See, e.g., Robert Agnew, *Foundation for a General Strain Theory of Crime and Delinquency*, 30 *CRIMINOLOGY* 47 (1992) (offering the most widely applied reinvention of Merton's (and earlier, Émile Durkheim's) idea of social strain); Margaret Farnworth & Michael J. Leiber, *Strain Theory Revisited: Economic Goals, Educational Means, and Delinquency*, 54 *AM. SOC. REV.* 263, 271 (1989); Wayne A. Santoro & Lisa Broidy, *Gendered Rioting: A General Strain Theoretical Approach*, 93 *SOC. FORCES* 329, 346 (2014).

⁴² STEVEN F. MESSNER & RICHARD ROSENFELD, *CRIME AND THE AMERICAN DREAM* 71–72, 88 (5th ed. 2013).

(felony, misdemeanor), *categories of punishment* (incarceration, supervision, monitoring), and *stages in the carceral continuum* (police interaction, arrest, charging, pleas, sentencing, reentry, and so forth).

At several levels of analysis and across multiple settings, poverty and punishment are inextricably linked. As explained above, poor individuals are simply more likely to go to prison than are higher-income people. Poor individuals move about daily life underneath the gaze of the punitive state.⁴³ Poor neighborhoods and institutions create conditions under which crime flourishes, and where crime-control institutions are omnipresent.⁴⁴ Poor neighborhoods within cities are “incarceration’s ‘hot spots’” in places like Chicago and beyond, even controlling for crime rates.⁴⁵ By reputation alone, when people envision high-crime neighborhoods, they often envision poor neighborhoods — specifically, poor predominantly black neighborhoods.⁴⁶ Poor towns have often turned to the carceral system to propel their economies.⁴⁷ As we have learned from Ferguson and from renewed scholarship and advocacy on penal fines and fees, poor cities may ratchet up ostensible crime control to generate municipal revenue.⁴⁸ Many of the states with the least gen-

⁴³ See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 11–12 (2018); Bruce Western et al., *Stress and Hardship After Prison*, 120 AM. J. SOC. 1512, 1516–17 (2015).

⁴⁴ See, e.g., Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 84–86 (2017); Jessica T. Simes, *Place and Punishment: The Spatial Context of Mass Incarceration*, 34 J. QUANTITATIVE CRIMINOLOGY 513 (2018); Bruce Western, *supra* note 33; cf. Fagan & Ash, *supra*, at 61 (showing that in Ferguson, a suburban area, policing is less spatially concentrated than in most urban areas).

⁴⁵ Sampson & Loeffler, *supra* note 28, at 20–21 (finding that “the combination of poverty, unemployment, family disruption, and racial isolation is bound up with high levels of incarceration even when adjusting for the rate of crime that a community experiences,” *id.* at 21); see also NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 27 (Jeremy Travis et al. eds., 2014) (“Given the demographic and geographic concentration of the rise in incarceration in the United States, the greatest impact has been felt by those living in the poorest communities.”).

⁴⁶ Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 718 (2001); Robert J. Sampson & Stephen Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCHOL. Q. 319, 322, 330–31, 336 (2004).

⁴⁷ JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* 65–67, 71–86 (2017).

⁴⁸ E.g., HARRIS, *supra* note 31, at 87–98. Although Harris finds that penal fines and fees do generate revenue in several jurisdictions, a recent report of the Berkeley Law Policy Advocacy Clinic analyzing juvenile administrative fees suggests that, at least in some California counties, the revenue-generation function of fines and fees falls short. POLICY ADVOCACY CLINIC, UNIV. OF CAL. BERKELEY SCH. OF LAW, *MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA* 17–19 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937534 [<https://perma.cc/V7MM-4GJG>].

erous social safety nets use criminal justice to stand in for poverty alleviation and thus have had the nation's highest incarceration rates.⁴⁹ In addition, the slow-and-then-precipitous hollowing out of federal welfare corresponded with the rise of mass incarceration, which has led many scholars to envision the national expansion of incarceration and other forms of penal supervision as a specific strategy to make subjects of poor populations.⁵⁰

Poverty colors the criminal justice experience at the felony and misdemeanor levels, under confinement and supervision, and from entry to reentry. Researchers focused on felony conviction and incarceration see poverty as both cause and consequence of involvement in serious crime.⁵¹ Scholars have widely argued that misdemeanor justice is bound up with the social control of marginalized people, including poor people.⁵² Studies of community corrections, such as probation, parole, and supervised release, largely follow a similar line⁵³ but also suggest that there is a “bifurcated” system of supervision that disadvantages poor people while granting greater privilege to those who are already relatively privileged.⁵⁴ At the front end of the carceral spectrum, the use of police to manage the poor — and increasingly today, to deliver social services — is well documented.⁵⁵ At the furthest end, people returning

⁴⁹ E.g., Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC'Y 43, 43–45 (2001) (linking a lack of welfare generosity with higher incarceration rates).

⁵⁰ See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 27–51 (2001); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 1–62 (2016) (describing how President Johnson's War on Poverty laid the foundation for the sharp rise in incarceration among poor African Americans beginning in the 1970s); KOHLER-HAUSMANN, *supra* note 43, at 11–12; LOÏC WACQUANT, *PUNISHING THE POOR* 1–3, 124–26 (English language ed. 2009); WESTERN, *supra* note 28, at 52–79; Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235, 244 (2008); Michelle S. Phelps, *Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation*, in *HANDBOOK ON PUNISHMENT DECISIONS: LOCATIONS OF DISPARITY* 43, 43–63 (Jeffery T. Ulmer & Mindy S. Bradley eds., 2018).

⁵¹ See generally NAT'L RESEARCH COUNCIL, *supra* note 45 (describing “urban economic distress,” *id.* at 127, as a cause of increased incarceration rates and poverty for both individuals and families as a consequence of higher incarceration rates).

⁵² See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 3–34 (1992); KOHLER-HAUSMANN, *supra* note 43, at 4–5; Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 812–13, 817–25 (2015); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1344 (2012).

⁵³ E.g., JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990*, at 138–68 (1993); Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1014 (2013).

⁵⁴ Phelps, *supra* note 50, at 56.

⁵⁵ E.g., FORREST STUART, *DOWN, OUT, AND UNDER ARREST* 37–77 (2016); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2183 (2013).

home after prison generally go home to poor neighborhoods and struggling families, and have a very difficult time raising themselves out of poverty — especially if they are people of color.⁵⁶ To be sure, the precise mechanisms linking poverty and punishment are complex and vary across these settings and units of analysis; it is critical that those interested in *truly* decriminalizing poverty take a nuanced and sophisticated look at these connections. Qualitative research reveals specific processes that link poverty with criminal justice involvement. For example, Professor Victor Rios explains how poor Latino and black boys growing up in Oakland come to be involved in a “youth control complex,” including school officials, community centers, parents, and other actors that construct a world that criminalizes these boys, essentially shuffling them into the carceral state.⁵⁷

Poverty plays a master role in selecting who moves through this particular apparatus. Professor Forrest Stuart richly depicts how people living on Los Angeles’s Skid Row become “copwise,” developing cultural techniques to strategically engage with the police and to evade net-widening aspects of “therapeutic policing.”⁵⁸ In an article on poor African American mothers in Washington, D.C., I describe how mothers sometimes report relying on the police despite their stated distrust of them.⁵⁹ Their constrained circumstances and the retrenchment of the welfare state mean that sometimes, law enforcement is the only institution that offers ready access to needed services. When children are frequently misbehaving, it might be difficult to find therapists, but police officers are readily available and can be conduits for services.⁶⁰ When children are truant, tracking them down can be difficult — but if parents do not make a documented effort, they could get stuck with an educational neglect charge.⁶¹ Seeking out a police officer or probation officer to make sure the child attends school protects the parent, but it also directly introduces the child to the carceral state.⁶² Poverty is a primary conduit toward criminal punishment generally, and separating the form of poverty criminalization that emanates from fines and fees from other forms of poverty criminalization obscures this social reality.

Smith’s article makes an important contribution by supporting a federal court response for those whose claims have been made somewhat

⁵⁶ See, e.g., JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 105–37; WESTERN, *supra* note 30, at 5–10; cf. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 957–60 (2003).

⁵⁷ VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 40–42 (2011).

⁵⁸ STUART, *supra* note 55, at 37–77, 135.

⁵⁹ Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC’Y REV. 314, 316–17 (2016).

⁶⁰ See *id.* at 334.

⁶¹ *Id.* at 336–37, 337 n.12.

⁶² See *id.* at 337.

more cognizable through the current “criminalization of poverty” framework. Yet scholars who study criminal justice through the lens of poverty should also read Smith’s article as a challenge to expand this framework by drawing clearer connections between the conditions of poverty and criminal justice control. The time of Ferguson is not just a time in which the public has learned about nondiscretionary money bail, fines, and fees, but also a time in which the entwinement of poverty, punishment, and race have been laid bare. We must be ever more precise about those connections.

III. RACE-CLASS SUBJUGATION⁶³ IN THE TIME OF FERGUSON

A curious aspect of Smith’s article is its very subtle — perhaps too subtle — engagement with racially framed social movements and, more importantly, *race as a constitutive process*. It is notable that a rich article that foregrounds Ferguson mentions Michael Brown only once and never references the Movement for Black Lives, or indeed, any contemporary nonlegal movement for criminal justice reimagination. Unlike other recent scholars who situate their work in this moment,⁶⁴ Smith also omits reference to the movement’s central organizations, such as Campaign Zero or Black Lives Matter. Yet race is embedded into Smith’s *background framework* for understanding Ferguson. He cites the 2015 Department of Justice (DOJ) investigation report on Ferguson, which draws out how race colors the city’s funding scheme.⁶⁵ He references the public scholarship of Professor Dorothy A. Brown, who describes the city’s “perfect storm of racism” reflected in the severe racial imbalances present in, among other things, political representation, the police force, and citizens implicated in arrest warrants and traffic stops.⁶⁶ In his discussion of “Reconstructed Federalism,” Smith writes movingly about the pain of remembering the brutal context of the Reconstruction Amendments.⁶⁷ Smith acknowledges that “the burden

⁶³ Professors Joe Soss and Vesla Weaver helpfully developed the label of “race-class subjugated (RCS) communities” to more efficiently capture the usual collinearity between race, poverty, and segregated geography. Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 567 (2017).

⁶⁴ See, e.g., Akbar, *supra* note 26, at 405–16; Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 392–94 (2016).

⁶⁵ See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 4–5 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/994R-P9GL>]; see also Smith, *supra* note 4, at 2286 n.9.

⁶⁶ Dorothy A. Brown, *Ferguson’s Perfect Storm of Racism*, CNN (Mar. 5, 2015, 4:16 PM), <http://www.cnn.com/2015/03/05/opinions/brown-ferguson-report/> [<https://perma.cc/TBX7-9U9N>].

⁶⁷ Smith, *supra* note 4, at 2335–37.

of America's mass incarceration and its criminalization of poverty disproportionately falls on the backs of descendants of American chattel slavery.⁶⁸ Moreover, as I note above, Smith frames his article with Baldwin and other black prophetic voices. He is aware that the criminalization of poverty has something to do with race. But recognizing that race is a background condition for Ferguson and carceral phenomena like those observed there and acknowledging their disparate impact are not equivalent to *situating race as part of the process* that creates and legitimizes those phenomena. While race cannot tell the entire story of mass punishment or overcriminalization, it seems difficult to deeply engage those phenomena without an explicit and *analytical* discussion of race.

One of the still-hidden laws of America's carceral regime is the constitutive relationship between race, poverty, and justice involvement, such that structural and systemic constitutional violations related to criminal justice cannot be understood without a serious racial analytic frame. Poverty and race operate together in ways that construct and are constructed by the carceral state,⁶⁹ and the racial structure of poverty feeds into the carceral state through distinct pathways.⁷⁰

"Our Ferguson" demands interrogation and reckoning with race, not as a variable or static condition, but as a process. Ferguson, Missouri became "Our Ferguson" when Darren Wilson killed Michael Brown on August 9, 2014.⁷¹ Shortly after Michael Brown's death, ArchCity Defenders, a small nonprofit civil rights firm in St. Louis, released a report on the local municipal court system.⁷² It pinpointed the courts in Bel-Ridge, Florissant, and Ferguson as particularly troubled.⁷³ The ArchCity Defenders report weaves together the roles of race and poverty in exploitative municipal court practices, concluding that "the current policies adopted by the municipal court system lead to the impression of the courts and municipalities as racist institutions that care much more

⁶⁸ *Id.* at 2337.

⁶⁹ See, e.g., WESTERN, *supra* note 30, at 156–58, 177–78.

⁷⁰ *Id.* at 9. This perspective is deeply related to the specific idea of intersectionality advanced in Professor Kimberlé Crenshaw's early work, which did not merely argue *that* race and gender intersect as a matter of social location, but showed *how* they intersect at a structural, processual, and relational level. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245–51 (1991); see also Matthew Desmond & Mustafa Emirbayer, *What Is Racial Domination?*, 6 DU BOIS REV. 335, 349–50 (2009).

⁷¹ U.S. DEP'T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [<https://perma.cc/Q4G3-XCMX>].

⁷² THOMAS HARVEY ET AL., ARCHCITY DEFS., MUNICIPAL COURTS WHITE PAPER (2014), <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> [<https://perma.cc/DL7Q-HSLU>].

⁷³ *Id.* at 3.

about collecting money — generally from poor, black residents — than about dispensing justice.”⁷⁴ The DOJ Ferguson report searingly indicts both the racial bias of policing in Ferguson and the exploitation of poor people through the municipal court system, recognizing that they operate in concert with each other.⁷⁵ The Ferguson Commission, a diverse and independent group of regional leaders tasked with studying the broad social conditions that led to the Ferguson crisis, made racial equity the centerpiece of its report.⁷⁶ The Commission expressed skepticism of approaches that center on economic reform rather than directly confronting racial marginalization.⁷⁷ These analyses suggest that Ferguson demands ideas and approaches that are *race-centered*, not race-neutral and not even merely race-conscious.

In the age of mass punishment, the carceral state gives meaning to race in America.⁷⁸ The consequence of punishment is part of what makes race “real.”⁷⁹ This is to say, we would not have “criminalization of poverty” if a particular type of poverty — urban, segregated, related to the withholding of structural opportunity — were not so closely associated with race.⁸⁰ Criminal fines and fees in the United States originated in convict leasing and the punishment of free blacks during slavery.⁸¹ As many scholars have pointed out, the nature and context of poverty vary by race such that even if a young black man and a young white man have the same income, the effect of income on each young man’s likelihood of experiencing incarceration will be different.⁸² In 2012, 12.3% of young white men in America aged 20–34 had less than a

⁷⁴ *Id.* at 15.

⁷⁵ CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *supra* note 65, at 9–15.

⁷⁶ FERGUSON COMM’N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUITY 61 (2015) (explaining that racial equity is “the overarching theme in the report”).

⁷⁷ *Id.* at 8–9.

⁷⁸ Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 117 (2001); *see also* Asad L. Asad & Matthew Clair, *Racialized Legal Status as a Social Determinant of Health*, 199 SOC. SCI. & MED. 19, 20 (2018); Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. (forthcoming Mar. 2019); Mario Luis Small, *Four Reasons to Abandon the Idea of “The Ghetto,”* 7 CITY & COMMUNITY 389, 389 (2008) (describing “strong conceptions of the ghetto”).

⁷⁹ I allude here to a basic principle in the social construction of race — the idea that race is socially constructed *and* real because it is “real in [its] consequences.” WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, *THE CHILD IN AMERICA* 572 (1928) (“If [humans] define situations as real, they are real in their consequences.”); Mara Loveman, *Is “Race” Essential?*, 64 AM. SOC. REV. 891, 891 n.2 (1999); Kohler-Hausmann, *supra* note 78.

⁸⁰ *See, e.g.*, HINTON, *supra* note 50, at 10–12; Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOC. REV. 354, 376 (2012).

⁸¹ *See, e.g.*, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 7–8 (2008); HARRIS, *supra* note 31, at 156–58; DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 34–37 (1996).

⁸² *See, e.g.*, WESTERN, *supra* note 28, at 77–78.

high school education.⁸³ For young African American men, that number was 35.5% — more than one-third.⁸⁴ As sociologist Megan Comfort has poignantly remarked, “prison has become the college of the poor and the dark skinned.”⁸⁵

To think of this issue as merely a matter of racial disproportionality or disparate impact overlooks the fact that the aspects of poverty that are criminalized are the aspects thought to be most associated with black communities. This is why, for example, employers regularly assume that certain subsets of African American men who apply for jobs have criminal records, even if they have ostensibly “banned the box.”⁸⁶ This is why, to avoid liability for racial steering under the Fair Housing Act, landlords and realtors should be wary of sharing information about a neighborhood’s crime rate or crime history with potential clients: marking a place as criminal is to mark it as black.⁸⁷ This is the reason that the racial composition of an area is a better predictor of whether police officers and laypersons will describe an area as “high-crime” than are actual crime rates.⁸⁸ In terms of social meaning: race means income; race means class; race means perception as criminal; race means status before legal institutions. And, in each case, the reverse is often true.

To be sure, some poor whites, too, are disadvantaged by the penal system.⁸⁹ However, to say that poor whites are also targets of the penal state is not to say that race can be understood separately from class in this domain. We need not pit race and poverty against each other in a

⁸³ Becky Pettit & Bryan L. Sykes, *Civil Rights Legislation and Legalized Exclusion: Mass Incarceration and the Masking of Inequality*, 30 SOC. F. 589, 597–98 (2015).

⁸⁴ *Id.*

⁸⁵ Megan Comfort, “*It Was Basically College to Us*”: *Poverty, Prison, and Emerging Adulthood*, 16 J. POVERTY 308, 316 (2012); see also PETTIT, *supra* note 29, at 68.

⁸⁶ See, e.g., Mike Vuolo, Sarah Lageson & Christopher Uggem, *Criminal Record Questions in the Era of “Ban the Box,”* 16 CRIMINOLOGY & PUB. POL’Y 139, 143 (2017); Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* 3 (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 16-012, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795 [<https://perma.cc/4AAU-HB2B>]; Jennifer L. Doleac & Benjamin Hansen, *Does “Ban the Box” Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* 4 (Nat’l Bureau of Econ. Research, Working Paper No. 22469, 2016), <http://www.nber.org/papers/w22469> [<https://perma.cc/86NV-E4SD>].

⁸⁷ See, e.g., Stephanie Booth, *4 Questions Your Agent Might Not Answer — And Why*, REALTOR.COM (Oct. 10, 2016), <https://www.realtor.com/advice/buy/questions-realtors-wont-answer/> [<https://perma.cc/XU3G-JQFA>]; Devon Thornsby, *What Your Real Estate Agent Can’t Tell You*, U.S. NEWS (Dec. 14, 2015, 12:18 PM), <https://realestate.usnews.com/real-estate/articles/what-your-real-estate-agent-cant-tell-you> [<https://perma.cc/UTC2-C94G>].

⁸⁸ See Quillian & Pager, *supra* note 46, at 718; Sampson & Raudenbush, *supra* note 46, at 320.

⁸⁹ Compare MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 205 (rev. ed. 2012) (arguing that the incarceration of poor whites is “collateral damage” of the institution’s targeting of African Americans), with James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 58–60 (2012) (arguing that poor whites are also targets of mass incarceration, not merely collateral damage).

macabre battle over which is *the most explanatory variable* for mass punishment.⁹⁰

Smith does not ignore race, but he deemphasizes it. Perhaps his choice is strategic: it is almost certainly more useful politically to envision Ferguson as a place where *poor* people have been oppressed rather than a place where poor *black* people have been oppressed.⁹¹ Perhaps Smith deemphasizes race because the plaintiffs or some class members in the cases discussed are indigent whites.⁹² Alternatively, it might have seemed more straightforward to envision bail, fines, and fees as issues of poverty and not primarily of race because the classes of defendants affected by these state laws are racially diverse. (Of course, this would be an insufficiently systemic way of thinking about the impact of race, and I suspect that the latter was not Smith's reasoning.) Instead, I return to the purpose of the article from Smith's perspective. Smith's intellectual project is to improve federal jurisdiction doctrine and to reveal how *Younger* abstention is used to bar access to federal courts from indigent defendants seeking freedom from harsh state laws. His invocation of Ferguson might be better understood as an entry point for broader discussion about measures that criminalize low income rather than the beginning of an inquiry that would confront the full set of issues that Ferguson raises, including the nature of the carceral state. Even if I would not take the same approach, I do understand it. Thus, I am ambivalent about the article's treatment of race, not condemning of it.

IV. LEGAL ESTRANGEMENT IN THE TIME OF FERGUSON

Finally, as I read Smith's work, I thought a great deal about what abstention might mean to the indigent criminal defendants who had been thrown out of court on those grounds. Federal courts scholars debate the legitimacy of abstention, but the litigants in "criminalization of poverty" cases likely do as well. Federal courts scholars are primarily

⁹⁰ Commentators and even scholars often miss this point. This narrow view of causality is why conversations about social policy often devolve into debates over whether a given phenomenon is *really* a result of race or *really* a result of class. To the very limited extent that this inquiry is useful, research seems to suggest that race is a stronger predictor of being arrested and incarcerated than is class. See, e.g., WESTERN, *supra* note 28, at 30–32; Khaing Zaw, Darrick Hamilton & William Darity Jr., *Race, Wealth and Incarceration: Results from the National Longitudinal Survey of Youth*, 8 RACE & SOC. PROBS. 103, 112 (2016). As Professors Matthew Desmond and Mustafa Emirbayer have explained, "[w]hile it is true that poor Whites experience many of the same hardships as poor Blacks, it is not true that poverty somehow de-Whitens poor Whites." Desmond & Emirbayer, *supra* note 70, at 348.

⁹¹ See, e.g., GILENS, *supra* note 34, at 67–79, 154–73; ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 20–21, 23–27 (2004).

⁹² See, e.g., Forman, *supra* note 89, at 58–60.

focused on the *legal* legitimacy of abstention — its compatibility with other tools, vocabularies, and power relations in the juridical field.⁹³ I join Smith in worrying about the *sociological* legitimacy of abstention, and of the legal system, particularly in the populations most vulnerable to the penal state.

But more than legitimacy — whether people like these litigants believe that law and law enforcers are authorities worthy of obedience⁹⁴ — I worry most about whether and to what extent these indigent litigants understand the law as a signal of the exclusion of their social group from the polity. What do these uses of abstention doctrine mean for how indigent litigants and their communities see their place within our democracy?

A law that remains surprisingly hidden to many is that institutions of justice, through which groups are meant to be meaningfully equal before the law, have an immense group-exclusionary capacity and tendency. Even when race-class-subjugated people yearn for the respect and protection of justice institutions, their social worth frequently goes unrecognized.⁹⁵ In other works, I have referred to this cultural understanding⁹⁶ and set of related processes as legal estrangement,⁹⁷ and it is of particular salience in the time of Ferguson. Indeed, one might say that — perhaps along with the time preceding the Kerner Commission report⁹⁸ — the time of Ferguson is the time of legal estrangement.

The idea of legal estrangement is partly rooted in Émile Durkheim's vision of social order.⁹⁹ A traditional way of thinking about the importance of social order would support harshly punishing people who

⁹³ E.g., Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847, 849 (2013).

⁹⁴ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 25 (2006); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005).

⁹⁵ Cf. Michèle Lamont, *Addressing Recognition Gaps: Destigmatization and the Reduction of Inequality*, 83 AM. SOC. REV. 419, 421–22 (2018) (discussing the ways that traditionally oppressed groups such as women and racial and religious minorities have sought justice).

⁹⁶ Critically, I use “culture” in a specific sense based on cultural sociology, which understands that culture is not a set of values or essential characteristics that homogeneously applies to a group (such as a racial group or class group). Instead, I align with cultural sociologists who see culture as a set of shared strategies that are more or less available to people depending on structural and situational context. Thus, culture is both shared and heterogeneous, and its precise linkages to individual actions vary over time. See, e.g., SWIDLER, *supra* note 24, at 24–25; Lamont & Small, *supra* note 40, at 76–77.

⁹⁷ Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2085–86 (2017).

⁹⁸ NAT'L CRIMINAL JUST. REFERENCE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 19 (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf> [<https://perma.cc/FKH2-GNCB>].

⁹⁹ See Bell, *supra* note 97, at 2083–84; see also ÉMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 246–58 (George Simpson ed., John A. Spaulding & George Simpson trans., Free Press 1951) (1897).

violate collectively agreed-upon law. However, I think about anomie as a way of connecting Durkheim's concern about strong norms with his observations about the division of labor. The purpose of modern punishment, in his view, was to maintain the division of labor;¹⁰⁰ restoring people to their security and usefulness was critical to this mission. A related way to think of the purpose of punishment is that it should restore people to their usefulness to the democratic order.

This reframing of the purpose of law allows us to think differently about how to evaluate its justness and rightness. In the past several decades, interdisciplinary scholarship has offered new ways of evaluating the law. Aside from the traditional balancing of rights and interests and concerns about equity, fairness, and justice,¹⁰¹ broadly defined, scholars interrogate whether and how a law is Pareto optimal or Kaldor-Hicks efficient,¹⁰² whether a law or policy maximizes individual utility,¹⁰³ whether law and law enforcement comport with how individuals react to the world,¹⁰⁴ whether law is consistent with the functioning of human brains,¹⁰⁵ whether law advances informedness,¹⁰⁶ whether law

¹⁰⁰ See ÉMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 88 (W.D. Halls trans., Free Press 2014) (1893).

¹⁰¹ See, e.g., ROBIN WEST, *NORMATIVE JURISPRUDENCE* 14–17 (2011) (critiquing jurisprudence for neglecting fundamental questions about the justness of a law).

¹⁰² See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014); Zachary D. Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. (forthcoming 2018) (manuscript at 7–8); see also Laura Nyantung Beny, *Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence*, 7 AM. L. & ECON. REV. 144, 145–48 (2005).

¹⁰³ E.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 979–82 (2001).

¹⁰⁴ E.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–80 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1070–75 (2000); Jeffrey J. Rachlinski, *New Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 745–52 (1999); Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCH. SCI. PUB. INT. 75, 81–83, 88–91 (2015).

¹⁰⁵ See, e.g., Oliver R. Goodenough & Micaela Tucker, *Law and Cognitive Neuroscience*, 6 ANN. REV. L. & SOC. SCI. 61, 69–75 (2010); Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCH. PUB. POL. & L. 410, 412–15 (2017); cf. Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1126–35 (2010); Amanda C. Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183, 204–14 (2009) (critiquing the use of cognitive neuroscience in criminal law theory); Nicole A. Vincent, *On the Relevance of Neuroscience to Criminal Responsibility*, 4 CRIM. L. & PHIL. 77, 85–93 (2010) (pointing out the complexity of the debate over the role of neuroscience in criminal law).

¹⁰⁶ See, e.g., Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411, 1412–13 (2015).

changes aggregated public behavior,¹⁰⁷ whether law changes how governments behave,¹⁰⁸ whether law is consistent with this or that conception of morality,¹⁰⁹ and more.

From a law and sociology perspective, one way of evaluating whether a law is just or right is to assess the degree to which it signals to groups that they are included within the polity. This implicit signaling of a group's worth is not merely a heartwarming value — from this vantage point, maximal group inclusion is *necessary* for societal stability and advancement. There are real social costs for everyone when inclusion is disregarded. One worthy research program might seek to answer some of these core questions in federal courts scholarship with legal estrangement and legitimacy concepts and empirical methodologies, exploring how courts' invocation of jurisdictional and procedural barriers relates to the social meanings of law and courts to various social groups and members of the public. Although Smith could have written even more directly about the potential consequences of estrangement, cynicism, and illegitimacy, that is not his core project. Smith's article makes an innovative contribution by forcing federal courts scholars to reckon with the social meaning of abstaining from certain types of cases in their analyses of *Younger* abstention's legitimacy.

CONCLUSION

"Abstention in the Time of Ferguson" proposes useful jurisdictional tools that could clear more pathways to justice for the criminalized poor. To be sure, the article's conceptualization of poverty criminalization could be richer. The race-class nexus could be more fully theorized. The positioning of different actors on the juridical field in these *Younger* abstention cases could be better articulated. But in the end, we who are inspired by Baldwin must create change, in our own ways, to the structures and ideologies that produced "Our Ferguson." Smith's proposal is

¹⁰⁷ E.g., Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1175–78, 1185–91 (2015).

¹⁰⁸ E.g., Christopher R. Berry & Jacob E. Gersen, *Agency Design & Political Control*, 126 YALE L.J. 1002, 1028–34 (2017); Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575, 582–85 (2016); William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMP. LEGAL STUDS. 474 (2017); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57 (2009).

¹⁰⁹ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); see also Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22–55 (Arthur Ripstein ed., 2007). Although there is debate over this categorization, one might classify scholarship that analyzes law according to its compliance with fiduciary norms as engaged in analysis of law's morality. See, e.g., Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1827–28, 1828 n.27 (2016).

emblematic of a broader program of research that seeks to unseat structural barriers, deeply embedded into the doctrines and traditions of federal courts, in service of palpable justice — for Michael Brown, for Sandra Bland, for Philando Castile, for so many others.¹¹⁰ I applaud this effort and eagerly anticipate Smith’s future scholarship.

Throughout the article, Smith juxtaposes “Our Federalism” against “Our Ferguson.” But what does it mean for Ferguson to be “ours”? To whom does the town and its story belong? We all bear responsibility to witness and respond to the injustice that Ferguson came to represent in late 2014 and beyond. Yet in the end, Ferguson truly belongs to the people who have made their homes and lives there. So I close this Response with the words of one of Ferguson’s residents — Michael Brown’s mother — in hopes of shedding light on a hopeful, and hopefully no longer hidden, law of our society.

After Mike Mike died, I believed we would have justice. I waited for the police to right the wrong, I waited for the county to bring justice to Mike Mike, I waited for the DOJ to discover the truth. The system has failed my son. It has failed me and it has failed all of us. But, now, I know that I can't wait for anyone else to make change. I must make change, myself, that will be Mike Mike's legacy; that will be his justice. That's the truth of it.

— Lezley McSpadden, *Tell the Truth & Shame the Devil*¹¹¹

¹¹⁰ Smith notes that Castile had been pulled over nearly fifty times, often because he could not pay traffic tickets. Smith, *supra* note 4, at 2306. Bland’s story should also be interpreted through this lens, as she committed suicide after spending three days in jail after a police officer pulled her over for failing to signal. The officer unnecessarily escalated the encounter and eventually arrested Bland for allegedly assaulting him. Bland’s bond was \$5000, which she had to pay either upfront or through a down payment of \$500 to a bail bondsman to submit the bond. Neither she nor her family members and friends were able to pull together that amount in time. See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 589–90 (2017); Shane Bauer, *Here's What Sandra Bland's Death Says About Our Broken Bail System*, MOTHER JONES (July 27, 2015, 7:56 PM), <https://www.motherjones.com/politics/2015/07/sandra-bland-bail-bond-system/> [<https://perma.cc/8BPX-67C4>]. Poor people often have poor networks. See, e.g., Desmond, *supra* note 39, at 1321–23.

¹¹¹ LEZLEY MCSADDEN WITH LYAH BETH LEFLORE, TELL THE TRUTH & SHAME THE DEVIL: THE LIFE, LEGACY, AND LOVE OF MY SON MICHAEL BROWN 251 (2016).