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Judge Lisa Foster

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## INJUSTICE UNDER LAW: PERPETUATING AND CRIMINALIZING POVERTY THROUGH THE COURTS

**Judge Lisa Foster (Ret.)\***

In 1962, in a speech to the American Bar Association, former Attorney General Robert Kennedy asked, “do . . . minorities or people who speak our language imperfectly . . . or those who are poor really receive the same protection before the courts as the rest of our citizens? [A]ll too often,” he said, “they do not.”<sup>1</sup> Today, our justice system is no longer formally based on race, ethnicity, or national origin, but it does depend on wealth.

Money matters in the justice system. If you can afford to purchase your freedom pretrial, if you can afford to immediately pay fines and fees for minor traffic offenses and municipal code violations, if you can afford to hire an attorney, your experience of the justice system both procedurally and substantively will be qualitatively different than the experience of someone who is poor. More disturbingly, through a variety of policies and practices—some of them blatantly unconstitutional—our courts are perpetuating and criminalizing poverty. And when we talk about poverty in the United States, we are still talking about race, ethnicity, and national origin. The majority of poor people in the United States are people of color.<sup>2</sup> Although a substantial plurality are white, 24% of African-Americans and 21% of Hispanics live in poverty.<sup>3</sup> Yet, African-Americans comprise just 12% of the total population, and Hispanics comprise just 18%.<sup>4</sup> The

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\*The author is the former Director of the Office for Access to Justice at the U.S. Department of Justice and a former California Superior Court Judge. This essay would not have been possible without the thoughtful work of my former colleagues at the Office for Access to Justice.

1. Att’y Gen. Robert F. Kennedy, Speech to the American Bar Association House of Delegates 4 (Aug. 6, 1962).

2. *Poverty Rate by Race/Ethnicity*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0> (change Data View to “number”) (last visited Feb. 10, 2017).

3. *Id.* (change Data View to “percent”).

4. *Population Distribution by Race/Ethnicity*, HENRY J. KAISER FAMILY FOUND., <http://kff.org/>

impact of what we have done and continue to do daily in courtrooms throughout the United States is to trap people—including disproportionately people of color—in poverty.<sup>5</sup>

In this essay, I will describe how the justice system enforces poverty employing three examples: bail, fines and fees, and access to counsel in civil cases. These are by no means the only ways in which the justice system quite literally imprisons people in poverty, but they are widespread and particularly pernicious. I will also provide a legal framework for analyzing these practices and a brief gloss on their history. I will conclude hopefully with a discussion of successful reform efforts and a way forward.

#### A. Bail

For ten years, I was a judge in California, and though I had been a civil litigator for my entire legal career, soon after I became a judge, I found myself presiding in a criminal trial department. I did not know very much about bail; I did not have to. San Diego County, like all California counties, is required by law to adopt a bail schedule,<sup>6</sup> and it is easy to use. Each offense is paired with a dollar amount.<sup>7</sup> If you are arrested, for example, for possession of a controlled substance, your bail is \$1,000; if you are arrested for assault with a firearm, bail is \$20,000.<sup>8</sup> If you or your family can afford to pay a bail bond company 10–35% of the bond amount, you are released and given a date to come back to court.<sup>9</sup> If you cannot afford a bail bond, you

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other/state-indicator/distribution-by-raceethnicity/?currentTimeframe=0 (last visited Feb. 10, 2017).

5. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). In *The New Jim Crow*, Michelle Alexander persuasively argues that, with respect to the war on drugs, this was and is deliberate. See *id.* However, this article does not address the motive for the criminalization of poverty.

6. CAL. PENAL CODE § 1269b(d) (West 2017).

7. See generally SUPER. CT. OF CAL., CITY OF SAN DIEGO, BAIL SCHEDULE (2016), [http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CRIMINAL2/CRIMINALRESOURCES/BAIL\\_SCHEDULE.PDF](http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CRIMINAL2/CRIMINALRESOURCES/BAIL_SCHEDULE.PDF).

8. *Id.* at 19, 22.

9. ARPIT GUPTA, DOUGLAS SWANSON & ETHAN FRENCHMAN, MD, OFFICE OF THE PUB. DEF., THE HIGH COST OF BAIL: HOW MARYLAND'S RELIANCE ON MONEY BAIL JAILS THE POOR AND COSTS THE COMMUNITY MILLIONS 8 (2016). The money paid to the bail bond company is never refunded. In Maryland, a study found that people arrested in the state from 2011–2015 paid combined bail bond premiums of more than \$256 million. *Id.* at 4. Of that amount, more than \$75 million in nonrefundable

stay in jail. It is as simple as that. To be perfectly honest, I did not think much about bail, and to the best of my recollection, neither did anyone else—not my colleagues on the bench, not the prosecutors, nor the public defenders.

My experience was and is common among state and local judges, even though in the federal system, bail works very differently—and has for fifty years. In 1964, Attorney General Kennedy testified before the Senate Judiciary Committee and urged Congress to enact bail reform.<sup>10</sup> Attorney General Kennedy explained:

Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom.<sup>11</sup>

As Kennedy and others who testified at the Senate hearings noted, bail was not supposed to be a mechanism for keeping people in custody.<sup>12</sup> In the Middle Ages, when bail first was invented in England, defendants were detained indefinitely—often for years—without trial.<sup>13</sup> Bail was devised as a way to allow someone charged with an offense to be free; appearance at trial could be secured by a pledge to pay money if the defendant did not return to court.<sup>14</sup> It became readily apparent that bail could be abused.<sup>15</sup> In 1689, the English Bill of Rights outlawed the widespread practice of keeping

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premiums were collected in cases that were dropped or the defendant was found not guilty. *Id.*

10. *See Hearings on S. 2838, S. 2839 & S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. 1 (1964) (testimony of Robert F. Kennedy, Att’y Gen. of the U.S.), <https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

11. *Id.*

12. *Id.*

13. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 4 (2010), <http://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf>.

14. *Id.* at 6.

15. *Id.*

defendants in jail by setting deliberately unaffordable bail, declaring that “excessive bail ought not to be required, nor excessive fines imposed.”<sup>16</sup> The language may sound familiar—it is repeated almost *verbatim* in the Eighth Amendment to the United States Constitution.<sup>17</sup>

In 1966, the federal Bail Reform Act adopted that constitutionally mandated approach to bail by insisting that judges “may not impose a financial condition that results in the pretrial detention of the person.”<sup>18</sup> The Act requires judges to make an individualized assessment of two factors: whether the defendant is a flight risk and whether the defendant is a risk to public safety.<sup>19</sup> If the judge finds that a defendant is a risk to public safety, the judge can impose conditions on the defendant’s release or, in rare instances, when no conditions can protect the public, detain a defendant pretrial.<sup>20</sup> If the judge finds the defendant is a flight risk, the judge can set a financial condition for his or her release, but only after giving meaningful consideration to an individual’s ability to pay and alternative methods of securing the defendant’s appearance at trial.<sup>21</sup> When President Johnson signed the bill into law, he described the bail system as “archaic and cruel.”<sup>22</sup> “Because of the bail system,” he said, “the scales of justice have been weighted not with fact nor law nor mercy. They have been weighted with money. But now we can begin to insure the defendants are considered as individuals and not as dollar signs.”<sup>23</sup>

Unfortunately, the Bail Reform Act was not the beginning of a movement to reform bail nationwide. It was, practically speaking, the end. Until recently, not a single state adopted statutes comparable to

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16. *Id.*

17. *Id.*

18. 18 U.S.C. § 3142(c)(2) (2016).

19. *Id.* § 3142(d).

20. *Id.* § 3142(c).

21. *See generally id.* § 3142(b)–(d) (outlining factors the courts must consider in determining whether to hold a defendant in custody until trial or release them on their own recognizance or pursuant to conditions).

22. Robert Young, *Bail Reform Act Is Signed by President*, CHI. TRIB., June 23, 1966, at A2.

23. *Id.*

the Bail Reform Act.<sup>24</sup> To the contrary, the number of people incarcerated pretrial has increased dramatically since the 1980s.<sup>25</sup> Despite the United States Supreme Court's unequivocal declaration that "[i]n our society, liberty is the norm, and detention prior to trial . . . the carefully limited exception,"<sup>26</sup> roughly 60% of the jail population nationally is comprised of pretrial defendants—a rate that has remained constant over the last decade.<sup>27</sup> Since 2000, 95% of the growth in the overall jail inmate population has been due to the increase in the population of defendants held pretrial.<sup>28</sup> Most of those detained pretrial are accused of nonviolent offenses.<sup>29</sup> Disproportionately, they are people of color.<sup>30</sup> African-Americans and Hispanics are at least twice as likely as whites to be detained pretrial for non-violent drug arrests.<sup>31</sup>

The overwhelming majority are poor.<sup>32</sup> Bail perpetuates and exacerbates poverty because of course only people who cannot afford bail are held in custody pretrial, and pretrial detention often makes them poorer.<sup>33</sup> As little as three days in custody increases the likelihood that a person will lose their job, their housing, be forced to abandon their education, and be unable to make their child support

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24. See Stephen L. Carter, *Bail Reform Is Overdue, but Finally Here*, BLOOMBERGVIEW (Feb. 16, 2017, 2:39 PM), <https://www.bloomberg.com/view/articles/2017-02-16/bail-reform-is-overdue-but-finally-here>; see also Lisa Foster, Director, Office for Access to Justice, Address at the Texas Fair Defense Act 14th Anniversary Symposium Celebration (May 6, 2016), <https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-2016-national-meeting>.

25. See RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAIL IN AMERICA 1, 7, 29 (2015), [http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report\\_02.pdf](http://archive.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf).

26. United States v. Salerno, 481 U.S. 739, 755 (1987).

27. TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, at 4 (2015), <https://www.bjs.gov/content/pub/pdf/jim14.pdf>; see also TODD D. MINTON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES 1 (2014), <https://www.bjs.gov/content/pub/pdf/jim13st.pdf>.

28. MINTON & ZENG, *supra* note 27, at 1.

29. See Richard Williams, *Bail or Jail: May 2012*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx> (last visited Feb. 10, 2017).

30. See SUBRAMANIAN ET AL., *supra* note 25, at 15.

31. See *id.* at 11.

32. BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR 2 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

33. SUBRAMANIAN ET AL., *supra* note 25, at 5, 12–13, 15–17.

payments.<sup>34</sup> The consequences of pretrial detention are not only borne by the individual in jail, but also by their family and the community.<sup>35</sup> A child whose single parent is taken into custody not only loses the financial and emotional support that parent provides, but she may be placed in foster care or be forced to move in with a relative and need to change schools.<sup>36</sup> The cost of our bail system is enormous: \$14 billion in direct costs to American taxpayers to detain people who are mostly low risk and accused of nonviolent offenses.<sup>37</sup>

We also know, and we have known for 50 years, that a decision to detain or release a defendant pretrial affects the outcome of a case.<sup>38</sup> An investigation made by the Laura and John Arnold Foundation found the following outcomes:

Compared to defendants released at some point pending trial, defendants detained for the entire pretrial period are more likely to be sentenced to jail or prison—and for longer periods of time. Detained defendants are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point pending trial. Sentences for detained defendants are also significantly longer: jail sentences are nearly three times as long, and prison sentences are more than twice as long.<sup>39</sup>

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34. See generally *id.*; see also *3 Days Count: Commonsense Pretrial*, PRETRIAL JUSTICE INST., [http://www.pretrial.org/download/advocacy/3DaysCount\\_overview.pdf](http://www.pretrial.org/download/advocacy/3DaysCount_overview.pdf) (last visited Feb. 10, 2017).

35. SUBRAMANIAN ET AL., *supra* note 25, at 5.

36. *Id.* at 18.

37. PRETRIAL JUST. INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 1, 2 (2017), <https://university.pretrial.org/viewdocument/pretrial-justice-how-much-does-it>.

38. In the words of Professor Caleb Foote, “there is an extraordinary correlation between pretrial status . . . and the severity of the sentence after conviction.” Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 960 (1965).

39. CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3 (2014), <https://csgjusticecenter.org/wp-content/uploads/2013/12/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes.pdf>.

People detained pretrial are more likely to plead guilty, not always because they are all guilty, but because sometimes it is just the fastest way home.<sup>40</sup>

Perversely, jail is also a gateway to deeper and more lasting involvement in the criminal justice system, turning the public safety argument for bail on its head. Defendants detained more than twenty-four hours pretrial are more likely to commit new crimes after they are released.<sup>41</sup>

Incarcerating defendants pretrial simply because they are poor violates the United States Constitution. In 2015, the Department of Justice filed a brief in *Varden v. the City of Clanton*, advising the district court that: “Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay.”<sup>42</sup> Last year, the Department filed an *amicus* brief in the Eleventh Circuit in *Walker v. City of Calhoun*, arguing that “a bail practice violates the fourteenth amendment if, without consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the pretrial detention of indigent defendants.”<sup>43</sup>

We have created a bail system in the United States that not only punishes people for their poverty, but also makes people accused of crimes, their families, and their communities poorer. And, it is being done by judges—like me—in violation of the United States Constitution.

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40. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713, 717 (2017).

41. CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION* 3 (2014), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf).

42. Statement of Interest of the United States at 14, *Jones v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (No. 215CV34-MHT), <https://www.justice.gov/file/340461/download>.

43. Brief for the United States as Amici Curiae Supporting Plaintiff-Appellee at 13, *Walker v. City of Calhoun*, 2017 U.S. App. LEXIS 4183 (11th Cir. Mar. 9, 2017) (No. 16-10521-HH), <https://www.justice.gov/crt/file/887436/download>.



*B. Fines and Fees*

Just as the number of defendants detained pretrial has increased dramatically since the mid-1980s, so has the amount of fines and fees imposed by the justice system.<sup>44</sup> The two are not unrelated, and both are a cause and consequence of mass incarceration. Since 1980, the number of people incarcerated in the United States has quintupled.<sup>45</sup> All of those individuals were at some point simply accused of a crime. In systems with bail schedules or those where judges did not consider an individual defendant's ability to make bail, the result was a dramatic increase in pretrial detention.<sup>46</sup> Simultaneously, because the vast majority of those incarcerated in the U.S. are held in state and local jails and prisons, the cost of incarceration has been borne overwhelmingly by state and local governments.<sup>47</sup> From 1979 to 2013, total state and local corrections expenditures increased by 324%—from \$17 billion to \$71 billion.<sup>48</sup> By comparison, during that same period, state and local education spending—from pre-Kindergarten through high school—increased only 107%.<sup>49</sup> The cost of corrections does not include the cost of adjudication or associated costs like public defenders, prosecutors, or police.<sup>50</sup> In order to defray these costs as well as, in some cases, simply to provide

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44. Fines are a monetary sanction imposed for violation of a statute. *Fine*, BLACK'S LAW DICTIONARY (10th ed. 2014). There can be fines for everything from civil infractions like failing to walk your dog on a leash to felonies like armed robbery. *Id.* The most common are traffic fines and fees. If you run a red light, the fine might be \$100. But in virtually every local or state jurisdiction in the country, fees are imposed in addition to the fine. The additional fees can range from five to five hundred dollars, and they are assessed for everything from court security to emergency medical services to public defenders; in some jurisdictions, the fees go directly into the general fund. *See, e.g.*, Ann McAdams, *Court Costs: Where Your Fine from Speeding Tickets Really Goes*, WECT, <http://www.wect.com/story/22237540/court-costs-where-your-speeding-ticket-fine-really-goes> (last visited Apr. 9, 2017).

45. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2015), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

46. SUBRAMANIAN ET AL., *supra* note 25, at 32–34.

47. U.S. DEP'T OF EDUC., POLICY AND PROGRAM STUDIES SERV., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUC. 1 (2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>.

48. *Id.*

49. *Id.*

50. *Id.* at 30.

additional general fund revenue, courts have imposed costs and fees on defendants.<sup>51</sup>

Since 2010, every state except Alaska, North Dakota, and the District of Columbia has increased civil and criminal fines and fees.<sup>52</sup> As state and local governments have moved aggressively to collect on so-called court debt, we have seen another way in which the justice system penalizes poor people: the return of debtor's prisons—a blatantly unconstitutional practice.<sup>53</sup> Other egregious court collection practices, such as driver's license suspensions, also criminalize poverty.<sup>54</sup>

Many Americans first heard or read about fines and fees as a result of the Justice Department's investigation of the Ferguson, Missouri police department. In 2015, Ferguson City anticipated that 23% of the City of Ferguson's revenue would come from court fines and fees.<sup>55</sup> The city imposed steep fines and fees for a range of minor offenses, including \$302 for jaywalking, \$427 for disturbing the peace, and \$531 for allowing high grass or weeds to grow on your lawn.<sup>56</sup> When people could not afford to pay these fines and fees,

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51. Even when fees are imposed for financing the justice system, they often hurt poor people the most. In at least forty-three states, even if a defendant qualifies for a public defender because of indigency, that person can be billed for the cost of the appointed defender. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>. Many jurisdictions charge defendants to apply for a defender before an attorney is appointed; some charge during or after a case has concluded for the cost of representation. In Florida and Ohio, individuals are required to pay defender fees even if they are acquitted or have charges dropped. Marian Wang, *Low-Income Criminal Defendants Face Mounting Fees, Even for Public Defenders*, PROPUBLICA (Oct. 6, 2010, 10:49 AM), <https://www.propublica.org/blog/item/criminal-defendants-often-face-mounting-fees-even-for-public-defenders>.

52. Russell Simmons, *How We Fund Our Criminal Justice System*, HUFFINGTON POST: THE BLOG (July 12, 2016, 5:00 PM), [http://www.huffingtonpost.com/russell-simmons/how-we-fund-our-criminal\\_b\\_10949090.html](http://www.huffingtonpost.com/russell-simmons/how-we-fund-our-criminal_b_10949090.html).

53. *Cf. Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

54. See Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., Civil Rights Div., Dep't of Justice, and Lisa Foster, Director, Office for Access to Justice, to Colleagues 6 (Mar. 14, 2016) [hereinafter Gupta and Foster Letter], <https://www.justice.gov/crt/file/832461/download>.

55. Michael Martinez, Alexandra Meeks & Ed Lavandera, *Policing for Profit: How Ferguson's Fines Violated Rights of African-Americans*, CNN (Mar. 6, 2015, 10:55 PM), <http://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/>.

56. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T 52 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

they were arrested, jailed, and faced payments that far exceeded the cost of the original ticket.<sup>57</sup> To cite just one example, an African-American woman had a case stemming from 2007, when, on a single occasion, she parked her car illegally.<sup>58</sup> She received two citations and was assessed \$151 in fines and fees and put on a payment plan.<sup>59</sup> The woman, who experienced financial difficulties and periods of homelessness over several years, could not always make her payments.<sup>60</sup> From 2007 to 2014, she was arrested twice, spent six days in jail, and paid \$550 to the court for the events stemming from this single instance of illegal parking.<sup>61</sup> Court records show that she twice attempted to make partial payments of \$25 and \$50, but the court returned those payments, refusing to accept anything less than payment in full.<sup>62</sup> As of December 2014, over seven years later, despite initially owing \$151 and having already paid \$550, she still owed the City of Ferguson \$541.<sup>63</sup>

Ferguson is not alone. Lorenzo Brown, a 58-year old disabled resident of Montgomery, Alabama, whose only income is a Social Security disability check, was arrested at his boarding house by police in 2014 for failure to pay court fines and fees arising from traffic tickets issued in 2010.<sup>64</sup> Mr. Brown was kept in jail for 3 days before he was brought to court where a municipal court judge told him he could be released if he paid \$1400—half of the total amount he owed and twice the amount of his monthly disability check.<sup>65</sup> Without conducting any inquiry into his ability to pay, the judge ordered him to serve 44 days in city jail to sit out debt at the rate of \$50 per day.<sup>66</sup> In Michigan, an unemployed 19-year old man was arrested and incarcerated after failing to pay a \$155 fine for catching

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57. *Id.* at 4.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. U.S. DEP'T OF JUSTICE, *supra* note 56, at 4.

63. *Id.*

64. First Amended Class Action Complaint at 6, *Mitchell v. City of Montgomery*, 2014 U.S. Dist. LEXIS 195207 (M.D. Ala. Nov. 17, 2014) (No. 2: 14-cv-186-MEF).

65. *Id.* at 7.

66. *Id.* at 1.

a fish out of season.<sup>67</sup> He was able to pay \$175 to a bail bond company to get out of jail, but then could not pay the original fine, so he went back to jail.<sup>68</sup> Vera Cheeks, of Bainbridge, Georgia, was cited for rolling through a stop sign in 2013.<sup>69</sup> The municipal court judge assessed a \$135 fine.<sup>70</sup> Ms. Cheeks did not have \$135, and the only way to pay the fine over time was to be put on probation, under the supervision of a private company that charged her an additional \$132 for three months of supervision.<sup>71</sup> In court that day, her probation officer told her she would have to report to him in person every week and make the payments due or a warrant would be issued and she would be arrested.<sup>72</sup> He demanded \$50 immediately.<sup>73</sup> Her fiancé pawned her engagement ring and a Weed Eater so she could leave the building.<sup>74</sup>

The breadth and depth of the problem is difficult to overestimate. In the United States today, approximately 6,500 municipal courts operate in 34 states, although they often go by different names such as city courts, justice courts, or mayor's courts.<sup>75</sup> Some states have just a handful; others, like Texas and New York, have over one thousand.<sup>76</sup> Many of the municipal courts are part time, and in 28 states, one does not have to be a lawyer to be a judge.<sup>77</sup> Until 2012, in Arkansas, the mayor, by law, was the judge.<sup>78</sup>

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67. Ed Spillane, *Why I Refuse to Send People to Jail for Failure to Pay Fines*, WASH. POST (Apr. 8, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/?utm\\_term=.2b97c3c55144](https://www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/?utm_term=.2b97c3c55144).

68. *Id.*

69. Carrie Teegardin, *Ticket Torment: Georgia Probation Systems Ensnare Those Too Poor to Pay Traffic Fines*, ATL. J.-CONST. (Nov. 22, 2014, 12:00 AM), <http://www.myajc.com/news/crime—law/ticket-torment/X8g1muJFCrI0TufIJRwBkM/>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, RESOURCE GUIDE: REFORMING THE ASSESSMENT AND ENFORCEMENT OF FINES AND FEES 2 (2016), <https://ojp.gov/docs/finesfeesresguide.pdf>.

76. Lisa Foster, Director, Office for Access to Justice, Address at the American Bar Association's Annual Summit on Public Defense (Feb. 6, 2016), <https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit>.

77. See *Methods of Judicial Selection*, NAT'L CTR. FOR STATE COURTS, [http://www.judicialselection.us/judicial\\_selection/methods/limited\\_jurisdiction\\_courts.cfm?state](http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state) (last

The problem of fines and fees is not confined to municipal courts. State and local governments have increased fines and fees on all criminal defendants, including juveniles.<sup>79</sup> Many jurisdictions today are enforcing court debt against children or their parents or guardians.<sup>80</sup> In Sacramento County, California, for example, juvenile fees average \$4,895.<sup>81</sup> In Alameda County, until a recent moratorium was imposed, the average court debt imposed in a juvenile delinquency case was \$2,861, but the average for black children was \$3,438, while the average for white children was \$1,192.<sup>82</sup>

Without question, courts have the authority to punish people who willfully refuse to pay a fine, but the court must first determine that the failure to pay was in fact willful, and that means determining that the person had the ability to pay the amount owed.<sup>83</sup> To do otherwise would amount to “no more than imprisoning a person solely because he lacks funds to pay a fine.”<sup>84</sup> And that is unconstitutional.<sup>85</sup> Instead, judges must inquire as to a person’s ability to pay prior to imposing incarceration for nonpayment.<sup>86</sup> Courts have an affirmative duty to conduct these inquiries and should do so *sua sponte*.<sup>87</sup> Further, a court’s obligation to conduct indigency inquiries endures throughout the life of a case.<sup>88</sup> A person may lose his or her job or suddenly require expensive medical care, leaving him or her in precarious financial circumstances. For that reason, a missed payment cannot itself be sufficient to trigger a person’s arrest or detention unless the court inquires anew into the reasons for the person’s non-payment

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visited Apr. 9, 2017).

78. See ARK. CODE ANN. § 16-18-112 (repealed 2012).

79. See BERKELEY L., UNIV. OF CAL., POL’Y ADVOCACY CLINIC, HIGH PAIN, NO GAIN: HOW JUVENILE ADMINISTRATIVE FEES HARM LOW-INCOME FAMILIES IN ALAMEDA COUNTY, CALIFORNIA 3 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2738710](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738710).

80. See *id.* at 5.

81. *Id.* at 15.

82. *Id.* at 9, 15.

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

84. *Id.* at 674.

85. *Id.*

86. *Id.* at 672.

87. *Id.*

88. *Id.* at 670.

and determines that it was willful.<sup>89</sup> For those who cannot afford to pay, the court must consider alternatives to incarceration.<sup>90</sup> These can include extending the time for payment, reducing the debt, requiring the defendant to attend traffic or public safety classes, participating in mental health or substance abuse counseling, attending school, or imposing community service.<sup>91</sup>

Even in jurisdictions that do not incarcerate people for failure to pay court debt, there are other collection practices that exacerbate and criminalize poverty.<sup>92</sup> The most common is driver's license suspensions.<sup>93</sup> In many jurisdictions, courts are authorized, and in many instances required, to initiate the suspension of a person's driver's license to compel the payment of outstanding court debt.<sup>94</sup> Often these suspensions are automatic; there is no hearing in advance of the suspension, and often there is no ability to obtain a hearing after the suspension occurs.<sup>95</sup> In Virginia, 900,000 people—or one in six drivers—have had their licenses suspended under these circumstances.<sup>96</sup> In California, from 2006 to 2013, the California Department of Motor Vehicles suspended more than 4.2 million driver's licenses for nonpayment of fines and fees.<sup>97</sup>

The consequences of license suspensions can be harsh. People depend on their driver's licenses to get to work, to get themselves or their families to the doctor, or their children to school.<sup>98</sup> From a

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89. *Bearden*, 461 U.S. at 672–73.

90. *Id.* at 672.

91. *See, e.g.*, O.C.G.A. § 42-8-102 (2015). Recognizing this constitutional imperative, some jurisdictions have codified alternatives to incarceration in state law. *See, e.g.*, O.C.G.A. § 42-8-102(f)(4)(A) (providing that for “[f]ailure to report to probation or failure to pay fines, statutory surcharges, or probation supervision fees, the court shall consider the use of alternatives to confinement, including community service”).

92. *See* ALEX BENDER ET AL., W. CTR. ON L. AND POVERTY, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 6 (2015), <https://wclp.org/wp-content/uploads/2015/04/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California.pdf>.

93. *Id.*

94. *Id.* at 6, 15.

95. *Id.* at 6, 12.

96. *See* Statement of Interest of the United States at 4, *Stinnie v. Holcomb*, No. 3:16-CV-00044, (W.D.V.A. 2016).

97. *See* BENDER ET AL., *supra* note 92, at 13, 26 n.40.

98. *Id.* at 6–7.

public policy perspective, suspending driver's licenses makes no sense. If the goal is for people to pay their court debt, why would we make it more difficult for them to get to work? As a practical matter, people whose licenses are suspended often drive anyway—because they have to get to work, or to the doctor, or to their children's school.<sup>99</sup> If they are stopped by law enforcement, they then get a ticket for driving on a suspended license, which in many states is a misdemeanor.<sup>100</sup> More fines and fees are imposed, and they may be incarcerated—all and simply because they are poor.<sup>101</sup>

### *C. Access to Counsel*

The final example of the ways in which the justice system enforces poverty concerns the absence of effective legal assistance in the civil justice system. Every day, Americans confront life-altering civil legal problems like foreclosure, eviction, unemployment, debt, and domestic violence, and most low- and moderate-income people do so without effective legal assistance.<sup>102</sup> There is no federal constitutional right to counsel in civil cases, and typically, state laws and constitutions only provide counsel in juvenile dependency actions when the state is attempting to remove children from their parents.<sup>103</sup>

Three barriers conspire to limit access to justice for low- and middle-income people. They are structural, economic, and epistemological. The structural impediment has existed from the outset. Our justice system was constructed by and for lawyers.<sup>104</sup> It rests largely on the premise that everyone has a lawyer, and it works reasonably well if that is true.<sup>105</sup> In our civil justice system today,

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99. *Id.* at 20.

100. *See id.*

101. *See id.*

102. *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 1 (2009).

103. *See* Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016, 9:03 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/>.

104. *See* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36, 36 (2002).

105. *See id.*

however, many people do not have lawyers to represent them, and in some areas of the law, many is most.<sup>106</sup> Our best estimate is that in at least 80% of family law cases—child support, child custody, divorce—at least one party is unrepresented.<sup>107</sup> Our best estimate is that 90% of tenants in eviction cases represent themselves.<sup>108</sup>

The reason people represent themselves is because lawyers are expensive—the economic barrier to access to justice. In 2013, the national average hourly rate for a law firm partner is \$536 per hour; for an associate, the average was \$370 per hour.<sup>109</sup> The cost of a lawyer is simply out of reach for any one living at or near the poverty level. A family of four living in poverty would spend over half of its weekly income for an hour of a lawyer's time.<sup>110</sup> An individual working at minimum wage could spend an entire week's wages for an hour of a lawyer's time.<sup>111</sup>

That is only one part of the economic equation; the other is the lack of resources for the organizations that provide civil legal aid. Most civil legal aid in the United States is provided through public-private partnerships, typically some federal, state, or local dollars are provided to non-profit organizations that provide services.<sup>112</sup> The primary and largest source of federal funding for legal services is the Legal Services Corporation (LSC).<sup>113</sup> In 2015, the budget for LSC was \$375 million—less than what the government of the Netherlands spends on legal services for a country with roughly 5% of our

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106. See LEGAL SERVS. CORP., *supra* note 102, at 23–25.

107. Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts*, 1 CAL. L. REV. CIR. 15, 15 (2010). The reason there are only estimates is because most courts do not track or otherwise measure the number of self-represented litigants in civil cases. See LEGAL SERVS. CORP., *supra* note 102, at 2.

108. LEGAL SERVS. CORP., *supra* note 102, at 25.

109. Debra Cassens Weiss, *Average Hourly Billing Rate for Partners Last Year Was \$727 in Largest Law Firms*, A.B.A. J. (July 15, 2013, 6:33 PM), [http://www.abajournal.com/news/article/average\\_hourly\\_billing\\_rate\\_for\\_partners\\_last\\_year\\_was\\_727\\_in\\_largest\\_law\\_f/](http://www.abajournal.com/news/article/average_hourly_billing_rate_for_partners_last_year_was_727_in_largest_law_f/).

110. See AMANDA NOSS, U.S. CENSUS BUREAU, HOUSEHOLD INCOME: 2013, at 3 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-02.pdf>.

111. Sam Glover, *We Can Close the Access-to-Justice Gap, but You're Not Going to Like It*, LAWYERIST.COM (Nov. 10, 2013), <https://lawyerist.com/70936/can-close-access-justice-gap-youre-going-like/>.

112. *Civil Legal Aid Funding*, NAT'L LEGAL AID & DEF. ASS'N., <http://www.nlada.org/tools-and-technical-assistance/civil-resources/civil-legal-aid-funding> (last visited Feb. 18, 2017).

113. See LEGAL SERVS. CORP., *supra* note 102, at 5.



population.<sup>114</sup> Put differently, in 2013, the 124 offices funded by the Legal Services Corporation served approximately 1.8 million people—four percent of the people living in poverty.<sup>115</sup> As a result, half of the people who walk in the door of a legal aid office are turned away.<sup>116</sup>

The third barrier to access to legal services is epistemological. Although civil justice problems are widespread and frequently experienced,<sup>117</sup> Americans “do not think of their justice problems in legal terms.”<sup>118</sup> Many people fail to connect the problems they are experiencing with law or rights.<sup>119</sup> Instead, they often understand the problem as a social problem, a moral problem, a private problem, or simply bad luck.<sup>120</sup> An immigrant woman from Somalia may not know the law protects her from an abusive husband or that there is something called a domestic violence restraining order; a worker injured on the job may think the accident was simply bad luck; a man whose girlfriend will not allow him to see their children may believe the dispute is personal.

On the ground, the lack of access to civil legal assistance means that poor and moderate income people are exploited in ways that exacerbate their precarious financial status.<sup>121</sup> Imagine a single mother working a minimum wage job whose daughter gets sick. Mom misses a week of work, and her landlord files to evict her. She may not know that the fact that her roof leaks and that she did not have heat for half the winter is a defense to nonpayment of rent. Because of work or childcare, she may not be able to come to court at 9:00 in the morning or 1:30 in the afternoon when her hearing is

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114. OPEN SOC’Y JUSTICE INITIATIVE, LEGAL AID IN: NETHERLANDS 1 (2015); *LSC Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/lsc-funding> (last visited Feb. 13, 2017).

115. Buckwalter-Poza, *supra* note 103.

116. *Id.*

117. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 56–59 (2010).

118. *Id.* at 78 n.96.

119. *Id.* at 80.

120. *Id.*

121. LISA STIFLER & LESLIE PARRISH, CTR. RESPONSIBLE LENDING, DEBT COLLECTION & DEBT BUYING: THE STATE OF LENDING IN AMERICA & ITS IMPACT ON U.S. HOUSEHOLDS 20 (2014), <http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf>.

scheduled. She may not come to court because she thinks that an uninhabitable apartment is what she paid for. She may just move, likely to an even lower rent and less habitable apartment, and ultimately, she may end up homeless. If she comes to court, she likely represents herself. As noted, 90% of tenants are self-represented, but 90% of landlords have lawyers.<sup>122</sup> Without legal assistance, she likely does not know that she has defenses. The judge is not likely to ask her, and she will likely lose the case.<sup>123</sup> In his seminal and award-winning book, *Evicted*, Mathew Desmond explains what happens next:

Losing your home and possessions and often your job; being stamped with an eviction record and denied government housing assistance; relocating to degrading housing in poor and dangerous neighborhoods; and suffering from increased material hardship, homelessness, depression, and illness—this is eviction’s fallout. Eviction does not simply drop poor families into a dark valley, a trying yet relatively brief detour on life’s journey. It fundamentally redirects their way, casting them onto a different and more difficult path. Eviction is a cause, not just a condition, of poverty.<sup>124</sup>

Another pervasive problem low income people often face without counsel is debt collection.<sup>125</sup> Consumer debt is rarely collected by the original lender; delinquent debt is sold to debt collection companies—often repeatedly—which then attempt to collect from the debtor.<sup>126</sup> Ultimately, a complaint may be filed and sent to the last known address of the debtor—a form of service one agrees to in

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122. Buckwalter-Poza, *supra* note 103.

123. D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 908–09 (2013).

124. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY*, 298–99 (2016).

125. STIFLER & PARRISH, *supra* note 121, at 3.

126. *Id.* at 2.

many credit card contracts.<sup>127</sup> The defendant likely does not live there any longer; there may not be a forwarding address; the statute of limitations may have run on the collection action; the company collecting the debt may or may not have the documentation needed to prove their claim.<sup>128</sup> They file the case anyway because they know that the default rate for collection cases is well over 50%.<sup>129</sup> Defendants who do get notice often do not know that the claim may be time-barred; they do not know that the company cannot prove its case; they may assume that if they did not pay an old bill, they are liable for whatever interest and fees have been added to their original debt.<sup>130</sup> If defendants do come to court, they usually represent themselves, while the debt collection company is represented by counsel.<sup>131</sup> Debt collectors typically win.<sup>132</sup> Whether by default or after a hearing, the debt collector secures an enforceable judgment, which in many states allows the company to garnish the defendant's wages or even attach a bank account—often without notice.<sup>133</sup>

It may not be self-evident why the lack of access to civil legal assistance—and its attendant consequences—is the fault of the court. There is no constitutional right to counsel in civil cases that judges are failing to uphold; there is no obvious unconstitutional practice being perpetrated by the court.<sup>134</sup> The problem is that many courts, and in particular many judges, do not treat self-represented litigants fairly or apply the law rigorously and that allows for economic exploitation to occur.<sup>135</sup> In a groundbreaking study, University of

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127. *Id.* at 13.

128. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, CONSUMER EXPERIENCES WITH DEBT COLLECTION 24 (2017), [http://files.consumerfinance.gov/f/documents/201701\\_cfpb\\_Debt-Collection-Survey-Report.pdf](http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf); STIFLER & PARRISH, *supra* note 121, at 3.

129. Jessica Mendoza et al., *Collection Claims Abuses Move Up to Higher Courts*, BOS. GLOBE (Mar. 28, 2015), <https://bostonglobe.com/metro/2015/03/28/new-restrictions-debt-collectors-district-court/sIMWIBGAjooNXc1QomaNpM/story.html>; STIFLER & PARRISH, *supra* note 121, at 13.

130. *See* STIFLER & PARRISH, *supra* note 121, at 10; *Consumer Information: Time-Barred Debts*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/articles/0117-time-barred-debts> (last visited Apr. 11, 2017).

131. STIFLER & PARRISH, *supra* note 121, at 20.

132. *Id.*

133. *Id.*

134. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOC. REV. 909, 925 (2015).

135. *Id.*

Illinois Professor Rebecca Sandefur examined the difference a lawyer makes in a civil case.<sup>136</sup> Her conclusion was striking: “[K]nowledge of substantive law explains surprisingly little of lawyers’ advantage compared to lay people appearing unrepresented. Instead, lawyers’ impact is greatest when they assist in navigating relatively simple (to lawyers) procedures and where their relational expertise helps courts follow their own rules.”<sup>137</sup>

If court procedures are difficult for self-represented litigants to navigate, an obvious solution is to simplify them—an effort that is, with greater or lesser success, ongoing in many jurisdictions. The more significant issue is Professor Sandefur’s conclusion that the presence of a lawyer in a civil courtroom causes judges to follow the rules.<sup>138</sup> In other words, due process happens when lawyers are present to enforce it. Instead of reviewing a debt collection company’s case to assess affirmatively whether the complaint was filed within the statute of limitations or whether the company has the documents required under state law to prove its case, many judges simply sign the default judgment that the company’s lawyer presents. Instead of making a finding that notice in an unlawful detainer action was legally sufficient or asking defendants affirmatively whether there are any habitability issues that may serve as a defense to an eviction action, many judges believe the antiquated maxim that the court must treat self-represented litigants exactly as it treats attorneys.<sup>139</sup> In fairness, many judges do not realize that they have the authority to scrutinize a default judgment, examine a notice, or ask questions of a self-represented litigant. Others have so many cases on their docket that the imperative to process rather than adjudicate cases is overwhelming. But the result is that in the civil justice system, self-represented litigants often lose and often when they should not.<sup>140</sup>

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136. *Id.* at 909.

137. *Id.*

138. *Id.* at 925.

139. JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS 3-1 (2007).

140. Sandefur, *supra* note 134, at 914. The failure of the judiciary to uphold the law when lawyers are not present also explains, in part, why, despite the fact that it is unconstitutional, judges set bail and jail

*D. Reasons for and Efforts to Reform*

These are just a few of the ways in which our justice system is perpetuating, exacerbating, and criminalizing poverty. The courthouse has become *Bleak House*. The consequences of our justice system not only wreak havoc on people's lives and destabilize communities, they also threaten to undermine our democracy. In a recent article published in the Iowa Law Review, Duke Law School Professor Sara Sternberg Greene described the findings from research she conducted among public housing residents in Massachusetts.<sup>141</sup> People profoundly distrust the justice system. As one of her respondents complained, "it's all law and courts and bad. Stay away from the law, that is my MO."<sup>142</sup> Indeed, the most disturbing finding of her research is that people's experiences with the justice system—what they perceived as a degrading and humiliating process with unfair results determined largely by whether you can afford an expensive lawyer—have convinced them to avoid the justice system even when they have a legal problem, even when they have a good defense or a strong claim.<sup>143</sup> Poor people's deep distrust of the justice system applies equally to our civil and criminal justice systems. Indeed, one conclusion Professor Greene reached was that for most people, the civil and criminal justice systems are one and the same.<sup>144</sup> As she observed, "for most poor respondents there is little difference

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people for failure to pay fines and fees without considering the defendant's ability to pay. Gupta and Foster Letter, *supra* note 54, at 1–2. Contrary to my experience in San Diego, in many, if not most jurisdictions, counsel is not present at a defendant's first appearance when bail is set or subject to review. Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 23 (2016). Even when defendants are represented, their public defenders are typically toiling under crushing caseloads and with inadequate resources. Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 24, 25 (2011). Far too often, they are able to do little more than "meet and plead" their client. *Id.* at 27, 30. Lawyers are rarely, if ever, present when fines and fees are imposed or defendants are incarcerated for failure to pay them. Bunin, *supra*, at 23.

141. Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1288–1313 (2016).

142. *Id.* at 1289.

143. *Id.* at 1288–89. The lack of trust in the justice system, however, was not uniform. When asked if they trust the courts, 75% of white respondents said that they did, but only 22% of the black people Professor Greene interviewed agreed. *Id.* at 1301–02.

144. *Id.* at 1288.

between the two systems. Court is court. The law is the law. Lawyers are lawyers. Judges are judges.”<sup>145</sup>

That experience of the law makes sense because while I have discussed bail, fines, fees, and the lack of access to legal assistance separately, in life they do not neatly disaggregate. A woman who cannot afford to pay the fines and fees imposed for a parking ticket may wind up in jail if she does not pay her court debt.<sup>146</sup> If she is in jail, she cannot work and cannot pay her rent. She gets evicted. At a minimum, she will have her driver’s license suspended, which may, in any event, land her in jail if she drives her daughter to school or to the hospital in an emergency.<sup>147</sup> Poor people caught in the justice system are trapped. And once they are in the system, the collateral consequences of an eviction, an arrest record, or a criminal conviction make it difficult, if not impossible, to get a job, housing, an education, public assistance, or access to credit.<sup>148</sup> It becomes impossible even to get a toehold on the proverbial ladder out of poverty.

Despite the fact that, as former Attorney General Lynch observed, “too many of our fellow citizens, especially low-income Americans and Americans of color . . . experience the law not as a guarantee of equality, but as an obstacle to opportunity,”<sup>149</sup> there is hope. Over the last few years, Alaska, Kentucky, Maryland, New Mexico, and New Jersey all enacted statewide bail reform, either legislatively or through changes in court rules.<sup>150</sup> New York, California, and

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145. *Id.* at 1290.

146. *Pennsylvania Woman Jailed for Failure to Pay Parking Tickets*, PRISON LEGAL NEWS (Jan. 15, 2014), <https://www.prisonlegalnews.org/news/2014/jan/15/pennsylvania-woman-jailed-for-failure-to-pay-parking-tickets/>.

147. *See, e.g.*, FLA. STAT. § 322.34 (West 2016).

148. For an overview of potential collateral consequences in each state, see *National Inventory of the Collateral Consequences of Conviction*, JUSTICE CTR., COUNCIL OF STATE GOV’TS, <https://niccc.csgjusticecenter.org/>.

149. Att’y Gen. Loretta E. Lynch, Remarks at the Eighth Annual Judge Thomas A. Flannery Lecture (Nov. 15, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-eighth-annual-judge-thomas-flannery>.

150. Press Release, Pretrial Justice Institute, PJI Commends Alaska’s Criminal Justice Reforms (July 11, 2016), <http://www.pretrial.org/pji-commends-alaskas-criminal-justice-reforms/>; Marc Levin, *Pretrial-Justice Reform: An Old Idea Gains New Momentum*, REAL CLEAR POLICY (Nov. 30, 2016), [http://www.realclearpolicy.com/articles/2016/11/30/pretrial-justice\\_reform\\_an\\_old\\_idea\\_gains\\_new\\_momentum\\_110103.html](http://www.realclearpolicy.com/articles/2016/11/30/pretrial-justice_reform_an_old_idea_gains_new_momentum_110103.html) (describing reforms in Kentucky and

Colorado have pending bail reform measures, suggesting strongly that we are reaching a tipping point on the issue of bail.<sup>151</sup> The Justice Department has been actively advocating bail reform in the states for many years. The Department convened a National Symposium on Pretrial Justice in 2011.<sup>152</sup> During their tenures, both Attorney Generals Holder and Lynch spoke out about the injustice of incarcerating the accused pretrial simply because they are poor.<sup>153</sup> As noted, the Department has filed briefs explaining why bail practices that do not consider a defendant's ability to pay are unconstitutional.<sup>154</sup> The Department's efforts are not unique. Advocates have sued state and local jurisdictions challenging their bail practices and together with public defenders and organizations like the Pretrial Justice Institute, have advocated for reform.<sup>155</sup>

Similarly, on the issue of fines and fees, there has been remarkable progress since the Department released its Ferguson Report.<sup>156</sup> In December of 2015, the Department and the White House convened judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals to raise awareness of and address solutions to the unlawful assessment and enforcement of fines and fees.<sup>157</sup> Vanita Gupta, the former head of the Civil Rights

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New Jersey); Nick Wing, *Maryland Court Overhauls Bail System That Jails Defendants Just Because They're Poor*, HUFFINGTON POST (Feb. 8, 2017, 4:59 PM), [http://www.huffingtonpost.com/entry/maryland-bail-reform\\_us\\_589b5ee8e4b0c1284f29f29c](http://www.huffingtonpost.com/entry/maryland-bail-reform_us_589b5ee8e4b0c1284f29f29c); Nick Wing, *New Mexico Votes to Reform Bail System that Jails People Just Because They're Poor*, HUFFINGTON POST (Nov. 8, 2016, 10:52 PM), [http://www.huffingtonpost.com/entry/new-mexico-amendment-1\\_us\\_5817a3cfe4b0990edc32ed05](http://www.huffingtonpost.com/entry/new-mexico-amendment-1_us_5817a3cfe4b0990edc32ed05).

151. Press Release, Gov. Andrew M. Cuomo, Governor Cuomo Presents the 12th Proposal of the 2017 State of the State Agenda: Launching the "New York Promise" Agenda to Advance Social Justice and Affirm New York's Progressive Values (Jan. 9, 2017), <https://www.governor.ny.gov/news/governor-cuomo-presents-12th-proposal-2017-state-state-agenda-launching-new-york-promise-agenda> (New York's pending bail reform measure); Press Release, Sen. Robert Hertzberg, Hertzberg Unveils Legislation to Reform Money Bail (Dec. 5, 2016), <http://sd18.senate.ca.gov/news/1252016-hertzberg-unveils-legislation-reform-money-bail> (California's pending bail reform measure); Wing, *supra* note 150 (Colorado's pending bail reform measure).

152. *Id.*

153. *Id.*

154. Brief for the United States as Amici Curiae Supporting Plaintiff-Appellee, *supra* note 43, at 12.

155. See, e.g., *The Solution*, PRETRIAL JUSTICE INST., <http://www.pretrial.org/solutions> (last visited Feb. 18, 2017).

156. Christopher Zoukis, *Ferguson, Missouri Under Fire for Revenue-Based Criminal Justice System*, PRISON LEGAL NEWS (Dec. 8, 2016), <https://www.prisonlegalnews.org/news/2016/dec/8/ferguson-missouri-under-fire-revenue-based-criminal-justice-system/>.

157. Press Release, U.S. Dep't of Justice, Fact Sheet on White House and Justice Department

Division, and I sent a letter to every state Chief Justice and every state court Administrator explaining their legal obligations with respect to fines and fees and sharing best practices.<sup>158</sup> The Department also provided funding to five states willing to pilot reform.<sup>159</sup> Former Assistant Attorney General Karol Mason and I signed an Advisory on the legal and policy framework that should govern fines and fees in juvenile courts.<sup>160</sup> The Conference of Chief Justices and the Conference of State Court Administrators formed a National Task Force on Fines, Fees and Bail Reform that is developing recommendations and resources for courts.<sup>161</sup> In Jackson and Biloxi, Mississippi, in Benton County, Washington, in Rutherford County, Tennessee, in Jennings, Missouri, in Montgomery, Alabama, in New Orleans, and in other jurisdictions throughout the country, public interest advocates like the ACLU, Civil Rights Corps, Equal Justice Under Law, the Southern Poverty Law Center, and the Southern Center for Human Rights, often with the assistance of pro bono lawyers, have either settled or won law suits challenging debtors' prisons.<sup>162</sup> In Virginia, advocates filed suit against the state's practice of suspending driver's licenses for unpaid court debt without first conducting an ability-to-pay hearing.<sup>163</sup> The

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Convening—A Cycle of Incarceration: Prison, Debt and Bail Practices (Dec. 3, 2015), <https://www.justice.gov/opa/pr/fact-sheet-white-house-and-justice-department-convening-cycle-incarceration-prison-debt-and>.

158. Gupta and Foster Letter, *supra* note 54, at 1.

159. U.S. Dep't of Justice, *supra* note 157.

160. U.S. DEP'T OF JUSTICE, OFFICE FOR ACCESS TO JUSTICE, ADVISORY FOR RECIPIENTS OF FINANCIAL ASSISTANCE FROM THE U.S. DEPARTMENT OF JUSTICE ON LEVYING FINES AND FEES ON JUVENILES (2017), <https://ojp.gov/about/ocr/pdfs/AdvisoryJuvFinesFees.pdf>.

161. Press Release, Nat'l Ctr. for State Courts, Top National State Court Leadership Associations Launch National Task Force on Fines, Fees and Bail Practices (Feb. 3, 2016), <http://www.ncsc.org/Newsroom/News-Releases/2016/Task-Force-on-Fines-Fees-and-Bail-Practices.aspx>.

162. *Fuentes v. Benton County*, AM. CIVIL LIBERTIES UNION (June 1, 2016), <https://www.aclu.org/cases/fuentes-v-benton-county>; *Shutting Down Debtors' Prisons*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/ending-debtors-prisons/> (last visited Feb. 13, 2017) (describing lawsuits in Alabama, Louisiana, Mississippi, and Missouri); Michelle Willard, *Suit Against Rutherford County, PCC Will Continue*, DAILY NEWS J. (Mar. 23, 2016, 9:14 AM), <http://www.dnj.com/story/news/local/2016/03/22/suit-against-county-pcc-continue/82112016/>.

163. *DOJ: Virginia Driver's License Suspension Law Is Unconstitutional*, WHSV (Nov. 14, 2016, 11:06 AM), <http://www.wHSV.com/content/news/DOJ-Virginia-drivers-license-suspension-law-is-unconstitutional-401114276.html>.



Justice Department filed a statement of interest in the case advancing the United States' position that suspending a driver's license is unconstitutional if it is done without providing due process and without assessing whether the individual's failure to pay was willful or the result of an inability to pay.<sup>164</sup> Similar suits in California and Tennessee were recently filed.<sup>165</sup>

Individual judges have also found the courage to stand up to prevailing practices and conduct themselves and their courtrooms differently. Judge Ed Spillane, a municipal court judge in College Station, Texas, wrote an op-ed in the *Washington Post* entitled "Why I Refuse to Send People to Jail for Failure to Pay Fines";<sup>166</sup> Judge Marcia Morey, Chief District Court Judge in Durham County, North Carolina, explained in the *News and Observer* what happens "When Traffic Court Becomes Debtors Prison."<sup>167</sup> In Arizona, Missouri, Ohio, and Texas, the Chief Justices have all championed changes to court rules that would mandate ability-to-pay determinations before any defendant is incarcerated for failure to pay fines and fees.<sup>168</sup> And, in January, the Alabama Court of the Judiciary found Judge Lester Hayes, Presiding Judge of the Montgomery Municipal Court, guilty of seven charges of violating the Canons of Judicial Ethics for routinely sending defendants to jail for failure to pay fines and fees without first conducting an ability-to-pay determination.<sup>169</sup> The court

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164. Press Release, U.S. Dep't of Justice, Justice Department Files Brief to Address Automatic Suspensions of Driver's Licenses for Failure to Pay Court Debt (Nov. 7, 2016), <https://www.justice.gov/opa/pr/justice-department-files-brief-address-automatic-suspensions-driver-s-licenses-failure-pay>.

165. Complaint, Thomas & Hixson v. Haslam, No. 3:17-cv-00005 (M.D.Tenn. Jan. 04, 2017); Press Release, Am. Civil Liberties Union, Low-Income Drivers Sue California DMV for Illegally Suspending Licenses (Oct. 25, 2016), <https://www.aclunc.org/news/low-income-drivers-sue-california-dmv-illegally-suspending-licenses>.

166. See Spillane, *supra* note 67.

167. See Marcia Morey, *When Traffic Court Becomes Debtors' Prison*, NEWS & OBSERVER (Apr. 19, 2016, 11:44 AM), <http://www.newsobserver.com/news/local/community/durham-news/dn-opinion/article72612127.html>.

168. See, e.g., *Money or Justice? How Fees and Fines Have Contributed to Deep Distrust of the Courts—and What Chief Judges Are Doing About It*, JUDICATURE, Winter 2016, at 43; SUPREME COURT OF ARIZ., TASK FORCE ON FAIR JUSTICE FOR ALL, JUSTICE FOR ALL 15–16 (2016), <http://www.azcourts.gov/LinkClick.aspx?fileticket=bmEC0PU-FD8%3D&portalid=74>.

169. Agreement and Stipulation of the Parties at 1, 2, 4, 13, 14, *In re Hayes*, No. 49 (Ala. Jud. Ct. Nov. 17, 2016).

suspended Judge Hayes without pay for 11 months, and taxed him with the cost of investigating and adjudicating the proceedings.<sup>170</sup>

There has also been progress with respect to the provision of effective legal assistance in civil cases. In 2010, the U.S. Department of Justice created the Office for Access to Justice (ATJ) whose “mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.”<sup>171</sup> Among many other initiatives, ATJ created what is now known as the White House Legal Aid Interagency Roundtable.<sup>172</sup> Comprised of twenty-one federal agencies committed to better serving low-income people and vulnerable populations by encouraging federal agency partnerships with civil legal aid,<sup>173</sup> the Roundtable has unlocked millions of dollars of federal funds for civil legal aid providers.

Courts, too, have recognized the need to better assist civil litigants. The Conference of Chief Justices and the Conference of State Court Administrators both adopted a resolution supporting the goal of 100% access to effective assistance for essential civil legal needs and urging their members to work with their state Access to Justice Commissions or other entities to develop a strategic plan with realistic and measurable outcomes. Toward that end, the Public Welfare Foundation recently launched the Justice for All project and funded seven states to assess effective access to justice and strategic action plans to implement the resolution.<sup>174</sup>

Overwhelmed by self-represented litigants, several courts have adopted innovative reforms. In New York, the Court Navigator Program trains college students, law students, and other volunteers to assist unrepresented litigants in housing court and in consumer debt

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170. *Id.*

171. *Office for Access to Justice Home*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atj> (last visited Apr. 12, 2017).

172. *White House Legal Aid Interagency Roundtable*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/lair> (last visited Apr. 12, 2017).

173. *Id.*

174. *Justice for All Project Grants Announced*, PUB. WELFARE FOUND. (Nov. 10, 2016), <http://www.publicwelfare.org/justice-for-all-project-grants-announced/>.

cases in civil court.<sup>175</sup> In California, the Court has created Justice Corps, a national service program that has helped over one million Californians.<sup>176</sup> Three hundred Justice Corps members volunteer to serve people coming to court without an attorney, helping them resolve crucial legal matters affecting their families, housing, personal safety, and financial stability.<sup>177</sup>

Much more needs to be done. First, we need to change court culture and restore people's faith in the justice system. That will require fundamentally shifting the paradigm under which courts operate away from one determined by what is best for the judges and lawyers to one that focuses on and serves the litigants who seek justice. Judges, too, must change. Rather than viewing their role as referees, calling balls and strikes in a game of combatants, judges need to embrace the ideal of justice. We need to make jurists like Judge Spillane and Judge Moray the norm and Judge Hayes the exception.

Second, we need to persuade legislators in state government that courts serve the entire community and should be funded by general revenue and not by fines and fees. The justice system itself is constrained by poverty. Since the Great Recession, funding for state and local courts has declined, leaving Courts overwhelmed with cases and without the resources to provide adequate self-help, to adopt innovative technologies, or to hold court at night or on weekends.<sup>178</sup>

Third, we need to continue to litigate against unlawful practices. We will never be able to bring lawsuits everywhere they are needed, but when a case is brought against one jurisdiction, others take notice. We need to develop and advance the argument that there can be no price tag on justice. The Supreme Court does not recognize

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175. *Volunteer Opportunities: Court Navigator Program*, N.Y. STATE UNIFIED COURT SYS., <https://www.nycourts.gov/courts/nyc/housing/rap.shtml> (last visited Apr. 12, 2017).

176. *JusticeCorps*, CAL. COURTS, <http://www.courts.ca.gov/justicecorps.htm> (last visited Apr. 12, 2017).

177. *Id.*

178. See PETER T. GROSSI, JR., JON L. MILLS, & KONSTANTINA VAGENAS, NAT'L CTR. FOR STATE COURTS, *CRISIS IN THE COURTS: RECONNAISSANCE AND RECOMMENDATIONS* 83 (2012).

poverty as a suspect classification,<sup>179</sup> nor, as noted, has the Court been willing to adopt a civil right to counsel.<sup>180</sup> The Court does, however, recognize that “punishing a person for his poverty” has no place in the justice system.<sup>181</sup> Indeed, one can craft a compelling argument that constitutionally, justice cannot in any way depend on money.<sup>182</sup> The parameters of this line of reasoning need to be pushed throughout the justice system—both civil and criminal.

In 1886, Frederick Douglass gave a speech commemorating the twenty-fourth anniversary of the Emancipation Proclamation.<sup>183</sup> Speaking nine years after the Federal Army was withdrawn from the South and Reconstruction era reforms had largely been reversed, Douglass focused on the justice system and warned that “where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.”<sup>184</sup> Douglass could well have been

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179. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973).

180. *See, e.g., Turner v. Rogers*, 564 U.S. 431, 432 (2011).

181. *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

182. In a long line of cases, the Supreme Court has made clear that conditioning access or outcomes in the justice system solely on a person’s ability to pay violates the Fourteenth Amendment. In *Griffin v. Illinois*, the Supreme Court held that a criminal appellant could not be denied the right to appeal based on an inability to pay a fee, finding that “[i]f [the state] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.” 351 U.S. 12, 16, 24 (1956) (Frankfurter, J., concurring). In *Williams v. Illinois*, the Court found that a state could not incarcerate an indigent individual beyond the statutory maximum term on account of missed fine and fee payments, because if that incarceration “results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay.” 399 U.S. 235, 240 (1970). And, in *Tate v. Short*, the Court found that a state could not convert a defendant’s unpaid fine for a fine-only offense to incarceration because that would subject him “to imprisonment solely because of his indigency.” 401 U.S. 395, 397–98 (1971).

In *Bearden v. Georgia*, the Court elaborated on this principle in holding that the Fourteenth Amendment prohibits a state from revoking an indigent defendant’s probation for failure to pay a fine and restitution without first inquiring “into the reasons for the failure to pay.” 461 U.S. at 672. Although *Griffin*, *Williams*, *Tate*, and *Bearden* were cases in which a criminal defendant’s liberty interest was directly implicated, “*Griffin*’s principle has not been confined to cases in which imprisonment is at stake.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 103 (1996). Rather, the constitutional principle reaffirmed by these cases prohibits the imposition of adverse consequences against indigent defendants solely because of their financial circumstances, regardless of whether those adverse consequences take the form of incarceration, reduced access to court procedures, or some other burden.

183. Frederick Douglass, *Speech on the Occasion of the Twenty-Fourth Anniversary of Emancipation in D.C.: Southern Barbarism* (Apr. 16, 1886), *reprinted in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS (Phillip S. Foner ed., 1950).

184. *Id.*

talking about the justice system today. We have seen lately considerable unrest among those denied justice. And while the protests have largely been focused on law enforcement, if you scratch the surface of people's discontent, it is the entire justice system that they indict. We need to heed Douglass' warning and ensure that our justice system finally and firmly provides equal justice under law.