

Ability to Pay

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Ability to Pay

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Ability to Pay

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Preface

This volume is the second Liman publication focused on the challenges that individuals with limited income and wealth face in courts. In 2018, in *Who Pays: Fines, Fees, Bail, and the Cost of Courts*, we explored the mechanisms for financing court systems and the economic challenges faced by judiciaries and by litigants. We addressed whether and how constitutional democracies can meet their obligations to make justice accessible to disputants, to provide fair treatment, and to make these commitments visible to the public. Our goals were to understand the dimensions of the problems, the inter-relationships among civil, criminal, and administrative processes, and the opportunities for generating the political will to bring about reform.

As reflected in the bulk of this second set of materials, *Ability to Pay*, legal and political will has indeed been mustered and has begun to put into place reforms necessary to limit the ways in which courts impose financial obligations. Within the last several years, an impressive body of literature has emerged to map the needs of low-income individuals, participating in courts as civil litigants and criminal defendants and to identify the harms of court-imposed debt. Capturing all the reforms underway requires more pages than we have provided as background readings for the 22nd Annual Liman Colloquium. Yet through a series of snapshots, we hope to understand how, in this dynamic world, to shape a more just legal system. These ambitions require joining with others to consider how public and private sectors can work collaboratively and how law schools, dedicated to teaching new lawyers and to research, can contribute. This volume is therefore one of many such joint endeavors: the Colloquium is co-sponsored by Jeff Selbin of the Policy Advocacy Clinic at UC Berkeley School of Law and by Lisa Foster and Joanna Weiss, the co-directors of the Fines and Fees Justice Center, and we compiled these readings with the help of many participants who contributed materials.

We, in turn, build on the work of prior generations, who helped to bring the problems of people with limited income and wealth to the fore more than a half century ago. Individuals and groups, supported by political and social movements, and assisted by lawyers, claimed a host of new rights—to habitable housing, government benefits, and fair treatment. Courts and legislatures responded in some instances with new doctrines and statutes focused on protecting tenants, recipients of federal benefits, and individuals harmed by a variety of forms of discrimination. In addition to recognizing rights, courts homed in on the process due and the need to equip individuals in conflict with the state. As a result, legal mandates insisted that, in some cases, states provide lawyers, waive fees, and give subsidies for transcripts and experts. In addition, Congress created fee-shifting to encourage the pursuit of civil rights claims, and both legislatures and courts shaped class actions and other forms of aggregation to permit cost-sharing among litigants and to provide incentives for lawyers to represent groups.

Over the last three decades, some of these innovations have been cut back through changes in statutes and in judicial interpretation. Moreover, the costs associated with

courts, policing, and detention have risen. Instead of responding through raising or reallocating general revenues or by altering policies, many jurisdictions have imposed a welter of fees and payback obligations. “Court debt” comes from many sources, including administrative fees, money bail, punitive fines, and victim restitution charges, as well as fees for transcripts, public defenders, arrests, and incarceration. The costs of these policies have been felt most acutely by people with limited resources and with intensive engagement with the legal system—either because they seek assistance or because they are subjected to over-policing, prosecution, and punishment.

As excerpts in *Ability to Pay* detail, empirical evidence has documented how debt associated with the legal system puts individuals, families, and communities into cycles of poverty and punishment; in some jurisdictions, court debt is a barrier to receipt of services and to voting. The research also demonstrates that race and class are at the center of these practices; the challenges of payment fall hardest on low-income, low-wealth people and on communities of color. Moreover, rather than serving to improve public safety, court-imposed financial obligations prohibit many individuals from participating in programs aimed at rehabilitation and instead may lead to more social dislocation and crime. In addition, some of the research documents that the work of assessing, collecting, and outsourcing monetary sanctions nets less than what might have been expected in revenues. The state resources consumed could have been dedicated to more generative, rather than such oppressive, activities.

Vivid examples of the injuries—encapsulated in the sad shorthand of “Ferguson” and marked by the police killing of black men—exposed the practices of using policing and courts to generate revenues for localities. As activists, researchers, members of the media, local, state, and national bar associations, judicial task forces, translocal organizations of government actors, and litigators showed how much legal financial obligations undermine fair and just decision-making, commitments to change laws and practices have grown. As detailed in this volume, in some jurisdictions, new legislation and administrative reforms have resulted in significant reforms. Examples, some proposed and others implemented, include court rulings preventing the imposition of assessments without inquiry into an individual’s ability to pay, revisions of price structures by using fines calibrated to earnings (termed “day fines”), and the abolition of fees and money bail. Yet a wide range of problems—from past debt owed to new debts incurred and new fees imposed—remain. Moreover, a host of private providers are marketing technologies to courts and prisons that are often accompanied by claims of the need to impose new charges on participants in courts, on those detained in jails and prisons, and on their families.

We have divided these materials into four segments. Part I, *Challenging, Restructuring, and Abolishing Fee Structures*, provides a sampling of the many lawsuits that have challenged fees, fines, forfeiture, bail charges, and driver’s license suspensions. What emerges is that the alchemy of equal protection and due process has in many cases produced relief with respect to the most egregious practices. Readers will see how the law has developed in the decades since the 1980s, when the Burger Court insisted that

incarceration ought not to flow from an inability to pay fines accompanying a sentence. The leitmotif is that inability to pay assessments and monetary sanctions ought not be the source of detention, loss of jobs, and other harms.

The litigation interacts with legislative revisions and, in some jurisdictions, abolition of certain court-ordered debt—from filing fees to money bail. We have excerpted illustrative statutes, as well as some rules promulgated by courts. Reforms are, in turn, embedded in a wealth of new research and reports—again with a few excerpted here—on the injuries that courts impose when seeking funds from individuals of limited income.

In Part II, *Data Collection and Creation*, we provide an overview of the kinds of data that state and federal court systems collect and how those materials do or could include information about the needs of participants in the legal system. Further, we explore the impact of online technologies, which may permit or inhibit insight into litigants’ and defendants’ needs, as well as outsourcing of court filing systems to private providers. As excerpts in this segment reflect, serious questions of the accessibility of data, protection of privacy, and accountability have yet to be addressed, as debates emerge about how to “measure” what counts as justice.

Part III, *Innovations and Interventions: A Sampling of New Research Projects*, provides a window into the breadth of activities across the country, as law schools have become research hubs taking on a host of issues related to court users. Again, we are not comprehensive but illustrative of the diverse efforts underway. Here, the questions are about the ways in which research agendas are formulated, their impacts measured, and their effectiveness appraised.

Part IV, *Law Schools, Funders, and Institutionalizing Reform*, reflects on the many times in which law schools have reinvented what counts as the “standard” curriculum. In the 1960s, foundation support brought clinical education to many law schools, and, since then, it has become a fixture. In the 1980s, funding went to law and economics, which has likewise become a familiar marker in legal education.

This volume makes plain that another reordering is underway, as law schools commit to generating new data about facets of the legal landscape and engaging students through coursework and research in how courts operate and impact communities. A survey of the work demonstrates that legal education is once again refocusing its concerns. New courses and research projects aim to displace the confidence that neo-liberal paradigms have placed in market-based solutions. Our hope is to help identify how partnerships among law schools and with other institutions can integrate the problems of courts and their users into analyses of the justice of the legal system. In short, just as clinical education and law and economics are now familiar topics, we believe that the economics of court services, including the need for public subsidies for litigants and public responsibility for the criminal justice system, are becoming part of legal education and part of routine aspects of courts’ rules and data collection.

A word about the Liman Center is also in order. Like the many Liman publications of the last two decades, these materials reflect the commitments of the Arthur Liman Center for Public Interest Law, which works to promote access to justice and fair treatment of individuals and groups seeking to use the legal system. This work began in 1997, when Yale Law School established what was then called the Arthur Liman Program to honor one of its most distinguished graduates. Arthur Liman spent much of his professional career at Paul, Weiss, Rifkind, Wharton & Garrison, even as he also devoted years to work in the public sector, including as counsel to the New York State Special Commission on Attica and as counsel to the Senate Iran-Contra Committee. Liman also served as president of the Legal Aid Society of New York and of Neighborhood Defender Services of Harlem; he was a trustee of the Vera Institute of Justice, chair of the New York State Capital Defender's Office, and a founder of the Legal Action Center.

That Arthur Liman was both wise and unusually smart marked him as an outstanding attorney. That he also cared passionately about social justice and devoted himself to its pursuit made him a great lawyer-citizen. Supported by the many family members and friends of the Liman family and by Yale Law School, this Center is dedicated to ensuring that generations of public interest lawyers continue to combine expert lawyerly skills with public spiritedness. Through funding fellowships, annual colloquia, classes, and scholarship, the Liman Center follows in Arthur Liman's tradition by devoting our energies and resources to working towards a more equitable justice system, even as it remains elusive.

We do so with the generous and long-term support of Yale Law School and with contributions from individuals and organizations. In 1997, we awarded one Liman Fellowship. We now award six to ten Fellowships annually. As of 2019, we have provided funding for 143 law graduates to spend a year working on behalf of individuals and communities with diverse needs. Liman Fellows have been hosted by more than 100 organizations around the United States; more than ninety percent of our former Fellows continue their work at nonprofits, in government, or in the academy. In addition to funding post-graduate Liman Law Fellows, the Center welcomes Liman Summer Fellows, enrolled at Barnard, Brown, Bryn Mawr, Harvard, Princeton, Spelman, Stanford, and Yale. These undergraduate fellows work on public interest projects, often with organizations that have employed Liman Law Fellows. The Liman Center is also the home to Senior Liman Fellows in Residence, who enable us to work with current Yale Law students on targeted research projects, teach classes, and produce reports and testimony.

The two institutional co-sponsors have come into being more recently and have made an enormous contribution in short order. In Berkeley Law's Policy Advocacy Clinic, students pursue non-litigation strategies to address systemic racial, economic, and social injustice. Since 2013, clinic students have supported local and state change campaigns to end monetary sanctions in the criminal legal system, with a special focus on abolishing fees in the juvenile delinquency system. The Fines and Fees Justice Center was founded in

2018 to catalyze a national movement to eliminate the fines and fees that distort justice. FFJC's goal is to eliminate fees in the justice system and to ensure that fines are equitably imposed and enforced.

This volume would not exist without the leadership of Alexandra Harrington, Senior Liman Fellow in Residence, and Liman Student Directors, Faith Barksdale, Alexandra Eynon, Stephanie Garlock, and Daniel Phillips. Central to all our work is Elizabeth Keane, the Liman Center Coordinator, without whom we would not have been able to carry out the vision for this Colloquium. Her patience, grace, and remarkable organizational gifts brought together an array of individuals from all over the country and coordinated the planning and detail at every stage. Thanks are also due to Bonnie Posick, Senior Administrative Assistant, for her expert editorial assistance, advice, and acumen.

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Founding Director of the Liman Center

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I. CHALLENGING, RESTRUCTURING, AND ABOLISHING FEE STRUCTURES

Within the last few years, several lawsuits have challenged fees, fines, forfeiture, bail charges, and driver's license suspensions. The leit motif is that inability to pay legal financial obligations ought not be the source of detention, loss of jobs, and other harms. This opening segment excerpts a few of the many decisions that reflect the alchemy of equal protection and due process that has, in many cases, produced relief. Readers will see how the law has developed in the decades since the 1980s, when the Burger Court insisted that incarceration ought not to flow from an inability to pay.

The litigation interacts with legislative revisions and, in some jurisdictions, abolition of certain legal financial obligations – from filing fees to money bail. Judiciaries have also revisited their charges. Those reforms are, in turn, embedded in a wealth (pun intended) of new research and reports on the injuries that courts impose when seeking funds from individuals of limited income. Again, these materials are illustrative and, even as voluminous, are far from exhaustive. In short, this segment documents the breadth of activities across the country that aim to revise the role of courts by curbing their role as sources of debt.

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THE LANDSCAPE

Hidden Laws in the Time of Ferguson (2018)

Monica C. Bell
132 HARV. L. REV. F. 1

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*

. . . 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*:

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.

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. . . .

“No one should be in jail or punished because she is poor,” [Fred] Smith asserts [in his article, *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018)]. 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. While 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. 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.

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. 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” 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.” 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. Social welfare policy, which has long implicitly distinguished between the “deserving” and “undeserving” poor, 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. . . .

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* (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. Poor neighborhoods and institutions create conditions under which crime flourishes, and where crime-control institutions are omnipresent. Poor

neighborhoods within cities are “incarceration’s ‘hot spots’” in places like Chicago and beyond, even controlling for crime rates. By reputation alone, when people envision high-crime neighborhoods, they often envision poor neighborhoods—specifically, poor predominantly black neighborhoods. Poor towns have often turned to the carceral system to propel their economies. 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. Many of the states with the least generous social safety nets use criminal justice to stand in for poverty alleviation and thus have had the nation’s highest incarceration rates. 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.

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. Scholars have widely argued that misdemeanor justice is bound up with the social control of marginalized people, including poor people. Studies of community corrections, such as probation, parole, and supervised release, largely follow a similar line 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. 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. At the furthest end, people returning 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. 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.

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.” 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. 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. 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. 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. 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. . . .

LIMITING STATE POWER: LITIGATING FINES, FEES, AND BAIL

Constraints on Forfeiture

Timbs v. Indiana

Supreme Court of the United States
139 S. Ct. 682 (2019)

Justice Ginsburg delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling \$1,203. At the time of Timbs’s arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about \$42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs’s Land Rover, charging that the vehicle had been used to transport heroin. After Timbs’s guilty plea in the criminal case, the trial court held a hearing on the forfeiture demand. Although finding that Timbs’s vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for \$42,000, more than four times the maximum \$10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs’s offense, hence unconstitutional under the Eighth Amendment’s Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. . . . The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. . . .

The question presented: Is the Eighth Amendment’s Excessive Fines Clause an “incorporated” protection applicable to the States under the Fourteenth Amendment’s Due Process Clause? Like the Eighth Amendment’s proscriptions of “cruel and unusual punishment” and “[e]xcessive bail,” the protection against excessive fines guards against abuses of government’s punitive or criminal- law-enforcement authority. This safeguard, we hold, is “fundamental to our scheme of ordered liberty,” with “dee[p] root[s] in [our] history and tradition.” *McDonald v. Chicago* . . . (2010) The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

When ratified in 1791, the Bill of Rights applied only to the Federal Government. *Barron ex rel. Tiernan v. Mayor of Baltimore* . . . (1833). “The constitutional Amendments adopted in the aftermath of the Civil War,” however, “fundamentally altered our country’s federal system.” *McDonald* With only “a handful” of exceptions, this Court has held that the Fourteenth Amendment’s Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. *Id.* . . . A Bill of Rights protection is incorporated, we have explained, if it is “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.” *Id.* . . .

Incorporated Bill of Rights guarantees are “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” *Id.* . . . Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.

Under the Eighth Amendment, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Taken together, these Clauses place “parallel limitations” on “the power of those entrusted with the criminal-law function of government.” *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.* . . . (1989) Directly at issue here is the phrase “nor excessive fines imposed,” which “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” *United States v. Bajakajian* . . . (1998) The Fourteenth Amendment, we hold, incorporates this protection.

The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that “[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenment.” . . . As relevant here, Magna Carta required that economic sanctions “be proportioned to the wrong” and “not be so large as to deprive [an offender] of his livelihood.” *Browning- Ferris*. . . .

Despite Magna Carta, imposition of excessive fines persisted. The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay. . . . When James II was overthrown in the Glorious Revolution, the attendant English Bill of Rights reaffirmed Magna Carta’s guarantee by providing that “excessive Bail ought not to be required, nor

excessive Fines imposed; nor cruel and unusual Punishments inflicted.” . . . (1689).

Across the Atlantic, this familiar language was adopted almost verbatim, first in the Virginia Declaration of Rights, then in the Eighth Amendment, which states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Adoption of the Excessive Fines Clause was in tune not only with English law; the Clause resonated as well with similar colonial-era provisions. See, e.g., Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in *Federal and State Constitutions* 3061 (F. Thorpe ed. 1909) (“[A]ll fines shall be moderate, and saving men’s contenements, merchandize, or wainage.”). In 1787, the constitutions of eight States—accounting for 70% of the U. S. population—forbade excessive fines. . . .

An even broader consensus obtained in 1868 upon ratification of the Fourteenth Amendment. By then, the constitutions of 35 of the 37 States—accounting for over 90% of the U. S. population—expressly prohibited excessive fines. . . .

Notwithstanding the States’ apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued. Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws’ provisions were draconian fines for violating broad proscriptions on “vagrancy” and other dubious offenses. . . . When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. . . . Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor. . . .

Today, acknowledgment of the right’s fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. . . .

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” *McDonald*. . . .

The State of Indiana does not meaningfully challenge the case for incorporating the Excessive Fines Clause as a general matter. Instead, the State argues that the Clause does not apply to its use of civil *in rem* forfeitures because, the State says, the Clause’s specific application to such forfeitures is neither fundamental nor deeply rooted.

In *Austin v. United States* . . . (1993), however, this Court held that civil *in rem*

forfeitures fall within the Clause’s protection when they are at least partially punitive. *Austin* arose in the federal context. But when a Bill of Rights protection is incorporated, the protection applies “identically to both the Federal Government and the States.” *McDonald* Accordingly, to prevail, Indiana must persuade us either to overrule our decision in *Austin* or to hold that, in light of *Austin*, the Excessive Fines Clause is not incorporated because the Clause’s application to civil *in rem* forfeitures is neither fundamental nor deeply rooted. The first argument is not properly before us, and the second misapprehends the nature of our incorporation inquiry. . . .

Justice Gorsuch, concurring.

The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment’s Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment’s Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause. . . . But nothing in this case turns on that question, and, regardless of the precise vehicle, there can be no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment.

Justice Thomas, concurring in the judgment.

I agree with the Court that the Fourteenth Amendment makes the Eighth Amendment’s prohibition on excessive fines fully applicable to the States. But I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment’s Due Process Clause to encompass a substantive right that has nothing to do with “process,” I would hold that the right to be free from excessive fines is one of the “privileges or immunities of citizens of the United States” protected by the Fourteenth Amendment. . . .

Inability to Pay in the Lower Courts

Thomas v. Haslam

United States District Court, M.D. Tennessee, Nashville Division
329 F. Supp. 3d 475 (M.D. Tenn. 2018), appeal pending

Aleta A. Trauger, United States District Judge:

. . . A person convicted of a crime in Tennessee is typically made liable, to the government, for various sums of money related to his prosecution. Some of the defendant’s debt may reflect fines imposed as part of his sentence, but Tennessee also holds a convicted defendant liable for additional, often substantial, amounts in the form of costs assessed against him and taxes imposed on litigants by the Tennessee General Assembly. . . . If the

defendant does not pay these fines, costs, and litigation taxes—also known as “court debt”—then local authorities can attempt to collect on the debt using the ordinary tools available to judgment creditors, such as garnishment of wages or execution on property. . . . Sometimes those tools may be effective; sometimes they may not. In particular, when a defendant has little or no income or assets, garnishment and execution will be of little use, because no tool is sufficient to collect from resources that do not exist. The fact that it is difficult to collect debts from very poor debtors is a reality faced by people and entities, both public and private, in a wide array of circumstances; indeed, it is a problem as old, presumably, as debt itself.

Failure to pay court debt, however, has consequences that failing to pay other debt does not. In particular, TDSHS [Texas Department of Safety and Homeland Security], by statute, revokes the driver’s license of any person who, like Thomas and Hixson, has failed to pay court debt for a year or more, unless that person is granted a form of discretionary relief by a court. *See* Tenn. Code Ann. § 40–24–105(b). . . . In short, Thomas and Hixson both live in severe poverty and both owe court debt related to past criminal convictions. Thomas is totally and permanently disabled. Hixson has spent time in recent years living in a homeless shelter after a period of incarceration. Each man struggles to afford the basic necessities of life and is unable to pay the court debt assessed against him. Because they failed to pay their court debt for over a year, Thomas and Hixson have both had their driver’s licenses revoked by TDSHS.

In contrast, a Tennessee driver with a criminal record identical to Thomas’s or Hixson’s—but with the material resources to pay his court debt—could have avoided revocation simply by making the payments that the plaintiffs cannot. . . .

Thomas and Hixson filed their class action Complaint on January 4, 2017. Shortly thereafter, they filed a motion asking the court to certify a class defined as follows:

All persons whose Tennessee driver’s licenses have been or will be revoked pursuant to Tenn. Code Ann. § 40–24–105(b), and who, at the time of the revocation, cannot or could not pay Court Debt due to their financial circumstances.

. . . The court granted that motion on March 26, 2018, and Thomas and Hixson now represent a statewide class of similarly situated plaintiffs. That class challenges the constitutionality of Tennessee’s court debt-based revocation scheme on three grounds: first, for violation of criminal defendants’ due process and equal protection rights by the “mandatory revocation of people’s driver’s licenses because they are too poor to pay Court Debt without any inquiry into their ability to pay”; second, for violation of their due process right to notice and a hearing on whether they can pay their court debt; and, third, for violation of equal protection based on Tennessee’s policy of revoking the licenses of court debtors and not other similarly situated debtors. Purkey filed a Motion to Dismiss and a Motion for Summary Judgment, arguing that (1) the court was barred from considering the plaintiffs’ claims under the *Rooker–Feldman* doctrine and (2) Purkey was entitled to

summary judgment on the merits. The plaintiffs also filed a Motion for Summary Judgment. In the First Memorandum and the accompanying Order, the court denied the Motion to Dismiss, resolved most of the issues underlying the Motions for Summary Judgment, and ordered supplemental briefing on a few outstanding evidentiary matters. That briefing having been completed, the court is prepared to rule on whether either party is entitled to summary judgment. . . .

Under a long and well-established line of Supreme Court precedents, a statute that penalizes or withholds relief from a defendant in a criminal case, based solely on his nonpayment of a particular sum of money and without providing for an exception if he is willing but unable to pay, is the constitutional equivalent of a statute that specifically imposes a harsher sanction on indigent defendants than on non-indigent defendants. *See Griffin v. Illinois* . . . (1956); *Douglas v. California* . . . (1963); *Roberts v. LaVallee* . . . (1967); *Williams v. Illinois* . . . (1970); *Tate v. Short* . . . (1971); *Mayer v. City of Chicago* . . . (1971); *Bearden v. Georgia* . . . (1983). In other words, the Supreme Court has held that the Constitution “addresses itself to actualities,” *Griffin* . . . (Frankfurter, J., concurring in judgment), and, therefore, is not blind to the commonsense fact that an ultimatum following the formula of “the money or your _____” is a different proposition for someone who has the money than for someone who does not. . . .

The Supreme Court has held that the *Griffin* line of cases implicates both Due Process and Equal Protection principles in ways that defy an easy application of the Court’s more general precedents involving either constitutional guarantee alone. *See Bearden* Accordingly, the Court has warned against resorting to the “easy slogans” and “pigeonhole analysis” associated with the rote sorting of cases into those involving either strict scrutiny or rational basis scrutiny. . . .

Nevertheless, the law of the Sixth Circuit is that distinctions based on economic circumstances are subject only to rational basis review unless they involve a fundamental right. *See Molina–Crespo v. U.S. Merit Sys. Prot. Bd.* . . . (6th Cir. 2008). . . . Accordingly, this court is bound to consider this case under rational basis review, which asks only whether the challenged policy is rationally related to a legitimate government purpose. *See Midkiff v. Adams Cty. Reg’l Water Dist.* . . . (6th Cir. 2005). . . .

The Sixth Circuit has recognized, however, that the application of rational basis review to distinctions based on indigence may call for a more searching inquiry if the challenged scheme is one that not only treats indigent people more harshly than the non-indigent, but also does so in a way that threatens to exacerbate the indigents’ poverty. *See Johnson v. Bredesen* . . . (6th Cir. 2010). . . . In other words, if a statute treats the rich better than the poor in a way that will affirmatively *make the poor poorer*, then the court should—though still not departing from the boundaries of rational basis review—take extra care to make sure that the minimum requirements of rationality are met. . . .

The State of Tennessee, its courts, and its local governments have a legitimate interest in collecting court debt. *See Sickles v. Campbell Cty., Ky.* . . . (6th Cir. 2007) (noting government interests in “sharing the costs of incarceration and furthering offender accountability”). While that interest may be reframed and subdivided in many ways, the core premise is that, once the government lawfully imposes a debt that is itself supported by a legitimate purpose, then the government also has a legitimate interest in encouraging payment of that debt. . . .

A scheme that revoked the driver’s licenses of non-indigent court debtors after one year of nonpayment would pass rational basis review, because the threat of revocation would plausibly serve as a method for coercing those people into paying their debts. Under the *Griffin* line of cases, however, the court must specifically consider whether the scheme’s lack of an indigence exception is itself rational. Revocation would not be an effective mechanism for coercing payment from a truly indigent debtor, because no person can be threatened or coerced into paying money that he does not have and cannot get. The numbers bear that ineffectiveness out. From July 1, 2012, to June 1, 2016, TDSHS revoked 146,211 driver’s licenses for failure to pay fines, costs and/or litigation taxes; only 10,750 of those people—about 7%—had their licenses reinstated. If Tennessee’s revocation law were capable of coercing people into paying their debts in order to get their licenses back, it would be doing so. The overwhelming majority of the time, it is not. . . .

Simply being ineffective does not typically cause a law to fail rational basis review, which is highly deferential to the legislative prerogative to choose the means through which the state will pursue its legitimate objectives. However, the Supreme Court has made clear that, “even in the ordinary . . . case calling for the most deferential of standards,” a law may be struck down if its substance is “so discontinuous with the reasons offered for it” that any pretense of rationality cannot be sustained. *Romer v. Evans* . . . (1996) The court’s review includes considering whether, “in practical effect,” the law “simply does not operate so as rationally to further the” legitimate purpose professed. *U.S. Dep’t of Agric. v. Moreno* . . . (1973). . . .

Ultimately, the court need not determine if the driver’s license revocation law would fail rational basis review based on its sheer ineffectiveness alone, because, as applied to indigent drivers, the law is not merely ineffective; it is powerfully counterproductive. If a person has no resources to pay a debt, he cannot be threatened or cajoled into paying it; he may, however, become able to pay it in the future. But taking his driver’s license away sabotages that prospect. For one thing, the lack of a driver’s license substantially limits one’s ability to obtain and maintain employment. Even aside from the effect on employment, however, the inability to drive introduces new obstacles, risks, and costs to a wide array of life activities, as the former driver is forced into a daily ordeal of logistical triage to compensate for his inadequate transportation. In short, losing one’s driver’s license simultaneously makes the burdens of life more expensive and renders the prospect of amassing the resources needed to overcome those burdens more remote. . . .

Because driving is necessary for so many important life activities, some Tennesseans whose licenses have been revoked continue to drive, despite the state's revocation of their privileges. Driving on a revoked license is a misdemeanor, punishable by up to six months in jail and a fine of up to \$500 for the first offense and up to 11 months and 29 days in jail and a fine of up to \$2,500 for subsequent offenses. As a result, a license revocation based on court debt from a single conviction may begin a cycle of subsequent convictions and mounting court debt that renders the driver increasingly unable to amass the resources necessary to get his license back. His first conviction—of trespass, for example, like Thomas's—creates a court debt; that debt leads to a license revocation; the revocation leads to another conviction, this time for driving on a revoked license; the new conviction creates more debt; and the cycle begins again, with the driver, who was already indigent, only deeper in the red to the government and less likely ever to have a driver's license again. This propensity to create a debt spiral further exacerbates the counterproductive nature of Tennessee's scheme, as applied to indigent drivers. Not only is the law ineffective at collecting debt; not only is it counterproductive with regard to existing debt; but, in at least some cases, it affirmatively leaves *more* unpayable debt in its wake. . . .

Based on the foregoing, the plaintiffs have stated a plausible theory of constitutional protection and constitutional injury, because they have been deprived of equal protection and due process by a law that lacks a rational basis for furthering any legitimate government objective. . . .

The court has already held that revoking the driver's licenses of indigent court debtors appears to be counterproductive to the legitimate purpose of collecting on the underlying debt, and that, at some point, a policy becomes so manifestly counterproductive that it fails even the deferential standard of rational basis review. . . .

. . . No rational creditor wants his debtor to be sidelined from productive economic life. No rational creditor wants his debtor to be less able to hold a job or cover his other, competing living expenses. A rational creditor might want the benefit of the threat of a license revocation, but nothing that the plaintiffs have argued would deny the state that threat. The state can still use the specter of revocation to encourage payment of court debt; it simply must afford the debtor the opportunity to demonstrate, first, that the only reason he has failed to pay is that he simply cannot.

Purkey or local authorities may complain that there is some expense associated with affording a debtor the opportunity to demonstrate his indigence. That is true, but it is no more true than in any of the other situations covered by the *Griffin* cases. The need to determine the indigence of court debtors, moreover, would fit into a preexisting system where such determinations are wholly routine. Even beyond *Griffin* and its progeny, indigence determinations are already a pervasive and unavoidable feature of the criminal justice system. *See, e.g., Gagnon v. Scarpelli* . . . (1973) (acknowledging right to indigent defense in some probation and parole revocation hearings); *Miranda v. Arizona* . . . (1966)

(acknowledging right to indigent defense during a custodial interrogation); *Gideon vs. Wainwright* . . . (1963) (acknowledging right to indigent defense at trial). Determining a person’s indigence is something that Tennessee courts do thousands of times a year, often in staggering volumes and at a breakneck pace. *See* Tenn. Admin. Office of the Courts, *Tennessee’s Indigent Defense Fund: A Report to the 107th Tennessee General Assembly* 11–12 (2011). The limited expense of adding one more stage where indigence matters is not enough to render a manifestly irrational legislative scheme rational. . . .

As the Supreme Court has made clear, the actual effect of attaching a price tag to a particular outcome under our criminal justice system is that the system treats indigent and non-indigent defendants differently. Even if such disparate treatment can sometimes be defended as rational, *see Johnson* . . . no presumption of rationality can stretch far enough to countenance the disparate treatment of indigent and non-indigent defendants when (1) the only goal of the challenged mechanism is ensuring payment of a sum of money and (2) the harsher sanction doled out to the indigent defendant is one that makes paying that sum substantially more difficult.

The Sixth Circuit has acknowledged that even a highly deferential standard of review like rational basis scrutiny may call for a somewhat “heightened” inquiry, if the law at issue targets indigent criminal debtors in a way that threatens to exacerbate their preexisting poverty. *See Johnson* The Supreme Court has recently acknowledged a principle that might explain such an approach, observing that its admittedly few cases striking down laws as failing rational basis review share “a common thread . . . that the laws at issue lack any purpose other than a ‘bare . . . desire to harm a politically unpopular group.’” *Trump v. Hawai* . . . (2018) (quoting *Moreno* . . .). That combination—a politically unpopular group and a law affirmatively and unjustifiably inflicting harm on them—is undeniably present here. It is difficult to imagine a group more politically unpopular than criminal defendants or less able to protect itself politically than the very poor. Purkey has repeatedly argued that, because those living in poverty have never been formally recognized as a suspect class, the court must ignore such considerations. The Supreme Court’s recent pronouncements should put that argument to rest. *See Trump* . . . (citing *Romer* . . . (striking down law targeting gays and lesbians under rational basis review); *Cleburne v. Cleburne Living Ctr., Inc.* . . . (1985) (striking down law targeting the intellectually disabled under rational basis review)). . . .

[The Court granted summary judgment on Count I, that mandatory driver’s license revocation without an inquiry into ability to pay court debt violates due process and equal protection rights. The Court also granted summary judgment on Count III, that revoking licenses of court debtors and not other similarly situation debtors violates equal protection.]

Robinson v. Purkey

United States District Court, M.D. Tennessee, Nashville Division
2018 WL 5786236 (M.D. Tenn. Nov. 5, 2018), appeal pending

Aleta A. Trauger, United States District Judge:

Tennessee Department of Safety and Homeland Security (“TDSHS”) Commissioner David W. Purkey (“Commissioner”) has filed a Motion for Partial Stay Pending Appeal . . . to which Fred Robinson, Ashley Sprague, and Johnny Gibbs have filed a Response . . . and the Commissioner has filed a Reply For the reasons set out herein, the Commissioner’s motion will be granted in part and denied in part. . . .

The plaintiffs have challenged the constitutionality of the Commissioner’s policy of suspending the driver’s licenses of Tennessee drivers who, because they are indigent, have been unable to pay fines and other fees assessed against them related to traffic violations. Those fines and other fees are also known as “traffic debt.” The plaintiffs do not challenge Tennessee’s authority to impose traffic debt or any local jurisdiction’s right to collect it using ordinary collection mechanisms, such as garnishment or attachment. . . . Nor do they challenge the Commissioner’s authority to suspend the driver’s licenses of people who are able to pay their traffic debt but choose not to. . . . Rather, the plaintiffs take issue with the fact that the Commissioner has historically suspended the license of every driver for whom it receives a notice of nonpayment from the relevant local jurisdiction, with no consideration of the driver’s reason for nonpayment. The inevitable result has been that many poor Tennesseans have seen minor traffic infractions transformed into debilitating suspensions because the traffic debt imposed on them—which routinely numbers in the hundreds and even thousands of dollars—is more than they can afford to pay. A driver with resources who commits a traffic offense can pay a sum, begrudgingly or not, and move on. An indigent driver who commits the same offense has his life severely disrupted for an indefinite period of time. The plaintiffs argue that that policy runs afoul of the constitutional guarantees of due process and equal protection.

The plaintiffs base their argument, first, on a series of well-settled Supreme Court precedents holding that certain other criminal procedures related to costs and payment—which, like the Commissioner’s policy, lacked indigence exceptions—deprived indigent defendants of due process and equal protection by irrationally and unfairly treating those defendants worse than non-indigent defendants for no reason other than their material poverty. *See Griffin v. Illinois* . . . (1956) (fees for transcripts to use on appeal); *Douglas v. California* . . . (1963) (counsel for direct appeal); *Roberts v. LaVallee* . . . (1967) (fees for preliminary hearing transcripts); *Williams v. Illinois* . . . (1970) (extension of sentence for failure to pay fines); *Tate v. Short* . . . (1971) (required service on municipal farm for failure to pay fines); *Mayer v. City of Chicago* . . . (1971) (fees for records to use on appeal in case involving fines only); *Bearden v. Georgia* . . . (1983) (revocation of probation for failure to pay fines or restitution).

In the alternative, the plaintiffs argue that the Commissioner’s policy violates

James v. Strange . . . (1972), in which the Supreme Court struck down an unusually harsh regime for recouping attorneys’ fees from indigent defendants on the ground that it “blight[ed] in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect.” . . . Finally, the plaintiffs argue that, by failing to provide drivers with adequate notice and procedural mechanisms related to an indigence exception, Tennessee has deprived drivers of the procedural due process that the government owes to drivers facing the loss of their driving privileges. *See Bell v. Burson* . . . (1971).

The plaintiffs filed a Motion for Preliminary Injunction seeking several types of broad relief related to the Commissioner’s policies, both with regard to existing suspensions and possible future suspensions. . . . With regard to existing suspensions, the plaintiffs asked the court to issue a blanket order requiring the Commissioner to reinstate the licenses of all drivers suffering from traffic debt-related suspensions, with the exception of certain drivers facing other bars to licensure. . . . With regard to the prospect of future suspensions, the plaintiffs sought an order requiring the Commissioner to either discontinue suspensions or alter TDSHS’s procedures to ensure that indigent drivers receive an exception and adequate notice and procedures related to that exception. . . .

The parties submitted the matter to the court on briefs, and, on October 16, 2018, the court granted the plaintiffs’ motion in part and denied it in part. . . . The court concluded that the plaintiffs had established a strong likelihood of success on the merits with regard to their constitutional claims and that, if injunctive relief were denied, irreparable harm would be done both to the members of the plaintiff class and to the broader public interest. The court also concluded, however, that the Commissioner had demonstrated that, if the court ordered universal, immediate relief to all currently suspended drivers, then TDSHS would experience significant logistical strains and revenue shortfalls that might interfere with the agency’s important public functions. Accordingly, the court granted the plaintiffs a circumscribed version of their requested relief. Pursuant to the court’s order, TDSHS is required to reinstate the license of any covered driver who affirmatively applies for reinstatement, unless TDSHS provides the applicant with notice of his right to an ability-to-pay determination. Under the terms of the order, TDSHS can either make that ability-to-pay determination itself or refer the applicant to a local jurisdiction for such a determination, and TDSHS is permitted to deny reinstatement if the applicant is found not to be indigent. TDSHS is also required to waive reinstatement fees and any other reinstatement requirements specifically related to the driver’s allegedly unlawful suspension (if there are any). With regard to future suspensions, the court’s order permits TDSHS to continue to engage in future suspensions only if it provides notice and an opportunity for an ability-to-pay determination or receives confirmation that such a notice and opportunity were afforded at the local level. (Docket No. 223 at 1–3.)

On October 18, 2018, the Commissioner filed a Notice of Appeal. . . . Contemporaneously, he filed a Motion for Partial Stay Pending Appeal, in which he asked the court to stay the portions of its preliminary injunction related to existing suspensions. . . . The Commissioner informed the court that TDSHS has, for the time being, stopped

imposing new suspensions for nonpayment of traffic debt, bringing it into compliance with paragraph 1 of the court’s order. . . . The Commissioner complains, however, that TDSHS currently has no mechanisms for making ability-to-pay determinations and no resources available for creating such a process. Specifically, the Commissioner has filed a Declaration by Director Susan Lowe of TDSHS’s Financial Responsibility Division stating that TDSHS currently has only six hearing officers, none of whom has received any training with regard to making indigence determinations. . . . Lowe reiterates that, as the parties and court have always understood, TDSHS had no preexisting regulations in place for making such determinations, and she confirms that TDSHS has not promulgated any such rules since the court’s order. . . . The Commissioner argues that, due to those limitations, the only way he can comply with paragraphs 2 and 3 of the court’s order—at least over the short term—is simply to waive fees and reinstatement requirements for all applicants seeking reinstatement from their traffic debt suspensions, including those who are not indigent. . . .

[In deciding whether to grant the partial stay requested by the Commissioner, the Court considered “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” The Commissioner argued that, given the unsettled nature of the law, a stay was warranted because allowing the full “injunction to go into effect . . . only to be vacated later, would unnecessarily disrupt TDSHS’s functioning and revenues.” The Court explained that it had already considered the possibility of a reversal by the Sixth Circuit when it determined the scope of relief. The Court also found that the economic injury to TDSHS from a stay is “speculative and can be mitigated.” The Court found that the harm to the plaintiffs if a stay issued would be significant. With respect to the final factor, the Court found that the public interest “continues to lie with (1) Tennessee’s complying with the Constitution and (2) Tennessee’s poorest residents not being subject to a system that irrationally imposes a mere inconvenience on the rich while upending the lives of the poor.” The Court rejected the Commissioner’s argument that any purported ambiguity in the injunction warranted a stay.]

For the foregoing reasons, the Commissioner’s Motion for Partial Stay Pending Appeal . . . is hereby granted in part and denied in part. The October 18, 2018 Order is hereby amended to include the following language:

The phrase “reinstatement requirements related to the suspension of a driver’s license” (1) shall be read to include fees or penalties imposed for failure to surrender the driver’s license at the time of the relevant suspension and (2) shall not be read to include any requirements or fees that are associated solely with the required renewal of a driver’s license that would have expired during the period of the applicant’s suspension. . . .

Briggs v. Montgomery
Plaintiffs’ Response to Motion to Dismiss by Defendant Treatment Advocacy
Screening Center

United States District Court for the District of Arizona
No. CV-18-2684 (D. AZ. Dec. 11, 2018)

[We excerpt a response filed by Plaintiffs challenging fees imposed to participate in a program that would divert them from prosecution. They argue for application of what is sometimes termed a “hybrid” of due process and equal protection with a distinctive approach to test the legality of fees.]

Plaintiffs bring this lawsuit to challenge certain aspects of a diversion program for possession of marijuana that violate their constitutional rights. The diversion program is jointly operated by a private, non-profit company, the Treatment Advocacy Screening Center, Inc. (TASC), and the Maricopa County Attorney’s Office (MCAO). Plaintiffs bring claims against TASC and the County Attorney, Bill Montgomery, in his official capacity, seeking damages for their injuries and prospective relief to stop Defendants from continuing the unlawful policies challenged in this case.

Plaintiffs challenge three policies that penalize poor people who cannot afford to pay certain fees associated with Defendants’ diversion program. First, poor people are terminated from diversion and prosecuted for felony possession of marijuana solely because they cannot afford monetary payments. Second, poor participants are subject to longer terms of onerous supervision restrictions solely because they cannot afford make payments at a quicker rate. Third, poor people are subject to additional, intrusive testing of their urine solely because they cannot afford to make payments at a certain rate. Plaintiffs allege that these policies violated their rights under the Fourth and Fourteenth Amendments to the U.S. Constitution.

Defendant TASC asks this Court to dismiss Plaintiffs’ claims. Defendant TASC raises a number of procedural defenses. Each is based on a misunderstanding of the facts and the governing law. Defendant TASC, joined by Defendant Montgomery, also challenges the merits of Plaintiffs’ claims. Defendants’ arguments on the merits are wrong on both the facts and the law. The motion to dismiss should be denied.

In Arizona, possession of any amount of marijuana—even trace amounts—is a felony. . . . For most people arrested for possession of marijuana in Maricopa County, the only way to avoid felony prosecution is to complete the diversion program jointly administered by MCAO and TASC. . . .

But avoiding prosecution through diversion costs money. Participants must pay \$950 or \$1000 in program fees. . . . They also must pass urine tests for drugs and alcohol

at least once—and often multiple times—each week. . . . Defendants charge \$15 or \$17 for each test. . . .

Participants who satisfy all program requirements and are wealthy enough to pay the fees within 90 days are released from diversion and are no longer subject to felony prosecution. . . . But no one can complete diversion without paying the fees in full. . . . As a result, people who cannot afford to pay within 90 days are forced to remain on diversion supervision until they do so (“pay-only participants”). . . .

Pay-only participants remain under threat of felony criminal prosecution. . . . They must comply with the same supervision requirements that apply within the first 90 days. . . . They cannot leave the state without “special permission of TASC.” . . . They cannot leave the county for more than one day without informing a TASC employee. . . . They cannot take any prescription medication without reporting it to TASC and bringing the prescription for verification. . . . They cannot use alcohol, including over-the-counter medications that contain alcohol, like Nyquil. . . .

Pay-only participants must also continue to submit to urine testing for drugs and alcohol once or multiple times each week. . . . To do so, a participant must come to a TASC office. . . . TASC employees then watch the participant through glass panels while she urinates. . . . In at least one TASC location, the bathroom where participants submit their urine samples includes multiple mirrors so that TASC employees can watch participants urinate from multiple angles. . . .

Pay-only participants also must continue to pay \$15 or \$17 for each test. . . . Thus, participants too poor to complete the program within 90 days ultimately have to pay more—potentially hundreds of dollars more—than participants wealthy enough to complete the program by paying Defendants’ fees within 90 days. . . .

In addition to extending the time that poor participants must remain on supervision, in some situations, Defendants terminate them from diversion altogether. Once terminated, participants are prosecuted for felony marijuana possession. . . .

Termination can happen in at least two ways. First, Defendants require participants to pay the program fees at a minimum monthly rate of \$160 or \$170. . . . Pursuant to Defendants’ written policy, failure to pay this minimum monthly rate will result in termination from diversion and felony prosecution. . . . Second, diversion participants are not permitted to take urine tests for drugs and alcohol unless they pay for them at the time of the test. . . . Missed urine tests are counted as “violations”—even if the person only missed the test because she could not afford to pay for it. . . . A person who has accrued too many of these violations will be terminated by TASC and referred for prosecution. . . .

Plaintiffs are current and former diversion participants who were penalized because they could not afford to pay fees or who will suffer if Defendants' policies continue. Plaintiffs Deshawn Briggs and Mark Pascale completed all requirements other than payment within 90 days. Because they could not afford to pay the program fees within that time-period, they were required to stay on supervision for approximately double that time until the fees were paid. . . .

Plaintiff McKenna Stephens, who works part-time as a waitress, is currently on diversion supervision. She cannot afford to pay the program fees within 90 days, and she cannot afford to pay them at the minimum monthly rate. As a result, Plaintiff Stephens will either be required to remain on supervision until she has paid the program fees or she will be terminated for failing to make the minimum monthly payment and face felony prosecution. . . .

Plaintiff Taja Collier was terminated from diversion solely because she could not afford to pay for urine tests. She was referred for prosecution and placed on diversion again. Ms. Collier still cannot afford to pay for drug tests or make the minimum monthly payment towards her program fees, and she faces termination and prosecution as a result. Ms. Collier will also be forced to remain on diversion supervision until her program fees are paid in full. . . .

The hybrid due process–equal protection framework that governs this case comes from the Supreme Court's opinion in *Bearden v. Georgia* . . . (1983).

. . . *Bearden* explained that these cases did not fit neatly under the rubric of equal protection or due process alone. Instead, questions of equal justice invoke both lines of doctrine. They address “[t]he fairness” of punishing people based on factors over which they have no control, which is normally assessed under due process, and the differential treatment of the poor, which is assessed under the rubric of equal protection. . . .

The Court also reasoned that the facts of the equal justice cases do not fit neatly into the frameworks that apply when equal protection and due process claims are analyzed separately. For example . . . “indigency in [the equal justice] context is a relative term rather than a classification.” . . . As a result, shoehorning these cases into the “equal protection framework is a task too Procrustean to be rationally accomplished.” . . .

Accordingly, although the parties in *Bearden* “debate[d] vigorously whether strict scrutiny or rational basis [was] the appropriate standard of review,” the Court declined to adopt one of the formal tiers of scrutiny that apply under equal protection or due process alone. . . . Instead, the Court prescribed a balancing framework to address both due process and equal protection simultaneously.

Bearden's hybrid analysis “requires a careful inquiry” into four factors: “[1] the nature of the individual interest affected, [2] the extent to which it is affected, [3] the

rationality of the connection between” the policy or practice and the state’s “purpose,” and [4] “the existence of alternative means for effectuating the purpose.” . . .

Applying this test, the Court held that the state violated due process and equal protection by revoking the petitioner’s probation solely because he had not “pa[id] the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure [to pay] or that alternative forms of punishment were inadequate.” . . .

Since *Bearden*, the Supreme Court and the Ninth Circuit have reaffirmed the use of *Bearden*’s balancing test instead of the formal tiers of scrutiny when the state makes wealth-based classifications that infringe on a person’s right to equal justice in the criminal or quasi-criminal context. Although the *Bearden* framework does not precisely correlate with one of the traditional tiers of scrutiny, courts in this circuit have described the balancing test that *Bearden* requires as a form of “heightened” scrutiny. . . .

Defendants offer four general justifications for “the Program and its fees.” . . . First, Defendants argue that the government has an interest in “requiring Program participants—rather than taxpayers—to pay the Program costs.” . . . That is true. But the challenged policies are not a logical means of satisfying that goal. Terminating and prosecuting participants who cannot afford a fee is not an effective way to collect their money. . . .

Nor is Defendants’ wealth-based supervision extension policy a logical means of extracting funds. It could, of course, be rational for Defendants to create a payment plan for participants who cannot quickly pay fees and enforce that payment plan with civil debt-collection remedies if needed. But Defendants’ policy is not a mere payment plan; it includes extending onerous requirements, including prohibitions on leaving the county and state, a prolonged threat of felony prosecution, urine testing, and scrutiny of sensitive medical information and prescriptions. Defendants do not even attempt to explain how these intrusions relate to a legitimate interest in revenue.

In addition, the restrictions imposed on poor participants by the program may ultimately depress their income, making them more likely to be terminated without paying in full, either because they could not afford a monthly minimum fee or because they could not afford to pay for urine tests. For example, Plaintiff Taja Collier left college, where she was studying social work, because the diversion program required her to submit to urine tests multiple times each week in Phoenix. Ms. Collier’s college was almost an hour away from Phoenix, and she did not have a car or money to make such a long trip so frequently. . . . She returned to Phoenix and started working part-time at Target. . . . Ultimately, she became homeless and began sleeping in parks. . . .

Defendants also fail to explain how the policy of requiring urine testing for participants who remain on diversion supervision solely because they cannot afford to pay

fees increases the likelihood that participants will pay them. In fact, this policy diminishes the likelihood of payment, since it imposes additional financial burdens—\$15 or \$17 per test multiple times each week—on people who are poor.

Defendants also emphasize their interests in “rehabilitation” and “holding the offender accountable.” . . . But after the first 90 days of the program, Defendants have no valid interest in rehabilitation or retribution for participants who have satisfied all requirements other than fees. Under Defendants’ policy, a person wealthy enough to pay fees will complete the program in 90 days. It is clear, then, that 90 days is sufficient to satisfy their rehabilitative and punitive interests. . . . Likewise, no rehabilitative or retributive interest is served by terminating people who, but for their poverty, would have successfully completed the program and avoided prosecution. . . .

Finally, Defendants state that they have an interest in “relieving the burden on the judicial system.” . . . But the challenged policies have the opposite effect. Defendants’ termination policies *eject* poor participants from diversion and *return them to court for prosecution*. Similarly, Defendants’ wealth-based extension and urine testing policies prolong participants’ exposure to termination, which increases the likelihood that they will be returned to court and prosecuted. This does not relieve the burden on the judicial system; it increases it. . . .

Even if Defendants were correct that rational basis applies, the challenged policies could not survive. A policy survives rational basis if it is “rationally related to a legitimate state interest.” *City of Cleburne, Tex. v. Cleburne Living Ctr.* . . . (1985). Although this standard is deferential, it is “not toothless.” *Trimble v. Gordon* . . . (1977) A policy fails rational basis if it has no “footing in the realities of the subject [it] address[es].” *Heller v. Doe* . . . (1993). . . .

The challenged policies are unrelated to any legitimate state interest and are counter-productive. . . .

Caliste v. Cantrell

United States District Court, E.D. Louisiana
329 F. Supp. 3d 296 (E.D. La. 2018)

Eldon E. Fallon, United States District Judge:

. . . On June 27, 2017, Plaintiffs Adrian Caliste and Brian Gisclair, individually and on behalf of others similarly situated, filed this action under 42 U.S.C. § 1983 against Orleans Parish Criminal District Magistrate Judge Harry E. Cantrell, alleging violations of their rights under the Fourteenth Amendment’s Due Process and Equal Protection Clauses.

. . . Plaintiffs are former criminal defendants who were in the custody of the Orleans Parish Sheriff's Office at the time the complaint was filed. . . . Defendant Cantrell is the Magistrate Judge for Orleans Parish Criminal District Court ("OPCDC"), where he is responsible for setting bail upon arrest and has a role in managing the expenditures of the Judicial Expense Fund. . . .

In Count One, Plaintiffs allege that Judge Cantrell routinely sets a \$2,500 minimum secured money bond without first considering the facts of the case to determine whether a lower bond amount or an alternative condition of release might be appropriate. . . . Plaintiffs further aver that Judge Cantrell requires the use of a bail bond from a commercial (for-profit) surety and does not allow arrestees to post cash bail. . . . In Count Two, Plaintiffs contend that Judge Cantrell has a conflict of interest because under Louisiana law, 1.8% of a bond amount collected from a commercial surety is allocated directly to the Court for its discretionary use. . . .

Plaintiffs moved to certify a class of similarly situated plaintiffs. . . . On March 16, 2018, the Court granted this motion and certified the class. . . . Plaintiffs now seek a declaratory judgement that Judge Cantrell's bond policy, which they assert results in the creation of a modern "debtor's prison," and financial conflict of interest are violations of Plaintiffs' constitutional rights. . . . Defendant, Judge Cantrell, denies Plaintiffs' allegations and seeks summary judgment dismissing Plaintiffs' complaint.

. . . The Court acknowledges the similarities between this case and *Cain v. City of New Orleans* . . . (E.D. La. 2017) (Vance, J.). The Court draws as relevant from Judge Vance's excellent and thorough opinion, particularly as it relates to analysis of judicial conflict of interest. . . .

Judge Cantrell has filed an affidavit stating that since the inception of this litigation he has "revised the protocol [he] follow[s] in setting bail and now take[s] into consideration the following factors":

There will be no minimum monetary bail amount utilized when assessing and setting bail;

The seriousness of the offense charged, including but not limited to whether the offense is a serious crime of violence or involves a controlled dangerous substance;

The weight of the evidence against the defendant;

The previous criminal record of the defendant;

The ability of the defendant to give bail;

The nature and seriousness of the danger to any other person or the community that

would be posed by the defendant's release;

The defendant's voluntary participation in a pretrial drug testing program;

The absence or presence in the defendant of any controlled dangerous substance;

Whether the defendant is currently out on a bail undertaking on a previous felony arrest for which he is awaiting institution of prosecution, arraignment, trial, or sentencing;

Any other circumstances affecting the probability of defendant's appearance;

The type or form of bail;

Amount and source of defendant's income;

Defendant's employment status;

Number and type of defendants;

Recommendations of pre-trial services report;

Should a defendant be unable to afford the amount set, they will be entitled to an adversarial hearing, wherein they have the right to be represented by counsel and to present any evidence and/or testimony and traverse (or deny) any evidence and/or testimony presented against them concerning the previously stated factors in determining the amount of bail. . .

Judge Cantrell further avers that he will now state on the record his reasoning when setting bail. . . .

The Court does not doubt that Judge Cantrell is earnest in his present intent to modify his bail procedures. However, . . . the Court. . . is not satisfied that the voluntary conduct has mooted Plaintiffs' claims regarding the alleged bail practices. Unlike cases where there has been a "formally announced change[]" regarding official policy . . . here the Court and Plaintiffs must rely solely on Judge Cantrell's statement that he has changed his procedures and will not change them back again. Judge Cantrell has submitted no evidence of the implementation of these new bail procedures. These changes were made only after this litigation was commenced and Judge Cantrell's affidavit is not binding on his future procedures. For these reasons, the Court finds that Judge Cantrell has not met his heavy burden of convincing the Court that the challenged bail procedures could not reasonably be expected to recur. Therefore, Plaintiffs' claims are not moot. . . .

The facts regarding Judge Cantrell's bail procedures are undisputed. . . . Judge Cantrell

agrees that the following are standard practices for setting bail in his court:

. . . Judge Cantrell uses the background information provided by the public defender to determine the conditions of release or detention; “he does not ask additional questions.”

Judge “Cantrell has told public defenders that he would hold them in contempt when they have attempted to argue for lower bond amounts or RORs for their clients.”

Judge “Cantrell does not determine whether the financial condition of release that he imposes will result in pretrial detention.” . . .

It is clear that under these procedures Judge Cantrell does not request much financial information from criminal defendants prior to determining the amount of their bail. Nor does he “consider or make findings concerning alternative conditions of release when he requires secured financial conditions, and does not make any findings that pretrial detention is necessary to serve any particular government interest if a secured financial condition will result in detention.” . . .

As an example, Ms. Mishana Johnson was detained prior to trial on a charge of simple battery. . . . Her appointed counsel requested \$1000 bail based on employment status and lack of risk factors. . . . Judge Cantrell set bail at \$5000 without inquiry into Ms. Johnson’s ability to pay and informed the public defender that he does not set bail lower than \$2500. . . .

More disturbing is the colloquy regarding bail set for Ms. Ashley Jackson on June 12, 2017. . . . Judge Cantrell had agreed to an ROR for this defendant until he realized that her listed address was a homeless shelter. . . . Subsequently, stating his concerns regarding the court’s ability to contact Ms. Jackson, he set a secured \$2500 bond. . . . After argument with defense counsel, Judge Cantrell stated that he was “not punishing [the defendant] for being poor [but that he was] punishing her because [the court could] not get in touch with her.” . . .

This evidence suggests that Judge Cantrell regularly sets bail without considering the defendant’s ability pay or qualification for alternative conditions of release and that these practices regularly result in pretrial detention based on inability to pay bail. Judge Cantrell has not argued that these descriptions of his practices are inaccurate and has made no substantive constitutional arguments in defense of these practices.

Plaintiffs argue that these practices violate their due process and equal protection rights under the Fourteenth Amendment. . . .

“[S]tandard analysis under [the Due Process Clause] proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived,

and if so we ask whether the procedures followed by the State were constitutionally sufficient.” *Swarthout v. Cooke* . . . (2011). Here, Plaintiffs successfully assert that they have been deprived of a liberty interest based on “the well-established principle that an indigent criminal defendant may not be imprisoned solely because of her indigence.” *Cain* Additionally, Plaintiffs have been deprived of their fundamental right to pretrial liberty. *United States v. Salerno* . . . (1987)

Under *Mathews*, courts consider three factors to identify the requirements of procedural due process when the state endeavors to deprive someone of these rights:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

. . . The Supreme Court has discussed the types of procedural safeguards required to authorize pretrial detention under the Bail Reform Act. *Salerno* Among the valuable procedural safeguards noted in *Salerno* were “right to counsel at the detention hearing”; the opportunity to testify, present evidence, and cross-examine witnesses; standards for the judicial officer “determining the appropriateness of detention”; government burden of clear and convincing evidence; and requirement of findings of fact and reasons for detention from the judicial officer. . . .

The Supreme Court has also articulated additional procedural safeguards in several different contexts including pretrial and post-conviction detention. In *Bearden v. Georgia*, the Supreme Court held that “a sentencing court can[not] revoke a defendant’s probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate.” . . . (1983). . . .

Moreover, in *Turner v. Rogers*, the Supreme Court held that court-appointed counsel was not required in a civil contempt proceeding if sufficient alternative procedures were provided “equivalent to . . . adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings.” . . . (2011). . . .

[W]hat is manifest and pertinent is the Supreme Court’s emphasis on the due process requirements of an informed inquiry into the ability to pay and findings on the record regarding that ability prior to detention based on failure to pay. . . .

With the principles of *Salerno*, *Bearden*, and *Turner* in mind, the Court applies the

Mathews factors to the present facts.

First, plaintiffs' interest in securing their "freedom 'from bodily restraint[]' lies 'at the core of the liberty protected by the Due Process Clause.'" *Turner* Plaintiffs' liberty interest weighs heavily in favor of procedural safeguards provided before imprisonment. *Cain*, 281 F.Supp.3d at 651.

"Second, the risk of erroneous deprivation without an inquiry into ability to pay is high." *Id.* The record suggests that many criminal defendants, including Named Plaintiffs, have been imprisoned solely because they are unable to pay the bail amount set by Judge Cantrell. These are criminal defendants who have been found to be indigent for the purpose of appointing counsel. Accordingly, the inquiry into the ability to pay "must involve at least notice and opportunity to be heard, [and express findings in the record] as suggested by *Turner*; an ability-to-pay inquiry without these basic procedural protections would likely be ineffective." *Id.*

Third, Judge Cantrell has not suggested any government interest that would prevent or discourage an inquiry into the ability to pay. . . . *Bearden* requires that this inquiry include court consideration of the reasons why a criminal defendant cannot pay and of alternative measures prior to imprisonment. . . .

Here, it is clear that Judge Cantrell did not conduct an inquiry into ability to pay or include satisfactory procedural safeguards to that inquiry when setting bail. To satisfy the Due Process principles articulated by Supreme Court precedent, Judge Cantrell must conduct an inquiry into criminal defendants' ability to pay prior to pretrial detention. "This inquiry must involve certain procedural safeguards, especially notice to the individual of the importance of ability to pay and an opportunity to be heard on the issue. If an individual is unable to pay, then [he] must consider alternative measures before imprisoning the individual." *Cain*, 281 F.Supp.3d at 652.

Plaintiffs suggest that due process requires additional procedures in order to "ensure the accuracy of [a] finding that pretrial ... detention is necessary." . . . Plaintiffs cite *Salerno* and the safeguards provided under the Bail Reform Act as the standard for these additional procedural safeguards because they provide confidence that a sufficient inquiry into ability to pay is conducted prior to pretrial detention. . . .

. . . As a summary of the above discussed *Mathews* analysis, the Court finds that in the context of hearings to determine pretrial detention Due Process requires:

- 1) an inquiry into the arrestee's ability to pay, including notice of the importance of this issue and the ability to be heard on this issue;
- 2) consideration of alternative conditions of release, including findings on the record

applying the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release; and

3) representative counsel.

In Count Two, Plaintiffs argue that Judge Cantrell has an unconstitutional conflict of interest that violates due process when he sets bail. Plaintiffs challenge Judge Cantrell's multipurpose role in determining their ability to pay bail, the amount of bail upon which pretrial release is conditioned, and managing the Judicial Expense Fund, a portion of which comes from fees levied on commercial surety bonds. Plaintiffs argue that Judge Cantrell's management role over this fund creates an unconstitutional conflict of interest that deprives them of their right to a neutral fact finder in pretrial detention hearings.

Louisiana Revised Statute 13:1381.4 sets up the Judicial Expense Fund ("the Fund") for the Orleans Parish Criminal District Court ("OPCDC"). The Fund receives revenue from fines, fees, costs, and forfeitures imposed by the OPCDC. . . . Approximately \$1 million per year in revenue comes from fees levied on commercial surety bonds, representing roughly 20-25% of the total Fund in a given year. . . . The fund is controlled by the Judges of the OPCDC and "may be used for any purpose connected with, incidental to, or related to the proper administration or function of the court or the office of the judges...." . . . However, the Fund may not be used to pay any judge's salary. . . . Generally, the Fund is used to finance court operations including, but not limited to, staff salaries and benefits, conferences and legal education, ceremonies, office supplies, law books, jury expenses, and other services. . . .

As discussed by the Court in *Cain v. City of New Orleans*, the unbiased judge or neutral fact finder has long been considered "essential to due process." . . . [T]he Supreme Court has held that when a judge has financial interests in the matter before him due process is violated. In *Tumey v. Ohio* (1927), the Supreme Court "held that the mayor, acting as judge, was disqualified from deciding Tumey's case 'both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.'" . . . There, the mayor acted as judge in courts that levied fines, some of which went to village funds. . . . These funds covered some court expenses as well as some fees paid to the mayor himself. . . .

Later, in *Ward v. Village of Monroeville*, the Court held that a mayor's court violated due process when it financed a "major part" of the city funds that were also managed by the mayor. . . . (1972). There, the Court reasoned that the principle articulated in *Tumey* did not rely on the mayor's personal interest in the funds. . . . Rather, the Court articulated the following test: "whether the ... situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.'" . . .

. . . [T]his Court has clarified that finding a conflict of interest in violation of due process “do[es] not require proof of actual bias.” *Caperton v. A.T. Massey Coal Co., Inc.* . . . (2009). . . .

. . . [T]his Court applied this line of cases holding that collection of costs and fees by judges in Orleans Criminal District Court who also administer those monies as part of the Judicial Expense Fund had an “institutional incentive[that] create[d] an impermissible conflict of interest when they determine, or are supposed to determine, plaintiffs’ ability to pay fines and fees.” *Cain* The *Cain* case dealt with the same Judicial Expense Fund at issue in this case and a different source of revenue also determined by judges. . . .

The Court in *Cain* reasoned that “[b]y no fault of their own, the Judges’ ‘executive responsibilities for [court] finances may make [them] partisan to maintain the high level of contribution,’ . . . from criminal defendants.” . . . For that reason, the Court found that the judge’s “substantial” conflict of interest in adjudicating plaintiffs’ ability to pay fines and fees “offend[ed] due process” “[s]o long as the Judges control and heavily rely on fines and fees revenue.” . . .

Here, it is clear from the record that Judge Cantrell participates in the management of the Fund, sets the amount of bail, and determines arrestee’s ability to pay bail. . . . As discussed above, the Fund is partially financed by fees levied on commercial surety bonds. Judges, including Judge Cantrell then use these funds to finance court operations. . . . “This funding structure puts the Judges in the difficult position of not having sufficient funds to staff their offices unless they impose and collect sufficient [monies] from a largely indigent population of criminal defendants.” *Cain*

Judge Cantrell’s participation in the management of bond fee revenue creates a conflict of interest because he is also responsible for determining whether a pretrial detainee is able to pay bail and the appropriate amount of bail. . . . Accordingly, Judge Cantrell “ha[s] an institutional incentive to find that criminal defendants are able to pay bail” and to set higher bail amounts. . . .

As explained by the Court in *Cain*, this conflict of interest is not created by Judge Cantrell, nor is it his fault. The conflict of interest is “the unfortunate result of the financing structure” and lack of sufficient funding from the state and local governments for the criminal justice system. . . . However, the source of the conflict does not change the fact that as long as Judge Cantrell participates in the control of bond fee revenue and the OPCDC relies on it as a substantial source of funding, Judge Cantrell’s determination of Plaintiffs’ ability to pay bail and the amount of that bail is in violation of due process. . . .

. . . Accordingly, Plaintiffs are entitled to summary judgment on Count Two and are entitled to a declaratory judgment that Judge Cantrell’s institutional incentives create a substantial and unconstitutional conflict of interest when he determines their ability to pay bail and sets the amount of that bail. . . .

Cain v. City of New Orleans
United States District Court Eastern District of Louisiana
No. 15-4479 (E.D. La. Aug. 3, 2018)

Sarah Vance, United States District Judge:

Named Plaintiffs, on behalf of all persons similarly situated, filed this action against, among others, the Judges of the Orleans Parish Criminal District Court (OPCDC), challenging the debt collection practices of that court. The undisputed evidence in this case establishes that the Judges have a policy or practice of not inquiring into criminal defendants' ability to pay before those individuals are imprisoned for nonpayment of court debts. The undisputed evidence further establishes that because of the Judges' institutional conflict of interest, the Judges fail to provide a neutral forum for determination of criminal defendants' ability to pay. The Fourteenth Amendment to the U.S. Constitution prohibits a state actor from arresting or detaining a criminal defendant solely for failure to pay a court-imposed debt absent a determination of ability to pay. *See Bearden v. Georgia*, 461 U.S. 660 (1983). The Fourteenth Amendment also requires a state court to provide a neutral forum in which to adjudicate ability to pay. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). Considering this law, the evidence in the record, and the Court's orders and reasons on file herein,

It is ordered, adjudged, and decreed that judgment is hereby entered in favor of Plaintiffs on Count Five of the Complaint. The Court declares that with respect to all persons who owe or will incur court debts arising from cases adjudicated in OPCDC, the Judges' policy or practice of not inquiring into the ability to pay of such persons before they are imprisoned for nonpayment of court debts is unconstitutional. The Court further DECLARES that with respect to all persons who owe or will incur court debts arising from cases adjudicated in OPCDC, and whose debts are at least partly owed to the OPCDC Judicial Expense Fund, the Judges' failure to provide a neutral forum for determination of such persons' ability to pay is unconstitutional.

Walker v. City of Calhoun
United States Court of Appeals, Eleventh Circuit
901 F.3d 1245 (11th Cir. 2018), *petition for cert. filed*, No. 18-814, Dec. 20, 2018

Before Martin, Julie Carnes, and O'Scannlain, Circuit Judges.

O'Scannlain, Circuit Judge*:

When this lawsuit began, Maurice Walker was a 54-year-old unemployed man with a mental health disability, whose income consisted only of \$530 in monthly Social Security

* Honorable Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit, sitting by designation.

disability payments. On Thursday, September 3, 2015, Walker was arrested in the City of Calhoun, Georgia by the Calhoun Police Department for being a pedestrian under the influence of alcohol, in violation of Ga. Code Ann. § 40-6-95. A violation of that section of Georgia’s code “is a misdemeanor and is punishable upon conviction by a fine not to exceed \$500.00.” The statute does not provide for any possible jail sentence.

Walker alleges that, after he was taken to jail, he was told by an officer that “he would not be released unless he paid the standard \$160 cash bond” required for those charged with being a pedestrian under the influence. Walker says that neither he nor his family had enough money to post the bond. Walker alleges that while he was jailed, he was not given his necessary mental disorder medication, and he was confined to a single-person cell except for one hour each day.

Walker filed this suit five days after his arrest, while still detained, alleging on behalf of himself and a class of similarly situated indigent arrestees that the City was violating the Fourteenth Amendment of the United States Constitution by “jailing the poor because they cannot pay a small amount of money.” . . .

Shortly after Walker’s suit was filed, the Municipal Court of the City of Calhoun altered the prevailing bail policy by issuing a Standing Bail Order, which adopted a bail schedule for State offenses within the Municipal Court’s jurisdiction, with cash bail set at “amount[s] represent[ing] the expected fine with applicable surcharges . . . should the accused later enter a plea, or be found guilty.” . . .

In summary, the Standing Bail Order envisions three forms of release depending on the type of offense charged and the financial means of the arrestee. *First*, arrestees charged with State offenses within the Municipal Court’s jurisdiction will be released immediately on a secured bond if they are able and willing to deposit money bail in the amount set by the bail schedule. They can post cash bail themselves or use a commercial surety at twice the amount set by the bail schedule. *Second*, arrestees charged with State offenses who do not post bail immediately must wait for a bail hearing with court-appointed counsel, to take place within 48 hours from arrest. Those who can prove they are indigent at the hearing will be released on a recognizance bond—meaning no bail amount is set, either secured or unsecured. *Third*, all arrestees charged with violating City ordinances will be released on unsecured bond, meaning that they need deposit no collateral immediately but will be assessed the bail schedule amount if they fail subsequently to appear in court. . . .

. . . [T]he district court . . . found the City’s bail policy under the Standing Bail Order to be unconstitutional and entered a . . . preliminary injunction. . . . The court enjoined the City “from detaining indigent . . . arrestees who are otherwise eligible for release but are unable, because of their poverty, to pay a secured or money bail.” . . .

The order granting the new injunction prescribed an affidavit-based process for making such determination. . . . Such affidavit must include information about the arrestee's finances and the opportunity for the arrestee to attest indigency, which the injunction order defines as "less than 100 percent of the applicable federal poverty guidelines." . . . An official must evaluate the affidavit "within twenty-four hours after arrest." . . . Those found indigent "shall be subject to release on . . . recognizance without making secured bail . . . or subject to release on an unsecured bond." . . .

. . . The City argues that the district court applied the wrong legal standard in two ways: first, by analyzing this case under the Fourteenth Amendment rather than the Eighth Amendment; and second, by applying too exacting a form of scrutiny to the City's bail policy. . . .

. . . In *Stack v. Boyle*, the Supreme Court explained that "bail set at a figure higher than an amount reasonably calculated to ensure the defendant's presence at trial is 'excessive' under the Eighth Amendment." . . . But the Excessive Bail Clause "says nothing about whether bail shall be available at all," and it is meant "merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." . . .

In applying that standard, we have implicitly held that bail is not excessive under the Eighth Amendment merely because it is unaffordable. In *United States v. James* (1982), we . . . [held] that "[t]he basic test for excessive bail is whether the amount is higher than reasonably necessary to assure the accused's presence at trial," and that "[a]s long as the primary reason in setting bond is to produce the defendant's presence, the final amount, type, and other conditions of release are within the sound discretion of the releasing authority." . . . If such standard applied to this case, Walker would have a difficult time showing that his \$160 bail amount was unconstitutional.

The district court was correct, however, to evaluate this case under due process and equal protection rubrics rather than the Eighth Amendment. The decisive case is *Pugh v. Rainwater* (1978), in which the former Fifth Circuit considered en banc whether, "in the case of indigents, equal protection standards require a presumption against money bail." . . . The court "accept[ed] the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." . . . It recognized that "[r]esolution of the problems concerning pretrial bail requires a delicate balancing of the vital interests of the state with those of the individual," as the State "has a compelling interest in assuring the presence at trial of persons charged with crime," while "individuals remain clothed with a presumption of innocence and with their constitutional guarantees intact." . . .

Weighing those competing interests, the court observed that "[t]he demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail." . . . Therefore, "[t]he incarceration of those who cannot" meet a master

bond schedule's requirements, "without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." . . .

Walker's claim, and the district court's mode of analysis, therefore fits squarely within the type of hybrid due process and equal protection claim that *Rainwater* recognized. Walker's allegation is precisely that the City is violating the "demands of equal protection of the laws and of due process" by depriving indigent "pre-trial detainees of the rights of other citizens to a greater extent than necessary." . . . In fact, the contemporary Fifth Circuit recently applied *Rainwater* in a case similar to Walker's to reject the defendant's contention that relief can be accorded only under the Eighth Amendment. See *ODonnell v. Harris Cty.* . . . (5th Cir. 2018).

. . . The *sine qua non* of a *Bearden*- or *Rainwater*-style claim, then, is that the State is treating the indigent and the non-indigent categorically differently. Only someone who can show that the indigent are being treated systematically worse "solely because of [their] lack of financial resources," . . . —and not for some legitimate State interest—will be able to make out such a claim. . . .

Because Walker's claim indeed rests on an allegation of categorically worse treatment of the indigent, it falls within the *Bearden* and *Rainwater* framework, and the district court was correct to apply those cases' hybrid analysis of equal protection and due process principles.

The City further contends that the district court applied the wrong legal standard by imposing too high a level of scrutiny in its equal protection and due process analysis. The City argues that only rational basis review should apply because there is no suspect classification involved or fundamental right at stake. Although somewhat ambiguous about what form of scrutiny it was applying, the district court was clear that it believed some form of heightened scrutiny applied to this case. . . .

The district court . . . contended that "detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classifications." . . . In the district court's view, because the Standing Bail Order treated differently those who could afford immediately to pay the bail schedule amount and those who could not, it was subject to heightened scrutiny. . . .

But such argument runs headlong into *Rainwater*. There, the court approved the "[u]tilization of a master bond schedule" without applying any heightened form of scrutiny. . . . It explained that a bond schedule "provides speedy and convenient release for those who have no difficulty in meeting its requirements." . . . Of course, if the bond schedule provided "speedy" release to those who could meet its requirements, it necessarily provided less speedy release to those who could not. Nevertheless, the *Rainwater* court upheld the scheme because it gave indigent defendants who could not satisfy the master bond schedule

a constitutionally permissible secondary option: a bail hearing at which the judge could consider “all relevant factors” when deciding the conditions of release. . . .

Rainwater’s conclusion is consistent with Supreme Court case law on how differential treatment by wealth is analyzed under the Equal Protection Clause. The definitive explanation comes from *San Antonio Independent School District v. Rodriguez*. . . . (1973). Analyzing prior cases, with a focus on *Bearden*’s antecedents, the Court concluded that instances where wealth-based distinctions were impermissible “shared two distinguishing characteristics: because of their impecuniosity[, the indigent] were completely unable to pay for some desired benefit, and as a consequence, they sustained *an absolute deprivation* of a meaningful opportunity to enjoy that benefit.” . . . Mere diminishment of a benefit was insufficient to make out an equal protection claim

Under the Standing Bail Order, Walker and other indigents suffer no “absolute deprivation” of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of time to receive the same benefit as the more affluent. Indeed, after such delay, they arguably receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security. Such scheme does not trigger heightened scrutiny under the Supreme Court’s equal protection jurisprudence.

Nor do we see how it could. If Walker were correct that wealth should be treated like race, sex, or religion, and that every policy that affects people differently based on ability to pay must be justified under heightened scrutiny, the courts would be flooded with litigation. Innumerable government programs—heretofore considered entirely benign—would be in grave constitutional danger. If the Postal Service wanted to continue to deny express service to those unwilling or unable to pay a fee, it would have to justify that decision under the same standard it would have to meet to justify providing express service only to white patrons. The University of Georgia would be unable to condition matriculation on ability to pay tuition unless it could meet the same constitutional standard that would allow it to deny admission to Catholics. In Walker’s preferred constitutional world, taxes that are independent of income, such as property taxes or sales taxes, would be the target of perpetual litigation. All that is to say, we do not believe that *Bearden* or *Rainwater* announced such radical results with so little fanfare, and we therefore reject Walker’s equal protection theory. The district court was wrong to apply heightened scrutiny under the Equal Protection Clause. . . .

The appropriate level of scrutiny is the point of departure for the dissent, and its contrary conclusion on that issue is the foundation for the rest of its analysis. The dissent would adopt Walker’s theory that any marginal increase in the length of detention attributable to inability to pay bail amounts to invidious discrimination warranting heightened scrutiny. . . .

The dissent provides a hypothetical that proves how far it would go. It asks us to consider two persons arrested for the same crime under the same circumstances, whose sole difference is the amount of money each has. The dissent says there is an equal protection problem because: “The person who has money pays it *and walks away*. The indigent can’t pay, so he *goes to jail*.” . . . But this hypothetical could apply to any government benefit contingent on ability to pay, including all the examples we used above. To illustrate, let’s simply switch out, by substituting the italicized phrases, the dispensation sought by the hypothetical persons:

“The person who has money pays it and *gets express postal service*. The indigent can’t pay, so he *goes with snail mail*.”

“The person who has money pays it and *matriculates at the state university*. The indigent can’t pay, so he *stays home*.”

“The person who has money pays it and *satisfies his property tax bill*. The indigent can’t pay, so he *loses his home to a tax foreclosure*.”

Any government benefit or dispensation can be framed in artificially narrow fashion to transform a diminishment into total deprivation. The dissent takes the interest identified by *Rainwater*—the “right to freedom before conviction,” or the “right to bail before trial,” . . . —and narrows it to something like “the right not to be held a moment longer than a person who can satisfy a bail schedule.” If such narrowing is permissible, then any wealth-based equal protection claim becomes valid so long as the plaintiff frames his interest in a cramped enough style. . . . That turns the Equal Protection Clause into a game of word play, a result inconsistent with the thrust of *Rodriguez* and its successors. . . .

. . . Disparate treatment based on wealth, in the dissent’s constitutional methodology, would be treated the same as official religious or racial discrimination. The Supreme Court has rejected so radical an application of the Equal Protection Clause, *see Rodriguez* . . . and we cannot adopt it on the unprincipled ad hoc basis urged by the dissent.

Thus the district court was correct to apply the *Bearden/Rainwater* style of analysis for cases in which “[d]ue process and equal protection principles converge,” . . . yet it was wrong to apply heightened scrutiny from traditional equal protection analysis.

The confusion is perhaps unsurprising because neither *Bearden* nor *Rainwater* is a model of clarity in setting out the standard of analysis to apply. As *Bearden* puts it, the proper analysis “requires a careful inquiry into such factors as ‘the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.’” . . .

We take *Bearden*'s quotation of Justice Harlan's *Williams* concurrence as a sign that the *Bearden* Court shared his assessment that these kinds of questions should be evaluated along something akin to a traditional due process rubric. ([Justice Harlan said,] "An analysis under due process standards, correctly understood, is . . . more conducive to judicial restraint than an approach couched in slogans and ringing phrases . . . that blur analysis by shifting focus away from the nature of the individual interest affected.") . . . That makes particular sense in this case because the relief Walker seeks is essentially procedural: a prompt process by which to prove his indigency and to gain release.

In such due process analysis, "[t]he fundamental requirement . . . is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge* (1976). . . . Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," but rather is "flexible" and "requires analysis of the governmental and private interests that are affected." . . . The district court should have applied such analysis in evaluating whether the Standing Bail Order comported with the Constitution's equal protection and due process guarantees. . . .

. . . Walker failed to make the necessary showing that he is likely to succeed on the merits of his claim that the Standing Bail order is unconstitutional. . . .

Martin, Circuit Judge, concurring in part and dissenting in part:

Maurice Walker was jailed by the City of Calhoun for six days because he was too poor to pay his bail. He challenges the City's practice of jailing people before trial when they are too poor to make bond, arguing it violates the constitutional guarantees of due process and equal protection. The Majority rejects this claim, characterizing the pretrial jailing as "merely wait[ing] some appropriate amount of time to receive the same benefit as the more affluent." In this way, the Majority renders it unnecessary to review the City's practice with heightened scrutiny. I believe the Majority rewrites this court's binding precedent in *Pugh v. Rainwater* . . . which held that "[t]he incarceration of those who cannot [pay for pretrial release], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." . . . The Majority fails to recognize this infringement on the rights of indigents, so I dissent.

The Supreme Court has repeatedly recognized that wealth-based detention is not permitted by our Constitution. See *Williams v. Illinois* . . . *Tate v. Short* . . . *Bearden v. Georgia*. . . . In *Rainwater*, the former Fifth Circuit extended these cases' "principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible" to "[t]he punitive and heavily burdensome nature of pretrial confinement." . . .

. . . I read these cases to support the District Court's application of heightened scrutiny under the Equal Protection Clause to the City's bail policy. . . .

The Majority relies on *San Antonio Independent School District v. Rodriguez* . . . in deciding that Mr. Walker cannot make out an equal protection claim warranting heightened scrutiny. But I read *Rodriguez* to say he can. . . . The *Rodriguez* test first asks whether the challenged scheme uses indigency as a classification, examining whether it treats differently a “class [] composed only of persons who were totally unable to pay.” . . . The second question is whether the class has suffered an “absolute deprivation” of a benefit. . . .

The Majority never addresses whether the Standing Bail Order discriminates against indigents. . . . I say the Bail Order clearly uses indigency as a classification, and offer this simple example in support. Consider two people, one who has money and the other who does not. They are arrested for the same crime at the same time under the same circumstances. Under the Standing Bail Order, these two would have the identical bail amount, as established by the master bail schedule. The person who has money pays it and walks away. The indigent can’t pay, so he goes to jail. This is plainly “imprisonment solely because of indigent status.” *Rainwater*

The Majority Opinion says this hypothetical shows I would require the government to be involved in all sorts of wealth-based interactions—including intervening to make pricier express mail options available to all postal patrons. . . . Not so. Instead I look to the Supreme Court, which has expressly established limiting principles for equal protection claims by indigents. . . . In *M.L.B.*, the Court plainly said “[s]tates are not forced by the Constitution to adjust all tolls to account for disparity in material circumstances.” . . . It explained that lawsuits seeking “state aid to subsidize [] privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action” are different from those vindicating a person’s right to participate in political processes or to have access to the courts in criminal cases. . . .

As to *Rodriguez*’s second question, the Majority relies on the fact that the Standing Bail Order caps an indigent arrestee’s pretrial detention at 48 hours to conclude that the detention isn’t an “absolute deprivation.” In fact, the Majority refers to this person’s time in jail as just a “diminishment of a benefit.” . . . But this is word play. First, the Majority renames the interest in “freedom from incarceration” at issue here, as an interest in “access to pretrial release.” *But see ODonnell* . . . (identifying the interest as “freedom from incarceration”). Second, the Majority’s characterization treats 48 hours in jail as a mere delay or “diminishment” of the benefit of being released, instead of the deprivation of liberty it surely is.

In my view, an incarcerated person suffers a complete deprivation of liberty within the meaning of *Rodriguez*, whether their jail time lasts two days or two years. . . . I am not alone in this view. In addressing a challenge to the bail policies of Harris County, Texas, the Fifth Circuit looked to *Rodriguez* in holding that “indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration.” *ODonnell*, . . . The Fifth Circuit thus

held that “[h]eightedened scrutiny of the County’s [bail] policy is appropriate.” . . . [T]he only difference between Harris County’s system, as described by the Texas District Judge, and Calhoun’s system, is that the Texas system allowed indigents to be detained for longer than 48 hours. . . . Under our precedent, I do not view this factual difference as meaningful.

It seems unremarkable to say that being jailed for 48 hours is more than a mere inconvenience. There are very real consequences for detained indigents. They can lose their jobs. They can lose their homes and transportation. Their family connections can be disrupted. And all this is to say nothing of the emotional and psychological toll a prison stay can have on an indigent person and her family members. . . .

In sum, I read *Rodriguez* (and *Bearden* for that matter) to require that Mr. Walker’s claim of wealth-based discrimination be subject to heightened scrutiny under a traditional equal protection framework. Thus, I would have affirmed the District Court’s analysis. . . .

In applying heightened scrutiny to Mr. Walker’s claim, I recognize that the Supreme Court has not made clear whether the level of scrutiny to be applied in *Bearden*-like cases is intermediate or strict scrutiny. . . . Nevertheless, it is my view that on this record, the City’s Standing Bail Order cannot survive even under intermediate scrutiny. The City failed to show that a 48-hour detention of only those who cannot afford to pay bond is “reasonably necessary to the accomplishment of legitimate state objectives.” . . .

Schultz v. Alabama

Memorandum Opinion and Order

United States District Court, N.D. Alabama, Northeastern Division
330 F. Supp. 3d 1344 (N.D. Al. 2018), appeal pending

Madeline Hughes Haikala, United States District Judge:

Bradley Hester was arrested and jailed in Cullman County. He was, and others similarly situated are, detained in the Cullman County jail following arrest because they cannot afford to post a surety bond or a property bond as a condition of pretrial release. Mr. Hester asks the Court to preliminarily enjoin the Cullman County Sheriff from detaining indigent defendants who cannot afford to post a property bond or a surety bond as a condition of pretrial release. Mr. Hester argues that Cullman County’s procedures for setting a secured bond as a condition of pretrial release are constitutionally flawed, and he argues that the way in which Cullman County implements those procedures is inequitable. . . . For the following reasons, the Court finds that Mr. Hester is entitled to a preliminary injunction. . . .

. . . In his first claim for relief, citing the Fourteenth Amendment, Mr. Hester alleges

that the defendants violate the “fundamental rights” of indigent criminal defendants arrested in Cullman County “by enforcing against them a post-arrest system of wealth-based detention” pursuant to which indigent defendants “are kept in jail because they cannot afford a monetary amount of bail.” . . . In his second claim for relief, Mr. Hester alleges that the defendants do not provide counsel for bail hearings, give arrestees an adequate opportunity to testify or present evidence at bail hearings, apply a uniform evidentiary standard to determine whether a person should be detained prior to trial, or “require a [judicial] finding that no affordable financial or non-financial condition of release will ensure appearance or public safety before jailing pretrial arrestees on monetary bail amounts that they cannot afford.” . . . Mr. Hester asserts that the defendants create *de facto* detention orders that apply to only indigent criminal defendants in Cullman County. Mr. Hester seeks declaratory relief from the judicial defendants—Circuit Clerk McSwain, Magistrate Black, Magistrate White, Judge Chaney, and Judge Turner—and injunctive relief from Sheriff Gentry. . . .

Under Alabama law, absent a capital murder charge, arrestees have a statutory right to bail. . . . In Cullman County, bail initially is set as a condition of pretrial release for every arrestee. The staff of Cullman County’s Sheriff’s Office selects the initial bail amount for individuals jailed for warrantless probable cause arrests; magistrates select the initial bail amount in arrest warrants. . . . On an average day, there are ten arrests in Cullman County, and six of those arrestees are immediately bail eligible. . . .

Cullman County primarily uses property bonds and surety bonds to meet the bail condition for pretrial release of arrestees. In the case of a property bond, a criminal defendant’s relative or neighbor may post property (typically real property, but occasionally a vehicle) to secure the defendant’s release. . . . Bonding companies provide surety bonds. . . .

On March 26, 2018, the presiding circuit judge in Cullman County signed a “Standing Order Regarding Pre-Trial Appearance and the Setting of Bond” which established new pretrial detention and bail policies for the Cullman County. . . . Pursuant to the March 26, 2018 Standing Order, the Cullman County Sheriff still uses a bail schedule, but the new bail schedule provides specific amounts of bail for specific criminal charges. . . . As with the former bail procedures, absent a capital murder charge, eligible defendants arrested without a warrant are released when they post a secured bond in the amount that Sheriff Gentry’s staff sets per the bail schedule, regardless of the nature of the crime charged, the arrestee’s criminal history, or the arrestee’s prior record of failures to appear. . . . When the sheriff sets a bond amount for a warrantless arrest, “there’s no leeway in . . . what your bond is going to be.” . . .

The Standing Order provides that defendants who are unable to post a secured bond in the amount listed in the bail schedule are entitled to a judicial determination of the conditions of their release by a district judge held no later than 72 hours after arrest. . . . A circuit judge must determine the conditions for release for a defendant who is arrested

pursuant to a warrant issued upon an indictment. . . . The judicial determination of conditions for release takes place at an initial appearance. If a defendant cannot pay the bond amount set by Sheriff Gentry or a magistrate, and the defendant does not receive an initial appearance within 72 hours of arrest, then Sheriff Gentry must release the defendant on an unsecured appearance bond in the amount set in the bail schedule. . . .

Before an initial appearance, a member of the Sheriff's Office meets with a defendant in jail and offers two forms to the defendant. A defendant may complete a "Release Questionnaire," and a defendant who indicates that she needs an attorney also may complete an "Affidavit of Substantial Hardship." . . .

. . . The release questionnaire asks the defendant to supply information about her residence, employment, family situation, health, and criminal history, including prior failures to appear. . . . The affidavit of substantial hardship asks the defendant to identify her employment, assistance benefits, monthly gross income, monthly expenses, and liquid assets. . . . The sheriff's court liaison deputy delivers the completed forms to court, so that the forms are available to the judge at the initial appearance. . . .

. . . . The information that arrestees provide on the bail forms is not always accurate, often because arrestees may have difficulty understanding the forms. . . . Therefore, the examination of defendants during an initial appearance is an important source of information for the determination of the conditions of bond. . . .

The initial appearance typically is held remotely by video conference. . . . The judge reviews the affidavit of substantial hardship, if the defendant has submitted one, to determine whether the defendant is indigent. . . . If the judge determines that the defendant is indigent, then the court appoints counsel for the defendant, but under the Standing Order, appointed counsel is not available to a defendant during an initial appearance. . . .

. . . [T]he judge determines the conditions of the defendant's release. . . . Pursuant to Rule 7.2(a) of the Alabama Rules of Criminal Procedure, the judge must consider releasing the defendant on the defendant's own recognizance or on an unsecured appearance bond unless the judge "determines that such a release will not reasonably assure the defendant's appearance as required, or the defendant's being at large will pose a real and present danger to the public at large." . . . Rule 7.2(a) [lists fourteen factors the court may consider in making a such a determination]. . . . The Standing Order requires the judge to consider the fourteen factors in Rule 7.2(a). . . .

The Standing Order provides that after considering the fourteen factors, the defendant's ability to post a secured bond, testimony from the defendant, and forms submitted to the Court, the Court "may release a defendant on his or her own recognizance, require the defendant to post an unsecured appearance bond, or require the posting of a secured appearance bond If there is "no less onerous condition for securing the defendant's appearance or protecting the public, then the Court may require a secured

appearance bond in an amount less than, equal to, or greater than that contained in the bond schedule,” even if the defendant cannot afford to post bond. . . .

. . . . It is not uncommon for a judge to set a bond in an amount he knows the defendant cannot afford. . . . Following her initial appearance, if a defendant still cannot afford to post bond, then the defendant may file a motion for bond reduction, and her appointed attorney may assist her. . . . A judge typically hears the motion within a month.

. . . .

Here, the mootness doctrine does not foreclose Mr. Hester’s efforts to obtain relief because although the Cullman County Circuit Court has revised its written criminal pretrial procedures, the record demonstrates that the defendants do not fully comply with the new written procedures. And even if the defendants did comply, as discussed in greater detail below, the new procedures, though an improvement over the old, still are constitutionally deficient. . . .

Mr. Hester argues that “[t]his case implicates two overlapping but distinct constitutional rights: the right against wealth-based detention and the right to pretrial liberty.” . . . Mr. Hester contends that Cullman County’s bail system cannot withstand constitutional scrutiny because it creates one standard of pretrial release for wealthy defendants and another for indigent defendants. The Court agrees. . . .

Liberty is prohibitively expensive for indigent criminal defendants in a jurisdiction where secured bond is a condition of liberty, and judges set unattainable bond amounts that serve as *de facto* detention orders for the indigent. Pretrial “imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.” *Pugh v. Rainwater* . . . (5th Cir. 1978) “The demands of equal protection of the laws and of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail.” *Pugh* When a jurisdiction like Cullman County creates a criminal process pursuant to which “those with means avoid imprisonment” and “the indigent cannot escape imprisonment,” the jurisdiction violates the Fourteenth Amendment. *Frazier v. Jordan* . . . (5th Cir. 1972). . . .

. . . [A]s the *Walker* majority held, the City of Calhoun’s Standing Bail Order “guarantees release to indigents within 48 hours.” . . . Indigent defendants in Cullman County receive no such guaranty; Cullman County affords that guaranty only to criminal defendants who have the financial means to post a bond at the time of arrest in an amount set in the county’s bail schedule. . . .

Cullman County’s bail process differs significantly from the process in the City of Calhoun because indigent defendants cannot secure their release merely by proving that they are indigent according to a uniform standard of indigency. Instead, within 72 hours of arrest, to obtain pretrial release in Cullman County, an indigent criminal defendant, without the assistance of counsel, must prove not only that he is indigent but also that he is not a

flight risk or a threat to himself or the community. If a judge, applying no particular legal standard, decides that a defendant is indigent but that the defendant is a danger to himself or his community or a flight risk, then the judge may set bail at a level that the defendant cannot afford, creating a *de facto* detention order. . . .

Those harmful consequences [of pretrial detention] are significant. Mr. Hester's un rebutted evidence shows that deprivation of pretrial liberty takes a high toll on a criminal defendant, and the negative effects of pretrial incarceration compound each day that a defendant is detained. . . . And detention for even 24 hours can cause a defendant to lose a job, a consequence an indigent defendant cannot afford. In Cullman County, these harmful consequences appear to be unacceptable for all but the indigent.

Mr. Hester is substantially likely to prove that Cullman County's discriminatory bail practices deprive indigent criminal defendants in Cullman County of equal protection of the law because the challenged distinction does not rationally further a legitimate state purpose. . . . Instead, Cullman County's stated interests are illusory and conspicuously arbitrary.

The defendants argue that three compelling interests warrant secured bonds in Cullman County: providing pretrial release as quickly as possible for all who can afford it . . . ensuring that criminal defendants appear for trial . . . and protecting the community from dangerous criminal defendants Mr. Hester is likely to demonstrate that the defendants' secured money bail procedures are not necessary to serve any of these interests.

With respect to efficient pretrial release of criminal defendants, the defendants have demonstrated that the bail schedule enables the defendants to quickly release criminal defendants who can afford a bond. . . . An unsecured bond system would allow wealthy and indigent defendants to be released at the same rate and on the same basis, thereby *increasing* the efficiency of pretrial release in the county by freeing additional jail space and returning all defendants, not just the wealthy, to their families as quickly as possible. Cullman County has not examined or tested an unsecured bond system. . . .

With respect to the issue of pretrial appearance, the plaintiffs' evidence demonstrates that Cullman County likely would not see an increase in failures to appear with unsecured bonds. Mr. Hester offered expert testimony and empirical studies to demonstrate that secured money bail is not more effective than unsecured bail or non-monetary conditions of release in reducing the risk of flight from prosecution. . . .

Mr. Hester's evidence shows that secured money bail actually may undermine the government's interest in court appearance because secured money bail results in longer periods of pretrial detention for those who cannot easily afford bail, which, in turn, is associated with higher failure to appear rates. . . . And evidence suggests that most defendants released without financial incentives to appear in court still appear at a very high rate. . . .

The defendants' third stated interest, the safety of the community, illustrates that Cullman County's bail procedure is entirely arbitrary. Empirical studies demonstrate that there is no statistically significant difference between the rates at which criminal defendants released on secured and unsecured bail are charged with new crimes. . . .

Significantly, Mr. Hester offered expert testimony and research studies which demonstrate that prolonged pretrial detention is associated with a greater likelihood of re-arrest upon release, meaning that pretrial detention may *increase* the risk of harm to the community. . . .

. . . The system is discriminatory: not all criminal defendants who pose a real and present danger to the public are indigent, but Cullman County detains only indigent criminal defendants who pose a real and present danger to the public. Dangerous defendants with means enjoy pretrial liberty. . . . There is a substantial likelihood that Mr. Hester will prove that Cullman County's bail procedures violate his constitutional right to substantive and procedural due process. . . .

Cullman County's secured money bail procedures are strikingly similar to the bail procedures at issue in the Fifth Circuit's recent opinion in *ODonnell v. Harris Cty.* . . . (5th Cir. 2018). . . . The Fifth Circuit affirmed the district court's ruling that Harris County violated indigent criminal defendants' due process rights by infringing on the fundamental right to pretrial liberty without constitutionally adequate procedures. *ODonnell* The Fifth Circuit found that the "fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: [Harris] County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances." *ODonnell* To cure the due process and equal protection violations, the county had to "implement the constitutionally-necessary procedures" *Id.* The Fifth Circuit held that "constitutionally-necessary procedures" specifically included "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker." *Id.* . . .

There is no meaningful difference between the bail procedures in this case and the procedures in *ODonnell*; both are equally arbitrary. Like Harris County pre-*ODonnell*, Cullman County mechanically applies a secured money bail schedule to detain the poor and release the wealthy. Like Harris County, Cullman County argues that its written "individualized" release procedures protect indigent defendants' due process rights. And like Harris County, Cullman County's actual procedures are significantly less individualized and protective than due process requires. . . .

The defendants do not provide constitutionally adequate notice to indigent criminal defendants before an initial appearance. . . . The language in the release questionnaire suggests to a defendant that she is entitled to some form of "release," when she really is not because the court may exercise its discretion to enter what amounts to an order of

detention. . . . Having these defendants rely on the information in the release questionnaire for notice is tantamount to no notice at all. . . .

Under the March 2018 Standing Order, at an initial appearance, a Cullman County judge does not have to give a criminal defendant an opportunity to be heard or present evidence. . . . Accordingly, the defendants impermissibly leave a criminal defendant's opportunity to be heard, a "fundamental requirement of due process," up to the judge's discretion. . . .

Under the March 2018 Standing Order, neither the Cullman County Sheriff nor a Cullman County judge must satisfy an evidentiary standard before entering an unaffordable secured bond that serves as a *de facto* detention order. . . . The Supreme Court has consistently "mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer* . . . (1982)

. . . The detention of a criminal defendant in Cullman County without a specific degree of confidence that detention is necessary offends a fundamental principle of justice. . . . Accordingly, before ordering an unaffordable secured bond, a judge must find by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public. . . .

Although the Standing Order states that "[t]he Court will make a written finding as to why the posting of a bond is reasonably necessary ..." . . . , Cullman County judges do not actually make "findings." Instead, a judge merely checks a box for any of fourteen factors he "considered." . . . This is insufficient. . . .

To obtain her freedom after an initial appearance, an indigent defendant must move the state court to reduce her bond. . . . Checking boxes for factors "considered" is tantamount to providing counsel with a copy of Rule 7.2(a) of the Alabama Rules of Criminal Procedure; checkboxes for factors "considered" provide no meaningful information to indigent defendants or their appointed counsel.

To cure these deficiencies, at a minimum, a judge must state on the record why the court determined that setting secured money bond above a defendant's financial means was necessary to secure the defendant's appearance at trial or protect the community. . . .

In all of these areas—absence of notice, absence of an opportunity to be heard, absence of an evidentiary standard, and absence of factual findings—Mr. Hester has demonstrated a substantial likelihood of success in proving that the defendants violate due process. . . .

The threatened harms to the putative class outweigh the harms the preliminary

injunction may cause to the defendants. The defendants argue that no alternative systems are workable in Cullman County. The defendants contend that detaining every arrestee until an initial appearance would put considerable strain on the county's resources. . . .

But alternative pretrial detention policies are cost effective. Three options are readily available to Cullman County at little or no cost. First, Cullman County could release all defendants on unsecured bond. In a case in which a defendant may pose a significant flight risk or a danger to the community, a judge could hold an initial hearing within 48 hours of arrest and, if necessary based on the evidence collected at the hearing, impose additional conditions for release such as a court-appointed third-party custodian or a requirement that the defendant periodically call one of the sheriff's court liaisons. The defendants acknowledge that an unsecured bail schedule would serve their interests. . . .

Alternatively, Cullman County could adopt the Calhoun model and, within 48 hours of arrest, release on recognizance bonds all indigent defendants who prove their indigency on the basis of an objective standard.

Finally, Cullman County could have all arrestees complete a release questionnaire, updated to conform to the procedural requirements discussed above. The Sheriff's Office could review those questionnaires and release on unsecured bond all low-risk arrestees. The Sheriff's Office would detain all high risk arrestees, wealthy and indigent alike, for an initial appearance at which a judge would assess the necessary conditions for pretrial release.

Holding procedurally sufficient initial appearances consistent with this memorandum opinion would not be overly burdensome. The defendants may be able to provide sufficient notice to arrestees by, for example, editing the affidavit of substantial hardship and release questionnaire and making sure that arrestees who have difficulty understanding the forms receive assistance. Satisfying an evidentiary standard before setting bail should add no extra cost, and making actual findings when requiring a bond may require very little extra time, if any. . . .

**Buffin v. City and County of San Francisco
Order Granting Plaintiffs' Motion for Summary Judgment; Denying CBAA's
Cross-Motion for Summary Judgment; Denying Plaintiffs' Motion to Revoke
CBAA's Intervenor Status**

United States District Court, N.D. California
2019 WL 1017537 (N.D. Cal. Mar. 4, 2019)

Yvonne Gonzalez Rogers, United States District Judge:

Plaintiffs challenge the use of San Francisco's Felony and Misdemeanor Bail

Schedule as a basis for defendant Sheriff Vicki Hennessy (the “Sheriff”) to release detainees prior to arraignment where those detainees do not have the means to afford the amounts set forth therein. Plaintiffs argue that plausible alternatives exist which would allow for their release and that the continued use of such a schedule violates the Due Process and Equal Protection clauses of the United States Constitution. When the Sheriff refused to defend the use of the Schedule, the Court granted California Bail Agents Association (“CBAA”) limited intervenor status. . . .

San Francisco police arrested plaintiff Riana Buffin on Monday, October 26, 2015 for “grand theft of personal property” . . . and “conspiracy to commit a crime” . . . According to her “booking card,” Ms. Buffin, at the time 19 years old, was booked into jail at 11:33 p.m. . . . She was informed that her bail amount was set at \$30,000, that is, the combined amount of \$15,000 for each booking charge pursuant to the Bail Schedule. . . .

Ms. Buffin did not post bail because she could not afford it, testifying:

Q. And why didn’t you call a bail agent?

A. Because we or my mom didn’t have the money for a bail agent, and they want a fortune. . . .

Q. Was there an amount that you could have afforded[?]. . . .

A. No.

The District Attorney’s office ultimately decided not to file formal charges against Ms. Buffin, and she was released. Despite having been detained on a Monday night, Ms. Buffin was never taken to court on Tuesday or Wednesday for an initial appearance. Notably, by the time of her release on Wednesday night, she had spent approximately 46 hours in custody, and normal court operations had long since ceased. As a consequence of her detention, Ms. Buffin lost her job at the Oakland Airport. . . .

San Francisco police arrested plaintiff Crystal Patterson on Tuesday, October 27, 2015 at 3:49 p.m. and, according to her booking card, she was detained for “assault with force likely to cause great bodily injury,” . . . Ms. Patterson, at the time 29 years old, was booked into jail, where she was informed that her bail amount was set at \$150,000. Again, this represented the combined amount of \$75,000 each for two separate counts of assault . . . Ms. Patterson, too, could not afford the \$150,000 for immediate release, nor was she taken to court:

Q. So you told [the bail agent], I can’t afford that?

A. Right.

Q. And then the second number was a number you could afford?

A. I couldn’t afford it. I had to borrow from my family.

After approximately 29 hours of incarceration, and prior to her initial appearance, Ms. Patterson was released after her uncle paid an “initial down payment” of \$1,500 on a \$15,000 non-refundable premium to secure a bond from a surety bail agent. . . . Following Ms. Patterson’s release, the District Attorney decided not to file formal charges against her and discharged the case.

The evidence gathered in this case reveals that, like Ms. Patterson, over 99% of arrestees who are released on bail in San Francisco obtain surety bonds through contracts with bail agents. In San Francisco, in 2016, the largest number of bonds issued ranged in amounts between \$10,000 and \$50,000, with the average bail amount posted at \$56,000 and the median bail posted at \$43,000. Bail agents are legally allowed to charge a non-refundable premium of up to 10% of the total bail amount for their services. Often, third-party family members, friends, or employers of the arrestee will co-sign with a detainee to obtain a surety bond. In fact, bail companies rely on these co-signors to help ensure that the detainee returns to court. Moreover, recent studies corroborate plaintiffs' own experiences, estimating in 2017 that "30% of custodial arrests...will be declined for prosecution each year. . . ."

Relevant here, California law requires superior court judges to "prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions." Penal Code § 1269b(c). In so doing, judges are required to consider the seriousness of the offense charged. *Id.* § 1269b(e). In this case, the San Francisco superior court established the referenced Bail Schedule, which is comprised principally of a three-columned table that identifies an "Offense," or Penal Code section, a short "Description" thereof, and a fixed "Bail" amount. . . . The Sheriff consults the Bail Schedule to determine an arrestee's bail amount. Specifically, the Sheriff locates each "booking charge," tabulates the amounts designated per charge, and releases the detainee upon payment of that sum. The Sheriff applies the process mechanically, making no individualized assessment regarding public safety, flight risk, ability to pay, or strength of the evidence.

The record is devoid of any evidence upon which the amounts in the Bail Schedule are determined or justified. . . . Under state law, some arrestees may apply to a magistrate for pre-arraignment release on lower bail or on his or her own recognizance ("OR"). *See* Penal Code § 1269c. This application may be made without a hearing. *Id.* Ironically, individuals charged with certain offenses are ineligible to apply pre-arraignment for either OR release or a reduction in bail, but, if they pay the applicable amount under the Bail Schedule, the Sheriff may release them absent some other legal impediment to their release. *Id.*

In setting bail, a judge or magistrate may consider the information included in a report prepared by an investigative staff employed by the court for the purpose of recommending whether a detainee should be released on his or her OR. . . .

On April 30, 2016, the OR Project staff began using a Public Safety Assessment Tool (the "PSA Tool") developed by the Laura and John Arnold Foundation. The purpose of the PSA Tool is to make an individualized assessment regarding the risk that an arrestee, if released pretrial, will fail to appear or will engage in new criminal activity, and to generate a release recommendation based on the assessed risk. Release recommendations

(not decisions) are a function of (1) the score generated by the PSA Tool and (2) a decision-making framework (“DMF”) prepared by a working group that includes representatives from the San Francisco Superior Court, Sheriff’s Department, District Attorney, Public Defender, and Conflict Counsel.

Since the PSA Tool has been in use, it has changed the OR Project staff’s various procedures. Previously, the OR Project staff prepared a report called an “OR Workup” after interviewing the arrestee. . . . Since implementation of the PSA Tool, the OR Project staff are no longer required to interview the arrestee. Rather, they prepare an OR Workup for each arrestee eligible for OR release (whether at arraignment or before), which includes a summary of the arrestee’s individual and criminal history, the criminal history printouts, the police report, and a cover sheet, supplemented with a release recommendation generated by the PSA Tool and the DMF. . . .

In its previous 20-page summary judgment order, the Court detailed the reasons for concluding that strict scrutiny review applies to plaintiffs’ Due Process and Equal Protection claims. In so explicating, the Court cabined the relevant inquiry as follows: “(i) whether the Sheriff, through use of the Bail Schedule, has significantly deprived plaintiffs of their fundamental right to liberty, and, if so, (ii) whether, under the strict scrutiny standard of review, the Sheriff’s use of the Bail Schedule is the least restrictive alternative for achieving the government’s compelling interests.” . . .

On August 28, 2018, Governor Jerry Brown signed the California Money Bail Reform Act (“S.B. 10”) into law, which was initially set to go into effect on October 1, 2019. . . . However, earlier this year, a referendum to overturn S.B. 10 qualified for the November 3, 2020 statewide ballot. Approval by a majority of voters will be required before S.B. 10 can take effect.

. . . S.B. 10’s statutory history reveals the Legislature’s decision to “remedy” California’s pretrial system by “reducing reliance on money bail, supporting pretrial defendants with pretrial services, focusing detention resources on those who pose a risk of danger, reducing racial disparities, and ensuring that people are not left in jail simply because they cannot afford to pay for their release.” . . .

In relevant part, S.B. 10 prohibits monetary conditions of release in California, authorizing Pretrial Assessment Services to release, *without court approval and prior to arraignment*, low-risk and medium-risk arrestees with “the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the person’s return to court.” . . .

. . . None of these provisions exist in Penal Code section 1296b. . . .

. . . [T]his Court found the instant challenge to be properly reviewed under strict scrutiny and is aligned with the dissenting opinions in both *ODonnell II* and *Walker*. The

deprivation of one's liberty cannot, and should not, be easily trampled. Nor should one's liberty be so easily discarded upon strained hypotheticals such as the *Walker* court's comparison of the inability to afford bail with the inability to pay for express mail. . . . As dissenting Circuit Judge Martin observed in *Walker*, the United States Supreme Court recently reaffirmed that "[a]ny amount of actual jail time is significant and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." . . . Here, the bonds of history remind us that the "presumption of innocence, secured only after centuries of struggle," should not vanish under the guise of the universal benefits of a bail option. While "indigency," by definition, indicates a lack of wealth, the constitutional principle is what controls. That principle here is grounded in liberty. We need not be concerned with hysteric claims of floodgates to wealth-based claims opening. . . .

As for the issue of whether plaintiffs' deprivation is "significant," it is undisputed that San Francisco arrestees who are released after posting secured money bail are detained, on average, 12.8 hours *less* than arrestees who obtain release through the OR Project and who spend an average of 25.4 hours in jail. . . . Thus, those who obtain release through the OR Project spend, on average, *more than twice as much time behind bars* than those who are able to post bail. The time detained can be even greater for others, such as Ms. Buffin, who was incarcerated for 46 hours.

Here, the time differential is but one component of the analysis. "Significance" is measured by more than just a difference in hours. Plaintiff Buffin's experience evidences the real-world consequences of such a deprivation; she lost her job. She is not alone. The evidence reveals that individuals can also lose their housing, public benefits, and child custody, and be burdened by significant long-term debt due to a short period of detention. Moreover, many detainees "plead guilty (or no contest) at an early stage in the proceedings to secure their release from custody." . . .

Given the consequences which flow from an extended duration of pre-arraignment detention, the Court finds the deprivation significant. Accordingly, plaintiffs have shown that the Sheriff, through use of the Bail Schedule, has significantly deprived plaintiffs of their fundamental right to liberty by sole reason of their indigence. . . .

Here, plaintiffs' proposed alternative is to "rely solely on a computerized risk assessment process (such as the current San Francisco Public Safety Assessment ('PSA')[,])" with S.B. 10 having "essentially implemented" this alternative, serving as a "more detailed version" of the same. . . . Importantly, the government *itself* concurs that the alternative is plausible; that is, the state has now enacted what it believes to be a less restrictive yet at least as effective alternative, with the express goal of reasonably assuring public safety and individuals' return to court.

Unlike the current reliance on a bail schedule, S.B. 10 requires all jurisdictions to generate *prior to arraignment* for each arrestee "[t]he results of a risk assessment using a

validated risk assessment instrument, including the risk score or risk level.” . . . Amongst its provisions, individuals who are assessed as low- or medium-risk to public safety and of failure to appear in court shall be released on their own recognizance, prior to arraignment and *without review by the court*, “with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the person’s return to court.” . . . This will allow for release when court is not in session. Further, individuals arrested for misdemeanors, with some exceptions, will be released within 12 hours . . . *i.e.*, roughly the average length of those posting bail for release under the current system. . . .

. . . CBAA argues that the proposed alternative is not plausible because it would pose “insurmountable administrative problems” for the Sheriff in determining which arrestees “cannot afford” bail. . . . However, CBAA has proffered *no* evidence in support thereof aside from the bald conclusion of its expert. Nor has the Sheriff conceded such “insurmountable” problems.

In order to analyze whether plaintiffs’ proposed alternative is less restrictive and at least as effective than the Bail Schedule in serving the government’s compelling interests, the Court must also consider how the Bail Schedule itself enhances public safety and ensures future court appearance. Importantly, the record is devoid of *any* evidence showing that the Bail Schedule considers either of the articulated goals. . . .

Absent any evidence justifying the Bail Schedule as a means for accomplishing the government’s compelling interests, the Court finds that “operational efficiency” does not trump a significant deprivation of liberty. . . . This practice . . . replaces the presumption of innocence with the presumption of detention. Accordingly, the Bail Schedule, which merely associates an amount of money with a specific crime, without any connection to public safety or future court appearance, cannot be deemed *necessary*. . . .

Once a plaintiff makes a *prima facie* showing under a strict scrutiny analysis, the burden shifts to the government to show that the proposed alternative would be less effective or more restrictive. Most of the CBAA’s arguments in this regard overlap with its arguments in response to plaintiffs’ initial burden. As for those not previously addressed, they are unavailing given that plaintiffs’ proposed alternative entails an individualized inquiry into the risk an arrestee has as to either public safety or a failure to appear and thus does not result in the deprivation of one’s liberty solely due to one’s indigence. The Bail Schedule, by contrast, is arbitrary in that it sets amounts without regard to any objective measurement and thus bears *no* relation to the government’s interests in enhancing public safety and ensuring court appearance. It merely provides a “Get Out of Jail” card for anyone with sufficient means to afford it. In light thereof, CBAA cannot show that plaintiffs’ proposed alternative would be less effective at serving the government’s compelling interest or more restrictive and has thus failed to meet its burden under the strict scrutiny standard. . . .

Daves v. Dallas County
**Brief of *Amici Curiae* Current and Former Prosecutors, Department of Justice
Officials, Law Enforcement Officials, and Judges in Support of Plaintiffs-Appellants**
United States Court of Appeals for the Fifth Circuit
No. 18-11368 (5th Cir. Jan. 30, 2019)

[Plaintiffs are individuals who have been arrested on misdemeanor and felony charges in Dallas County. They filed suit under 42 U.S.C. §1983 and argued that the County’s bail system was unconstitutional. The challenge rested on the use of a secured money bail schedule and the judges’ failure to make an inquiry into their ability to pay. The district court certified the class and found plaintiffs substantially likely to prevail on their equal protection and procedural due process claims. The County’s appeal is pending.]

. . . Amici curiae are 82 current and former local, state, and federal prosecutors and law enforcement officials, former Department of Justice leaders, and former judges representing 34 different states and including elected and appointed officials from both political parties. Amici all are or have been responsible for public safety or involved in the criminal justice system in their jurisdictions. They have a strong interest in this case because detaining indigent defendants based solely on their inability to pay money bail, while others similarly situated but able to pay are released, offends the Constitution, undermines confidence in the criminal justice system, impedes the work of prosecutors and law enforcement officials, and fails to promote safe communities. . . .

Whether elected, appointed, or career, amici current and former local, state, and federal prosecutors and law enforcement officials, former Department of Justice leaders, and former judges (“amici”), are or have been accountable to their communities to pursue justice fairly and without regard to race, religion, ethnicity, gender, sexual orientation, disability, or wealth. Their work depends on preserving the integrity of the justice system and building trusting relationships with community members, so that those community members will report crimes, cooperate with law enforcement, testify in court proceedings, and sit fairly as jurors. Fostering such relationships and thus protecting the public cannot be achieved when the legitimacy of the criminal justice system is undermined by a practice of detaining indigent defendants before trial solely because of their inability to pay monetary bail, while releasing similarly situated defendants who can.

The failures of wealth-based bail systems, from the personal harm inflicted on those detained to the widespread adverse impact on the justice system, have led to federal and state reform measures. Reformed jurisdictions base pretrial release decisions on individualized determinations of flight risk and dangerousness, and utilize non-financial conditions of release with pretrial supervision where appropriate. In the experience of amici, these types of reformed bail practices not only are more effective than money bail

at ensuring appearance, but also preserve the legitimacy of the criminal justice system, enhance public safety, better address the underlying causes of crime and recidivism, and ultimately save taxpayers money.

Amici urge this court to adhere to the principle espoused in this circuit’s *en banc* opinion in *Pugh v. Rainwater*, reiterated last year in *ODonnell v. Harris County*, that “[t]he incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.” . . . (5th Cir. 2018) [*ODonnell II*] (quoting *Rainwater* . . . (5th Cir. 1978) (*en banc*)). . . .

Alternatives to money bail can accomplish the pretrial goals of maintaining community safety and assuring a defendant’s presence at trial as well as, or better than, money bail, but without the attendant unfairness to indigent defendants. As an extensive body of evidence reveals, pretrial release with nonfinancial conditions determined by individualized assessments can be very effective at ensuring appearance for court proceedings.

In Kentucky, for example, county judges in 2013 began using a new risk-based assessment tool to inform decisions about pretrial release options. . . . Data from 2014 and 2015 show that 85 percent of defendants released before trial appeared as required; in the low-risk category, the appearance rate was over 90 percent. . . .

In the District of Columbia, which also utilizes a risk-based assessment to evaluate pretrial-release options, data from FY 2016 show that 91 percent of defendants released before trial made all scheduled court appearances.

The data on pretrial criminal activity for released defendants are equally impressive: in Kentucky in 2014 and 2015, 94 percent of released defendants assessed to be low-risk committed no new criminal activity . . . ; and in Washington, D.C., in FY 2016, 98 percent of all released defendants remained arrest-free from violent crimes during pretrial release, while 88 percent remained arrest-free from all crimes. . . .

And a study of the impact of the type of bond (*i.e.*, secured or unsecured) on pretrial-release outcomes where pretrial supervision was ordered showed no significant differences in court-appearance rates or new criminal-activity rates.

Studies on the use of money bail, meanwhile, reveal that it is no more effective at mitigating the risk of nonappearance and results in significant negative outcomes, including increased rates of conviction and recidivism. . . . As the federal system and many states have recognized, pretrial supervision can also address some of the underlying drivers of criminal activity, thus breaking the cycle of recidivism and enhancing public safety. In Kentucky, dozens of diversion programs allow defendants to agree to comply with individually tailored terms in order to obtain dismissal of criminal charges. Terms may

include alcohol and drug treatment, mental health and counseling services, educational, vocational and job-training requirements, and volunteer work. In 2012, Kentucky Pretrial Services supervised more than 4,000 misdemeanor diversion cases; 87 percent of misdemeanor clients successfully completed their programs, resulting in reduced trial dockets, decreased recidivism, and 25,000 hours of community service. . . .

In the District of Columbia, the Pretrial Services Agency (PSA) has responsibility for over 17,000 misdemeanor and felony defendants each year and supervises approximately 4,600 on any given day. . . . PSA assigns supervision levels based on risk but also provides or makes referrals for treatment to defendants with substance-use and mental-health disorders. . . . In FY 2016, 88 percent of all defendants in pretrial supervision remained on release status through the conclusion of the release period without any request for revocation based on noncompliance. . . .

Although pretrial-supervision and -diversion programs require resources, the financial cost is far less than that of pretrial detention. In the District of Columbia, considered one of the costlier jurisdictions because PSA personnel are paid on a federal pay schedule, supervision cost only about \$18 per defendant per day in 2014. . . . Compared to the (conservative) \$85-per-day estimate for pretrial detention, pretrial supervision is far more cost effective. . . . Even limited and low-cost steps to encourage appearances, such as phone calls or text-message reminders about court dates, effectively reduce failure-to-appear rates. . . .

Individuals with vested interests in the perpetuation of money bail have repeatedly challenged attempts to reform unjust bail systems around the country. Representatives of the bail industry, who have a direct financial stake in requiring incarcerated people to purchase their freedom through commercial surety bonds, have filed briefs as amici curiae in cases arising in Harris County, Texas, the City of Calhoun, Georgia, and Cullman County, Alabama. And, in a federal class action challenging the City of San Francisco’s money-bail schedule, the California Bail Agents Association was permitted to intervene to defend the practice when all defendants conceded its unconstitutionality. Order Granting Motion to Intervene, *Buffin v. City & Cty. of San Francisco* . . . (N.D. Cal. Mar. 6, 2017). . . .

Meanwhile, the U.S. Court of Appeals for the Third Circuit recently rejected a request for a preliminary injunction in a bail industry-backed lawsuit attacking New Jersey’s reformed pretrial system that discourages money bail. The court found “no right” to money bail, *Holland v. Rosen* . . . (3d Cir. 2018), and concluded that nonmonetary conditions of bail “allow[] the State to release low-risk defendants, who may be unable to afford to post cash or pay a bondsman, while addressing riskier defendants’ potential to flee, endanger the community or another person, or interfere with the judicial process,” . . .

The Third Circuit exhaustively examined the history of bail in *Holland* and concluded that at the time of the U.S. Constitution’s ratification, “bail” did not contemplate monetary bail in the form of cash or corporate surety bonds. . . . The first commercial surety operation for money bail reportedly opened for business in the United States only in 1898 Ironically, the purposeful move toward money bail to help moreailable defendants be released was quickly undercut by “rampant abuses in professional bail bonding,” . . . including unnecessary pretrial detention due to bondspersons’ demands for payment up front, which many defendants are unable to make. . . .

Bail industry representatives have suggested elsewhere that the money bail system is preferable to “uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions.” . . . But amici do not advocate any of these extremes. A “uniform system” or “categorical rule” that fails to take into consideration the circumstances of individual defendants and their alleged crimes would not enhance public confidence in the system and—other than uniform detention—would do little to ensure appearances by defendants and promote public safety. . . .

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People v. Dueñas

Court of Appeal, Second District, Division 7, California
30 Cal. App. 5th 1157 (Ct. App. 2019),
petition to depublish pending

Zelon, Acting P. J.; Segal, J.; Wiley, J.:

Velia Dueñas, an indigent and homeless mother of young children, pleaded no contest to driving with a suspended license. The trial court placed her on probation, imposed \$220 in fees and fines, and ordered that if an outstanding debt remained at the end of her probation, the amount due would go to collections without further order of the court. Dueñas contends that imposing the fees and fine without considering her ability to pay violates state and federal constitutional guarantees because it simply punishes her for being poor. We agree. “Whatever hardship poverty may cause in the society generally, the judicial process must make itself available to the indigent; it must free itself of sanctions born of financial inability.” (*Preston v. Municipal Court* (1961)

Because the only reason Dueñas cannot pay the fine and fees is her poverty, using the criminal process to collect a fine she cannot pay is unconstitutional. Accordingly, we reverse the order imposing court facilities and court operations assessments, and we remand the case to the trial court with directions to stay the execution of the restitution fine until the People prove that Dueñas has gained an ability to pay. . . .

Dueñas is a married mother of two young children. She has cerebral palsy, and because of her illness she dropped out of high school and does not have a job. Dueñas’s husband is also unemployed, although occasionally he is able to obtain short-term work in construction.

The family of four receives \$350 per month in CalWorks cash benefits and \$649 per month in CalFresh food stamps benefits. Dueñas uses all the money she receives to take care of the children, but she cannot afford basic necessities for her family. She has no bank account and no credit card. . . .

The family has no home of their own; they alternate between staying at Dueñas’s mother’s home and the home of her mother-in-law. . . .

On July 13, 2015, Dueñas pleaded no contest to another misdemeanor charge of driving with a suspended license (Veh. Code, § 14601.1, subd. (a)) based on a plea agreement that conditioned the consequences for the conviction on whether she obtained a valid driver's license by the time of the sentencing hearing. If Dueñas returned to court on the date of sentencing without a valid license, she would be fined and sentenced to 30 days in jail. If Dueñas returned with a valid license, however, the court would place her on 36 months summary probation and impose a \$300 fine.

At the February 22, 2016 sentencing hearing, Dueñas did not have a valid driver's license and was prepared to surrender that day. The court asked if Dueñas wished to "save money and convert the \$300 [fine] to 9 days of county jail," and her counsel said, "Yes. She doesn't have the ability to pay."

The court suspended imposition of sentence and placed Dueñas on 36 months summary probation on the condition that she serve 30 days in county jail and pay \$300, plus a penalty and assessment, or that she serve 9 additional days in custody in lieu of paying the \$300 fine. The court imposed a \$30 court facilities assessment under Government Code section 70373, a \$40 court operations assessment under Penal Code section 1465.8, and a \$150 restitution fine under Penal Code section 1202.4. The trial court also imposed and stayed a probation revocation restitution fine. . . .

Dueñas asked the court to set a hearing to determine her ability to pay "the attorney fees [she had previously been assessed] and court fees." She advised the court that she was homeless and receiving public assistance. The court said such a hearing could be held in the future, if needed: "She has three years to pay them. If it gets near the time where she can suffer a consequence as a result of not paying them, which would almost never be the case, we can set a hearing at that time."

Citing Penal Code section 987.8, subdivision (b), which provides that a court may order a defendant who has been represented by a public defender to pay attorney fees only if the court determines he or she has the present ability to pay all or part of the cost of legal assistance, Dueñas again asked the court to conduct an ability to pay hearing. The court asked if it had to hold the hearing before it imposed fees or only to have a hearing "before she suffers the consequences of not being able to pay them." Dueñas advised the court that as a matter of due process, "before you can impose the fees there must be an ability-to-pay hearing."

After what the court described as "searching for some sort of case law" to support Dueñas's position, the court declared it would hold an ability to pay hearing. The court imposed "all the other fines and fees," and ordered that Dueñas serve her 39 days in county jail, see the court's financial evaluator, and return to court in three weeks for an ability to pay hearing on the attorney fees.

Dueñas pointed out that she would be unable to serve her sentence and see the financial evaluator within three weeks. Her counsel suggested that given that Dueñas was homeless, “it might be simpler to do it here in court” rather than require her to see the financial evaluator. The court said that it did not make sense for it to “sort through the documents myself” and that she should “avail herself of the expertise of the financial evaluator.” The court offered some flexibility in setting the date of the hearing but cautioned, “I don’t want to get into the habit of having litigants determine what day they want to come back.” The court also stated its belief, which was inaccurate, that if Dueñas were to be unable to appear for the hearing, the fees and fines would not be sent to collections or transformed into a civil judgment.

At the March 17, 2016 ability to pay hearing, the court reviewed Dueñas’s uncontested declaration concerning her financial circumstances, determined that she lacked the ability to pay the previously-ordered attorney fees, and waived them on the basis of her indigence. The court concluded that the \$30 court facilities assessment under Government Code section 70373 and \$40 court operations assessment under Penal Code section 1465.8 were both mandatory regardless of Dueñas’s inability to pay them. With respect to the \$150 restitution fine, the court found that Dueñas had not shown the “compelling and extraordinary reasons” required by statute (Pen. Code, § 1202.4, subd. (c)) to justify waiving this fine. The court rejected Dueñas’s constitutional arguments that due process and equal protection required the court to consider her ability to pay these fines and assessments, and ordered her to pay \$220 by February 21, 2019. The trial court told Dueñas that, “[i]f in the end you’re not able to pay, you won’t be punished for it. Those [sums] will go to collections without any further order from this court.” The superior court appellate division affirmed the trial court’s order. . . .

“Raising money for government through law enforcement whatever the source—parking tickets, police-issued citations, court-imposed fees, bills for court appointed attorneys, punitive fines, incarceration charges, supervision fees, and more—can lay a debt trap for the poor. When a minor offense produces a debt, that debt, along with the attendant court appearances, can lead to loss of employment or shelter, compounding interest, yet more legal action, and an ever-expanding financial burden—a cycle as predictable and counterproductive as it is intractable.” . . . The record in this matter illustrates the cascading consequences of imposing fines and assessments that a defendant cannot pay.

As the trial court noted, this matter “doesn’t stem from one case for which she’s not capable of paying the fines and fees,” but from a series of criminal proceedings driven by, and contributing to, Dueñas’s poverty. Unable to pay the fees for citations she received when she was a teenager, Dueñas lost her driver’s license. Like many who are “faced with the need to navigate the world and no feasible, affordable, and legal option for doing so” . . . , she broke the law and continued to drive. As a result, Dueñas now has four misdemeanor convictions for driving without a valid license. These, in turn, have occasioned new fines, fees, and assessments that she is unable to pay. As the trial court described it, the repeat criminal proceedings have caused her financial obligations to

“snowball.”

Dueñas argues that laws imposing fines and fees on people too poor to pay punish the poor for their poverty. These statutes, she asserts, are fundamentally unfair because they use the criminal law, which is centrally concerned with identifying and punishing only blameworthy decisions, to punish the blameless failure to pay by a person who cannot pay because of her poverty. The laws, moreover, are irrational: they raise no money because people who cannot pay do not pay. We conclude that due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant’s present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373. We also hold that although Penal Code section 1202.4 bars consideration of a defendant’s ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine. . . .

Government Code section 70373 and Penal Code section 1465.8, which impose court facilities and court operations assessments on every criminal conviction, each provide that the assessment “shall be imposed on every conviction for a criminal offense” except for parking offenses. . . .

Neither fee is intended to be punitive in nature. . . . Both were enacted as parts of more comprehensive legislation intended to raise funds for California courts. . . .

Accordingly, the Legislature has provided for fee waivers for indigent litigants at the trial and appellate court levels that excuse them from paying fees for the first pleading or other paper, and other court fees and costs, including assessments for certain court investigations. . . . While this protective mechanism lessens the disproportionate burden that these fundraising fees present to indigent litigants in the civil context, the Legislature neither instituted nor rejected a corresponding safeguard for assessments attached to a criminal conviction. Both Government Code section 70373 and Penal Code section 1465.8 are silent as to the consideration of a defendant’s ability to pay in imposing the assessments. . . .

These additional, potentially devastating consequences suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay. Under the *Griffin-Antazo-Bearden* analysis, the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are thus fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution. . . . These fees, assessed as part of a larger statutory scheme to raise revenue to fund court operations, should be treated

no differently than their civil counterparts enacted in the same legislation and imposed only on those with the means to pay them. . . .

California law provides for two types of restitution: direct restitution to the victim (Pen. Code, § 1202.4, subd. (f)), which is based on a direct victim’s loss, and a restitution fine (Pen. Code, § 1202.4, subd. (b)), which is not. . . . Direct victim restitution was not ordered and is not at issue in this case.

Here, the trial court imposed a restitution fine on Dueñas. Restitution fines are set at the discretion of the court in an amount commensurate with the seriousness of the offense and within a range set by statute. . . . Restitution fines are not paid to the victim of the crime. Instead, they are paid into a statewide victim compensation fund. . . .

Unlike the assessments discussed above, the restitution fine is intended to be, and is recognized as, additional punishment for a crime. . . .

“The principle that a punitive award must be considered in light of the defendant’s financial condition is ancient.” . . . Yet, although Penal Code section 1202.4 permits the court to waive imposition of a restitution fine if it finds “compelling and extraordinary reasons” why the fine should not be imposed, the statute expressly states that inability to pay the fine does not qualify This provision is at odds with the policy articulated in Penal Code section 1203.2, subdivision (a): “Restitution shall be consistent with a person’s ability to pay.” . . .

In this statutory scheme . . . the wealthy defendant is offered an ultimate outcome that the indigent one will never be able to obtain—the successful completion of all the terms of probation and the resultant absolute right to relief from the conviction, charges, penalties, and disabilities of the offense. At best, indigent defendants who cannot pay their restitution fine can try to persuade a trial court to exercise its discretion to grant them relief, despite their failure to comply with all terms of probation; at worst, they are deprived of relief, with all the collateral consequences that the legislation was designed to avoid. This result arises solely and exclusively from their poverty.

The statutory scheme thus results in a limitation of rights to those who are unable to pay. The heart of the due process inquiry is whether it is “fundamentally unfair” to use the criminal justice system to impose punitive burdens on probationers who have “made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of [their] own” (*Bearden* . . .) Penal Code section 1203.4 is not a substitute for due process.

. . .

We acknowledge, as do the parties, that the Vehicle Code section Dueñas violated makes her ineligible for mandatory relief upon her completion of probation. This does not change our conclusion, however, because the trial court here indicated that it would neither consider Dueñas’s inability to pay the restitution fine nor relieve her of it at the close of

probation, stating that “[i]f *in the end* you’re not able to pay,” the fine and fees “will go to collections *without any further order from this court.*” (Italics added.)

We interpret statutes to avoid serious constitutional questions when such interpretations are fairly possible. . . . Accordingly, we hold that although the trial court is required by Penal Code section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine. We invite the Legislature to consider whether the statute should be amended to direct a trial court to consider the defendant’s ability to pay in imposing the fine. . . .

We reverse the order imposing assessments under Government Code section 70373 and Penal Code section 1465.8. We remand the case to the trial court with directions to stay the execution of the Penal Code section 1202.4 restitution fine unless and until the People prove that Dueñas has the present ability to pay it.

Courts as Mandated Government Services

Courts *and* Economic and Social Rights/ Courts *as* Economic and Social Rights (2019)

Judith Resnik

ECONOMIC AND SOCIAL RIGHTS (Katharine Young, ed. Cambridge Press, 2019)

Courts play a prominent role in many discussions of economic and social rights. Once the proposition is accepted that states have obligations to support human flourishing through providing services such as health, education, housing, and welfare, a myriad of issues emerge about the universality of these entitlements, their allocation, and whether such rights are enforceable in courts. If the hurdle of justiciability is overcome, the focus shifts to the potential for and propriety of the judiciary serving as mediator, intervener, overseer, and guarantor of economic and social rights.

Yet little attention has been paid to courts themselves as *services* that governments must provide to individuals. Because courts are a longstanding feature of political orders (democratic or not), their provisioning (along with the related services of policing and prisons) goes unseen as a welfarist form of resource distribution. Yet, as is familiar in analyses of economic and social rights, courts-as-services raise questions about what branches of government decide levels of funding; when taxes (called “fees” in this context) can be imposed on users and when subsidies are required or discounts accorded to avoid imposing economic obligations that poorer litigants cannot meet. Thus, issues about when and how rationing is licit abound.

I put courts into economic and social rights discourse with three aims in mind. A first is to understand what can be learned about courts by seeing them through this lens. A second is to understand more about economic and social rights once justice systems are seen as within that fold. A third is to use the example of courts to analyze the impact of privatization and globalization on the sovereignty of states and the array of services that they have come to provide.

My argument is that by classifying courts as economic and social rights, the challenges and the fragility of judicial systems in democratic orders become vivid. Pre-democratic systems did not welcome all persons as eligible to participate in courts. Indeed, courts were often instruments of subordination, as famously and tragically illustrated in the United States by enforcing slavery.

But egalitarian social and political movements of the twentieth century changed the persons to whom courts had to provide fair treatment and expanded the kind and nature of rights claims to be advanced. The result has been soaring demands for services, bringing questions about levels of funding for both the justice apparatus and its users to the fore. Courts thus provide an example of a successful universal entitlement under stress, as diverse individuals and groups regularly seek services. Detailed below are debates about funding and subsidies that reflect the commitments to, the challenges of, and the backlash against open courthouse doors. I use the United States as a central example because it is categorized as less committed to welfarist rights than many other constitutional democracies.

But rights-to-courts have a special character. Arguments for constitutionalizing economic and social rights often rest on their ability to enable individuals to have a “decent life” by supporting their autonomy and well-being. Rights-to and rights-in courts not only are in service of users, but also statist; governments *depend* on courts to implement their norms, to develop and to protect their economies, and to prove their capacity to provide “peace and security.” Indeed, much of courts’ work comes from other branches of government, seeking enforcement of criminal and civil laws. Putting courts into the literature on economic and social rights as a site of (rather than a guarantor of) those rights raises the question of whether other such rights confer comparable benefits on the body politic so as to be seen as also part of the fabric of a well-functioning government.

The goal of a well-functioning government brings me to a third point, addressing the risks of unraveling “the governmental,” which puts an array of rights in jeopardy. The phrase “aspiring states”—used in reference to subnational entities seeking their own identity in conflicts within extant governments—is apt for all sorts of polities, beleaguered by internal conflicts, hyper-nationalism, transnationalism, globalization, and privatization. These words have become part of the lexicon. But an additional term needs to be manufactured—“statization”—to capture the movement from the private to the public

sector, such that a myriad of government-based services came into being during the last centuries.

But efforts to insist on the privatization of government services, in pursuit of deregulation, aim to denude the state of its identity as a provider of goods and services. Focusing on my example here of courts, new rules of process push for “alternative dispute resolution” (ADR), which shifts activities away from public observation either through non-public exchanges in courts or by delegation to agencies and outsourcing to private providers. Moreover, in the last decades, judges in the United States have enforced mandates imposed by employers, providers of goods and services, and manufacturers that require waiver of access to courts and the use of private arbitrators who have no obligations to the public.

This movement is part of the backlash against the egalitarian redistributive aspirations that the moniker “economic and social rights” encodes and that transformed courts into institutions protecting rights across classes, from the propertied to the prisoner. My hope is that seeing courts as economic and social rights clarifies the utility of government services committed to norms of fairness. If courts make true on their obligations to accord dignified and equal treatment to all disputants and do so in public, courts may be one venue in which to garner popular support for the continuation of democratic sovereignties, struggling as “aspiring states” to fulfill commitments to equality.

Courts as Obligations and as Rights

The lack of attention paid to courts-as-services comes in part from conventions of political and constitutional discourse. The framing provided by T.H. Marshall’s classic 1949 essay *Citizenship and Social Class* distinguished the “civil and political” from the “social and economic.” But even as Marshall located the “right to justice” as a part of a description of civil and political rights (“the institutions most directly associated with civil rights are the courts of justice,”) Marshall also saw that “formal recognition of an equal capacity for rights was not enough” and that welfarist support, akin to those provided for health and education, was needed.

Mid-century U.N. Conventions, shadowed by the Cold War, likewise separated government commitments to civil and political rights from socio-economic rights. And constitutional democracies such as the United States developed a jurisprudence of “positive” and “negative” liberties that, in contrast to other political orders, gave an impression that characterizing something as a “positive” right placed costs on the state that “negative” rights did not. Thus, less attention has been paid to how the very structures of government are themselves a species of positive rights that undermine the assumption that services deemed economic and social rights impose obligations for government-provisioning that political and civil rights do not.

A few details are therefore needed on how constitutions create courts as entitlements and generate what Jeremy Waldron has termed “waves of duty,” instantiating

rights over time and with variation rather than through a single act. Judiciaries are common features of constitutions, and many insist on access to justice. But what do those provisions mean? Below, I use examples from the United States to outline the translation of some of those commitments to dispute resolution services and to supporting subsets of litigants. I then turn to law from several jurisdictions to illustrate the elaboration of constitutional obligations that courts be open to all persons and, as a consequence, to waive fees for some; to equip certain indigent litigants with counsel or experts; to take ability-to-pay into account when deciding on bail and fines; to reconfigure processes to try to lower per capita costs of cases; and, on rare occasion, to order the political branches to comply with the mandate to support the judiciary itself. . . .

1. Making Rights Material: Asymmetries and Subsidies

Turn from the structure, funding, and jurisdiction of courts to their users. The question of the costs of dispute resolution services is not new. In the nineteenth century, Jeremy Bentham saw the problems, as he inveighed against “law-taxes” (a “tax upon distress”) as well as against “Judge and Company” and the common law more generally. A part of Bentham’s proposed solution was to create an “Equal Justice Fund,” to be supported by “the fines imposed on wrongdoers” as well as by government and by charities. Bentham wanted to subsidize legal assistance, the transport of witnesses, and the costs of producing other evidence. Bentham also suggested that judges be available “every hour on every day of the year,” and that courts be put on a “budget” to produce one-day trials and immediate decisions.

Bentham’s recommendations echo in contemporary arguments to obtain user subsidies from the public and private sectors, to lower costs by simplifying procedures and through new technologies—which are strategies deployed not only in courts but across the spectrum of government services. Yet adjudication’s adversarial structure poses distinct questions about deciding who to subsidize. Asymmetries abound, as some litigants are defendants facing the state (whose litigation costs are paid by taxpayers), while other disputes involve private parties, albeit often with vastly different access to resources. The costs vary widely, as do the stakes and the nature of the claims.

Yet once governments became committed to showing “equal concern for the fate of every person over which it claims dominion” (to borrow Ronald Dworkin’s description of entailments of equality), the costs of litigation become troubling. Just as poll taxes fell (even as they could support the apparatus of elections), so too might user fees for courts. Moreover, pursuing the analogy to voting, one could argue that in addition to not charging voters to vote, governments should fund and cap campaign costs so as to level playing fields. In the United States, that approach has been rejected as undermining First Amendment freedoms, but some litigation costs have been seen as requiring public support, even if opponents remain free from caps on spending.

Thus, courts have decided who merits what kind of subsidies for what costs of litigation. The issues arise *ex ante*, when filing fees are imposed, and run thereafter to a

myriad of other court-imposed fees (such as record searches, public defender fees, document request fees) and fees paid to third parties (bail bondspersons, lawyers, experts, investigators, mediators and arbitrators, probation officers). For example, in 2016, 43 states had some form of “cost-recovery” for public defenders, and 27 imposed upfront “registration fees.” In Los Angeles, until 2017 when the L.A. Board of Supervisors banned the practice, poor criminal defendants were required to pay \$50 in “registration fees” to obtain public defender services; that office had garnered \$300,000 in a year by doing so. In addition, after decisions are rendered, litigants may also face fees, to pay the costs of their opponents or to pay penalties such as restitution to victims and fines paid to the state, as well as the costs of special services like probation and parole.

The coherence of adjudication comes under strain when litigants are patently unable to participate. The doctrine in US law that a criminal prosecution cannot proceed unless a defendant is able to understand the charges and assist in a defense is one acknowledgment of court *dependence* on litigants to function. Further, because enforcement of court orders rests largely on voluntary compliance, courts rely on popular acceptance of the legitimacy of their processes and rulings. The universality of rights of access and remedies become illusory when courts charge fees for entry that systematically exclude sets of claimants; the idea of adjudication producing accurate or fair results is undermined when the resources of the disputants are widely asymmetrical.

Constitutional courts around the world have responded to arguments from litigants that their economic disadvantages *in* courts requires redress *by* courts. Parallel discussions of mandates for government subsidies occur, of course, in other forms of social and economic rights litigation, although the methods proposed for thinking through such allocations have not been engaged by judges focused on rights of support to use their own services. Instead, decisions center on what a promise of a court system entails and the import of terms such as due process, equal protection, fair hearing, and effective remedy.

For example, the idea that structural guarantees of courts beget individually enforceable user-rights can be found in a 2014 ruling by Canada’s Supreme Court, which held that Section 96 of its Constitution Act of 1867 (providing that the “Governor General shall appoint the Judges” of most of the provincial courts) guarantees both the “core jurisdiction” of provincial courts and a right of access to those “section 96 courts.” As a consequence, British Columbia could not impose hundreds of dollars in fees on individuals whose trials exceeded three days if doing so imposed an “undue hardship,” even if such persons were not exempt under the statutory definition of indigency.

Some constitutions have more direct protection, as illustrated by provisions in the Constitution of India that the state ensure that “the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation . . . to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.” On the basis of these and related guarantees, the High Court of Delhi concluded that new court fees, imposed in 2010,

“disproportionately impact[ed] the fundamental right of access to justice” by putting up unconstitutional financial barriers.

Moving to the transnational level, in the 1970s, the European Court of Human Rights decided that the Convention guarantee of a fair hearing required Ireland, which permitted divorce only through High Court proceedings, to ensure that individuals had an “effective right to courts for the determination of their ‘civil rights and obligations.’” While states were free to choose the means, supporting legal aid was one method of doing so.

In addition to subsidizing the use of courts, the ECtHR has also insisted that judicial remedies themselves be provided. In 2013, in *Valiulienė v. Lithuania*, the ECtHR held that Lithuania had breached its positive obligation “to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.” Article 3 of the European Convention required states to provide “practical and effective protection” through court-based remedies for domestic violence.

The law in the United States is more complex, in part because of the older constitutional text, in part because of a lack of success in the 1970s to persuade the United States Supreme Court to treat poverty as a “suspect classification” under federal equal protection guarantees, and in part because of the breadth of the need. California’s courts reported 4.3 million people in civil litigation without the assistance of lawyers in 2009, and a year later, New York counted 2.3 million civil litigants without lawyers—including almost all tenants in eviction cases, debtors in consumer credit cases, and ninety-five percent of parents in child support matters. In the federal system in 2015, one quarter of the civil filings at the trial level and one half on appeal were by unrepresented litigants.

Yet some claims of unconstitutional wealth-based distinctions have generated positive rights to state-funded lawyers, experts, and fee waivers. Through a mix of Sixth Amendment guarantees, the Petitioning Clause, and the Due Process and Equal Protection Clauses, judges have required state-funded resources that vary with the stakes of the decision, parties’ asymmetrical access to resources and information, and asymmetries across sets of litigants. While the case law focuses on the needs of the disputants, the subtext (and occasionally the text) is the needs of courts, as mention is made about how inequalities undermine the ability of courts to make decisions in the face of competing claims of right. The consequence is that while poverty is not a “suspect classification” for U.S. law in general, poverty has had special purchase (pun intended) in courts.

Illustrative of intra-litigant disparities is a 1956 decision that unfairness resulted if some defendants could afford to pay for transcripts for appeals that others could not, or if some could afford appellate counsel and others could not: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” Asymmetries between opponents came to the fore in the 1963 decision of *Gideon v. Wainwright*, which read the Sixth Amendment “right to counsel” to require that states pay lawyers for indigent

criminal defendants facing prosecutions for felonies. (Subsequent decisions concluded that the right attached when criminal defendants were facing the possibility of imprisonment, whether the crime was classified as a felony or a misdemeanor.)

Thereafter, the US Supreme Court relied on the Due Process Clause as the basis of constitutional obligations to give indigent criminal defendants other resources, such as experts and translators. Prosecutors were also enlisted, as the Court held in its 1963 *Brady v. Maryland* decision that due process required governments to turn over exculpatory, material information to all criminal defendants—whether rich or poor. Courts’ dependency on parties was central: “Society wins not only when the guilty are convicted but when criminal trials are fair.”

Challenges to bail—fees for pretrial release—have become the focus of litigation in the last decade. In 2017, a federal court held the bail system in Harris County, Texas (where 50,000 people are arrested on misdemeanor charges every year) unconstitutional in not providing due process safeguards yet detaining forty percent of those defendants because they could not make bail. As the district court explained, “misdemeanor defendants who can pay secured money bail are able to purchase pretrial liberty, while those who are indigent and cannot pay . . . are detained by their indigence.”

Yet this account of *principles* ought not to be read as a description of actual *practices*. “*Gideon’s* promise” is far from fulfilled; a series of lawsuits have challenged public defender offices for failing to provide staff adequate to represent defendants. More than that, as I have described, a welter of provisions impose costs on criminal defendants, including sometimes reimbursement for the costs of a “free” criminal defense lawyer as well as for “services” that have become commonplace – drug testing, ankle monitoring, and participating in specialty “problem-solving courts” requiring regular meetings with court personnel to support diversion from criminal prosecution or in lieu of incarceration.

Some of the charges aim to recoup the costs of services provided. Others aim to generate profits for localities. As famously documented in the Department of Justice’s 2015 account of the failures of the municipal court in Ferguson, Missouri, rather than “administering justice or protecting the rights of the accused,” the local court’s goal was “maximizing revenue” through “constitutionally deficient” procedures that had a racially biased impact. The result across the country has been endless cycles of debt and a resurgence of “debtors’ prisons,” populated by individuals held in contempt for failure to comply with court payment orders.

Moreover, while the class-action challenge to bail in Texas exemplifies the potential for enforcing a subset of equality rights, the ability to obtain relief—even for liberty claims—remains limited. The US Supreme Court has imposed barriers to the use of post-conviction habeas remedies and limited civil rights damage actions. The result is systematic under-enforcement of *Gideon*, *Brady*, and other constitutional rights. At best, one can resort to the hope for “progressive realization” (to borrow from the language of

economic and social rights) and understand efforts underway as steps towards equipage that had not been taken before.

I have begun with a focus on criminal defendants, but claims for state subsidies have sometimes succeeded for civil litigants. Asymmetrical power and high stakes have been the predicates for court-mandated resources in cases related to family configurations. As in the ECtHR *Airey* decision involving divorces in Ireland, barriers to court access in the United States prompted a class of “welfare recipients residing in Connecticut” to argue that the state’s failure to waive the fee of sixty dollars that it required to file for divorce violated the federal constitution. In 1971, in *Boddie v. Connecticut*, Justice Harlan agreed; he wrote for the Court that the combination of “the basic position of the marriage relationship in this society’s hierarchy of values and the . . . state monopolization” of lawful dissolution required the state, as a matter of due process, to waive the fee.

Yet cutting off access is not only a problem when divorce is the question. As Justice Brennan argued, *Boddie* presented a “classic problem of equal protection” on top of due process; the state’s legal monopoly required access for all attempting to “vindicate any . . . right arising under federal or state law.” But the Court has not been persuaded to insist on fee waivers for other poor civil litigants, such as those facing bankruptcy and eviction.

Family-based status claims have, however, been the basis for other constitutionally required subsidies, albeit in an uneven pattern. State assistance in the production of evidence moved beyond the criminal context when an indigent man sought to defend a paternity claim brought by a private party. The Court mandated state-funded testing; as Chief Justice Burger explained in 1981, the “requirement of ‘fundamental fairness’ expressed by the Due Process Clause” would not otherwise be “satisfied.” Yet in the same year, the Court concluded that state efforts to terminate the parental rights of an indigent woman did not create a per se right to counsel; only if a sufficient showing was made in an individual case was counsel to be provided. In 2011, the Court also drew another line around rights to counsel, and concluded that the Due Process Clause did not require a lawyer for an indigent man facing detention (in that instance for a year) as a civil contemnor for failure to pay child support to a private opponent. But the Court has insisted on rights to state-paid transcripts, if needed for appeals of terminations of parental rights.

Turn from the questions of resources ex ante and during litigation to the imposition of fines or efforts to recoup costs ex post. If states can impose fines, what happens to those who cannot afford to pay? In the 1970 decision of *Williams v. Illinois*, Chief Justice Warren Burger wrote that the state could not extend a person’s time of incarceration “beyond the maximum duration fixed by statute” based solely on the fact that a defendant was “financially unable to pay a fine.” In a subsequent decision, the Court concluded that once a state decided that an “appropriate and adequate penalty” for a crime was a fine or restitution, it could not “imprison a person solely” because of the inability to pay. Rather, imprisonment could only take place after determining a willful refusal to pay and that

“alternative measures are not adequate to meet the State’s interest in punishment and deterrence.”

One summary that translates the rules into contemporary U.S. constitutional law doctrine is that “an absolute deprivation of liberty based on wealth creates a suspect classification deserving of heightened scrutiny.” For litigants who are not detained, federal constitutional mandates to waive fees or provide support are uneven. The legacy of *Gideon* has produced both a keen awareness of unfairness and inequality in courts and an acute awareness of how much fairness and equality cost. Thus courts continue to grapple with the challenges that economically disparate claimants (both criminal and civil) raise for the effort of applying twentieth-century egalitarian norms to eighteenth-century statements that courts were government institutions for “every person.” One could therefore conceptualize these decades of work as iterative efforts to understand the implications of these new commitments, and to see judges as partners in developing policies, framed by constitutional aspirations and on occasion obligations.

Progressive De-realization? Privatization and Backlash

Not all celebrate the trajectory producing more rights and more claimants knocking at courthouse doors. The intersection of high demand curves for courts, the burdens of procedures, the costs of lawyers, and the regulatory successes achieved by some plaintiffs have prompted diverse critiques, styling the criminal justice system as dysfunctional and the civil justice system as overburdened, overreaching, and overly adversarial. New social movements of the later part of the twentieth century, funded by institutions identified with repeat-player defendants, argued that courts were unduly broadening their own mandates and chilling productive economic exchanges. At times joined by judges worried about docket overloads and undue adversarialism, they have succeeded in “playing for the rules” by pushing a great deal of dispute resolution out of public courts and into alternatives. In the language of social and economic rights, retrogressive measures have become commonplace. . . .

State Dependency on and the Democratic Potential in Courts

Economic and social rights are often explained as predicates to human flourishing. By putting courts into that mix, another justification comes to the fore—as predicates to flourishing governments. That point was at the center of the development of court fee waivers in the United States. As Justice Harlan explained in 1971 when concluding that states had to let poor people seeking divorce into their courts,

“Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner.”

While education and health rights enable individuals to contribute to and participate in social ordering, the historical sweep provided above makes plain that courts are forms of

government support of a special kind, on which the state, as well as individuals, depends. States *need* their members and residents to participate in adjudicatory processes, both to maintain peace and security as well as to generate and to reinforce their own authority to do so. Adjudication, whether civil or criminal, both confirms and produces the power to impose authority.

Courts in democracies have the potential to contribute beyond serving to support government authority and respond to individual needs. Many tasks that have historically been associated with sovereignty—war-making, peace-making, taxing, and legislating—are remote from wide segments of the population because the activities occur offshore, are episodic, or concentrated at the site where a legislature sits. In contrast, the institutions on which sovereigns have relied to monitor and control—courts, along with police and prisons—turn the abstraction of government into a material presence, personifying the state and demonstrating its capacity to provide goods and services that have utilities for the private as well as the public sector. Once these activities moved to the public sector, they provided springboards for the development of norms about the state, shaping values about the relationship of governed and government.

In many eras, those rules authorized autocratic power; hierarchies of status rendered some individuals abused on the streets, marginalized in courts, and mistreated in prisons. In prior centuries, these personages embodied inhospitable and often oppressive control. But constitutional injunctions now frame those exchanges and (whether realized in practice or not) require trained officials—such as judges—to treat individuals (suspects, detainees, litigants, witnesses) with dignity.

Now-classic explanations for adjudication’s values and contributions come from Frank Michelman, who explained that access to litigation gives individuals opportunities for participation, for efficacy, and for dignified treatment from the state. Jerry Mashaw noted another value, that governments ought to treat similarly-situated claimants equally. The argument that Dennis Curtis and I proffered in our book *Representing Justice* focused on another aspect, the relationship among disputants, governments, and third parties that adjudication produces. Trial-level litigation contributes to democracy through its public processes in which the government—through its judges—is required to demonstrate its commitments to equal and dignified treatment, to commit itself to forms of self-restraint and explanation, and to reveal its own exercise of power to respond to conflicting claims of right.

Thus, while courts have long provided experiences of sovereignty, their current constitutional obligations are novel. When working well, courts generate collective narratives of identity and obligation. “Connective justice” is a phrase proffered to describe the efforts of ancient Egypt to bridge the worlds of humans and the gods, but the phrase could be transposed to capture aspirations for courts operating in democratic political systems. Judges are supposed to treat all with dignity and respect, and disputants are obliged to do the same toward their adversaries.

These egalitarian exchanges of mutual recognition make adjudication itself a democratic practice and, as discussed above, third-party rights of access put the performance of these obligations before the public eye. As Bentham put it, “publicity” enables the “Public-Opinion Tribunal” to form independent judgments about the quality of government actions. While presiding over a trial, the judge is, to paraphrase Bentham, on trial. The information forced into the public realm by court processes becomes part of iterative exchanges with other branches of government and social movements.

Courts’ mandate to operate in public endows the audience—the public—with the ability and the authority of critique. Through such participatory parity, public processes both teach about democratic practices of norm development and offer the opportunity for popular input to produce changes in legal rights. The redundancy produced by litigants raising parallel claims of rights enables debate about the underlying legal rules. The particular structural obligations of courts have the potential to produce, redistribute, and curb power in a fashion that is generative in democracies.

Of course, failures of court systems—and failures to equip users—are commonplace. Yet the publicity that Bentham commended has also provided a window into these problems and the potential for critique and reform. But with the devolution of adjudication and its outsourcing to private providers, and the reconfiguration of court-based processes toward settlement for both civil and criminal cases, the occasions for public observation of and involvement in adjudication diminish. The deliberate ceding of authority is taking a toll. In the federal courts of the United States for example, while filings increased, trial rates dropped over the last few decades. By 2016, trials began in only one of a hundred civil cases filed. “Vanishing trials” is also a description of the federal criminal docket.

Through the privatization of processes inside courts and the outsourcing, the public loses its opportunities to engage. Gone are Jeremy Bentham’s “auditors” and the potential for a Tribunal of Public Opinion to function, for no one can evaluate the decision-makers and the disputants. Lost are opportunities to assess whether procedures and decision-makers are fair, how resources affect outcomes, whether similarly-situated litigants are treated comparably, and why one would want to get into (or avoid) court. Instead, a private transaction has been substituted and, unlike public adjudication, control over the meaning of the claims made and the judgments rendered rests with the corporate provider of the service. Just as Foucault mapped how governing powers, eager to maintain control, moved punishment practices from public streets into closed prisons, adjudication itself is at risk of being removed from public purview—rendering the exercise and consequences of public and private power harder to ascertain. The public and private sectors increasingly rely on practices that do not admit the need to show their processes in order to justify the exercise of authority.

Given the volume of filings, the demand for more services, and the spate of architecturally important courthouses, the diminution in the aegis of adjudication and the incursions on courts' authority are at risk of being overlooked- especially given the breadth of the need in sectors traditionally understood as social and economic rights. Yet while monumental in ambition and often in physical girth, the durability of courts as active sites of public exchanges before independent jurists should not be taken for granted. Like other venerable institutions of the eighteenth century, such as the postal service and the press, which serve in parallel fashion to disseminate information and which support democratic competency, courts are vulnerable.

The current obligations of courts to provide services and subsidies are exemplary of the success of egalitarian regulatory policies, just as the efforts to limit that form of government provisioning reflect widespread efforts to restrict government efforts in favor of privatization. The struggles of courts to make good on promises of fair treatment ought to be put into the narrative of the progressive – and uneven and challenging -- realization of rights. Yet continuation of accessible courts for ordinary disputants seeking state dispute resolution assistance is far from assured but requires, as it always has, political commitments to sustaining the services that courts, and the governments of which they are a part, provide.

Legislative Oversight and Court-Based Rule-Making and Reforms

Ten Guidelines on Court Fines and Fees (2018)

American Bar Association

Guideline 1: Limits to Fees

If a state or local legislature or a court imposes fees in connection with a conviction for a criminal offense or civil infraction, those fees must be related to the justice system and the services provided to the individual. The amount imposed, if any, should never be greater than an individual's ability to pay or more than the actual cost of the service provided. No law or rule should limit or prohibit a judge's ability to waive or reduce any fee, and a full waiver of fees should be readily accessible to people for whom payment would cause a substantial hardship. . . .

Guideline 2: Limits to Fines

Fines used as a form of punishment for criminal offenses or civil infractions should not result in substantial and undue hardship to individuals or their families. No law or rule should limit or prohibit a judge's ability to waive or reduce any fine, and a full waiver of fines should be readily accessible to people for whom payment would cause a substantial hardship. . . .

Guideline 3: Prohibition against Incarceration and Other Disproportionate Sanctions, Including Driver’s License Suspensions.

A person’s inability to pay a fine, fee or restitution should never result in incarceration or other disproportionate sanctions. . . .

Guideline 4: Mandatory Ability-To-Pay Hearings

Before a court imposes a sanction on an individual for nonpayment of fines, fees, or restitution, the court must first hold an “ability-to-pay” hearing, find willful failure to pay a fine or fee the individual can afford, and consider alternatives to incarceration. . . .

Guideline 5: Prohibition against Deprivation of Other Fundamental Rights

Failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote. . . .

Guideline 6: Alternatives to Incarceration, Substantial Sanctions, and Monetary Penalties

For people who are unable to pay fines or fees, courts must consider alternatives to incarceration and to disproportionate sanctions, and any alternatives imposed must be reasonable and proportionate to the offense. . . .

Guideline 7: Ability-to-Pay Standard

Ability-to-pay standards should be clear and consistent and should, at a minimum, require consideration of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person’s ability to pay; and whether payment would result in manifest hardship to the person or dependents.

Guideline 8: Right to Counsel

An individual who is unable to afford counsel must be provided counsel, without cost, at any proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be a consequence of nonpayment of fines and/or fees. Waiver of counsel must not be permitted unless the waiver is knowing, voluntary and intelligent, and the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences. . . .

Guideline 9: Transparency

Information concerning fines and fees, including financial and demographic data, should be publicly available. . . .

Guideline 10: Collection Practices

Any entities authorized to collect fines, fees, or restitution, whether public or private, should abide by these Guidelines and must not directly or indirectly attempt to thwart these

Guidelines in order to collect money; nor should they ever be delegated authority that is properly exercised by a judicial officer, such as the authority to adjudicate whether a person should be incarcerated for failure to pay. Any contracts with collection companies should clearly forbid intimidation, prohibit charging interest or fees, mandate rigorous accounting, outlaw reselling, and otherwise avoid incentivizing harmful behavior. Contracts should include some mechanism for monitoring compliance with these prohibitions. . . .

Principles on Fines, Fees, and Bail Practices (2018)
National Task Force on Fines, Fees, and Bail Practices

State courts occupy a unique place in a democracy. Public trust in them is essential, as is the need for their independence, accountability, and a service-oriented approach in all they do.

Important questions have arisen over the last several years concerning the manner in which courts handle the imposition and enforcement of court-ordered fines, fees, or surcharges (“Legal Financial Obligations”) and about the ways court systems manage the release of individuals awaiting trial. Local, state, and national studies and reports have generated reliable, thorough, and news-worthy examples of the unfairness, inefficiency, and individual harm that can result from unconstitutional practices relating to Legal Financial Obligations and pretrial detention.

As a way of drawing attention to these issues and promoting ongoing improvements in the state courts, in 2016 the Conference of Chief Justices and the Conference of State Court Administrators established the National Task Force on Fines, Fees, and Bail Practices (the “National Task Force”).

The goals of the National Task Force are to develop recommendations that promote the fair and efficient enforcement of the law; to develop resources for courts to use to ensure that no person is denied their liberty or access to the justice system based on race, culture, or lack of economic resources; and to develop policies relating to the handling of Legal Financial Obligations that promote access, fairness, and transparency. . . .

The National Task Force is now pleased to offer its Principles on Fines, Fees, and Bail Practices. Developed with input from a variety of stakeholders, these principles are designed to be a point of reference for state and local court systems in their assessment of current court system structure and state and local court practice. The principles can also be used as a basis for developing more fair, transparent, and efficient methods of judicial practice regarding bail practices and the imposition and collection of Legal Financial Obligations.

The National Task Force’s 34 principles each fall into one of the following seven categories:

- Structural and Policy-Related Principles
- Governance Principles
- Transparency Principles
- Fundamental Fairness Principles
- Pretrial Release and Bail Reform Principles
- Fines, Fees and Alternative Sanctions Principles
- Accountability Principles

The National Task Force expects these principles to be refined over time as jurisdictions put them into practice and the court community gains insight into the strategies associated with their implementation. It is anticipated that the Task Force’s Executive Committee will review them periodically. In the ordinary course, such review will be biennial, unless extraordinary circumstances, such as a landmark State Supreme Court or United States Supreme Court decision, have changed the underlying legal landscape. . . .

Principle 1.4. Access to Courts. All court proceedings should be open to the public, subject to clearly articulated legal exceptions. Access to court proceedings should be open, as permissible, and administered in a way that maximizes access to the courts, promotes timely resolution, and enhances public trust and confidence in judicial officers and the judicial process. Judicial branch leaders should increase access to the courts in whatever manner possible, such as by providing flexibility in hours of service and through the use of technology innovations, *e.g.*, online dispute resolution where appropriate, electronic payment of fines and costs, online case scheduling and rescheduling, and e-mail, text messages, or other electronic reminder notices of court proceedings.

Principle 1.5. Court Funding and Legal Financial Obligations. Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should not be supported by revenues generated from Legal Financial Obligations. Under no circumstances should judicial performance be measured by, or judicial compensation be related to, a judge’s or a court’s performance in generating revenue. A judge’s decision to impose a Legal Financial Obligation should be unrelated to the goal of generating revenue. Revenue generated from the imposition of a Legal Financial Obligation should not be used for salaries or benefits of judicial branch officials or operations, including judges, prosecutors, defense attorneys, and court staff, nor should such funds be used to evaluate the performance of judges or other court officials.

Principle 1.6. Fees and Surcharges: Nexus to the “Administration of Justice.” While situations occur where user fees and surcharges may be necessary, such fees and surcharges should always be minimized and should never fund activities outside the justice system. Fees and surcharges should be established only for “administration of justice” purposes.

“Administration of justice” should be narrowly defined and in no case should the amount of such a fee or surcharge exceed the actual cost of providing the service. The core functions of courts, such as personnel and salaries, should be funded by general tax revenues.

Principle 1.7. Court Facilities. Court facilities should be provided for and operated in a manner that ensures an impartial and independent judiciary.

Principle 1.8. Court Management and Staffing. Courts should be operated in a manner that ensures an impartial and independent judiciary. Court staff should not be managed or directed by officials in either the executive or legislative branch.

Principle 1.9. Judicial Officers Exclusively Within Judicial Branch. All judges, judicial officers, and other individuals exercising a judicial or administrative function in support of judicial proceedings should be members of the judicial branch of government. Such individuals should also be independent of management by or direction from officials in the executive or legislative branch. All judges and judicial officers, including those serving in a court established by a political subdivision, should be subject to the authority of the court of last resort or the administrative office of the courts, bound by the state’s code of judicial conduct, and subject to discipline by the state’s judicial conduct commission or similar body.

Principle 1.10. Accessible Proceedings, Assistance for Court Users, and Payment Options. Court proceedings, services provided by the clerk’s office, other assistance provided to court users, and methods for paying Legal Financial Obligations should be easily accessible during normal business hours and during extended hours whenever possible. Judicial branch leaders should consider providing 24/7 access to online services, without any additional fees other than those reasonable and necessary to support such services. . . .

Transparency Principles

Principle 3.1. Proceedings. All judicial proceedings should be recorded, regardless of whether a court is recognized in law as a “court of record.”

Principle 3.2. Financial Data. All courts should demonstrate transparency and accountability in their collection of fines, fees, costs, surcharges, assessments, and restitution, through the collection and reporting of financial data and the dates of all case dispositions to the state’s court of last resort or administrative office of the courts. This reporting of financial information should be in addition to any reporting required by state or local authority.

Principle 3.3. Schedule for Legal Financial Obligations. The amounts, source of authority, and authorized and actual use of Legal Financial Obligations should be compiled and maintained in such a way as to promote transparency and ease of comprehension. Such a listing should also include instructions about how an individual can be heard if they are

unable to pay.

Principle 3.4. Public Access to Information. Except as otherwise required by state law or court rule, all courts should make information about their rules, procedures, dockets, calendars, schedules, hours of operation, contact information, grievance procedures, methods of dispute resolution, and availability of off-site payment methods accessible, easy to understand, and publicly available. All “Advice of Rights” forms used by a court should be publicly available.

Principle 3.5. Caseload Data. Court caseload data should reflect core court functions and be provided by each court or jurisdiction to the court of last resort or administrative office of the courts on a regular basis, at least annually. Such data should be subject to quality assurance reviews. Case data, including data on race and ethnicity of defendants, should be made available to the public.

Fundamental Fairness Principles

Principle 4.1. Disparate Impact and Collateral Consequences of Current Practices. Courts should adopt policies and follow practices that promote fairness and equal treatment. Courts should acknowledge that their fines, fees, and bail practices may have a disparate impact on the poor and on racial and ethnic minorities and their communities.

Principle 4.2. Right to Counsel. Courts should be diligent in complying with federal and state laws concerning guaranteeing the right to counsel. Courts should ensure that defendants understand that they can request court-appointed counsel at any point in the case process, starting at the initiation of adversarial judicial proceedings. Courts should also ensure that procedures for making such a request are clearly and timely communicated.

Principle 4.3. Driver’s License Suspension. Courts should not initiate license suspension procedures for nonpayment of a Legal Financial Obligation until an ability to pay hearing is held and a determination has been made on the record that nonpayment was willful. Judges should have discretion in reporting nonpayment of Legal Financial Obligations so that a driver’s license suspension is not automatic upon a missed payment. Judges should have discretion to modify the amount of fines and fees imposed based on an individual’s income and ability to pay.

Principle 4.4. Cost of Counsel for Indigent People. Representation by court-appointed counsel should be free of charge to indigent defendants, and the fact that such representation will be free should be clearly and timely communicated in order to prevent eligible individuals from missing an opportunity to obtain counsel. No effort should be made to recoup the costs of court- appointed counsel from indigent defendants unless there is a finding that the defendant committed fraud in obtaining a determination of indigency.

Pretrial Release and Bail Reform Principles

Principle 5.1. Pretrial Release. Money-based pretrial detention practices should be replaced

with those based on a presumption of pretrial release by the least restrictive means reasonably to assure appearance in court and promote public safety. States should adopt statutes, rules, and policies reflecting a presumption in favor of pretrial release based on personal recognizance. If risk assessment protocols are used, they should be validated and transparent and should not result in differential treatment by race, ethnicity, or gender. Such tools are not substitutes for individualized determinations of release conditions. Judges should not detain an individual based solely on an inability to make a monetary bail or satisfy any other Legal Financial Obligation. Judges should have authority to use, and should consider the use of, all available non-monetary pretrial release options. Judges may only use preventative detention if there is clear and convincing evidence that an individual poses a serious risk of danger to the community or flight. Preventative detention may only be ordered after a detention hearing that affords an individual all appropriate due process protections.

Principle 5.2. Bail Schedules. Fixed monetary bail schedules should be eliminated and their use prohibited.

Principle 5.3. Pre-Payment or Non-Payment. Courts should not impose monetary bail as prepayment of anticipated Legal Financial Obligations or as a method for collecting past-due Legal Financial Obligations.

Fines, Fees, and Alternative Sanctions Principles

Principle 6.1. Legal Financial Obligations. The monetary amounts of Legal Financial Obligations should be established by the legislative branch in consultation with judicial branch officials. These amounts should not be excessive and should periodically be reviewed and modified, as necessary or appropriate.

Principle 6.2. Judicial Discretion with Respect to Legal Financial Obligations. State law and court rule should provide for judicial discretion in the imposition of Legal Financial Obligations. State courts should avoid adopting mandatory Legal Financial Obligations for misdemeanors and traffic-related and other low-level offenses and infractions. Judges should have authority and discretion to (1) waive or decline to assess fees or surcharges; (2) impose Legal Financial Obligations based on an individual's income and ability to pay; (3) modify sanctions after sentencing if an individual's circumstances change and his or her ability to comply with a Legal Financial Obligation becomes a hardship; and (4) impose modified sanctions (*e.g.*, reduced or eliminated interest charges, reduced or eliminated fees, reduced fines) or alternative sanctions (*e.g.*, community service, successful completion of an online or in-person driving class for moving violations and other non-parking, ticket-related offenses) for individuals whose financial circumstances warrant it.

Principle 6.3. Enforcement of Legal Financial Obligations. As a general proposition, in cases where the court finds that the failure to pay was due not to the fault of the defendant/respondent but to lack of financial resources, the court must consider measures of punishment other than incarceration. Courts cannot incarcerate or revoke the probation

of a defendant/respondent for nonpayment of a Legal Financial Obligation unless the court holds a hearing and makes one of the following findings: (1) that the defendant's/respondent's failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or (2) that even if the failure to pay was not willful or was due to inability to pay, no adequate alternatives to imprisonment exist to meet the State's interest in punishment and deterrence in the defendant's/respondent's particular situation.

Principle 6.4. Judicial Training and Continuing Education with Respect to Ability to Pay. Continuing education requirements for judges and court personnel on issues relating to all relevant constitutional, legal, and procedural principles relating to Legal Financial Obligations and pretrial release should be established. Judges should receive training on how to conduct a fair and unbiased inquiry regarding a party's ability to pay.

Principle 6.5. Alternative Sanctions. Courts should not charge fees or impose any penalty for an individual's participation in community service programs or other alternative sanctions. Courts should consider an individual's financial situation, mental and physical health, transportation needs, and other factors such as school attendance and caregiving and employment responsibilities, when deciding whether and what type of alternative sanctions are appropriate.

Principle 6.6. Probation. Courts should not order or extend probation or other court-ordered supervision exclusively for the purpose of collecting fines, fees, or costs.

Principle 6.7. Third Party Collections. All agreements for services with third party collectors should contain provisions binding such vendors to applicable laws and policies relating to notice to defendants, sanctions for defendants' nonpayment, avoidance of penalties, and the availability of non-monetary alternatives to satisfying defendants' Legal Financial Obligations.

Principle 6.8. Interest. Courts should not charge interest on payment plans entered into by a defendant, respondent, or probationer. . . .

**Supreme Court Announces Changes to Make Court Costs More Manageable
(February 13, 2019)**
Supreme Court of Illinois

Chief Justice Lloyd A. Karmeier and the Illinois Supreme Court announced today multiple changes to the assessment system by which fees, fines, and other court costs are paid by civil and criminal case litigants. These changes are a result of Public Act 100-0987, which was passed by the legislature in 2018 in order to simplify the imposition, collection, and distribution of court assessments. The changes include Civil Assessment

Schedules as well as fee waivers in amended Rule 298 and new Rule 404. The changes are effective July 1, 2019, and the new assessment structure, not including the waivers, expires January 1, 2021.

Changes to the assessment system were proposed by the 15-member Statutory Court Fee Task Force, a bipartisan body of judges, retired judges, legislators, circuit clerks, and members of the private bar from across the state. In a wide ranging study, the Task Force found that a large number of filing fees on litigants in civil cases and court costs on defendants in criminal cases result in excessive financial impact on citizens, particularly those near poverty. It was additionally discovered that assessments could be significantly inconsistent from county to county even for the same type of proceedings.

“The court’s implementation of the new civil filing and appearance fee schedules and amendments to Supreme Court Rules 298 and the creation of new Rule 404 are the welcome culmination of a concerted effort by all three branches of government to address the confusion, inconsistency and financial hardship caused by the old system for assessing fines and fees,” Illinois Supreme Court Chief Justice Lloyd A. Karmeier said. “Although the changes originated with the Statutory Fee Task Force – with the direct input and support of the Administrative Office of the Illinois Courts – they could not have come to fruition without supporting legislation enacted by the General Assembly and signed by former Gov. Rauner.

“Addressing the tangle of fees, fines, surcharges and other costs faced by civil and criminal litigants has been one of the most vexing challenges confronting our justice system. Today’s reforms represent a giant step forward in addressing that challenge. The court is confident that implementing these changes will help us achieve a system of justice that is easier to administer, more consistent in its application, and more accessible by the People of Illinois. We are grateful to the Statutory Fee Task Force, the circuit clerks, the legislature and the governor for their critical roles in making this possible.”

The amendment to Rule 298 expands the existing civil fee waiver provision to allow partial waivers for litigants who may not qualify for a full waiver. New Rule 404 creates similar full and partial fee waivers for criminal defendants. . . .

“With today’s action by the Supreme Court, our State has taken an important step forward in pursuit of the goal of making Illinois courts accessible to all, regardless of financial circumstance,” said Steven F. Pflaum, Chair of the Statutory Court Fee Task Force. “In one sense, the Court’s promulgation of court rules implementing recent legislation overhauling fees and costs in civil, criminal, and traffic cases represents the culmination of a multi-year, concerted effort by all three branches of State government to address a dizzying array of filing fees in civil cases and court costs imposed on defendants in criminal and traffic cases. In a larger sense, today’s action simply marks a milestone, albeit an important one, in the never-ending effort to reduce economic and

other barriers to access to justice.

“The members of the Statutory Court Fee Task Force are deeply grateful to the General Assembly for passing legislation (P.A. 100-0987) that embodied the key proposals in the Task Force Report. The Task Force is especially indebted to the Supreme Court for developing the Access to Justice Act that spawned the Task Force, providing crucial staff support through the dedicated services of the Administrative Office of the Illinois Courts, and guiding and assisting the Task Force throughout its existence.”

The Civil Assessment Schedules streamline the current statutory fee provisions into a framework of fee schedules identifying the maximum amounts which can be assessed in each civil case category. County boards will implement the fee amounts according to the new schedules.

“While it’s a huge undertaking for the clerks, as well as the software managers of the case management systems in each county, we are very thankful to the AOIC for the extensive training and assistance. We’ve anticipated this change for some time,” said Sandra Cianci, Kankakee County Circuit Clerk and President of the Illinois Association of Court Clerks. “Once we’ve overhauled our systems to align with legislation, and have attained uniformity of fines and fees, we will be better suited to serve the court patrons throughout the state of Illinois.” . . .

**Application for Waiver of Court Fees &
Application for Waiver of Court Assessments,
ILL. SUP. CT. AMENDED R. 298, and R. 404 (2019)**
(effective July 1, 2019)

Rule 298. Application for Waiver of Court Fees

(a) Contents. An Application for Waiver of Court Fees in a civil action pursuant to 735 ILCS 5/5-105 shall be in writing and signed by the applicant or, if the applicant is a minor or an incompetent adult, by another person having knowledge of the facts.

(1) The contents of the Application must be sufficient to allow a court to determine whether an applicant qualifies for full or partial waiver of assessments fees pursuant to 735 ILCS 5/5-105, and shall include information regarding the applicant’s household composition, receipt of need-based public benefits, income, expenses, and nonexempt assets.

(2) Applicants shall use the “Application for Waiver of Court Fees” adopted by the Illinois Supreme Court Access to Justice Commission, which can be found in the Article II Forms Appendix.

(b) Ruling. The court shall either enter a ruling on the Application or ~~shall~~ set the Application for a hearing requiring the applicant to personally appear in person a timely manner. The court may order the applicant to produce copies of specified certain documents in support of the Application at the hearing. The court’s ruling on an

Application for Waiver of Court Fees shall be made according to standards set forth in 735 ILCS 5/5-105. If the Application is denied, the court shall enter an order to that effect ~~stating the specific~~ specifying the reason for the denial. If the court determines that the conditions for a full assessment waiver under 735 ILCS 5/5-105(b)(1) are satisfied, it ~~Application is granted, the court~~ shall enter an order permitting the applicant to sue or defend without payment of assessments, fees, costs or charges. If the court determines that the conditions for a partial assessment waiver under 735 ILCS 5/5-105(b)(2) are satisfied, it shall enter an order permitting the applicant to sue or defend after payment of a specified percentage of assessments, costs, or charges. If an Application for a partial assessment waiver is granted, and if necessary to avoid undue hardship on the applicant, the court may allow the applicant to defer payment of assessments costs and charges make installment payments or make payment upon reasonable terms and conditions stated in the order.

(c) Filing. No fee may be charged for filing an Application for Waiver of Court Fees. The clerk must allow an applicant to file an Application for Waiver of Court Fees in the court where his case will be heard.

(d) Cases involving representation by civil legal services provider or lawyer in court- sponsored pro bono program. In any case where a party is represented by a civil legal services provider or attorney in a court-sponsored *pro bono* program as defined in 735 ILCS 5/5-105.5, the attorney representing that party shall file a certification with the court, and that ~~the~~ party shall be allowed to sue or defend without payment of assessments, fees, costs or charges as defined in 735 ILCS 5/5-105(a)(1) without necessity of an Application under this rule. Instead, the attorney representing the party shall file a certification prepared by utilizing, or substantially adopting the appearance and content of, the form provided in the Article II Forms Appendix. . . .

Rule 404. Application for Waiver of Court Assessments

(a) Contents. An Application for Waiver of Court Assessments in a criminal action pursuant to 725 ILCS 5/124A-20 shall be in writing and signed by the applicant or, if the applicant is a minor or an incompetent adult, by another person having knowledge of the facts. The Application should be submitted no later than 30 days after sentencing.

(1) The contents of the Application must be sufficient to allow a court to determine whether an applicant qualifies for a full or partial waiver of assessments pursuant to 725 ILCS 5/124A-20 and shall include information regarding the applicant's household composition, receipt of need-based public benefits, income, expenses, and nonexempt assets.

(2) Applicants shall use the "Application for Waiver of Court Assessments" adopted by the Illinois Supreme Court Access to Justice Commission, which can be found in the Article IV Forms Appendix.

(b) Ruling. The court shall either enter a ruling on the Application or shall set the Application for a hearing requiring the applicant to appear in person. The court may order the applicant to produce copies of certain documents in support of the Application at the hearing. The court's ruling on an Application for Waiver of Assessments shall be made according to standards set forth in 725 ILCS 5/124A-20. If the Application is

denied, the court shall enter an order to that effect specifying the reasons for the denial. If the court determines that the conditions for a full assessment waiver are satisfied under 725 ILCS 5/124A-20(b)(1), it shall enter an order waiving the payment of the assessments. If the court determines that the conditions for a partial assessment waiver under 725 ILCS 5/124A-20(b)(2) are satisfied, it shall enter an order for payment of a specified percentage of the assessments. If an Application is denied or an Application for a partial assessment waiver is granted, the court may allow the applicant to defer payment of the assessments, make installment payments, or make payment upon reasonable terms and conditions stated in the order.

(c) Filing. No fee may be charged for filing an Application for Waiver of Court Assessments. The clerk must allow an applicant to file an Application for Waiver of Assessments in the court where his case will be heard.

(d) Cases involving representation by criminal legal services providers or attorneys in court-sponsored *pro bono* program. In any case where a party is represented by a criminal legal services provider or an attorney in a court-sponsored *pro bono* program, the attorney representing that party shall file a certification with the court, and that party shall be allowed to proceed without payment of assessments as defined in 725 ILCS 5/124A-20(a) without necessity of an Application under this rule. "Criminal legal services provider" means a not-for-profit corporation that (i) employs one or more attorneys who are licensed to practice law in the State of Illinois and who directly provide free criminal legal services or (ii) is established for the purpose of providing free criminal legal services by an organized panel of *pro bono* attorneys. "Court-sponsored *pro bono* program" means a *pro bono* program established by or in partnership with a court in this State for the purpose of providing free criminal legal services by an organized panel of *pro bono* attorneys. . . .

Order In re: Civil Assessment Schedules
M.R. 29741 (February 13, 2019)
Supreme Court of Illinois

The Access to Justice Act ("Act") (705 ILCS 95/1 *et seq.*) was enacted in 2013 with the goal of improving meaningful access to legal information, resources and assistance for all litigants, regardless of their income or circumstances. The Act established the Statutory Court Fee Task Force ("Task Force"), a bipartisan, multi-cameral coalition of stakeholders convened to study the current system of fees, fines and other court costs (collectively, "assessments") imposed upon civil and criminal litigants. The Task Force was charged with proposing recommendations to the Supreme Court and the General Assembly to simplify the imposition, collection and distribution of these assessments while making them more transparent, affordable, and fair.

After many months of study, the Task Force released its Report and

Recommendations in 2016, which adopted five core principles:

1. Courts should be substantially funded from general government revenue sources. Court users may be required to pay reasonable assessments to offset a portion of the cost of the courts borne by the public-at-large.
2. The amount of assessments should not impede access to the courts and should be waived, to the extent possible, for indigent litigants and the working poor.
3. Assessments should be simple, easy to understand, and uniform to the extent possible.
4. Assessments should be directly related to the operation of the court system. Assessments imposed for a particular purpose should be limited to the types of court proceedings that are related to that purpose. Monies raised by assessments intended for a specific purpose should be used only for that purpose.
5. The General Assembly should periodically review all assessments to determine if they should be adjusted or repealed.

In response to the Task Force's recommendations, the General Assembly enacted Public Act 100-0987 which streamlines the current statutory fee provisions into a framework of fee schedules identifying the maximum amounts which can be assessed in each civil case category established by this Order.

In the coming months, the county boards will implement, by ordinance, the local fee amounts according to these new schedules. Before setting fees, county boards are strongly urged to review the five core principles outlined by the Task Force and to carefully consider the role and purpose of assessments in funding the justice system, as well as the relationship between assessments and access to justice.

Therefore it is ordered that:

Effective July 1, 2019, the following civil case schedules are established. The case categories referenced herein refer to those identified in the Supreme Court's General Administrative Order on Recordkeeping in the Circuit Courts, as amended.

For the assessment of civil filing fees pursuant to subsection (a) of section 27.1b of the Clerk of Courts Act (705 ILCS 105/27.1 b(a)):

Schedule 1 [imposing fees “not to exceed a total of \$366 in a county with a population of 3,000,000 or more and \$316 in any other county, except as applied to units of local government and school districts in counties with more than 3,000,000 inhabitants an amount not to exceed \$190 through December 31, 2021 and \$184 on and after January 1, 2022”]. . . shall include the following case categories:

- Arbitration (AR) cases where the amount in controversy is \$15,000.01 or more;
- Chancery (CH) cases;
- Dissolution (D) cases;
- Eminent Domain (ED) cases;
- Family (F) cases, except:
 - o Petitions filed pursuant to the Parental Notice of Abortion Act of 1995 (750 ILCS 70/1 *et seq.*);
 - o Voluntary petitions to determine parentage filed pursuant to section 309 of the Illinois Parentage Act of 2015 (750 ILCS 46/309);
- Law (L) cases, except:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- Law-Magistrate (LM) cases where the amount in controversy is \$15,000.01 or more, except:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- Miscellaneous Remedy (MR) cases, except:
 - o Cases filed pursuant to the Estrays and Lost Property Act (765 ILCS 1020/1 *et seq.*);
 - o Petitions seeking administrative review of unemployment decisions filed pursuant to Section 1100 of the Unemployment Insurance Act (820 ILCS 405/1100);
- Municipal Corporation (MC) cases;
- Tax (TX) cases;

Schedule 2 [imposing fees not to exceed a total of \$357 in a county with a population of 3,000,000 or more and \$266 in any other county, except as applied to units of local government and school districts in counties with more than 3,000,000 inhabitants an amount not to exceed \$190 through December 31, 2021 and \$184 on and after January 1, 2022] . . . shall include the following case categories :

- Arbitration (AR) cases where the amount in controversy is \$15,000.00 or less;
- Probate (P) cases, except:
 - o The filing of a will pursuant to section 6-1 of the Probate Act of 1975 (755 ILCS 5/6-1);
- Law-Magistrate (LM) cases where the amount in controversy is \$15,000.00 or less, except:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- Small Claim (SC) cases where the amount in controversy is \$2,500.01 or more;

Schedule 3 [imposing fees “not to exceed a total of \$265 in a county with a population of 3,000,000 or more and \$89 in any other county, except as applied to units of local government and school districts in counties with more than 3,000,000 inhabitants an

amount not to exceed \$190 through December 31, 2021 and \$184 on and after January 1, 2022”] . . . shall include the following case categories:

- Adoption (AD) cases, except
 - o Petitions for appointment of a confidential intermediary filed pursuant to Section 18.3a of the Adoption Act (750 ILCS 50/18.3a);
- The following Law (L) cases:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- The following Law-Magistrate (LM) cases:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- Small Claim (SC) cases where the amount in controversy is \$2,500.00 or less;

Schedule 4 [imposing a fee of \$0] . . . shall include the following case categories:

- The following Adoption (AD) cases:
 - o Petitions for appointment of a confidential intermediary filed pursuant to Section 18.3a of the Adoption Act (750 ILCS 50/18.3a);
- The following Probate (P) cases:
 - o The filing of a will pursuant to section 6-1 of the Probate Act of 1975 (755 ILCS 5/6-1);
- The following Family (F) cases:
 - o Petitions filed pursuant to the Parental Notice of Abortion Act of 1995 (750 ILCS 70/5 *et seq.*);
 - o Voluntary petitions to determine parentage filed pursuant to section 309 of the Illinois Parentage Act of 2015 (750 ILCS 46/309);
- Mental Health (MH) cases;
- The following Miscellaneous Remedy (MR) cases:
 - o Cases filed pursuant to the Estrays and Lost Property Act (765 ILCS 1020/1 *et seq.*)
 - o Petitions seeking administrative review of unemployment decisions filed pursuant to Section 1100 of the Unemployment Insurance Act (820 ILCS 405/1100);
- Order of Protection (OP) cases;
- All cases filed by units of local government or school districts, except in counties having a population of 500,000 or more where the county board has, by resolution, set reduced filing fees for such units of local government or school districts, pursuant to subsection (z)(1)(A-5) of Section 27.1b of the Clerk of Courts Act (705 ILCS 105/27.1b(z)(1)(A-5)).

For the assessment of civil appearance fees pursuant to subsection (b) of section 27.1b of the Clerk of Courts Act (705 ILCS 105/27.1b(b)):

Schedule 1 [imposing fees “not to exceed a total of \$230 in a county with a population of 3,000,000 or more and \$191 in any other county, except as applied to units of local

government and school districts in counties with more than 3,000,000 inhabitants an amount not to exceed \$75”] . . . shall include the following case categories:

- Arbitration (AR) cases;
- Chancery (CH) cases;
- Dissolution (D) cases;
- Eminent Domain (ED) cases;
- Family (F) cases, except:
 - o Petitions filed pursuant to the Parental Notice of Abortion Act of 1995 (750 ILCS 70/1 *et seq.*);
 - o Voluntary petitions to determine parentage filed pursuant to section 309 of the Illinois Parentage Act of 2015 (750 ILCS 46/309);
- Probate (P) cases;
- Law (L) cases, except:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- Law-Magistrate (LM) cases, except:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- Miscellaneous Remedy (MR) cases, except:
 - o Cases filed pursuant to the Estrays and Lost Property Act (765 ILCS 1020/1 *et seq.*);
 - o Petitions seeking administrative review of unemployment decisions filed pursuant to Section 1100 of the Unemployment Insurance Act (820 ILCS 405/1100);
- Municipal Corporation (MC) cases;
- Small Claim (SC) cases where the amount in controversy is \$2,500.01 or more;
- Tax (TX) cases;

Schedule 2 [imposing fees “not to exceed a total of \$130 in a county with a population of 3,000,000 or more and \$109 in any other county, except as applied to units of local government and school districts in counties with more than 3,000,000 inhabitants an amount not to exceed \$75”]. . . shall include the following case categories:

- The following Law (L) cases:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- The following Law-Magistrate (LM) cases:
 - o Eviction cases filed pursuant to Article IX of the Code of Civil Procedure (735 ILCS 5/9-101 *et seq.*) seeking possession only;
- Small Claim (SC) cases where the amount in controversy is \$2,500.00 or less;

Schedule 3 [imposing a fee of \$0] . . . shall include the following case categories:

- Adoption (AD) cases;
- The following Family (F) cases:

- o Petitions filed pursuant to the Parental Notice of Abortion Act of 1995 (750 ILCS 70/5 *et seq.*);
- o Voluntary petitions to determine parentage filed pursuant to Section 309 of the Illinois Parentage Act of 2015 (750 ILCS 46/309);
- Mental Health (MH) cases;
- The following Miscellaneous Remedy (MR) cases:
 - o Cases filed pursuant to the Estrays and Lost Property Act (765 ILCS 1020/1 *et seq.*)
 - o Petitions seeking administrative review of unemployment decisions filed pursuant to Section 1100 of the Unemployment Insurance Act (820 ILCS 405/1100);
- Order of Protection (OP) cases;
- All appearances filed by units of local government or school districts, except in counties having a population of 500,000 or more where the county board has, by resolution, set reduced appearance fees for such units of local government or school districts, pursuant to subsection (z)(1)(A-5) of Section 27.1b of the Clerk of Courts Act (705 ILCS 105/27.1b(z)(1)(A-5)).

A complete list of electronic filing configuration codes for each filing and appearance schedule shall be provided by the Administrative Office of the Illinois Courts.

Pursuant to Section 27.1b of the Clerk of Courts Act (705 ILCS 105/27.1b), effective July 1, 2019, distribution of the portion of filing and appearance fees retained by the clerks of the circuit court for deposit into the Court Automation Fund, Court Document Storage Fund and Circuit Clerk Operations and Administration Fund shall be approved by the Supreme Court's Administrative Director upon the chief judge and the circuit clerk's execution and submission of the attached County Civil Fee Case Schedule Breakdown Form.

**Provision of Telephone Services to Individuals in City Correctional Facilities
(Jul. 18, 2018)**

New York City Introduction No. 741-A

By The Speaker (Council Member Johnson), and Council Members Brannan, Rosenthal, Powers, Levin, Ampry-Samuel, Rivera, Espinal, Gibson, Rose, Cumbo, Williams, Koslowitz, Lancman and Ayala

A Local Law to amend the administrative code of the city of New York, in relation to the provision of telephone services to individuals in custody in city correctional facilities

Be it enacted by the Council as follows:

Section 1. Chapter 1 of title 9 of the administrative code of the city of New York is amended by adding a new section 9-154 to read as follows:

§ 9-154 Telephone services to inmates. The city shall provide telephone services to individuals within the custody of the department in city correctional facilities at no cost to the individuals or the receiving parties for domestic telephone calls. The city shall not be authorized to receive or retain any revenue for providing telephone services.

Section 2. This local law takes effect 270 days after it becomes law.

**Ordinance Amending the Administrative Code to Abolish Fees Associated with Probation Costs, Restitution, Booking, the Sheriff's Work Alternative Program, the Automated County Warrant System, the Sheriff's Home Detention Program, and to Abolish Local Penalties Associated with Alcohol Testing and Court-Ordered Penalties for Misdemeanor and Felony Offenses
(passed June 5, 2018, effective July 1, 2018)
City and County of San Francisco Ordinance 131-18**

Be it ordained by the People of the City and County of San Francisco:

Section 1. Findings and Purpose.

(a) When people are convicted of a crime, they are often charged thousands of dollars in fines, fees, or financial penalties related to their conviction, sentence, or incarceration—in addition, in many cases, to their serving time in jail or prison. These financial exactions are intended to generate revenue for public programs and to fund their operations. But there is often an insidious, unintended consequence of this practice—to push people into poverty, or push them even deeper into poverty if they already were there. These fines, fees, and penalties can trap people in a cycle of debt, and low-income people and people of color are often hit the hardest. Under this system, government becomes a driver of inequality, creating additional layers of punishment for those moving through the criminal justice system.

(b) More specifically, these financial burdens frequently hit individuals at the precise moment they are trying to turn their lives around. The vast majority of people exiting jail or prison are unemployed, have unstable housing, have no steady source of income, and find work difficult or nearly impossible to obtain after release. Approximately 80% of individuals in jail are indigent. Yet, after someone has already served their time, they frequently receive a bill for a long list of fines

and fees to pay for probation, fingerprinting, and mandated user fees. According to a report by the Ella Baker Center, the average debt incurred for court-related fines and fees of over 700 people surveyed was \$13,607, nearly equal to the annual income for respondents in the survey.

(c) In San Francisco, people who have spent time in jail or prison or have been involved in the criminal justice system are charged a long list of fines and fees. The Public Defender's Office found that people participating in its Clean Slate Program have received bills for approximately 25 fees for administrative functions such as automated record keeping, a court operations assessment, a DNA identification program, state court construction penalty, an automated fingerprint fund, and emergency medical services. The monthly probation fee appears to impose the most debt on those who have been involved in the criminal justice system in San Francisco, where people are charged \$50 a month to be on probation. These individuals are charged \$1,800 up-front when they start their probation, as probation typically lasts for three years.

(d) The fines and fees incurred by those involved in the criminal justice system in San Francisco are substantial. People in the Clean Slate program typically owe \$3,000 to \$5,000 in criminal justice fines and fees, according to a sample of clients examined by the Clean Slate Program. The men and women paying these fines and fees are typically unemployed, and earn wages, if at all, well below the federal poverty level. Clean Slate participants are disproportionately people of color. Indeed, the burden of these fines and fees falls heaviest on the African-American community, which accounts for less than 6% of the population in San Francisco, but makes up over half the population in the county jail.

(e) Left unpaid, these fines and fees can grow in size, and can result in wage garnishment and levies on bank accounts, to the extent there are wages to garnish or a bank account to draw upon. The fines and fees make it harder for people to cover their expenses and therefore can create burdens for others. For example, the Ella Baker Center study stated that family members often pay the fines and fees on behalf of their loved ones, and over 20% of families had to take out a loan to cover the costs of these fines and fees.

(f) Furthermore, research shows that these fines and fees are often an inefficient source of revenue. Researchers at the University of California, Berkeley, among other researchers, have found that some criminal justice fines and fees are "High Pain" (hitting poor people particularly hard) and "Low Gain" (bringing in very little revenue), as the fees are charged to people who often cannot afford to pay them. Both the White House Council of Economic Advisors and the Conference of State Court Administrators have found that these legal financial obligations are often an ineffective and inefficient means of raising revenue.

(g) San Francisco has a long history of leadership in this area: It is the only county that has never charged fees to parents of children who have been incarcerated in Juvenile Hall, and was the first county court in the state to stop suspending driver's licenses for unpaid fines and fees. With this ordinance, San Francisco becomes the first county in California to eliminate the criminal justice fines, fees, and financial penalties under its control, that so disadvantage the most vulnerable in our society. By removing these financial burdens and the outstanding debt they create that hangs over thousands of families, San Francisco hopes to inspire other jurisdictions to lift this burden off of low-income families, and to find more fair and just ways to fund their criminal justice systems.

(h) The City urges the San Francisco Superior Court to modify any prior orders to eliminate the fine, fees, and penalties included in this ordinance, and to discharge all debt associated with the same, to the extent permitted by law. The City urges the Public Defender to assist individuals in seeking modification of court orders to pay fines, fees, and penalties covered by this ordinance. Finally, to the extent permitted by law, the City urges all City departments to stop collecting the fines, fees, and penalties covered by this ordinance.

Section 2. The Administrative Code is hereby amended by deleting Section 8.14-1, adding Section 8.29, deleting Sections 8.31, 8.31-1, 8.36, and 8.38, revising Section 8.42, and deleting Sections 10.39-4 and 10.100-280, to read as follows:

[Deleting Sec. 8.14.1 Penalty Assessment for Testing for Alcohol Content]

SEC. 8.29. NO AUTHORIZATION TO COLLECT FEES FOR PROBATION COSTS.

Notwithstanding any prior ordinance enacted to make operative Penal Code Section 1203.1b, there is no authorization to collect fees for probation costs, pre-sentence report costs, or any other costs authorized under Penal Code section 1203.1 b.

[Deleting Sec. 8.31 Adult Probation Department Restitution Collection Fee]

[Deleting Sec. 8.31.1 Adult Probation Department Restitution Fine Administrative Fee]

[Deleting Sec. 8.36 Juvenile Probation Department Restitution Collection Fee]

[Deleting Sec. 8.38 Adult Probation Booking Fee]

SEC. 8.42. PENALTY ASSESSMENT FOR EMERGENCY MEDICAL SERVICES.

~~(a)~~ Pursuant to ~~California~~ Government Code Section 76000.5, there is hereby established an additional penalty of ~~two dollars (\$2.00)~~ over that currently levied under ~~California~~ Penal Code Section 1464 for every ~~ten dollars (\$10.00)~~ or fraction thereof upon every fine, penalty, or forfeiture imposed and collected by the courts for non-misdemeanor and non-felony eriminal offenses, including violations of the ~~California~~ Vehicle Code or local ordinances adopted pursuant to the Vehicle Code, as authorized by Penal Code Sections 1464 and 1465 , with the exceptions noted therein. The

revenues from this assessment shall go to the Public Health Emergency Medical Services Fund established in Section 10.100-195 of this Code. Pursuant to Government Code Section 76000.5(b), these increased penalties shall not offset or reduce the funding of other programs from other sources, but shall result in increased funding to those programs. ~~(b) This section shall expire on January 1, 2009, unless the Legislature deletes or extends the expiration date for Government Code Section 76000.5 adopted as part of Chapter 841 of the Statutes of 2006.~~

[Deleting Sec. 10.39-4 Sheriff's Work Alternative Program Fees]

[Deleting Sec. 10.100-280 San Francisco Automated County Warrant System]

Section 3. The Administrative Code is hereby amended by revising Sections 2A.301 and 13.63, to read as follows:

SEC. 2A.301. HOME DETENTION AND ELECTRONIC MONITORING AS A SANCTION FOR VIOLATION OF POSTRELEASE COMMUNITY SUPERVISION.

. . . The Adult Probation Department shall not charge fees for participation in the Home Detention and Electronic Monitoring program.

SEC. 13.63. HOME DETENTION PROGRAM.

. . . The Sheriff shall not charge fees for participation in the Home Detention Program.

Section 4. Effective and Operative Dates.

(a) This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

(b) This ordinance shall become operative on July 1, 2018.

Section 5. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the ordinance.

An Ordinance Amending Section 2.42.190 of the Administrative Code to Eliminate Probation Fees; Repealing Resolution 2011-142 Regarding Public Defender/Conflict Counsel Fees for Representation of Indigent Adults; and Eliminating Sheriff's Work Alternative Program Administrative and Attendance Fees (passed December 4, 2018)

Alameda County Ordinance No. 2018-67

WHEREAS, criminal justice financial obligations like probation supervision and investigation fees, indigent defense fees, and fees associated with work release programs, can have long-term effects that can undermine successful societal reentry goals of the formerly-incarcerated, such as attaining stable housing, transportation, and employment; and

WHEREAS, this Board of Supervisors recognizes that criminal justice debt levied against low- income or indigent adults compromises key principles of fairness in the administration of justice in a democratic society and engenders deep distrust of the criminal justice system among those overburdened by such debt; and

WHEREAS, California Penal Code section 1203.1b authorizes but does not require a county to recover the actual costs for probation services in lieu of incarceration; and

WHEREAS, County of Alameda Administrative Code section 2.42.190 establishes probation department fees; and

WHEREAS, California Penal Code sections 987.5 and 987.8 authorizes but does not require the assessment of fees to cover the costs of appointed counsel; and

WHEREAS, the Board of Supervisors most recently authorized Indigent Defense Fees in Resolution 2011-142; and

WHEREAS, California Penal Code section 4024.2 authorizes but does not require a board of supervisors to assess an administrative fee on inmates of the county jail for costs associated with a county's work release program; and

WHEREAS, the Board of Supervisors has approved the Alameda County Sheriff's Office Sheriff Work Alternative Program (SWAP) and set administrative and attendance fees for participation in that Program; and

WHEREAS, the Board of Supervisors finds that it is in the best interest of the County, justice- involved adults, and the larger community to repeal the above-named adult fees; and

WHEREAS, it is also in the best interests of the County and the community that the Auditor- Controller be authorized to write-off all accounts receivable balances and close the associated fee accounts;

NOW, THEREFORE, the Board of Supervisors of the County of Alameda ordains as follows:

SECTION I

Section 2.42.190 of the County of Alameda Administrative Code is hereby amended to read as follows:

2.42.190 Probation Department fees.

Notwithstanding any prior County ordinance or resolution of the Board of Supervisors to permit assessment of probation fees and costs under California Penal Code section 1203.1b, neither the Probation Department nor any other County agency shall assess fees for probation services, or any other fees or costs authorized by Penal Code section 1203.1b.

SECTION II

The Public Defender schedule of fees authorized by this Board in Resolution No. 2011-142 on May 10, 2011 is hereby repealed.

SECTION III

The Sheriff's Office Alternative Work Program (SWAP) administrative fee and attendance fee, authorized by this Board by resolution as permitted by Penal Code section 4024.2 is repealed. Neither the Sheriff's Office or any other County agency shall assess SWAP administration or attendance fees.

SECTION IV

This ordinance shall take effect and be in force thirty (30) days from and after the date of passage and before the expiration of fifteen (15) days after its passage it shall be published once with the names of the members voting for and against the same in the Inter-City Express, a newspaper published in the County of Alameda. . . .

**Pending Statewide Reform of Criminal Fees Administration
California Senate Bill No. 144, 2019-2020 Leg., Reg. Sess. (Cal. 2019)**

Introduced by Senator Mitchell: An act relating to criminal fees. January 18, 2019
. . . Existing law imposes various fees contingent upon a criminal arrest,

prosecution, or conviction for the cost of administering the criminal justice system, including administering probation and diversion programs, collecting restitution orders, processing arrests and citations, administering drug testing, incarcerating inmates, facilitating medical visits, and sealing or expunging criminal records.

This bill would state the intent of the Legislature to enact legislation to eliminate the range of administrative fees that agencies and courts are authorized to impose to fund elements of the criminal legal system, and to eliminate all outstanding debt incurred as a result of the imposition of administrative fees. . .

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

- (a) State law authorizes counties to charge criminal administrative fees. These financial exactions are imposed in addition, in many cases, to serving time in prison, and are intended to generate revenue for public programs and to fund their operations.
- (b) Administrative fees, penalty assessments, and surcharges are extraordinarily burdensome. Individuals exiting the criminal justice system are often charged dozens of administrative fees and surcharges, totaling thousands of dollars per person. In Los Angeles County, for example, someone with a 3-year term of probation accumulates over \$5,500 in probation fees alone.
- (c) These fees are charged to people who have already paid their debt to society and serve no formal punitive function, and are often assigned to people who simply cannot afford to pay them.
- (d) This practice often pushes families into poverty and can trap them in a cycle of debt. They serve as a perpetual punishment by pushing vulnerable families further into economic insecurity and peril, as well as increased mental stress, with low-income people and people of color often hit the hardest. Additionally, a national survey of formerly incarcerated people found that families often bear the burden of fees, and that 83 percent of the people responsible for paying these costs are women.
- (e) Due to overpolicing and systemic racial bias, these fees are disproportionately imposed on communities of color and are especially harmful for Black and Latinx people, who are overrepresented in the criminal legal system across the state. Despite making up only 7 percent of the state population, Black people make up 23 percent of the probation population and are also grossly overrepresented in felony and misdemeanor arrests. Moreover, close to half of Black and Latinx

households in California live on the brink of poverty as they struggle to put food on the table and pay for housing.

- (f) The vast majority of people exiting jail or prison are unemployed, have unstable housing, have no steady source of income, and find work difficult or nearly impossible to obtain after release. Approximately 80 percent of individuals in jail are indigent. Yet, after someone has already served their time, they frequently receive a bill for a long list of fines and fees to pay for probation, fingerprinting, and mandated user fees. According to a report by the Ella Baker Center for Human Rights, the average debt incurred for court-related fines and fees of over 700 people surveyed was \$13,607, nearly equal to the annual income for respondents in the survey.
- (g) Criminal fees also undermine public safety. The goal of a successful postincarceration period is to reintegrate into the community, yet these fees create significant barriers to successful reentry. These financial burdens frequently hit individuals at the precise moment they are trying to turn their lives around. The nonpayment of criminal fees can lead to wage garnishment, bank account levies, tax refund intercepts, driver's and professional license suspensions, negative credit scores, and even incarceration or deportation. These consequences can, in turn, limit access to employment, housing, education, and public benefits, which creates additional barriers to successful reentry. Research also shows that the fees can push individuals into underground economies and can result in individuals turning to criminal activity or predatory lending to pay their debts.
- (h) Criminal fees are also an inefficient source of government revenue. Research shows that the fees are expensive and difficult to collect. For instance, in one year, Alameda County Central Collections spent approximately \$1.6 million toward collection of adult fines, fees and restitution for all cases, resulting in a net loss of \$1.3 million. Similarly, a study of comparable juvenile administrative fees found that counties typically netted very little or even lost revenue after accounting for collections costs.
- (i) Momentum to end criminal fees is growing in the state and individual counties have begun to recognize that these fees are "high pain, low gain," and are taking steps to eliminate them. In May 2018, San Francisco eliminated all criminal administrative fees under its control, freeing over 21,000 people of more than \$32,000,000 in outstanding criminal administrative fees and surcharges. Additionally, in December of 2018, the Alameda County Board of Supervisors voted to eliminate a host of county-imposed criminal fees. The board voted to eliminate \$26,000,000 in fees for tens of thousands of Alameda County residents. In

2017, the County of Los Angeles eliminated its public defender registration fee.

- (j) With the passage of Senate Bill 190 in 2017 and other important criminal justice reform bills, California is a national leader in criminal justice reform. In order to live up to our progressive values of fairness, equity, and opportunity for all, the Legislature should continue its work on criminal justice reform and take all measures necessary to ensure all California families have a chance to achieve economic stability and are treated fairly.

SEC. 2. It is the intent of the Legislature to enact legislation to eliminate the range of administrative fees that agencies and courts are authorized to impose to fund elements of the criminal legal system, and to eliminate all outstanding debt incurred as a result of the imposition of administrative fees.

Pretrial Release or Detention: Pretrial Services
California Senate Bill No. 10 (effective Oct. 1, 2019)

S. B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2018)

. . . Existing law provides for the procedure of approving and accepting bail, and issuing an order for the appearance and release of an arrested person. Existing law requires that bail be set in a fixed amount and requires, in setting, reducing, or denying bail, a judge or magistrate to take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. Under existing law, the magistrate or commissioner to whom the application is made is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance. Existing law provides that a defendant being held for a misdemeanor offense is entitled to be released on his or her own recognizance, unless the court makes a finding on the record that an own recognizance release would compromise public safety or would not reasonably ensure the appearance of the defendant as required.

This bill would, as of October 1, 2019, repeal existing laws regarding bail and require that any remaining references to bail refer to the procedures specified in the bill.

This bill would require, commencing October 1, 2019, persons arrested and detained to be subject to a pretrial risk assessment conducted by Pretrial Assessment Services, which the bill would define as an entity, division, or program that is assigned the

responsibility to assess the risk level of persons charged with the commission of a crime, report the results of the risk determination to the court, and make recommendations for conditions of release of individuals pending adjudication of their criminal case. The bill would require the courts to establish pretrial assessment services, and would authorize the services to be performed by court employees or through a contract with a local public agency, as specified. The bill would require, if no local agency will agree to perform the pretrial assessments, and if the court elects not to perform the assessments, that the court may contract with a new local pretrial assessment services agency established specifically to perform the role.

The bill would require a person arrested or detained for a misdemeanor, except as specified, to be booked and released without being required to submit to a risk assessment by Pretrial Assessment Services. The bill would authorize Pretrial Assessment Services to release a person assessed as being a low risk, as defined, on his or her own recognizance, as specified. The bill would additionally require a superior court to adopt a rule authorizing Pretrial Assessment Services to release persons assessed as being a medium risk, as defined, on his or her own recognizance. The bill would prohibit Pretrial Assessment Services from releasing persons who meet specified conditions. If a person is not released, the bill would authorize the court to conduct a prearraignment review and release the person. The bill would allow the court to detain the person pending arraignment if there is a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person in court.

The bill would require the victim of the crime to be given notice of the arraignment by the prosecution and a chance to be heard on the matter of the defendant's custody status. By imposing additional duties on local prosecutors, this bill would impose a state-mandated local program. The bill would create a presumption that the court will release the defendant on his or her own recognizance at arraignment with the least restrictive nonmonetary conditions that will reasonably assure public safety and the defendant's return to court.

The bill would allow the prosecutor to file a motion seeking detention of the defendant pending trial under specified circumstances. If the court determines that there is a substantial likelihood that no conditions of pretrial supervision will reasonably assure the appearance of the defendant in court or reasonably assure public safety, the bill would authorize the court to detain the defendant pending a preventive detention hearing and require the court to state the reasons for the detention on the record. The bill would prohibit the court from imposing a financial condition.

In cases in which the defendant is detained in custody, the bill would require a preventive detention hearing to be held no later than 3 court days after the motion for preventive detention is filed. The bill would grant the defendant the right to be represented by counsel at the preventive detention hearing and would require the court to appoint counsel if the defendant is financially unable to obtain representation. By imposing additional duties on county public defenders, this bill would impose a state-mandated local

program. The bill would require the prosecutor to give the victim notice of the preventive detention hearing. By imposing new duties on local prosecutors, this bill would impose a state-mandated local program. The bill would create a rebuttable presumption that no condition of pretrial supervision will reasonably assure public safety if, among other things, the crime was a violent felony or the defendant was convicted of a violent felony within the past 5 years. The bill would allow the court to order preventive detention of the defendant pending trial if the court determines by clear and convincing evidence that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the defendant in court. If the court determines there is not a sufficient basis for detaining the defendant, the bill would require the court to release the defendant on his or her own recognizance or supervised own recognizance and impose the least restrictive nonmonetary conditions of pretrial release to reasonably assure public safety and the appearance of the defendant.

The bill would require the Judicial Council to adopt Rules of Court and forms to implement these provisions as specified, and to identify specified data to be reported by each court. The bill would require the Judicial Council to, on or before January 1, 2021, and every other year thereafter, to submit a report to the Governor and the Legislature. The bill would provide that upon appropriation by the Legislature, the Judicial Council would allocate funds to local courts for pretrial assessment services and the Department of Finance would allocate funds to local probation departments for pretrial supervision services, as specified.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above. . . .

Comments of Columbia Law School Researchers on Proposed California Judicial Council Rules 4.10 and 4.40 (December 14, 2018)

Kellen Funk

[California’s 2018 bail reform legislation delegates to the Judicial Council of California the role of implementing several of the reforms prescribed through its rulemaking process. The Judicial Council gave notice of two proposed rules: “rule 4.10, which sets forth the proper use of pretrial risk assessment information, and rule 4.40, which addresses review and release standards for Pretrial Assessment Services for persons assessed as medium risk.” Judicial Council of California, Invitation to Comment, SP18-23(Nov. 6, 2018).]

. . . The undersigned faculty and students at Columbia Law School are scholars and researchers of pretrial practices, including criminal procedure; pretrial detention; and the history, sociology, and reform of pretrial bail. We write with concern about the incomplete guidance offered by proposed Rules 4.10 and 4.40. . . .

We are opposed to proposed Rules 4.10 and 4.40. While the Rules contain a number of laudable provisions, their often unspecific requirements are largely unenforceable as written. Although a reformed pretrial justice system that maximizes the number of defendants released pretrial while minimizing costs and risks to the public *could* be achieved under the Rules, a draconian system that punitively and unnecessarily detains the vast majority of defendants pretrial is equally possible under the Rules as formulated. That is, the undefined terms and unclear guidance of the Rules allow for many possibilities, as S.B. 10 itself does. Yet the purpose and value of the Council’s rulemaking should be to implement S.B. 10 in ways that honor constitutional principles of due process, equal protection, and the presumption of innocence, and that constrain the use of risk assessments and preventive detention to incarcerate the same populations at the same rates as the unequal and indefensible secured money bail system abolished by S.B. 10. . . .

Perhaps of most significant concern about the proposed Rules is the Council’s repeated references to “low,” “medium,” and “high” risk categories, as if there were a single spectrum of risk, paired with the continual requirement that courts evaluate two distinct kinds of risk: “reasonably assur[ing] public safety *or* the appearance of the person as required.” The distinct risks of nonappearance or of pretrial offense should be separately analyzed both at the risk assessment stage and throughout the pretrial process. It is especially important that the Council disaggregate these risks at the outset of its rulemaking and that it require local jurisdictions to do so as well. Further, the Council should caution against conflating risk of nonappearance (a minor and often easily remedied form of pretrial failure) with risk of flight (a very rare occurrence for most charge categories today), or conflating risk of re-offense pretrial (which might include technical failures to adhere to the strict letter of monitoring conditions, like weekly check-ins) from risk of dangerous or violent offense.

Only risk assessment tools that disaggregate the risk of non-appearance from the risk that the defendant will commit new violent crimes while awaiting trial should be approved for use. Risk assessment tools that provide only one “pretrial failure” score do not acknowledge an important distinction between risk of non-appearance and risk to public safety, two very different measurements that are informed by different inputs and require different mitigation techniques. The policy concerns that must be considered when evaluating the strength of various risk assessment tools are “what statistical information [the risk assessment tool] provides, whether that information represents an improvement over the status quo, and whether it can justifiably guide pre-trial decision-making.” Any tool that does not give two distinct scores for two distinct risks does not give courts

sufficient information to identify the least restrictive nonmonetary conditions necessary for defendants' release. . . .

If, as S.B. 10 and the Council require, courts must evaluate and guard against both the risk of a defendant's nonappearance and the risk the defendant may commit of a new offense pretrial, a single risk score or designation (e.g., "high") is uninformative unless the decision maker knows what the particular risk is. A person at high risk for nonappearance may be a low risk of reoffending pretrial because the causes of nonappearance are generally distinct and uncorrelated with criminality. Under the proposed Rules, Pretrial Assessment Services and courts are likely to overestimate a defendant's risk by looking at an aggregated score. Overestimation may lead to over-detention of defendants or the unnecessary imposition of counterproductive pretrial monitoring measures.

We should note that even among tools that disaggregate risks, over-estimation is a danger when risk assessment tools rely on criminal history data in jurisdictions that are undergoing major criminal justice reforms. In many jurisdictions, bail reform has begun to mitigate defendants' risk of failing to appear or reoffending. Implementing low-cost and low-tech interventions like court date reminder programs through live-callers, postcards, or text messages have reduced failure to appear rates sizably. One study has even suggested that reducing pretrial detention, which these mitigation techniques are designed to do, may decrease the overall level of rearrests. As new risk assessment tools have been validated or re-validated, studies have shown that defendants rated in the four highest risk categories for failure to appear exceeded expectations upon release. The same was true for the two highest risk categories for new criminal activity.

If these risks are already being overestimated, then combining the two risks by giving each defendant only one risk score can exaggerate the effect. Especially when presented in qualitative terms (i.e. "low risk," "medium risk") rather than quantitative, a defendant could be given a low risk score in both categories and still be assessed as medium risk when the two scores are combined. These overestimations are of tremendous importance because the way a defendant's level of risk is framed and communicated to a decision maker affects how the decision maker perceives the defendant and the ultimate treatment of the defendant. Overestimation can create a vicious feedback loop by overburdening defendants with unnecessarily onerous pretrial monitoring requirements. Defendants who are over-supervised have increased opportunities to fall out of compliance with the terms of their release and accordingly, their chances of success can worsen, a cycle that makes the risk overestimation a self-fulfilling prophecy. As a result, imposing counterproductive conditions of release on defendants on the basis of risk overestimation could undermine the reform that S.B. 10 aims to achieve. . . .

The American Bar Association's codified standards on pretrial release call for courts to use the least restrictive means available to reasonably mitigate non-appearance and public safety risks while protecting the integrity of the judicial system. Least restrictive

conditions are those that are targeted toward a specific risk posed by an individual defendant.

The use of a single, or aggregated, risk score complicates courts' ability to tailor conditions to an individual defendant's actual risk because many release conditions are effective in mitigating one risk or the other, but not both. For example, if a defendant poses a high risk of failure to appear, travel restrictions could be imposed. But those same conditions would not be effective or tailored to a defendant with a low risk of failure to appear but higher risk of new violent criminal activity, whose rate of offense might be lowered by requirements that she attend a drug treatment program, stay away from an identifiable victim or community, or refrain from carrying weapons.

Disaggregated risk measures are also vital to assess the tools' performance, to adjust the tools to improve their accuracy, and to give judges feedback on whether the conditions they are imposing on defendants are working as intended. "Data on the risk scores and subsequent outcomes, whether for all defendants or for a representative sample of them, is necessary in order to understand the relationship between scores and true levels of risk." It is imperative that new data be collected on which defendants are failing to appear for their court dates and reoffending, what their conditions of release were, and what their risk scores were that induced the specific conditions of release. This data should then be used to calibrate the risk assessment tools, which in turn will give Pretrial Assessment Services and the courts scores built on more accurate data that are both jurisdiction-specific and up-to-date.

Disaggregation will allow courts and the legislature to measure the effectiveness of mitigation techniques. A court that relies heavily on electronic monitoring as a condition of pretrial release may conclude that the condition is ineffective in general if a higher-than-expected number of defendants placed on electronic monitoring experience "pretrial failure," when in reality the condition could be working for reducing criminal activity but not for assuring court appearances. As a result, a judge might stop using a tool that is very effective for one risk but not the other simply for lack of or misattribution of data. . . .

At a minimum, any chosen risk assessment tool should disaggregate a defendant's risk of non-appearance and the risk of threatening public safety. An even better tool will make further appropriate distinctions in the kinds of risk Pretrial Assessment Services and the courts should be informing themselves about. . . .

Throughout Rule 4.10 and Rule 4.40, a defendant's return to court is one of the major intended purposes of pretrial risk assessment and the justification for specific release conditions. That requirement is in keeping with the long history and tradition of bail as a means to guard against the "flight" of a defendant pretrial. But the risk that a defendant will fail to appear for a court date is different from the risk that a defendant will flee. The Council should take care that courts using risk assessment scores not conflate the two.

When a defendant misses a court appearance it is typically for a reason other than avoidance of prosecution. Often defendants do not realize that failing to appear is a violation of the law that can lead to an arrest warrant, or the defendant might fear that not going to work or providing child care will have greater consequences than not going to court. Misperceiving a risk of failure to appear as a flight risk is the same kind of overestimation described above and often entails over-supervision such as the imposition of ankle monitoring when text message reminders or travel vouchers would have been much more effective mitigation measure. . . .

Rule 4.10(a)(2)(A) refers to the use of pretrial risk assessment information for the purpose of “increas[ing]” public safety. However, most risk assessment tools measure only the risk of rearrest, which is not an indicator of “dangerousness” as much as it is a predictor of future contact with the criminal justice system. In fact, most pretrial arrests appear from the available data to be for technical violations, not for new or violent crimes. While technical violations are not desirable, imposing additional release conditions to prevent them could result in a net loss to the community if the additional conditions are more costly than the benefit of decreasing the risk of a technical violation.

Further, if increasing public safety is to be addressed through mitigating the risk of a defendant committing a new violent crime, then any chosen risk assessment tool needs to have separate scores for a defendant’s risk of committing crime and risk of committing a violent crime while on release. Only looking at risk of rearrest would be counterproductive to addressing violent crime risk because “people at highest risk for any arrest are *not* at highest risk of arrest for violent crimes in particular, and vice versa.” . . .

**Washington Pretrial Reform Task Force:
Final Recommendations Report (2019)**

Intisar Surur & Andrea Valdez

. . . Pretrial Services

- 1) Governments should bear the cost of pretrial services rather than the accused: Accused persons cannot and should not be required to incur additional costs or debts as a result of their participation in pretrial services. Pretrial services include, but are not limited to: electronic monitoring, drug and alcohol monitoring, mental/behavioral health treatment, and court reminders.
- 2) Court Reminders: The available research consistently shows that pretrial court date reminders through texts, emails, mail or phone calls are an effective method to reduce the risk of failure to appear, and should be available to all defendants.
- 3) Voluntary Service Referrals: Referrals such as mental and/or behavioral health treatment, vocational services, or housing assistance should be offered to assist

defendants maintain court attendance and supervision compliance, and prevent re-arrest. Referrals should be individualized, offered voluntarily rather than as a condition of release, and should involve little or no cost to the individual.

4) Stakeholder Involvement: A local stakeholder group can make actionable recommendations to improve the practices and outcomes of the pretrial system, and can ensure the success of reforms by soliciting input from all participants and by making informed decisions as a team, rather than separate and distinct entities.

5) Transportation support: Offering free or subsidized transportation to defendants for court appointments can help ensure low-income people and people with disabilities can attend their court-ordered appointments.

Risk Assessment

The Task Force takes no position on whether local jurisdictions should, or should not, adopt a pretrial risk assessment (PTRA) tool. But the Task Force does recommend that jurisdictions choosing to employ a PTRA consider the following minimum criteria before the adoption or creation of a PTRA.

1) Identify Desired Goals: A jurisdiction should clearly identify what it intends to accomplish in order to determine whether the use of a PTRA has been successful in reaching its stated goals, such as reducing the jail population or increasing pretrial release.

2) Defining Terms: A PTRA must have clear, operational definitions for “FTA” and “new offense” and jurisdictions should train all court partners on their usage.

3) Comparative Data: Jurisdictions should collect data relevant to the identified goals before, during, and after implementation of the PTRA in order to measure the PTRA’s performance.

4) Clarify Interpretations of “Risk”: Jurisdictions must (a) understand the different kinds of “risk” a tool may measure for (non-violent versus violent offenses), (b) differentiate the factors courts must consider under Washington’s criminal rules to address the likelihood of an individual’s failure to appear (FTA), danger to the public, or interference with the administration of justice, and (c) have a deep understanding of the risk “scoring” provided by the tool.

5) Validation for Predictive Accuracy and Race Neutrality: The PTRA must be validated using local data prior to adoption and periodically throughout its use in order to ensure the PTRA is predicting new (violent) offenses and FTAs with accuracy and precision.

6) Disproportionate Racial Impact of a PTRA: Jurisdictions must examine whether

the PTRAs has or is likely to have a disproportionately negative effect on certain racial, ethnic, or socio-economic groups. This should occur before implementation of the PTRAs and then periodically throughout its use.

7) Community Participation: The adoption and utilization of a PTRAs should be transparent and should engage communities of color, marginalized groups, and victims' rights groups in the development, implementation, and validation of any jurisdiction's PTRAs.

8) Planning and Implementation: Many organizations, including the National Center for State Courts, have developed materials to help jurisdictions plan for the phases of implementation. A list of Resources, following the Appendix, provides reports and tools for jurisdictions to use in the planning stages of implementation.

Data Collection

1) Collect and Record Data: Jurisdictions should collect and record complete information at all points of the pretrial system, including: defendant demographics; booking and first appearance; release/detention decisions and bail; and, release, new criminal charges and failure to appear.

2) Data Analysis: Jurisdictions should conduct data analysis on all pretrial elements related to: time from booking to arraignment; pretrial releases and detentions; and pretrial outcomes.

3) Data Analysis Results: Jurisdictions should use the results of the data analysis to evaluate pretrial services and conduct improvements as necessary.

4) Data Dissemination: Jurisdictions should provide data analysis to stakeholders and/or the public on a regular basis.

5) Pretrial Services Data: If implementing a pretrial program, jurisdictions should collect and analyze at all points of the pretrial services program, to: measure program success, identify areas of improvement, and support adherence to best practices.

6) PTRAs Data: Jurisdictions that implement a pretrial risk assessment tool should collect data to assess (a) the concurrence between supervision level or detention status and their assessed risk; (b) the percentage of cases with release eligible defendants who received a risk assessment; and (c) percentage of judges' release decisions that differ with a risk assessment tool recommendation. . . .

Documenting Needs and Harms

The Need for Proportionality in Criminal Justice Debt Practices (2018)

Mitali Nagrecha & Ranit Patel

THE LIMAN CENTER REPORTS

Over the last few years, jurisdictions across the country have begun implementing criminal justice debt reforms. These efforts have revitalized the Supreme Court's 1983 case, *Bearden v. Georgia*, which requires courts to consider willfulness before incarcerating individuals for non-payment of fines and fees. While policymakers have instituted changes beyond *Bearden*'s specific mandate, the goals of the movement are often defined as ending harsh enforcement practices such as debtor's prisons and driver's license revocations, and solutions sound in *Bearden*'s framework.

Reformers are right to focus on remedying the worst harms first, but the movement's emphasis on *Bearden* runs the risk of avoiding a larger conversation about how to achieve justice in individual cases. At the Criminal Justice Policy Program (CJPP), our goal is to spark this broader discussion with a focus on proportionality. Through our work advising judges on fees and fines reform across the country, we have found proportionality to be a helpful guiding framework in developing a set of policies we view as necessary to reform. These policies would likely fall under *subjective proportionality*, as we advocate for punishment tailored to an individual's crime, their ability to pay, and their personal circumstances. With this framing, we design reforms for proportionate financial penalties at sentencing and proportionate responses to non-payment.

Over the last two years, CJPP has used this proportionality framework to create a bench card for judges in Charlotte-Mecklenburg, North Carolina. Under state law, individuals charged with the lowest level misdemeanor (including acts like littering and trespassing) face one to ten days in jail or a maximum \$200 fine. In addition to the fine, individuals with convictions face hundreds of dollars in fees, some of which are imposed only on indigent individuals, including a \$60 fee for a public defender. While some judges imposed modified financial penalty amounts based on individuals' ability to pay, more often, when individuals were unable to pay their financial penalties at sentencing, they were placed on probation and a payment plan. Judges reported that they set the length of probation to accommodate collections rather than in proportion to the nature of the offense. Individuals with low level misdemeanors were commonly sentenced to probation for at least 12 months, and *often for two years*.

These sentences were disproportionate relative to the sentences received by non-indigent individuals who could pay their fines and fees immediately. They were also out of proportion with the individual's initial offense. Two years on supervision for trespassing is simply not necessary to achieve justice. To address this problem, we advise courts to adopt meaningful ability to pay determinations at sentencing that explicitly consider how long an individual should be in the system.

The ultimate fairness of the sentence hinges on this ability to pay inquiry, so it must be done well. Yet, recent ability to pay reforms entrench unequal treatment of indigent individuals in two ways. First, vague ability to pay standards (such as “substantial hardship”) and specifically enumerated factors (such as other debts, education level) provide insufficient guidance to judges and lead to inconsistent treatment of defendants and high monthly payment amounts. Second, payment plans tied to individual’s ability to pay can last indefinitely. Many reform states are enacting new requirements to consider ability to pay in setting monthly payment amounts, but are setting no upper limit on how long an individual will be required to pay. Such reforms ensure states continue to collect, but do not proportionately tailor legal financial obligations (“LFOs”): they merely extend the period of punishment.

These are problems with solutions. Over 30 countries in Europe and Latin America currently set fines based on the severity of the offense committed and an individual’s financial circumstances. Often referred to as *day fines*, these systems are a model for setting fair payment amounts based on individuals’ daily wage. In Charlotte-Mecklenburg, we used a similar model. We suggested that LFOs be set to 10% of an individual’s net monthly income after basic living expenses. Our bench card also included presumptions of indigence and factors for determining ability to pay to help judges determine when and how to depart from our baseline suggestion. We addressed the problem of indefinite payment plans by suggesting judges limit the amount of time an individual remains on a plan based on the nature of the crime. For low-level offenses for which individuals previously paid \$300 over two years, they would instead be ordered to pay \$10 per month for six months. We provided the judges with clear guidance for setting a fair, proportionate penalty, rather than giving them a broad mandate to “do better,” and they were receptive to our recommendations.

While imposing proportionate LFOs at sentencing goes a long way towards a more equitable system of fines and fees, should individuals fail to pay, our system must also respond proportionately.

Throughout the country, when individuals fall behind on their payments, they face harsh consequences. In addition to the harshest consequences—drivers’ license revocation and incarceration—there are a number of recurring harms individuals experience. Missed payments, even because of an inability to pay, lead to court appearances, orders to show cause, warrants, and arrests. When individuals fail to appear for a hearing – perhaps because they can’t afford to pay or has no access to transportation – he faces additional punishment, often including a new criminal charge. This entanglement with the justice system persists so long as individuals hold outstanding debt, which can often be for decades. Judges may view these life disrupting responses to non-payment as collection methods rather than additional punishment, but to the individuals experiencing them, this is a distinction without a difference. Viewed from our proportionality lens, this spiral of

consequences is inappropriate given the underlying crime and the lack of culpability associated with inability to pay.

In Charlotte-Mecklenburg, we worked with the judges to reduce the use of orders to show cause and warrants in response to non-payment or failure to appear. Instead, judges in Charlotte-Mecklenburg now rely on reminders to respond to non-payment. After three reminders, the Court may issue an order to show cause, but only after a judge reviews the case and determines that modification of the amount owed, waiver, or civil judgment* of remaining fees and fines would not better serve the interests of justice. Judges consider the original charge and indicia of poverty, and determine whether orders to show cause or warrants are necessary and proportionate responses to non-payment. Judges must conduct the same analysis before issuing a warrant for failure to appear; this is often a difficult reform to adopt because of judges' concerns about failures to respect their authority and courtroom management. Underlying these changes is the recognition that inability to pay requires a proportionate, non-punitive response.

Shifting our focus towards proportionality helps us craft policy changes that address the inequalities inherent in current practices of imposing and enforcing fines and fees. Preliminary data shows that our work in Charlotte-Mecklenburg has led payment plan amounts and orders for arrest to decrease by almost half. As we continue to monitor the results of our work, we are hopeful for more evidence of success and believe this model can produce similar results in jurisdictions across the country.

A Pound of Flesh: The Criminalization of Private Debt (2018)

ACLU

... An estimated 77 million Americans—one in three adults—have a debt that has been turned over to a private collection agency. Thousands of these debtors are arrested and jailed each year because they owe money. Millions more are threatened with jail. The debts owed can be as small as a few dollars and can involve every kind of consumer debt, from car payments to utility bills to student loans to medical fees. These trends devastate communities across the country as unmanageable debt and household financial crisis become ubiquitous, and they impact Black and Latino communities most harshly due to longstanding racial and ethnic gaps in poverty and wealth.

Debtors' prisons were abolished by Congress in 1833 and are thought to be a relic of the Dickensian past. In reality, private debt collectors—empowered by the courts and prosecutors' offices—are using the criminal justice system to punish debtors and terrorize

* CJPP has concerns about the use of civil judgments but the jurisdiction included this as an option for judges under current state law.

them into paying even when a debt is in dispute or when a debtor has no ability to pay.

The criminalization of private debt happens when judges, at the request of collection agencies, issue arrest warrants for people who failed to appear in court to deal with unpaid civil debt judgments. In many cases, the debtors were unaware they were sued or had not received notice to show up in court.

Tens of thousands of these warrants are issued annually, but the total number is unknown because states and local courts do not typically track these orders as a category of arrest warrants. In a review of court records, the ACLU examined more than 1,000 cases in which civil court judges issued arrest warrants for debtors, sometimes to collect amounts as small as \$28. These cases took place in 26 states—Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, and Wisconsin—and Puerto Rico and the Northern Mariana Islands.

Even without arrest warrants, the mere threat of jail can be effective in extracting payment—even if that threat is legally unfounded. In the case of debts involving bounced checks, private collection companies now have contracts with more than 200 district attorneys' offices that allow them to use the prosecutor's seal and signature on repayment demand letters. It's estimated that more than 1 million consumers each year receive such letters threatening criminal prosecution and jail time if they do not pay up. But review of company practices has documented that letters often falsely misrepresent the threat of prosecution as a means of coercing payments from unknowing consumers. . . .

When Americans fail to repay financial obligations, creditors usually hire debt collectors to go after the debtors or sell the debts to companies that specialize in collections. More than 6,000 debt collection firms operate in the United States, collecting billions of dollars each year.

These collectors flood small-claims and other state courts with lawsuits seeking repayment. Millions of collection lawsuits are filed each year in state and local courts that have effectively become collectors' courts. The majority of cases on many state court dockets are debt collection suits, and in many state courts, debt purchasers file more suits than any other type of plaintiff.

Debt collection lawyers can file hundreds of suits a day, often with little evidence that the alleged debt is actually owed. Once a lawsuit is filed, the process is stacked against defendants, the overwhelming majority of whom are not represented by an attorney. And collectors have a big advantage in small-claims courts, which provide very limited due process protections to debtors.

Many courts churn through collection lawsuits with astonishing speed and little

scrutiny. Over 95 percent of debt collection suits end in favor of the collector, usually because alleged debtors do not mount a defense. In many cases, defendants did not know they had been sued. And, of course, collectors have little incentive to give proper notice to the defendants.

Once a collection company has won a judgment, it has multiple methods to collect the money owed. It can seek to have a defendant's paycheck or bank account garnished, seize their cars or other personal property, or record a lien against their property. Creditors can also ask courts to require defendants to be in court for post-judgment proceedings. At these proceedings, often called "judgment debtor examinations," defendants are required to answer questions about their wages, bank account balances, property, and assets. Debt collectors use these responses to take other steps to collect on the judgment.

If the debtor does not appear in court for the judgment debtor exam, creditors can ask the judge to issue a civil warrant for the debtor's arrest. In the cases the ACLU documented, debtors failed to appear at hearings for various reasons, most often because they did not receive notification of the court date or even of the existence of the lawsuit. Some were unable to appear because of work, child care responsibilities, lack of transportation, physical disability, illness, or dementia. We found two cases in which debtors missed hearings because they were terminally ill and died shortly after warrants were issued for their arrest. . . .

State court judges have the power to order the debtor's employer to garnish the debtor's wages and authorize a sheriff to seize the debtor's property. In 44 states, judges—including district court civil judges, small-claims court judges, clerk-magistrates, and justices of the peace—are allowed to issue arrest warrants for failure to appear at post-judgment proceedings or for failure to provide information about finances. These warrants, usually called "body attachments" or "capias warrants," are issued on the charge of contempt of court. In some cases, debtors are threatened with jail for contempt of court if they do not pay or agree to payment plans.

Once arrested, debtors may languish in jail for days until they can arrange to pay the bail. In some cases, people were jailed for as long as two weeks. Judges sometimes set bail at the exact amount of the judgment. And the bail money is often turned over to the debt collector or creditor as payment against the judgment.

Many of those arrested said they had no idea a warrant had been issued for their arrest. They learned of the warrant only when police pulled them over for a broken taillight or traffic violation and the warrant showed up in computer records. Some were arrested at home in the middle of the night or at their workplace. In some cases, people were arrested when police officers came to their home because of an incident involving another family member or when they were witnesses to a crime and the police discovered the warrant after obtaining their identifying information. In other cases, debtors with warrants issued against them were arrested when law enforcement conducted a sweep of all residents of public

housing who had outstanding warrants for any reason.

These arrests impose real costs on the courts and jails in time and resources. But the damage these arrests do to debtors—including those whose debts are disputed—in terms of lost wages, lost jobs, and psychological distress can be enormous. Arrest warrants, even if they don't result in jailing, can cause long-lasting harm because such warrants may be entered into background check databases, with serious consequences for future employment, housing applications, education opportunities, and access to security clearances. . . .

Local prosecutors have no role in civil debt collection lawsuits. But they have a central role when it comes to money owed due to bounced checks. Every state has criminal laws dealing with bad or bounced checks, and prosecutors are required to review these cases to determine if they are subject to prosecution. Unfortunately, in many places, district attorneys seeking to get these cases off their desks and divert defendants from court have decided to hand over enforcement to private collection companies, even when no crime has been committed. These companies face a conflict of interest when issuing repayment demand letters because they profit when an unwitting recipient pays up in response to a false threat of prosecution.

Private debt collectors have entered into hundreds of partnerships with local district attorneys' offices to get people to pay on bounced check claims, under threat of prosecution. Some collectors with these contracts send letters on the district attorney's letterhead to threaten people with criminal prosecution, jail, and fines—even when the prosecutor hasn't reviewed the case to see if a criminal violation occurred.

The companies collect not only restitution for the unpaid check, but also nearly always tack on a variety of fees, including fees to attend a diversion program run by these same companies, usually a class on financial responsibility for which the check writers may have to pay more than \$200, which may be far more than the value of the bounced check. Some portion of these fees, depending on the contract, is then funneled to the district attorneys' offices.

Few, if any, of the bounced checks that trigger threatening collection letters qualify for criminal charges. In the vast majority of cases, check writers have inadvertently bounced checks without criminal intent, or the amount of the bounced check was too low to warrant prosecution. The ACLU found cases in which threatening letters were sent for bounced checks as low as \$2, clearly too low to meet the criteria for criminal prosecution. Paul Arons, a lawyer based in Washington state who has been fighting these check collection tactics in the courts since 2001, told the ACLU he has documented over 10,000 checks for under \$10 that triggered letters threatening consumers with jail, including bounced checks for as little as one penny.

In the case of one of the largest check diversion companies, the Consumer Financial

Protection Bureau (CFPB) found that less than 1 percent of cases were examined by a prosecutor for possible criminal prosecution. In practice, prosecutors merely review a monthly list of bounced checks and the check writer's name and address without evaluating why the bank returned the check unpaid or the check writer's intent. . . .

With little government oversight, debt collectors, backed by arrest warrants and wielding bounced check demand letters, can frighten people into paying money that may not even be owed. Few tools are as coercive or as effective as the threat of incarceration. For example, one 75-year-old woman subsisting on \$800 monthly Social Security checks went without her medications in order to pay the fees she believed were required to avoid jail time for bouncing a check. And as one lawyer in Texas, who has sought arrests of student loan borrowers who are in arrears, said, "It's easier to settle when the debtor is under arrest."

The people who are jailed or threatened with jail often are the most vulnerable Americans, living paycheck to paycheck, one emergency away from financial catastrophe. In the more than 1,000 cases reviewed by the ACLU, many were struggling to recover after the loss of a job, mounting medical bills, the death of a family member, a divorce, or an illness. They included retirees or people with disabilities who are unable to work. Some were subsisting solely on Social Security, unemployment insurance, disability benefits, or veterans' benefits—income that is legally protected from outstanding debt judgments.

Key Recommendations

These abusive practices raise grave due process, equal protection, and human rights concerns, yet they remain largely unchecked because there is minimal government oversight and scant protection for debtors under federal and state laws. With a few notable exceptions, regulators rarely intervene to stop these practices. For example, in Illinois, where residents in a third of the counties commonly faced incarceration in debt collection cases, reforms spearheaded by Attorney General Lisa Madigan and enacted by the state Legislature substantially curbed the practice. But there's much that can be done by state attorneys general, state courts, legislatures, the CFPB, and Congress to protect consumers against these forms of intimidation and threats.

- Legislatures should enact laws that prohibit courts from issuing arrest warrants in debt collection proceedings. Until arrest warrants are prohibited, at a minimum, legislators should require that defendants be released on their own recognizance upon service of the warrant and not taken into custody or required to pay bail.
- State court rules committees should prohibit judges from issuing arrest warrants for contempt, either for failure to pay or for failure to appear, in debt collection litigation. Court rules committees should also amend rules or issue court administrative directives that provide for more robust due process protections for consumers.

- District attorney offices should terminate their contracts with private check collection companies.
- State attorneys general should take action against check collection companies abusing their contracts with district attorney offices. State attorneys general have the duty to enforce consumer protection laws by bringing civil enforcement actions pursuant to their authority under federal and state consumer protection statutes. By suing check collection companies engaged in unfair and deceptive practices that violate state and federal laws, state attorneys general can compel an end to these practices, provide restitution to affected consumers, and impose civil penalties.
- Pursuant to its rulemaking authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB should promulgate rules that preclude debt collectors from seeking the arrest or jailing of alleged debtors in pursuit of payments toward civil debts. The CFPB should also initiate further enforcement actions against companies operating bad-check enforcement programs for violations of the Fair Debt Collection Practices Act (FDCPA).
- The Conference of Chief Justices and the Conference of State Court Administrators should issue a judicial bench card creating guidelines for judges to prevent the abuse of their contempt of court authority in civil debt collection proceedings. . . .

**Unfamiliar Justice: Indigent Criminal Defendants’
Experiences with Civil Legal Needs (forthcoming 2019)**

Lauren Sudeall & Ruth Richardson
52 U.C. DAVIS L. REV. (forthcoming 2019)

. . . The study revealed that, like many low-income individuals, a majority of those interviewed had experienced problems in their lives that may have benefited from some form of legal assistance. Many clients, however, did not have any familiarity with civil legal services providers and were unaware that they could benefit from such assistance for free. Most clients had never sought out civil legal assistance and, of those that did — only twenty percent — none had received such assistance. Clients interviewed demonstrated an openness toward receiving such assistance but were understandably skeptical of how or whether they could obtain it and whether assistance that comes at no cost is as of much value as paid legal help. The study also identifies and describes significant barriers public defender clients face in attempting to address civil legal problems or related issues on their own, including: limited education and literacy, limited mental and emotional bandwidth, complex administrative processes that make it difficult to obtain benefits, and background

conditions such as homelessness and time served in custody that create added difficulties to following such processes through consistently.

While civil and criminal service providers have long held anecdotal understandings of some of the above, our findings provide rare qualitative documentation and analysis of the obstacles public defender clients face in navigating the civil legal system at various points in their lives. The issues we identify suggest numerous possibilities for intervention and a critical lens through which to view broader discussions about civil justice reform. Our hope is that by including the experiences of indigent criminal defendants in the discussion of access-to-justice reform, we can encourage more inclusive solutions and expand the notion of what it means to provide access to justice for all. . . .

Themes from the study include: (1) *Information Scarcity* — clients do not have access to information about the availability and scope of legal services, or to substantive and procedural legal information relevant to their life experiences; (2) *Procedural Barriers* — procedural complexity, logistical difficulties, and limited education and literacy make it difficult for clients to navigate the system and access benefits or legal solutions; (3) *Structural Barriers* — poverty and its attendant challenges limit the time, ability, and bandwidth public defender clients have available to resolve civil legal problems (or criminal ones); and (4) *Legal Assistance: Valuable but Unreliable* — while clients' view of lawyers was not unduly negative, and they expressed openness to additional legal assistance, their perceptions and experiences with the justice system and with lawyers, both criminal and civil, left some doubt as to whether lawyers would have a significant impact on their unaddressed needs. . . .

Under Pressure: How Fines and Fees Hurt People, Undermine Public Safety, and Drive Alabama's Racial Wealth Divide (2018)

Alabama Appleseed Center for Law & Justice, University of Alabama at Birmingham
Treatment Alternatives for Safer Communities (TASC) & Greater Birmingham
Ministries, Legal Services Alabama

. . . Each year, Alabama's municipal, district, and circuit courts assess millions of dollars in court costs, fines, fees, and restitution. Most of this money is sent to the state General Fund, government agencies, county and municipal funds, and used to finance pet projects.

This hidden tax is disproportionately borne by poor people – particularly by poor people of color. In Alabama, African Americans are arrested, prosecuted, and convicted at higher rates than white people. For example, while African Americans and white people use marijuana at roughly the same rate, African Americans are over four times as likely to be arrested for marijuana possession in Alabama.

This system is a perfect setup for conflicts of interest, as courts and law enforcement agencies weigh the fair administration of justice against their own financial viability, which hinges on collecting fines, fees, court costs, and other debt connected to the criminal justice system. Courts and prosecutors are recast as revenue collectors who impose and collect the debt that finances their daily activities and supplements the state's perennially underfilled coffers.

The fallout is not hypothetical: A recent national study found that police departments in cities that relied heavily on court debt as a revenue source solved violent crimes at a lower rate than those that rely on more equitable sources of revenue. Possible reasons for this correlation, according to the study, included pressure on police to focus their resources on debt collection instead of police work, and distrust of police by people who had come to perceive them as debt collectors with badges.

Under this system, people who commit the same act face very different punishments because of nothing more than their relative wealth. People with the resources to make timely payments experience fine-only violations as costly nuisances at worst. They can minimize the fallout from even criminal charges by paying to participate in diversion programs that result in either reduced penalties or clean records if successfully completed. People without ready access to cash, meanwhile, find themselves in an escalating cycle of late fees, collections fees, loss of drivers' licenses, jail time, and life-altering criminal records. The result is a two-tiered justice system that has disastrous human, economic, and public safety consequences for individuals, families, and communities.

Making matters worse, the financial consequences can vary by location, as counties and municipalities often assess different court costs for the same offenses.

In Alabama, the problem is worsened by state lawmakers' longstanding aversion to traditional means of raising revenue. The state constitution severely limits property taxes, and property values in some of the poorest parts of the state are so low that they would not generate adequate revenue even if they were taxed at a much higher rate. But even where more equitable mechanisms for generating income exist – including things like constitutional reform – lawmakers have not adopted them.

This report is an effort to examine, in detail, the collateral consequences of Alabama's court debt system and explore the ways in which it undermines public safety and drives the state's racial wealth divide. It is a product of our work with the Annie E. Casey Foundation's Southern Partnership to Reduce Debt, which is developing strategies to lessen the impact of criminal and civil judicial fines and fees, as well as medical fees and high-cost consumer products, on communities of color.

We surveyed 980 Alabamians about their experience with court debt, asking how court costs, fines, and fees had affected their daily lives. Study participants included 879

“justice-involved” individuals who were paying their own court debt for offenses ranging from traffic violations to felonies, and 101 people who did not themselves owe court debt but were paying debt for other people. We analyzed results for the two groups separately and conducted a further analysis of the 810 justice-involved individuals who had also helped others pay of their debt.

The purpose of any criminal justice system is to deter unlawful activity, protect the public, and rehabilitate people with criminal convictions. We found that Alabama’s criminal justice system, which imposes court debt on people who cannot possibly afford to repay it, does the opposite. Almost 40% of all justice-involved people, including an astounding 19.6% of people whose court debt stemmed solely from traffic violations like driving with an expired tag or without insurance, admitted that they had stolen, sold drugs, engaged in sex work, or committed other unlawful acts to stay current on their debt.

In addition, we found:

More than eight in ten (82.9%) gave up necessities like rent, food, medical bills, car payments, and child support to pay their court debt.

Nearly half (49.6%) said they had been jailed for failure to pay court debt. People who had been declared indigent in a court of law were far more likely than their non-indigent peers to have spent time behind bars for failure to come up with the money demanded of them, with eight in ten (80.4%) of them reporting that this had happened to them.

44% had used payday loans to cover court debt.

Eight in ten borrowed money from a friend or family member to cover their court debt.

Almost two-thirds (65.9%) received money or food assistance from a faith-based charity or church that they would not have had to request if it were not for their court debt.

Almost four in ten (38.3%) admitted to having committed at least one crime to pay of their court debt, including almost one in five (19.6%) whose only previous offenses were traffic violations. The most common offense committed to pay of court debt was selling drugs, followed by stealing and sex work. Survey respondents also admitted to passing bad checks, gambling, robbery, selling food stamps, and selling stolen items.

About one in five (19.9%) were turned down for a diversion program like drug court because they could not afford it. The likelihood of being turned down for diversion for that reason rose to almost one in four (23.7%) if they had been declared indigent.

About one in six (14.6%) were kicked out of a diversion program such as drug court or court referral because they could not afford it. This rose to 17.4% for individuals who had been declared indigent.

Almost half (48%) did not think they would ever be able to pay what they owe. Nearly the same number (48.7%) said they would have no money to get out of jail if they needed it that day. The median amount owed was \$2,700, and the mean was \$6,536.

In general, we found that black and white Alabamians had broadly similar experiences with court debt once they were caught up in the criminal justice system. People of both races faced the same desperate choices and suffered the same consequences when it came to impositions on their economic stability, employment status, mobility, civic engagement, and liberty.

However, the 101 non-justice-involved individuals who took our survey – that is, people who were paying debt for someone else (usually a family member) – were demographically distinct. Our findings indicate unambiguously that middle-aged African-American women were more likely than any other group to be paying someone else's debt.

This is not the only reason to be concerned about the disparate harms visited upon people of color. While Alabama's court debt system is damaging to all lower-income Alabamians once they are caught up in it, other factors mean that its harms are disproportionately inflicted on people of color, and especially the state's African-American community.

First, the legacy of slavery and Jim Crow, coupled with modern-day structural racism, has left African-American Alabamians disproportionately impoverished as compared to their white peers.

Second, the over-policing of African-American communities means African Americans are far more likely than white people to face court debt. In 2016, for instance, black people were more than twice as likely as white people to be arrested for six of the 20 charges (among them marijuana possession) for which the most Alabamians were arrested in 2016. That includes several offenses that hinge on the perception and inclinations of the police officer making the arrest, such as disorderly conduct.

African Americans are also overrepresented in Alabama's jails and prisons. While black people comprise about 27% of the state's overall population, the jail and prison populations are 54% black. Thus, because they are caught up in the criminal justice system at a much higher rate than their white peers, African Americans are more likely to owe court debt, and the fallout of Alabama's court debt system lands more heavily on African Americans as a group.

The status quo is both unsustainable and unconscionable. As a practical matter, Alabama should not fund its state government on the backs of poor people whose ability to obtain gainful employment is severely hampered by the consequences of having criminal records. As a matter of conscience, we should not tolerate a system that forces people to choose between paying for basic necessities like food and medicine, and paying their court debt. . . .

To be effective, reforms will have to be implemented by a range of bodies, including state lawmakers, judges, district attorneys, court clerks, and local governments.

State lawmakers should. . .

- Eliminate court costs and fees, and scale fines to each person's ability to pay.
- Create a truly unified court system that includes municipal courts.
- Short of eliminating all forms of court debt, lawmakers should. . .
- Insist on transparency regarding money assessed via the criminal justice system and collected from justice-involved people.
- Fully fund courts from Alabama's state budget.
- Adequately fund district attorneys and repeal all laws creating alternative revenue streams outside of the General Fund.
- Send revenue from all court debt to the state General Fund.
- Create an indigency standard that is uniform and applied across the entire system and at all phases, from pretrial to post-conviction.
- Create a mechanism for appeal and settlement of unpaid debt, and ensure that justice-involved individuals have access to counsel throughout the post-conviction period during which they continue to owe court debt.
- Limit restitution to material losses.
- Eliminate poverty penalties.
- Prohibit the suspension of drivers' licenses unless the suspension is public safety focused and directly connected to a driving offense.
- Ensure equal access to diversion programs.
- Eliminate court costs, fines, and fees for children under 18, and prohibit the transfer of court costs, fines, and fees from children to parents and guardians.
- Eliminate Failure to Appear warrants when the individual failed to appear because they were in government custody.
- Create a database accessible to municipal, district, and circuit judges that includes records of outstanding court debt across all Alabama jurisdictions.
- Prohibit the denial of voting rights based only on the nonpayment of court costs and fines.
- Reclassify one ounce or less of marijuana and possession of drug paraphernalia as civil infractions with fines scaled to the defendant's ability to pay.

Judges should . . .

- Determine whether a person is in government custody prior to issuing a Failure to Appear warrant, and not issue the warrant if the person is found to be in government custody.
- When discretionary, reduce debt assessed against any person found to be indigent for criminal representation purposes.
- Docket hearings on ability to pay within 90 days of a missed payment, and appoint counsel at ability-to-pay hearings.
- Appoint counsel any time a justice-involved individual faces loss of liberty.

District Attorneys should . . .

- Voluntarily disclose revenue from all sources, by source, on an annual basis.
- Apply an objective standard to determine eligibility for diversion, and use an objective standard to determine indigency for purposes of participation in diversion programs.
- Avoid revenue streams that are funneled through the court system.
- When people miss court dates, determine whether they are in government custody and argue that the court not issue a warrant if they are.
- Decline to establish District Attorney Restitution and Recovery Teams (DART).
- Advocate in the legislature for the elimination of the current court debt system, as it makes communities less safe when people commit crimes to pay their court debt.
- Stop prosecuting people for possessing one ounce or less of marijuana and for possessing drug paraphernalia.

Court clerks should . . .

- Prioritize making victims whole over repaying entities, such as DART teams, that assist with collections.
- Make a practice of alerting judges when people are behind on payments so that ability-to-pay reviews can be conducted within 90 days.

Local governments should . . .

- Instruct local law enforcement to de-emphasize the enforcement of Alabama's marijuana possession and drug paraphernalia possession laws. . . .

**Criminal Justice Administrative Fees:
High Pain for People, Low Gain for Government
A Call to Action for California Counties (2018)
The San Francisco Financial Justice Project**

. . . On February 6, 2018, San Francisco Board of Supervisors President London Breed held a press conference on the steps of San Francisco City Hall. Surrounded by

dozens of residents, community activists, and elected officials, Breed announced that she was introducing legislation to make San Francisco the first city and county in the nation to eliminate all criminal justice administrative fees authorized by our local government. The legislation also aims to eliminate all outstanding debt from these criminal justice fees, and challenges other counties to re-examine their reliance on criminal justice fees, and search for more fair and just ways to fund our criminal justice system.*

The broader public often does not realize that when individuals exit the criminal justice system, they can be assessed thousands of dollars in administrative fees that aim to recoup costs for the courts and government. For example, in San Francisco people can be charged a \$50 monthly probation fee; up to \$35 a day to rent an electronic ankle surveillance monitor, and other fees to pay for reports, collections costs, or tests. The fees can add up to thousands of dollars.

The ten San Francisco criminal justice administrative fees targeted for elimination by this legislation are assessed on individuals who have already paid other consequences for their crime. They have often served time in jail, paid other fines or are paying victim restitution. The goals of these local criminal justice fees are to generate revenue to cover costs, not create an additional layer of punishment. . . .

Pay or Prey: How the Alameda County Criminal Justice System Extracts Wealth from Marginalized Communities (2018)

Theresa Zhen & Brandon Greene, East Bay Community Law Center

. . . In 2016, Alameda County eliminated juvenile fees, which totaled \$2000 per juvenile individual on average. This eventually led to the passage of a bill that made California the first state in the country to eliminate fees and court costs for juveniles. But for adults, exorbitant criminal justice fines and fees remain the status quo. These realities are evident in the data. In total, the average adult on probation in Alameda County in 2018 may be assessed over \$6,000 in probation supervision fees, public defender fees, and sheriff's work alternative program fees. The collections rates are consistently low, while the burden of court debt wreaks extraordinary havoc on the lives of individuals, who are disproportionately people of color trying to successfully reenter society. The current system is not only a manifestation of the racialization of the criminal justice system but also an example of how bad fiscal policy that exacts high pain for little gain contributes to wealth stripping of vulnerable communities. This white paper endeavors to provide evidence-based research and concrete stories of harm directly caused by a suite of criminal justice fees authorized by local county agencies and the Alameda County Board of

* On July 1, 2018, San Francisco Ordinance 131-18, the legislation referenced in this report, went into effect.

Supervisors. . . .

This paper concludes by recommending that the Alameda County Board of Supervisors repeal fees end collections, and discharge outstanding debt. * This recommendation has been fully endorsed by the Probation Department, Public Defender, and Sheriff’s Department. . . .

The City and County of San Francisco was the first county in the nation to successfully repeal probation supervision fees, electronic monitoring fees, and sheriff’s work alternative program fees. In its ordinance eliminating criminal justice fees, the Board of Supervisors of San Francisco acknowledged that “penalties can trap people in a cycle of debt, and low-income people and people of color are often the hardest hit.” The Board further acknowledged that by administering fees, the “government [became] a driver of inequality, creating additional layers of punishment for those moving through the criminal justice system.”

In Alameda County, we are on the verge of similar change. The Alameda County Board of Supervisors has the power to repeal county ordinances and resolutions that impose criminal justice fees at the local level. The Probation Department, Public Defender, and Sheriff’s Department have all fully endorsed such legislation. . . .

We recommend the following:

A. Stop All Fee Assessments Immediately

To stop fee assessments against low-income individuals and families, the County should:

- Designate a point person to implement the cessation of fee assessments
- Inform all relevant county employees that no fees may be assessed, including, but not limited to:
 - Board of Supervisors
 - County Administrator
 - County Counsel
 - Chief Probation Officer
 - Collections/Revenue Officer
 - Public Defender
 - District Attorney
 - Presiding Judge
 - Court Executive Officer
- Update applicable online payment platforms and relevant county webpages to inform visitors that fees cannot be assessed

* After this report was published, Alameda County passed Ordinance No. 2018-67, repealing probation department fees, public defender fees, and Sheriff’s Office Alternative Work Program fees.

- Update all personnel manuals and training materials to inform county employees that fees will no longer be assessed

B. End All Collection Activity

To end fee collection activity the County should:

- Write off all accounts receivable balances for fees as satisfied
- Cease all solicitation of payment for previously assessed fees, including from third party debt collectors
- Inform all impacted individuals by mail that unpaid previously assessed fees are no longer owed and that no payment will be collected or accepted
- Update applicable online payment platforms and relevant county webpages to inform visitors that no payments on fees will be collected or accepted
- Recall all previously assessed fees referred to the Franchise Tax Board's Court-Ordered Debt Collections and/or the Interagency Intercept Collection Program

C. Discharge All Previously Assessed Fees

To discharge previously assessed fees, the County should:

- Satisfy and release all fee agreements and stipulations entered into between the county financial evaluation officer and impacted individuals, and notify them in writing
- File an acknowledgement of satisfaction with the court of all relevant fee judgments and serve notice to impacted individuals

D. Reimburse individuals who were improperly assessed fees

Following the repeal of juvenile cost of care fees in Contra Costa County, the Board of Supervisors approved refunds for cost of care fees assessed to youth whose cases were dismissed or who were found not guilty. Prompted by research mirroring the findings above, the Board's intent in refunding families was aimed at "removing a burden on families and instead supporting them to be successful." As Supervisor John Gioia stated, "the greater community benefit is correcting a wrong that should never have occurred and acknowledging that we want to right that wrong."

As previously stated, criminal justice fees fall disproportionately on residents of color, which makes the levying of these fees an issue of racial justice. The myriad ways that these fees negatively affect the lives of those charged militate in favor of reimbursing individuals who were improperly charged. When we consider the ripple effects that come with diverting money from investments in health, education, and the welfare of one's self and family, it is clear that the collection of criminal justice fees has served only to reinforce cyclical poverty in Alameda's communities of color.

In order to repair predominantly Black and Latino communities that have suffered economic harm for years at the hands of county agencies, we cannot stop at ending

collections; instead, we must address the wrongs that these collection practices have created by acknowledging the harm and investing in its correction.

Consequently, Alameda County must first commit to some form of reimbursement beyond the discharging of fines and fees. In order to carry this out, the county should commission a thorough study detailing the process of pursuing reimbursements and engage all three county agencies: the Probation Department, the Sheriff's Department, and the Public Defender's office. The parameters of reimbursements to be explored range from refunding those who paid upfront to participate in SWAP but failed to finish and were sent to jail, to those who had their probation terminated early but continued to be charged for the cost based on original fee assessments. In order to make reimbursements a reality, the onus must be on the county to investigate the logistics and implications. Such action would constitute the concrete, monetary reinvestment in communities of color that is needed to correct a history of predatory behavior.

**New York Should Re-Examine Mandatory Court Fees Imposed on
Individuals Convicted of Criminal Offenses and Violations (2018)**

The Association of the Bar of the City of New York

. . . When any person in New York is convicted of a crime or violation, the law requires that a judge impose certain mandatory surcharges and fees, regardless of an individual's ability to pay. The system of mandatorily imposing hundreds of dollars of fees on every person convicted of an offense in New York disadvantages indigent defendants in a variety of ways, from saddling them with civil judgments to depleting their commissary accounts if they are incarcerated. These burdens have far-reaching consequences that endanger individuals' attempts to avoid recidivism and secure stable housing and employment. The Legislature has exacerbated the problem by steadily increasing the amounts of fees and surcharges and, in 1995, removing discretion from judges to waive them.

The Legislature has not attempted to justify these mandatory surcharges and fees as anything other than a form of taxation. They are not levied in an attempt at punishment, but only to raise revenue for the State. Mandatory surcharges and fees are a fundamentally unfair burden often directly at odds with the aims of the criminal justice system -- they tend to make reentry more difficult and recidivism more likely, particularly for those whose crimes stem from poverty. These harms also disproportionately fall upon people of color. As the co-directors of the Fines and Fees Justice Center noted in a recent op-ed, "Communities of color are most likely to suffer from abusive fines and fees practices because of overpolicing, the demographics of poverty (a majority of people living in poverty in the United States are people of color) and racism. A recent study found a 'clear positive relationship' between revenue from fines and fees and the proportion of black

residents in a city.”

Thus, along with other measures aimed at making the criminal justice system fairer for those who are most vulnerable, the City Bar recommends that the New York State Legislature re-examine the mandatory court fees imposed on individuals convicted of criminal offenses and violations. Given that the aims of the criminal justice system are in no way advanced by these mandatory surcharges and fees, and that the revenue does not enhance the court budget, the Legislature should simply abolish them for all those convicted of a crime or violation, or, at a minimum, restructure them to be imposed on a sliding scale consistent with an individual defendant’s ability to pay. If the Legislature is unwilling to make these changes, the law should at least be amended in various ways to make it more equitable for indigent defendants. The Legislature should allow sentencing courts to waive fees which would result in hardship, and simplify the process by which courts can defer fees until after incarceratory terms are served. The law should also be amended so that youthful offenders and those convicted only of violations would not be assessed any mandatory court fees, and individuals taking a single plea on multiple crimes would not face double or triple mandatory fees. New York lawmakers should ameliorate the inequitable financial burdens placed upon indigent criminal defendants and their families, and put New York at the forefront of an important but often overlooked area of needed criminal justice reform. . . .

Driven by Debt: How Driver’s License Suspensions for Unpaid Fines and Fees Hurt Texas Families (2018)

Texas Fair Defense Project & Texas Appleseed

Julie’s license troubles started in 2011, when she got a ticket for letting her car insurance lapse. Despite being a single mother with tight finances, Julie got insurance and saved up to pay off the ticket in 2013. But in 2017, she was pulled over again. Julie was shocked when the officer told her that her license was not valid and had in fact been suspended for four years. Ironically, her paying the ticket in 2013 had triggered additional surcharges for which Julie never received notice, and led to a suspension when she failed to pay them. The officer then gave Julie a ticket for driving with a suspended license, which she later learned triggered more fines, surcharges and yet another suspension.

Julie spent years trying to get her license back, but in the meantime, she had to keep driving to keep her job and care for her children. This led to more tickets and more suspensions. Every time she saved up to pay a ticket, she’d be surprised by yet another suspension. She also accumulated warrants for missed payments on her tickets. She was afraid to even try to renew her license, because she could be arrested on these warrants at the Department of Public Safety’s driver’s license office. . . .

Eventually, Julie met with a pro bono attorney from the Texas Fair Defense Project who was able to help her reinstate her license. Unfortunately, most people don't have access to the legal assistance that Julie received. And her story is far from unique. *Approximately 1.7 million Texans are currently unable to obtain a valid license as a direct result of not paying fines, fees or surcharges.* As with Julie, the suspensions often start with a minor traffic offense. After losing their licenses due to inability to pay the original fines and fees for that ticket, people face a difficult choice. Most Texans must drive in order to provide for themselves and their families. But by doing so, they risk receiving more tickets, compounding their debts and driving them deeper into poverty. Yet, if they stop driving, they may lose their jobs, access to medical care, their ability to care for their children and any hope of ever paying off the fines, fees and surcharges.

Most license suspensions do not result from dangerous driving but from failing to pay fines, fees and surcharges. Like Julie, the vast majority of people caught in this cycle desperately want to resolve what they owe and to drive legally. However, Texas law currently puts up virtually insurmountable financial and procedural barriers to legal driving for people like Julie. The state's illogical suspension programs harm all Texans, not just those barred from getting a valid license. The programs harm public safety by diverting law enforcement resources away from more serious crime. People with warrants for license-related offenses also frequently avoid contact with the police for fear of arrest, further harming public safety. The programs also negatively affect the Texas economy by causing people to lose jobs or preventing people from obtaining employment, forcing many to rely on public benefits. And they clog up our courts and the Department of Public Safety phone lines and offices with people who want a valid license, but cannot navigate the myriad suspension programs and complicated reinstatement process. . . .

Changing Course: Driver's License Suspension in Florida (2018)

James Craven & Sal Nuzzo, The James Madison Institute

. . . Florida regularly suspends its citizens' driver's licenses as a punishment for a vast array of civil and criminal offenses, with many offenses carrying a mandatory license suspension. While suspending licenses for unsafe driving has a common sense value to the public, many of the offenses for which Florida suspends an individual's license have no relation to traffic safety. These suspensions cut off a vital lifeline for individuals in the workforce, and can herald an endless cycle of fines, court costs, and liabilities that make escaping the criminal justice system nearly impossible. Florida workers aren't the only victims: the state itself spends man-hours and taxpayer dollars prosecuting and imprisoning individuals for the crime of Driving While License Suspended, even while burdened with the tenth-largest prison system in the nation. . . .

The poor are among the hardest hit by these policies. Failing to pay any of the fines or fees associated with license suspension often results in more. These costs are numerous, and take many forms:

Florida’s Financial Penalty System for Traffic Crimes

Reason for Fine/Fee	Cost
Average traffic fine	Between \$100 & \$300.65
Late fee (assessed after 30 days of nonpayment)	\$25.66
Collector’s fee (assessed after 90 days of nonpayment if the state)	Up to 40% of outstanding costs
Driver’s license reinstatement fee (suspended)	\$45.68
Driver’s license reinstatement fee (revoked)	\$75.69
Additional reinstatement fee for failure to pay traffic fines, appear for a traffic summons, or attend traffic school (“D6 clearance fee”)	\$60.70
Additional reinstatement fee for failure to pay child support	\$60.71
Additional reinstatement fee for failure to maintain car insurance	\$150.72
Additional administrative fee for offenses related to drugs or alcohol	\$130.73
Driving While License Suspended fine	Up to \$500 (first offense), up to \$1,000 (second offense), or up to \$5,000 (third offense)

. . . License suspensions can last anywhere from one month to several years. Without a license, many individuals lose their jobs. . . . Yet Florida’s requirements for license reinstatement do not factor in ability to pay or changes in employment. Laws that pile on new suspensions, fines, and fees exacerbate these penalties when individuals can’t afford to pay previous fines or miss their court dates. These laws disproportionately impact the poor and indigent, punishing individuals for their inability to pay. This can create a cycle of debt and criminality that, for the poor, can be inescapable. . . .

Recommendations for Reform

. . . Suspending driver’s licenses for non-traffic-safety related offenses in Florida deserves re-examination. The practice hurts the state’s citizens, diverts resources from public safety, and generates significant costs. Florida legislators should narrow offenses that can result in a driver’s license suspension to traffic safety crimes only.

Policy Recommendations:

License Suspensions for Failure to Appear

Option 1: Stop Suspending Licenses for Failure to Appear for Invalid License/Registration Offenses and Passing a Worthless Check.

These offenses do not actively affect public safety. Ending license suspension for FTA on these offenses would have the largest impact on reducing the number of Florida citizens who have their driver's licenses suspended and must deal with the consequences. This change would save the state millions of dollars, free up police resources to better protect public safety, and end a practice that has limited opportunity for Florida's poorest citizens.

Option 2: Give Judges Discretion over License Suspensions when Offenders Fail to Appear for Invalid License/Registration Offenses.

Florida granted judges discretion over whether or not to suspend driver's licenses for FTA on worthless check charges in 2014. This approach would bring FTAs for other offenses unrelated to traffic safety in line with the policy. Judges could determine whether or not to suspend licenses based on factors such as the offender's traffic record.

...

Ending license suspensions for offenses unrelated to traffic safety will put Florida back on the right track. These changes will result in cost savings for taxpayers, and better protect the liberty and safety of its citizens.

Pretrial Decarceration at a Crossroads (2019)*

Skylar Albertson

How could it be that California Senate Bill 10, which would abolish money bail, elicited opposition from advocacy groups such as Californians United for a Responsible Budget (CURB), Silicon Valley De-Bug, Human Rights Watch, the ACLU of Southern California, and my fellowship host organization, The Bail Project?

Jurisdictions moving ahead with pretrial reform are at a crossroads. They must choose between focusing limited political capital on a technocratic sorting tool or on a firm commitment to achieving pretrial decarceration. Increasingly, jurisdictions are opting for the sorting tool – actuarial risk assessment instruments. Use of these tools, however, will

*This piece represents the personal views of the author, informed by his experiences as a Liman Fellow with The Bail Project – This piece does not necessarily represent the positions of The Bail Project on all issues that the piece addresses.

not necessarily result in fewer people being detained in jail. These instruments obscure important normative choices, project past racial and socioeconomic inequities into the future, face implementation challenges, and offer weak predictive power.

Revolving bail funds such as The Bail Project offer a different vision for how to move forward: responding to arrests by releasing the overwhelming majority of people from custody and connecting them with voluntary, supportive services. In this vision, courts would reserve pretrial detention and restrictive conditions of release only for when police and prosecutors can use specific, individualized facts and allegations to tell a compelling story about why a person poses an imminent threat of serious harm to another person. Pretrial services agencies might fill the role of revolving bail funds by connecting people with voluntary services, or jurisdictions could provide existing non-governmental community groups and service providers with additional funding to help people navigate the pretrial system.

Actuarial risk assessment instruments are developed using datasets containing past criminal cases and pretrial outcomes (typically new arrests, new arrests for violent offenses, and failures to appear within a certain amount of time). Creators of the tools identify factors such as past criminal history that correlate in the dataset with the pretrial outcomes and assign point values to those factors such that a person in the dataset with a higher point score is more likely to have had the specified pretrial outcome occur than someone in the dataset with a lower point score. The results of the assessments are communicated to judges as point values; “low,” “moderate,” or “high” risk labels; or probabilities (i.e. someone in the past dataset with identical or similar factors present had a new arrest within six months X% of the time).

When tools use point values or risk labels, they obscure a critical normative decision – what probability suffices to mark someone with the stigma of a high point value or risk label? Risk assessment tools cannot answer this question on their own. Someone must decide which probabilities correspond with each tier of risk.

Even if tools communicate probabilities, they risk distracting from broader social and economic drivers of incarceration that demand firm commitments to pretrial decarceration to counteract. Kentucky was an early adopter of pretrial risk assessment tools. Yet, a recent report from the Vera Institute reveals that incarceration is growing in Kentucky and that economic forces are a significant driver of this phenomenon.

Additionally, the actuarial assessment tools currently in use offer weak predictive power. The Public Safety Assessment (PSA), for example, labels individuals as high risk for a new arrest if 23% of the people with similar risk factors in the past dataset were arrested for *any* crime within six months of arrest. Even if a particular actuarial assessment tool were shown to hold hypothetical promise for decarceration, it is unclear that judges would use the tool as intended.

Perhaps most importantly, using actuarial risk assessment tools to inform pretrial release decisions projects past inequities into the future. By using past datasets to predict future outcomes, risk assessment tools guide pretrial decisionmakers to repeat past patterns. If reformers believe that the past and current racial and socioeconomic disparities of the pretrial legal system are unjust, why would basing release decisions on correlations drawn from past outcomes offer hope for transformative change? As Professor Sandra Mayson puts it: “All prediction functions like a mirror. Its premise is that we can learn from the past because, absent intervention, the future will repeat it.”

But what if there was an intervention? Revolving bail funds such as The Bail Project offer an alternate vision of pretrial decarceration by releasing people from custody and providing them with support to reappear in court and fight their cases from positions of freedom. Support can range from phone and text reminders, to brainstorming with friends and family about how to travel to court, to paying for bus passes or ride shares, to connecting or reconnecting clients with organizations providing help with everything from housing to medical care.

As a Liman Fellow with The Bail Project, my work has followed three tracks. First, I research potential new sites and identify potential legal or practical obstacles, such as deductions of fines and fees from money deposited for bail. Second, I coordinate the launch of new sites as part of our operations team. In this role, I have co-led or supported the opening of The Bail Project’s sites in San Diego, Compton, and Indianapolis. Finally, I work with our central team to think “big picture” about how the experiences of our clients and staff across our sites can inform efforts already underway by organizers, advocates, and policymakers to chart a new direction forward in pretrial justice.

**Freedom Should Be Free:
A Brief History of Bail Funds in the United States (2018)**

Robin Steinberg, Lillian Kalish & Ezra Ritchin
2 UCLA CRIM. JUST. L. REV. 79

Introduction

For as long as there have been jail cells and bondage in America, families and communities have pooled their resources together to try to purchase the freedom of their loved ones. From slavery to mass incarceration, American systems have conspired to control and incarcerate men and women from marginalized communities, particularly communities of color. Today, eleven million men and women, almost all from low-income communities and disproportionately from communities of color, are shoveled into jails across America for ever-increasing minor offenses—conduct that goes on in every community but is only policed in their communities.

Every night, almost half a million people—who have not been convicted of anything—go to sleep in jail cells because they cannot afford to pay cash bail. It is one key driver of mass incarceration, responsible for 99 percent of jail growth in America over the past fifteen years. It is, for those who cannot afford to pay it, the most destructive force in the criminal legal system—ruining lives, destabilizing families, and weakening communities. Moreover, it creates enormous pressure on the person locked in a jail cell to plead guilty to a crime—whether or not she is guilty—so she can return to the safety of her home. Whether a person is in jail, on bail, or at liberty, will determine just about everything that comes after the jail door does, or does not, close. It will influence case outcomes, life outcomes, and the long-term consequences of an arrest. So, the ability to get someone out of jail while his or her case winds its way through an overburdened criminal legal system is critical.

For low-income families, struggling to feed their families, pay rent, and make ends meet, even a low-end bail is an insurmountable challenge. In this precarious situation, poor people under arrest often fall prey to the whispers of prosecutors who promise them an enticing deal—plead guilty now and you can return home. But this comes at an enormous cost—a permanent criminal record that will have negative rippling effects on all aspects of an individual’s life, including his or her employment, housing, voting rights, immigration status, child custody, physical and mental health.

Throughout American history, the criminal legal system has targeted marginalized communities. It has targeted dissidents, activists and members of political groups that challenge the status quo. The response has been to pool personal, family, or community resources wherever possible. One mechanism, and the subject of this paper, has been the creation of organized “bail funds” to pay bail for those who cannot afford it. Bail funds have long presented a pathway to freedom—a disruptive fissure in a system that criminalizes both poverty and race. In many ways, the story of bail funds provides a window into many critical moments in American history over the last century. Bail funds have sprouted up during times of intense conflict between the United States government and political activists, suspected Communists, civil rights leaders, and students. Visually, the history of bail funds would look much like the ebb and flow of an ocean’s tide, growing with consciousness about injustice and falling into extinction once the momentum, or often the money, dies out. The creation of bail funds in the United States is a tribute to the power of individuals to create a collective force to push back against the complex and growing force of mass incarceration.

Bail funds build on the tradition of churches, families, and other community members who, as black communities did during slavery, join together to purchase the freedom of their loved ones. As mass incarceration has entrapped more and more of the country, communities have responded in recent years with an increasing commitment to the direct action of bailing strangers out of jail. While marginalized communities have long been pooling resources to pay bail, organized bail funds—often aimed at bailing out strangers—were few and far between for much of the twentieth and start of the twenty-first

century. But as mass incarceration has spread across the country, more Americans have come to understand the injustice that has long been apparent to low-income communities and communities of color, and there has been a subsequent influx of resources into decarceration efforts.

As Jocelyn Simonson writes in her article, *Bail Nullification*, “[c]ommunity groups and churches have long had a practice of passing a hat to collect funds to help people with bail and legal defense, but formal charitable bail funds—formed expressly for the purpose of posting bail— have taken off nationally only in the last five years.” Today, they operate in over twenty cities across America and collectively bail out thousands of people annually. More funds are sprouting up every year. There are, without a doubt, more collective resources in bail funds today than at any point in American history.

While bail funds have taken off recently, the history of organized bail funds in the United States, recorded as far back as the 1920s, is long and dynamic. From the American Civil Liberties Union’s establishment of a national bail fund in 1920, at a time when anti-Communist sentiments ran high and political dissidents were incarcerated, to the community bail funds popping up across the country today, the bail fund has historically served as a staple in people’s fight for freedom. This Article traces the chronology of several bail funds in the United States drawing from archival documents, court cases, letters, newspaper articles, and first-person interviews. It will focus on bail funds in the criminal court context rather than immigration bonds, and it is by no means a comprehensive review of all bail funds or bail-out efforts, many which remain unknown to those beyond the communities they serve. It is instead an attempt to highlight a few efforts from different time periods and trace the themes and lessons learned from the dynamic history of organized bail funds. It is our hope that by reviving some of this history, we can take the lessons of the past to inform how we deploy this rapidly expanding tool in the struggles of today. . . .

While collaborating with local governments has at times been successful in smaller jurisdictions where county funding is a lifeline, bail funds created in partnership with government officials and law enforcement have proven to be restrictive both in the ways the funds can operate and their ability to effect lasting change in the world of criminal justice. Many have either disbanded when funds ran out or had to concede to the desires of the county in order to secure funding—in effect, losing the radical spirit of past political bail funds where unjust detention roused urgent, direct responses.

Today, widespread organizing efforts, community engagement, strong leadership, and an influx of resources have preserved funds capable of continuing in this radical spirit. There are over twenty bail funds around the country currently pulling from the lessons of the past and striving to decarcerate their communities. Funds today have employed some of the same strategies as funds of previous decades: raising awareness through their work, targeting specific groups as a political strategy, and working towards jail population reduction and broader decarceration. But funds are also paving new ground, rethinking

strategy, and pushing new ideas.

The Bronx Freedom Fund, for instance, grew out of the Bronx Defenders, a holistic public defender office in the South Bronx. The Freedom Fund, a revolving bail fund consisting of only donated money, launched in 2007 to pay low-end bails for Bronx residents, measure case outcomes and court appearance rates, and use their experience as leverage for change in the criminal justice system. Beyond dispelling the myth of cash bail as an incentive for court appearance, a 96 percent court attendance rate meant that bail money was returned at the end of a case, allowing each dollar to be reused to pay bail for hundreds of people every year. The Bronx Freedom Fund also launched separate funds to assist those incarcerated on immigration bonds or cases that could affect their legal status.

Only two years after it opened its doors to the Bronx, a judge called the fund a de facto “bail bond business” and “insurance business” and attempted to shut it down. The founders and the fund’s sole employee were threatened with criminal charges if they continued in their work, reflecting some of the resistance experienced by early funds. In response, the founders, along with a local state senator and assembly member, helped draft and push a bill to recognize the legality of nonprofit bail funds. After a 2011 veto from Governor Cuomo, the bill passed in 2012, allowing bail funds in New York State to post misdemeanor bails up to \$2,000. Today, funds across the state operate under this statute, with legislation currently pending that would significantly expand the purview of their work. This year, the Bronx Freedom Fund served as the model for The Bail Project, which is an unprecedented national effort to bail out tens of thousands of people in jurisdictions across the country through a national revolving bail fund, and to harness its results to effect change. Working in partnership with local public defenders, community organizers, stakeholders, and advocates, The Bail Project plans to scale across America with the goal of bailing out 160,000 people over the next 5 years.

Funds across the country have pushed the envelope in other innovative and unprecedented ways as well. In doing so, funds have been met with “allies along with enemies within the criminal legal system,” as an Atlanta-based queer liberation organization, Southerners on New Ground (SONG) writes. They operate in vastly different communities with vastly different tactics. With the rise of social media, for instance, social justice organizations have launched targeted bailouts through a combination of online campaigns and grassroots organizing. Perhaps the most prominent manifestation of this strategy was the National Black Mamas Bail Out, which was started in 2017 by a coalition of 25 groups across the country including Brooklyn Community Bail Fund, Color of Change, Movement for Black Lives, and SONG. On Mother’s Day 2017, they conducted a series of strategic bailouts across the country to bring women and femmes of color home for the holiday. Since Mother’s Day, the group has consolidated their efforts to create a National Bail Out to continue grassroots organizing work, bailing out mostly black and brown people, exposing the inherent and historic racism of the system, and advocating for an end to money bail.

As with bail funds of the past, today's bail funds have been successful through a commitment to decarceration and inventive strategies. The National Bail Out, for instance, has raised money and awareness through targeted media strategy and crowdfunding, including via a technology platform called Appolition that allows you to donate spare change to bail.⁹⁹ The Bronx Freedom Fund partnered with The New Inquiry, an online intellectual magazine, to raise money through distributed crypto-currency mining—a technology that had never been used for nonprofit purposes. These crowdfunding efforts recall the strategies of early bail funds—the Civil Rights Congress fund of the 1950's raised its money from nearly four thousand supporters.

Other funds have employed other innovative tactics. The Chicago Community Bond Fund has melded the work of bail funds and court-watching programs to hold the system accountable. The Brooklyn Community Bail Fund has investigated the exploitative tactics of local bail bondsmen in an effort to fight the industry. Several funds are integrating immigration bond into their work to take on the parallel problems in the immigration context. And the National Bail Fund Network has served as an organizing tool to convene bail funds, learn from best practices, and agree on collective principles and strategy. One critical collective principle, “[b]e in collaboration with larger movement work against mass criminalization and incarceration,” holds as true today as it did with the work of civil rights funds of the past.

Each of the interventions of today's funds, only a few of the many ongoing efforts across the country, is a reflection of bail funds' continued commitment to the philosophy summarized by Howard Fast in his reflections on the Civil Rights Congress fund of the 1950's: “that no man should be imprisoned until he has been tried and sentenced,” a tradition “as old as the United States itself.” In carrying on this past, bail funds today also continue in the tradition of innovation and resistance. Only with fresh strategies, renewed energy, and an unrelenting fight against the status quo can bail funds disrupt mass incarceration, demonstrate what a more just system might look like, and carry the torch of their radical predecessors.

II. DATA COLLECTION AND CREATION

This section provides a glimpse of the kinds of data routinely collected in state and federal courts. We then turn to proposals to obtain more information about how courts function and about the needs of their users. Thereafter, we excerpt discussions from innovative efforts gathering data from extant court-based materials. We close this segment with a brief foray abroad, as the U.K. is moving to “online dispute resolution,” justified in part as user-friendly and access-enhancing. Yet commentators are concerned that without built-in research plans for the new online system, questions about its impact on access to law and justice cannot be answered. Hence, the materials reflect on how courts currently obtain data and what more they could do to illuminate the impact of the lack of resources of litigants.

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State Court Guide to Statistical Reporting (2019)

Court Statistics Project

Conference of State Court Administrators and the National Center for State Courts

. . . The *State Court Guide to Statistical Reporting* (hereafter, the *Guide*) is a standardized reporting framework for state court caseload statistics designed to promote intelligent comparisons among state courts. The statistics reported through this framework are compiled, analyzed, and published by the Court Statistics Project (CSP), a collaborative effort of the Conference of State Court Administrators (COSCA) and the National Center for State Courts (NCSC). Since 1975, the CSP has served as the de facto national archive of state court caseload information.

Comparable data from the state courts allows the CSP to publish national trends and analyze caseload statistics for use by state court leaders, policy makers, and local court managers. Being able to put each state's caseload in a jurisdictional, regional, or national context provides useful insights that inform policy, budgetary, and court management decisions.

State courts vary, sometimes dramatically, in their organizational structure and constitutional and statutory frameworks. But regardless of how the courts are organized in each state, the task the state court leadership has set for itself is the same in every state: to map the caseload data used in that state to the reporting framework defined by the *Guide*.

The CSP began compiling national court caseload statistics in 1975. At that time, it was evident that there were profound differences in how states defined and reported their caseload data. Without common caseload definitions and a standard format for classifying and reporting data, the goal of the CSP could never be achieved. The *Guide* has been designed to provide a comprehensive set of model reporting matrices, case type definitions, and counting rules. Terms used in the reporting matrices are defined in order to ensure comparable reporting.

The *Guide* is divided into two main sections—one for trial courts and one for appellate courts. Within each section, subsections are organized by case category and each of these follows a similar outline. Note that all case categories, case types, case

status categories, manners of disposition, and case characteristics are defined as they apply to the *Guide*, and therefore may vary somewhat from other definitions or common usage in any particular state. . . .

The Landscape of Civil Litigation in State Courts (2015)
National Center for State Courts, Civil Justice Initiative

. . . The sample of courts in the *Landscape* study was intentionally selected to mirror the variety of organizational structures in state courts. The resulting *Landscape* dataset consisted of all non-domestic civil cases disposed between July 1, 2012 and June 30, 2013 in 152 courts with civil jurisdiction in 10 urban counties. The 925,344 cases comprise approximately five percent (5%) of state civil caseloads nationally.

. . . The picture of civil caseloads that emerges from the *Landscape* study is very different than one might imagine from listening to current criticism about the American civil justice system. High-value tort and commercial contract disputes are the predominant focus of contemporary debates, but collectively they comprised only a small proportion of the *Landscape* caseload. In contrast, nearly two-thirds (64%) were contract cases, and more than half of those were debt collection (37%) and landlord/tenant cases (29%). An additional sixteen percent (16%) were small claims cases involving disputes valued at \$12,000 or less, and nine percent (9%) were characterized as “other civil” cases involving agency appeals and domestic or criminal-related cases. Only seven percent (7%) were tort cases and one percent (1%) were real property cases.

To the extent that damage awards recorded in the final judgment are a reliable measure of the monetary value of civil cases, the cases in the dataset involved relatively modest sums. Despite widespread perceptions that civil litigation involves high-value commercial and tort cases, only 357 cases (0.2%) had judgments that exceeded \$500,000 and only 165 cases (less than 0.1%) had judgments that exceeded \$1 million. Instead, three-quarters (75%) of all judgments were less than \$5,200. These values varied somewhat based on case type; three-quarters of real property judgments, for example, were less than \$106,000 and three-quarters of torts were less than \$12,200. For most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case.

Litigation costs that routinely exceed the case value explain the low rate of dispositions involving any form of formal adjudication. Only four percent (4%) of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97%) of these were bench trials, almost half of which (46%) took

place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than half of those in small claims cases (\$1,785 versus \$3,900). This contradicts assertions that most bench trials involve adjudication over complex, high-stakes cases.

Most cases were disposed through an administrative process. A judgment was entered in nearly half (46%) of the cases, most of which were likely default judgments. One-third of cases were dismissed, possibly following a settlement; ten percent (10%) were explicitly recorded as settlements.

Summary judgment is a much less favored disposition in state courts compared to federal courts. Only one percent (1%) were disposed by summary judgment, and most of these would have been default judgments in debt collection cases except the plaintiff pursued summary judgment to minimize the risk of post-disposition challenges.

A traditional hallmark of civil litigation is the presence of competent attorneys zealously representing both parties. One of the most striking findings in the dataset was the relatively large proportion of cases (76%) in which at least one party was self-represented, usually the defendant. Tort cases were the only ones in which a majority (64%) of cases had both parties represented by attorneys. Small claims dockets had an unexpectedly high proportion (76%) of plaintiffs who were represented by attorneys, which suggests that small claims courts, which were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases.

Approximately three-quarters of cases were disposed in just over one year (372 days), and half were disposed in just under four months (113 days). Nevertheless, small claims were the only case type that came close to complying with the *Model Time Standards for State Trial Courts (Standards)*. Tort cases were the worst-case category in terms of compliance with the *Standards*. On average, tort cases took 16 months (486 days) to resolve and only 69 percent were disposed within 540 days of filing compared to 98 percent recommended by the *Standards*. . . .

The vast majority of civil cases that remain in state courts are debt collection, landlord/tenant, foreclosure, and small claims cases. State courts are the preferred forum for plaintiffs in these cases for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments. Securing a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings. The majority of defendants in these cases, however, are self-represented. Even if defendants might have the financial resources to hire a lawyer to defend them in court, most would not because the cost of the lawyer exceeds the potential judgment. The idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.

State court budgets experienced dramatic cuts during the economic recessions both in 2001–2003 and in 2008–2009, and there is no expectation among state court policymakers that state court budgets will return to pre-2008 recession levels. These budget cuts combined with constitutional and statutory provisions that prioritize criminal and domestic caseloads over civil caseloads have undermined courts’ discretion to allocate resources to improved civil case management. As both the quantity and quality of adjudicatory services provided by state courts decline, it becomes questionable whether state legislators will be persuaded to augment budgets to support civil caseloads.

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants with lessened standards for negotiating civil transactions or conforming their conduct in a responsible manner. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts. Because the civil justice system directly touches everyone in contemporary American society — through housing, food, education, employment, household services and products, personal finance, and commercial transactions — ineffective civil case management by state courts has an outsized effect on public trust and confidence compared to the criminal justice system. If state court policymakers are to return to the traditional role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or even implemented incrementally through mere changes in rules of procedure. It is imperative that court leaders move with dispatch to improve civil case management with tools and methods that align with the realities of modern civil dockets to control costs, reduce delays, and ensure fairness for litigants. . . .

. . . The picture of contemporary litigation that emerges from the *Landscape* dataset is very different from the one suggested in debates about the contemporary civil justice system. State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial and tort cases. Only one in four cases has attorneys representing both the plaintiff and the defendant. In addition, only a tiny proportion of cases are adjudicated on the merits, and almost all of those are bench trials in lower-value contract, small claims and other civil cases.

With rare exceptions, the monetary value of cases disposed in state courts is quite modest. Seventy-five percent (75%) of judgments greater than zero were less than \$5,200. Only judgments in real property cases exceeded \$100,000 more than 25 percent of the time. At the 75th percentile, judgments in small claims cases were actually greater than

judgments in contract cases (\$6,000 compared to \$4,981). This is particularly striking given recent estimates of the costs of civil litigation. In the vast majority of cases, deciding to litigate a typical civil case in state courts is economically unsound unless the litigant is prepared to do so on a self-represented basis, which appears to be the case for most defendants.

The relatively high proportion of self-represented defendants in civil cases is also troubling. Much of the civil justice system is designed with the assumption that both parties will be represented by competent attorneys. The asymmetry of representation between plaintiffs and defendants across all of the case types—even in small claims courts—raises serious questions about the substantive fairness of outcomes in those cases. Although there has been a sea change in state court policies with respect to the legitimacy of court-supported assistance to self-represented litigants, it is still a very controversial topic in many states. Moreover, most of that assistance takes the form of self-help forms and general instructions for filing cases and gathering documents in preparation for evidentiary hearings. As a general rule, state codes of judicial ethics prohibit judges from giving the appearance of providing assistance, much less actually giving assistance, to a self-represented litigant. This has certain implications with respect to public trust and confidence in the courts. The idealized view is that courts provide a forum in which civil litigants can negotiate effectively to resolve disputes, but also one in which Justice (with a capital J) will be done if those negotiations fail. It is fair to question the extent to which self-represented defendants are able to bargain effectively with represented litigants given unequal resources and expertise.

The economic realities of contemporary civil litigation suggest one explanation for the dominance of contract and small claims cases, which comprise 80 percent of civil caseloads in the *Landscape* courts. For plaintiffs in these cases, state courts essentially function as a monopoly insofar that securing a judgment from a court of competent jurisdiction is the only legal mechanism for enforcing payment of the award through post-judgment garnishment or asset seizure proceedings. Even so, plaintiffs must generally wait months to secure the judgment before they can initiate enforcement proceedings. The majority of claims asserted in tort cases, in contrast, are likely to involve insurance coverage for the defendant, which provides greater incentives for litigants to settle claims and a mechanism for judgments and settlement agreements to be paid. Indeed, in the vast majority of incidents giving rise to tort claims, the existence of a robust and highly regulated insurance market largely precludes the need to file cases in court at all. . . .

This reality raises the question of why perceptions of civil litigation are so distorted. One possibility is that some findings from the *Landscape* study may be at least partly attributed to ongoing effects of the 2008-2009 economic recession. For example, the large proportion of debt collection and foreclosure cases may have inflated the proportion of contract cases relative to other case types. However, the majority of those cases were filed after July 1, 2011, well after the peak of civil filings from the recession. Moreover, civil case filing statistics indicate that the proportion of contract cases routinely fluctuates over

time in response to economic conditions, and rarely dips below 50 percent of civil caseloads. The relative stability of caseload compositions over time tends to counter the possibility that the *Landscape* findings are a temporary anomaly.

A more likely explanation is the focus on high-value and complex litigation by the media (especially business reports), much of which is filed in federal rather than state courts. Lower-value debt collections, landlord/tenant cases, and automobile torts involving property damage and soft-tissue injuries are rarely newsworthy. Another explanation is that perceptions are largely driven by the experiences of lawyers, who are repeat players in the civil justice system and who are much more likely to be involved in high-value and complex cases. Likewise, judges tend to focus on their experience in cases that demand a great deal of judicial attention. A final explanation for the distorted perception of civil caseloads is the institutional complexity inherent in the variety of organizational structures and jurisdictional authorities in state courts, which make it extremely difficult to document the size of civil caseloads, much less make accurate comparisons across states. . . .

The Future of the Civil Justice System in State Courts

Substantial evidence supports allegations that civil jury and bench trials have declined precipitously over the past several decades. The most frequent explanation for this trend is that the cost and time involved in getting to trial make alternative methods of dispute resolution more attractive. A substantial commercial industry providing ADR services (e.g., mediation, arbitration, private judging) not only actively competes with state and federal courts for business, it even relies largely on experienced trial lawyers and judges to provide those services. Not only are these methods more likely to be pursued in existing disputes, many routine consumer and commercial transactions (e.g., utility contracts, financial services agreements, healthcare and insurance contracts, commercial mergers, and employment contracts) now specify that future disputes must be resolved by mediation or binding arbitration. The rise of the Internet economy has also spurred the development of online dispute resolution forums for major Internet-based companies such as E-bay, PayPal, and Amazon. A significant consequence of these trends is the growing lack of jury trial experience within the bar and increasingly the state court trial bench. This may further feed the decline in civil jury trials as lawyers and judges discourage their use due to unfamiliarity with trial practices. In addition to declining trial rates, there is growing concern that many civil litigants are not filing claims in state courts at all. Preemptive clauses for binding arbitration in consumer and commercial contracts divert claims away from state courts, but other factors including federal preemption of certain types of cases, international treaties, and legislative requirements that litigants exhaust administrative remedies in state or federal agencies before seeking court review have also proliferated in recent years.

Although not related to trends in civil caseloads and disposition rates, state court budgets declined precipitously during the economic recessions in 2002-2003 and again in 2008–2009. Although most state courts experienced some recovery after the 2003 recession, there is currently no expectation among state court policymakers that state court

budgets will return to pre-2008 recession levels. Moreover, state and federal constitutional and statutory provisions place higher priority on criminal and domestic caseloads in state courts, further undermining timely and effective management of civil caseloads. For the past two decades, state courts leaders have resigned themselves to doing more with less, all the while watching civil litigants move with their feet to other forums to resolve disputes or forego civil justice entirely.

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants without clear standards for negotiating civil transactions or conforming their conduct in a responsible manner. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts. Because the civil justice system directly touches everyone in contemporary American society — through housing, food, education, employment, household services and products, personal finance, and commercial transactions — ineffective civil case management by state courts has an outsized effect on public trust and confidence compared to the criminal justice system. If state court policymakers are to preserve the traditional role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or even implemented incrementally through changes in rules of civil procedure. Instead, it will require dramatic changes in court operations to provide considerably greater court oversight of caseload management to control costs, reduce delays, and improve litigants’ experiences with the civil justice system.

[A summary of the NCSC findings comes from *Glimpsing the Volume, the Needs, and the Practices*, prepared by Judith Resnik for “Court Debt”: Fines, Fees, and Bail, Circa 2020, AALS Annual Meeting January 4 2019:

National Center for State Courts:
The Landscape of Civil Litigation in State Courts 2012-2013
925,344 civil cases, 10 major urban counties

Contracts	64%
Debt collection	37%
Landlord/tenant	29%

Foreclosure	17%
Small claims	16%
Other civil cases	9%
Tort	7%
Automobile tort	40%
Personal injury/property damage	20%
Medical malpractice	3%
Products liability	2%]

Case dispositions
N=925,344

Dismissed	35%
Judgment unspecified	26%
Default judgment	20%
Settled	10%
Trial, summary judgment, or binding arbitration	4%

Cases without lawyers
N=649,811

Parties without representation	
Both parties	6%
Defendants	74%
Plaintiffs	8%]

The Landscape of Domestic Relations Cases in State Courts (2018)

National Center for State Courts, Family Justice Initiative

. . . Domestic relations cases are a key entry point into the state court system for many American families. The characteristics of these cases have changed rapidly over the last several decades, and the landscape of current domestic relations litigation is not fully understood. The positive response to the findings and subsequent recommendations of the CCJ Civil Justice Improvements Committee prompted the CCJ/COSCA Joint Committee on Courts, Children and Families to initiate the Family Justice Initiative (FJI), which employs a similar methodology to domestic relations cases. An FJI Task Force has been formed to develop recommendations for issues facing domestic relations cases, and an FJI Landscape study was commissioned to provide the Task Force with information about domestic relations caseloads in state courts

Currently, anecdotal accounts and conventional wisdom are the most prevalent evidence for issues in domestic relations cases. This landscape study tested that conventional wisdom using actual court data, finding that many are correct. This report documents the caseload characteristics of domestic relations cases disposed between July 1, 2016, and June 30, 2017, across eleven large, urban courts. Three levels of analysis were used to examine the landscape of litigation in domestic relations cases: case-level, court procedures and operations, and community characteristics. The sample of 147,436 cases represented approximately 8 percent of domestic relations caseloads nationally. . . .

More than three-quarters (76%) of cases were divorce/dissolution cases, followed by “other” (14%), a case type used by some courts in their case management system. The final 10 percent of cases involved parental responsibility claims (e.g., custody/visitation, child support). Some courts were unable to provide one or more of these case type categories and may have grouped categories together more broadly (e.g., a custody case grouped under the initiating divorce case). About half of cases (51.7%) involved minor children.

Cases were primarily disposed by a judgment (76.5%), followed by dismissals (20.3%), with the remaining cases disposed by transfer or by an unknown disposition type. Judgments were mostly unspecified formal adjudications (34%), followed by settlements (26%), then default judgments (17%). Time to disposition was examined at the 75th percentile, which represents the time it takes for 75 percent of cases to dispose. This method was chosen as averages are sensitive to extreme values and medians often reflect optimistic standards for comparison. The 75th percentile for time to disposition across all cases was 263 days, or about 8 and a half months. Divorce cases typically have statutory waiting periods before a final decree can be issued. Each site’s statutory waiting period was factored into their divorce caseload by subtracting the minimum statutory waiting period from the total time to disposition for divorce cases. The adjusted time to disposition for divorce cases was 170 days, or about five and a half months when excluding waiting

periods. Overall, the cases included in the study were close to meeting the Model Time Standards. . . .

The majority of cases (64.3%) in the FJI Landscape were uncontested, which was consistent across courts and case types. Contested cases were more likely than uncontested cases to involve minor children and had higher rates of requests for emergency or injunctive relief and allegations of domestic violence. Scheduled and held in-court hearings and pretrial conferences were also more frequent in contested cases, indicating more court involvement in those cases with contested issues. Interestingly, there was no significant difference in average time to disposition between contested and uncontested cases. Other case characteristics may have confounded this result, as other case factors are important contributors to case time (e.g., manner of disposition, case type). . . .

As expected, the majority of cases (72%) involved at least one self-represented party. The petitioner was more likely to be represented than the respondent across courts and case types (42% versus 33% overall, respectively). Both parties were more likely to be represented in contested cases. For initial filings, both parties were more likely to be represented when the case involved minor children. In reopened filings, both parties were more likely to be represented in cases without the involvement of minor children. Cases in which there was at least one self-represented party were less likely to secure a final judgment, and more likely to have their case dismissed.

Self-help resources for litigants at each court were examined in light the representation status of litigants and community demographics. The number of self-help resources provided by the court was related to the proportion of self-represented litigants in the study caseload. The self-help resources most highly related to self-representation were fillable and interactive forms and presence of a domestic relations navigator. As the median adjusted income across sites increased, the presence of these resources decreased. . . .

Studying the “New” Civil Judges (2018)

Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark
2018 WISC. L. REV. 249

. . . Americans turn to state courts to manage personal and business problems of all types. We rely on state courts to end failing relationships, manage the custody of children, and gain protection from violence. We often turn to these courts when faced with broken commitments, failed deals, or damaged property. Increasingly, people are pulled into state court litigation because they have fallen behind on credit card, mortgage, or rent payments. State civil courts are the primary place where most Americans interact with the civil justice system; these courts and the judges who preside over and administer them sit at the heart of our civic, economic, and social life.

Unlike other fundamental systems like health care and education, we know very little about our state courts—from what goes on in local courtrooms and clerks’ offices to court administration at the state level. We lack even the most rudimentary knowledge of the most powerful actors in this system—judges, including what happens inside their courts, and why. This lack of knowledge persists, despite legal scholarship’s ongoing investments and interest in empiricism and the recent burst of access to justice research across multiple disciplines.

The lack of information about state civil courts and judges makes it difficult to develop theoretical expectations about how they operate, to evaluate those expectations empirically, and to develop policies and practices to improve the justice system. The state court knowledge deficit is no secret; a smattering of scholars have identified and bemoaned it over the past thirty years. Yet legal scholarship continues to focus almost exclusively on federal courts, federal judges, and a particular judicial function in those courts: decision making in appellate cases. Though federal courts decide complex cases and articulate the final word on essential doctrinal and procedural questions, these courts currently handle less than one percent of America’s annual civil caseload. To ignore state civil courts is to ignore ninety-nine percent of the cases in our civil justice system. When legal scholars (and social scientists) do turn to state courts and judges, they tend to focus on criminal dockets and state appellate courts.

The data we do have about state courts point to a radical and ongoing transformation in the civil justice system, a transformation both easy to observe and largely overlooked. State civil court dockets are now dominated by lay people who manage their civil justice problems without the assistance of a lawyer, a group one of us has called the “unrepresented majority.” An estimate based on recent data suggests that three-quarters of all state civil cases—at least 15.5 million per year—involve at least one unrepresented party. This massive figure reflects a complete reversal in the representation status of state court litigants in less than three decades. Twenty-five years ago, nearly every party in state court had a lawyer. Today, the vast majority represent themselves.

In response to the rise of unrepresented parties, the adversary system in state courts has fundamentally changed. The leading authority on state courts has called the adversary system in these courts an “idealized picture” and an “illusion.” Our own research shows that party control of litigation has fallen away and that judges are routinely departing from the traditional, passive judicial role in varied and ad hoc ways when they deal with pro se parties. One of us was the first to point out that judges are behaving in ways that neither the law nor ethical rules authorize. One was the first to create a formal taxonomy of active judging behaviors. Another was the first to examine how judges’ treatment of pretrial procedural requests defines pro se parties’ access to the hearing room. We have also studied the role judges play in shaping how advocates develop and exercise legal expertise.

Judicial departures from the passive role, which we call “active judging,” range from procedural adjustments, like asking questions to authenticate evidence, to moves with

substantive implications for case outcomes, like raising new legal claims or defenses where parties have failed to do so. It also includes judicial behavior outside the confines of a hearing, from informal party interactions to judicial participation in redefining court systems. At the same time, some state courts (led by judges) are developing new programs and practices that empower other actors (including nonlawyers) to assist unrepresented parties, often in strong collaboration with outside organizations.

We know that the adversary system and the judicial role are changing in courts across the country, but we do not have the data to say with any certainty how widespread such changes are, let alone to understand their nature and effect. We cannot meaningfully describe what most state civil court judges actually do in their day-to-day work, much less the causes and consequences of this behavior. Our ignorance stretches from the courtroom to the clerk's office and beyond. Only by piecing together disparate strands of research can we even begin to identify the questions we should be asking. An entire field of study sits almost completely unexplored.

In this article, we are intentionally pushing back on prevailing wisdom about the study of courts and judges, which implicitly, and sometimes explicitly, holds that only nonroutine or idiosyncratic cases are worthy of study. Instead, we argue that ignoring the routine, daily work of our nation's courts has left a massive gap in our understanding of the civil justice system, a system that has real effects on the people whose lives and well-being are at stake within it. Researchers have not evaluated existing theories of judging and civil justice in state courts. Our current theoretical models may be inadequate to explain the vast majority of judicial and civil court activity in the United States.

The stories we tell about civil justice in America are likely based on assumptions and models that may only apply in the rarefied world of federal court. For example, current legal scholarship emphasizes the “vanishing trial” and the rise of “privatized procedure.” While trials are on the decline in state courts just as they are in federal courts, state court litigation differs in important ways. In-person interactions between judges and parties are still the primary means of conducting business in state courts. Judges and parties routinely interact in open court to process and dispose of litigation; few cases are resolved based on written pleadings and motions.

Privatized procedure—where parties develop out-of-court contractual arrangements to alter standard procedural regimes—belongs almost exclusively to the realm of federal courts. The majority of lay people who find themselves engaged in state court litigation are simply not equipped to strategically manage procedures to advance their interests. In the courtrooms we have observed, judges exert tight control over procedure and case processing. In courts with few lawyers, there is simply no one else with the requisite expertise to wield the necessary procedural tools. The limited available research suggests prevailing stories about the evolving civil justice system do not neatly map onto the state court context.

Even the recent growth of empirical access to justice research has not reached the study of state civil judges and courts. Instead, researchers have focused on legal needs and services. Access to justice scholars have been the loudest voices regarding the plight of unrepresented parties in state courts and promoting reform of courts and judicial practices. But we have not seen calls for research aimed at increasing our understanding of how judges behave and courts operate in the existing civil justice system, or at analyzing the implementation and effect of reforms. Instead, most scholars have focused on making the normative case for change and offering prescriptions for reform.

In this article, we make the case for a research agenda focused on state courts and the judges who manage and work within them. In Part I, we present a brief overview of the state civil justice landscape and make the critical and often-overlooked point that state courts are pro se courts; the majority of civil matters in the United States now involve at least one unrepresented party. We then review what we know about how courts and judges are responding to this new pro se reality. In Part II, we ask why so little research focuses on state civil courts and judges, particularly at a time when empirical analysis is a regular part of legal scholarship and access to justice research is on the rise. We identify and discuss barriers to knowledge and access; a federal court bias in legal scholarship; a lack of interdisciplinary coordination in state court research; and a trend of lawyer-centric research. In Part III, we offer a framework for future research on state civil courts, with an emphasis on the judicial role. Here, we develop a four-part theory of how state courts differ from federal courts (the default focus of most civil justice scholarship) and identify research questions based on this theory. Specifically, we theorize that state courts differ because the adversary process is in decline; most state court business is still conducted through in-person interactions; the judicial role in pro se cases is increasingly ethically ambiguous; and written substantive and procedural law has largely not kept pace with the evolving and dynamic issues facing state courts. In conclusion, we call for scholars to invest in research on state civil courts and judges and briefly describe our own ongoing research project. . . .

The Integrated Database: Data Availability in the Federal Courts (2019)

Kristin Garri, George Cort & Margaret S. Williams
Federal Judicial Center*

The FJC, under a working arrangement with the Administrative Office of the U.S. Courts (AOUSC), provides public access to its Integrated Data Base (IDB) through its

* This publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. While the Center regards the content as responsible and valuable, this publication does not reflect policy or recommendations of the Board of the Federal Judicial Center.

webpage. The IDB contains data on civil case and criminal defendant filings and terminations in the district courts, along with bankruptcy court and appellate court case information. This white paper provides information for those seeking to use the data provided in the IDB, including how the data are collected, the time periods and data elements available, where to find the descriptions of the codes used, and some basic tips for using the data as well as its limitations.

Collection Process

The FJC receives quarterly updates of the case-related data that are routinely reported by the courts to the AOUSC and published in the Judicial Business Reports. The FJC then post-processes the data, consistent with the policies of the Judicial Conference of the United States governing access to these data, into a unified longitudinal database, the IDB. The post-processing of the data takes several forms. First, data values that are out of range for the variable are recoded as missing. Second, some information is redacted. For example, the names of criminal defendants in criminal and appellate files are redacted. Relatedly, information on the judge or judges presiding over the case is redacted pursuant to Judicial Conference policy. Third, the IDB integrates three types of case records: filings, pendings, or terminations. New cases are filings records. Cases that were filed previously but not yet terminated are pending records. Cases that were previously filed, or filed and terminated in the same quarter, are terminations records. Each quarterly update reflects the current status of the case records, including new case related information (such as conversion of a bankruptcy from a Chapter 11 to a Chapter 7). These quarterly updates have implications for how best to use the IDB, discussed in more detail below.

Time Periods Available

The data available through the IDB varies in terms of the number of years available. Civil and criminal data are available back to 1970. Data from the courts of appeals are available back to 1971. Bankruptcy data is available back to 2008. Because the data collection process has change over time, and to allow for easier access to the data, the civil, criminal and appellate databases are divided into two files based on time periods. As detailed in the codebooks, and noted below, the lengthy duration of the available data creates some challenges for analyzing the data. The codebooks note the changes in the data collection processes, including codes that have changed, that may require researchers to recode specific variables if they want to combine data files.

The courts report data for the statistical year, most notably in the Judicial Business Reports, and the information on the reporting year is provided in the IDB. Researchers may want to match their results to those reports, in which case they must be aware of changes to the statistical year over time. Up to 1992, the statistical year went from July through June (e.g. statistical year 1990 covered the period July 1, 1989 through June 30, 1990). In 1992, the statistical reporting period was changed to conform to the federal government's standard fiscal year, October through September (e.g. fiscal year 1993 covered the period October 1, 1992 through September 30, 1993). All of the previous data files in the IDB conform to the old statistical year (SY70-SY91). The 1992 files cover a 15-month time

span (July 1, 1991 through September 30, 1992) to accommodate this conversion period. The 1993 file and all subsequent files conform to the new fiscal year (October 1 through September 30).

Basic Data Elements

The basic data elements available on the cases included in each version of the IDB are essentially the same. The circuit and district in which the case was filed, the office code, and the docket number create a unique case identifier. Dates of filing and termination (if applicable) are available on each case, as is the type of termination.

Apart from these common fields, the information in each IDB file includes the case-level information relevant to each area of litigation. In the civil files, information on nature of suit, jurisdiction, origin codes, the names of plaintiffs and defendants, class action allegation, the procedural progress of the case at termination, and the nature and amounts of judgment are all included in the files.

The files for criminal litigation are structured somewhat differently to reflect the differences between civil and criminal litigation. Criminal cases often include multiple defendants, so the information provided in the criminal IDB is at the defendant (not case) level. The defendant number needs to be part of the unique identifier created for each observation. Included in the criminal IDB are the offense codes associated with the top five most severe counts, both at filing and termination, the number of the defendant in the case, the date of sentencing (if any) and the terms of sentencing for each offense code (if any), including separate fields for prison, probation, and supervised release. Aggregating the unique identifier across years will show how many defendants had data reported for that case.

The files for appellate data are a hybrid of the types of fields collected in both the civil and criminal data. The database contains information on the lower court proceedings as well as the appellate record, including which side appealed and the agency of the U.S. government involved (if any). For cases originating in the courts of appeals, such as second or successive capital habeas petitions, the outcome is reported as granted or denied. For outcomes of cases from the lower courts, a combination of fields (disposition plus outcome or procedural termination or method) indicate the appellate court's decision.

Bankruptcy data involve substantially more variables than the other databases simply due to the nature of what is collected through the court filings. In addition to the petition, a schedule of assets and liabilities is submitted, providing information on the nature and amount of debt, as well as the availability of assets. Much of this information is included in the case record for the bankruptcy proceeding. Additionally, because bankruptcies can be moved from one Chapter to another, information about the original and current filing chapter, as well as the chapter at termination is provided.

Codebooks

In cooperation with the Judiciary Data and Analysis Office of the AOUSC, the FJC has created and maintains code books that detail changes in the case data that have occurred since the creation of the IDB. These changes include details about new data fields that may have been added, for example due to new legislation expanding the jurisdiction of the federal courts, or data elements that have been deleted and no longer routinely reported by the courts to the AOUSC. Additionally, the codebooks provide information on the source of information provided in the cases, and descriptions for the alphanumeric codes used in the databases themselves.

Guidelines for Use

While potential uses for IDB data are limited only by the researcher's imagination, there are some basic guidelines to be aware of when using these databases. First is how the data collection process affects the information. In each quarterly update, the case records are replaced according to whether the case falls into the filed, pending, or terminated cohorts described above. In practice, this means that case information is potentially overwritten with each update if the record has been altered by the court. This may lead to some loss of information. For example, if a superseding indictment is filed, and the offenses involved change, the information on the first indictment may be lost. Similarly, if a replacement schedule of assets and liabilities is filed in a bankruptcy proceeding, the information will be replaced. Ultimately, the updating of records most accurately captures the specifics of the case as of the most recent snapshot. It does, however, inhibit a researcher's ability to know the full detail of the case record. For example, if a defendant was *ever* charged with a specific offense code, or if a litigant *ever* had counsel or was pro se for the entire duration of their case. If researchers are continually studying the federal courts, it would be best to download each quarterly update and compare across records to have the more complete information on each case.

A second issue for researchers to consider is how data quality may affect results. While many of the fields, especially with respect to those values in the published Judicial Business Reports, are collected with data quality control measures in place, some are not. A process of error correction and detection does not cover all the variables in the IDB, though both the FJC and the AO make every effort to ensure the accuracy of the data. Nonetheless, there may be some problems with specific fields that are not routinely reported.

The two issues with respect to data collection noted above are more likely to specific fields related to under-served populations. These fields include information regarding pro se litigants, *in forma pauperis* (IFP) status, and class action allegations. All three fields may change over the life of the case, making the issues with record replacement more pronounced in these fields, and all three are without data quality control checks, making it more likely that there are errors in reporting at any point during the duration of the case.

Conclusions

With the publicly available information on federal cases in district, bankruptcy, and appellate courts, researchers have an opportunity to explore patterns in federal litigation. The data available cover decades of cases and controversies, and the dozens of variables provided enable researchers to start exploring patterns immediately after download. Moreover the case information available through the IDB gives researchers an accurate and complete account of case records from which they can sample or augment data available based on the needs of their research agenda or audience.

Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges (2011)

Donna J. Stienstra, Jared J. Bataillon & Jason A. Cantone, Federal Judicial Center

Executive Summary

The report that follows is based on a study conducted by the Federal Judicial Center for the Judicial Conference Committee on Court Administration and Case Management. The study sought information from district court clerks of court about programs, services, and materials their courts have developed to assist pro se litigants and to assist staff in handling pro se cases. The study also sought information from district court chief judges about the impact of pro se litigants on judges and chambers staff and what measures the judges have taken to meet the demands of these cases. This report first covers the findings from the survey of clerks of court and then discusses the findings from the survey of chief judges. The Center conducted a companion study of pro se services in the bankruptcy courts for the Judicial Conference Committee on the Administration of the Bankruptcy System. The results of the bankruptcy study are provided in two separate reports.

Findings from a Survey of Clerks of Court

The clerk's office provides a variety of services to help reduce the burden of pro se cases. The most common form of direct assistance provided to pro se litigants is procedural help by clerk's office staff as part of their regular duties; such assistance is provided by 76 (84%) of the 90 responding districts.

Almost all of the districts offer at least one of the programs or services listed in the questionnaire, which included electronic filing through CM/ECF, dissemination outside the courthouse of information about pro se services, a mediation program, and a bar-sponsored program to help pro se litigants prepare their submissions. Almost all of the districts offer at least one service to assist non-prisoner pro se litigants in obtaining legal representation. More than half of the districts appoint counsel to represent a pro se litigant for the full case or in limited circumstances (e.g., in mediation or at trial). Most districts help pro se litigants find counsel, pay for counsel, or both. Nearly half the district courts

pay costs, and an additional quarter pay costs and some or all attorneys' fees. Additionally, a majority of district courts have taken steps to encourage attorneys to provide pro bono legal counsel for pro se litigants.

The district courts rely heavily on print and electronic materials to help and guide pro se litigants. The most common sources of information are the district's local rules, principal forms, and courthouse or courtroom locations, followed by handbooks developed specifically for pro se litigants. Eighty-four percent of the districts have such a handbook for non-prisoner pro se litigants, and 77% have one for prisoner pro se litigants. The courts' websites are the most likely place to find rules, forms, and courthouse locations, while the public area of the clerk's office is the most common place to acquire a nonprisoner handbook. Pro se litigants with access to neither must depend on getting the appropriate materials from court staff through the mail or by finding some other source. The prisoner pro se handbook, for example, is most accessible by mail. While 84% of district courts provide free public access to computers in the clerk's office and 67% provide access to CM/ECF, only 6% provide software to assist pro se filers in preparing pleadings or other submissions.

In general, the number of pro se filings in a district is not correlated with the number of programs or procedures offered by the district to assist pro se litigants, with the resources, services, or notices provided to pro se litigants, or with the amount of access to resources on public access computers. However, districts with a higher number of pro se filings do offer more services to assist non-prisoner pro se litigants in obtaining legal representation and are more likely to encourage pro bono services for pro se litigants.

The survey clearly reveals clerks' concerns about the impact of pro se litigation on court staff. More than half of the responding districts have taken steps to reduce the impact of these cases on their staff. The most common effort, made by about a third of the districts, is to include pro se litigation in court staff training programs. The most common topics either clarify what is permissible and impermissible assistance to pro se litigants or explain how to deal with angry or upset pro se litigants. In addition, more than 20% of district courts have changed the duties of staff or the organization of the clerk's office in the past three years to help staff handle pro se cases. These changes include designating specific staff to handle all pro se cases, rotating the responsibility for pro se cases, or referring pro se litigants to outside help.

The clerks also identified the measures they found most effective in helping the clerk's office handle pro se cases. Two measures have been especially helpful to the clerk's office: special arrangements of staff (such as designated staff for specific duties) and providing specially tailored information to pro se litigants (such as a package of forms and instructions for filing a case). The measure seen by clerks as most effective in helping both prisoner and non-prisoner pro se litigants is making information and guidance tailored to the litigant, such as standardized forms, instructions, and handbooks, readily available.

About a third of the respondents identified a number of actions and conditions that present constraints or difficulties in handling pro se litigation. The most common problems, other than those presented by the litigants themselves, are the policies and practices of state departments of corrections and the Bureau of Prisons. These policies and practices include prisons' lack of cooperation in providing materials electronically and prisoners' lack of access to computers or forms.

Although the clerks' offices have taken a number of steps to assist pro se litigants and to make it easier for court staff to handle this portion of the caseload, the clerks identified a number of issues that remain unresolved or that lie ahead. Considering the issues ranked first, second, or third most important, the issue mentioned most often was the demand pro se cases make on court staff. The issue mentioned second most often—and the one mentioned most often as the number one issue—was the limited access or complete lack of access pro se litigants have to e-filing, CM/ECF, PACER, or computers generally. Also noted by a sizable number of respondents were submissions that are hard to read, are incomplete, or whose issues cannot be discerned; an increase in pro se filings, repeat filers, and frivolous filings; difficult or unstable litigants; lack of counsel; and the need for improvements in the content or availability of court forms and information.

Findings from a Survey of Chief Judges

Although judges do not have as much direct contact with pro se litigants as clerk's office staff do, pro se cases pose a number of challenges for judges and chambers staff. One-half to two-thirds of the 61 chief judges who responded to the survey reported that five major issues or conditions are present in most or all pro se cases:

1. pleadings or submissions that are unnecessary, illegible, or cannot be understood;
2. problems with pro se litigants' responses to motions to dismiss or for summary judgment;
3. pro se litigants' lack of knowledge about legal decisions or other information that would help their cases;
4. pro se litigants' failure to know when to object to testimony or evidence; and
5. pro se litigants' failure to understand the legal consequences of their actions or inactions (e.g., failure to plead statute of limitation, failure to respond to requests for admissions).

Overall, pro se litigants appear to have a difficult time presenting the substance of their cases to the court.

Prisoner and non-prisoner pro se cases do not necessarily present the same issues for chambers. Prisoner cases present special problems in discerning the substance of the case, whereas non-prisoner cases present special issues involving the litigants themselves, who are more likely than prisoner pro se litigants to demand things a court cannot provide or to be irrational, unreasonable, or mentally unstable. Judges identified procedural

problems as being present in both prisoner and non-prisoner pro se cases, but they noted that frivolous cases or logistical problems pose more of a problem for prisoner cases.

While only a few chief judges mentioned lack of counsel or difficulty appointing counsel when asked to identify special issues pro se cases present for judges, almost three-quarters stated that there is a “great need” for counsel at trial, and almost 90% identified at least one type of case event or court proceeding with a great need for counsel. The judges also identified differences between prisoner and non-prisoner pro se litigants in their need for counsel. Most said prisoner pro se litigants have a greater need for counsel because they lack mobility and access (e.g., to conduct discovery or to file electronically).

District courts have established a number of practices and procedures that judges use to assist pro se litigants or to help judges and chambers staff manage these cases. Two-thirds or more of the judges use the following practices and procedures for both prisoner and non-prisoner pro se cases:

- broad standards in construing pleadings and other submissions;
- acceptance of letters as motions or pleadings;
- appointment of counsel when the merits of the case warrant it;
- referral of pretrial matters to a magistrate judge;
- more active personal involvement than in represented cases; and
- broad standards for compliance with deadlines.

Some additional measures are more common for prisoner cases, including assignment of the case to a pro se law clerk and appointment of counsel for a particular step or procedure in the case.

Judges in districts with a higher number of pro se filings for the years 2008 through 2010 reported a larger number of issues and conditions as being present in most or all pro se cases. Judges in districts with a higher average number of pro se filings also reported using a higher number of measures to assist prisoner pro se litigants (but not to assist non-prisoner pro se litigants). There was no relationship between a judge’s perceived need for assistance of counsel and the number of pro se filings in the judge’s district.

The judges identified a number of measures they have found most effective in helping themselves and their staff handle the pro se caseload. The most effective measures used in chambers are assignment of cases to pro se law clerks; use of specially designated staff (e.g., magistrate judges); and procedures for assigning and tracking cases (e.g., automation, identification of repeat filers). The most effective measures used by the clerk’s office to assist chambers are similar—use of specially designated staff (e.g., magistrate judges) and procedures for assigning and tracking cases. Whether used by the clerk’s office or chambers, these measures appear to screen and streamline the pro se caseload.

The judges also identified measures they have found most effective in helping pro se litigants. By far the most common measures used in chambers are those we might call “managerial.” These include clear orders and instructions, standardized forms, and methods for responding to filings without delay. For prisoner cases, judges also find effective appointment of counsel and liberal interpretation of pleadings and time frames. As for assistance provided by the clerk’s office, many judges find that handbooks, standardized forms, instructions, and other materials that help with the case are most effective in helping pro se litigants.

Although chambers and clerks’ offices have developed procedures to help with pro se litigation, the judges also identified a number of issues these cases continue to present for chambers. The most commonly stated issues focus on the quality of the pleadings—the litigants’ filing of voluminous and unnecessary material, their lack of legal knowledge, and the risk the judge might miss meritorious claims. Judges are also concerned about the rising caseload, caused in part by numerous frivolous cases, frequent filers, and repetitive filings.

The judges showed a strong interest in learning more about methods that can help reduce the burden of the pro se caseload. Nearly three-quarters said they would like more information about special staffing arrangements, and almost two-thirds said they would like more information about funding for programs that assist pro se litigants.

Altogether, the two surveys show that the district courts have developed many methods to assist chambers, clerk’s office staff, and litigants in effectively managing pro se cases. Nonetheless, problems remain: for the clerks, the weight of these cases on their staff; for the judges, the difficulty of discerning the substance of the cases. . . .

Understanding State Courts: A Preliminary List of Data Needs (March 2019)
Tanina Rostain & Erika Rickard

In the summer of 2018, the American Academy of Arts and Sciences launched a project focused on making justice accessible, with a central focus on data collection and analysis. The legal community does not have enough reliable and accessible data to be able to address adequately the scope and variety of the crisis in the civil legal system. This project—convening an array of scholars, practitioners, and advocates—will identify the essential facts that should be collected about civil justice activity and the entities who are best placed to collect that information. It will also develop a set of data access standards to help guide the use of civil justice data for research purposes. The Academy is expected to issue a report in November 2019.

What follows is an informal, initial discussion of the key data elements that are relevant to assessing the functioning of the civil justice system. The list focuses on state courts, which handle 96% of all court proceedings.

Essential State Court Data

“Unlike other fundamental systems like health care and education, we know very little about our state courts.” State courts lack a centralized repository for data along the lines of federal Integrated Database (IDB), where case-level data on civil legal matters is publicly available. Fewer than 10 state court systems make civil case-level data searchable to the general public, and most state public records request processes do not apply to state judiciaries. While most do report aggregate statistics on case filings and dispositions, more of the information that is routinely collected must be routinely available in order to fully understand how our civil justice system functions. As a starting point, we propose thinking about essential data about state courts in three categories: aggregate reports; case-level court data; and data about court users.

I. Aggregate reports

Annual statistical reports from state court systems and aggregate figures submitted to the national Court Statistics Project provide a starting point. In addition, some courts provide a model for reporting more detailed information in their aggregate reports, from which we can glean a richer understanding of the work of state courts.

Examples of information to report in aggregate:

A. Detailed case type categories

Few state courts report more detailed categories beyond the following: Traffic, Criminal, Civil, Family, Juvenile. Model courts include more precise case types (e.g., debt claims, landlord-tenant, guardianship of minor, guardianship of adult).

B. Case filings by party type

The implications for access to justice vary depending on whether one or both parties is a “repeat player” in navigating court procedure. For example, the vast majority of small claims cases across the country are debt claims. Within debt claims, it is (business, government, individual)

C. Rates of fee waiver applications, denials, and approvals, by party type

D. Rates of representation by case type

E. Rates of dispositions by case type and by party type

F. Rates of specific signs of procedural hurdles

A key indicator of effective access to court process is the use or application of procedural levers or legal safeguards that are ostensibly available to parties. Litigants’ ability to file petitions, prove that they effectively served interested parties, raised cognizable claims, offered evidence, and challenged the opposing parties’ proposed resolution are all indicators of actual engagement

with court processes, and the fair application of those processes across cases.

II. Case-level data

While we recognize that there are legitimate privacy and confidentiality concerns regarding case-level data and personal identifying information, we do not address those concerns in this list.

A. Type of matter

As with the aggregate case types listed above, individual case-level data can be broken into categories relevant to researchers and the general public, e.g., debt litigation (medical debt, education debt, other consumer debt), rental housing (eviction, housing conditions), foreclosure, children and custody, guardianship, disability, income maintenance, and other public benefits.

B. Representation status

The Court Statistics Project has made an attempt at identifying a clear point for courts to identify whether litigants are or aren't represented by an attorney. The binary distinction of represented / unrepresented does not fully capture the experiences of litigants, who may be represented for all, some, or no stages of a court case. At the case level, it may be easier to report with precision the nature of any representation that a litigant has during a court case.

Type of lawyer

Legal services lawyer or private lawyer

1. Nature of representation

Full representation

Lawyer for the day

Limited scope

C. Stages of proceedings (including lapsed time)

Court case management systems already collect information about the procedural progress from case initiation through disposition, including:

1. Case initiation and disposition dates
2. Filings / procedural mechanisms initiated by each party (motions to dismiss, affidavit for inability to pay)
3. Procedural mechanisms initiated by court (sua sponte dismissal, settlement review, review for ability to pay)
4. Date and event outcome for in-court appearances, if any
5. Date and event outcome for court-based mediation, if any
6. Trial, if any

D. Disposition

A vast majority of civil cases in state courts never reach a judge or judicial officer on the merits, but rather end in default, dismissal, or some form of agreement between the parties. Consistent information about the form or type of disposition, however, is not available across state courts.

1. Nature of disposition
2. Disposition details (e.g., total amount of settlement agreement; non-monetary elements included in agreement/judgment)
3. Time from initial filing to final disposition
4. Post-disposition actions, if any (e.g., payment review, civil arrest warrant, post-disposition filings for breach of initial agreement; modifications of prior agreement)

E. Court fees

1. Costs and fees assigned to each party
2. Fees and court costs received by court

F. Judicial officer characteristics

To the extent that individual judicial decisions and practices are a part of available datasets, information about judges may provide useful insights. Judicial characteristics can include race, gender, sexual orientation, national origin, ethnicity, age, elected/appointed status (as best as can be known).

III. Litigant demographics

What can we know about the difference between the majority of people living in the U.S. who have civil legal problems and those who are parties to court proceedings? Unlike criminal court cases, the civil legal system does not tend to specifically collect data on litigant demographics such as gender, sexual orientation, race, national origin, ethnicity, age, family status, or economic status. Some of that information may be extrapolated from what courts do collect (e.g., if date of birth and/or name are reported); other data points, such as zip code and primary language, are in large part already collected and can be more easily reported and analyzed.

The word “litigant” is used in the broadest application, including those who are sued but may not respond, for example because they were never aware of the lawsuit in the first place. In addition, litigant demographics can be compared to census and other data sources to begin to gain an understanding of the majority of individuals who have a civil legal problem and do not use the court system as an avenue for addressing that problem.

IV. Connection to data outside the courts

State administrative agencies and other government actors interact and report on the experiences of individuals navigating their systems. Courts can better connect the case-level and aggregate-level reporting on court cases to related systems.

Facilitating Data Access and Use

As mentioned above, there are important privacy and confidentiality considerations that must be addressed alongside the need for open and transparent information about how courts operate. In addition, the variation in ways that court data are collected, labeled, and identified presents a solvable problem for researchers seeking to analyze court data across jurisdictions.

Researchers have the opportunity to strike a balance between openness and confidentiality by forming agreements with courts about safe and permissible uses for court data, including data use and data sharing agreements, or broader memoranda of understanding. Empirical legal scholars and social scientists regularly engage in such agreements with government entities that hold data, including courts. To facilitate access across research institutions and to limit administrative burden on courts and other data holders, the AAAS project is exploring the concept of research data centers and similar repositories a central space for holding and securing data to be used for research purposes.

A uniform coding system and shared data collection standards are required to compare cases between counties and states. In the best of all possible worlds, the coding system would also track the codebook of legal needs created by the Legal Services Corporation, as well as a common taxonomy developed for legal service providers.

Access to Justice: An Agenda for Legal Education and Research (2013)

Deborah L. Rhode
62 J. LEGAL EDUC. 531

. . . One central problem in discussions about access to justice is a lack of clarity or consensus about what exactly the problem is. To what should Americans have access? Is it justice in a procedural sense: access to legal assistance and legal processes that can address law-related concerns? Or is it justice in a substantive sense: access to a just resolution of legal disputes and social problems? . . .

Efforts to understand the distribution of legal services and unmet needs have suffered from the absence of any central organization responsible for collecting such data. Although bar associations, the Legal Services Corporation, state access to justice commissions and various court administrative bodies have all made efforts to map the demand side of the legal market, their cumulative efforts provide only a partial, and not readily accessible, picture.

One common approach is to ask a random sample of low-income (and sometimes moderate-income) individuals whether they have experienced specified problems that could be addressed by law and how they have responded. The most recent national study was published by the American Bar Association in 1994. Proposals to repeat it have been rejected as too expensive and unnecessary. However, the Legal Services Corporation has compiled information from more recent state surveys. They typically find that low-income households encounter two to three legal problems a year and that they seek help from an attorney (private or publicly funded) for only about a fifth of their problems. The corporation also reports that about half of those who seek assistance at federally funded offices are turned away. . . .

Although useful to a point, these studies also have inherent limits. They likely underestimate unmet need because they rely on subjective perceptions of individual problems, and many individuals may be unaware of rights and remedies. . . . Nor do such studies capture collective problems that public interest organizations address, such as environmental risks or inequitable school financing structures. Surveys documenting the numbers of eligible individuals turned away by legal aid offices give no indication of the much larger number with legal problems who fail to make contact with providers because of disability, language barriers, geographic isolation, insufficient information or lack of confidence in the value of seeking assistance. Nor do these studies reflect the needs of the near poor and moderate-income individuals who cannot realistically afford legal representation or who find the price excessive in light of the expected outcome. . . .

Neither do legal needs studies provide an adequate understanding of the stratification of access to justice by characteristics such as race, ethnicity, age, gender and geographic region. The fragmentary research available reveals considerable disparities in the amount of aid available. Certain subgroups are chronically underserved; the rural poor and non-English speaking immigrants face particular obstacles. . . . Little systematic research is available on how these barriers operate and how they might best be addressed. . . .

Comprehensive data are lacking on the supply side of the legal market as well. What is the range of services available for particular problems for low-income clients, how are they funded and how do they compare in cost and accessibility? Although various groups collect some information, it is highly fragmentary and frequently leaves out certain providers, such as attorneys offering pro bono, “low bono” (reduced rate) or “unbundled” (partial) representation. Also often omitted are certain forms of assistance such as advice-only hotlines, courthouse pro se services and online form preparation programs. No national data are available on the number of self-represented litigants and the aid they receive. One survey found that only 11 states had comprehensive programs to help pro se parties, 19 states had partially integrated programs, 14 had highly limited “emerging” programs and eight states did not bother to respond and were assumed to offer little or no assistance. . . .

We also lack information comparing the cost effectiveness of various delivery mechanisms. To make rational allocations of resources, decision makers need to know what outcomes different forms of assistance produce, how long they take, how much they cost, how satisfied recipients are with the services and results, how much stress and instability recipients experience before their legal problems are resolved and what long-term social impact results. . . .

For certain forms of assistance, such as pro bono service by private lawyers, systematic evaluation is almost entirely lacking. We know very little about the range and quality of services provided. . . .

For other forms of assistance, such as hotlines and pro se assistance programs, evaluation research is also highly inadequate. Most surveys simply ask clients and court personnel about the services provided and generally find high rates of satisfaction. However, when clients are asked about satisfaction with results, the findings are more mixed. One sobering study found more unhappiness among people who had received assistance from a self-help center than among those who received no aid. The pro se staff apparently had done a good job in explaining tenants' legal rights, but not in communicating what was likely to happen when a litigant attempted to exercise them. By contrast, unassisted parties were less well informed about the remedy they might achieve and therefore less disappointed when they failed to obtain it

We also need better data on the factors that motivate, sustain and support attorneys who serve underrepresented groups. . . .

Related research should also address the growing disconnect between legal needs and employment patterns. Since the 2008 recession, the American legal profession has suffered significant job loss. . . . [A]t least some of the problem is structural and not simply a function of the downturn. Our restrictive legal licensing and law school accreditation structures have long worked to price legal services out of reach of those who need them most. The limited data available suggest that many routine needs of low- and moderate-income individuals could be met by those with less expensive educational preparation. More comprehensive research on alternative licensing frameworks could point the way toward a more cost-effective educational structure.

More information is also necessary about the challenges facing public interest legal organizations and pro bono programs, as well as the responses that have been most successful. . . . More comprehensive information is needed about the intersecting political, doctrinal and financial constraints that hobble public interest work and what might best address them. Research is also critical concerning efforts to increase the quantity and monitor the quality of pro bono work. What can we learn from jurisdictions that require lawyers to report contributions or that make such contributions a factor in allocating paid legal matters? Would promulgating best practices or model surveys on quality and

satisfaction make a difference? It is not enough for lawyers to label their assistance “pro bono publico.” They also need to know to what extent the public is actually benefitting. . .

Law Schools Must Focus on Access to Justice; Fordham, Stanford and Other Institutions Are Working to Lessen the Legal System's Limitations (2016)

Jonathan Lippman, Matthew Diller & David Udell

NAT'L LAW J., Sept. 26, 2016

We have arrived at a critical moment where our most fundamental legal ideals are threatened by a profound justice gap. Millions of people—evicted tenants, indigent defendants and immigrant mothers—find themselves buffeted by legal processes that do not assure a meaningful right to be heard, much less representation by competent counsel.

Teaching the next generation of lawyers the values, knowledge and skills needed to deliver on the promise of access to justice is paramount. To do this, Fordham University School of Law and other leading law schools are placing the issue of access to justice at the center of legal education. . . .

[In fall of 2018], Fordham Law School begins its Access to Justice Initiative. The effort aims to serve as a national model for legal education in accordance with the law school's credo, “In the Service of Others.” Fordham Law aspires to bring the importance of adequate representation to the fore throughout its curriculum, educating students about the justice gap and opportunities for reform. The initiative will focus our direct-service efforts as students and faculty provide legal help in communities direly in need. Finally, we will bring to bear our research capacity, informing lawyers, policymakers and the public about access to justice. As a capstone to this commitment, the National Center for Access to Justice relocated to Fordham Law in fall 2016 to infuse the initiative with cutting-edge research and analytical techniques.

The center created the data-driven Justice Index, www.justiceindex.org, which ranks, compares and promotes progress in state justice systems to help expand and assure access to justice for all. . . .

Our Vision, Work, Campaigns, and Clearinghouse (2019)

The Fines and Fees Justice Center

Finesandfeesjusticecenter.org/about-fines-fees-justice-center

Our Vision and Our Work

The Fines and Fees Justice Center seeks to catalyze a movement to eliminate the fines and fees that distort justice. Our goal is to eliminate fees in the justice system and to ensure that fines are equitably imposed and enforced.

Our justice system is supposed to operate with integrity—providing equal justice for all. Yet in far too many places in the United States, court fines and fees have put an exorbitant price tag on justice. Across the country, courts impose fines as a punishment for minor traffic and municipal code violations, misdemeanors and felonies. Courts then tax people with fees, surcharges, and costs used to fund the justice system and other government services.

Fines and fees devastate the lives of millions of Americans. People who cannot immediately pay face additional fees, license suspensions, loss of voting rights and, far too frequently, arrest and jail. Millions of Americans get trapped in the justice system simply because they can't afford to pay fines and fees. Stuck in a cycle of punishment and poverty, people can lose their jobs, their homes, and even their children. We've created a two-tier system of justice where poor people—and particularly communities of color—are disproportionately punished.

As national center for advocacy, information, and collaboration, the Fines and Fees Justice Center's mission is to create a justice system that treats individuals fairly, ensures public safety and community prosperity, and is funded equitably. FFJC works collaboratively with affected communities and justice system stakeholders to end abusive collection practices and eliminate the justice tax.

To accomplish our mission, the Fines and Fees Justice Center (FFJC) is pursuing a three-pronged approach:

1. Developing a replicable advocacy model for comprehensive state-based reform,
2. Creating a national Clearinghouse to provide information about reform efforts in all 50 states, and
3. Providing support for reform efforts around the country.

State Campaigns

The Fines and Fees Justice Center works in states to achieve comprehensive reform. Working with directly impacted communities, FFJC is building broad-based coalitions from across the political spectrum including grassroots organizations, judges, public defenders, prosecutors, legislators, law enforcement, and faith-based and advocacy organizations.

Initially targeting the most egregious practices, each state coalition will create a community-driven strategy for legislative and policy reforms. Our goal is to capitalize on the momentum of early success to achieve comprehensive, community-centered and durable reforms. We aim to create a replicable advocacy model that can be used to drive reform across the country, including effective communication and media tools, research, and best practices.

Currently, FFJC has active state campaigns in Florida and New York. If you want to join our coalition in either Florida or New York, or if you want to find out more about our campaigns, please visit our Florida and New York campaign pages.

Clearinghouse

FFJC's online Clearinghouse collects and organizes research, pilot projects, litigation, legislation, court-rule changes, data, media, and community voices related to fines and fees reform in the United States. The goal of the Clearinghouse is to provide an easily-accessible library of information about fines and fees reform efforts around the country. Every piece of Clearinghouse content includes a summary written in plain language, and users can control how they navigate the Clearinghouse by applying combinations of filters: jurisdiction (e.g. Arizona), the type of content (e.g. legislation), and by the subject matter of the content (e.g. driver's license suspensions).

The Clearinghouse also contains actionable guidance and tools that can be used by policymakers, advocates, courts, and community organizations interested in reform. For example, a community organization interested in ending driver's license suspensions for non-payment of fines and fees would find legislation, research on the negative impacts of suspensions, and pilot reinstatement projects.

National Reform Hub

FFJC serves as a hub for the fines and fees reform movement, working with impacted communities, researchers, advocates, legislators, justice system stakeholders, and media all across America. We provide resources, make critical connections, and offer strategic advice. Organizing and participating in national coalitions and convenings, we help reformers collaborate effectively and share their experiences and best practices. FFJC staff are frequent speakers at conferences and meetings, helping to educate the country about fines and fees.

Measures for Justice (2017)

Measuresforjustice.org/about

... Problem

We cannot answer basic questions about how well justice is working in this country. Instead, we are spending billions of dollars on reforms with no way to gauge their success. The public feels cheated. System practitioners are overburdened. Legislators are short on resources.

Solution

Gather criminal justice data from all 50 states and make them available to everyone, for free, so we can begin to see where problems and success stories thrive. Enter Measures for Justice (MFJ). On May 23, 2017, MFJ published six states' worth of the most

comprehensive data ever to be released to the public for free. For the first time, everyone could see how the system was functioning. Our team:

1. Designed and implemented a ground-breaking methodology for county-level data collection and measurement.
2. Developed an easy-to-use but rigorous Data Portal to showcase our findings, complete with a “Filter” function to see disparities based on race, indigency, sex, age, and type of crime.
3. Uncovered problems no one knew existed.
4. Inspired counties to use our data to save money and improve defendant outcomes.
5. Made lawmakers understand they had to change the way they collect criminal justice data.

Background

Measures for Justice (MFJ) was founded in 2011 to develop a data-driven set of performance measures to assess and compare the criminal justice process from arrest to post-conviction on a county-by-county basis. The data set comprises measures that address three broad categories: Fiscal Responsibility, Fair Process, and Public Safety.

MFJ developed and tested its first draft set of measures with a grant from the Department of Justice’s Bureau of Justice Assistance. MFJ gathered some of the finest measurement experts in the country with diverse expertise in the judicial system to isolate useful indicators of system performance and from them develop MFJ’s initial set of measures. These were first piloted in Milwaukee County, Wisconsin, and then extended to cover the entire state. Based on the success of that pilot, MFJ received funding to measure more states.

Data collection across a country whose records are maintained differently county by county has required some innovative and old-fashioned methods. MFJ acquires its data by approaching state and local leaders, often traveling county by county. In the process, we solicit feedback on our metrics and counsel on the limitations of the data we’re acquiring. We also share with state and local leaders the purpose of our work. Back in Rochester, NY, our eighteen researchers and technologists with PhD and Master degrees in Criminal Justice, Public Administration, Cognitive Science, and Computer Science from major universities across the U.S. work on cleaning and coding the data. They also work on software automation to streamline the process of cleaning and standardizing data from disparate sources. With this combination of strategies, MFJ is able to aggregate case-level data into one central repository.

This data repository is paramount to MFJ’s mission because transparency in the criminal justice system is paramount to more informed discussions about how it’s working. MFJ does not advocate any specific reforms, but we do acknowledge that transparency provides a basis for positive, change-focused dialogue as needed. With this in mind, MFJ

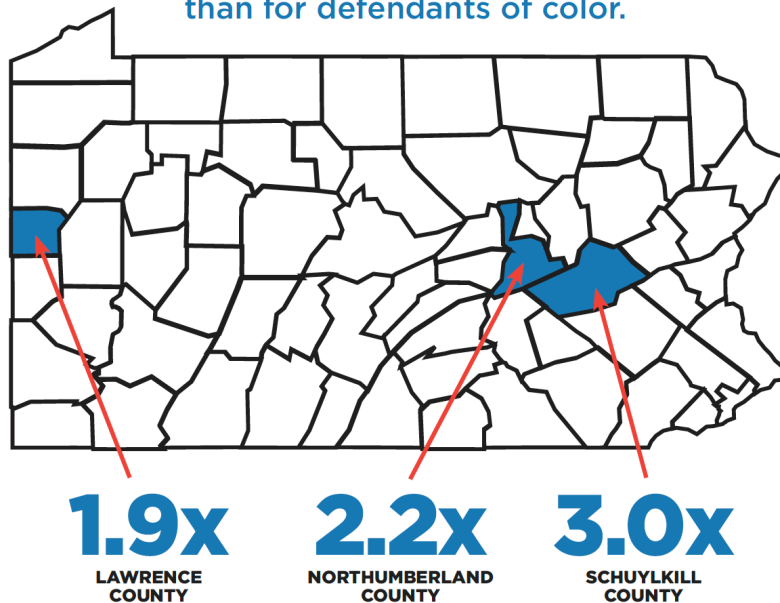
has developed a web-based platform that convenes all its data and analyses and offers them free to the public. The platform is searchable and can be configured to break down performance data across multiple factors including race/ethnicity; sex; indigent status; age; and offense type. The platform also allows for county-to-county comparison within and across states.

MFJ's data platform is unprecedented in scale and scope. It is designed for any user—from criminal justice stakeholders to average citizens interested in how their county is performing—and, in this way, offers up a neutral language that reform initiatives can deploy. MFJ's goal is to ensure the platform becomes the go-to resource for legislators and advocates—for anyone in a position to initiate and catalyze criminal justice reform.

MFJ's Data Portal

To date, we've offered up a way to figure out where the problems are at the county level. Why do we measure counties? Because most people encounter the criminal justice system at the county level and most of the important decisions are made by county-level actors: judges, prosecutors, sheriffs, etc. Moreover, state and national numbers tend to drive people into action without telling them where or what action is needed. For instance: "African Americans constitute nearly 1 million of the 2.3 million people incarcerated, a rate at nearly six times that of whites." These numbers are informative, but they don't tell you where to start dealing with the problem. So why not get data that do? This is what our Data Portal is all about.

The percentage of white defendants diverted for minor crimes in Pennsylvania counties is sometimes **three times higher** than for defendants of color.



Diversions allow defendants to enter rehab, do community service, etc., in lieu of getting a criminal record. Diversions can save counties hundreds of thousands of dollars a year in jail and prison costs.

With this data, we now have some idea of where to channel resources.

MFJ's Impact: Financial

Local criminal justice data can drive pragmatic criminal justice reforms that can improve public safety, make the system more fair, and save billions of hard-earned taxpayer dollars at the same time.

The cost of our current system is huge, and growing fast. The combined cost of state corrections spending has grown an astonishing 400% in just the past few decades, even though crime has been on the decline for two decades. In fact, corrections costs have risen so fast and so high that eleven states now spend more on corrections than on higher education.

Our data can help solve this problem. They are helping already. Some examples:

1. With our data, Keir Bradford-Grey, Chief Public Defender in Philadelphia, PA, found out Philadelphia County had a higher rate of pretrial release violations than the state average. So she piloted a program that connects defendants with tailored social services.

The result was that 90% of those defendants did not violate again.

Attractive Math: Defendants who violate the terms of their release end up back in jail. Jail in Philadelphia costs about \$116 a day. So if only 10 people are kept out of jail, the county will save \$1,160 a day. That's \$423,400 a year. Imagine scaling this to the state level where there are over 20K pretrial violations per year.

2. Christian Gossett, D.A. of Winnebago County, WI, found out that 40 percent of the people in his county who failed to pay low bail were jailed for failing to pay bails of \$500 or less. He used these data to change office policy, with the potential to save \$45k a year—quite a lot for a rural county with a population of around 170k.

Now, imagine \$45k x 3,000 counties in the US. That's \$135 million in savings—money that could be reinvested in programs for the mentally ill, substance abuse, chronic homelessness, education, etc. . . .

MFJ's Impact: Legislative

Closing the Criminal Justice Data Gap

Florida recently passed a law to reconfigure its data collection system to accord with our best practices. Under the new plan, disparate criminal justice data will be available continuously—very close to live or real time—for anyone who wants to use them.

MFJ is helping Florida make the transition. The law set the stage for how data are going to be collected for the whole country. Either MFJ collects them; or we provide the know-how and impetus for governments to start collecting the data themselves.

How did this happen?

In May 2017, MFJ launched its Portal with data from six states, including Florida. When Florida policy makers reviewed the data, they immediately realized the state had a wide data gap to fill. MFJ was invited to educate the Florida House Judiciary Committee on the gap and the possibilities for Florida if more and better data were collected in a uniform way.

Fast forward six months. The Florida legislature passed a bill that mandated uniform and comprehensive data collection and recording based on our data elements. A central repository will connect different criminal justice data (courts, prosecutor, public defender, law enforcement) and present them in a user-friendly manner to the public. The law was hailed nationwide. Now the state is piloting the project in Florida's 6th circuit court. MFJ is leading the pilot.

Florida is the Future

Florida understood that only with comprehensive data could the state broach intelligent reform. As former Florida Attorney General Richard Doran wrote in an op-ed in the *Tampa Bay Times*:

This is our first time having access to this important data; such information can be the launching point for change. It is about seeing our achievements and shortcomings and improving them by replicating better practices. But better practices can only be ‘better’ when they are markedly improved, when we are building from something that is measured. . . .

Measures for Justice is supported by the Chan Zuckerberg Initiative, The Ballmer Group, Google.org, MacArthur's Safety and Justice Challenge, the Laura and John Arnold, Pershing Square, Draper Richards Kaplan, and Open Society Foundations, in addition to the Bureau for Justice Assistance in the Department of Justice.

Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice (2019)

Natalie Byrom, The Legal Education Foundation

...
2.1 In England and Wales, a £1bn programme of reform (“the reform programme”) aims to develop a modernised justice system where cases will increasingly be dealt with online. In whole areas of the justice system, such as divorce and civil money claims, physical and remote hearings will be reserved: “*only for those cases that cannot be otherwise resolved*” (Vos, 2018:2). The stated ambition of these reforms is to create: “*a courts and tribunal system that is just, and proportionate and accessible to everyone*” (Lord Chancellor et al. 2016:4). By March 2023 Her Majesty’s Courts and Tribunal Service expects to: “employ 5,000 fewer full time equivalent staff, reduce the number of cases held in physical courtrooms by 2.4 million per year and reduce annual spending by £265 million.” (NAO, 2018:5). Savings will be achieved through lower administrative and judicial staff costs, fewer physical hearings and a reduced estate, with new hearing centres replacing court buildings.

2.2 Whilst the reform programme is being delivered by Her Majesty’s Courts and Tribunals Service² with the budget and business case approved by the Executive, the settlement achieved through the enactment of the Constitutional Reform Act 2005 has resulted in the judiciary adopting a crucial leadership role in relation to the reforms. Lord Thomas, the then Lord Chief Justice, speaking in 2015 stated that: “*the overhaul of the machinery of justice now to be delivered would never have occurred without the judiciary assuming*

its new role of leadership” (Thomas, 2015:13). In keeping with their prominent role in instigating and overseeing the reform programme, the senior judiciary have proposed six criteria according to which the projects developed will be: “*tested, and if successful, implemented*” (Ryder, 2018:2), the first of which is: “*1. Ensure justice is accessible to those who need it ie to improve or maintain access to justice;*”

2.3 In addition, in the summer of 2018, the Public Accounts Committee, a body tasked with “holding the government and its civil servants to account for the delivery of public services” conducted a review of progress made in respect of the reform programme. One of their recommendations, which HMCTS have agreed to is: “*...write to the Committee by January 2019, setting out how it will identify and evaluate the impact of changes on peoples access to, and the fairness of, the justice system, particularly in relation to those who are vulnerable.*”(HM Treasury, 2018:49). Official HMCTS publications have also referenced an internal commitment to capturing data that will enable HMCTS to: “*..change and improve [services] regularly in the future...make(ing) our changes future-proof by designing for further improvement*” (HMCTS, 2018:21).

2.4 With these commitments in mind, The Legal Education Foundation conducted a review of existing measures used to demonstrate the success or otherwise of public justice system Online Dispute Resolution projects on access to justice (Byrom, 2018), to understand what could be learned from international best practice. The review revealed an emphasis on indicators such as: (i.) reductions in cost (both to the court system and individual litigants); (ii) reduction in time to resolution; (iii.) reduced need for hearings (as hearings are associated with greater cost and increased time to resolution) (iv.) increased rates of settlement; (v.) increased case volume and litigant engagement; and (v.) subjective measures of procedural justice and user satisfaction. Whilst these measures are important, they do not clearly map to the existing definitions of “access to justice” set out in case law, or the measures used to assess access to justice in empirical research in physical settings.

2.5 In order to address the gaps in the existing approaches to measurement, The Legal Education Foundation in partnership with Professor Dame Hazel Genn (University College London) and Professor Abigail Adams and Professor Jeremias Prassl (University of Oxford), convened workshops with expert stakeholders including officials from HMCTS and the Ministry of Justice to recommend:

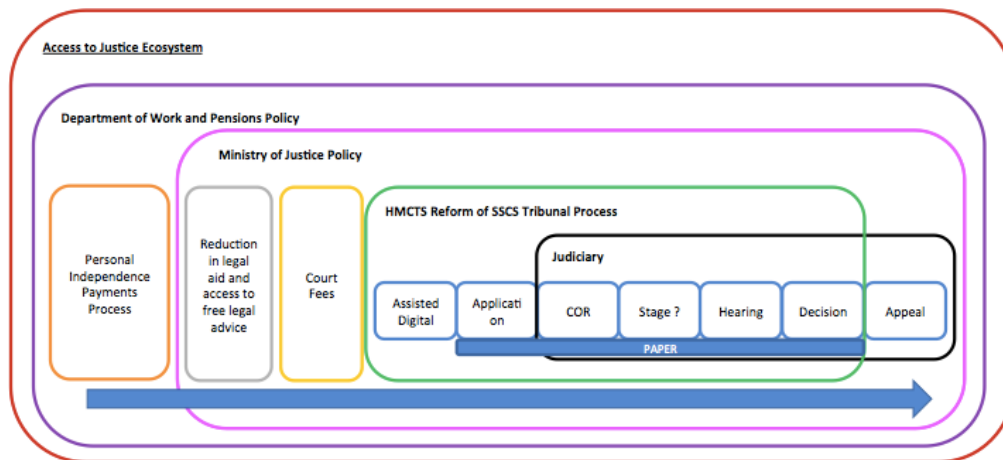
- (i.) The way in which an evaluation that robustly captures the impact of the reform programme on both access to the justice system and the fairness of the justice, particularly in relation to those who are vulnerable, should be approached.
- (ii.) The data that should be recorded through reform to facilitate continuous improvement in the interests of maintaining or improving access to justice. . . .

4.1 The reform programme is being conducted in the context of a justice landscape that

has seen significant changes in recent years. It is indisputable that there are numerous factors beyond the scope of reform that impact on the overall accessibility of the justice system- factors that range from the introduction court fees, reductions in the availability of public funding for legal advice and assistance and the low levels of public understanding of law and legal rights. However, the current reform programme is fundamentally altering the processes through which justice is delivered, and as such, it is incumbent on reform leaders to demonstrate (or create the data that enables others to demonstrate) that new systems do not impede access to justice by creating barriers to bringing a claim or design processes that place users at an unacceptable risk of being “processed unfairly.”

4.2 Disaggregating the impact of the reform programme (or the individual projects that comprise it) from other external factors is complex but necessary task. Figure 1 below illustrates this complexity, through attempting to describe the ecosystem of factors that impact on access to justice beyond the scope of the reform programme, using the example of Social Security Claims Tribunal Appeals project as an example. The recommendations in this paper focus on the part of the “Justice Ecosystem” that is within the remit of the HMCTS reform programme (shown in green in Figure 4.1 below).

Figure 4-1: Illustrative example of the access to justice ecosystem



4.3 The Public Accounts Committee recommendation, agreed to by HMCTS, underlined the importance of considering the impact of reform on: “access to, and the fairness of, the justice system, particularly in relation to those who are vulnerable”. As stated above, on 5 February 2019, the Ministry of Justice published their response to the Public Accounts Committee which set out, at a high level, the issues to be considered in the scoping of the evaluation of the reform programme. This response identified the need to construct a definition of “vulnerability” for the purposes of evaluation. Workshop attendees and consultees pointed to a range of materials that might be used to construct a

definition of “vulnerability.” . . .

12.1 External engagement in the development of a detailed evaluation plan for both the reform programme as a whole and the individual projects that comprise it has, to date, been hampered by the lack of availability of logic models and intended outcomes for individual service projects (such as Civil Money Claims Online service). We have heard from HMCTS (in their November 2018 response to the Public Accounts Committee) that the organisation is: “using insights from external research and academia to validate and challenge our approach”(HMCTS, 2018b:15). However, without specific, authoritative information regarding the nature of service projects, it is difficult for external researchers and academics to fulfill this role, and moreover, to assist in identifying the data and approaches necessary to conduct a robust evaluation. As such workshop attendees strongly recommended that for each individual service (for example Civil Money Claims Online) HMCTS should publish the underpinning logic models and intended outcomes for individuals at each stage of the process. These logic models should be made available at step two of the seven step project cycle adopted by HMCTS (HMCTS 2018b:18).

12.2 Stakeholders have heard from HMCTS that cross-cutting projects such as court closures (“estates”) and fully video hearings will cut across multiple service projects, however, stakeholders have not seen estimates of the percentage of individuals/cases within each service likely to be impacted by these cross-cutting changes. Workshop participants recommended that HMCTS set out these estimates at the earliest possible opportunity in order to: (i.) guide the design of the evaluation and (ii.) assist the legal advice and legal services sector in preparing for the impact of reform. . . .

12.4 In order to monitor the impact of reform both on access to justice for those who are vulnerable and on the fairness of the justice system, workshop participants recommended that HMCTS commit to embedding the collection of the thirteen data-points relating to vulnerability into each service at the earliest possible opportunity in the user journey. This is necessary to monitor patterns in attrition at different stages and the relationship between vulnerability and different types of outcome (e.g. settlement, withdrawal from the system).

12.5 Workshop participants stated that it is imperative that the evaluation of the reform programme should address the impact of reform on access to and the fairness of the justice system with particular reference to persons who share protected characteristics under the *Equality Act 2010*.

12.6 Workshop participants recommended that HMCTS consider the benefits and risks of introducing unique identifiers for individual users of the justice system. Unique identifiers at the user, rather than case level would facilitate the development of a detailed understanding of the way in which court users progress through the system, where and when they exit the system, and the outcomes they secure when they do so. This would support HMCTS to deliver a better service to users of reformed systems. If appropriately

anonymised, this data could also be of use to researchers and wider stakeholders (including policy-makers). Experts in privacy law and data ethics should be consulted to advise on the benefits and drawbacks of this approach and ensure that this data is captured, stored and utilised in a manner that respects the Rule of Law. . . .

Measuring Component 1: Access to the formal legal system

12.11 In determining whether a system poses an inherent risk to access to justice, the case law establishes that the test to be applied is whether: “looking at the full run of cases...that go through the system, the other forms of assistance relied on by the Lord Chancellor are adequate and available” to ensure effective participation (*R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor* [2017] EWCA Civ 244 [51]) and “whether the safeguards relied on are sufficient to render the system fair and just” (*R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber)* [27]). Answering this question requires: “a detailed examination of the support that is available in practice” (*R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor* [2017] EWCA Civ 244 [52])

12.12 In the case of the reform programme, the practical support and safeguards put in place to ensure that access is not impeded are (i.) the assisted digital programme, which is designed to help those who are ‘digitally excluded’ or lack digital skills to engage with new processes and (ii.) the continued existence of a paper channel. The National Audit Office reported in May 2018 that HMCTS has assumed that: “at least 70% of users will move to online services within five years.” . . . Based on the experience of other government departments, workshop participants felt that these estimates may be overly optimistic and raised concerns that, if these conversion rates were not secured, the paper and assisted digital routes may not be adequately resourced to cope with demand. Workshop attendees argued that any evaluation of the impact of the reform programme on access to justice must examine both the operation of assisted digital and the paper channel, and the experience of individuals who use them.

12.13 Recent case law (*R(Unison) v Lord Chancellor* [2017] UKSC 51[96]) has established the principle that changes to the justice system should be assessed according to their likely impact on behaviour in the real world. . . . Justice (2018:42) has highlighted the importance of monitoring the impact of the court reform programme on motivation and confidence to access the justice system. As such, workshop attendees considered that an element of survey work to explore the impact of reform on attitudes to the justice system could be helpful in generating insights into the impact of the programme on the ability and willingness to initiate claims. Pleasence and Balmer (2018a) have published standardised inventories designed to measure confidence in the civil justice system that could be deployed to assess changes over time.

12.14 Workshop participants welcomed the proposals from HMCTS to incorporate measures of “cost” and “effort” into the performance framework for the reformed system. Previous research . . . has explored the link between the cost of access to the justice system

(court fees and perceptions regarding the cost of legal advice and representation respectively) on willingness and ability to initiate claims. Workshop participants strongly recommended that any evaluation of the reform programme should explore the impact of reform on the effort involved in initiating and resolving a claim on different types of service user, with particular emphasis on monitoring the impact on those who are vulnerable. For example, in the context of Civil Money Claims, it is possible that digitising processes and moving them online reduces the effort expended by claimant companies, whilst increasing the effort burdens placed on vulnerable defendants. Attendees recommended that the definition of and approach to measuring “effort” adopted by HMCTS be made available at the earliest possible opportunity.

12.15 Workshop attendees also raised the point that digitisation of processes has an *ex ante* ambiguous effect on the ability of individuals to initiate claims. Digitisation may make it easier for certain types of claimant to initiate claims, whilst deterring others. Reducing barriers to accessing legal processes may alter the types of cases that individuals pursue through the justice system. In light of this, workshop participants strongly recommended that changes in the characteristics of claimants initiating cases and the types of cases being initiated should be monitored, in order to understand the impact of reform on access to justice.

Measuring Component 2: Access to a fair and effective hearing

12.16 Workshop participants identified the concept of: “a fair and effective hearing” as a crucial component of any definition of access to justice, noting that the existing case law on access to justice gives primacy to the notion of an individual being able to put his or her case effectively. Discussion at the workshops focussed on four issues: (i.) subjective measures of fairness and efficacy, (ii.) objective measures of fairness and efficacy, (iii.) the imperative to monitor the impact and accuracy of triage procedures within new services and (iv.) the need to understand the impact of change of “mode of hearing” on judicial decision making, in order to ensure that physical and online hearings deliver equality of fairness and efficacy.

Subjective measures of fairness and efficacy

12.17 In relation to measuring subjective fairness and efficacy: workshop participants expressed concern that to date, HMCTS has relied on “user satisfaction” surveys as a proxy for measuring the efficacy of new services rather than established measures of procedural fairness. For example, in reporting on progress in respect of the Civil Money Claims Online service, the Chief Executive of Her Majesty’s Courts and Tribunal Service Susan Acland-Hood stated that: “Over 80% of users including claimants and defendants have told us that the service was very good” (HMCTS, 2018:12). To date the questions used to assess user satisfaction have not been made publicly available, making it difficult to assess the extent to which the user satisfaction surveys deployed map to existing validated approaches for measuring procedural justice. Workshop participants strongly recommended that existing validated tools be used to monitor subjective perceptions of procedural fairness as part of any evaluation of new online services (for an example of

these validated tools see Sela (2016) at Appendix C).

Objective measures of fairness and efficacy

12.18 Further to this, it was strongly recommended that data from validated subjective measures of procedural justice be combined with data from objective indicators of procedural justice as part of any evaluation of the impact of reform on the fairness and efficacy of hearings. Workshop participants emphasised the importance of including objective measures of procedural justice in any evaluation of new processes such as Continuous Online Resolution or virtual hearings, particularly where they are likely to involve vulnerable individuals. Participants noted that those who have low levels of legal knowledge, are disadvantaged or are involved in disputes of subjective importance are most at risk of exploitation if the sole focus of evaluation is based on subjective indicators of procedural justice. The Center for Court Innovation in the USA has developed a range of tools for evaluating procedural fairness in court settings, including both subjective and objective measures (Gold La Gratta and Jensen, 2015) recognising that those individuals who lack legal knowledge, advice and support are unlikely to be well placed to assess the legality a given process or procedure. Accordingly, workshop participants emphasized the importance of building in opportunities for third parties to read or watch ODR interactions as they took place as part of any evaluation in order to monitor the efficacy and fairness of new services.

12.19 The ex-ante ambiguous impact of the move to online processes on user behaviour underscores the need to incorporate measures of objective fairness into any evaluation of reform. Workshop participants with expertise in the design and evaluation of ODR systems emphasised that small changes in the design architecture of systems (e.g. altering the position of different boxes or questions) could radically impact on the behaviour of individuals in unintended ways. Given the lack of extant evidence exploring the impact of design architecture on user behaviour in the context of justice system processes, any evaluation of the impact of reform must entail comprehensive and ongoing evaluation of the impact of design architecture on user behaviour.

12.20 In addition, workshop attendees raised concerns that changes in mode might impact on user engagement with legal processes. Workshop attendees recommended that any evaluation of reform projects should explore the impact of new processes on litigant engagement. Participants recommended the use of management information or platform data to capture proxies for engagement with online or virtual processes, such as the dates and time of party interactions, the duration of time spent by party on each interaction with the ODR platform. It was also suggested that data relating to the volume and quality of evidence provided could be used as an indicator of engagement.

12.21 Workshop participants strongly recommended that data be captured on rates of representation between online and physical processes. Research conducted by Eagly (2015) into the impact of the introduction of remote hearings in immigration detention settings in the USA demonstrated that remote hearings impacted negatively on the level of litigant

engagement in the process- litigants perceived the process as less legitimate and therefore did not take full advantage of the legal safeguards available to them. Research published by the Ministry of Justice in 2010 into a pilot “Virtual Court” process that allowed defendants charged with an offence to appear in the Magistrates Court for their first hearing via a secure video link identified that: “the rate of defence representation was lower in Virtual Courts compared to the expectations of the pilot in the original model and the comparator area” (Terry, 2010:vi). The Lammy Review (2017) highlighted the impact of engagement with defence representation on outcomes for individuals. Participants recommended that discrepancies in patterns in engagement between physical and online processes should be monitored in order to ensure that parity of fairness is maintained.

Understanding triage

12.22 Workshop participants stated that the common law in England and Wales recognises that an oral hearing may be required: “when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted” *R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor [2017] EWCA Civ 244 (41)*. Publications relating to reform have emphasised that online processes, such as the new Online Civil Money Claims service and Continuous Online Resolution in Personal Independence Payment Appeals are primarily intended to target “relatively simple” disputes.

12.23 Given these objectives, workshop participants were concerned that HMCTS reflect on lessons from the experience of the Detained Fast Track (DFT) process. The DFT was: “designed to accelerate timescales for claims that were considered suitable for a quick decision” however in practice triage procedures were inadequate and vulnerable people with complex cases were regularly detained (IVAR, 2017:2). This had serious consequences for individuals- wrongly entering the process had a significant impact on a person’s chances of successfully claiming asylum- one study stated that in many years, the Home Office refused 99% of asylum claims that were placed on the Detained Fast Track (Detention Action, 2011:12).

12.24 Given this context, workshop participants called for increased transparency around the triage process adopted for identifying “relatively simple” cases and publication of the evidence base for deriving the triage process. Participants strongly recommended that evaluation of the reform programme should address the extent to which processes are effective in distributing cases to the most appropriate track or process.

12.25 Whilst triage processes are being designed and tested, workshop participants called for safeguards to be put in place to protect those who are vulnerable, for example, in the case of Continuous Online Resolution for Personal Independence Payment Appeals, workshop attendees strongly argued that decisions arising from the Continuous Online Resolution process should only be binding if they are in favour of the appellant. Workshop attendees also praised examples from the USA, where Online Dispute Resolution platforms such as Matterhorn have built-in safeguards to protect vulnerable individuals in

money claims, for example, making it impossible for litigants to mediate if they have a defence to a claim.

Understanding the impact of mode of hearing on decision making

12.26 An effective hearing requires both that individuals are able to present the information necessary to enable a decision maker to make a determination based on applying the law to the facts of the case and that the decision maker is able to comprehend this information.

12.27 Workshop participants therefore recommended that any evaluation of new processes intended to replace the function of physical hearings, such as Continuous Online Resolution or virtual hearings, should look at the impact of changes in mode on judicial attitudes, behaviour and decision-making in order to ensure that changing the mode of hearing does not impact on the way in which evidence is heard and understood.

Measuring Component 3: Access to a determination

12.28 Workshop participants affirmed that the constitutional function of courts is to apply the substantive law to the facts of the case. This is particularly important in a common law jurisdiction, where in order to develop the substantive law, cases must be determined by the courts.

12.29 Workshop participants noted that the business case for the reform programme is expected to be achieved through the creation of: “new online systems for mediation and resolution so that citizens can resolve more disputes outside the courtroom” (NAO:2018:4). This emphasis on ADR and settlement is not a new phenomenon. However, participants expressed concerns that the reform programme as currently constituted represented a wholesale endorsement of the proposition that the function of the justice system in certain areas is to promote resolution rather than vindicate rights. Accordingly, workshop participants strongly recommended that any evaluation of the impact of reform programme on access to justice must capture the impact of reform on the types of cases that are being decided before the Courts and the individuals who bring them in order to understand whether the impact of the reform programme is to replicate existing trends or create new ones.

Measuring Component 4: Access to remedy

12.30 Workshop participants emphasised that assessments of the impact of changes to the justice system on access to justice must take account of “behaviour in the real world” (Bogg, 2018: 513). In *R(Unison) v Lord Chancellor [2017] UKSC 51* [96] it was established that access to justice can be violated if changes to the system render it “futile or irrational to bring a claim”. Data on the enforcement of judgements can form part of an individual calculation as to the rationality of initiating a claim. In light of this, workshop participants recommended that data should be captured on enforcement rates, and time from decision to enforcement as part of any evaluation of the impact of the reform programme on access to justice.

III. Innovations and Intervention: Sampling New Research and Ongoing Data Collection

Law schools have become research hubs taking on a host of problems. This section offers but a few of the many institutes, centers, and programs underway. The brief descriptions are complemented by short excerpts from a few of the projects generating new data. The goals are to understand the impetus for such work, its relationship to the classes and clinics offered in law schools, the connections to reform efforts, and assessments of its impact.

The Policy Advocacy Clinic at Berkeley Law

The Community Advocacy Lab at Columbia Law School

The National Center for Access to Justice at Fordham Law School

The Center for Access to Justice at Georgia State University College of Law

The Criminal Justice Policy Program at Harvard Law School

Natalia Emanuel, Emma Harrington, Hannah Shaffer, and Jonathan Tebes,
Towards Estimating the Hidden Costs of Legal Financial Obligations, Harvard University Department of Economics and the Criminal Justice Policy Program at Harvard Law School (2019)

The Government Performance Lab at Harvard's Kennedy School of Government

The Brennan Center for Justice at New York University School of Law

The Center on Civil Justice at New York University School of Law

Lucas Guttentag, *Cataloguing Trump Administration Immigration Policies: A Comprehensive Compilation*, Yale Law School and Stanford Law School (2019)

The Justice Collaboratory at Yale Law School

The Arthur Liman Center for Public Interest Law at Yale Law School

The Policy Advocacy Clinic
Berkeley Law, Berkeley, CA

The Policy Advocacy Clinic (PAC) was founded in 2012 as a project of the East Bay Community Law Center Berkeley Law's community-based clinic. In PAC, teams of law and public policy students pursue non-litigation strategies to address systemic racial, economic, and social injustice. The clinic's approach is bottom-up (grounded in the lives of people), problem-based (addressing pressing issues), and client-driven (accountable to community groups).

Clinic students work under the supervision of faculty to support local, state, and national change campaigns while exploring the capacities and limits of law and public policy to solve problems. Since 2013, PAC students have assisted community groups seeking to end the regressive and racially discriminatory practice of imposing fees on low-income people in the criminal legal system, with a particular focus on abolishing fees in the juvenile system.

According to a path-breaking report by the Juvenile Law Center, almost every state imposes fees on families with youth in the juvenile system. The fees vary by jurisdiction, but families can be charged for their child's detention, probation supervision, electronic monitoring, drug testing, diversion, and legal counsel. Youth whose families cannot pay the fees face detention, extended probation, and high debt, pushing them deeper into the juvenile system and poverty.

PAC students extensively researched juvenile fee practices in California, which they found to be harmful, costly, and frequently unlawful. Counties charged fees to families whose children were not adjudicated delinquent, and some counties pursued fee collection even after the debt had driven families into bankruptcy. Research by criminologist found that fees correlate with recidivism, undermining the rehabilitative and public safety goals of the juvenile system.

Because African American and Latino youths are over-policed, over-prosecuted, and over-punished in California's juvenile system, courts and probation departments disproportionately impose fees on low-income families of color. Fees are based on the frequency and duration of system sanctions, so families of color are also charged higher fee amounts. Given most families' limited ability to pay, counties generate little or no net fee revenue.

Armed with research findings, PAC students provided legal and policy support to fee reform efforts, which led to significant county fee repeals. In 2017, California became the first state to eliminate all juvenile fees, establishing proof of concept that abolition is possible. Students are conducting on-going advocacy to persuade counties to discharge

outstanding fee balances. To date, counties have ended collection of more than \$235 million in previously assessed fees.

In partnership with advocates, activists, and law school clinics, PAC is also pursuing a multi-pronged juvenile fee reform strategy in other states. Since 2017, local jurisdictions in Kansas, Louisiana, Ohio, Pennsylvania, Texas, and Wisconsin have taken one or more steps to end juvenile fees, and statewide repeal bills are pending in Maryland and Nevada. With the Juvenile Law Center, PAC is organizing a “#DebtFreeJustice” campaign to end juvenile fees nationwide.

The Community Advocacy Lab
Columbia Law School, New York, NY

Through representation of social justice organizations and an intensive classroom experience, this clinic allows students to use a creative and expansive range of lawyering strategies to create change.

Clinic students develop and advance policy campaigns, design and evaluate legal services and access to justice programs, draft legislation and provide legislative advocacy tools, and act as problem solvers, innovative researchers, and strategic planners. Through this social justice advocacy, clinic students develop expertise in finding creative solutions to legal problems, reflect on the complex social and political aspects of legal problems, and develop lawyering skills that reflect the range of strategies beyond litigation that lawyers can use to create change. In doing this work, students develop a critical understanding of the complexity of poverty, social justice, and racial justice across different areas of law.

Community Advocacy Lab students work closely with the clinic director, colleagues, clients, and community members. Students attend weekly supervision meetings with the clinic director and work with clients and colleagues during weekly office hours. Students participate in a classroom seminar that:

Addresses the theoretical and substantive bases of their work;

Provides opportunities to reflect on ongoing client representation; and

Provides skill development in support of client work, including interviewing, research and information gathering, policy, legislative, and strategic analysis, written and oral advocacy, collaboration, working with diverse communities, project planning and management, professional ethics, negotiation, and media advocacy skills.

Community Advocacy Lab will begin taking students and representing clients in Fall 2019. Areas of initial focus are under development and may include criminal justice reform, juvenile justice reform, fines and fees in the criminal justice system, and civil access to justice. . . .

The National Center for Access to Justice
Fordham Law School, New York, NY

What is The National Center for Access to Justice?

The National Center for Access to Justice (NCAJ) works to expand access to justice, the meaningful opportunity to be heard. Access to justice is unavailable to millions of people even though its presence is often the essential difference between losing the right to raise a child or keeping the family together, between living homeless on the street or preserving the roof over one's head, between going to bed hungry or having enough to eat, and between suffering physical and emotional injury or finding refuge from harm. Access to justice is especially elusive for people facing language barriers, contending with disabilities, or living in marginalized and poor communities. It means specifically that people learn about their rights and assert them effectively in a neutral and nondiscriminatory process that determines facts, applies law, and enforces outcomes. We all have a stake in access to justice not only because we (and those we love) are likely to face legal problems in our lives, but also because the basic stability of our society—of our rule of law and of our democratic institutions—requires equal justice for all.

Connection with Fordham Law

NCAJ works with law schools, courts, the bar, and other justice system stakeholders, while enjoying a special relationship with Fordham Law School in New York City, where NCAJ is based and where David Udell co-chairs the Access to Justice Initiative with Dean Matthew Diller and NYS former Chief Judge Jonathan Lippman. NCAJ's affiliation with Fordham includes consulting with faculty members, working with Fordham's centers, institutes, and clinics, partnering on courses and projects, supervising law students on note topics and student papers, supporting pro bono projects, hosting diverse gatherings, and teaching.

Our Flagship Project

The Justice Index, justiceindex.org, an online resource, was created by a team of pro bono lawyers, statisticians, accountants, and coders. They were recognized with the ABA's 2017 Pro Bono Publico Award for creating carrot-and-stick incentives that improve the justice system by ranking the 50 states, Puerto Rico, and Washington, D.C., on the degree to which they have adopted best policies for access to justice. With 120 "indicators" and 5,000 data points, the Justice Index makes it easy for everyone to see and understand

these policies by sorting its findings into four categories: 1) the ratio of the number of civil legal aid attorneys to the number of people who are poor, 2) policies for self-represented litigants, 3) policies for people with limited English proficiency, and 4) policies for people with disabilities. Online since March 2014, the Justice Index is in its fourth year of increasing public understanding of American courts, facilitating social science research, and supporting justice system reform. It is widely covered in the media and used by countries developing justice indexes of their own. In an era when facts are questioned with “alternative facts,” it offers an objective measure of whether our nation’s commitment to equal justice is being honored.

The Center for Access to Justice
Georgia State University College of Law, Atlanta, GA

The Center for Access to Justice was founded in 2016 to support those working to ensure meaningful access to the courts and equal treatment in the civil and criminal justice systems, with a regional focus on the South. To that end, we convene stakeholders, engage in research and public education, and train the next generation of lawyers to serve the public interest.

Collaboration. The center serves as a convening space within the university context to explore existing obstacles to access to justice and discuss strategies for lasting change. To that end, we organize interdisciplinary workshops for faculty and graduate students; co-sponsor CLE programs for practitioners; host guest lecturers, including academics, policymakers, and lawyers; and collaborate with other departments, universities, and research centers to promote access to justice.

Research. The center also conducts and facilitates research to help identify and better understand the difficulties individuals face in navigating the justice system. For example, the center worked with the Sociology and Criminal Justice & Criminology departments at Georgia State and public defender offices in Fulton and DeKalb counties to study the civil legal needs of indigent criminal defendants.

Education. The center is a hub for students interested in pursuing public interest or pro bono work, either during or after their time in law school. Law students may enroll in the Public Interest Law and Policy Certificate Program, designed to give students the training and legal knowledge necessary to serve traditionally underrepresented individuals, communities and interests. The center also houses an award-winning, student-run Pro Bono Program, which connects law students with volunteer legal opportunities and facilitates

Alternative Spring Break—week-long trips during which students are immersed in a substantive legal issue while engaging in related pro bono service. The Center for Access to Justice is building a community at Georgia State to support student contributions to access to justice and encourage students to maintain a commitment to access to justice throughout their professional careers.

Below are a few examples of the research projects underway or recently completed by the center and its student fellows.

Access to Justice Map of Georgia. In partnership with Georgia Institute of Technology’s Joshua Weitz and Chad Wigington, the center produced an Access to Justice map of Georgia, which provides a snapshot of metrics that might affect how, and if, Georgia residents are able to gain ready access to the justice system. The data, compiled from a number of sources, are depicted graphically to demonstrate the ways in which geographic location and other demographic data may have a significant impact on the ability to utilize available resources in the pursuit of justice.

Eviction in Semi-Rural Georgia: The center was selected from a pool of 94 applicants to receive a 2018 Opportunity Grant from the American Bar Endowment, an independent 501(c)(3) public charity. The \$24,000 grant supports a pilot study exploring eviction in semi-rural Georgia. The study is a collaboration with the Georgia State Sociology department and the Georgia Legal Services Program.

Assessing the Civil Legal Needs of Indigent Criminal Defendants: Supported by a grant from the Charles Koch Foundation, the center conducted a study of the civil legal needs of indigent criminal defendants. In conjunction with the Sociology and Criminal Justice and Criminology departments at Georgia State, the center worked with public defender offices in Fulton and DeKalb counties to assess the nature and pervasiveness of civil legal issues facing those who enter the criminal justice system.

Misdemeanor Bail Reform: A Summary of Recent Efforts: Several states and municipalities, including Atlanta, have recently enacted or considered legislation to address pretrial policy, such as bail practices. The center prepared a report for the Georgia Judicial Council’s Committee on Misdemeanor Bail for its use in considering what changes might be implemented in Georgia.

Observations from Mississippi State Criminal Courts: As part of an Alternative Spring Break trip and in conjunction with the Mississippi Office of the Public Defender, students working with the center conducted court observation to identify trends in indigent defendants’ experience in state criminal courts. The

center then prepared a report detailing the unconstitutional practices students witnessed in some of Mississippi's misdemeanor courts.

Self-help Resources in Georgia: In 2016, more than 800,000 cases in Georgia involved self-represented litigants. In partnership with the Administrative Office of the Courts, the center worked with a student to profile a sample set of self-help resources available in Georgia courts.

The Criminal Justice Policy Program Harvard Law School, Cambridge, MA

Criminalization of Poverty

When the criminal justice system produces harsher outcomes for poor defendants due to their poverty, profound constitutional, policy, and moral concerns rise to the surface. The Criminal Justice Policy Program seeks to help policymakers end the criminalization of poverty.

Fees and fines, cash bail, private probation—all of these phenomena link criminal justice outcomes to a person's economic status. As former U.S. Attorney General Loretta Lynch recently noted, “[W]hat we are seeing in this country amounts to nothing less than the criminalization of poverty.” Criminalizing poverty violates basic notions of fairness. It also leads to stark racial disparities and can distort the operation of the criminal justice system by making courts and other actors inappropriately reliant on revenue extracted from defendants.

The Criminal Justice Policy Program has taken on several initiatives designed to counteract the criminalization of poverty.

Criminal Justice Debt: Excessive imposition of fees and fines, and harsh practices to enforce those debts, can lead to widespread abuse. The Criminal Justice Policy Program is engaging in a broad, nationwide effort to reform those practices through its National Criminal Justice Debt Initiative.

Cash Bail: Cash bail does not serve the purposes of pretrial justice: it is a poor tool for protecting the integrity of criminal proceedings or ensuring public safety. Yet it can have devastating consequences for individuals detained before trial simply because they cannot afford a cash bond. The Criminal Justice Policy Program works to support policy reform built around sound alternatives to cash bail. As part of that effort, it has published a Primer on Bail Reform. The primer provides guidance on

navigating the legal and policy terrain of pretrial justice in a system that moves beyond cash bail.

Private Probation: In many jurisdictions around the country, probation supervision is outsourced to private companies. Advocates and researchers have uncovered widespread abuse by private probation companies, often growing out of misaligned incentives that link a company's revenue to fees imposed on probationers. Along with partners in Georgia, the Criminal Justice Policy Program has launched several projects to reform unfair practices connected to private probation.

**Harvard University Department of Economics and the
Criminal Justice Policy Program at Harvard Law School**

Natalia Emanuel, Emma Harrington, Hannah Shaffer, and Jonathan Tebes
Towards Estimating the Hidden Costs of Legal Financial Obligations (2019)

This paper will empirically estimate the causal effects of legal financial obligations (LFOs) on legal debt, interactions with the criminal justice system (e.g. court appearances, recidivism, etc.), collection costs, and court revenue. Using detailed administrative records from Pennsylvania courts from 2008-2018, we will first document the prevalence and magnitude of LFOs and associated debt. Next, we will document the cross-sectional relationship between legal debt and our outcomes of interest. Since those who are unable to pay likely differ from those able to pay, we will implement an instrumental variables analysis that exploits the fact that defendants were quasi-randomly assigned to judges from 2008 to 2014. Since judges differ in their tendencies to waive LFOs for poor defendants, we can use judge assignment as an instrument for the level of LFOs faced by the defendant. By combining our estimates, we will calculate the marginal value (to courts) of reducing LFOs (which may very well be positive if court revenue is low and future court interactions are high). We also will explore the impact of LFOs by the defendant's ability to pay and provide suggestive evidence on what factors (e.g. suspension of driver's licenses, arrest warrants for unpaid debt, interest on unpaid LFOs, etc.) predict poor outcomes. In future work, we hope to link these data to credit reports and administrative tax records in order to estimate the causal effects of LFOs on employment, earnings, and financial health (e.g. unpaid bills, bankruptcy, access to credit, and borrowing). These additional outcomes will allow us to make welfare assessments that incorporate important defendant outcomes.

The Government Performance Lab
Harvard's Kennedy School of Government, Cambridge, MA

The mission of the Harvard Kennedy School Government Performance Lab (GPL) is to accelerate U.S. progress on difficult social problems by improving how state and local governments function. Each year the GPL receives applications from state and local governments across the country and awards grants of technical assistance to a set of applicants. The GPL model centers on intensive, on-the-ground technical assistance, hiring and training full-time employees and embedding them in government agencies to collaborate closely with governors', mayors', and agency executives' teams in leading intensive reform projects. GPL staff advance key initiatives through technical assistance including carrying out rigorous data analysis, identifying high-impact areas for systems re-engineering, implementing pilot projects to demonstrate innovative methods, and building government capacity for sustained change. To date, the GPL has carried out over 100 projects in 30 states across the country in policy areas including criminal justice, child welfare, workforce development, homelessness, behavioral health, and procurement systems.

The Brennan Center for Justice
New York University School of Law, New York, NY

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize—and, when necessary, defend—our country's systems of democracy and justice.

At this critical moment, the Brennan Center is dedicated to protecting the rule of law and the values of Constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them—in Congress and the states, in the courts, and in the court of public opinion.

Criminal Justice Debt

An increasing number of states and localities seek to close budget shortages by charging those who interact with the criminal justice system for everything from public defense to food and other basic necessities for life in prison. As a result, indigent defendants and their families bear costs they cannot afford. Defendants remain entangled in the criminal justice system long after serving their original punishment, and can end up back behind bars due to their debt, worsening mass incarceration.

The Brennan Center remains at the forefront of identifying and drawing attention to the negative consequences and questionable constitutionality of criminal justice fees and fines. We seek to reduce the use of this practice and establish clear, effective ‘ability-to-pay’ assessments that bar imposition of court-ordered fines on those who cannot afford to pay.

For several years, the Brennan Center has been working on a first of its kind study diving deep into the costs and revenues associated with fees and fines. Advocates have long suspected that collecting fees and fines requires significant costs to the taxpayers, but it is extremely difficult to quantify these costs, which range across diffuse and decentralized government agencies at the local, county, and state level.

Fees and fines are an extremely inefficient means of raising revenue. Jurisdictions are spending too little time evaluating defendants’ ability to pay, with troubling results. Across the jurisdictions we studied, more than a third of criminal justice debt is never collected. We found a large and growing backlog of unpaid debt that carries significant real-world consequences for those unable to pay, including incarceration, license suspension, disenfranchisement, and lower credit scores. The costs of collecting fees and fines is significantly higher in jurisdictions that jail for failure to pay.

The Center on Civil Justice

New York University School of Law, New York, NY

New York University School of Law is home to the leading group of scholars in the fields of civil procedure and aggregate litigation. Building on this strength, the Law School has created the Center on Civil Justice to connect its faculty with practitioners, judges, and other experts who share an interest in improving the civil litigation system.

This is a particularly suitable time to host this new Center, which officially launched in January 2014. The legal profession is just over seventy-five years into the modern era of the Federal Rules of Civil Procedure (FRCP). For all the promise of the FRCP to cut through the technical, non-merits forms of action of the common law period, the hoped-for “just, speedy, and inexpensive” adjudication of disputes appears an increasingly distant vision. Our legal world is far more complex than the FRCP could ever have envisioned.

In our current world economy, even routine transactions can trigger legal oversight by local, national, and multi-national jurisdictions—each with its own administrative, statutory, and adjudicatory regime. As a result, the complications and costs of adjudication

have ballooned. Some litigants have been forced to defend themselves in highly consequential, yet unaffordable, lawsuits (e.g., home foreclosures and deportations). Others with legitimate claims cannot afford to bring them to court; and still others, who have substantial resources, complain about the destructive effects excessive litigation costs have on business. At the same time that the cost of litigation has soared, trials in civil courts have all but disappeared as the expected means of resolving disputes.

It is time to take a fresh look at the role that litigation plays in our legal system without excessively focusing on specific litigated disputes. What would a legal system look like that acknowledged and accommodated an interdependent world market with a complex web of overlapping legal authority? How might a legal system manage large numbers of small-scale claims that could not separately stand the stresses of full adjudication? What of claims by ordinary people that would be squeezed out of the justice system because, although small, they nonetheless present complex issues expensive to unravel?

The Center on Civil Justice follows the same principles as the other successful Centers at NYU. The goal of the Center on Civil Justice is to look realistically at the problems stressing our civil justice system and to provide a forum for research, discussion, and writing about how the participants in the system can be more satisfactorily served, while preserving the values that have made it a pillar of our democracy. The Center joins scholars, practicing lawyers, judges, court administrators, and other interested participants and encourages them to explore anew the role that litigation plays in our legal system, the values that need to be preserved, and what can be done in the modern age to preserve them. Toward that end, the Center will initiate original research; organize conferences that include law professors, practitioners, and judges; and provide a unique forum for the discussion and debate of proposed civil justice reforms.

The Center operates under the direction of our resident faculty directors, Professors Samuel Issacharoff, Troy McKenzie, Arthur Miller, and Geoffrey Miller. Peter Zimroth, Monitor of the New York Police Department, retired Partner of Arnold & Porter, and former Corporation Counsel for New York City, joined the Center as its Director in January 2014. In addition, the Center has an advisory board made up of leading practicing lawyers, each in his or her individual capacity, drawn from both the plaintiffs' and defense bars, as well as leading members of the judiciary. The chair of the Board of Advisors is Sheila Birnbaum.

Aggregate Litigation Data Project

The Center on Civil Justice is engaged in efforts to make data from aggregate litigation cases publicly available. The Center is working with judges and claims administrators to ensure that judges, lawyers, academics, and policy makers have the data they need to understand what is and is not working in aggregate litigation cases, and to ensure that the important decisions being made in and about these cases are being made with the necessary information.

In 2018, the United States District Court for the Northern District of California updated its procedural guidance for class action settlements. Professor Samuel Issacharoff had previously given a presentation to the Northern District on the Center on Civil Justice's Aggregate Litigation Data project. The Northern District's guidance is an important effort to ensure that more data from class action settlements will be made publicly available in cases before that court, and beyond.

In 2017, the United States Senate overrode the Consumer Financial Protection Bureau and blocked an attempt by the CFPB to obtain data from claims administrators. The Center on Civil Justice remains committed to making public data that is currently held privately by claims administrators, and its work to do so is ongoing.

Dispute Financing Library

The Dispute Financing Library will serve as a neutral repository for documents and media related to third-party litigation funding. The Library will contain statutes, case law, legislative history, agency documents, articles, news stories, videos, and more. Most of the documents will be full-text searchable, and many will be freely available to download.

Cataloguing Trump Administration Immigration Policies: A Comprehensive Compilation (2019)

Yale Law School and Stanford Law School
Lucas Guttentag

The Trump administration has disrupted and altered the U.S. immigration system in multiple ways, ranging from high-profile actions, such as the travel ban and rescission of DACA, to innumerable less-visible but highly-consequently changes with large cumulative effects. Of central significance, none of these changes is the result of legislation or statutory amendments. Nor, for the most part, do the changes come from formal regulations. Rather, almost exclusively, the Trump administration is acting through executive orders, policy memoranda, internal directives, and other sub-regulatory mechanisms that are difficult to trace and monitor.

In the fall of 2017, as the end of the first year of the Trump administration was approaching, there appeared to be no systematic or comprehensive effort underway to catalogue all the new immigration policies and actions. A quick survey of advocates and organizations confirmed that no one was undertaking this effort. That led me to assemble a small team of Yale Law School students to brainstorm how we might take on that task.

The importance of this project was informed significantly by my two-year stint in the Obama administration from 2014-2016 as senior counselor on immigration policy to

the Secretary of Homeland Security, and previously to the Director of U.S. Citizenship and Immigration Services. That experience convinced me that a careful tracking of every change was essential both to capturing the myriad lesser-known new policies, and to developing an effective reform blueprint for a new administration. I had seen first-hand the lack of an agency institutional memory and began to understand the difficulty that new political leadership would have unraveling how and when earlier policies had been adopted. Career civil servants place little significance on when, and even by which administration, a policy was put in place. Thus, without an external catalogue of every Trump administration immigration action, a new president and executive branch leaders would have great difficulty identifying, prioritizing, and addressing the multitude of policies that can become embedded over a four-year period. In addition, the predecessor policies that the Trump administration replaces or abandons can be long-gone and forgotten by the time the administration leaves office. A catalogue of Trump policy changes is essential, both as a tool for advocates and policymakers, and as a roadmap for a new presidential administration.

With that in mind, we launched the “TrumpTracker” Immigration Project in November 2017, and I expanded the project to Stanford Law School in 2018. Over the course of the last eighteen months, nearly forty students at both schools have contributed to the project. The goal of the TrumpTracker Immigration Project is to identify all the rules, regulations, policies, directives, instructions, executive orders, and other actions governing immigration policy issued by the Trump administration through executive or administrative action. For each policy, the Tracker identifies the policy, collects the original source document whenever possible, identifies and collects any predecessor policy that was superseded or modified, and summarizes the information about both. The policy actions are divided into various subject areas for organizational coherence and convenience. They are Asylum/Refugees/Humanitarian, Visas, LPR/Naturalization/Citizenship, Enforcement/Detention, Department of Justice, Labor/Employment, 287(g) Agreements, and Legislation. Initially, all the information was collected and organized on a massive shared spreadsheet and all the underlying documents were centrally archived. Eventually, the data was to be available on an interactive website to make all the information accessible.

The project has two principal objectives. The first is to provide advocates, policymakers, and other interested parties with the data to allow a more thorough assessment of the scope and effects of Trump administration immigration policy changes. The second is to create the tool that allows legislators, candidates, and a new administration to undo the almost-countless policies that the Trump administration has adopted. The Tracker is designed to ensure that *every* Trump immigration initiative—not just the most notorious or well-known—is scrutinized and subject to reversal or improvement, and to guarantee that none is left in place because it is overlooked or buried in a bureaucratic maze.

The work on the TrumpTracker Immigration Project is undertaken primarily by law students. The students track a designated set of sources that report policy changes, such as government websites, immigration newsletters, think tank reports, legal news sources, and many blogs and list serves. Students teams “curate,” or edit the data to ensure consistency and completeness, check for accuracy, and manage the data spreadsheet. They review each other’s work and provide feedback in an iterative process, recommending changes in procedure or format, and on website design. A few outside experts have helped review entries and provided invaluable guidance. The website was custom-designed by Stanford computer science students based on team design concepts and ideas.

Progress on the Tracker accelerated in the fall of 2018, when I taught a seminar at Yale, Advanced Immigration Policy Reform. The course studied the doctrine and practice of administrative policy-making, including with guest speakers who had served as high-level government officials, agency counsel, legislative aides, and White House policy advisors. The students, most of whom had backgrounds in administrative or immigration law, worked in teams to systematically review and curate one of the categories in the Tracker before writing a final memo on how to apply the data for policy reforms by a new administration. I am teaching a similar seminar in the spring at Stanford.

Most of the students who have contributed to the project had little experience with this type of project. They come from a range of backgrounds, including legislative policy work, executive agency experience, immigration clinical experience, web design, and journalism. They are interested in a variety of fields of law. The team is often seeking new sources of feedback on the website, from colleagues, additional students with particular skills, and outside immigration advocates and experts. We are still in the first phase of the project as the website is scheduled to go live this spring.

Working together, we have created the most comprehensive collection of data on Trump administration immigration policy changes available anywhere. In addition to being an invaluable resource, we hope it may encourage and inspire advocates in other fields to undertake similar tracking to lay the groundwork for future reform.

The Justice Collaboratory
Yale Law School, New Haven, CT

Our Goal

Our goal is to bring the latest ideas in the social sciences to bear on current problems, and our core approaches include:

Legitimacy and procedural justice. We study popular legitimacy and develop theoretical models for the creation and maintenance of public trust.

Networks and network analysis. We import network models into the arena of criminal justice to both identify perpetrators and victims of violence and understand how police behaviors diffuse through departments.

Adolescent development. We contribute to research on the neuroscience of development and write about the process through which children and adolescents acquire their orientations toward the law and legal authority.

New models for understanding bias. We apply insights about the evolving nature of bias to evaluate criminal justice policies and practices.

Our Vision

Justice Forward is our vision for building a fairer and effective justice system.

To Move Justice Forward We Must:

Arrest the persistence of inequality and draw down the concentration of criminal justice exposure that itself can become criminogenic.

Mobilize and engage community members as co-producers of justice who have a stake in realizing justice-oriented goals.

Advance understanding of the reality that offending and victimization are concentrated and intertwined within the same small social networks.

Building This Vision Requires That We:

Transform the Goal: Legitimacy. The central goal of the criminal justice system must be to increase cooperation and trust between individuals and the state.

Transform the Focus: Communities. Criminal justice exposure is fundamentally linked to underlying inequalities in distributions of wealth and power; it burdens the same neighborhoods that have been weighed down by inadequate housing, failing schools, food insecurity, lead poisoning, and so on—often for generations. Communities, not individuals, are the most meaningful unit of analysis.

Transform the Language: Public Safety. Offending & Victimization. Public safety is not just the reduction of harm, the maintenance of order, or promotion of security. Rather, safety requires freedom from personal victimization, community disenfranchisement, and government overreach.

Projects

The National Initiative for Building Community Trust and Justice

The National Initiative for Building Community Trust and Justice (NI) is supported by the U.S. Department of Justice. The effort aims to improve relationships

and increase trust between communities and the criminal justice system. Fellow NI members include: the National Network for Safe Communities (John Jay College of Criminal Justice), Center for Policing Equity (John Jay College of Criminal Justice and UCLA), and the Urban Institute.

Justice Collaboratory staff work in collaboration with other members of the NI to design intervention programs that aim to improve police-community relations in six pilot cities (Birmingham, Alabama; Fort Worth, Texas; Gary, Indiana; Minneapolis, Minnesota; Pittsburgh, Pennsylvania; and Stockton, California). The interventions have been developed based on existing research concerning procedural justice, implicit bias, and reconciliation.

Procedural Justice Training for Practitioners

Members of The Justice Collaboratory, the Center for Policing Equity, and the Chicago Police Department's Education and Training Division developed a three-day procedural justice training module for law enforcement. This training addresses the theory and implementation of procedural justice as a means of building community trust, as well as the role implicit bias plays in police-community interactions. These three modules were incorporated into the National Initiative on Building Community Trust (NI) and adapted to the unique history and police practices of the six pilot sites: Birmingham, Alabama; Fort Worth, Texas; Gary, Indiana; Minneapolis, Minnesota; Pittsburgh, Pennsylvania; and Stockton, California.

The Justice Collaboratory is currently developing similar training materials for prosecutors, working alongside district attorneys who have volunteered to pilot procedural justice training for staff attorneys in their offices. Working closely with district attorneys' offices, we will design a procedural justice training that suits the unique needs of prosecutors. These materials will cover the theory of procedural justice, how prosecutors' discretionary decisions can either build on or detract from procedural justice, and how implicit bias impacts perceptions of fairness and trust.

A Community Study of Procedural Justice & Criminal Justice System Legitimacy

In partnership with the New York City Mayor's Office of Criminal Justice, The Justice Collaboratory is examining community-level perceptions of procedural justice—as applied not just to policing, but to the criminal justice system at large—and is measuring the effects of those perceptions on a range of outcomes. A second component of the project also examines perceptions of procedural justice among workers in various jobs in the criminal justice industry, and examines how their views impact upon the legitimacy of the system as a whole. Despite the salience of procedural justice throughout the criminal justice system, few studies have systematically assessed what constitutes procedural justice in the other component parts of the system or how individuals view procedural justice of one component of the criminal justice system in relation to others. Moreover, to date, few studies have attempted to measure perceptions of procedural justice on a community level, allowing comparison of procedural justice

and legal legitimacy across neighborhoods. In addition, procedural justice surveys have tended to focus on one criminal justice agency at a time, for example focusing on just police or just courts. While these more narrow studies have significant value, they omit the perceived procedural justice of other actors—probation officers, correctional officers, attorneys, and so forth—and overlook ways they may collectively contribute to communities’ perceptions of the legitimacy of the criminal justice system.

Workers’ Perspectives Study of Procedural Justice & Criminal Justice System Legitimacy

The goal of this study is to gain the perspectives of individuals working at the frontline of six key institutions in New York City’s criminal justice system (prosecutors, defense attorneys, judges, corrections officers, probation officers, and police) about the legitimacy of the institutions in which they work. The study will assess worker perspectives on procedural justice in order to enhance our understandings of how criminal justice systems build and sustain their legitimacy, and how workers in those systems contribute to that process.

Criminal Justice Reform Seminar: Theory and Research in Action

Most recently, students have worked closely with the staff of the Mayor’s Office of Criminal Justice in New York City to provide research and recommendations on three projects: 1) a review of national best practices for policing and adjudicating low-level crime, 2) building an effective approach to combating domestic violence and 3) developing “legitimacy indicators” that will feed into the new NYC “Neighborhood Stat Meter,” a tool that will be used to capture resident concerns and perceptions and other critical data to help stakeholders surface issues that impact the community’s sense of safety and identify actionable solutions.

Portals

The central purpose of this project is to describe and analyze the experiences of Americans—especially those from disadvantaged backgrounds—with police and other authorities in similar communities across several cities in order to develop better theories of how communities understand and assess police authority and legal authority more generally.

During the pilot phase of the project, which rolled out in Milwaukee, WI and Newark, NJ, approximately 200 conversations were captured and are in the process of being transcribed. The Portals project is expanding to new locations and will ultimately generate between 1,000 and 1,500 usable conversations of about 20 minutes each, equally distributed across sites.

The Social Contagion of Police Misconduct

The discourse around police misconduct often pivots on whether such behaviors are driven by a few “bad apples” or larger systematic or institutional problems. The truth, as it is in so many instances, is likely somewhere in the middle. Whether criminal offending or corporate malfeasance, deviant behavior is a learned

behavior and is influenced by the structure and content of one's social networks. Police misconduct is no exception and is most likely learned through informal relationships and interactions between officers. Indeed, on the first day "on the job," police officers often hear some iteration of the idea: "Forget what they taught you in the police academy, I'm going to show you how real policing works."

American Police and the Danger Imperative

Despite the fact that policing is getting safer, there exists a persistent and paradoxical rhetoric that claims police work is more dangerous than ever. This pervasive understanding of policing as dangerous creates a shared perceptual lens that is preoccupied with violence and the need for officer safety— a cultural frame that is termed "the danger imperative". How the danger imperative is constructed at a time when policing is objectively safer, and how this danger imperative affects officers' behaviors in this historical moment, are open questions.

Unfortunately, while policing and the criminal justice system are currently in the spotlight of academic attention, current sociological research on the criminal justice system and social control more broadly does little to investigate police officers directly. While sociological inquiry has not passed over police and the salience of danger in police work, these topics have gone largely unattended since research spurred by the police reform era of the 1960s and 70s.

Data Transparency Advisory Group (DTAG)

The Justice Collaboratory is leading a group that will review Facebook's measurement and transparency of content standards enforcement. Facebook chartered the DTAG to assess its Content Standards Enforcement Report, to provide recommendations for how to improve its measurement and reporting practices, and to produce a public report on its efforts. The DTAG members include academics from several universities who are experts in measurement and the role that metrics play in building legitimate, accountable institutions. DTAG's goal is to ensure that Facebook is developing, and making public, information that is useful to understand and evaluate Facebook's Community Standards enforcement practices.

Social Media Governance Initiative (SMGI)

Social media is increasingly the medium through which people live their social and civic lives. This reality has important implications both for the regulation of social interactions and for broader issues of democratic governance. The Collaboratory is looking specifically at social media companies' responsibilities in terms of maintaining conditions and values that are necessary for democracy, such as civil discourse, respect for others, and healthy community. This involves reviewing two issues and developing evidence informed policies to address them: (1) What might be done to make social media a source of revitalized community; and, (2) Whether and how social media platforms can cultivate values

that are essential to successful civic discourse and democratic governance. Overall, this is an exciting opportunity to leverage new possibilities provided by social media to address issues in democratic governance.

A Study of Procedural Justice & Juveniles: The Influence of School Resource officers (SROs)

The Justice Collaboratory is exploring the influence of school-based policing on adolescent safety and well-being, as well as on juvenile perceptions of the criminal justice system. Over the past decade, the presence of full-time, armed police officers in American public schools has increased exponentially. These School Resource Officers (SROs) are now installed in over two-thirds of high schools across the country. However, the duties of SROs are often poorly defined and vary greatly across jurisdictions. The impact of their increased presence is largely unknown. Do these officers effectively reduce school violence and promote student safety? Or do they feed the school-to-prison pipeline, responding with legal consequences to actions that might otherwise be considered minor offenses? Minimal and often contradictory research has addressed the effect that this chronic police presence is having over students' behavior as well as their psychological development.

The Arthur Liman Center for Public Interest Law Yale Law School, New Haven, CT

Through research projects, teaching, fellowship funding, and colloquia, the Liman Center supports efforts to bring about a more just legal system, even as that aspiration remains elusive. We began in 1997, when Yale Law School established what was then called the Arthur Liman Public Interest Program to honor Arthur Liman, a 1957 graduate of Yale Law School. In 2017, the Liman Program became the Arthur Liman Center for Public Interest Law.

The Liman Fellows

In 1997, the Liman Program supported one fellowship for a Yale Law School graduate. Today, the Liman Center supports six to ten such fellowships each year. As of 2019, Liman has awarded 143 fellowships for law graduates to work at 111 host organizations. Fellows work on areas ranging from juvenile justice, criminal defense, and prison reform to efforts to expand affordable housing, protect the environment, accommodate individuals with physical and mental disabilities, accord fair treatment to immigrants, and ensure equal and dignified treatment to all persons.

In 1997, the Liman Program helped to support summer public interest work by undergraduates at Harvard. The Liman Center now enables summer fellowships for students at Barnard, Brown, Bryn Mawr, Harvard, Princeton, Spelman, Stanford, and Yale. As of 2019, about 450 fellowships have been awarded.

Since 2011, Senior Fellows in Residence have joined the Liman Center at Yale to co-teach seminars, supervise research, and work on their own scholarly projects. The Liman Center also collaborates with Affiliated Faculty from Yale's School of Medicine, School of Architecture, and the Faculty of Arts and Sciences.

Liman Center Teaching

Every spring, the Liman Center convenes weekly seminars. Topics have included *Detention; Rationing Access to Justice in Democracies; Abolition: Slavery, Supermax, and Social Movements; and Poverty and the Courts: Fines, Fees, Bail, and Collective Redress.*

Liman Center Colloquia

The annual Liman Center Colloquium brings together Fellows, faculty, other scholars, lawyers, judges, and leaders of nonprofits each spring. Volumes of the colloquia background readings are available at www.law.yale.edu/liman.

Liman Center Research

The Liman Center undertakes targeted research and, in the last few years, has worked on a variety of issues including the financial burdens of courts, the challenges women face in prison, and the problem of solitary confinement.

In 2018, the Liman Center published a volume, *Who Pays? Fines, Fees, Bail, and the Costs of Courts*, that explored the mechanisms for financing court systems and the economic challenges faced by judiciaries and by litigants. *Who Pays?* addressed questions of how constitutional democracies can meet their obligations to make justice accessible to disputants and to make fair treatment visible to the public. This volume sought to understand the dimensions of the problems, the inter-relationships among civil, criminal, and administrative processes, and the opportunities for generating the political will to bring about reform.

Another research focus is incarceration. In the winter of 2019, the Liman Center presented testimony at a hearing of the U.S. Commission on Civil Rights, *Women in Prison: Seeking Justice Behind Bars*. The Liman Center noted that comprehensive data are lacking to implement the goals of promoting gender-consciousness in services and programs and improving the lives of women in prison. The Liman Center recommended the collection of intersectional data and regular, publicly accessible reporting by state and federal systems and by the Bureau of Justice Statistics. Such data would contribute to understanding and addressing issues faced by women in prison including discipline, "isolation by place," economic and

educational opportunities, health, and safety. The Center suggested that a potential mechanism to coordinate and support such efforts would be for Congress to create a national advisory body on women in prison and authorize it to provide assistance to state and federal prisons and jail systems as well as to serve as a clearinghouse for data collection and dissemination.

In addition, the Liman Center has worked on a series of reports on solitary confinement. Our two latest reports, co-authored with the Association of State Correctional Administrators, are part of a project begun in 2013 to learn how many prisoners are in isolation and for how long. The 2018 research, based on a nationwide survey, found that about 61,000 people were held for 15 days or more on average for 22 hours or more in cells. The reports found that some 4,000 people had been held in solitary for three years or more. Further, using the definitions provided by the jurisdictions, more than 4,000 “seriously mentally ill” individuals were in isolation. *See* Association of State Correctional Administrators and Arthur Liman Center at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* (October 2018), available at <https://law.yale.edu/centers-workshops/arthur-liman-center-public-interest-law/liman-center-publications>.

Having created the first longitudinal database, we were able to report on a decrease from the prior 2014 and 2016 surveys, as well as a significant shift in the governing policies. Once, prison administrators saw solitary as the solution to disciplinary issues in prison. The professional leadership now understands that solitary is a problem that itself needs solving. In 2018, four jurisdictions made efforts to reduce radically the use of solitary, including one, Colorado, which abolished keeping individuals 15 days or more in such conditions. *See* Association of State Correctional Administrators and Arthur Liman Center at Yale Law School, *Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes* (October 2018), available at <https://law.yale.edu/centers-workshops/arthur-liman-center-public-interest-law/liman-center-publications>.

In October 2018, the Washington Post published an editorial on the ASCA-Liman data and called solitary confinement “an affront to human decency.” A survey for 2019 is underway.

IV. LAW SCHOOLS, FUNDERS, AND INSTITUTIONALIZING REFORMS

Legal education has been shaped by funding streams supporting curricular innovations of various kinds. A survey of work underway at law schools reveals renewed focus on access to justice. This closing section reflects on the interaction between funders and law schools. It examines how law school work reflects and relates to community-based concerns and to court needs and practices, as well as the sustainability of reforms.

Stephen Wizner & Dennis E. Curtis, *“Here’s What We Do:” Some Notes about Clinical Legal Education*, 29 CLEV. ST. L. REV. 673 (1980)

J.P. “Sandy” Ogilvy, *Celebrating CLEPR’s 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1 (2009)

Stephen Wizner, *The Law School Legal Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929 (2002)

Henry G. Manne, *How Law and Economics Was Marketed in a Hostile World: A Very Personal History*, in THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS (Francesco Parisi & Charles K. Rowley eds. 2005)

Larry Kramer, *Beyond Neoliberalism: Rethinking Political Economy* (Hewlett Foundation 2018)

Arnold Ventures, *Creating a Fairer Pretrial System; Eliminating Excessive Fines and Fees* (Dec. 1, 2017)

Statement of Principles (2019)

Pew Charitable Trusts, Public Safety Performance Project (2019)

Lincoln Caplan, *The Invisible Justice Problem*, 148 DAEDALUS 19 (2019)

“Here’s What We Do:” Some Notes about Clinical Legal Education (1980)

Stephen Wizner & Dennis E. Curtis

29 CLEV. ST. L. REV. 673

Half a century ago, at the University of Southern California, John Bradway started the first legal clinic in a modern law school. Justin Miller, then the dean of the law school, observed:

At Southern California the most important innovation has been the close union of legal aid society work with legal education by the mechanical device of bringing the legal aid society into the law school building and operating it as a part of the law school curriculum, under the direction of a man who is both director of the clinic and Professor of Law. . . .

At the same time that Bradway was organizing and carrying out his clinical legal education experiments at the University of Southern California, and later at Duke University, Jerome Frank, one of the “legal realists” on the Yale Law School faculty, was waging his own campaign for clinical training in law schools. In 1933 Frank bemoaned the artificial quality of the Socratic case-method:

The trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly oversimplified. Something important and of immense worth was given up when the legal apprentice system was abandoned as the basis of teaching in the leading American law schools. . . . [I]s it not plain that, without giving up entirely the casebook system or the growing and valuable alliance with the so-called social sciences, the law schools should once more get in intimate contact with what clients need and with what courts and lawyers actually do?

. . . Frank’s criticisms of Bradway’s methods . . . were three-fold: (1) that the third year was too late in a law student’s career to introduce clinical work; (2) that Bradway’s method failed to stress interdisciplinary cooperation; and (3) that the clinics did not emphasize judicial reform. . . .

Today, Bradway and Frank would find much in contemporary legal education to vindicate their early efforts. Most American law schools now have in-house legal clinics where law school faculty members serve as supervising attorneys and clinical teachers for law students providing direct legal services to clients. However, Frank’s critiques might still be applicable since most contemporary law school clinical programs, like Bradway’s, are still offered late in a student’s law school career and do not include interdisciplinary work and policy studies. Thus, clinics continue to stand apart from the law school curriculum and fail to incorporate modern innovations in legal education. . . .

A clinical program should have two related goals. First, the program should introduce students to the workings of the legal system through concentrated interaction with clients under the supervision of law school faculty. This introduction to clients should take place as early as possible in law students’ careers. Early experience with the legal system will help students to understand better the concepts developed in traditional classroom courses. The students will, in turn, be able to contribute with some degree of sophistication to classroom discussions. The second goal of a clinical program is to provide

a laboratory in which students and faculty study, in depth, particular substantive areas of the law. It is possible through a sustained and comprehensive combination of practice and research to develop a profound understanding of the legal theory, economic implications and social dynamics of a given segment of the legal system. Clinical programs provide a broader view of legal problems than is typically available through classroom study. Students are not only introduced to various parts of the legal system or to the inner workings of an agency, but also come to comprehend the relationships among these segments and to use their knowledge of the workings of the system in their attempts to assist clients. By representing many clients with a wide variety of problems, students quickly develop a perception of core issues, including many which, for a variety of reasons, rarely find their way into court decisions and thus, ultimately, into law school casebooks and classrooms.

This laboratory function of a law school clinical program leads not only to a better understanding of a particular part of the legal process but should also result in efforts to reform that process. Law reform can be accomplished through litigation and other means; a good clinical program generates information and data conducive to reform efforts in many areas. For example, in Yale's Mental Hospital Legal Services Project, students developed knowledge and experience by representing patients at commitment hearings. The students then undertook a campaign to update and revise Connecticut's criteria for commitment to mental institutions and the commitment procedures. Over a period of five or six years, the students drafted legislative proposals and brought law suits which resulted in a substantial rewrite of Connecticut's commitment laws.

Further examples come from our clinic's Prison Legal Services Project. There students learned about the federal parole system by representing clients seeking parole release. Their knowledge, in turn, led them to generate ideas for reform of the federal sentencing and parole system. These ideas were presented at a seminar attended by federal judges and officials of the Justice Department, the United States Parole Commission and the Bureau of Prisons. The seminar's participants developed a bill which served as the basis for an early draft of the sentencing and parole provisions in the proposed new Federal Criminal Code. Another product of this seminar was a Yale Law Journal project written by three of the most experienced members of the prison project. This note won the prize for the best student piece in 1975 and is probably the most often cited scholarly reference in court opinions involving challenges to the theory or application of the rules and regulations of the United States Parole Commission. It is particularly gratifying that many law students who participate in the clinical program also write notes and comments on subjects arising from their clinical experiences. A successful clinical program should be a fertile seed-bed for ideas leading to scholarly articles. . . .

As a result of these experiences, and from writing law journal notes and undertaking empirical research, Yale students have come to see themselves as national commentators on agency operations. The educational value of across-the-board contact with an administrative agency is enormous. Students draft comments on rules and

regulations proposed by the Department of Justice. They act as gadflies and lobbyists as well as legal representatives of prospective parolees. In short, they function not as passive recipients of a preset curriculum, but as architects of their own work. . . .

Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools (2009)

J.P. "Sandy" Ogilvy

16 CLINICAL L. REV. 1

. . . It was in 1958 that William Pincus, then a program officer with the Ford Foundation in New York, and Emory Brownell, the Executive Director of the National Legal Aid and Defender Association (NLADA), hatched the idea of a grant from Ford to NLADA to encourage law schools to get law students to participate in legal aid clinics. Brownell saw it as an opportunity to get some bright young people into legal aid offices where they could lend a hand with some of the cases and be introduced to the work of the legal aid offices. He also appreciated the prestige that NLADA could obtain from being associated with a significant grant from the Ford Foundation. Pincus had something more in mind. He saw the grant as "some little beginning to see [if] it was possible to enrich law school education [and] bring it outside the strictures of just the classroom." He wanted to encourage law schools to expose law students to clients while in law school just as medical schools exposed medical students to patients as part of medical school education. Later, for Pincus, it "became a crusade to really change legal education."

The discussions that Pincus and Brownell had led to a grant proposal to the Ford Foundation by the NLADA and the creation of the National Council on Legal Clinics (NCLC). The Ford Foundation authorized a seven-year project and awarded NLADA \$800,000 to be administered by NCLC, a group that included representatives from NLADA, the ABA, and the AALS. Howard Sacks took a leave from Northwestern University School of Law to serve as Administrator of the Professional Responsibility Project of the NCLC. Emory Brownell served as Director of NCLC until his death in 1961, and Sacks was appointed to replace him. . . .

During the six years of its existence (1959-65), NCLC made grants totaling about \$500,000 to nineteen law schools to create or expand clinical programs. In addition to law school grants for clinics and externships, NCLC made grants totaling \$150,000 for the preparation of teaching materials. Some of the materials receiving support from NCLC included legal ethics casebooks by Professors Vern Countryman and Murray Schwartz and other materials for teaching professional responsibility. NCLC also produced a film featuring Justice Felix Frankfurter. . . . [I]n 1965 the Ford Foundation made a grant of \$950,000, plus the balance of the funds remaining from the original grant to NCLC, to continue the work for a five-year term. The project was renamed the Council on Education

in Professional Responsibility (COEPR).

The new board of directors of COEPR was composed of three members nominated by the ABA, three nominated by NLADA, four nominated by the AALS, and four at large members. Seven of the original NCLC board retained seats on the COEPR board and Howard Sacks continued as Executive Director on a part-time basis.

COEPR operated from 1965 until June 1968 and made grants totaling approximately \$290,000 to twenty-one law schools. “Half of these grants were for summer internships . . . [and] the remaining grants were for clinical programs conducted during the regular school year.” Approximately \$24,000 in grants were made for teaching materials and field research. The AALS received \$25,000 for a conference on teaching professional responsibility in the law schools, and \$23,300 was made available to non-law school organizations for experimental clinical programs. . . .

. . . [I]n June 1968, the Ford Foundation announced a grant to the Council on Legal Education for Professional Responsibility [(CLEPR)]. The initial grant was for a five-year period with a promise of support for a second five-year period at its expiration. The Foundation made \$6 million available immediately. . . .

Although the criteria for the grants to law schools evolved over time, from the beginning Pincus and the board agreed on several points. Most grants would be small, in the range of \$50,000 a year; limited, usually for two years; and the grantee schools would be obligated to pay a small portion of the costs of the program in the first year of the grant and up to half of the costs in the second year of the grant, with the understanding that the school would absorb all of the costs of the program going forward.

The first nine CLEPR grants, totaling \$757,000, were awarded in January 1969, about six months after the creation of CLEPR. The first grant was to Duke University and North Carolina College at Durham for a jointly-sponsored project to fund summer internships with private practitioners and prosecutors for ten Duke law students and five from North Carolina College. . . .

The grants to North Carolina College and Harvard Law School shed light on Pincus’s strategy for insinuating clinical legal education into American legal education. Pincus was very egalitarian; he wanted assure that there were clinical programs in every law school in the country, so he funded proposals from some schools even though the proposals were not as strong as he would have liked. At the same time, he recognized that schools like Harvard and Yale commanded respect in legal education, so he sought to fund programs at these institutions, believing that if Harvard and Yale had clinics, the other lesser-ranked schools would be more willing to consider creating clinics as well. Notably, University of Chicago Law School, where Levi (the man who hand-picked Bill Pincus to lead CLEPR) had been Dean and later University Provost and President, never received a CLEPR grant, because the school refused to award course credit for clinical work, and

Pincus would not budge on that criterion.

The strategy worked. By the time that CLEPR closed its doors in 1980, nearly every law school in the country had at least one clinical course and many had substantially more. Not all of the programs, or even a substantial majority in 1980, met the criteria for a good clinical program that Pincus had tried to foster. He defined clinical as “lawyer-client experience, under law school supervision, for credit.” Although most schools did award course credit for participation in clinical courses, many were “farmout” programs with little or no direct supervision by law faculty.

In addition to making grants to law schools to start or expand clinical programs, CLEPR pursued two other activities intended to spread the word about the value and viability of clinical education. First, CLEPR published a Newsletter that was circulated to nearly 6000 persons including law teachers and members of the bench and bar. Through the Newsletter, CLEPR made grant announcements and solicited new proposals for grants from the law schools. The Newsletter also featured reports on workshops and conferences sponsored by CLEPR, descriptions of clinical programs and courses, and news and features about issues important to the new clinical community. Second, and arguably more important to the development of the clinical movement, was CLEPR’s sponsorship of workshops and conferences. . . .

In addition to the small workshops, CLEPR sponsored several large national conferences on clinical legal education. The first, in 1973, at Buck Hill Falls, Pennsylvania, attracted about two hundred participants. Before the conference, CLEPR had solicited working papers to be used as a starting point for discussions by the participants. The essays were collected in a book, *Clinical Education for the Law Student*, which was distributed to the participants before the conference. One of the working papers, now regarded as a seminal paper in legal pedagogy, “On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology,” by Gary Bellow, set out an idea of what should be taught in a clinic that was radically different from what many others were claiming. . . .

In 1977, CLEPR made a grant to the AALS to hold the first national clinical teachers’ conferences that the AALS ever sponsored. The grant, secured by Gary Barnhizer at Cleveland State Law School, enabled the AALS to organize clinical conferences in Cleveland, Ohio, in 1977, in Washington, D.C., in 1978, and in Snowmass, Aspen, Colorado, in 1979. Starting with the 1977 conference, the AALS has sponsored a clinical conference or workshop every year. These conferences and workshops and the regional conferences, such as the Mid-West Clinical Conference, are the direct descendents of the early CLEPR workshops and can be credited with creating the strong community of clinical teachers that exists today.

By the end of the first, five-year grant period, CLEPR had succeeded in encouraging most law schools to start or expand a clinical course or program. By the close

of 1972, CLEPR had made 116 grants totaling more than \$4,000,000 at more than 90 of the then-existing ABA-approved law schools. Coming out of the Buck Hill Falls Conference in 1973, there was a measure of agreement that clinical legal education was now an established part of American legal education but that work remained to be done.

Over the final two funding cycles (1974-75 and 1976-77), CLEPR sought to improve the clinical programs it had fostered rather than to encourage more schools to join the parade. Grants were made to expand the kinds of cases and clientele served by clinics, to address the scarcity of trained clinical teachers, and for programs that exposed more first-year students to clinical education. Grants were given to aid the development of new kinds of teaching materials, including videotapes, a simulation manual, and computerized problems for use in pre-clinical programs. In addition, CLEPR sought to encourage schools with existing clinical programs to raise the status of their clinical programs closer to parity with traditional courses in the curriculum by making some grants for general operating expenses, capital improvements, and to establish parity between clinical and academic salaries. Pincus wanted clinical faculty to be viewed as equals with other faculty in the law schools. He did not want clinical faculty to be “second class citizens,” and parity in salaries and facilities was a measure of the status that schools should be encouraged to provide to clinical faculty. . . .

The Law School Legal Clinic: Legal Education in the Interests of Justice (2002)

Stephen Wizner
70 FORDHAM L. REV. 1929

. . . The founders of the clinical legal education movement, responding to the social ferment and legal rights explosion in America during the 1960s, envisioned clinical legal education not only as a way of enriching legal education with professional training, but as a means of stimulating law schools to attend to the legal needs of the poor and minorities, and engaging students in the pursuit of social justice in American society.

A central goal of clinical legal education has been to provide professional education in the interests of justice. Its pedagogical objectives are to teach students to employ legal knowledge, legal theory, and legal skills to meet individual and social needs; to expose students to the ways in which law can work either to advance or to subvert public welfare and social justice; to instill in students a professional obligation to perform public service; and to “challenge[] tendencies in the students toward opportunism and social irresponsibility.”

The law school clinic plays a unique role in exposing students to social and economic injustice in society. By providing legal assistance to low-income clients who cannot afford to pay for legal representation, law students learn not only about the

importance of lawyers in resolving clients' legal problems, but they also learn about poverty and the circumstances of the poor first-hand and experientially, not just as a study of statistics, social policy, and legislation. This is an important lesson, and one that challenges the implicit message of the rest of the law school curriculum, in which law is taught as if everyone in society has equal access to it. . . .

In the real world the majority of low-income people cannot afford legal services that, in many instances, are essential to the just resolution of their legal problems. This is a malfunction in the legal system that renders the ideal of equality before the law an empty promise. Law schools have virtually ignored this malfunction. They have failed to commit intellectual and financial resources to teaching, research, and writing aimed at exposing, analyzing, and addressing social justice issues. With few exceptions, they have failed to play a critical role in studying the state of the justice system and what needs to be done to repair it, in teaching students about this, and in proposing and advocating the necessary reforms.

Lawyers should see themselves as trustees of justice. On them rests a fiduciary responsibility to see to it that the legal system provides, as far as practically possible, justice for all citizens, not only for the rich and powerful. Law teachers share that responsibility. As members of the legal profession, they must take on the responsibility, through their teaching, research, writing, and example, of striving to democratize the legal culture. It is in this regard that the law school clinic can provide legal education in the interests of justice.

**How Law and Economics Was Marketed in a Hostile World:
A Very Personal History (2005)**

Henry G. Manne

THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS
(Francesco Parisi & Charles K. Rowley eds. 2005)

Undoubtedly the most celebrated program of the Law and Economics Center was not included in the prospectus, even though I had been mulling the idea over for some time. This was an extension of the idea of the Summer Economics Institute for Law Professors to federal judges. The very idea was enough to strike terror into the hearts of most law professors who heard it. There were doubts that it was even 'legal' to offer such programs to judges, and certainly, given the intellectual hostility to free market ideas in the country, there was sensitivity galore to this idea. I decided not to include it in the prospectus, as I was not at all confident that I could deliver. . . .

However, the idea took hold, and in 1976 the Center offered the first of the Economics Institutes for Federal Judges. . . .

We were, of course, extremely sensitive to the possible charge that the program was biased or in some sense not completely intellectually honest. After all, my entire academic career had been beset with the ‘Chicago Economics’ calumny, and there was no reason to suppose that it was not going to follow me into the judges’ educational chambers. It did, of course, this time in the form of a front-page, factually incorrect story in the *Washington Post* saying that we were ‘brainwashing’ federal judges (Barbash, 1980).

Careful advance preparation for just such an eventuality starved serious damage to the program. Plans for the program had been vetted in advance by the most professionally powerful judge in the country, Irving Kauffman of the Court of Appeals in New York, as well as by the Director of the Federal Judicial Center. Both gave warm encouragement to the venture, as did a later Federal Judicial Conference Committee responding to a judge concerned about the *Post* story. This committee examined every aspect of the program in considerable detail. Their report not only ‘cleared’ the program, it actually encouraged all judges to attend.

Paul Samuelson, a most distinguished and avowedly liberal economist lectured on the program, as did the more neutrally viewed Martin Feldstein of Harvard and Paul McAvoy of Yale. In fact Milton Friedman was the only lecturer formally connected with the University of Chicago, and the first judges’ program (1976) was his first stop on returning to the U.S. after collecting his Nobel Prize in Stockholm. It took some effort in the early years to keep Samuelson on the straight path of positive economics and not normative policy. But he came to appreciate what we were trying to do and never missed a program for 17 years. By the end of the first program judges were asking, in a perplexed tone, what the issue was, since Paul Samuelson seemed to be teaching the same economics as Armen Alchian.

Two comments by judges who attended that first program summarized for me all I wanted judges to get from the program. One was by a former Chief Judge of the U.S. Court of Appeals for the Eighth Circuit. One night at dinner, as judges were excitedly discussing the day’s lesson, he pounded his fist on the table and exclaimed, ‘What I want to know is why in hell hasn’t anyone told me about this before now.’ Great question! The other comment came from a very liberal judge from the Southern District of New York while attending his third advanced course. He said, ‘Henry and I don’t see eye to eye on a number of policy issues, but he has made me understand for the first time that everything I want has its cost.’ Every economics course should be so fortunate!

The judges’ program did have some far-reaching effects, though I think they were not specifically what the foundations supporting the program might have hoped for. Certainly the judges came out of this intellectual boot camp with a significant appreciation for market realities. Many judges and lawyers have told me that the general quality of courtroom argument about economic issues was noticeably improved by the program. And certainly there was a new appreciation of the power of economics to enlighten judges on issues they addressed.

But the greatest influence was on the law professors, and that was actually what I intended. After all, if a large percentage of the most important judges in the country were going to study economics, then perhaps the professors should be taking it more seriously as well. There is no question that the judges' program did increase academic attention to the role of economics in law. That could actually be the most lasting contribution of the judges' program to the development of law and economics. As I always told the judges in my session-closing remarks, 'If you are doing your job right, there really should not be many different results in your cases. But you will have a better understanding of the law because of the insights economics offers, and that will help you be better judges.' Well, enough about the judges' program.

Another important part of the Center prospectus was the proposal for a specially designed law degree for PhDs or near-PhDs in Economics. At the time there was no organized program for the production of new law and economics scholars. There were, of course, a few people in law teaching who had advanced degrees in Economics. But some of them were too mathematical in their orientation to be of much practical use in the popular interdisciplinary work, since ultimately the value of this scholarship would be in its use to judges and practicing lawyers. Others had specialized in macroeconomics and, therefore, substantially disqualified themselves from most serious law and economics work. So there was not a reliable source of future law and economics scholars, and, unless such a source could be guaranteed at this critical stage, the field could easily fizzle out.

This argument for producing future scholars appealed to a new law and economics enthusiast by the name of Frank O'Connell, a lawyer, who, as it happened, was the President of the then newly active John M. Olin Foundation. O'Connell presented the entire prospectus of the Law and Economics Center to Mr. Olin, who himself then became an enthusiast for the field and agreed to fund five three-year fellowships for economists to attend law school under the Center's aegis.

The existence of high-quality graduate students gave the Center a panache and an excitement that it did not have before – or after. Ultimately there were 33 of these John M. Olin Fellows at Miami and Emory, at least 16 of whom ended up in academia, a pretty good percentage even for Harvard or Chicago but almost unbelievable for Miami and Emory. Some of these have enjoyed truly brilliant careers, including the four who were or still are at George Mason University School of Law.

It is difficult to conceive of the fellowship program that ever delivered more successfully on its promise. But perhaps even more important, the John M. Olin Foundation's enormous financial support for law and economics in major universities all over the country dates from this initial involvement with the field. However, the fellowship program was very expensive (around a million dollars a year in 1979). Consequently, after Mr. O'Connell left the Foundation and after Mr. Olin died in 1982, there was insufficient support for such an expensive program at what seemed to be a less than major law school, and it was discontinued. The final group of Olin Fellows graduated from Emory in 1986.

The Olin Fellowship program also was the occasion for a growing animosity between the Law and Economics Center and the Dean of the University of Miami Law School, Soia Mentschikof. She had been very pleased to accept my offer to start the Center at the Miami Law School and was very cooperative, especially in allowing us to design the specialized curriculum for the John M. Olin Fellows. However, as the Center became more successful, she seemed to think that it posed some sort of threat to the Law School, and she unilaterally rescinded her prior agreement to a special curriculum (in merely one-sixth of their courses) for the Olin Fellows. . . .

By 1986 every major law school in the country (and several in Canada) had an organized program in law and economics, many of them funded by the John M. Olin Foundation. There were five or six journals devoted exclusively to law and economics (and at one count over 25 per cent of the major articles in the ten leading law journals in the country), probably eight textbooks, numerous conferences, and recognition for research grants by the National Science Foundation. A professional academic society was still years off, but in truth what the field of law and economics really lacked now was a law school base of its very own. . . .

Beyond Neoliberalism: Rethinking Political Economy (2018)

Larry Kramer, Hewlett Foundation

We launched the Madison Initiative to tackle the problem of democratic dysfunction, which we have addressed with a strategy focused on the *practice of politics*—looking for levers to reduce or mitigate the tribalism that prevents our elected officials from working together effectively. The unexpected election of Donald Trump — a rebuke by voters of the establishment on the right and the left, following a campaign of unusual vitriol with the new specter of digital disinformation—led us to reassess our analysis. That process, which took place throughout 2017, for the most part corroborated our original diagnosis of the fraying of key democratic institutions amid political polarization. But it also exposed some blind spots. We address these now with two related proposals for new funding.

The first proposal, which seeks to make a small but important addition to the Madison Initiative, is presented in a separate memorandum. It focuses on *information*—or, more specifically, on how citizens are being misinformed about politics via the internet and social media platforms. There are compelling reasons to incorporate concern for digital disinformation into the Madison Initiative: Propaganda and misinformation are being used to stoke voters' emotions in ways that threaten the very idea of political community and make it harder for government to act. Equally important, any progress we make in repairing politics will come to naught if citizens are misled about what has been done and deceived about whether it works.

Yet finding ways to address societal problems is not solely a matter of fixing how politics is practiced or assuring that citizens receive trustworthy information. It is also a matter of *ideas*: of finding plausible solutions around which agreement and public acceptance are possible. Unfortunately, today's prevailing intellectual paradigm—which has come to be labeled “neoliberalism”—is no longer up to the task. However well this free market orthodoxy suited the late 20th century, when it achieved broad acceptance, it has proved unable to provide satisfactory answers to problems like wealth inequality, wage stagnation, economic dislocation due to globalization, and loss of jobs and economic security due to technology and automation. Worse, it has become one of the principal sites of hyperpartisan conflict.

Yet circumstances are ripe for the emergence of a new intellectual paradigm—a different way to think about political economy and the terms for a new 21st-century social contract. Helping develop and communicate such ideas is a task well suited to philanthropy, and one in which the Hewlett Foundation is well positioned to participate. Our second request is for modest funding to explore this possibility—specifically, \$10 million from the foundation's 2018 unallocated funds to be spent over two years. . . .

The significance of the movement of [Milton] Friedman's ideas from the fringe to the center can hardly be overstated, but not because the world ever fully conformed to his beliefs. After all, government regulation has hardly disappeared in the years since Ronald Reagan was elected. But no intellectual paradigm is perfectly realized in practice. Life and politics are much too complicated for that ever to be the case. There was plenty of regulation at the apex of laissez-faire, just as free markets remained immensely important during the Keynesian years. It would be naïve to expect any political or economic philosophy to be followed or applied with perfect consistency, particularly as neither the politicians and administrators who create and enforce policy, nor the people and organized interests to whom they must respond, are academics moved by the need to respect theoretical purity. In our messy, complex world, the policies and actions of different actors will always embody a host of contradictions and inconsistencies, no matter the reigning intellectual paradigm.

The importance of these intellectual paradigms is in how they structure arguments and tilt the playing field for or against competing claims. Politicians, administrators, citizens, business leaders, political activists, and the media may not make intellectual consistency their primary concern, but they do understand and frame their arguments and plans in light of broad understandings about how the world works and should work. Opinions and beliefs may be guided by material needs or desires, but material needs and desires are likewise influenced by intellectual understandings. Ideas play a critical role by putting a thumb on the scale in favor of some arguments and against others; they reshape the world, if not perfectly in their own image, then still in ways that are powerfully different from how the world would look without them.

The participants in the 20th-century debates about political economy understood this perfectly well. As Friedman's senior colleague and intellectual mentor, Friedrich

Hayek, observed, “experience indicates that once a great body of intellectuals have accepted a philosophy, it is only a question of time until these views become the governing force of politics.” Friedman himself noted much the same, explaining that “the role of thinkers . . . is primarily to have available alternatives, so when the brute force of events make a change inevitable, there is an alternative available to change it.” But the clearest statement of the importance of ideas in shaping interests may have come from Keynes himself:

I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for in the field of economic and political philosophy . . . the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest. But, soon or late, it is ideas, not vested interests, which are dangerous for good or evil.

Keynes, Hayek, and Friedman knew whereof they spoke, and the latter two lived long enough to see their ideas yield colossal change, for the repudiation of Keynesianism in favor of free market orthodoxy in the 1970s and ‘80s reshaped the entire world. Government regulation may persist in many arenas, but in the years since Hayek’s and Friedman’s economic philosophy—now called “neoliberalism”—became ascendant, it has reshaped everything. Fiscal policy, monetary policy, labor policy, trade policy, welfare policy, and industrial policy, to name only a few, have been fundamentally altered in line with the ideas of Hayek and Friedman and their followers. Nor have the effects been confined to economics, and market-based thinking has similarly colonized law, political science, sociology, psychology, anthropology, public policy, and myriad other disciplines. The private sector has likewise been dramatically reshaped by these ideas—from models of corporate governance to the role of business in society, how workers and executives are paid, and how the financial sector operates. Friedman himself might look askance at the world today, disappointed by the many ways we fall short of his vision, but it’s impossible to deny that we live in a world profoundly reshaped by the ideas he and his followers advanced. . . .

How did an analytic paradigm thought risible in the 1940s come to dominate global policymaking by the 1980s? Two developments explain the change—the first a product of circumstances, the second of intentional efforts, including the efforts of philanthropic funders. . . .

Historically speaking, intellectual paradigm shifts are an infrequent but recurrent phenomenon. Just as neoliberalism superseded Keynes, the Keynesian paradigm supplanted laissez-faire, which had itself replaced the system of mercantilism that dominated Western economic thought in the 18th and early-19th centuries. There is, at any given time, a dominant way of thinking that helps structure political and social activities, and that persists (subject to the sorts of contradictions and inconsistencies discussed above) until displaced by something new.

These displacements occur in varied ways, depending on when and how changing circumstances put stress on the reigning intellectual paradigm. . . . People embrace ideas like these because doing so helps them understand and make sense of the world around them. And once embraced, people hold onto their ideas until the force of events deprives those ideas of their power to explain the world—until, in [historian Edmund] Morgan’s words, the “facts stray too far from the fiction.” There may then be a period of confusion, but eventually a new paradigm emerges, one that does a better job addressing people’s concerns and explaining events as they experience them.

We have witnessed this process a number of times in U.S. history. Laissez-faire fit the conditions of mid-19th century America, helping fuel western expansion and economic development in a constantly growing, freewheeling marketplace. Strains began to emerge after the Civil War, as economic integration from the communication and transportation revolutions—together with the transformation in work wrought by the second industrial revolution—gave rise to new circumstances and new problems for both labor and capital. Even so, it took the shock of the Great Depression, followed by the economic demands of World War II, to finally induce widespread abandonment of extreme libertarian ideas, which seemed to no longer answer the needs and problems of society. Keynes’ managed economy made more sense. . . .

Things were very different by the 1970s. The managed economy was no longer managing so well. . . . Making matters worse, in the years after World War II, principles of top-down government management migrated beyond fiscal and monetary policy. . . . Yet society felt like it was coming apart at the seams, particularly as these economic disruptions were intensified by social and cultural anxieties associated with race and gender and radical politics. Social tensions may seem high today, but they are mild compared to what people thought, and feared, in the early 1970s.

And there, cool and confident, stood Milton Friedman and his compatriots with answers in hand. The problem, they said, is too much government, too much top-down management of things that would sort themselves out better if left to free markets. What we need, they said, is less regulation, less government, less management—fewer efforts by small numbers of flawed and imperfect humans to do better than the invisible hand of a rational market.

They struck a chord. By 1980, with the elections of Margaret Thatcher in the U.K. and Ronald Reagan here, the neoliberal takeover was all but complete. . . .

. . . For present purposes, it will suffice to highlight a few key points [about the neoliberal movement and its growth]:

- First, the *raison d’être* of the project was the development and dissemination of ideas. Its supporters very deliberately and intentionally built intellectual hubs at key universities, most notably the University of Chicago.

- Second, leaders of the movement realized early on that they needed ways to transmit ideas from the academy to policymakers. They became pioneers in the development of policy think tanks, and launched a number of these specifically to propagate free market ideas, including the American Enterprise Institute, the Foundation for Economic Education, the Hudson Institute, and, later, the Heritage Foundation, the Cato Institute, and others.
- Third, pains were taken to create outlets to circulate and publicize ideas among both other intellectuals and the broader public. *National Review*, the *American Spectator*, *Reader's Digest*, and the *Saturday Evening Post* were favorites in the early years, joined later by new entrants like the *Weekly Standard*, the *New Criterion*, the *Public Interest*, and *Commentary*.
- Fourth, parallel work was begun as early as the 1950s to build alliances in the business community, churches, and broadcast media (the last concentrating chiefly on radio). While many of these efforts focused on winning over individual leaders, a number of formal organizations were established or converted. The Business Roundtable was launched specifically to press the case for markets, as was Spiritual Mobilization, a precursor of later, more successful efforts like the Moral Majority and Focus on the Family.

Most important, the free market movement was paid for—backed every step of the way by sympathetic foundations and philanthropists who provided the resources to succeed. Important early support came from the William Volker Fund, succeeded by the Earhart and Relm foundations, which were in turn replaced by the William E. Simon and John M. Olin foundations, among others. Today, the wide array of neoliberal institutions is supported by an equally wide mix of funders, including the Koch brothers; the Bradley, Smith-Richardson, and Scaife foundations; the Searle Freedom Trust; and many more. . . .

Income and wealth inequality have grown enormously, partly as a result of neoliberal policies, yielding a wealth distribution the likes of which we have not seen since laissez-faire was upended by the Great Depression. Wealth inequality—along with income stagnation, the hollowing out of the middle class, and increased economic insecurity—has in turn become one of the major causes, if not *the* major cause, of rising political and social tensions (albeit for reasons understood and explained differently on the left and right). The global free trade regime that neoliberalism justified and encouraged has become another major source of political and economic anxiety—anxiety for which the champions of free trade have little to offer beyond more of the same. The workplace is being upended by new technologies, automation, robotics, and AI; and while it may be too soon to portray the future of work with confidence, no one disputes either that dramatic changes are afoot, or that, if left to the market, these will yield another huge shift of wealth from labor to capital. The point is simply that, as has happened before, society's problems have changed, and the reigning intellectual paradigm, if not in fact causing these problems, certainly no longer seems up to the task of solving them.

The struggle politically to address people’s legitimate grievances and anxieties is made more difficult by hyperpartisan polarization. The leadership of both parties may accept the primacy of markets, but by now they have moved in such wildly different directions from this shared starting point that they are no longer speaking the same language. . . . Yet their solutions—like their efforts to address issues beyond identity, such as health care or banking—have been encumbered by market-based thinking, which has made them politically unsaleable: too interventionist for conservatives, too restrained for progressives. And while there are now factions on both the left and the right prepared to revisit the constraints of market thinking, they have yet to offer a persuasive alternative intellectual framework for doing so, much less solutions capable of finding broad political acceptance.

The upshot is that the 20th-century free market paradigm has reached the end of its useful shelf life. There is little or no room left within it for useful solutions, or even productive disagreement about alternatives, when it comes to the challenges we face today. Neoliberals have long argued that the only alternative to their free market orientation is socialism—in either the soft Keynesian mode that failed in the 1970s, or the harder style that ended with the collapse of the Berlin Wall in 1989. We must reject the notion that our only choice is between neoliberalism and socialism. We must develop new ideas. . . .

. . . [T]wo obstacles have impeded its [existing criticism of neoliberalism’s] evolution into a full-blown replacement for neoliberalism. First, the work is almost entirely critique. We learn a great deal about the shortcomings of market-based thinking, sometimes accompanied by policy tweaks, but no one has offered anything remotely like a comprehensive alternative to neoliberalism. . . .

A second impediment to developing a new vision of political economy has been the lack of communal thinking among the economists, philosophers, historians, political scientists, lawyers, and others behind the critique of free markets. It’s a large and diverse group that includes academics scattered throughout Europe and the U.S., joined by a number of deeply engaged institutes, centers, and think tanks. . . .

The diverse people and institutions doing this work all know or know of each other, but they have so far operated (to borrow a phrase from history) in “splendid isolation.” Conferences and convenings have been few, and the group displays little sense of working together on a common intellectual project, much less launching a new intellectual movement. . . .

Here, then, is a potentially meaningful role for philanthropy. Between our funding and convening power, we can both facilitate the development of an affirmative agenda, and build the connective tissue needed to help likeminded actors turn assorted individual ideas into a coherent program. “Changing the reigning intellectual paradigm” sounds grandiloquent. Yet from a funding perspective, it’s actually quite straightforward—calling for the use of classic tools of philanthropy in a way that has frequently succeeded (including, of course, the funding of neoliberalism in the first place). . . .

Creating a Fairer Pretrial System and Eliminating Excessive Fines and Fees (2017) Arnold Ventures

Arnold Ventures' core objective is to maximize opportunity and minimize injustice. Arnold Ventures is a philanthropy dedicated to tackling some of the most pressing problems in the United States. We invest in sustainable change, building it from the ground up based on research, deep thinking, and a strong foundation of evidence. We drive public conversation, craft policy, and inspire action through education and advocacy. We are a team of more than 80 subject-matter experts headquartered in Houston with offices in New York and Washington, D.C. We work in four key issue areas: Criminal Justice, Education, Health, and Public Finance. Our work is guided by Evidence-Based Policy, Research, and Advocacy. Our Criminal Justice team *strives to advance community safety and the values of fairness, effectiveness, and racial justice.* Our work in criminal justice is about changing the system to improve people's lives. Are people being treated fairly without regard to race or income? Is there an underlying issue like substance use disorder or mental illness that the system is unable to address? To get a clear picture, we look at interactions with the justice system from start to finish—policing and pretrial, probation and parole, prison reform, and reintegration—and engage with experts and those directly affected to explore new policies and practices.

Creating a Fairer Pretrial System (2017)

The American system of cash bail has long been recognized as deeply problematic. Although individuals charged with crimes are considered innocent until proven guilty, many are held in jail while awaiting their day in court simply because they cannot afford to make bail. Yet the legal framework governing pretrial detention provides only two considerations: Is the person likely to commit a new crime or obstruct justice if released before trial, and is he or she likely to return to court? A justice system that relies on cash bail to determine liberty, without effective alternatives, keeps people in jail simply because they are poor.

In many jurisdictions, bail-setting practices do not take into account the defendant's ability to pay. Judges use uniform bail schedules keyed only to the crime charged to determine conditions of pretrial release. With limited information about the defendants who come before them, judges frequently rely on money bail as a proxy for risk as they try to balance public safety, defendants' constitutional rights, and the cost of detention. But when money bail is assigned without considering a defendant's ability to pay, the approach creates persistent overcrowding in jails and keeps low-risk people behind bars.

Across the country, people are recognizing that overreliance on cash bail doesn't work, and it's ruining lives. There is no perfect system, but this year, there has been significant progress in efforts to overhaul money-based regimes and replace them with a fairer, more effective system focused on a defendant's risk. One such effort is New Jersey's

Bail Reform and Speedy Trial Act, which went into effect Jan. 1. Among many other significant changes to pretrial policy and practice in the state, judges are now able to consider the Public Safety Assessment (PSA), a pretrial risk assessment developed by our team in partnership with leading criminal justice researchers. The PSA uses neutral, reliable data to assess the likelihood that an individual will commit a new crime or will fail to return to court if released before trial. It's also the only pretrial risk assessment that flags defendants who present an elevated risk of committing a violent crime if released.

Developed using the largest pretrial dataset ever assembled, the PSA uses nine neutral factors found to be most predictive of risk. Those factors do not include neighborhood, employment status, housing, drug use, or other factors that have been identified as likely to produce racial bias. Judges can consider the risk scores and any violence flag, but still retain all of their authority and discretion when making pretrial decisions.

The PSA measures probabilities—no risk assessment can predict human behavior with 100 percent accuracy. And it is not intended to serve as a substitute for judicial decision making and discretion. However, research suggests that using a well-designed pretrial risk assessment such as the PSA—in concert with judicial discretion—produces better overall outcomes than decisions based on bail schedules alone. Since the reforms in New Jersey went into effect, the pretrial jail population is down 17.2 percent. The state is one of approximately 40 jurisdictions that has adopted the PSA. Others that began using it in 2017 include Harris County, Texas, and Cleveland, Ohio.

Our Criminal Justice team is tracking PSA use and has commissioned studies by respected, independent research organizations to evaluate the risk assessment. We are committed to supporting ongoing research on the PSA and intend to expand access to more jurisdictions in the future.

Eliminating Excessive Fines and Fees (2017)

Excessive monetary sanctions in the criminal justice system violate Americans' constitutional rights and have a disproportionate impact on minorities and people who are poor. Courts often charge fines as punishment for crimes, plus additional fees for the use of court services. These costs can be extensive, even for minor offenses. Failure to pay can result in incarceration—meaning that many people are jailed because they cannot afford the fees for low-level violations such as jaywalking or driving with a broken taillight. Furthermore, people who have completed their misdemeanor sentences often leave prison with court debt that can make it harder to re-enter society. Outstanding debt can lead to driver's license suspensions, wage garnishment, and re-arrest. In some cities, fees are imposed not to reform behavior, but to generate revenue. The overuse of monetary sanctions doesn't serve a larger criminal justice purpose, and it may exacerbate existing inequities in the criminal justice system.

A national movement to curtail the use of fines and fees gained momentum in 2017 due to the release of important research findings and key achievements spearheaded by our grantees. For instance, as a result of educational efforts conducted by the Southern Poverty Law Center, Mississippi no longer suspends drivers' licenses for people with court debt. In Philadelphia, courts stopped charging parents for juvenile detention after the Juvenile Law Center and other partners exposed the ways that high fees impacted the community. And thanks to the efforts of the Policy Advocacy Clinic at the University of California, Berkeley, the state of California will eliminate all juvenile justice fees beginning next year. Policies associated with fines and fees vary by state, county, city, and even by judge. In order to make it easier for officials to understand how their local policies compare to those in other jurisdictions, we are funding a variety of research projects to provide a view of the landscape. We also support efforts in states that are actively working to reform their fines and fees practices, such as Arizona, Arkansas, Massachusetts, Michigan, and North Carolina.

**Statement of Principles on Pretrial Justice and
Use of Pretrial Risk Assessment (2019)**

Arnold Ventures

Reforming our broken pretrial justice systems is a cornerstone of Arnold Ventures' criminal justice work. America's criminal justice system strips too many people of their jobs, families, health, and dignity; it puts people of color at risk, disproportionately harms the poor, limits the potential of juveniles caught in the system, and doesn't provide impacted individuals the opportunities they need to get back on track. And it does all this at an enormous fiscal cost. Pretrial justice is a critical and understudied part of this larger problem: in short, too many people are in jail who do not need to be there. Arnold Ventures envisions a criminal justice system that dramatically reduces the use of pretrial detention. We strive to advance community safety and the values of fairness, effectiveness, and racial justice by working to eliminate unjust pretrial detention and ensure that jail is used only when necessary.

In this statement, we reflect on the problems of pretrial detention, the role of pretrial risk assessment in reform, and set forth principles that guide our efforts in three critical areas of our pretrial justice research and policy work: *first*, that to protect the presumption of innocence, only people charged with the most serious offenses should be eligible for pretrial detention and any decision to detain those people must be based on individualized findings of pretrial risk (risk of flight or risk of danger to the community); *second*, that relying on money bail as the basis for release and detention decisions abrogates the required risk-based analysis, traps people in jail for no reason other than poverty, and contributes to unconscionable racial and economic disparities in our justice system; and *third*, that validated and evidence-based pretrial risk assessment can support more objective and

consistent judicial decision-making about pretrial release conditions— but is only one among a variety of pretrial justice reforms jurisdictions should adopt.

The Growth and Overuse of Pretrial Detention

Jails and Mass Incarceration

While the term “mass incarceration” often focuses on the dramatic growth of people in prison, jails have also experienced exponential growth in recent years. Between 1970 and 2014, the U.S. jail population quadrupled; and between 1983 and 2013, the jail incarceration rate increased from 96 per 100,000 residents to 231 per 100,000 residents. On a national scale, this growth in jail populations is the result of an increase in pretrial detention: the incarceration of people who have yet to be convicted of anything while their criminal cases are still pending. At any given time, there are more than 730,000 people in jail in the U.S., two-thirds of whom are in pretrial detention. And, in the last thirty years, the American criminal justice system has significantly increased its use of jail relative to arrests: even as arrest rates have fallen, more people have been booked into jail. In 1984, there were 51 jail admissions per 100 arrests; in 2012, there were 95 admissions per 100 arrests, and during that same period jail stays have grown longer. Jails have a singular reach across the country with 19 times the number of admissions as prisons—nearly 10.6 million admissions annually.

The massive growth of people in pretrial detention reflects a fundamental injustice within our local systems: many of those who are jailed should not be there. That is because many local justice systems and system actors use pretrial detention as the norm, rather the exception: they have broad discretion and few limits on the use of pretrial detention; and they lack the information and tools to make better-informed decisions about pretrial release conditions or detention. In such an environment, money bail, not public safety or flight risk, drives detention decision-making and wealth predetermines liberty.

Racial and Economic Disparities

As a result of those systemic flaws, jail populations are plagued by racial and economic disparities. Decades of research on bail decisions have shown that African Americans face higher bail amounts than whites with similar arrest charges and criminal histories and that the race of the person arrested plays a significant role in bail and pretrial detention decisions, to the detriment of African Americans. High rates of pretrial detention exacerbate pre-existing racial and economic disparities as bail decisions are frequently driven by implicit and explicit racial bias. People in jail are poor: poorer than people in prison and poorer than their non-incarcerated counterparts, with a median income less than half that of non- incarcerated people their age.

Community Costs

Over the past few decades, even though crime rates have dropped significantly, the number of people held before trial has increased dramatically, and the cost of running the country’s jails has also increased—now exceeding \$22.2 billion each year. Jails are

typically the most expensive public safety resource in a county; their overuse comes at the expense of other municipal services and public safety investments that could be more cost-effective and deliver better outcomes. People confined to jail before trial are at risk of losing their jobs, their homes, or even custody of their children. In fact, research shows that defendants detained before trial are more likely to plead guilty, receive jail sentences, receive longer jail sentences, and eventually be rearrested.

Judicial Decisions and Risk Assessment

Public Dialogue

In the past few years, much of the public conversation related to pretrial justice has focused on pretrial risk assessment. In the pretrial context, risk assessments are actuarial measurements that use administrative data to predict risk of non-appearance or risk of committing a new offense if released pretrial. These assessments aim to provide judges with objective and consistent data to make informed decisions. Today, advocates, academics, researchers, practitioners, and policymakers are all considering the concept of risk assessment—debating the merits of the various available assessments, and examining the legal and policy frameworks in which they operate.

Consistent Decisions

The development of risk assessments over the past sixty years reflects research showing that human decision-making can be deeply flawed, reflecting ingrained biases that are virtually impossible to correct. Providing judges with an objective means to consider only relevant data may counterbalance some of those biases and lead to fairer pretrial outcomes. While future research may provide additional information on the effectiveness of pretrial risk assessment, we know—both from research and from implementation experience—that decision-making informed by a quality risk assessment is fairer than without.

Using Criminal Justice Data

Even though risk assessment can promote consistency, it is important to acknowledge the fundamental challenge that all data scientists and policy experts face when collecting, analyzing, and using criminal justice data from federal, state, or local administrative systems: these data will inevitably reflect the biases and racial injustice endemic to the American criminal justice system. This means that, like any other data-informed policy intervention, pretrial risk assessment is not perfect. But data-informed decision-making is certainly less biased than the status quo of human intuition and bail schedules, both of which inevitably produce inequities. Pretrial risk assessment introduces a new measure of consistency into judicial decision-making and can deliver improvements on current practice. Moreover, risk assessment can always improve: the factors and weights of all assessments can—and should—be re-evaluated and recalibrated as researchers learn more; promoting even better judicial decisions, and moving us closer to our goal of eliminating unjust pretrial detention.

The Public Safety Assessment

One of Arnold Ventures' earliest investments in pretrial reform was to develop, implement, and evaluate a risk assessment—the Public Safety Assessment or PSA. The PSA was born out of the demand from policymakers and administrators committed to pretrial reform for an accessible and validated pretrial risk assessment that did not require an interview of the arrested person. Since 2013, Arnold Ventures has funded the PSA's development, piloting it initially in seven sites and then limiting implementation to about 30 additional jurisdictions until its public release in 2018.

The PSA was designed to improve upon or eliminate some of the limitations of other pretrial risk assessments that have been implemented across the country over the years. Detailed information about the PSA's development, validation, implementation, and evaluation is available on the PSA website. Unique characteristics of the PSA include:

Size of dataset. The PSA was created using the largest, most diverse set of pretrial records ever assembled—a dataset of 1.5 million cases of which approximately 750,000 cases were analyzed from approximately 300 jurisdictions across the United States. We engaged researchers who analyzed the data to determine which factors are most predictive of new criminal activity, new violent criminal activity, and failure to appear.

Including most predictive factors and protecting against racial bias. The research team identified and tested hundreds of factors, which fell into broad categories, including prior arrests and convictions, pending charges, prior failures to appear in court, drug and alcohol use, mental health, employment, and residence. Factors such as drug and alcohol use, mental health, employment and residence were excluded because of their lack of predictive strength. Race was never a factor under consideration in the PSA's development. Ultimately, the team isolated the nine factors that most effectively predicted new criminal activity, new violent criminal activity, and failure to appear. Historical and prospective validations have examined how well the PSA performs by race and gender to ensure that the PSA does not promote racial bias.

Accessibility. The PSA does not require an interview and is freely available. Other risk assessments require a face-to-face or phone-based interview, which immediately introduces greater subjectivity and bias into the process, compounding the problem we are trying to avoid. Interviews are also costly and time-consuming to administer because of the staffing needed to conduct them. Further, Arnold Ventures provides the PSA to jurisdictions at no cost; we have no profit motive in its adoption or implementation.

Evaluation. The PSA factors and weights are publicly available, and the tool is being rigorously evaluated by independent research organizations to ensure that it works as expected without racial, ethnic, or gender bias. Early results of those

evaluations are promising: for example, Mecklenburg County, North Carolina found that fewer defendants were detained and money bail was used less often after implementation; likewise, Yakima County, Washington found that pretrial release rates increased by 24% for people of color post-implementation. Arnold Ventures is committed to ongoing evaluation: we are currently supporting seven randomized control trials, two impact evaluations, and several validation studies of the PSA, all conducted by respected researchers.

Local stakeholder leadership. The implementation of the PSA, including how it is scored, interpreted and used is led by local leaders and community members. Before implementing the PSA, local policymakers (e.g., representatives from the local courts, law enforcement, district attorney's office, and indigent defenders) must collaborate to create a Decision Framework (DF) and Release Conditions Matrix (RCM) for their jurisdiction. The DF lays out when and how the PSA is used in pretrial decision-making in the jurisdiction. Once a release decision is made, the judge must decide the terms and conditions of a person's release. Local policymakers develop the RCM to match local pretrial release options with the PSA results. It is through development of the DF and RCM that local law and statute, policy preference, and community values related to pretrial detention and release are expressed.

Research Expansion

In 2019, Arnold Ventures will launch the Advancing Pretrial Initiative, which pairs a training and technical assistance provider with a research partner to open the next chapter in research and development for the PSA and additional pretrial reforms. By working intensively with up to ten jurisdictions (Research-Action Sites), and providing implementation assistance in another 200 sites across the country that want to implement the PSA, we will further examine the implementation of the PSA, validate it, and consider improvements as we learn even more about the efficacy of risk assessment in action. By collaborating with a research and evaluation partner in this new phase of the PSA's development, we are affirming Arnold Ventures' commitment to re-evaluating and recalibrating the PSA factors and weights in response to research findings. This iterative approach is critical to our belief in transparency and research integrity.

Risk Assessment in Context

Risk assessments are valuable for reframing the pretrial decision about release conditions from money to likelihood of success as well as for improving judicial decision-making. But they are not a cure-all for the problems of our pretrial justice system. It is essential to recognize that states and counties that have made significant progress in reducing their use of pretrial detention have done so through the adoption of pretrial risk assessment together with other reforms, such as using citations in lieu of arrest, early appointment of counsel, strengthening pretrial services, and case processing reforms. Arnold Ventures' commitment to implementation, research, and improvement of pretrial

risk assessment is in service of our holistic vision of pretrial justice reform. Risk assessment is a beginning, not an end.

Pretrial Justice Problems and Principles for Reform

As Arnold Ventures moves into a new phase of pretrial justice grant-making, we articulate below the problems of our pretrial system that must be addressed if we are to achieve just outcomes for arrested individuals. For each problem, we lay out principles that we recommend to guide pretrial reform efforts in the field.

Problem 1

Our current pretrial system is an assembly line that often results in detention-by-default and undermines the presumption of innocence. The Supreme Court has affirmed that pretrial freedom should be the norm in the American criminal justice system, with pretrial detention the “carefully limited exception.” To make the presumption of innocence real, state statutes and constitutions require that judges make pretrial detention decisions on the basis of public safety, risk of flight, or both. But these jurisprudential bases for pretrial detention have not been defined by the Court. As such, they function as broad parameters justifying pretrial detention, and few states meaningfully limit the categories of arrested persons that may be considered for detention (either based on charge or criminal history) referred to as the “detention eligibility net.” And, in practice, judges often functionally detain people by setting unaffordable money bail (or other conditions of pretrial release) without properly assessing the two risk factors or the individual’s ability to pay. In fact, many jurisdictions use fixed bail schedules that assign predetermined dollar amounts to charges, irrespective of any assessment. Although the concept of money bail was originally intended to facilitate release while “reasonably assuring” future court appearance, there is no rigorous empirical evidence demonstrating that it accomplishes this objective, even while there are other tools (e.g., court reminders) that have proven to be effective in increasing appearance rates. Finally, our pretrial system too often fails to provide individuals with due process of law: days-long delays before arraignment are routine and most jurisdictions across the country do not provide defendants with pretrial legal counsel. It is not uncommon for someone who is arrested, booked into jail, and unable to bail out immediately to spend a week in jail before meeting with a lawyer.

Principles

The detention eligibility net should be narrowed to allow for pretrial detention only in the most serious cases, and only upon a showing and finding of dangerousness or risk of willful flight that cannot be safely mitigated in the community.

Detention decisions should be individualized and made with strict due process protections for defendants (e.g., adversarial hearing with discovery, required findings on the record, clear and convincing evidence standard). Fixed bail schedules are incompatible with these due process rights.

Any court-ordered conditions should be governed by a presumption of release under the least restrictive conditions that reasonably ensure public safety and the individual's return to court.

Problem 2

Wealth is used as a proxy for risk to public safety or risk of flight. An individual's wealth bears no relation to public safety risk. Nonetheless, the way our money bail system functions in most places, some people can pay their way out of jail, while poor people—even those who pose no threat to the community—cannot. These people, jailed solely due to poverty, are also disproportionately people of color. Evidence also supports the notion that unnecessary pretrial detention has adverse public safety impacts. Thus, the primacy of money in pretrial decision-making obscures legitimate public concerns while punishing the poor, exacerbating racial disparities, and increasing the likelihood of conviction and the length of sentences.

Principles

Pretrial detention should reflect the concerns set forth in state bail statutes—public safety and flight risk—not one's income; and courts should be responsible for designing a system that maximizes court appearance.

To the extent there is a role for money bail as a condition of release, it should only be imposed following an assessment of ability to pay.

The practice of commercial bail bonding should be restricted and subject to stringent regulation to protect defendants; fees that raise justice system revenue should be eliminated; unsecured bonds should be favored over secured bonds.

Problem 3

The law requires that judges assess risk, but they often lack an objective way to do so. Since the early 1960s, judges in some jurisdictions have used assessments to help them meet their obligation of assessing pretrial risk. Pretrial risk assessments aim to provide judges with a means of objectively assessing relevant data on risk to public safety and/or likelihood of flight to inform how they set release conditions. Ultimately, judges are responsible for incorporating the outcome of a pretrial risk assessment into their decision-making processes, alongside any other factors they are required to consider or may consider in their discretion. But risk assessments are not widely used: only 25% of Americans live in a jurisdiction that uses a validated, evidence-based pretrial risk assessment.

Principles

Pretrial risk assessments, when properly developed and implemented, are advisable in order to give judges an objective way to analyze relevant data and make better-informed pretrial decisions.

Risk assessments must be transparent, locally validated, and must not exacerbate racial disparities.

Risk assessment should not be used as the basis to detain someone, only to inform release conditions. Detention decisions should be reserved for a legal process as outlined by the Supreme Court in *U.S. v. Salerno*.

A pretrial risk assessment is intended to be a support for better judicial decisions about pretrial release conditions. It is not intended, nor should it be used, to replace the role or discretion of a judge.

Every day, in countless courtrooms across the country, judges must decide whether to detain and under what conditions to release people arrested and charged with crimes. Too often, those decisions are made without proper regard for the constitutional rights at stake, or for the impact of pretrial detention on the individual before the court. Under virtually every state statute governing this decision, judges are mandated to consider the risk of failure to appear and the risk to public safety, but, frequently, those considerations are not squarely addressed and are made without the benefit of complete, accurate, and pertinent information. Arnold Ventures believes that the conversation about reducing the harmful consequences of pretrial detention presents an opportunity to open the pretrial process to public scrutiny, assess the costs and effectiveness of various alternatives to jail, promote use of data to guide judicial decisions, and reserve the deprivation of liberty for those cases where the risks are high and effective alternatives do not exist. The goal of eliminating unjust and unnecessary pretrial detention is within reach.

Pew Charitable Trusts (2019)

Launched in 2006 as a project of the Pew Center on the States, the public safety performance project seeks to help states advance fiscally sound, data-driven policies and practices in sentencing and corrections that protect public safety, hold people accountable, and control corrections costs. To learn more about the project, please visit pewtrusts.org/publicsafety.

The Invisible Justice Problem (2019)

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. . . How is it possible that legal problems of the poor and the economically struggling have become invisible? Politics over the past half-century has made them so.

Searing photographs of the poor are plentiful—the writer Adam Haslett called them “a morally indignant anthropology”—and the images played a significant part in launching the war on poverty and, indirectly, the Legal Services program that grew out of that effort. Earl Johnson Jr., who succeeded [Clinton] Bamberger as the [Office of Economic Opportunity’s] director and later became a California judge, reported in 1968 that the program had funded “250 locally-operated programs in forty-eight states” that had “set up 850 Neighborhood Law Offices” and hired “more than 1,800 full-time attorneys.” There were “almost as many lawyers” in Legal Services projects than were “employed by the United States Department of Justice and all of the United States Attorneys Offices around the nation.”

These offices provided legal aid to the poor. They also sought to reform law that penalized people for being poor. Before the Legal Services program, during the near-century that legal aid had existed in the United States as a largely voluntary effort by a small minority of lawyers, the Supreme Court heard one case brought by a legal-aid lawyer. Between 1965 and 1974, Legal Services lawyers became the voice of the poor at the Court—often, a persuasive one. The Supreme Court accepted 64 percent of the cases the Legal Services lawyers asked them to, a remarkably high rate. Of the 110 cases considered, they won 62 percent, with conservative justices supporting those victories as often as the liberals.

The landmark victories included:

Shapiro v. Thompson, where the Court struck down state residency requirements for obtaining welfare benefits, ruling that it was unconstitutional to deny them “to otherwise eligible applicants solely because they have recently moved from state to state or to the District of Columbia”;

Sniadach v. Family Finance Corporation, where the Court struck down the practice of garnishing the wages of an alleged debtor before a hearing had determined that the person owed any money; and

Goldberg v. Kelly, where the Court ruled that officials could not terminate a recipient’s welfare benefits without giving notice or providing the opportunity to challenge the termination in a hearing:

[the] interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State’s interest that his payments not be erroneously terminated, clearly outweighs the State’s competing concern to prevent any increase in its fiscal and administrative burdens.

Legal Services lawyers developed a new field of poverty law while often obtaining justice in individual cases.

From the beginning, however, the Legal Services program faced angry opposition from lawyers, bar associations, and politicians where the program funded legal aid, and from members of Congress. The favorite punching bag was California Rural Legal Assistance (CRLA), a network of offices in rural parts of the state set up to represent migrant farm workers against agribusiness, to which the program gave a million-dollar grant (about \$7.5 million today). Ronald Reagan, as California's governor, vehemently opposed the network and the legal counsel it provided. This campaign helped catapult him to national power.

The State Bar of California joined him in opposition, on grounds that CRLA represented "militant advocacy on a state-wide basis of the contentions of one side of an economic struggle now pending." In response, Sargent Shriver, who led the Office of Economic Opportunity, ribbed the state bar's president: "Look, I'll make an agreement with you. If you will agree that no lawyers in California will represent the growers, I will agree that no legal services people will represent the pickers."

Shriver's joke captured the essence of the access that Legal Services lawyers were providing, but that wasn't what concerned their opponents. The California bar portrayed Legal Services as anti-capitalist. The only vindication of the bar's view would be elimination of Legal Services' part in reforming law that penalized people for being poor. The bar's premise—that lawyers had the ability to reduce poverty or even end it by diminishing capitalism—was surely wrong. Legal Services lawyers made a serious mistake in not challenging that premise. Poverty in America is a product of the combination of capitalism and a limited welfare state. No amount of creative lawyering can eliminate poverty.

As Clinton Bamberger explained, the program's view of the Legal Services lawyer's role was that the "poor are least equipped with the resources and resilience to obtain fair treatment" and "competent advocacy in the form of a lawyer—an articulate friend—can improve the lot and dignity of the poor. The OEO seeks the achievement of some greater approximation of equal justice for the poor—equal significance as human beings—than has ever been achieved before." He went on,

Lawyers must excise the evils that prey on the poor—challenge that minority of disreputable and unethical businessmen until their values and their actions conform to the high standards of the remainder of the commercial community and pierce the complacency of those federal and state bureaucrats who administer benefit programs arbitrarily on the premise that what the statute calls a right is really only a privilege subject to their Olympian discretion.

Opponents of the program successfully yoked these aspirations of Legal Services lawyers to a threat to capitalism itself. To shield capitalism, opponents sought to prohibit Legal Services lawyers from using law reform and other tactics to create a larger political coalition to work on reducing inequality and poverty. Legal Services lawyers did a poor

job of articulating their role in that effort, but their opponents likely would have rejected any positive account of the Legal Services vocation, because challenges to “evils that prey on the poor” were challenges to entrenched power.

The hostilities led, in 1974, to the creation of the Legal Services Corporation (LSC) as an independent organization funded largely by the federal government. Its purpose is to award grants to organizations providing legal aid to people who lack money to pay for lawyers as a means of solving problems—but no longer with the aim of alleviating, let alone eliminating, poverty.

In the final year of the presidency of Jimmy Carter, the LSC budget reached its high point, allowing it to support 325 grantees, with 1,450 offices and 6,200 lawyers. But in 1981, after Reagan defeated Carter to become president, he brought his antipathy to Legal Services to the White House. His team submitted to Congress a zero-budget request for the LSC to shut them down. As an independent agency, the LSC submitted its own request for an increased budget. With some political wrangling, the organization ended up with a 25 percent cut in funding.

The law establishing the LSC mentioned neither the poor nor poverty; it alluded only glancingly to that profound challenge and to those who endure it: “there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program.” Instead, the law focused on the “need to provide equal access to the system of justice,” now shortened to “access to justice.”

In a rule-of-law nation, relying on a constitution to ensure equal justice, this was arguably the more ambitious choice, embracing the prospect of protecting low-income as well as poor Americans from exploitation. It was a choice about justice, not only politics. Yet the LSC law did what the law in general as an expression of the limits of political will has often done: it shifted attention from a substantive, morally defined end, to neutral-seeming means of process. That allowed the nation to pat itself on the back for its commitment to equal justice while freeing itself from providing an integral part of what that entails. The law separated the American commitment to providing legal services for people who are struggling economically from concern about economic hardship.

In 2014, Earl Johnson Jr. published a three-volume work called *To Establish Justice for All* in which he told the story of the nation’s and the legal profession’s failure, since the beginning of the war on poverty, to provide equal justice for the poor with the same success and broad commitment as for the rich. In his words, it is “the story behind our nation’s tardy and as yet unfinished effort to make those people unable to afford lawyers equal to those who can—and thus for the first time to establish justice for that segment of the population.”

On the one hand, he recounted, this unfinished effort is the result of “a contest over two visions of what poor people deserve in the way of legal aid. To analogize to health care—should the government only provide them a network of first aid stations or should it also give them access to specialists and hospitals when they have serious illnesses.” The former are called “everyday” or “routine” problems. The latter involves “impact work” or “high-quality legal services,” “promoting measures” for the protection of the poor and others struggling economically.

On the other hand, for the last half-century, “legal aid for poor people has been a major political and ideological battle-ground, a target of nearly constant assaults from the right wing of U.S. politics as well as some powerful politicians and wealthy campaign contributors.”

The political and ideological struggle has been between two relatively small groups who believe fervently in the rightness of their opposing views, with a vast group in between who are indifferent and have over the past half-century moved considerably to the right in their politics. That description applies to the American body politic and to the American legal profession.

Still, gloomy as that picture is, it understates the challenge for anyone convinced that increased access to justice for the poor and those who are economically struggling should be a central American aim. In the past half-century, attacks of the right on the provision of this access have rested on the triumph of laissez-faire views: the fresh embrace of markets and the free-enterprise system. This began as an assertion of the need for reinvigorated competition in business in the 1970s and 1980s. It grew to become the dominant ideology in American politics.

The upshot is the winner-take-all economy of the past generation. This phenomenon has had the aura of economic destiny, as if the resulting extreme inequality is the product of beneficent economic freedom. But winner-take-all politics has brought it about. That entails the substantial shift to the right of both major political parties, the majority’s support for tax, investment, and other policies favoring the wealthy, and the resistance to economic redistribution: to reducing inequality and its consequences, including by making rules of society fairer and their consequences more equal.

The current state of the legal marketplace reflects this phenomenon: The wealthy can afford to hire a lawyer when they need one. The well-off can afford to do so with budgeting. Except for hiring a lawyer to handle a limited transaction like buying or selling a house, relatively few others can. The marketplace has failed and, in the ongoing winner-take-all politics, improved access to justice is a nonissue, despite the difference it would make in many of the lives of the one hundred million or more Americans who face a serious civil legal issue each year. That is five times the number who benefited from the Affordable Care Act, which was the most fiercely debated social legislation of the past generation.

In the microclimate of the politics about funding legal services, it was positive that the Republican-controlled board of the Legal Services Corporation during the George W. Bush administration was earnestly committed to the improvement of legal services, and laid the foundation for efforts by the Democrat-controlled board during the Obama administration to make the LSC the best-run version of itself in the history of the organization.

But the form of legal services at stake addresses “everyday” or “routine” problems. It largely excludes reform, or impact, work. The LSC supports an essential method of solving problems, but without the means of producing significant enforcement of existing legal rights or the aim of addressing poverty and economic hardship. By law, legal-aid organizations receiving LSC grants can’t take part in class action lawsuits. They can’t get involved in litigation or other activities about immigration, abortion, assisted suicide, desegregation of public schools, or civil rights of prisoners, the LSC itself, or (with narrow caveats) criminal cases. They can’t engage in legislative or regulatory lobbying, political activities like voter registration and promoting ballot measures like referendums, or welfare reform. They can’t engage in or encourage public demonstrations, picketing, boycotts, or strikes.

The restrictions are meant to keep legal-aid organizations focused on solving legal problems for individuals and families. They are meant to keep them from engaging in collective action to reform laws and public policies, from representing large groups of people in lawsuits challenging government agencies or major corporations, and from taking sides in disputes about the most divisive social issues. They are intended to safeguard the status quo, which harms people who are poor or struggling economically.

In 2017, the LSC released its important report about “the justice gap”: the difference between low-income Americans’ need for help in dealing with calamitous legal matters and the resources available to provide that help. Despite the high incidence of these problems and their often-devastating consequences, in nearly nine out of every ten instances, the people involved lacked the help of a lawyer or other problem-solver, leaving them at the mercy of courts and other government agencies with byzantine rules, insufficient resources, and short supplies of mercy.

The organization is punctilious about documenting growth in the distance between the goal of providing justice in the form of legal representation for poor and low-income Americans and the realization of that goal. But the combination of the struggle in vain of American Legal Services lawyers to meet the nation’s needs and the triumph of the conservative resistance to redistribution makes clear how triumphant the resistance has been. Even among leading advocates for redressing inequality, improved access to justice is barely on the agenda.

Access to justice has been separated in both rhetoric and reality from its fundamental purpose: ameliorating the economic insecurity and inequality at the core of

the problem. By law, the LSC cannot directly concern itself with this fundamental justice gap, which has left the nation with a yawning justice problem.

In 2016, the American Bar Association (aba) released its *Report on the Future of Legal Services in the United States*, the product of a two-year study by an ABA commission. A reader would be forgiven for thinking that the report was about the issue of access to justice. The report presents the access issue as a subset of the larger issue that the report addresses: the future of legal services in general in the United States, not only legal services for poor and economically struggling Americans.

A premise of the report is that the United States cannot solve the access-to-justice problem without understanding the state of the American legal profession and identifying where the access problem fits among the major problems facing the profession.

These problems include: the malfunctioning of the market for legal services in the United States, with many lawyers “unemployed or underemployed despite the significant unmet need for legal services”; the overburdened and often malfunctioning systems of state courts, in part because the “vast number of unrepresented parties in court adversely impacts all litigants, including those who have representation”; the transformation of this rule-of-law country into one frustrated by the rule of often arbitrary-seeming rules, in a system designed by lawyers for lawyers; and the undermining of public trust and confidence in the system and in the profession by the latter’s lack of diversity: of 1.3 million members of the bar in 2015, 88 percent were white and 12 percent minority, compared with the country’s population, which was 77 percent white and 23 percent minority.

Each of these problems is real and serious. The report is well-done and useful. But as Rebecca Sandefur writes in this issue of *Dædalus* [*“Access to Justice, Dædalus Winter 2019*], “Lawyers’ fundamental interest is in maintaining their rights to define and diagnose people’s problems as legal, and to provide the services that treat them.” The ABA report acknowledges that the profession’s monopoly on legal services limits useful problem-solving for poor, low-income, and moderate-income individuals and families: “The legal profession’s resistance to change hinders additional innovations,” the report says, including services by nonlawyers. The report strongly promotes innovations in technology that could displace lawyers. Yet the impression it leaves is that the legal profession cannot solve the access problem until it gets its own house in order. Even if unintentionally, that puts the interests of lawyers first.

In the half-century that the access problem has been left to lawyers to solve, the problem has gotten measurably worse, despite first-rate leadership of the LSC, substantial commitment of leading law firms and growing commitment of major corporations to the provision of pro bono legal services as a supplement to the work of legal-aid offices, growth in the use of technology to make legal-aid lawyering more efficient, and other positive steps. Most poor and low-income Americans, as well as the majority of moderate-income Americans, “do not receive the legal help they need.”

Politics over the past half-century has all but made these problems invisible, with the legal profession failing to make them visible again. For access to justice to be a priority of a national movement, it needs champions in national politics, not just in the legal profession and among its allies. It needs champions who regard greatly increased and improved access as a primary commitment, not one of a list of needs whose fulfillment depends on solving a host of other problems of the legal profession. That is the conviction on which this *Dædalus* issue rests, as John Levi and David Rubenstein explain in their introduction.

The purpose of access to justice is to ensure that people disadvantaged economically are not disadvantaged legally. That entails: providing those who can use them effectively with information about the workings of the law and tools for navigating the legal process; changing legal procedures and proceedings and substantive law so they are only as complicated as they need to be and can be managed more easily by nonlawyers; deregulating some legal services, so consumers have access to more assistance and more advocacy from nonlawyer problem-solvers; reforming legal education so more law-school graduates are prepared to provide legal services and more can afford to take legal-services jobs; expanding the opportunities for non-legal services lawyers to take on legal-services representations; greatly increasing the public and philanthropic support for legal services; removing the bans on class actions and other forms of litigation and policy-making that penalize people for being poor; greatly strengthening state court systems; challenging corporate leaders to end forced arbitration and let their customers and employers use those systems to fight alleged corporate wrongdoing; and according anyone without resources, as they deal with the challenge of a divorce, a natural disaster, a fraudulent tele-marketer, or a health crisis, for example, the same dignity and respect as someone who is wealthy.

In *Winner-Take-All Politics*, the political scientists Jacob S. Hacker and Paul Pierson counsel that reversing the “economic hyper-concentration at the top” will require engaging in politics many more people “whose voices are currently drowned out”; developing new capacity “to mobilize middle-class voters and monitor government and politics on their behalf”; and reducing the ability of “entrenched elites to block needed reform.”

For the access-to-justice issue to become salient again, it must become part of this effort. A key aspect of the agenda must be greatly increased and improved services for the poor, the economically struggling, and others who need help in solving a legal problem, and services to reform laws and other policies that penalize people for being poor. They must become visible again.

