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Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts

Lisa Foster, former director of U.S. Department of Justice's Office for Access to Justice
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In 1962, in a speech to the American Bar Association, former Attorney General Robert Kennedy asked, “do . . . minorities or people who speak our language imperfectly . . . or those who are poor really receive the same protection before the courts as the rest of our citizens? All too often,” he said, “they do not.” Today, our justice system is no longer formally based on race, ethnicity or national origin, but it still depends on wealth.

Money matters in the justice system. If you can afford to purchase your freedom pretrial, if you can afford to immediately pay fines and fees for minor traffic offenses, if you can afford to hire an attorney, your experience of the justice system both procedurally and substantively will be qualitatively different than the experience of someone who is poor. What’s worse, through a variety of policies and practices – some of them blatantly unconstitutional – poverty is being perpetuated and criminalized by our courts. And when we talk about poverty in the United States, we are, over fifty years after Kennedy posed his provocative question, still talking about race, ethnicity, and national origin. The majority of poor people in the United States are white; but 24 % of African-Americans and 21 % of Hispanics live in poverty while African-Americans comprise just 12 % of the total population, and Hispanics comprise just 18. The impact of what we have done and continue to do daily in courtrooms throughout the United States is to trap people in poverty– including disproportionately people of color.

I am going to talk today about how the justice system enforces poverty employing three examples: bail, fines and fees, and access to counsel. These are by no means the only examples

of how the justice system quite literally imprisons people in poverty, but they are widespread and particularly pernicious. Understanding these practices and the impact they have on individuals, families and communities will, I hope, inspire you to work with me and many other advocates around the country to end them.

For ten years, I was a judge in California. Because I had been a civil litigator for my entire legal career, my first assignment was... in a criminal trial department. I didn't know very much about bail. I didn't have to. San Diego County, like all California counties, is required by law to adopt a bail schedule, and it's easy to use. Each offense is paired with a dollar amount. If you are arrested, for example, for assault on a parking control officer – something I'm sure we've all been tempted to do, your bail is \$5000; if you're arrested for assault with a firearm, bail is \$20,000. If you or your family can afford to pay a bail bond company 10-35% of the bond amount, you are released and given a date to come back to court. If you can't afford a bail bond, you stay in jail. People with money go home; people without money go to jail. It was as simple as that. To be perfectly honest, I didn't think much about bail, and to the best of my recollection, neither did anyone else – not my colleagues on the bench, not the prosecutors nor the public defenders.

And it seems that until quite recently, few policy makers have thought much about bail since Congress passed the federal Bail Reform Act fifty years ago. The Act, which applies only in federal court, allows bail to be set only if the judge finds the defendant is a flight risk, and only after the judge makes an individualized assessment of the defendant's ability to pay. When President Johnson signed the bill into law, he described the bail system as "archaic and cruel." "Because of the bail system," he said, "the scales of justice have been weighted not with fact nor law nor mercy. They have been weighted with money. But now we can begin to insure the defendants are considered as individuals and not as dollar signs."

Unfortunately, the Bail Reform Act was not the beginning of a movement to reform bail nationwide – it was, practically speaking, the end. Until recently, not a single state adopted statutes comparable to the Bail Reform Act. To the contrary, the number of people incarcerated

pretrial has increased dramatically since the 1980's. Despite the United States Supreme Court's unequivocal declaration that "[i]n our society, liberty is the norm, and detention prior to trial . . . the carefully limited exception," roughly 60 % of the jail population nationally is comprised of pretrial defendants – up from 50 % in 1996 and 40 % in 1986. Since 2000, 95 % of the growth in the overall jail inmate population has been due to the increase in the population of defendants held pretrial. Most of those detained pretrial are accused of nonviolent offenses. Disproportionately, they are people of color. African-Americans and Hispanics are at least twice as likely as Whites to be detained pretrial for non-violent drug arrests.

And the overwhelming majority are poor. Bail exacerbates and perpetuates poverty because of course only people who cannot afford bail are held in custody pretrial. And just a few days in jail can make you poorer. As little as 3 days in custody increases the likelihood that a person will lose their job, their housing, be forced to abandon their education, or be unable to make their child support payments. The consequences of pretrial detention are not only borne by the individual in jail, but also by their family and the community. A child whose single parent is taken into custody not only is deprived of the emotional and financial support of their parent, they may be placed in foster care or move in with a relative and be forced to change schools. Even a temporary disruption in a child's life can have catastrophic and long-lasting consequences. Finally, the cost to taxpayers of this system is enormous. In the United States, we spent \$9 billion on pretrial detention last year.

We also know, and we have known for 50 years – that a decision to detain or release a defendant pretrial affects the outcome of a case. In state criminal cases, if a conviction can result in a jail sentence, people who are detained pretrial are four times more likely to be sentenced to jail and their sentences are three times longer than defendants who are released pretrial. If a conviction can result in a prison sentence, people who are detained pretrial are three times more likely to be sentenced to prison and their sentences are twice as long as someone released pretrial. And people detained pretrial are more likely to plead guilty – whether that's because they are guilty or because they simply want to go home.

We have created a bail system in the United States that not only punishes people for their poverty, it makes people accused of crimes, their families and their communities poorer still. And it's being done by judges, -- just like me -- in flagrant violation of the United States Constitution.

In 2015, the Department of Justice filed a brief in *Varden v. the City of Clanton, Alabama*, advising the District Court that: “Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay.” Last year, the Department filed an *amicus* brief in the Eleventh Circuit in *Walker v. City of Calhoun, Georgia*, arguing that “a bail practice violates the fourteenth amendment if, without consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the pretrial detention of indigent defendants.”

Just as the number of defendants detained pretrial has increased dramatically since the mid-1980's, so has the amount of fines and fees imposed by the justice system. The two are not unrelated, and both are a cause and a consequence of mass incarceration. Since 1980, the number of people incarcerated in the United States has quintupled. Because the vast majority of those incarcerated are held in state and local jails and prisons, the cost of incarceration has been born overwhelmingly by state and local governments. From 1979 to 2013, total state and local corrections expenditures increased by 324 percent – from \$17 to \$71 billion. By comparison, during that same period, state and local education spending – from pre-Kindergarten through high school increased 107 percent. The cost of corrections does not include the cost of adjudication, that is, the cost of operating courts nor does it include associated costs like public defenders, prosecutors, police, or probation services. In order to defray these costs, as well as, in some cases, simply to provide additional general fund revenue, state and local legislators have demanded that courts impose steep fines and fees on defendants.

Since 2010, every state except Alaska, North Dakota and the District of Columbia has increased civil and criminal fines and fees. As state and local governments have moved aggressively to collect on what is known as court debt, we have seen another way in which the

justice system penalizes poor people -- the return of debtor's prisons -- a blatantly unconstitutional practice.

Many Americans first heard or read about fines and fees as a result of the Justice Department's investigation of the Ferguson, Missouri police department. In 2015, 23 % of the city of Ferguson's revenue came from court fines and fees, and they were excessive: \$302 for jaywalking, \$427 for disturbing the peace, and \$531 for allowing high grass or weeds to grow on your lawn. When people could not afford to pay these fines and fees, they were arrested, jailed and faced payments that far exceeded the cost of the original ticket. To cite just one example, an African-American woman had a case stemming from 2007, when, on a single occasion, she parked her car illegally. She received two citations and was assessed \$151 in fines and fees. The woman, who experienced financial difficulties and periods of homelessness over several years, sometimes missed court dates and payments on that original fine -- resulting in arrest warrants and additional fines and fees. From 2007 to 2014, she was arrested twice, spent six days in jail, and paid \$550 to the court for the events stemming from this single instance of illegal parking. As of December 2014, over seven years later, despite initially owing a \$151 and having already paid \$550, she still owed the City of Ferguson \$541.

Ferguson is not alone. Lorenzo Brown, a 58-year old disabled resident of Montgomery, Alabama whose only income is a Social Security disability check was arrested at his boarding house by police in 2014 for failure to pay court fines and fees arising from traffic tickets issued in 2010. Mr. Brown was kept in jail for 3 days before he was brought to court where a municipal court judge told him he could be released if he paid \$1400 -- half of the total amount he owed and twice the amount of his monthly disability check. Without conducting any inquiry into his ability to pay, the judge ordered him to serve 44 days in city jail to sit out debt at the rate of \$50 per day. In Michigan, an unemployed 19-year old man was arrested and incarcerated after failing to pay a \$155 fine for catching a fish out of season. He was able to pay \$175 to a bail bond company to get out of jail, but then couldn't pay the original fine, so he went back to jail. Vera Cheeks, of Bainbridge, Georgia, was cited for rolling through a stop sign

in 2013. The municipal court judge assessed a \$135 fine. Ms. Cheeks didn't have \$135, and the only way to pay the fine over time was to be put on probation, under the supervision of a private company that charged her an additional \$132 for three months of supervision. In court that day, her probation officer told her that she had to pay \$50 immediately or go to jail. Her fiancé pawned her engagement ring and a Weed Eater so she could leave the building.

Without question, states have a fundamental interest in punishing people – rich and poor – who violate the law. And courts must have the authority to punish people who willfully refuse to pay a fine. But before a court can incarcerate someone for nonpayment of court debt, a judge must first determine that the failure to pay was in fact willful, and that means determining that the person had the ability to pay the amount owed. To do otherwise, according to the United States Supreme Court, would amount to the unconstitutional practice of “imprisoning a person solely because he lacks funds to pay a fine.” For those who cannot afford to pay, the court must consider alternatives to incarceration, such as community service.

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

The consequences can be devastating. People depend on their driver's licenses to get to work, to get themselves or their families to the doctor or their children to school. From a public policy perspective, suspending driver's licenses makes no sense. If the goal is to get people to pay their court debt, why would you make it more difficult for them to get to work? And as a practical matter, people whose licenses are suspended often drive any way – because they have

to get to work or to the doctor or to their children's school. And then, if they're stopped by law enforcement, they get a ticket for driving on a suspended license, which in many states is a misdemeanor. More fines and fees are imposed, and ultimately, they may be incarcerated – simply because they are poor.

The final example of the ways in which the justice system enforces poverty concerns the absence of effective legal assistance in the civil justice system. Every day, millions of Americans confront life-altering civil legal problems like foreclosure, eviction, unemployment, debt, and domestic violence, without effective legal assistance. There is no federal constitutional right to counsel in civil cases, and typically, state laws and constitutions only provide counsel when the state is attempting to remove children from their parents.

Three barriers conspire to limit access to justice for low- and middle-income people. They are structural, economic and epistemological.

Here's the structural problem. Our justice system was constructed by and for lawyers. It rests on the premise that everyone has a lawyer, and it works reasonably well when that is true. In our civil justice system today, the reality is that many people don't have lawyers to represent them, and in some areas of the law, many is most. Our best estimate is that in at 80 % of family law cases – child support, child custody, divorce – at least one party is unrepresented. Our best estimate is that 90 % of tenants in eviction cases represent themselves. A 2015 study by the National Center for State Courts found that in 70 % of all civil cases, at least one party was unrepresented.

Why don't people have lawyers? That's largely a function of cost – the economic barrier to access to justice. In 2013, the national average hourly rate for an attorney was \$ 370 per hour. A family of four living in poverty would spend over half of its weekly income for an hour of a lawyer's time. An individual working at minimum wage could spend an entire week's wages for an hour of a lawyer's time.

That is only one part of the economic equation; the other is the lack of resources for the organizations that provide civil legal aid. Most civil legal aid in the United States is provided through public/private partnerships, typically some federal, state or local dollars are provided to non-profit organizations that provide services. The primary and largest source of federal funding for legal services is the Legal Services Corporation (LSC). In 2014, the budget for LSC was \$375 million – less than what the government of the Netherlands spends on legal services for a country with roughly 5 % of our population. Put differently, in 2013, the 124 offices funded by the Legal Services Corporation served approximately 1.8 million people – that’s 4 % of the people living in poverty. As a result, half of the people who walk in the door of a legal aid office are turned away.

The third barrier to access to legal services is epistemological. Americans often don’t think of their problems in legal terms. They don’t connect the problems they are experiencing with law or rights. Instead, they often understand the problem as a social, moral or private issue, or simply bad luck. An immigrant woman from Somalia may not know the law protects her from an abusive husband or that there is something called a domestic violence restraining order; a worker injured on the job may think the accident was simply bad luck; a man whose girlfriend won’t allow him to see their child may believe the dispute is personal.

On the ground, the lack of access to civil legal assistance means that poor and moderate income people are exploited. Let’s imagine a single mother working a minimum wage job whose daughter gets sick. Mom misses a week of work, and her landlord files to evict her. She may not know that the fact that her roof leaks and that she didn’t have heat for half the winter is a defense to nonpayment of rent. Because of work or childcare, she may not be able to come to court at 9 a.m. or 1:30 in the afternoon when her hearing is scheduled. She may not come to court because she thinks that an uninhabitable apartment is what she paid for. So she may just move. If she comes to court, she likely represents herself. As noted, 90 % of tenants are self-represented, but 90 % of landlords have lawyers. Without legal assistance, she likely does not know that she has defenses. The judge is not likely to ask her, and she will likely lose the case.

In his seminal and award-winning book, *Evicted*, Mathew Desmond explains what happens next. “Losing your home and possessions and often your job; being stamped with an eviction record and denied government housing assistance; relocating to degrading housing in poor and dangerous neighborhoods; and suffering from increased material hardship, homelessness, depression, and illness – this is evictions fallout. Eviction does not simply drop poor families into a dark valley, a trying yet relatively brief detour on life’s journey. It fundamentally redirects their way, casting them onto a different and more difficult path. Eviction is a cause, not just a condition, of poverty.”

Here’s another pervasive problem– debt collection. Consumer debt is rarely collected by the original creditor; instead, delinquent debt is sold to debt collection companies – often repeatedly – which then try to collect from the debtor. Ultimately, a complaint may be filed and sent to the last known address of the debtor – a form of service one agrees to in many consumer credit contracts. The person likely doesn’t live there any longer; there may not be a forwarding address. The statute of limitations may have run on the collection action; the company collecting the debt may or may not have the documentation needed to prove their claim. They file the case anyway, because they know that the default rate for collection cases is typically well over 50%. Defendants don’t know that the claim may be time-barred; they don’t know that the company can’t prove its case; they may assume that if they didn’t pay an old bill, they’re liable for whatever interest and fees have been added to their original debt. That – coupled with the lack of effective notice -- explains the default rate. If debtors do come to court, they usually represent themselves, while the debt collector is represented by counsel. Debt collectors typically win. Whether by default or after a hearing, the debt collector secures an enforceable judgment, which in many states allows the company to garnish the debtor’s wages or even attach a bank account – often without notice.

It may not be self-evident why the lack of access to civil legal assistance is the fault of the court. There is no obvious unconstitutional practice being perpetrated by the court. The problem is that many courts and, in particular many judges, do not treat self-represented

litigants fairly or apply the law rigorously and that allows for economic exploitation to occur. In a groundbreaking study, University of Illinois Professor Rebecca Sandefur examined the difference a lawyer makes in a civil case. Her conclusion was striking: “[K]nowledge of substantive law explains surprisingly little of lawyers’ advantage compared to lay people appearing unrepresented. Instead, lawyers’ impact is greatest . . . where their relational expertise helps courts follow their own rules.”

In other words, due process happens when lawyers are present to enforce it. Instead of reviewing a debt collection company’s case to assess affirmatively whether the complaint was filed within the statute of limitations or whether the company has the documents required under state law to prove its case, many judges simply sign the default judgment that the company’s lawyer presents. Instead of making a finding that notice in a unlawful detainer action was legally sufficient, instead of asking defendants affirmatively whether there are any habitability issues that may serve as a defense to an eviction action, many judges believe the antiquated maxim that the court must treat self-represented litigants exactly as it treats attorneys. In fairness, many judges do not realize that they have the authority to scrutinize a default judgment, examine a notice, or ask questions of a self-represented litigant. Others have so many cases on their docket, that the imperative to process rather than adjudicate cases is overwhelming. But the result is that in the civil justice system, self-represented litigants often lose and often when they shouldn’t.

These are just a few of the ways in which our justice system is perpetuating, exacerbating, and criminalizing poverty. The court house has become *Bleak House*. The consequences of our justice system not only wreak havoc on people’s lives and destabilize communities, they also threaten to undermine our democracy. In a recent article published in the Iowa Law Review, Duke Law School Professor Sara Sternberg Greene described the findings from research she had conducted among public housing residents in Massachusetts. She found that people profoundly distrust the justice system. As one of her respondents complained, “it’s all law and courts and bad. Stay away from the law, that is my MO.” Indeed, the most

disturbing finding of her research is that people's experiences in courts have convinced them to avoid the justice system even when they know they have a legal problem - even when they know they have a good defense or a strong claim.

It's not surprising then that, as former Attorney General Loretta Lynch observed, "too many of our fellow citizens, especially low-income Americans and Americans of color . . . experience the law not as a guarantee of equality, but as an obstacle to opportunity."

But I am here today to tell you that there is hope. Over the last few years, Alaska, Kentucky, New Mexico, New Jersey, and just last month, Maryland, have all enacted statewide bail reform, either legislatively or through changes in court rules. New York, California, and Colorado have pending bail reform measures, suggesting strongly that we are reaching a tipping point on the issue of bail. The Justice Department has been actively advocating bail reform in the states for many years. During their tenures, both Attorneys General Holder and Lynch spoke out about the injustice of incarcerating the accused pretrial simply because they are poor. As noted, the Department has filed briefs explaining why bail practices that do not consider a defendant's ability to pay are unconstitutional. The Department's efforts are not unique. Advocates have sued state and local jurisdictions challenging their bail practices and together with public defenders and organizations like the Pretrial Justice Institute have advocated for reform.

Similarly, on the issue of fines and fees, there has been remarkable progress since the Department released its Ferguson Report. In December of 2015, the Department and the White House convened judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals to raise awareness of and address solutions to the unlawful assessment and enforcement of fines and fees. Vanita Gupta, the former head of the Civil Rights Division, and I sent a letter to every state Chief Justice and every state court Administrator explaining their legal obligations with respect to fines and fees and why many of their courts practices are unconstitutional. The Department also provided funding to five states willing to pilot reform. Former Assistant Attorney General Karol Mason and I signed an Advisory on the

legal and policy framework that should govern fines and fees in juvenile courts. And, yes, fines and fees are even assessed against children. The Conference of Chief Justices and the Conference of State Court Administrators formed a National Task Force on Fines, Fees and Bail Reform that is developing recommendations and resources for courts. In Jackson and Biloxi, Mississippi, in Benton County, Washington, in Rutherford County, Tennessee, in Jennings, Missouri, in Montgomery, Alabama, in New Orleans, and in other jurisdictions throughout the country, public interest advocates like the ACLU, Civil Rights Corps, Equal Justice Under Law, and Atlanta's own Southern Center for Human Rights, often with the assistance of pro bono lawyers, have either settled or won law suits challenging debtor's prisons. In Virginia, advocates filed suit against the state's practice of suspending driver's licenses for unpaid court debt without first conducting an ability to pay hearing. The Justice Department filed a statement of interest in the case advancing the United States' position that suspending a driver's license is unconstitutional if it is done without providing due process and without assessing whether the individual's failure to pay was willful or the result of an inability to pay. Similar suits in California and Tennessee were recently filed.

Individual judges have also found the courage to stand up to prevailing practices and conduct themselves and their courtrooms differently. Judge Ed Spillane, a municipal court judge in College Station, Texas wrote an op-ed in the [Washington Post](#) entitled, "Why I refuse to send people to jail for failure to pay fines." In Arizona, Missouri, Ohio and Texas, the Chief Justices have all championed changes to court rules that would mandate ability to pay determinations before any defendant is incarcerated for failure to pay fines and fees. And in January, the Alabama Court of the Judiciary found Judge Lester Hayes, Presiding Judge of the Montgomery Municipal Court, guilty of seven charges of violating the Canons of Judicial Ethics and suspended him without pay for 11 months because he routinely sent defendants to jail for failure to pay fines and fees without first conducting an ability to pay determination.

There has also been progress with respect to the provision of effective legal assistance in civil cases. In 2010, former Attorney General Eric Holder created the Office for Access to Justice

(ATJ) whose mission is to help the justice system deliver outcomes that are fair and accessible to all regardless of wealth or status. Among many other initiatives, ATJ created what is now known as the White House Legal Aid Interagency Roundtable. The Roundtable is comprised of 22 federal agencies committed to better serving low-income people and vulnerable populations by partnering with civil legal aid. The Roundtable has unlocked millions of dollars of federal funds for civil legal aid providers.

Courts, too, have recognized the need to better assist civil litigants. The Conference of Chief Justices and the Conference of State Court Administrators both adopted a resolution supporting the goal of 100 percent access to effective assistance for essential civil legal needs. Toward that end, the Public Welfare Foundation recently launched the Justice for All project and funded seven states to develop strategic action plans to implement the resolution.

Overwhelmed by self-represented litigants, several courts have adopted innovative reforms. In New York, the Court Navigator Program trains college students, law students and other volunteers to assist unrepresented litigants in housing court and in consumer debt cases in civil court. In California, the Court has created Justice Corps, whose three hundred members have served over one million Californians people coming to court without an attorney, helping them resolve crucial legal matters affecting their family, housing, personal safety, and financial stability.

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

Second, we need to persuade legislators in state government that courts serve the entire community and should be funded by general revenue and not by fines and fees. The justice system itself is constrained by poverty. Since the Great Recession, funding for state and local courts has declined – in some places dramatically, leaving Courts overwhelmed with cases and without the resources to provide adequate self-help, simplify forms, or adopt innovative technologies.

Third, we need to continue to litigate against unlawful practices. We will never be able to bring lawsuits everywhere they are needed, but when a case is brought against one jurisdiction, others take notice. We need to develop and advance the argument that there can be no price tag on justice. The Supreme Court does not recognize poverty as a suspect classification nor, as noted, has the court been willing to adopt a civil right to counsel. The Court does, however, recognize that “punishing a person for his poverty” has no place in the justice system. Indeed, one can craft a compelling argument that constitutionally, justice cannot in any way depend on money. The parameters of this line of reasoning need to be pushed throughout the justice system -- both civil and criminal.

In 1886, Frederick Douglass gave a speech commemorating the 24th anniversary of the Emancipation Proclamation. Speaking nine years after the Federal Army was withdrawn from the South and Reconstruction era reforms had largely been reversed, Douglass focused on the justice system and warned that “where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.”

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

