

ARTICLES

The Criminalization of Poverty and the People Who Fight Back

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I. INTRODUCTION

Mass incarceration has been doing its damage for decades, but a newer criminalization—the criminalization of poverty—arrived with the Reagan era and the anti-tax rebellion that is still with us. Strapped, governments at all levels cut budgets and looked for money wherever they could find it. Among other things, states and municipalities turned to ubiquitous “user fees,” and the whole criminal “justice” system jacked up fines to exorbitant levels and soaked defendants with enormous fees irrelevant to the case, followed by more fees for every stage of the process from diversion to money bail to room and board in prisons. Drivers’ license suspensions are an especially effective tool. Altogether, ten million people owe \$50 billion for a sweeping list of penalties, composed disproportionately of people of color.¹ It earned its name of “criminalization of poverty.”

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1. DOUGLAS N. EVANS, THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 7 (Research and Evaluation Ctr., John Jay Coll. of Criminal Justice ed., Aug. 2014), <https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf>; FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 7 (Council of Econ. Advisers

For years there was little national awareness of what was going on. Journalists and policy experts wrote about it and lawyers saved some people, but few saw that it was a national phenomenon. That finally happened in 2014 after the killing of Michael Brown in Ferguson, Missouri, with the concomitant discovery of the squeezing of its own citizens and throwing them into jail when they could not pay the fines and fees, and the devastating report by the Obama Department of Justice that brought the story to national attention.² The issue was no longer under the radar.

Parts II and III of this Article discuss the fines, fees, and accompanying use of money bail that force people by the thousands to plead guilty to get out of jail, only to be stuck with payment plans that turn into cash cows for the authorities and hold them in thrall, sometimes for life.

Part IV describes the subsequent metastasizing of the criminalization of poverty, done for reasons other than raising money but like the fines and fees with victims who are disproportionately people of color. The metastasizing concerns sending children of color and with disabilities involved in minor occurrences at school to court instead of the principal's office, police ordering of landlords to evict women who call 911 one too many times to get protection from domestic violence, penalizing people making a mistake in applying for a public benefit, banning ex-offenders from public housing, and driving homeless people out of town by banning them from sleeping outside. All are examples of the criminalization of poverty.

But this is not a story solely of horrors. It is also about the fight of lawyers and journalists and some judges and legislators who are pushing back. It should be a national movement, but we are moving in the right directions.

II. FINES AND FEES

A. Problem: Anti-Tax Fervor and the Phenomenal Number of Arrests

Adel Edwards, who lives in Georgia, has a significant intellectual disability and cannot read or write. He was arrested and convicted for burning leaves without a permit. He was fined \$500 and a fee of \$528 for so-called probation services in the Municipal Court of Pelham. Unable to pay the initial \$500 fine, he was put on "probation" for one year. No one asked about his ability to pay. The for-profit probation company, Red Hills, demanded an instant payment of \$250, which he could not raise, so he went to jail for several days until a friend came up with the money. He made four additional installment payments over a year that added up to \$138. Even when his probation was supposed to have expired, Red Hills nonetheless threatened him regularly with more jail time if he did not pay what they claimed he owed them.

ed., Dec. 2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [hereinafter FINES, FEES, AND BAIL].

2. See U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 84 (2015).

Nor is it a happenstance that Adel Edwards is African American. Visit municipal courtrooms any morning in New Orleans, St. Louis, Cleveland, or many other places and one will see the same thing—men, and occasionally women, all or nearly all African American (Latino in some places), in orange jumpsuits, often shackled. The criminalization of poverty takes place at one of the most dangerous intersections in America: The intersection of race and poverty. Adel Edwards was saved by being found by a lawyer, but many more have no such fortune.

Stories like that of Adel Edwards are a national fact, and have been for years, but they fly under the radar. Most people are completely unaware. Of course, the victims knew (although they did not know that there were millions facing similar situations), and some lawyers, journalists, legislators, judges, and others in court systems knew. Indeed, those who created the regime of massive fines and fees knew all too well. Both “quality of life” crime convictions and the even more frequent suspensions of drivers’ licenses funnel victims into an abyss of fines and fees, a spiral that begins at conviction and escalates into an ever-mounting flood of debt. The vast majority of those infractions involve minor violations that nonetheless balloon into enormous debt.

Pure and simple, it is a systematic way for states and communities to raise millions of dollars from the poor. It is the twenty-first century’s debtors’ prisons and then some.

Why did all of this happen? The anti-tax revolution. Mass incarceration, which disproportionately victimized people of color from its beginning in the 1970s, had set the scene for the new criminalization of poverty. But to understand the impulse to make poverty a crime, one has to follow the trail of tax cuts which created revenue gaps all over the country. Deep budget cuts ensued, and the onus of paying for our justice system—from courts to law enforcement agencies and even other arms of government—began to shift to the “users” of the courts, including those least equipped to pay.

Governments jacked up fines and added mountainous fees that had no connection with the violation—for example, a portion of a \$500 fee went toward the cost of running the courthouse gym in one county in Michigan.³ We live in an era of user charges, but there is an enormous difference between paying for a trip to a national park and paying for room and board while incarcerated. In some jurisdictions, the fees begin when a person is booked.⁴ They have to pay for diversion and, if they cannot pay, they wait in jail to be tried. They have to pay for an electronic bracelet if they are let out on bail or recognizance, and if they cannot afford that, they, again, have to wait in jail to be tried.⁵ The same applies for community service in lieu of trial.⁶ Probation costs \$40 a month, give or take. It

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

4. See Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUSTICE (July 31, 2014), <https://www.brennancenter.org/analysis/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate-excessive-fines-clause>.

5. FINES, FEES, AND BAIL, *supra* note 1, at 3.

6. See *Alternative Community Service*, MONTGOMERY CTY. DEP’T OF CORR. AND REHAB., <https://www.montgomerycountymd.gov/cor/PTS/ACS.html> (last visited Feb. 10, 2019); *Community Service*, WASH. CTY. OR., <https://www.co.washington.or.us/communitycorrections/probationparole/>

goes on and on, including fees that are often completely unrelated to the defendant or inmate.

In Oklahoma, a first-offense misdemeanor DUI conviction is now \$715.50, including fees.⁷ There exist fifteen possible types of fees that may be tacked on, including a charge for the law library.⁸ When these fees were increased again in 2016, the vice chairman of the state Senate Appropriation Committee said tersely, “[t]he courts could not have functioned without raising some of those fees.”⁹

In 1996, Florida added more than twenty new sets of fees, and it has added even more since.¹⁰ The state repealed most of the exemptions for people unable to pay, and added a mandate that defendants be charged for the costs of their prosecution and public defense regardless of their ability to pay.¹¹ It allows private debt collection firms to add a surcharge of forty percent on unpaid court debt.¹² Fees are authorized for room and board, medical care, probation supervision, substance abuse treatment, electronic monitoring, and urinalysis. Then there are the fees the state imposes to subsidize other government functions: Mandatory fees go to crime prevention programs, the Crime Compensation Trust Fund, the Crime Stoppers Trust fund, and on and on.¹³ Fines and fees take in more than \$1 billion a year to the state coffers.¹⁴

Governments made up new offenses, too—unmowed grass and weeds, or drinking a beer on the front porch.¹⁵ Rolling through a stop sign is a favorite.¹⁶ Broken tail lights are another.¹⁷

“Broken window” policing brought in even more cash because it brought in more “customers.”¹⁸ The ostensible idea is that mass arrests for minor offenses

community-service.cfm (last visited Feb. 10, 2019); *Community Service Sentencing*, BOULDER CTY., <https://www.bouldercounty.org/safety/community-justice-services/community-service-sentencing> (last visited Feb. 10, 2019).

7. See Arianna Pickard, *Jail's Revolving Door: Thousands Arrested Every Year for Failure to Pay Court Costs*, TULSA WORLD (Sept. 28, 2015), https://www.tulsaworld.com/news/courts/jail-s-revolving-door-thousands-arrested-every-year-for-failure/article_c48b44cd-1651-5453-9401-66847822f10e.html.

8. See *id.*

9. Barbara Hoberock, *Fees to Increase Friday as New Oklahoma Laws Take Effect*, TULSA WORLD (July 1, 2016), https://www.tulsaworld.com/news/capitol_report/fees-to-increase-friday-as-new-oklahoma-laws-take-effect/article_4274db2e-59e5-5fa1-aa5b-0a5bceaeb6e7.html.

10. BANNON ET AL., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7 (Brennan Ctr. for Justice ed., 2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

11. *Id.*

12. *Id.* at 1.

13. PETER EDELMAN, NOT A CRIME TO BE POOR 14 (2017).

14. *Id.*

15. See Barry Leibowitz, *Cut Your Lawn, or Your *ss is Grass in Long Island Town*, CBS NEWS (June 13, 2012), <https://www.cbsnews.com/news/cut-your-lawn-or-your-ss-is-grass-in-long-island-town>; Lizzie Dearden, *Getting Drunk on Your Front Porch is Not Illegal, Rules US Court*, INDEPENDENT (June 13, 2015), <https://www.independent.co.uk/news/world/americas/us-state-court-re-affirms-peoples-right-to-be-drunk-on-their-own-front-porches-10318074.html>.

16. See EDELMAN, *supra* note 13, at 7; Telephone Interview with Jill Webb, Criminal Defense Attorney, Tulsa Cty. Pub. Defenders (July 20, 2016).

17. Alan P. Sherouse, *The Problem with Broken Taillights*, HUFFINGTON POST (June 16, 2015), https://www.huffingtonpost.com/alan-p-sherouse/the-problem-with-broken-taillights_b_7030592.html.

18. See U.S. COMM’N ON C.R., TARGETED FINDS AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 8 (Sept. 2017), <https://www.usccr.gov/pubs/2017/>

promote community order. In reality, it aided and abetted the new criminalization, making the police complicit in the victimization of the poor. Enforcing “quality of life” rules was touted as a way to achieve civic tranquility and prevent more serious crime. What it actually did was fill jails with poor people, especially because those arrested could not pay for bail.

The biggest source of money comes from the suspension of drivers’ licenses. A Washington Post study found that at least forty-one states and the District of Columbia take away licenses, and the total number is likely higher because of underreporting.¹⁹ Little of it has anything to do with bad driving. Most of it is to squeeze people who owe court debt. Montana suspends licenses for unpaid student loans.²⁰ Iowa suspends for public drunkenness, with no car involved.²¹ Other states suspend drivers’ licenses for writing bad checks, graffiti, and littering.²²

California has suspended four million people, one out of six adults in the state, although it has been reforming its policies over the last few years.²³ Texas has taken 1.8 million licenses, North Carolina about 1.2 million, Virginia almost 1 million, and Florida around 700,000.²⁴

Why? Because it works so well. Once a state takes away a license, it is a near certainty that the defendant will re-offend. People have to get to work and buy groceries and take children to school. They get arrested again and again, and the state rakes in the money. At the peak of this policy, California was collecting nearly \$2.2 billion a year.²⁵ The “smart” states do it without jailing because using jail is expensive, even when there are fees levied to pay for room and board. The state can collect fees by garnishing wages and grabbing state tax refunds without using jails, although some do anyway.

The whole scheme is a government-operated loan shark system. Outsized fees and fines are a big, national business. Two in every three current and former

Statutory_Enforcement_Report2017.pdf; Telephone Interview with Danny Engelberg, Chief of Trials, Orleans Public Defenders (2017); Telephone Interview with Deborah Fowler, Executive Director, Texas Appleseed (2017).

19. Justin Wm. Moyer, *More Than 7 Million People May Have Lost Driver’s Licenses Because of Traffic Debt*, WASH. POST (May 19, 2018), https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d_story.html.

20. Jessica Silver-Greenberg, *When Unpaid Student Loan Bills Mean You Can No Longer Work*, N.Y. TIMES (Nov. 18, 2017) <https://www.nytimes.com/2017/11/18/business/student-loans-licenses.html>.

21. Legislative Services Agency, *Legislative Guide to Driver’s License Sanctions* (Dec. 2000), <https://www.legis.iowa.gov/docs/publications/LG/9485.pdf>.

22. See BANNON ET. AL., *supra* note 10.

23. See LAWYERS’ COMM. FOR C. R. OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 4 (2015).

24. See Mike Riggs, *Reconsidering Driver’s License Suspensions as Punishment*, NAT’L PUB. RADIO (Mar. 10, 2014, 11:56 AM ET), <https://www.npr.org/2014/03/10/288587071/reconsidering-drivers-license-suspensions-as-punishment>.

25. See MAC TAYLOR, LEGIS. ANALYST’S OFF., IMPROVING CALIFORNIA’S CRIMINAL FINE AND FEE SYSTEM (2016), <https://lao.ca.gov/reports/2016/3322/criminal-fine-and-fee-system-010516.pdf>; see also ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS A PUNISHMENT FOR THE POOR 51 (2016); Editorial, *The Way California Collects Fines, Fees is Almost Criminal*, SACRAMENTO BEE (Apr. 8, 2016), <https://www.sacbee.com/opinion/editorials/article70797647.html> (“California distributes between \$1.8 billion and \$2 billion every year from fines and fees.”).

inmates owe unpaid fines and fees, including fees for their stays in prison.²⁶ The ten million people caught in the whole thing owe some \$50 billion in accumulated fines, costs, fees, charges for room and board in jails and prisons, and other impositions.²⁷ Seven million of those ten million people owing court debt in one form or another have lost their drivers' licenses.²⁸ In California alone, court debt totals \$11 billion and most of it is associated with license suspensions.²⁹

Community policing has turned into community fleecing. It calls up memories of the sharecropper economy that held families in financial servitude, always ending the year owing the plantation more than they had earned from the cotton crop and consequently obligated to continue for another season. It was a vicious, unforgiving cycle. That was then. This is now. And it is not so different.

How does it work? Low-income people are arrested for minor violations. While only mere annoyances for people with means, this can be disastrous for the poor and near poor because of the high fines and fees now almost routinely imposed. Those who cannot make bail are too often held in jail to await trial, and only get out by pleading guilty and thereby owing fines and fees in excessive amounts. Then, unable to keep up with their payment plan, they are hit with more debt. Failure to pay begets more jail time, more debts from accumulated interest charges, additional fines and fees, and, in line with the most common penalty with significant consequences for those living below or near the poverty line, repeated drivers' license suspensions.

Poor people lose their liberty and often lose their jobs, are frequently barred from a host of public benefits, may lose custody of their children, and may even lose their right to vote. Immigrants, even some with green cards, can be subject to deportation. Once incarcerated, impoverished inmates with no access to paid work are often charged for room and board. Many debtors will carry debts to their deaths, often hounded by bill collectors and new prosecutions, as well as having wages garnished and state tax refunds confiscated.

Even without the use of jailing, exorbitant fines and fees are now a staple throughout most of the country to make up for the revenue shortfalls that have resulted from tax cuts. Meanwhile, white-collar criminals get slaps on the wrist for financial crimes that ruin millions, while fines and fees from the justice system hit lower income people—especially people of color—the hardest.

The ways of getting money are ubiquitous. Take probation—forty-four states charge for probation services, for which no real services are rendered in many instances.³⁰ One might surmise that these are for-profit agencies given a contract by a state or a municipality. However, that would be an incorrect assumption. Only thirteen states have for-profit probation agencies. The other thirty-one are public agencies which also charge.³¹ Fees are everywhere, many for-profit but not nearly

26. See FINES, FEES, AND BAIL, *supra* note 1.

27. EVANS, *supra* note 1.

28. Moyer, *supra* note 19.

29. See TAYLOR, *supra* note 25, at 8.

30. Shapiro, *supra* note 3.

31. CHRIS ALBIN-LACKEY, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 12 (2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry#>.

all: Forty-nine states charge for electronic bracelets in order to be out on bail; forty-one charge for room and board in jails and prisons; and, maybe most shockingly, forty-three states charge for having a public defender.³² Nor is the cash register less busy now—forty-eight states have increased their fees since 2010.³³

Profiteering off the poor is not confined to the adult criminal justice system. Insiders knew that juvenile systems were equally poisoned, but a stunning report done in 2016 by the Juvenile Law Center of Philadelphia brought it out into the daylight.³⁴ In numerous states, the same ground rules operate. They charge for probation, supervision, diversion, drug tests when there is no history of drug abuse, cost of care (room and board), and on and on.³⁵ Of course, the bills are sent to the families who typically cannot possibly pay, and worse, the debt is then carried as the child grows into adulthood.³⁶ It ruins credit and carries collateral consequences that make employment somewhere from difficult to impossible, bars residence from public housing, denies financial help with college, and more. California is dialing it back, but other states have not done much.³⁷

B. Response: Fighting Back

There is, however, a rising counter-attack. Across the country, a growing movement is pushing back, using law, legislation, and policy to dismantle the vicious cycle of debt and incarceration that traps so many poor people. Importantly, nearly every major case spearheaded by attorneys from non-profit organizations has been done in partnership with large private law firms acting pro bono. Their collaboration provides needed financial resources and makes it possible to have the numbers of lawyers necessary to succeed.

Lawyers have been some of the staunchest leaders of the counter-attack. These are attorneys like Thomas Harvey, then of ArchCity Defenders, and Alec Karakatsanis of Civil Rights Corps who sued, in 2014, the city of Jennings, Missouri, just to the east of Ferguson, and succeeded in emptying the jail of its mistreated population. They also obtained \$4.7 million for almost two thousand people who had been locked up for a combined total of 8,300 days.³⁸ The same year, Sam Brooke of the Southern Poverty Law Center (“SPLC”) and Karakatsanis won the release from jail of sixty people in Montgomery, Alabama, and the

32. Shapiro, *supra* note 3.

33. KAREN DOLAN & JODI L. CARR, INST. FOR POL’Y STUD., THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 10 (2017), <https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf>.

34. See JESSICA FEIERMAN ET AL., JUV. L. CTR., DEBTORS’ PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM (2016), <http://debtorsprison.jlc.org/documents/jlc-debtors-prison.pdf>.

35. *Id.* at 3.

36. *Id.* at 23.

37. *Id.*

38. Campbell Robertson, *Missouri City to Pay \$4.7 Million to Settle Suit Over Jailing Practices*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/us/missouri-city-to-pay-4-7-million-to-settle-suit-over-jailing-practices.html>.

termination of the city's debtors' prison policy.³⁹ An ensuing SPLC-led campaign against Judicial Correction Services, the for-profit probation company that was locking up poor people across the state, was so effective that the company eventually fled the state altogether.⁴⁰ And in 2016, the ACLU joined forces with a pro bono firm to rescue Jayne Fuentes, who had been forced to labor on a local work crew to pay off her court debts, from unconstitutional treatment in Benton County, Washington.⁴¹ They also obtained a settlement that ended the county's debtors' prison system.⁴²

More recently, using both litigation and legislation, reformers working on drivers' license suspensions have had important successes. Led by State Senator Robert Hertzberg and advocate Mike Herald of the Western Center on Law and Poverty, among others, California's legislature began rolling back its harsh suspension policy, first with an amnesty program and most recently with a ban on taking away licenses because of court debt.⁴³ With a push by lawyers from SPLC, Mississippi gave back 100,000 licenses.⁴⁴ On the litigation side, with a 116-page opinion, a federal judge in Tennessee held that suspending licenses for acts unrelated to road safety is unconstitutional, resulting in the return of 146,000 licenses.⁴⁵

Bottom line, on fines and fees, six forces have coalesced: 1) Anti-tax fervor, 2) exorbitant fines and fees, 3) a phenomenal number of arrests, 4) money bail policies that pressure people to plead guilty, 5) a lack of lawyers, and 6) racism.

39. See Joseph Shapiro, *Alabama Settlement Could Be Model for Handling Poor Defendants in Ferguson, Mo.*, NAT'L PUB. RADIO (Nov. 20, 2014), <https://www.npr.org/sections/thetwo-way/2014/11/20/365510846/alabama-settlement-could-be-model-for-handling-poor-defendants-in-ferguson-mo>.

40. Andrew J. Yawn, *Court Collection Company JCS Flees State*, MONTGOMERY ADVERTISER (Oct. 20, 2015), <https://www.montgomeryadvertiser.com/story/news/local/community/2015/10/20/court-collection-company-jcs-flees-state/74265554>.

41. See Complaint for Declaratory and Injunctive Relief, *Fuentes v. Benton Cty.*, No. 15-2-02976-1 (Wa. Super. Ct. Oct. 7, 2015).

42. See Press Release, ACLU, Settlement Reached in Lawsuit Ending Benton County's Modern-Day Debtors' Prison (June 1, 2016), <https://www.aclu.org/news/settlement-reached-lawsuit-ending-benton-countys-modern-day-debtors-prison>.

43. See *Californians Can No Longer Lose Their Driver's Licenses Due to Unpaid Traffic Fines*, W. CTR. ON L. & POVERTY, <https://wclp.org/californians-can-no-longer-lose-their-drivers-license-due-to-unpaid-traffic-fines> (last visited Feb. 10, 2019); Press Release, State of California Department of Motor Vehicles, DMV Removes Driving Suspensions for Failure to Pay Fines (Mar. 15, 2018), https://www.dmv.ca.gov/portal/dmv/detail/pubs/newsrel/2018/2018_21; Press Release, Senator Robert Hertzberg, Hertzberg Pushes Legislation to Roll Back DL Suspensions (Sept. 8, 2017), <https://sd18.senate.ca.gov/news/982017-hertzberg-pushes-legislation-roll-back-dl-suspensions>; *Traffic Tickets/Infractions Amnesty Program*, STATE OF CAL. DEP'T OF MOTOR VEHICLES, <https://www.dmv.ca.gov/portal/dmv/detail/home/trafficamnestyprogram> (last visited Feb. 10, 2019).

44. See *SPLC Reaches Agreement with Mississippi to Reinstate Over 100,000 Driver's Licenses Suspended for Non-Payment of Fines*, S. POVERTY L. CTR. (Dec. 19, 2017), <https://www.splcenter.org/news/2017/12/19/splc-reaches-agreement-mississippi>.

45. See *Thomas v. Haslam*, 303 F. Supp. 3d 585 (M.D. Tenn. 2018).

III. MONEY BAIL

A. Problem: Money Bail Pressures People to Plead Guilty

Money bail plays a far larger role than squeezing out money for fines and fees, as important as that is. The whole criminal setup in large cities depends on a money bail system. If the vast number of people held in lieu of bail were released on recognizance, the courts would be unable to provide enough judges and court staff to effectively function. The structure would crumble. So, the setup remains. The defendant is held (expensively) in jail until he or she gives in and pleads guilty, despite his or her innocence. Even if a defendant is lucky and receives probation or a sentence of time served, the conviction includes collateral consequences that are likely unknown to the defendant.

Out of the 700,000 people held in jails in each day nationally, 450,000 have not been found guilty of any crime.⁴⁶ They are simply poor people waiting for a trial. Most have been accused of low-level infractions that should not be crimes at all or should not carry jail time even when people are convicted. Even so, judges in state after state require bail of \$500 or \$1,000 for these low-level infractions—an amount which the defendant usually does not have and cannot get. This is a horrible system. Of course, releasing the vast majority on recognizance would save the jail a great deal of money in operating expenses that could be used to add courtrooms, judges, staff, and other resources. Nonetheless, bail bondsmen and insurance companies strike fear with dire warnings that a policy of recognizance will bring on a wave of crime, when their real motive is to make sure their stream of income is not disturbed.

B. Response: Making Headway

Litigation and legislation to abolish money bail altogether are also making headway. Alec Karakatsanis and partners won an enormous victory in Harris County, Texas (which includes Houston), where he challenged the widespread mistreatment of people during their arraignments.⁴⁷ Federal Judge Lee Rosenthal accompanied her ruling with a 193-page opinion, holding on a preliminary injunction that it is unconstitutional to assess excessive bail since it creates two separate and unequal criminal justice systems: One for the wealthy and another for the poor.⁴⁸ The facts were so egregious that the usually conservative Fifth Circuit affirmed the decision unanimously.⁴⁹

If anything, Karakatsanis and colleagues topped their Texas victory when the California state intermediate appeals court ruled that the money bail system of the

46. See RAM SUBRAMANIAN ET AL., VERA INST. FOR JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 4 (2015), https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf.

47. See ODonnell v. Harris Cty., 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

48. See *id.*

49. See ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2017).

entire state is unconstitutional.⁵⁰ Governor Jerry Brown and legislative leaders, pressed by outside advocates, wrote the statute necessitated by the court decision. It is far from perfect, with advocates on the defense arguing that the law, as written, leaves too much discretion for judges, who therefore have the power to hold defendants in jail even without using money bail. On the other hand, the bail bondsmen have succeeded to place a ballot initiative in 2020 to rescind the statute.⁵¹

Based on careful research, states, including Kentucky, New Jersey, and Maryland have adopted a methodology that helps determine whether an accused person will be a flight risk or pose a danger outside of jail.⁵² Not surprisingly, bail bondsmen and underwriters have waged resistance to these changes, as they have in California, but none have succeeded.

Still, the fight continues—even among the most entrenched systems. Rikers Island in New York City holds thousands who have not been convicted of any crime, simply because they cannot afford bail. These are people like Kalief Browder, a young man who killed himself in 2015 after spending three years in Rikers without ever being convicted of a crime.⁵³ In the wake of the Browder tragedy and widespread demands for action, Mayor Bill de Blasio announced that the city will close the complex, although the stated time frame for doing so is painfully long.⁵⁴

And so, the effort to decriminalize poverty continues. As hundreds of thousands of people molder in jails for the simple crime of being poor, a stronger public outcry is needed to call out the legislative irresponsibility that finances courts on the backs of the poor, and stand up to the bail bondsmen and their underwriters, as well as the private prison industry and the correction officers' unions, who all profit off the misery of low-income people in a system where injustice reigns.

IV. CRIMINALIZATION OF POVERTY FOR NONMONETARY REASONS

The criminalization of poverty has metastasized into other areas which are not about money. These areas disproportionately affect low-income people, especially people of color. They also involve roles for police that take on responsibilities

50. See In re Humphrey, 228 Cal. Rptr. 3d 513 (Cal. Dist. Ct. App. Jan. 25, 2018).

51. See John Myers, *Even If They Lose, Backers of California's Bail Industry May Help Themselves by Going to the Ballot in 2020*, L.A. TIMES (Sept. 2, 2018), <http://www.latimes.com/politics/la-pol-ca-road-map-bail-referendum-20180902-story.html>.

52. See Letter from Brian E. Frosh to The Honorable Alan M. Wilner, *Rules Committee Letter on Pretrial Release* (Oct. 25, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf; John Schuppe, *Post Bail: America's Justice System on the Exchange of Money for Freedom. Some Say That's Unfair. But Can Data Fix It?*, NBC NEWS (Aug. 22, 2017), <https://www.nbcnews.com/specials/bail-reform>; LAURA AND JOHN ARNOLD FOUNDATION, PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA, <https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf>.

53. See Jennifer Gonnerman, *Kalief Browder 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

54. See William Neuman, *Mayor and Council Agree on New Jail Sites to Replace Rikers Island*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/nyregion/rikers-close-nyc-bronx-jail.html>.

beyond their traditional duties, sometimes against their own preferences, but the policies are not about squeezing people for money.

Examples of this include: Use of police officers as the front line of discipline in schools serving low-income students, leading to criminal records for behavior that should be dealt with in the principal's office; vigorous prosecution of vagrancy laws against the homeless; rules barring ex-offenders from living in public housing; and we see it in the heartless practice of evicting poor women from their homes for calling 911 "too often," even when they are reporting domestic abuse. For far too many people, to be poor in 2018 is to live under the constant threat of incarceration for no other reason than poverty itself.

Children act up in a classroom and they end up in a courtroom where judges rule on minor incidents that principals once handled in their office. The surge in children sent to court occurred after the tragic shooting at Columbine, Colorado when the federal government consequently spent \$750 million to add 6,500 School Resource Officers ("SRO") in three thousand schools across the country.⁵⁵ Then and now we certainly worry about the safety of our children, but the sad fact is that the SRO expansion is used too often to send children to court for minor incidents instead of handling serious events. In 2011–12, 260,000 students were arrested in school and referred to law enforcement.⁵⁶ In Texas and Wyoming, those students are sent to adult court.⁵⁷

Jayden A., a high school junior in Antioch, California, was attacked by other girls in the hall one morning before school started. Jayden was sent to court because a teacher said a student, the victim of the attack, elbowed him in the course of the melee. Luckily, her mother found Annie Lee, then a lawyer at the National Center for Youth Law.⁵⁸ Lee represented Jayden through the ordeal and ultimately got the charges expunged. Far more often, a child has no attorney, and the result is unfortunate. The direct effects of the court's action are bad enough, but the sanctions often include collateral consequences, which continue liability from fines and fees into adulthood that ruin the person's credit and mean difficulty with employment and housing.

In many jurisdictions, the police have the power to evict women from their homes when they call 911 to seek protection against domestic violence too often. Fearing eviction, Lakisha Briggs, a certified nurse assistant in Norristown, Pennsylvania, did not call 911 when her former boyfriend got out of jail and attacked her.⁵⁹ Despite an earlier attack, the police had told her she would be evicted if she called again. His attack nearly killed her.

55. See SENTENCING PROJECT, THE FACTS ABOUT DANGERS OF ADDED POLICE IN SCHOOLS, SENTENCING PROJECT (Jan. 17, 2013), <https://www.sentencingproject.org/publications/the-facts-about-dangers-of-added-police-in-schools>.

56. See U.S. DEP'T OF EDUC. OFFICE FOR C.R., CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 7 (Mar. 21, 2014), <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>.

57. See Claudia Feldman, *Truancy Bill Will Be Hotly Debated During the Texas Legislative Session*, HOUSTON CHRON. (Jan. 18, 2015), <https://www.houstonchronicle.com/life/article/Truancy-bill-will-be-hotly-debated-during-the-6012827.php>.

58. Telephone Interview with Annie Lee, Attorney, Nat'l Ctr. for Youth Law (July 18, 2016).

59. See Eric Eckholm, *Victims' Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES (Aug. 17, 2013), <https://www.nytimes.com/2013/08/17/us/victims-dilemma-911-calls-can-bring-eviction.html>.

The police had the power of eviction because of a local chronic nuisance ordinance. The story only became widely known because Ms. Briggs went to a local legal aid lawyer who connected her to Sandra Park of the ACLU. Her case resulted in a half-million-dollar settlement with the city, which was also required to repeal its ordinance.⁶⁰ In the wake of the events, the state repealed its law, too.

The most recent atrocity occurred in Maplewood, Missouri, a town less than ten miles from St. Louis, where if a female tenant called the police more than twice for domestic violence, she could be banned from living anywhere in the entire city for six months. Rosetta Watson was directly impacted by this law. Her ex-boyfriend's attacks evoked four calls to the police and a ban, but unlike others, she found a lawyer—Sandra Park, in fact. The ordinance was patently unconstitutional and violated multiple statutes, but it took almost two years to get a settlement. The settlement resulted in major changes to the ordinance, training for local officials, reports to the ACLU, and compensation and attorneys' fees for Ms. Watson.⁶¹

Criminal nuisance ordinances are a national problem. No one knows how many of these ordinances exist, but one study estimates more than two thousand.⁶² That is probably low because Kate Walz of the Sargent Shriver National Poverty Center found one hundred and thirty in Illinois alone and the Metropolitan St. Louis Equal Housing & Opportunity Council counted sixty-nine in the St. Louis region.⁶³ Matthew Desmond, the author of *Evicted*, conducted a national study in fifty-nine cities and found that all fifty-nine cities had ordinances.⁶⁴ Only four of them explicitly barred evictions for people calling the police about domestic violence.⁶⁵ Desmond took a deeper dive in Milwaukee and found that the victims of eviction for this reason were overwhelmingly African American and low-income.⁶⁶ Needless to say, this is criminalization of poverty.

Fraud charges against public benefits applications and recipients are used in many places to deter people from applying for help. Kevin Grifka, an electrician from Michigan, received a letter from the state that he was being charged with unemployment fraud amounting to \$12,000. He was unemployed, but that was the only fact the letter cited. Governor Rick Snyder had purchased a new computer for the agency issuing the letters. The machine was not overseen by a human person and the computer made calculations on its own. It turned out, the computer was spewing out convictions that added up to more than \$60 million⁶⁷ to enrich state coffers over a period of four years. Grifka found a lawyer and was made whole.

60. See Sandra Park & Michaela Wallin, *Local Nuisance Ordinances: Penalizing the Victim, Undermining Communities?*, MUN. LAW. MAG., May/June 2015, at 6, <http://www.imla.org/images/links/MISC/ML-May-June%202015%20FINAL%20JUNE%2016%202015.pdf>.

61. See *Rosetta Watson v. Maplewood*, ACLU (Apr. 10, 2017), <https://www.aclu.org/cases/rosetta-watson-v-maplewood>.

62. See Nicole Livanos, *Crime-Free Housing Ordinances: One Call Away from Eviction*, PUB. INT. L. REP. 106, 107 (2014).

63. See EDELMAN, *supra* note 13 at 138.

64. See Matthew Desmond & Nicole Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. ASS'N 117, 117–41 (2013).

65. See *id.*

66. See *id.*

67. Ryan Felton, *Criminalizing the Unemployed*, DETROIT METRO TIMES (July 1, 2015), <https://www.metrotimes.com/detroit/criminalizing-the-unemployed/Content?oid=2353533>.

Thousands did not. It took seven years to clear up the matter, and even now some of the mess remains.⁶⁸

The criminalization of homelessness is worsening. Over the last decade citywide bans on camping in public spaces have increased by sixty-nine percent, on loitering, loafing, and vagrancy by eighty-eight percent, and on living in a vehicle by one hundred forty-three percent.⁶⁹ The message to the homeless people in too many cities is, “go away.”

Russell Bartholow, a Native American who sustained a brain injury in a racially motivated attack, lived for fifteen years under a bridge in Sacramento, California. He was once married but his mental health deteriorated, and after his adopted mother died, he ended up under the bridge. In the fifteen years that he lived under that bridge, he was arrested one hundred and ninety times, spent one hundred and four days in jail, and was assessed \$104,000 in fines. His guardian angel turned up in the form of his adoptive sister. She had become a lawyer at the Western Center on Law and Poverty and finally succeeded in finding him after searching for many years.⁷⁰

We do know how to end homelessness. Housing First—supported housing—has stabilized lives for thousands who expected to be homeless for the rest of their lives.⁷¹ But for this solution to succeed, we have to make the investment. Supported housing produces dividends in less jailing, fewer trips to the emergency room, and more.

Jails and prisons are our mental hospitals of the twenty-first century. One out of seven inmates has serious mental illness.⁷² Nearly forty percent of New York City’s Rikers jail inmates have been diagnosed with mental illness.⁷³ Darren Rainey, a Florida prison inmate with mental illness, was killed by correctional

68. See Letter from H. Luke Schaefer and Steve Gray to Gay Gilbert, Administrator, U.S. Dep’t of Lab., *Michigan Unemployment Insurance Agency: Unjust Fraud and Multiple Determinations* (May 19, 2016), https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Shaefer-Gray-USDOL-Memo_06-01-2015.pdf.

69. See NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 9–10, 22, 24–25 (2016), <https://www.nlchp.org/documents/Housing-Not-Handcuffs>; NAT’L CTR ON HOMELESSNESS & POVERTY, *NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 6–8 (2015), https://www.nlchp.org/documents/No_Safe_Place.

70. See John Flynn and Matt Kramer, *Sacramento’s \$100,000 Homeless Man*, SACRAMENTO NEWS & REV. (Feb. 16, 2017), <https://www.newsreview.com/sacramento/sacramentos-100-000-homeless-man/content?oid=23694183>.

71. See EHREN DOHLER ET AL., CTR. ON BUDGET & POL’Y PRIORITIES, *SUPPORTIVE HOUSING HELPS VULNERABLE PEOPLE LIVE AND THRIVE IN THE COMMUNITY* (May 31, 2016), <https://www.cbpp.org/research/housing/supportive-housing-helps-vulnerable-people-live-and-thrive-in-the-community>.

72. See RAM SUBRAMANIAN ET AL., *supra* note 46 at 12.

73. HUMAN RIGHTS WATCH, *CALLOUS AND CRUEL: USE OF FORCE AGAINST INMATES WITH MENTAL DISABILITIES IN US JAILS AND PRISONS* 20 (2015), <https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and#>.

officers who rigged up a shower with scalding hot water and left him to burn to death.⁷⁴

V. CONCLUSION

There is much to do, but much is being done. What we lack is the public awareness that exists regarding mass incarceration. Ferguson accelerated the work of lawyers and journalists around the country and increasing efforts among judiciary and legislative leaders have followed, but we do not yet see the common knowledge associated with the criminalization of poverty that we do with the excessive numbers we have in the nation's prisons. Litigation, legislation, and judicial policy are moving at a faster pace, but wider pressure for action coming from people generally is vital.

74. See Julie K. Brown, *Behind Bars, a Brutal and Unexplained Death*, MIAMI HERALD (May 17, 2014), <https://www.miamiherald.com/news/local/community/miami-dade/article1964620.html>; Julie K. Brown, *Prisoner: I Cleaned Up Skin of Inmate Scalded in Shower, Human-Rights Groups Call for Federal Intervention*, MIAMI HERALD (June 25, 2014), <https://www.miamiherald.com/news/local/community/miami-dade/article1972693.html>; see also Julie K. Brown, *Florida Pledges to Protect Inmates with Mental Illness*, MIAMI HERALD (May 27, 2015), <https://www.miamiherald.com/news/special-reports/florida-prisons/article22478370.html>.