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2023

### **As Long As There is Money Involved in Justice, There Will Be No Justice: The United States' Criminalization of Poverty and the Need to Demonitize our Criminal "Justice" System**

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Final Paper  
Ethics in Criminal Advocacy  
May 1, 2023

**AS LONG AS THERE IS MONEY INVOLVED IN JUSTICE, THERE WILL BE NO JUSTICE:  
THE UNITED STATES' CRIMINALIZATION OF POVERTY AND THE NEED TO  
DEMONITIZE OUR CRIMINAL "JUSTICE" SYSTEM.**

**I. INTRODUCTION**

The United States has the highest incarceration rate of not only any Western democracy but in the world.<sup>1</sup> When comparing the U.S. individual state incarceration rates to other countries with “violent crime” and incarceration, the U.S. is aligned most closely with authoritarian governments like Russia’s, Cuba’s, and Rwanda’s incarceration rates.<sup>2</sup> As of 2020, the U.S. incarceration rate was thirty-seven percent (37%) greater than Cuba and sixty-nine percent (69%) greater than Russia.<sup>3</sup> Incarceration has historically been the “default response to crime” in the United States.<sup>4</sup> While the crime rate has declined since the 1990s, incarceration rates throughout the country remain the same, if not higher.<sup>5</sup>

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<sup>1</sup>See *Connections Among Poverty, Incarceration, and Inequality*, INST. FOR RSCH. ON POVERTY (May 2020), <https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality>; See also Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> (“Every single U.S state incarcerates more people per capita than virtually any independent democracy on earth.”)

<sup>2</sup>See Emily Widra & Tiana Herring, *supra* note 1 (defining and analyzing violent crime in four offense categories – murder and nonnegligent manslaughter, rape and sexual violence, robbery, and aggravated and serious assault).

<sup>3</sup>See Tara O’Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://www.americanactionforum.org>.

<sup>4</sup>See Emily Widra & Tiana Herring, *supra* note 1.

<sup>5</sup>See *id*; See also *Connections Among Poverty, Incarceration, and Inequality*, *supra* note 1 (arguing that greater criminal activity is not a “plausible explanation” for the sharp increase in incarceration rates, instead, the rise in imprisonment “happened when crime was actually historically low” and studies suggest policy changes like imprisoning people for a wider range of offenses and longer sentences might be responsible for the increases).

As of 2018, more than two million (2,200,000) people were incarcerated.<sup>6</sup> In 2008, the United States had a record-high prison rate, with more than one out of every one hundred (1/100) adults “behind bars.”<sup>7</sup> One-fourth (1/4) of those incarcerated individuals were held pre-trial because they could not afford bail.<sup>8</sup> Approximately three-fifths (3/5) of the prison population are low-income.<sup>9</sup> Two-thirds (2/3) of those incarcerated reported incomes under twelve thousand dollars (\$12,000) per year before arrest.<sup>10</sup> Further, the astronomically high rate of imprisonment has disproportionately impacted communities of color and other minority populations since the formation of the criminal “justice” system.<sup>11</sup> Approximately two-thirds (2/3) of the prison population are people of color.<sup>12</sup> Prison populations are disproportionately comprised of black and Hispanic men at rates of more than sixty percent (60%).<sup>13</sup> Unequal incarceration rates continue to perpetuate a cycle of poverty for people of color and unjustly enrich the state.<sup>14</sup>

The lack of equity within the system led to movements questioning if “justice” ever existed, resulting in the system being referred to now as the “criminal legal system.”<sup>15</sup> Our monetized justice system leaves people destitute with little choice but to pay the criminal debt or spend more

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<sup>6</sup>See Tara O’Neill Hayes & Margaret Barnhorst, *supra* note 3; *See also Prison Population by State*, WISE VOTER (last accessed Apr. 25, 2023), [https://wisevoter.com/state-rankings/prison-population-by-state/#tracker\\_introduction](https://wisevoter.com/state-rankings/prison-population-by-state/#tracker_introduction).

<sup>7</sup>See *Connections Among Poverty*, *supra* note 1.

<sup>8</sup>See Tara O’Neill Hayes & Margaret Barnhorst, *supra* note 3.

<sup>9</sup>See *id.*

<sup>10</sup>See *The Relationship between Poverty & Mass Incarceration*, CTR. FOR CMTY. CHANGE (last accessed Mar. 15, 2023), <https://www.masslegalservices.org>.

<sup>11</sup>See Tara O’Neill Hayes & Margaret Barnhorst, *supra* note 3.

<sup>12</sup>See *id.*

<sup>13</sup>See *Connections Among Poverty*, *supra* note 1.

<sup>14</sup>See *id.*

<sup>15</sup>See Tara O’Neill Hayes & Margaret Barnhorst, *supra* note 3; *See also* Erica Bryant, *Why We Say “Criminal Legal System,” Not “Criminal Justice System,”* VERA INST. OF JUST. (Dec. 1, 2021), <https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system>.

time locked away from husbands, wives, children, siblings, parents, and friends.<sup>16</sup> Criminal debt is acquired through high court fees and fines, probation fees, deprivation of public benefits, and employment barriers that prevent previously incarcerated people from easily obtaining employment.<sup>17</sup> This system perpetuates a cycle of poverty and oppression.<sup>18</sup> “When profit becomes the point, families become targets of the very justice system that is meant to protect everyone.”<sup>19</sup>

This paper will show how the United States will fail to achieve a criminal “justice” system if money is involved. The cyclical impacts of poverty and marginalization on communities of color throughout our nation’s history will continuously perpetuate an unequal and unfair criminal system. Section II begins by delving into the history of poverty in the United States. It then analyzes poverty and its impacts today while specifically discussing the effects on communities of color and the intersections with crime. Section III examines the legal issue, exploring our monetized legal system and discussing how we can change our criminal legal system to reduce court and state economic reliance on fee and fine payments by looking at international and state comparisons and the work of progressive prosecutors throughout the country. Section IV will

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<sup>16</sup>See generally Daniel Medwed, *The U.S. Prison System Doesn’t Value True Justice*, TIME (Nov. 29, 2022), <https://time.com/6236494/criminal-exoneration-prison-system-feeds-on-innocent>; See also *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. FOR HUM. RTS. (Sept. 2015), <https://ellabakercenter.org/wp-content/uploads/2022/09/Who-Pays-FINAL.pdf>.

<sup>17</sup>See *The Relationship between Poverty & Mass Incarceration*, *supra* note 10; See also Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People’s Employment Reveal Labor Market Injustices*, PRISON POLICY INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment> (“...more than 50,000 people released from federal prisons in 2010, a staggering 33% found no employment at all over four years post-release, and at any given time, no more than 40% of the cohort was employed. People who did find jobs struggled, too: Formerly incarcerated people in the sample had an average of 3.4 jobs throughout the four-year study period, suggesting that they were landing jobs that didn’t offer security or upward mobility.”)

<sup>18</sup>See Tara O’Neill Hayes & Margaret Barnhorst, *supra* note 3.

<sup>19</sup>See Meghna Chakrabarti & Stefano Kotsonis, *Courts, Profit and the Monetization of America’s Justice System*, WBUR (Mar. 7, 2023), <https://www.wbur.org/onpoint/2023/03/07/courts-profit-and-the-monetization-of-americas-justice-system>.

examine the counterargument of why the legal system will fail without monetary payments. Section V will offer a rebuttal exploring why the removal of fees and fines will better serve *all* communities and enhance public safety. Lastly, Section VI will conclude with a call to action to prevent additional injustice and rectify our nation’s wrongdoing.

## II. BACKGROUND

Poverty is “the state or condition in which people or communities lack the financial resources and essentials for a minimum standard of living. As such, their basic human needs cannot be met.”<sup>20</sup> From 1820 to 1955, seven hundred and fifty-seven million (757,000,000) people, more than one-half (1/2) of the global population, lived in extreme poverty.<sup>21</sup> The number decreased over the following decades but exceeded the original rates, with approximately seven hundred and sixty-four million (764,000,000) people worldwide experiencing extreme poverty in 2018.<sup>22</sup> Nearly half (1/2) of the world’s population lives on less than seven dollars (\$6.85) daily.<sup>23</sup> The COVID-19 pandemic has only exacerbated the dramatic impacts of poverty.<sup>24</sup>

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<sup>20</sup>See James Chen, *What’s Poverty? Meaning, Causes, and How to Measure*, INVESTOPEDIA (Mar. 20, 2023), <https://www.investopedia.com/terms/p/poverty.asp> (explaining that poverty is not only an individual concern, but a societal problem, high poverty levels affect economic growth and are associated with “crime, unemployment, urban decay, education, and poor health.”)

<sup>21</sup>See Michail Moatsos, “Global extreme poverty: Present and past since 1820”, in *How Was Life? Volume II: New Perspectives on Well-being and Global Inequality since 1820*, UTRECHT U. (2021), <https://www.oecd-ilibrary.org>

<sup>22</sup>See *id.*

<sup>23</sup>See *Poverty*, THE WORLD BANK (Nov. 30, 2022), <https://www.worldbank.org>

<sup>24</sup>See *id.* (“The recent crises [COVID-19 and War in Ukraine] have pushed the world further off track from the global goal of ending extreme poverty by 2030. Given current trends, 574 million people—nearly 7 percent of the world’s population—will still be living on less than \$2.15 a day in 2030.”)

## A. THE ORIGINS OF POVERTY IN THE UNITED STATES

### 1. THE EARLY DAYS: HOW TO CALCULATE POVERTY

The official calculation of United States poverty levels developed in the 1960s.<sup>25</sup> The federal government measures poverty using the Poverty Threshold analysis, developed by the Department of Health and Human Services, set a minimum amount of income necessary for covering basic needs; if someone is found at or below that amount, they are considered to be “experiencing poverty.”<sup>26</sup> Poverty is concentrated in the rural areas of the south and southwest regions due to historic agricultural reliance and the lack of emphasis on innovation.<sup>27</sup> Poverty rates have declined drastically from the 1950s, when twenty-two percent (22%) of the population experienced poverty.<sup>28</sup> President Lyndon B. Johnson was the first to address the Union and urge an “all-out war on human poverty and unemployment in the United States.”<sup>29</sup> However, this war was unsuccessful, as many in our country still struggle to survive.<sup>30</sup>

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<sup>25</sup>See Bill Fay, *Poverty in the United States*, DEBT.ORG (Oct. 12, 2021), <https://www.debt.org/faqs/americans-in-debt/poverty-united-states>; See also *The History of the Official Poverty Measure*, U.S. CENSUS BUREAU (last visited Apr. 27, 2023), <https://www.census.gov/topics/income-poverty/poverty/about/history-of-the-poverty-measure.html> (“The current official poverty measure was developed in the mid 1960s by Mollie Orshansky, a staff economist at the Social Security Administration. Poverty thresholds were derived from the cost of a minimum food diet multiplied by three to account for other family expenses.”)

<sup>26</sup>See Jim Hughes, *The Link Between Crime and Poverty in the U.S. by State*, OPEN CASH ADVANCE (Feb. 15, 2022), <https://opencashadvance.com/blog/link-between-poverty-and-crime>.

<sup>27</sup>See Bill Fay, *supra* note 25.

<sup>28</sup>See *id.*

<sup>29</sup>See Drew DeSilver, *Who’s Poor in America? 50 Years into the ‘War on Poverty,’ a Data Portrait*, PEW RSCH. CTR. (Jan. 13, 2014), <https://www.pewresearch.org/short-reads/2014/01/13/whos-poor-in-america-50-years-into-the-war-on-poverty-a-data-portrait>.

<sup>30</sup>See John Creamer, *Poverty in the United States: 2021*, U.S. CENSUS BUREAU (Sept. 3, 2022), <https://www.census.gov/library/publications/2022/demo/p60-277.html>.

## 2. TODAY: THE “WAR ON POVERTY” HAS YET TO SUCCEED

According to the United States Census Bureau 2021 Report, approximately thirty-seven million (37,900,000) live in poverty, which is a little over eleven and a half percent (11.6%) of the population.<sup>31</sup> Nine out of ten states (9/10) in the U.S. with the highest poverty rates per two-year average are located in the south.<sup>32</sup> Among the most disadvantaged groups are those in female-headed households with no husband present at about twenty-four percent (24.3%), young adults without a high school diploma at almost twenty-four percent (23.7%), those in a family whose head of household is unemployed at about twenty-six and a half percent (26.4%), and minorities, specifically black people at almost nineteen percent (18.8%).<sup>33</sup> The COVID-19 pandemic further exacerbated the rates of poverty in the U.S., which continue to impact communities of color disproportionately.<sup>34</sup>

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<sup>31</sup>*See id.*

<sup>32</sup>*See* Bill Fay, *supra* note 25. The states include Mississippi (19.4% of the population below the poverty line); Louisiana (18.4%), Arkansas (15.0%), West Virginia (14.9%), Kentucky (14.6%), Alabama (14.4%), South Carolina (13.9%), Georgia (13.5%) and North Carolina (12.9%). *Id.* The other state is New Mexico (16%). *Id.* *See also* Regina Baker, *Why is the American South Poorer*, OXFORD ACAD. (Dec. 12, 2019), <https://academic.oup.com/sf/article/99/1/126/5673997> (summarizing how scholars have explored the legacy of slavery analyzing the relationship between slavery and racial inequality in poverty and socioeconomic mobility).

<sup>33</sup>*See* Bill Fay, *supra* note 25.

<sup>34</sup>*See id.* (“The World Bank expects the COVID pandemic to push between 88 million and 115 million people worldwide into extreme poverty in 2020 and up to 150 million in 2021, reversing improvements that had been taking place.”); *See also* Carolina Sánchez-Páramo, *COVID-19 Leaves a Legacy of Rising Poverty and Widening Inequality*, WORLD BANK BLOGS (Oct. 7, 2021), <https://blogs.worldbank.org/developmenttalk/covid-19-leaves-legacy-rising-poverty-and-widening-inequality> (discussing job loss among vulnerable populations during the COVID-19 pandemic including women, youth, and those without a college education, impacted economic growth as economies recovered from the devastating impacts the pandemic had).

*i. Widening the Gap: The Disproportionate Rates of Poverty on Communities of Color*

Poverty gaps have persisted for decades in the United States due to our nation's history as a slave society where "all men" were not created "equal."<sup>35</sup> Slavery has left an undeniable and unerasable imprint on the people of this nation, unfortunately, accompanied by an apparent lack of targeted change to address inequities from the federal and state governments.<sup>36</sup> From 1990 to 2021, ethnicity gaps have shown minimal improvements.<sup>37</sup> "In 2019, the median black household earned just 61 cents for every dollar of income the median white household earned (up from 59 cents in 2018), while the median Hispanic household earned 74 cents."<sup>38</sup> Black adults in their thirties are over sixteen times more likely to be the third generation dealing with poverty.<sup>39</sup> Poverty

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<sup>35</sup>See Kyle Ross & Justin Dorazio, *The Latest Poverty, Income, and Food Insecurity Data Reveal Continuing Racial Disparities*, AM. PROGRESS (Dec. 21, 2022), <https://www.americanprogress.org/article/the-latest-poverty-income-and-food-insecurity-data-reveal-continuing-racial-disparities>; See also Glenn Loury, *An American Tragedy: The Legacy of Slavery Lingers in Our Cities' Ghettos*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/an-american-tragedy-the-legacy-of-slavery-lingers-in-our-cities-ghettos>.

<sup>36</sup>See Kyle Ross & Justin Dorazio, *supra* note 35.

<sup>37</sup>See *id.*

Despite progress in reducing poverty within these communities, however, gender and racial wage gaps, occupational segregation, and a lack of family-centered policies such as access to paid leave and affordable childcare prevent meaningful closure of racial and ethnic poverty gaps. In addition, recent laws banning and restricting abortions in many states upon the overturning of *Roe v. Wade* risk reversing progress in future years, as women of color, particularly Latinas and Black women, are set to lose access to abortions at disproportionate rates. Studies have shown that restricting access to abortion can harm women's economic security, leading to increased exits from the workforce and moves to lower-paying jobs, while also increasing child poverty rates."

<sup>38</sup>See Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL'Y INST. (Sept. 16, 2020), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019>.

<sup>39</sup>See Scott Winship, *Long Shadows: The Black-White Gap in Multigenerational Poverty*, BROOKINGS (June 10, 2021), <https://www.brookings.edu/research/long-shadows-the-black-white-gap-in-multigenerational-poverty> ("Black Americans are 41 percent more likely to be in third-generation poverty than white Americans are to be poor.")



rates have also risen among Hispanics, especially for Hispanic children, who are three times more likely to live in poverty than non-Hispanic white children.<sup>40</sup> “Radicalized poverty is a direct result of intentional racist policies.”<sup>41</sup>

*ii. The Intersection between Crime and Poverty*

The relationship between crime and poverty is complex. To analyze these factors, research must also focus on factors such as unemployment, income inequality, food insecurity, population density, high school dropout rate, and drug use.<sup>42</sup> “It has long been theorized that... a causal link exists between poverty and property crimes because generating wealth reduces the benefit-to-cost ratio of committing crimes.”<sup>43</sup> Famous economist, Gary Stanley Becker, demonstrated this direct link in his “economic theory of crime,” which theorized people commit a crime only if the costs are lower than the benefits they would gain.<sup>44</sup> The “strain theory” developed by American sociologist Robert K. Merton found that the likelihood of committing a violent crime is higher among those who feel economically or socially alienated from the majority group.<sup>45</sup> As unemployment increased during the COVID-19 pandemic, there were about twenty-five percent

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<sup>40</sup>See Drew DeSilver, *supra* note 29; See also Astrid Galván, *Latino Child Poverty Fell but Danger Lurks, Experts Say*, AXIOS (Sept. 20, 2022), <https://www.axios.com/2022/09/20/childhood-poverty-hispanic-latino-census> (analyzing immigration status for some Hispanic individuals which prevent access to government benefits, high-wage jobs, and childcare which further contributes to childhood poverty rates).

<sup>41</sup>See Michael W. Waters, *The Root of America’s Crime Problem is Poverty*, DALL. MORNING NEWS (Apr. 25, 2021), <https://www.dallasnews.com/opinion/commentary/2021/04/25/the-root-of-americas-crime-problem-is-poverty>.

<sup>42</sup>See Bill Fay, *supra* note 25.

<sup>43</sup>See Michael Olson, *How Poverty Drives Violent Crime*, OK JUST. REFORM (Dec. 7, 2021), <https://okjusticereform.org/2021/12/how-poverty-drives-violent-crime> (describing data which confirms a reduction in property-based crimes from Alaska, where eligible citizens have received cash dividends since the 1980s, “[i]n other words, most property crime is committed by people who feel the need to do so out of survival.”)

<sup>44</sup>See Jim Hughes, *supra* note 26.

<sup>45</sup>See *id.*

(25%) more homicides in 2020 than in 2019, illustrating economic hardship and uncertainty are likely to represent at least one explanation for increased crime.<sup>46</sup>

### III. ISSUE: MONEY IN THE CRIMINAL LEGAL SYSTEM

#### 1. WAS THERE EVER REALLY JUSTICE?

Since the creation of the criminal legal system, some form of payment has been involved.

In 1983, the Supreme Court decided in the seminal case on the issue *Bearden v. Georgia* that “punishing a person for his poverty” violates the equal protection clause of the Fourteenth Amendment and the “indigent defendant cannot be jailed for inability to pay a fine unless he has ‘willfully refused to pay the fine or restitution when he has the means to pay.’”<sup>47</sup> However, the Supreme Court failed to define “willfully refused” and gave deference to the individual courts to determine whether, by appearance or other questioning, the defendant has the means to pay.<sup>48</sup> If a court determines that a defendant is unable to pay, the judge is required to consider alternatives such as deferrals, payment plans, community service, and waivers; however, these financial determinations are rarely made.<sup>49</sup>

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<sup>46</sup>*See id.*

<sup>47</sup>*See* Peter Edelman, *Not a Crime To Be Poor: The Criminalization of Poverty in America* (The New Press 2017) at 5. Danny Bearden was an illiterate ninth-grade dropout convicted of receiving stolen goods. *Id.* In 1983, he was fined \$500 and placed on probation with a \$250 order of restitution. *Id.* He tried to make the payments but was laid off from his factory job and could not make the payment, his probation was then revoked, and he was sent to jail. *Id.*

<sup>48</sup>*See id.* (“A judge in Illinois asked all defendants if they smoked, and when any said yes, the judge said they have the means to pay. A judge in Michigan found that because the defendant had cable television he was capable of paying.”); *Bearden v. Georgia*, 461 U.S. 660 (1983); *See Paying on Probation: How Financial Sanctions Intersect with Probation to Target, Trap, and Punish People Who Cannot Pay*, FINES & FEES JUST. CTR. (June 9, 2020), <https://finesandfeesjusticecenter.org/articles/financial-sanctions-intersect-with-probation>.

<sup>49</sup>*See* Matthew Menendez & Lauren-Brooke Eisen, *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> (considering although it is unlikely a court will allow for community service hours, these are often paid at the federal

Our constitutional right to an attorney can even cost a fee; the Supreme Court decided in *Fuller v. Oregon* that a fee for a public defender is unconstitutional if it would create “manifest hardship” however, this decision is often widely ignored.<sup>50</sup> Forty-three out of fifty states (43/50) have some associated fee for a public defender. <sup>51</sup> In 2014 in Louisiana, the fees charged paid for about two-thirds (2/3) of the budget for public defenders statewide.<sup>52</sup> In 2021 in New Jersey, at minimum, the state law requires that the public defender’s office charge defendants at least one hundred and fifty dollars (\$150) and requires payment within six months of the case.<sup>53</sup> Failure to pay this fee creates debt which can result in liens on assets, damaged credit scores, and garnish any tax returns on inheritance.<sup>54</sup> While for some one hundred and fifty dollars (\$150) seems like a reasonable amount of money to pay for your lawyer, there are additional fees and other fines the defendant will likely have to repay.<sup>55</sup> It is estimated that one-third (1/3) of American adults cannot cover four

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minimum wage which makes it “unrealistic for people to devote the time necessary to work down their debt.”)

<sup>50</sup>See Peter Edelman, *supra* note 47 at 6.

<sup>51</sup>See *id* (explaining Florida does not “waive its \$50 public defender application fee for the indigent” instead it is a part of sentencing or a probation condition, North Carolina defendants must pay the full value of defense services, Virginia defendants must pay up to \$1,235 on each count of certain felonies, South Dakota charges \$92 an hour even if the defendant is found innocent and failure to pay is considered a crime); See also Samantha Sunne, *Why Your Right to a Public Defender May Come With a Fee*, NPR (May 29, 2014), <https://www.npr.org/2014/05/29/316735545/why-your-right-to-a-public-defender-may-come-with-a-fee>.

<sup>52</sup>See Samantha Sunne, *supra* note 51.

<sup>53</sup>See Marleina Ubel, *The High Cost of “Free” Representation: Why New Jersey Should Eliminate Public Defender Fees*, N.J. POL’Y PERSPECTIVE (Oct. 24, 2022), <https://www.njpp.org/publications/blog-category/the-high-cost-of-representation-public-defender-fees>.

<sup>54</sup>See *id*.

<sup>55</sup>See *id*.

hundred dollars (\$400) in expenses without experiencing debt or needing to sell assets.<sup>56</sup> “Access to a constitutional right should not come with a price tag.”<sup>57</sup>

Cash bail has also criminalized poverty for decades and contributed to mass incarceration.<sup>58</sup> Cash bail is a large sum of money collected to ensure that the defendant will appear at trial, regardless of the level of crime; those who cannot make bail are held in jail pending trial.<sup>59</sup> Those held in jail are under excessive pressure to plead guilty or take a plea for a crime they might not have committed just to be released with excessive fees and fines.<sup>60</sup> Washington D.C. Superior Court Judge Truman Morrison stated, “[t]here is no evidence you need money to get people back to court. It’s irrational, ineffective, unsafe, and profoundly unfair.”<sup>61</sup> In recent years, the constitutionality of cash bail is now a focus in several courts with challenges on equal protection, due process, and the Eighth Amendment’s explicit ban on “excessive cash bail.”<sup>62</sup>

Probation is also a great revenue generator for the state.<sup>63</sup> The number of people on probation went from approximately eight hundred thousand (800,000) adults in 1977 to about five times that in 2010 at four million (4,000,000) people.<sup>64</sup> Probation is likely to cost well over one thousand dollars (\$1,000) per year, and in forty-four states (44/50), offenders are expected to cover those

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<sup>56</sup>*See id.*

<sup>57</sup>*See id.*

<sup>58</sup>*See* Peter Edelman, *supra* note 47 at 6.

<sup>59</sup>*See* Marleina Ubel, *supra* note 53.

<sup>60</sup>*See* Peter Edelman, *supra* note 47 at 11.

<sup>61</sup>*See* Lea Hunter, *What You Need to Know About Ending Cash Bail*, AM. PROGRESS (Mar. 16, 2020), <https://www.americanprogress.org/article/ending-cash-bail>.

<sup>62</sup>*See* Peter Edelman, *supra* note 47 at 6.

<sup>63</sup>*See id.* at 12.

<sup>64</sup>*See id.*

fees on their own.<sup>65</sup> Further, probation officers can impose graduated sanctions, additional conditions in response to the failure to pay court debts.<sup>66</sup> These additional requirements are likely to raise the overall financial burden and can even result in incarceration when in reality, the defendant needs fines and fees lowered or waived.<sup>67</sup>

For decades states and localities relied on fees and fines collected from defendants to fund their court systems or basic government operations.<sup>68</sup> An estimated ten million (10,000,000) people owe fifty billion dollars (\$50,000,000,000) in legal fees, fines, and penalties.<sup>69</sup> Debtors' prisons are not a thing of the past, although they are unconstitutional.<sup>70</sup> Fees have increased dramatically and accelerated since the 1990s, when the need for revenue created the need for a financial increase; new fines and expensive fees were invented and continued to "creep."<sup>71</sup> Police officers were required to meet arrest quotas to divert more revenue to the state, a practice still used today.<sup>72</sup> Just one example of gouging defendants is from New Orleans, Louisiana, where public defenders shared that a transcript costs two hundred dollars (\$200), five hundred dollars (\$500) for the

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<sup>65</sup>*See id.*

Forty-nine [states] (except Hawaii and the District of Columbia) have a fee for electronic bracelets in lieu of detention while waiting trial. Defendants are also charged for drug testing, vehicle interlocking for those with a DUI, and any court-ordered treatment they receive, as well as interest, late fees, payment plan fees and collection fees. The charges can be stiff. Home supervision and alcohol monitoring cost between \$180 and \$360 a month, and drug testing can be \$25 per week, or \$1,300 a year.

<sup>66</sup>*See Paying on Probation: How Financial Sanctions Intersect with Probation to Target, Trap, and Punish People Who Cannot Pay, supra* note 48.

<sup>67</sup>*See id.*

<sup>68</sup>*See* Matthew Menendez & Lauren-Brooke Eisen, *supra* note 49 (defining fines as payment imposed upon conviction to serve as both deterrence and punishment, fines are imposed as a result of the specific crime, fees, by contrast, are intended to raise revenue, these are imposed regardless of the offense, fees shift payment from taxpayers to the defendants).

<sup>69</sup>*See* Tara O'Neill Hayes & Margaret Barnhorst, *supra* note 3.

<sup>70</sup>*See* Matthew Menendez & Lauren-Brooke Eisen, *supra* note 49.

<sup>71</sup>*See* Peter Edelman, *supra* note 47 at 7.

<sup>72</sup>*See id.*

judicial expense fund, two hundred and forty-four dollars (\$244) for the felony court fee, and at a *minimum* three hundred dollars (\$300) for “other services” ordered by the court.<sup>73</sup> These fees totaled are above one thousand dollars (\$1,000) and are not an uncommon example.<sup>74</sup> Not to mention, some states like Florida allow private debt collection firms to “add a surcharge up to forty percent (40%) on an unpaid court debt.”<sup>75</sup> Even a convicted person cannot escape the exorbitant fees.<sup>76</sup> Forty-one states (41/50) charge for “room and board” in prisons and jails, which calls into question the purpose these jails are supposed to serve, if not for state revenue generation.<sup>77</sup> For example, the Riverside County jail in California charges over one hundred dollars (\$142) per day to stay in their prison.<sup>78</sup> Inmates are responsible for their medical fees, administrative fees, criminal lab fees, funds for prison construction, and even prosecution reimbursement.<sup>79</sup>

Fines and fees further inequality by attaching costs to “the already lowest earners and prevents those released from prison from escaping poverty, which makes them more likely to commit both property and violent crimes.”<sup>80</sup> Excessive fines create a “never-ending cycle of

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<sup>73</sup>*See id.* at 11.

<sup>74</sup>*See id.*

<sup>75</sup>*See id.*

<sup>76</sup>*See id.* at 18.

<sup>77</sup>*See id*; *See also* Kiren Jahangeer, *Fees and Fines: The Criminalization of Poverty*, A.B.A. (Dec. 16, 2019), [https://www.americanbar.org/groups/government\\_public/publications](https://www.americanbar.org/groups/government_public/publications) (illustrating the costs of prison for the offender).

In April of 2016, a 30-year-old woman from St. Louis was accused of stealing a tube of mascara from a Walmart and was arrested for shoplifting. She said that she threw away the package and forgot to pay the \$8.74 for the mascara. She served jail time, received a fine and was put on probation. When she did not appear at a probation hearing, she was sent back to jail. She fell behind on payments and was sent to jail again. Her board jail bill is now more than \$10,000.

<sup>78</sup>*See* Peter Edelman, *supra* note 47 at 18.

<sup>79</sup>*See id* (illustrating an example of medical expense payments, where an inmate in Dallas was found unresponsive in solitary confinement and was taken to the hospital where he was pronounced dead, and the City of Dallas forwarded an invoice to the father for the more than one-thousand dollar (\$1,000) ambulance ride).

<sup>80</sup>*See* Michael Olson, *supra* note 43.

poverty into crime,” upon release, defendants are forced back into poverty, and due to the intrinsic link between poverty and crime eventually leads to recidivism.<sup>81</sup>

This paper seeks to address the critical issue of how to reconstruct our monetized criminal legal system financed through defendants. We must reduce court and state economic reliance on fee and fine payments and seek financing through other means. Through looking at state and international comparisons, it is clear some fees and fines are inevitable, but the need to assess them based on the individual income of each defendant is critical to creating an equitable system. Additionally, it is important to explore the work of progressive prosecutors across the country to see how they work to undo the dramatic impacts that a monetized criminal legal system has created for low-income individuals and communities of color to implement a system nationwide focused on “*justice for all*.”<sup>82</sup>

## 2. HOW CAN WE DO BETTER?

### *i. International Efforts and Comparative Criminal Systems*

Aside from other comparative democracies having significantly lower incarceration rates, the system and programs for incarcerated people are more expansive and rehabilitative.<sup>83</sup> While fines and fees are still assessed in most countries, these fines are well thought out and individualized for each person to avoid criminalizing poverty and uplift their citizens.<sup>84</sup> In the Netherlands and Germany, fines are used more favorably than incarceration; however, fines are

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<sup>81</sup>*See id.*

<sup>82</sup>*See generally Justice for All*, BILL OF RTS. INST. (last accessed Apr. 23, 2023), <https://billofrightsinstitute.org/essays/justice-for-all>.

<sup>83</sup>*See Ram Subramanian & Alison Shames, Sentencing and Prison Practices in Germany and Netherlands*, VERA INST. OF JUST. (Oct. 2013), <https://www.vera.org/publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states>.

<sup>84</sup>*See John McKenna, In Finland, Speeding Tickets are Linked to Your Income*, WORLD ECON. F. (June 15, 2018), <https://www.weforum.org/agenda/2018/06/in-finland-speeding-tickets-are-linked-to-your-income>.

always assessed based on an offender's income.<sup>85</sup> Both countries rely on community-based sanctions and alternatives for a wide array of offenses which are deliberate policy choices to keep offenders out of prisons.<sup>86</sup> In Finland, speeding fines are calculated based on salary; the court assesses a "day fine" system that looks at disposable income.<sup>87</sup> While these systems are not perfect, there are many positive aspects that the United States can take inspiration from.

### *ii. State Efforts*

It would be disingenuous to fail to acknowledge that some states have made valiant efforts to change our criminal legal system overburdened with oppression. In 2015, the U.S. Department of Justice established the Working Group on Poverty and the Criminal Justice System, which sent a letter to chief justices and state court administrators reminding them about legal obligations related to enforcing fees and fines.<sup>88</sup> Other efforts are being conducted at state and local levels nationwide to address the issues that fees and fines create.<sup>89</sup> In August 2018, the American Bar Association created ten guidelines on court fees and fines prepared by the Presidential Task Force on Building Public Trust in the American Justice System.<sup>90</sup> At a state level, the Governor of

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<sup>85</sup>See Ram Subramanian & Alison Shames, *supra* note 83.

<sup>86</sup>See *id.*

<sup>87</sup>See John McKenna, *supra* note 84.

<sup>88</sup>See Kiren Jahangeer, *supra* note 77.

<sup>89</sup>See *id.*

<sup>90</sup>See *ABA Ten Guidelines on Court Fines and Fees*, A.B.A. (Aug. 2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_ind\\_10\\_guidelines\\_court\\_fines.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf) (defining the ten guidelines as (1) Limits to Fees – “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, (2) Limits to Fines – fines should “not result in substantial and undue hardship to individuals or their families,” (3) Prohibition against Incarceration and Other Disproportionate Sanctions, Including Driver’s License Suspensions, (4) Mandatory Ability-To-Pay Hearings, (5) Prohibition against Deprivation of Other Fundamental Rights – failure to pay “should never result in the deprivation of fundamental rights including the right to vote,” (6) Alternatives to Incarceration, Substantial Sanctions, and Monetary Penalties, (7) Ability-to-Pay Standards, (8) Right to Counsel, (9) Transparency, (10) Collection Practices).



California signed legislation that banned counties from charging juvenile detention fees, and Los Angeles canceled ninety million dollars (\$90,000,000) of debt owed for such fees.<sup>91</sup> San Francisco became the first jurisdiction in the nation to “stop imposing fees for probation, electronic monitoring, and jail booking.”<sup>92</sup> In 2017 in Texas, the state legislature passed a law allowing courts to ask defendants earlier in the court process about their ability to pay fees and fines, and tailor the fees according to individual financial situations.<sup>93</sup> The judge must also conduct an inquiry at sentencing and assign a reasonable payment amount.<sup>94</sup> These assessments have proven successful, in court collections for the state have risen by approximately seven percent (7%).<sup>95</sup> However, statewide work needs to be accompanied by support from both prosecution and defense attorneys.

### *iii. The Work of Progressive Prosecutors*

A growing number of progressive prosecutors have shifted away from an “overall punitive vision of safety and justice” toward exploring alternatives to promote a more equitable criminal legal system.<sup>96</sup> First, progressive prosecutors have worked to reduce prosecution of low-level crimes, removing some individuals from ever being involved in the system.<sup>97</sup> Brooklyn District Attorney Eric Gonzalez said, “[w]hen you talk about holding people accountable...I don't think our primary responsibility should be incarceration. That should be the last option.” In Philadelphia, District Attorney Larry Krasner has reduced the use of cash bail and pledged to help stop mass

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<sup>91</sup> *See also* Kiren Jahangeer, *supra* note 77.

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See* Allison Young, *The Facts on Progressive Prosecutors*, AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice>.

<sup>97</sup> *See id.*

incarceration.<sup>98</sup> Reports show that one thousand and seven hundred (1,700) fewer people were jailed awaiting trial after this reduction without increasing crime rates.<sup>99</sup> In Houston, elected D.A. Kim Ogg strongly supported a lawsuit challenging the cash bail system for misdemeanor cases in the face of opposition from high-ranking judges throughout the state.<sup>100</sup> In Chicago, State Attorney Kim Foxx raised the threshold for felony theft prosecution to reduce the number of shoplifters in jail.<sup>101</sup> Prosecutors have broad discretion over whether and how to prosecute and what bail to seek against defendants.<sup>102</sup> Progressive prosecutors have increasingly declined to prosecute low-level marijuana offenses and stopped asking for bail in many misdemeanor cases, which make up almost eighty percent (80%) of court dockets.<sup>103</sup> However, these are only a few examples of what is being done across the country. There is still major reform needed.<sup>104</sup> “Fairness and safety aren’t a trade-off. They complement each other. This new corps of prosecutors can lead the way toward doing more justice with more mercy.”<sup>105</sup>

#### IV. NOT MY CASE – NOT MY PROBLEM?

Many critics are concerned that removing money from the criminal legal system will diminish the purposes of punishment and deterrence that fees and fines serve.<sup>106</sup> Criminals owe a

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<sup>98</sup>See *id.*; See also Pat Loeb, *Philly DA Says Bail Reform is Working, Offers Data to Back Up Claim*, KYW NEWS RADIO (Feb. 19, 2019), <https://www.audacy.com/kywnewsradio/articles>.

<sup>99</sup>See Allison Young, *supra* note 96.

<sup>100</sup>See Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

<sup>101</sup>See *id.*

<sup>102</sup>See *id.*

<sup>103</sup>See *id.*

<sup>104</sup>See *id.*

<sup>105</sup>See *id.*

<sup>106</sup>See Matthew Menendez & Lauren-Brooke Eisen, *supra* note 49.

debt to society.<sup>107</sup> This is one of the very foundations the criminal system was built upon.<sup>108</sup> Critics argue defendants should be responsible for funding the criminal system since they are the “users” of the courts, not all taxpayers.<sup>109</sup> There are also public safety concerns; crimes like burglary, stalking, petty assault, drug offenses, and some types of arson and robbery are no longer bail crimes in some states.<sup>110</sup> According to Tucker Carlson of Fox News, “habitual offenders will find it easier than ever to commit more crimes immediately after getting caught.”<sup>111</sup> Critics of a cashless criminal legal system argue that the courts need the money from fees and fines to properly function, prevent delays, and increase judicial injustice.<sup>112</sup> Fees generally cover operational costs in the system and state and court budgets rely tremendously on them.<sup>113</sup>

#### **V. WHAT ABOUT ACTUALLY IMPROVING PUBLIC SAFETY AND CONSERVING OUR STATE RESOURCES?**

Fees and fines unjustly burden people with debt who are re-entering society.<sup>114</sup> These fees are imposed without regard to a defendant’s ability to pay.<sup>115</sup> Many of these jurisdictions end up with billions unpaid while insurmountable debt prevents defendants from becoming functioning members of society and achieving one of the pillars, “rehabilitation,” our justice system was built upon.<sup>116</sup> While critics argue that these fees and fines serve another pillar of the justice system,

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<sup>107</sup>*See id.*

<sup>108</sup>*See id.*

<sup>109</sup>*See id.*

<sup>110</sup>*See* Tucker Carlson, *Normal People Don’t Want Criminal Justice Reform, They Want Criminal Justice Enforcement*, FOX NEWS (Jan. 3, 2020), <https://www.foxnews.com/opinion/tucker-carlson-criminal-justice-reform-enforcement>.

<sup>111</sup>*See id.*

<sup>112</sup>*See generally* Caroline Greer, *States Need to Reform Criminal Justice Fines and Fees*, REASON FOUND. (July 2, 2021), <https://reason.org/commentary/states-need-to-reform-criminal-justice-fines-and-fees>.

<sup>113</sup>*See id.*

<sup>114</sup>*See* Matthew Menendez & Lauren-Brooke Eisen, *supra* note 49.

<sup>115</sup>*See id.*

<sup>116</sup>*See id.*

“deterrence,” there is little to no evidence that payment is a deterrent to crime since they are likely never repaid.<sup>117</sup> Instead, it is evidenced that the pressures of payment and looming debt lead to recidivism and social isolation.<sup>118</sup>

Further, these fees and fines are an inefficient source of government revenue.<sup>119</sup> There are significant costs associated with fee and fine enforcement, “on average, the jurisdictions spent more than \$0.41 for every dollar [(\$0.41/\$1.00)] they collected over the period studied.”<sup>120</sup> Assuming a defendant owes about the average one thousand dollars (\$1,000) in fees and fines, the state uses around four hundred dollars (\$410) to acquire this money. While this number might not seem high when compared to the Internal Revenue Service (IRS), which spends only thirty-four cents (\$0.34) for every *one hundred dollars* (\$100) collected in taxes. Using the same scenario stated above, if the IRS were to collect the debt instead, it would cost them three dollars and forty cents (\$3.40). It costs approximately one hundred and twenty-one times more for the state to collect these fees and fines.<sup>121</sup> Instead, resources used to collect fees and fines could be spent on improving public safety.<sup>122</sup> “The main tenant of any criminal justice regime is to increase public safety, and enforcing burdensome fines and fees on criminal defendants only serves to increase recidivism

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<sup>117</sup>*See id.*

<sup>118</sup>*See id.*

<sup>119</sup>*See id.*

The Texas and New Mexico counties studied here effectively spend more than 41 cents of every dollar of revenue they raise from fees and fines on in-court hearings and jail costs alone. That’s 121 times what the Internal Revenue Service spends to collect taxes and many times what the states themselves spend to collect taxes. One New Mexico County spends at least \$1.17 to collect every dollar of revenue it raises through fees and fines, meaning that it loses money through this system.

<sup>120</sup>*See id.* (suggesting that the cost is likely higher, but lack of available data resulted in the estimate being based on only in-court and jail costs, the much higher costs of police departments for warrant enforcement and arrests, DMV costs, and parole and probation officer costs are not included).

<sup>121</sup>*See id.*

<sup>122</sup>*See id.*

and decrease public safety.”<sup>123</sup> Sheriff’s deputies waste time serving warrants to pay fees and fines instead of responding to 911 calls, courts schedule failure to pay appearances, which can delay more serious violent criminal trials, and resources are exhausted collecting payment instead of spent on education to break cycles of repeated contact with the criminal legal system.

Additionally, there is evidence that courts can receive funding elsewhere but now rely on fees and fines to fund basic operations and state budgets.<sup>124</sup> “Using fee and fine revenues to fund the judiciary can create perverse incentives with the potential to distort the fair administration of justice.”<sup>125</sup> When criminal courts are responsible for financing, fees and fines become excessive and have even been used for personal perks.<sup>126</sup> Instead of expecting payment from defendants, courts must look to those who control the states’ budget for more resources.

## VI. A PUSH FOR REAL CHANGE

There is an ever-growing need to fight inequities in our country. If you want to address violence effectively you must first address radicalized poverty. This is a more difficult task, which must be done, but for immediate impact, we can fight to remove exorbitant fees and fines. Instead, prosecutors, defenders, judges, and all those who work in the legal system to support our local communities must devote time to address these grave injustices and rectify the wrongs that have so long destroyed communities and built up both the government and individual pockets. Through

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<sup>123</sup>See Michael Olson, *supra* note 43.

<sup>124</sup>See Matthew Menendez & Lauren-Brooke Eisen, *supra* note 49 (explaining in North Carolina the fees collected are used to fund half of the state’s judicial budget, as well as jails, law enforcement, counties, and schools); See also Antonya Jeffrey, *How Government Reliance on Fines and Fees Harms Communities Across the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Apr. 25, 2023), <https://equitablegrowth.org/how-government-reliance-on-fines-and-fees-harms-communities-across-the-united-states>.

<sup>125</sup>See Matthew Menendez & Lauren-Brooke Eisen, *supra* note 49.

<sup>126</sup>See *id* (“Fees and surcharges allocated to a judicial expense fund in Louisiana were found to have been spent on luxury goods, including supplemental health insurance for judges, two Ford Expeditions, a leather upholstery upgrade for a take-home vehicle, and a full-time private chef.”)

financing our “criminal justice system” off the backs of defendants, our justice system oppressed an unimaginable number of victims. Crime is a cause and consequence of underlying social and economic problems in the United States that have disproportionately impacted and disadvantaged the poorest and most vulnerable families for decades. If the justice system’s purpose is to serve *all* people of this country, then *all* people should be responsible to pay or better yet, to hold our governments accountable to finance the system on their own. States should remove the old balances that have continued to complicate the lives of millions and jumpstart our path to justice in the United States, the most “democratic country in the world.”<sup>127</sup>

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<sup>127</sup>*See id.*