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JUDICIAL RESPONSIBILITY FOR JUSTICE IN CRIMINAL COURTS

*Lisa Foster**

Good morning. In 2003, I became a trial judge in San Diego. Because I had been a civil litigator for my entire legal career, my first assignment was, of course, in a criminal trial department. I didn't know much about criminal justice. But I had good and kind judicial colleagues who helped whenever I asked, and both the prosecutors and defense attorneys who appeared before me taught me the ropes. When I left the bench in 2013 to work for the Justice Department, I assumed every state criminal trial court worked the way San Diego's did. Bail was set according to a schedule; unpaid fines and fees were subject to a civil collection process which included the suspension of your driver's license if you didn't pay; lawyers—either private counsel or a public defender—were present at every stage of a criminal proceeding from arraignment to sentencing for felonies and misdemeanors. Plea bargaining was the norm, and for misdemeanors, the majority of defendants pled guilty at arraignment with a public defender standing by their side. And I assumed that the criminal justice system I had worked in was fair, just, and certainly constitutional. I was wrong on all counts.

I want to share with you three short stories—all reported in the media—that challenged my assumptions about the state of criminal justice in the states, including my home state.

The first story comes from the *Washington Post* in December of last year.¹ Shannan Wise, a single mother of two, was working two

* The author is the former Director of the Office for Access to Justice at the U.S. Department of Justice and a retired California Superior Court Judge. These remarks were delivered as the keynote address at the Judicial Responsibility for Justice in Criminal Courts Conference, adapted in part from the author's previously published Article, *Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts*, 33 GA. ST. U. L. REV. 695 (2017). The transcript has been lightly footnoted and adapted for publication by the *Hofstra Law Review*.

1. Ovetta Wiggins, *She Spent Five Days in Jail Because She Couldn't Come Up with \$1,000. Bail Overhaul Advocates Say Her Story Is Not Uncommon.*, WASH. POST (Dec. 27, 2016), https://www.washingtonpost.com/local/md-politics/she-spent-five-days-in-jail-because-she-couldnt-come-up-with-1000-bail-overhaul-advocates-say-her-story-is-not-uncommon/2016/12/27/6fe11ed4-c621-11e6-85b5-76616a33048d_story.html?utm_term=.7483743876e9.

temporary jobs and attending school in Baltimore, Maryland, when a police officer arrived at her door and said he had a warrant for her arrest.² Wise's younger sister, who suffered from mental illness, had filed an assault charge against her.³ Wise made countless calls from Central Booking in Baltimore, and prayed that her friends and family could raise the \$1000 she needed to get out of jail.⁴ She told her sisters to pawn her television set, and her sisters tried to pawn their laptops; one friend offered \$25, and another pitched in \$100.⁵ At twenty-seven years old, Wise had never been in jail before, and she remained in jail for five days before she was able to post bail.⁶ If the bail money had not been gathered, Wise would have been detained until January 2016—three months after her arrest—when her first hearing was held and the charges were dismissed.⁷

National Public Radio reported the second story in November 2014.⁸ Sharnelle Mitchell was arrested in January 2014 at her home in Montgomery, Alabama, because she failed to pay traffic tickets that she received in 2010.⁹ The single mother was handcuffed in front of her children, who were one and four years old, and she was sentenced to fifty-eight days in jail to “sit out” her unpaid traffic tickets—she was credited with \$50 a day and an additional \$25 a day if she agreed to clean the jail.¹⁰ “Mitchell, who also cared for her disabled mother, said she made a couple of small payments but fell behind because she had little income, less than \$14,000 a year that she made from her occasional work styling hair.”¹¹

The third story dated October 5, 2016, comes from the Marshall Project.¹² An insurance attorney, Ryan Goodwin, was bracing himself for an awkward conversation in the visiting area of the Caddo Correctional Center in Shreveport, Louisiana.¹³ He had to tell his new client—a sixteen year old who was facing life in prison for stealing

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Joseph Shapiro, *Alabama Settlement Could Be Model for Handling Poor Defendants in Ferguson, Mo.*, NPR (Nov. 20, 2014, 5:18 PM), <http://www.npr.org/sections/thetwo-way/2014/11/20/365510846/alabama-settlement-could-be-model-for-handling-poor-defendants-in-ferguson-mo>.

9. *Id.*

10. *Id.*

11. *Id.*

12. Eli Hager, *When Real Estate and Tax Layers Are Forced to Do a Public Defender's Job*, MARSHALL PROJECT (Sept. 9, 2016, 9:00 AM), <https://www.themarshallproject.org/2016/09/09/what-happens-when-there-s-only-one-public-defender#.IklucOuHG>.

13. *Id.*

someone's wallet and cell phone at gunpoint: "I don't do criminal defense"; Goodwin typically represents insurance companies in litigation following car accidents and "ha[d] no criminal law experience."¹⁴ Because the Caddo Parish Public Defender's Office suffered from a critical lack of funding, it was unable to provide counsel to hundreds of poor defendants.¹⁵ To remedy the problem, judges randomly assigned lawyers to represent defendants, without pay, by choosing any lawyer from an alphabetical list that contained every lawyer with a professional address in Caddo Parish.¹⁶

All three of these stories have elements in common. All of the defendants were poor. Reflecting the demographics of poverty in the United States today, two of the three defendants were people of color. Regardless of whether the offense was a "minor misdemeanor"—the consequences to the individuals and their families were serious and long lasting. All three of these individuals, and their friends, families, and communities lost faith and confidence in our justice system.

These stories have another element in common—a judge. A judge like me—who imposed bail without considering whether the defendant needed to be detained pretrial, or what amount of bail the individual could afford, or whether the individual's failure to pay fines and fees was willful, or whether an insurance lawyer who was conscripted to represent an indigent criminal defendant could provide effective representation.

I am going to talk about the state of our state justice system this morning using three examples: bail, fines and fees, and access to counsel. These are by no means the only problems in our criminal justice system, but they are widespread and pernicious, and they are areas where judges have a particular role to play; they can by their actions perpetuate or ameliorate injustice.

My goal this morning is not only to talk substantively about these issues but to challenge you—as I was challenged—to think critically about the role of the judge, and to consider what judges can and should do to right a pendulum that is listing perilously to one side. We're all here today because we care deeply about justice; justice for our communities and justice for the individual men, women, and children who appear before us. We believe in the rule of law, we believe in fundamental fairness. But to be a just judge today, we can't just be judges uncritically accepting the system we work in. We need to change the culture of our courts, to shift the paradigm of the judge from an

14. *Id.*

15. *Id.*

16. *Id.*

umpire dispassionately calling balls and strikes to what I call neutral engagement. A judge who is impartial, but passionate about doing justice; a judge who can ensure that our system truly provides equal justice for all.

As I noted at the outset, San Diego County, like all California counties, is required by law to adopt a bail schedule.¹⁷ Each offense is paired with a dollar amount.¹⁸ If you are arrested, for example, for assault on a parking control officer—something I’m sure all of us have been tempted to do, your bail is \$5000;¹⁹ if you’re arrested for assault with a firearm, bail is \$20,000.²⁰ If you or your family can afford to make bail, you are released and given a date to come back to court. If you can’t afford a bail bond, you stay in jail.²¹ People with money go home; people without money go to jail.

To be perfectly honest, I didn’t think much about bail, and to the best of my recollection, neither did anyone else; not my colleagues on the bench, not the prosecutors nor the public defenders.

And it seems that until quite recently, few policy makers have thought much about bail since Congress passed the Federal Bail Reform Act fifty-one years ago.²² The modern statute, which applies only in federal court, requires a judge to make an individualized assessment of two factors: (1) whether the defendant is a flight risk; and (2) whether the defendant is a risk to public safety.²³ If the judge finds that a defendant is a risk to public safety, the judge can impose conditions on the defendant’s release or, in rare instances where no conditions can protect the public, detain a defendant pretrial. If the judge finds the defendant is a flight risk, the judge can set a financial condition but only after giving meaningful consideration of the individual’s ability to pay and alternative methods of securing the individual’s appearance at trial.

Why? Because bail was never supposed to be a mechanism for keeping people in custody; when bail was first invented in England in the Middle Ages, it’s purpose was to let people get out of jail pretrial.²⁴ Somehow, some time between the Middle Ages and now, the paradigm shifted. Despite the United States Supreme Court’s unequivocal

17. CAL. PENAL CODE § 1269b(c) (West 2017).

18. *Id.* § 1269b(f).

19. SUPER. CT. OF CAL., CTY. OF SAN DIEGO, BAIL SCHEDULE 22 (2016), http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/CRIMINAL2/CRIMINALRESOURCES/BAIL_SCHEDULE.PDF.

20. *Id.*

21. See Wiggins, *supra* note 1.

22. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.

23. 18 U.S.C. § 3142(c)(1) (2012).

24. See Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966-67 (1961).

declaration that “[i]n our society, liberty is the norm, and detention prior to trial is the carefully limited exception,”²⁵ we started to view detention as the norm and pretrial release as the exception.

The number of people incarcerated pretrial has increased dramatically since the 1980s.²⁶ Roughly sixty percent of the jail population nationally is comprised of pretrial defendants; up from forty percent in the 1980s.²⁷ Since 2000, ninety-five percent of the growth in the overall jail inmate population has been due to the increase in the population of defendants held pretrial.²⁸ Most of those detained pretrial are accused of non-violent offenses.²⁹ Disproportionately, they are people of color.³⁰ African Americans and Hispanics are at least twice as likely as Whites to be detained pretrial for non-violent drug arrests.³¹

The overwhelming majority of pretrial detainees are poor, because of course, only people who cannot afford bail are held in custody pretrial.³² And just a few days in jail can make a defendant even poorer. As little as three days in custody increases the likelihood that a person will lose their job, their housing, be forced to abandon their education, or be unable to make their child support payments.³³ The consequences of pretrial detention are not only borne by the individual in jail, but also by his family and the community. A child whose single parent is taken into custody not only is deprived of the emotional and financial support of their parent, she may be placed in foster care or move in with a relative and be forced to change schools. Even a temporary disruption in a child’s life can have harsh and long-lasting consequences. The cost to taxpayers in this system is enormous. In the United States, we spent nine billion dollars on pretrial detention last year.³⁴

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

26. RAM SUBRAMANIAN ET AL., *VERA INST. FOR JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA* 10 (2015), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>.

27. *Id.* at 10, 29.

28. TODD D. MINTON & ZHEN ZENG, U.S. DEP’T OF JUSTICE, *JAIL INMATES AT MIDYEAR 2014*, at 4 (2015), <https://www.bjs.gov/content/pub/pdf/jim14.pdf>.

29. Richard Williams, *Bail or Jail: May 2012*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx> (last visited Nov. 15, 2017).

30. *See* SUBRAMANIAN ET AL., *supra* note 26, at 15.

31. ASHLEY NELLIS, SENTENCING PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 10 (2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

32. *See* SUBRAMANIAN ET AL., *supra* note 26, at 5, 12-13, 15-17.

33. *See id.* at 38; *3 Days Count*, PRETRIAL JUST. INST., <http://projects.pretrial.org/3dayscount> (last visited Nov. 15, 2017).

34. LAURA & JOHN ARNOLD FOUND., *PRETRIAL CRIMINAL JUSTICE RESEARCH* 1 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

We also know that a decision to detain or release a defendant pretrial affects the outcome of a case. In state criminal cases, if a conviction can result in a jail sentence, people who are detained pretrial are four times more likely to be sentenced to jail, and their sentences are three times longer than defendants who are released pretrial.³⁵ If a conviction can result in a prison sentence, people who are detained pretrial are three times more likely to be sentenced to prison and their sentences are twice as long as someone released pretrial.³⁶ And people detained pretrial are more likely to plead guilty; whether that's because they *are* guilty or because they simply want to go home.³⁷

Finally, bail does not make our communities safer.³⁸ Perversely, pretrial detention is actually a gateway to deeper and more lasting involvement in the criminal justice system.³⁹ Defendants detained more than twenty-four hours are more likely to commit new crimes after they are released than defendants charged with the same offense who are released pretrial.⁴⁰

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

In briefs filed in the Middle District of Alabama and the Eleventh Circuit, the Department of Justice stated unequivocally that “[f]undamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay.”⁴¹

Just as the number of defendants detained pretrial has increased dramatically since the mid-1980s,⁴² so too has the amount of fines and fees imposed by the justice system.⁴³ The two are not unrelated, and both

35. CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING 10-19 (2013), <https://csgjusticecenter.org/wp-content/uploads/2013/12/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes.pdf>.

36. PRETRIAL CRIMINAL JUSTICE RESEARCH, *supra* note 34, at 3.

37. See Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 748 tbl.3, 771 (2017).

38. See Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 12 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016).

39. Heaton et al., *supra* note 37, at 761-63, 763 fig.6.

40. See *id.*

41. Statement of Interest of the United States at 14, *Jones v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (No. 2:15-cv-34-MHT-WC); see Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance of the Issue Addressed Herein, *Walker v. City of Calhoun*, 682 Fed. App'x 721 (11th Cir. 2017) (No. 16-10521-HH).

42. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 551 (2012).

43. COUNCIL OF ECON. ADVISERS, OFFICE OF THE PRESIDENT, FINES, FEES, AND BAIL:

are a cause and a consequence of mass incarceration.⁴⁴ Since 1980, the number of people incarcerated in the United States has quintupled.⁴⁵ Because the vast majority of those incarcerated are held in state and local jails and prisons, the cost of incarceration has been born overwhelmingly by state and local governments.⁴⁶ From 1979 to 2013, total state and local corrections expenditures increased by 324%—from \$17 billion to \$71 billion.⁴⁷ By comparison, during that same period, state and local education spending from pre-kindergarten through high school increased 107%.⁴⁸ The cost of corrections does not include the cost of adjudication, that is, the cost of operating courts; nor does it include associated costs like public defenders, prosecutors, police, or probation services.⁴⁹ In order to defray these costs, as well as, in some cases, simply provide additional general fund revenue, state and local legislators have demanded that courts impose steep fines and fees on defendants.⁵⁰

Since 2010, every state except Alaska, North Dakota, and the District of Columbia has increased civil and criminal fines and fees.⁵¹ To cite just one example, in my home state, the fine for rolling through a stop sign is \$35.⁵² But the additional fees the legislature has imposed brings the total cost of the ticket to \$237.⁵³ As state and local

PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf.

44. *Id.* at 2-3.

45. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33-34 (2014); STEPHANIE STULLICH ET AL., U.S. DEP'T OF EDUC., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION 2 (2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf>.

46. STULLICH ET AL., *supra* note 45, at 1-2; Press Release, The White House, CEA Report: Economic Perspectives on Incarceration and the Criminal Justice System (Apr. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>.

47. STULLICH ET AL., *supra* note 45, at 1.

48. *Id.* at 5.

49. See CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 2 (2012), https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/price-of-prisons-updated-version-021914.pdf (“[I]n some cases, expenditures at corrections departments account for only a portion of the financial obligation a state commits to when it sentences an individual to prison.”).

50. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

51. *State-By-State Court Fees*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.

52. JUDICIAL COUNCIL OF CAL., UNIFORM BAIL AND PENALTY SCHEDULES 13 (2017), <http://www.courts.ca.gov/documents/2017-JC-BAIL.pdf>.

53. *Id.*

governments have moved aggressively to collect on what is known as “court debt,” we have seen another injustice in our justice system—the return of debtor’s prisons.

Many Americans first heard or read about fines and fees as a result of the Justice Department’s investigation of the Ferguson, Missouri, Police Department. In 2015, twenty-three percent of the City of Ferguson’s revenue came from court fines and fees, and they were excessive: \$302 for jaywalking, \$427 for disturbing the peace, and \$531 for allowing high grass or weeds to grow on your lawn.⁵⁴ When people could not afford to pay these fines and fees, they were arrested, jailed, and faced payments that far exceeded the cost of the original ticket.⁵⁵ In one case, a woman who was ticketed on a single occasion when she parked her car illegally was arrested twice, spent six days in jail, paid the court \$550 dollars in fines and fees, and still owed the City of Ferguson \$541.⁵⁶

Ferguson is not alone. The same practices occur in Alabama, Georgia, Michigan, Mississippi, Ohio, Texas, and Washington—and that’s just the list of states where suits have been brought challenging the practices.⁵⁷

Without question, states have a fundamental interest in punishing people—rich and poor—who violate the law. And courts must have the authority to punish people who willfully refuse to pay a fine. But before a court can incarcerate someone for nonpayment of court debt, a judge must first determine that the failure to pay was in fact willful, and that means determining that the person had the ability to pay the amount owed.⁵⁸ To do otherwise, according to the United States Supreme Court,

54. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 52 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; Michael Martinez et al., *Policing for Profit: How Ferguson’s Fines Violated Rights of African-Americans*, CNN (Mar. 6, 2015, 10:55 PM), <http://www.cnn.com/2015/03/06/us/ferguson-missouri-racism-tickets-fines/index.html>.

55. U.S. DEP’T OF JUSTICE, *supra* note 54, at 42.

56. *Id.*

57. See Mike Carter, *Poor Offenders Must Be Asked if They Can Afford to Pay Fines*, *State Supreme Court Says*, SEATTLE TIMES (Mar. 12, 2015, 7:06 PM), <http://www.seattletimes.com/seattle-news/crime/state-supreme-court-says-judge-must-ask-if-defendant-can-afford-fine>; Chevel Johnson, *Settlement Ends System of Jail for Those Who Can’t Pay Fines*, WASH. TIMES (June 20, 2016), <http://www.washingtontimes.com/news/2016/jun/20/settlement-ends-system-of-jail-for-those-who-cant->; Simon McCormack, *‘Debtors’ Prisons’ Struck Down by Ohio Supreme Court*, HUFFINGTON POST (Feb. 5, 2014, 3:00 PM), http://www.huffingtonpost.com/2014/02/05/debtors-prisons-ohio_n_4732596.html; Shapiro, *supra* note 50; Ed Spillane, *Why I Refuse to Send People to Jail for Failure to Pay Fines*, WASH. POST (Apr. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/?utm_term=.32076885961b.

58. See *Bearden v. Georgia*, 461 U.S. 660, 672 (1982).

would amount to the unconstitutional practice of “imprisoning a person solely because he lacks funds to pay the fine.”⁵⁹ For those who cannot afford to pay, the court must consider alternatives to incarceration, such as community service.

Even in jurisdictions that do not incarcerate people for failure to pay court debt, there are other collection practices that exacerbate and criminalize poverty. The most common is driver’s license suspension.⁶⁰ In multiple jurisdictions, courts are authorized, and in many instances required, to suspend a person’s driver’s license for nonpayment of court debt.⁶¹ Often these suspensions are automatic; there is no hearing in advance of the suspension, and often there is no ability to obtain a hearing after the suspension occurs.⁶² In Virginia, 900,000 people have had their licenses suspended under these circumstances.⁶³ In California, from 2006 to 2013, the Department of Motor Vehicles suspended more than 4.2 million driver’s licenses for nonpayment of fines and fees—one in six drivers was affected.⁶⁴

From a public policy perspective, suspending driver’s licenses makes no sense. If the goal is to get people to pay their court debt, why would you make it more difficult for them to get to work? As a practical matter, people whose licenses are suspended often drive anyway—because they have to get to work or to the doctor or to their children’s school. And then, if they’re stopped by law enforcement, they get a ticket for driving on a suspended license, which in many states is a misdemeanor. More fines and fees are imposed, and ultimately, they may be incarcerated—not always, but often simply because they are poor.

So why does this happen? We are supposed to have an adversarial system where the prosecutor argues for the state, defense counsel makes the case for the accused, and the judge weighs the arguments; she considers the facts and the law, and reaches a just decision. The problem is that one critical component of that equation is often missing—and it’s defense counsel.

59. *Id.* at 674.

60. LAWYERS’ COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 6, 9 (2015), <https://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf> [hereinafter NOT JUST A FERGUSON PROBLEM].

61. *Id.* at 6-7, 15.

62. *Id.* at 6.

63. Michael Campbell, *DOJ Calls State Driver’s License Suspension Law Unconstitutional*, SUSSEX-SURRY DISPATCH, <http://www.thesussexsurrydispatch.com/news/doj-calls-state-drivers-license-suspension-law-unconstitutional> (last visited Nov. 15, 2017).

64. NOT JUST A FERGUSON PROBLEM, *supra* note 60, at 9.

In Louisiana, the public defender system has been so chronically underfunded that last year, thirty-three out of forty-two public defender districts restricted services because defender caseloads were three to four times the state public defender board's caseload standards.⁶⁵ Judges began taking drastic measures, including those in Caddo Parish, where lawyers who had no criminal experience whatsoever were conscripted to represent defendants.⁶⁶ Other judges held mass plea and sentencing hearings with groups of fifty defendants represented by a single public defender.⁶⁷ Some judges put defendants on waiting lists for public defenders, and if the accused could not afford bail, they remained in jail until a lawyer was available—in some cases for months.⁶⁸

Wholesale violations of the Sixth Amendment right to counsel are not just a problem in Louisiana. In New York State, Washington State, Pennsylvania, Georgia, and Idaho, advocates have brought cases arguing that the Sixth Amendment right to counsel has been violated because defense counsel are so overworked and under-resourced that they are lawyers in name only.⁶⁹ The Department of Justice has weighed-in arguing that if the facts are as the plaintiffs claim, the defender systems are unconstitutional.⁷⁰ Similar cases are pending in other states.⁷¹

In Utah, according to a report prepared by the Sixth Amendment Center, trial courts do not uniformly provide counsel at all critical stages of criminal cases.⁷² Many defendants, particularly those facing misdemeanor charges, never speak with an attorney.⁷³ According to the Sixth Amendment Center's report:

65. Debbie Elliot, *Public Defenders Hard to Come by in Louisiana*, NPR (Mar. 10, 2017, 5:29 PM), <http://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana>; Joe Gyan, Jr., *Public Defense Funding at 'Critical Moment' in Louisiana and Can't Be Cut*, *American Bar Association Official Claims*, ADVOC. (Apr. 1, 2016, 3:17 PM), http://www.theadvocate.com/baton_rouge/news/article_7d2502ea-18e5-5d68-9c80-c4f6befdc641.html.

66. See Hager, *supra* note 12.

67. Eli Hager, *When There's Only One Public Defender in Town*, MARSHALL PROJECT (Sept. 9, 2016), <https://www.themarshallproject.org/2016/09/09/what-happens-when-there-s-only-one-public-defender#.IkIucOuHG>.

68. Elliot, *supra* note 65.

69. NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 9 (2009), <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

70. *Court Filings in Support of Access to Justice*, U.S. DEP'T OF JUST., <https://www.justice.gov/atj/court-filings-support-access-justice> (last updated Nov. 18, 2016).

71. See, e.g., *Tucker v. State*, 394 P.3d 54, 59, 71 (Idaho 2017).

72. SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES 89 (2015), http://sixthamendment.org/6ac/6AC_utahreport.pdf.

73. *Id.*

The challenge of providing effective representation for each client can be exacerbated by an excessive caseload that reduces the time a lawyer can spend on an individual case. And, these attorneys generally lack the appropriate independence from undue state and local government interference in securing the necessary resources to put the state's case to the test.⁷⁴

Similar reports from Delaware, Indiana, Nevada, South Carolina, and Wyoming demonstrate that in far too many jurisdictions, the right to counsel is often observed in the breach.⁷⁵

And the problem pervades not just adult systems, but also juvenile proceedings. In the Cordele Circuit in Georgia during 2013, of 661 juvenile delinquency cases, children were represented by counsel in just nineteen.⁷⁶ The remaining children “waived” their right to counsel—without being counseled by a lawyer first.⁷⁷ Again, this is not just a problem in the South. The same practice has been documented in other states.⁷⁸

The problem is particularly acute pretrial despite the Supreme Court's holding in *Powell v. Alabama*,⁷⁹ eighty-five years ago:

[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants

74. *Id.*

75. See SIXTH AMENDMENT CTR., ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS 8, 11 (2015), <http://sixthamendment.org/wp-content/uploads/2015/05/Actual-Denial-of-Counsel-in-Misdemeanor-Courts.pdf> (noting that Nevada and Indiana have “no state structure to support trial-level right to counsel representation for misdemeanors,” and that Delaware, South Carolina, and Wyoming are among a group of states where “actual denial of counsel is likely to occur” because “local prosecution of jailable misdemeanor offenses takes place beyond the purview of [their] public defense system[s]”); see also SIXTH AMENDMENT CTR., THE CRUCIBLE OF ADVERSARIAL TESTING: ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS 103 (2014), http://sixthamendment.org/6ac/6AC_delawarereport.pdf (“Delaware fails to meet [the] minimum constitutional standard in all criminal courts, in all of its counties. Defendants are advised of the right to assistance of counsel at their initial appearance, yet no formal activation of that right occurs unless the defendant is fortunate enough to remain incarcerated pretrial. As a result, many defendants appear at subsequent critical stages in the Court of Common Pleas without representation . . .”); SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES 88 (2016), http://sixthamendment.org/6ac/6AC_indianareport.pdf (“The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in misdemeanor cases in any of its courts, including city and town courts.”).

76. Petition for Writ of Mandamus and First Amended Complaint for Injunctive and Declaratory Relief at 3, *N.P. v. Georgia*, 2014cv-241025 (Fulton Cty. Super. Ct. Oct. 3, 2014).

77. See *id.* at 42-44.

78. See, e.g., Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 616-17 (2002).

79. 287 U.S. 45 (1932).

did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.⁸⁰

In eight states, lawyers are never present at first bail hearings; in seventeen states, lawyers appear infrequently or in only a token number of courts; in eleven other states, a defendant has only a fifty percent chance of obtaining counsel at first appearance.⁸¹

When courts are assessing fines and fees, and especially when they are attempting to enforce collection, counsel are almost entirely lacking. Many courts characterize debt collection as civil contempt proceedings; despite the fact that the consequence can be incarceration, no lawyer is appointed.

To be sure, the U.S. Supreme Court has not held definitively that the Constitution requires counsel at first appearance or at a civil contempt hearing or if incarceration is not a possible punishment for the offense—but justice does.⁸² The consequences of pretrial detention; the consequences of a civil contempt proceeding; the consequences of any criminal conviction—are enormous. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great. Going to jail for even a few days may result in loss of professional licenses, exclusion from public housing, inability to secure student loans and other forms of credit, and today, it will almost certainly result in deportation for non-citizens. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings at taxpayers' expense. For many people, our nation's misdemeanor courts are the first and often the only place they come into contact with our criminal justice system. People's confidence in the courts as a whole, their faith in the state's ability to dispense justice fairly and effectively, is framed through these initial encounters. It's not surprising then that, as former Attorney General Loretta Lynch observed, "too many of our fellow citizens, especially low-income Americans and Americans of color . . . experience the law not as a guarantee of equality, but as an obstacle to opportunity."⁸³

80. *Id.* at 57.

81. CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 24 (2015), https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf.

82. *See id.* at 17-19, 24-25.

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

There are many reasons why the justice system has evolved as it has. The criminal justice system is chronically underfunded, including the courts, pretrial services, and probation; sentencing statutes and the myriad collateral consequences of a conviction reflect “tough on crime” policies. Judges and court personnel have to contend with crowded dockets and limited resources.

But we need—indeed, we must—do better. And judges need to be part of the solution. Some of you already are; you’ve pioneered programs in your courts or simply changed the way your courtroom operates. We want to share those best practices and talk about others. Our hope is that we can engage in a candid, honest conversation about what judges can do to judge more justly and how we can change court culture so that our colleagues do too.

In 1886, Frederick Douglass gave a speech commemorating the twenty-fourth anniversary of the Emancipation Proclamation.⁸⁴ Speaking nine years after the Federal Army was withdrawn from the South and Reconstruction-era reforms had largely been reversed, Douglass focused on the justice system and warned that “where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.”⁸⁵

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

84. Frederick Douglass, Speech on the Occasion of the Twenty-Fourth Anniversary of Emancipation in the District of Columbia, Washington, D.C. (Apr. 16, 1886), in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 696 (Philip S. Foner ed., 1999) (ebook).

85. *Id.* at 699.