

**THE CHALLENGE OF
ECONOMIC INEQUALITY**

Richard R. Buery, Jr.
Honorable Fern Fisher

HOUSING AND COMMUNITY

Steven W. Bender
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CRIMINAL JUSTICE REFORM

Michael Pinard
Speart
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POLITICAL PARTICIPATION

J. Gerald Hebert

**REPRODUCTIVE RIGHTS
AND WOMEN'S EQUALITY**

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LESSONS FROM NEW YORK CITY

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Anna Shwedel
Melanie Hartzog
Patti Banghart
Jennifer Jones Austin
Steven Banks

**COLLECTED
ESSAYS
ON THE
THREAT OF
ECONOMIC
INEQUALITY**



ABOUT THE IMPACT CENTER FOR PUBLIC INTEREST LAW

The Impact Center for Public Interest Law is committed to using the formidable power of law and legal education to advance social justice and to have a positive impact on the public interest, promote the practice of public interest law, and expand the role of public interest law in the professional development of New York Law School students. The Impact Center engages in advocacy on a wide range of legal issues that promote the rights and liberties and social and economic empowerment of members of our community—throughout New York City, the country, and the world. Through its advocacy, the Impact Center works to expand access to justice, eliminate the barriers to equal opportunity, and enhance the quality of public services.

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ABOUT THE NEW YORK LAW SCHOOL RACIAL JUSTICE PROJECT

The New York Law School Racial Justice Project is a legal advocacy initiative to protect the constitutional and civil rights of people who have been denied those rights on the basis of race and to increase public awareness of racism and racial injustice in the areas of education, employment, political participation, and criminal justice. The Project has worked to achieve these goals through impact litigation, amicus briefs, and public education initiatives.

ACKNOWLEDGEMENTS

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Letter from Deborah N. Archer, Co-Director of the Impact Center for Public Interest Law

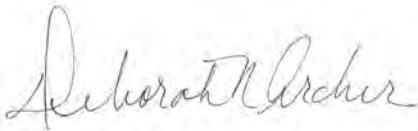
During his State of the Union address in January 1964, President Lyndon Johnson proclaimed, “[t]his administration today, here and now, declares unconditional war on poverty in America.” Many battles were joined: the Social Security Amendments of 1965, which created Medicare and Medicaid; the Food Stamp Act of 1964; the Economic Opportunity Act of 1964, which created Job Corps, Head Start, and the Volunteers in Service to America (VISTA); and the Elementary and Secondary Education Act.

There can be no doubt that initiatives like Social Security, food stamps, and Medicare have fundamentally changed the lives of millions of Americans for the better. And yet more than 45 million Americans continue to live below the poverty line, and the gap between them and the rich are evidence of a new Gilded Age. Is it true, as President Ronald Reagan once pessimistically said, that “we fought a war on poverty and poverty won”?

Fifty years after President Johnson’s call to arms, we are still fiercely fighting that war. Even as advocates struggle to challenge growing economic inequality and the undeniable role that race, ethnicity, gender, segregation, and criminal status play in the perpetuation of poverty, we should recognize and celebrate the progress we have made and the legacy and spirit of the War on Poverty that lives on. In many ways, the War on Poverty can feel a failure only because the challenge President Johnson took on—the eradication of poverty—was so large.

On April 17, 2015, the Impact Center for Public Interest Law at New York Law School hosted a symposium entitled “Tackling Economic Inequality” to bring together policymakers, advocates, academics, and community members to explore some of the causes and solutions to this growing problem. We are publishing the essays collected in this volume, written by leading social justice advocates, to continue to stimulate conversation on this critically important issue.

All my best,

A handwritten signature in cursive script that reads "Deborah N. Archer". The signature is written in dark ink and is positioned above the typed name and title.

Deborah N. Archer
Co-Director of the Impact Center for Public Interest Law
Professor of Law, New York Law School

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Making the Dream Real

By Richard R. Buery, Jr.¹

The American Dream is that dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or achievement. It is a difficult dream for the European upper classes to interpret adequately, and too many of us ourselves have grown weary and mistrustful of it. It is not a dream of motor cars and high wages merely, but a dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.²

Perhaps no idea is as central to America's sense of self as the American Dream. Our founding Revolution was fought to advance this Dream of a nation without a permanent ruling class. The most quoted phrases in our founding documents speak to this ideal. One of the critical distinctions between America and most Western democracies is that ours is not an ethnic nationalism: one can be ethnically German, Polish, Irish, or Italian, but one cannot be ethnically American. Indeed, many of these nations enshrine a "Right to Return" in their laws, which allows anyone who shares the dominant ethnic heritage of those countries to claim citizenship.³ But—the ravings of some racist revisionists notwithstanding—being an American is not about shared ethnicity. Instead, we are defined first and foremost by our adherence to our founding philosophy: everyone deserves the equal protection of the laws;⁴ we should be judged not by the color of our skin, but by the content of our character;⁵ and where you end up in life should not be determined by where you began life.

Of course, this American Dream has always been just that: a dream. America has never fully afforded its citizens the equal protection of the laws. A quick review of our civil⁶ and criminal justice⁷ systems makes that abundantly clear. We have a sad history of judging people not only by the color of their skin, but by their ethnic origins, their gender, their sexuality, their religious beliefs, their disabilities, or other irrelevant aspects of appearance or personhood. And it has always mattered where you began in life. Those born with economic advantage have consistently outperformed those without.

And yet the brilliance of America is that our history can be understood as the advancement of the American Dream. The reality of life in America has grown closer to the Dream of America decade after decade, generation after generation. America has fought wars to advance this idea,

¹ Deputy Mayor for Strategic Policy Initiatives, The City of New York. My deepest thanks to Dean Deborah Archer and Professor Andy Scherer for organizing the Symposium. Susan Reed provided excellent research assistance.

² JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 214-215 (1931).

³ Jerry Z. Muller, *Us and Them*, *FOREIGN AFFAIRS*, Mar./Apr. 2008, at 9-14, available at <https://www.foreignaffairs.com/articles/europe/2008-03-02/us-and-them>.

⁴ U.S. CONST. amend. XIV.

⁵ Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), available at <http://www.americanrhetoric.com/speeches/mlkhaveadream.htm>.

⁶ See, e.g., ALAN W. HOUSEMAN & LINDA E. PERLE, CENTER FOR LAW AND SOCIAL POLICY, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* (3rd rev. 2013), available at <http://www.clasp.org/resources-and-publications/publication-1/Securing-Equal-Justice-for-All-2013-Revision.pdf>.

⁷ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010).

from the bloody Civil War that freed the slaves to the bloody civil rights movement that made their grandchildren citizens. There were battles to defend the rights of labor to organize and the rights of gays to enjoy basic human rights free of government interference. So while the American Dream has always been constrained by who was doing the dreaming, the history of our nation is living proof of the maxim first articulated by the abolitionist Theodore Parker but made famous by Martin Luther King, Jr.: “The moral arc of the universe is long, but it bends toward justice.”⁸ So, too, the history of America bends toward the realization of the American Dream. The moral arc of the universe, however, does not bend itself, and the march toward the Dream is not inexorable. It bends because people, activists, organizations, and government decide that they believe in America enough to take her promises seriously and demand that she keep them.

Today, we face a difficult moment in history. Despite the enormous progress we have made toward equality of opportunity, there are troubling clouds on the horizon. We need to demand the American Dream now as much as we have at any point in our history.

Income inequality, measured by the gap between the 10th percentile and the 90th percentile of income, has been widening greatly since the 1970s.⁹ Income inequality is at its worst level since 1928.¹⁰

Yet even income inequality is not necessarily inconsistent with the American Dream, if you believe that those at the bottom of the economic ladder have an opportunity to rise. Such gaps may offend our notions of justice, particularly when those at the top have so much while those at the bottom struggle with the basic necessities. But one could argue that the American Dream is fulfilled if those at the bottom have a meaningful chance to advance. However, this is proving not to be true. For example, a child born to parents with income in the lowest quintile is more than ten times more likely to end up in the lowest quintile than the highest as an adult (43 percent versus 4 percent). And, a child born to parents in the highest quintile is five times more likely to end up in the highest quintile than the lowest (40 percent versus 8 percent).¹¹

Among Western democracies, only Britain rivals America in the persistence of our social classes. The late historian Tony Judt pointed out that: “[C]hildren today in the UK as in the US have very little expectation of improving upon the condition into which they were born. The poor stay poor. Economic disadvantage for the overwhelming majority translates into ill health and missed educational opportunity.”¹²

The American Dream is under threat in other ways as well. We are on the cusp of true marriage equality, perhaps the most important advance in civil rights since the right to choose was upheld in *Roe v. Wade*. Yet, many of the laws and policies America has established to advance the Dream are under assault in courthouses and legislatures around the nation. Section 5 of the Voting Rights

⁸ For the original quote by Rev. Theodore Parker, see THEODORE PARKER, *Justice and the Conscience*, in TEN SERMONS OF RELIGION 66, 84-85 (1853).

⁹ See U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2013 30-35* (2014), available at <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

¹⁰ See Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, U.C. BERKELEY 1-3, <http://eml.berkeley.edu/~saez/saez-UStopincomes-2012.pdf>.

¹¹ See MICHAEL GREENSTONE ET. AL, THE HAMILTON PROJECT, THIRTEEN ECONOMIC FACTS ABOUT SOCIAL MOBILITY AND THE ROLE OF EDUCATION 6 (2013), available at http://www.hamiltonproject.org/files/downloads_and_links/THP_13EconFacts_FINAL33.pdf.

¹² See TONY JUDT, *ILL FARES THE LAND* 3 (2010).

Act of 1965 has been neutered, apparently because it was working too well.¹³ The rights of unions to organize and collectively bargain are under attack, most notably in Wisconsin¹⁴. Affirmative action, a woman's right to choose, etcetera, etcetera. The arc of the universe does bend, but it is not a smooth curve.

The challenge before us is straightforward. Will we allow our children to be the first generation to have less opportunity, less equality, than their parents had? One thing we know for certain is that if the American Dream advances, it will not happen on its own. It will be because we advance it. It is admittedly a big challenge. But considering how far we have come, we should not doubt our ability to right the course once again.

If the essential idea of America is the American Dream, then American government has no more important task than making that Dream real. If the Declaration of Independence does not describe advancing reality, if all men (and of course, women) are not created equal, and endowed with certain unalienable Rights, including Life, Liberty and the pursuit of Happiness, then our mutual national enterprise has failed. The Declaration further notes that governments are instituted to secure these rights. We can disagree about the best means to that end: what policies will improve social mobility, and allow people of all backgrounds to fully participate in the economic, social and political life of our nation? But we can no longer question the primal importance of finding the correct answer.

As a great poet once wrote:

America never was America to me,
And yet I swear this oath—
America will be!¹⁵

But only if we make it so. •

¹³ See, e.g., Deborah N. Archer, *Still Fighting After All These Years: Minority Voting Rights 50 Years After The March On Washington*, 17 BERKELEY J. AFR.-AM. L & POL'Y 69 (2015), available at <http://scholarship.law.berkeley.edu/bjalp/vol17/iss2/7>.

¹⁴ See Robert Samuels, *Walker's Anti-union Law has Labor Reeling in Wisconsin*, WASHINGTON POST, Feb. 22, 2015, http://www.washingtonpost.com/politics/in-wisconsin-walkers-anti-union-law-has-crippled-labor-movement/2015/02/22/1eb3ef82-b6f1-11e4-aa05-1ce812b3fdd2_story.html.

¹⁵ Langston Hughes, *Let America Be America Again*, available at <http://www.poets.org/poetsorg/poem/let-america-be-america-again>.

Insuring Civil Justice for All: Meeting the Challenges of Poverty

Honorable Fern Fisher¹

There are 45.3 million persons living in poverty in the United States.² Poverty creates numerous challenges for individuals. Lack of affordable and livable housing, adequate healthcare, and sufficient food, and the inability to access and complete a quality education are common difficulties faced by persons living below the poverty line.³ But do persons who live in poverty fare the same as middle class and wealthy individuals when contact with the civil justice system becomes necessary? This essay discusses the particular challenges persons who live in poverty face when they encounter the civil justice system and the need for the justice system to address those challenges. Finally, some possible solutions are suggested to insure that, regardless of income level, all individuals have equal access to justice as well as actual justice.

The Scope of the Challenge

The initial problem for the courts in addressing poverty-related challenges is the lack of data regarding the demographics and backgrounds of litigants in court.⁴ Courts do not track income, race, ethnicity, or origin of birth. Most courts only have estimates on the numbers of unrepresented litigants. However, estimates by state courts of the numbers of litigants who appear without lawyers are indicative of the numbers of low-income individuals interfacing with the justice system;⁵ unrepresented litigants most often appear pro se because they cannot afford attorneys.⁶ Records on the use of interpreters by some courts indicate that a substantial number of court users come from many different countries and have limited English proficiency.⁷ While hard data is not available, it is widely known that low-income people have unique problems that the justice system must address. Collecting data in the future is essential to defining the problem fully.

¹ Director, New York State Access to Justice Program and Deputy Chief Administrative Judge, NYC Courts.

² See CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, INCOME AND POVERTY IN THE UNITED STATES: 2013 12 (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

³ Marlene Kim, *Problems Facing the Working Poor*, U.S. DEP'T OF LABOR (June 15, 1999), http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/workingpoor/workingpoor_toc.htm.

⁴ “No reliable method exists for tracking the composition of the civil litigant population. Neither the gender nor the race and ethnicity of parties are recorded. For information on this subject, therefore, the Committees were required to rely largely on the impressions of the judges, attorneys, and members of the clerks’ offices. Solid statistical evidence by race and gender of litigants is available only with regard to criminal matters.” *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 124, 167 (1997).

⁵ THE TASK FORCE TO EXPAND ACCESS TO CIVIL LIBERTIES SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1-2 (2010), available at <http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.

⁶ *Id.*; See also Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 752 (2015) (stating that “most studies that have examined the characteristics of unrepresented litigants conclude that poverty is the primary force driving individuals to represent themselves in court”).

⁷ NATIONAL CENTER FOR STATE COURTS & STATE JUSTICE INSTITUTE, A NATIONAL CALL TO ACTION: ACCESS TO JUSTICE FOR LIMITED ENGLISH PROFICIENT LITIGANTS 2-3 (2013), available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Language%20Access/Call-to-Action.ashx>.

The Challenges

Poverty prevents individuals from avoiding legal issues that eventually bring them to the justice system. Individuals often fail to recognize they have legal issues, and those living in poverty are the least likely to perceive they have legal issues.⁸ Low-income individuals can ill afford everyday necessities and have little or no access to preventative measures that can avoid legal problems. For example, poor people don't have wills or do estate planning. They often do not get divorced or legally separated, causing a myriad of legal issues involving adults and children.⁹

Poor persons are often unable to resolve their legal problems because they rely on external resources to pay for the necessities of life. They simply don't have money. They also often have social services needs due to mental and physical disabilities, addiction, age, and domestic violence that are not addressed.¹⁰ Families get evicted and become homeless because of denials of public grants, loss of rent subsidies, or child support or maintenance that is not paid.¹¹ Parents fail to pay child support due to being indigent, creating legal problems for the non-payor and further impoverishing the payee.¹² Individuals lose their governmental benefits such as public assistance, rent subsidies, or Social Security income and then require administrative hearings.¹³ Hospital or medical bills go unpaid due to Medicaid or Medicare problems. Mentally ill individuals and drug-addicted individuals are evicted due to unmanaged behaviors because of inadequate or ineffective social services.¹⁴ The elderly also lose their housing.¹⁵ Parents lose custody of their children due

⁸ REBECCA L. SANDAFUR, CIVIL NEEDS AND PUBLIC LEGAL UNDERSTANDING, *available at* http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf.

⁹ FRANCES LEOS MARTINEZ & LUCY WOOD, A HOME BUT NO WILL: PROBLEMS FACED BY LOW-INCOME HOMEOWNERS LACKING ACCESS TO PROBATE SYSTEMS IN TEXAS (2004), *available at* http://www.utexas.edu/law/centers/publicinterest/docs/no_will_homeowners.pdf. See generally RUBY K. PAYNE, BRIDGES OUT OF POVERTY: STRATEGIES FOR PROFESSIONALS AND COMMUNITIES 56 (rev. ed. 2009) (providing that for those living through generational poverty "many marital arrangements are common-law. Marriage and divorce in a legal court are only important if there is property to distribute or custody of children"); Catherine New, *Divorce Too Expensive for Poorest Americans, New Study Shows*, THE HUFFINGTON POST (Aug. 20, 2014), http://www.huffingtonpost.com/2012/08/20/divorce-expensive-americans_n_1811821.html.

¹⁰ PAYNE, *supra* note 9, at 191 (rev. ed. 2009); ACLU WOMEN'S RIGHTS PROJECT, DOMESTIC VIOLENCE AND HOMELESSNESS, *available at* <https://www.aclu.org/sites/default/files/pdfs/dvhomelessness032106.pdf>; FLORIDA COUNCIL FOR COMMUNITY MENTAL HEALTH, MENTAL HEALTH AND POVERTY FACT SHEET (2007), *available at* <http://www.fccmh.org/resources/dos/MentalIllnessandPoverty.pdf>; Zachery Levinson et al., *A State-by-State Snapshot of Poverty Among Seniors: Findings From Analysis of the Supplemental Poverty Measure*, THE HENRY J. KAISER FAMILY FOUNDATION, <http://kff.org/medicare/issue-brief/a-state-by-state-snapshot-of-poverty-among-seniors/>.

¹¹ See generally Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L. J. 1215 (2002) (identifying some of the causes of homelessness as a decline in affordable housing, a decrease in federally subsidized housing, and "[r]estrictions on eligibility for public assistance and the relative decline in grant levels in the past two decades").

¹² See Ann Cammett, *Deadbeat Dads and Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C.J.L. & Soc. JUST. 233 (2014) (noting that child support enforcement tools include "withholding, suspension, or restriction of drivers', professional, and occupational licenses for individuals who owe child support,' garnishing up to sixty-five percent of salaries, and requiring that overdue child support be reported to the national credit bureaus" and stating that these measures actually result in parents being less able to provide and children not receiving the support sought).

¹³ See generally Hafetz, *supra* note 11.

¹⁴ *Id.* at 1230 (stating that mental illness is an important factor in causing homelessness, but that it must be viewed "in the context of changes in mental health policy. Proportionally no more Americans suffer from mental illness now than a generation ago; yet mentally ill people make up an increasing proportion of the homeless population. Many mentally ill people become homeless after their discharge from health care institutions to the street or shelters. The McKinney-Vento Homeless Assistance Act ("McKinney Act") places considerable emphasis on mental illness through funding for supportive housing and homeless outreach programs").

¹⁵ *Id.* at 1259 (stating that the "increase in homelessness among elderly persons is primarily due to the declining availability of affordable housing and growing poverty among certain segments of this age group").

to many factors, including the inability to find a suitable home.¹⁶ Poverty creates legal problems that middle class and wealthy individuals will not have. Failure to take preventative measures puts poor people, who have no or too little access to assistance or resources, on a collision course that leads them right to administrative hearings and courts. The justice system traditionally tries to resolve their legal issues without attention to the underlying social services needs. Some state court systems have moved toward handling the civil legal issues and the social service needs of impoverished persons using inter-disciplinary approaches.¹⁷ However, these efforts are not widespread.¹⁸

In New York in 2013, there were an estimated 1.8 million litigants without lawyers primarily in housing, family, divorce, consumer, small estates, and foreclosure cases.¹⁹ Legal Services providers increasingly turn away persons seeking civil legal services.²⁰ It is estimated that, in the United States, we meet only 20 percent of the need for civil legal services.²¹ This dismal statistic has earned the United States a low ranking as compared to other wealthy nations by The World Justice Project Rule of Law Index, which measures how the rule of law is experienced in everyday life around the globe.²² The United States ranked lower than other wealthy nations in access to justice in the civil area based on lack of legal assistance.²³ In 2012, the survey found, “Legal assistance is frequently expensive or unavailable, and the gap between rich and poor individuals in terms of both actual use of and satisfaction with the civil court system is significant. In addition, there is a perception that ethnic minorities and foreigners receive unequal treatment.”²⁴

¹⁶ See, e.g., In the Matter of Yates, 63 N.Y.2d 388 (1984) (addressing a petition to terminate the parental rights of parents of “limited resources and abilities,” who experienced “extended periods of unemployment, inability to pay rent, lack of transportation, telephone, heat and other amenities,” and failed to meet the requirements for return of their child from foster care, including obtaining a “suitable home”). See also Matter of Shina R., N.Y.L.J., April 27, 2015, p. 17, col. 3 (Fam. Ct., Bronx Co., April 10, 2010).

¹⁷ SEEDCO, HOUSING HELP PROGRAM: HOMELESS PREVENTION PILOT FINAL REPORT (2010), available at http://www.nyc.gov/html/dhs/downloads/pdf/final_HHP_Seedco_rpt.pdf; *New York State Access to Justice Program, Litigants with Diverse Needs: The Assigned Counsel Project*, NYCOURTS.GOV, <http://www.nycourts.gov/ip/nya2j/diverseneeds/assignedcounsel.shtml>.

¹⁸ In the criminal area problem-solving courts are more prevalent. See, e.g., BUREAU OF JUSTICE ASSISTANCE, PROBLEM-SOLVING JUSTICE IN THE UNITED STATES: COMMON PRINCIPLES, available at http://www.courtinnovation.org/sites/default/files/Problem_Solving_Justice_in_the_US%5B1%5D.pdf; *Problem-Solving Courts: A Resource Guide*, NATIONAL CENTER FOR STATE COURTS <http://www.ncsc.org/Topics/Problem-Solving-Courts/Problem-Solving-Courts/Resource-Guide.aspx>.

¹⁹ THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2014), available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS%20TaskForce%20Report%202014.pdf>.

²⁰ See LEGAL SERVICES CORPORATION, LEGAL SERVICES CORPORATION REPORT OF THE PRO BONO TASK FORCE 1-2 (2012) (providing that “at least 50% of people seeking help from LSC-funded organizations—and eligible to receive it—are turned away because of insufficient resources”), available at http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf.

²¹ *Id.* at 2 (stating that “studies have found that 80% of the civil legal needs of low-income people go unmet”).

²² WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2015 30, available at http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf; Roderic B. Mathews & Juan Carlos Botero, *Access to Justice in the United States: Findings from the Newly Released Rule of Law Index of the World Justice Project*, 59 VA. LAW. 24 (2010), available at http://worldjusticeproject.org/sites/default/files/486481access_to_justice_in_the_united_states_virginia_lawyer_12-10.pdf.

²³ Lisa Mahapatra, *United States Justice System Falls Behind That of Other High-Income Nations*, THE INTERNATIONAL BUSINESS TIMES (Mar. 7, 2014), <http://www.ibtimes.com/united-states-justice-system-falls-behind-other-high-income-nations-charts-1560167>.

²⁴ Don Froomkin, *Rule of Law Index: U.S. Ranks Low in Access to Justice Compared to Other Wealthy Nations*, THE HUFFINGTON POST (Nov. 28, 2012, 8:56 AM), http://www.huffingtonpost.com/2012/11/28/rule-of-law-index-2012_n_2200765.html.

Individuals who represent themselves are at a disadvantage when their adversaries are represented by counsel.²⁵ The right to counsel in criminal cases is well established.²⁶ However, in civil cases, we have yet to reckon with moving toward the right to counsel.²⁷ In fact, instead of progressing toward more civil legal services nationally, the Legal Services Corporation, the largest funder of civil legal services providers in the nation, received fewer funds over the last few years from the United States Congress.²⁸ Low income people fare particularly poorly in a skewed civil justice system.

The majority of persons living in poverty will have to navigate the Justice system without legal assistance. The legal system was designed to be navigated by lawyers. Substantive and procedural rule of law is an unfamiliar and difficult arena for any untrained individual, but particularly difficult for many persons who are impoverished. Our system is grounded in legal terms and sophisticated concepts. Written documents memorialize agreements and judicial decisions and orders. These documents are written at high levels of literacy. While efforts are being made in many jurisdictions to put court forms in plain language, court systems have a long way to go to make forms and procedures understandable for a critical mass of unrepresented litigants. Only 13 percent of the adult population in the United States reads at the level of literacy needed to read and understand complex concepts.²⁹ Some college students would have difficulty with most legal documents. Fifty percent of adults read at an eighth grade reading level and read so poorly they cannot perform simple tasks. Forty-five million people in the United States are functionally illiterate and read below fifth grade levels.³⁰ Of individuals reading at the lowest proficiency level, 43 percent live in poverty.³¹ Twenty-five million individuals have limited English proficiency, which would prevent them from using the courts without an interpreter. Many individuals who have limited English proficiency are compelled to use the courts.³² Courts across the nation are failing in their legal obligation to provide free interpreter services.³³ Many of these individuals had little exposure to literacy in the countries they come from.³⁴ Impoverished persons are the most challenged litigants because of their inability to read and comprehend information.

²⁵ ANDREW SCHERER, THE IMPORTANCE OF COLLABORATING TO SECURE A CIVIL RIGHT TO COUNSEL (2005), available at <https://www.nycourts.gov/ip/partnersinjustice/Right-to-Counsel-Collaboration.pdf>.

²⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁷ *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

²⁸ LEGAL SERVICES CORPORATION, ANNUAL LSC APPROPRIATIONS 1976-2013 IN CONSTANT 2013 DOLLARS, <http://www.lsc.gov/congress/funding/funding-history>; NATIONAL CENTER FOR STATE COURTS, LEGAL SERVICES CORPORATION, <http://www.ncsc.org/Services-and-Experts/Government-Relations/Access-to-Justice/Legal-Services-Corporation.aspx>.

²⁹ See NATIONAL CENTER FOR EDUCATIONAL STATISTICS, NATIONAL ASSESSMENT OF ADULT LITERACY, https://nces.ed.gov/naal/kf_demographics.asp#2 (providing that 13 percent of the American adult population “possess the skills necessary to perform complex and challenging literacy activities”).

³⁰ *Staggering Illiteracy Statistics*, LITERACY PROJECT FOUNDATION, <http://literacyprojectfoundation.org/community/statistics/> (last visited June 9, 2015).

³¹ *Literacy Statistics*, BEGIN TO READ, <http://www.begintoread.com/research/literacystatistics.html> (last visited June 9, 2015).

³² LAURA ABEL, BRENNAN CTR. FOR JUSTICE, LANGUAGE ACCESS IN STATE COURTS (2009), available at <http://www.brennancenter.org/sites/default/files/legacy/Justice/LanguageAccessinStateCourts.pdf>.

³³ Of 35 state court systems surveyed, “1. 46% fail[ed] to require that interpreters be provided in all civil cases, 2. 80% fail[ed] to guarantee that the courts will pay for the interpreters they provide, with the result that many people who need interpreters do not in fact receive them; and 3. 37% fail[ed] to require the use of credentialed interpreters, even when such interpreters are available.” *Id.* at 1.

³⁴ VICKY ZYGOURIS-COE, LITERACY FOR LIMITED ENGLISH PROFICIENCY (LEP) STUDENTS (2001), available at <https://education.ucf.edu/mirc/Research/Limited%20English%20Proficiency.pdf>.

Addressing the problems of poverty and justice requires that we not view persons who live in poverty as all the same. At least one defining important difference between people who live in poverty is whether a person is impoverished due to a fairly recent event such as divorce, illness or loss of employment (situational) or a person's situation is a product of generational poverty. Generational poverty generally is defined as having lived in at least two generations of poverty.³⁵ Individuals in situational poverty will generally have a better ability to communicate and slightly better access to resources.³⁶ Persons in generational poverty will have different issues and problems that the justice system must embrace and address.

Each class has its own non-transparent rules. Generational poverty rules value the present and are based on feelings or survival; the view of the future is fatalistic, money is meant to be spent, language is about survival, and communication is based on a casual register.³⁷ A casual register is "language between friends and is characterized by a 400- to 800-word vocabulary. Word choice [is] general and not specific. Conversation [is] dependent upon non-verbal assists. Sentence syntax often [is] incomplete."³⁸ The discourse pattern in casual register involves the speaker going around the issue until finally getting to the point.³⁹ The story structure starts with the end or the most emotional part of the story first.⁴⁰ Middle class rules value the future and planning for the future, belief is in the ability to change the future, money is to be managed, language is about negotiation, and communication is based on a formal register.⁴¹ Persons who are experiencing situational poverty will most often also use the formal register.⁴² Formal register communication is "[t]he standard sentence syntax and word choice of work and school[,] [and] [h]as complete sentences and specific word choice."⁴³ In formal register the speaker gets straight to the point, and the story telling starts at the beginning and proceeds chronologically to the end.⁴⁴

Experts point out other distinctions with communicating or culture with individuals who live with generational poverty. Generational poverty involves oral culture while other classes rely on print culture. Oral culture characteristics involve spontaneity, which is exhibited by jumping from subject to subject, being emotional, needing to repeat things over and over in storytelling and as a way to maintain knowledge, being attuned to the present and unable to plan for the future, and being focused on the big picture and unable to focus on a single idea. In oral culture, individuals are highly connected to their senses, their environment, and the people immediately around them.⁴⁵ The majority population relies on print culture. Characteristics of print culture that are distinct from oral culture are: ability to process and analyze by breaking things down according to parts; reasoning developed by reading; ability to filter out big picture ideas to focus on a single idea; and ability to think in a linear, first this, then that fashion. Print culture involves the ability to delay gratification, prioritize time in daily activities, and plan for the future by setting goals.⁴⁶

³⁵ PAYNE, *supra* note 9, at 49 (rev. ed. 2009).

³⁶ *Id.*

³⁷ *Id.* at 44-45.

³⁸ *Id.* at 31.

³⁹ *Id.* at 32.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 31.

⁴⁴ *Id.* at 32, 34-35.

⁴⁵ COMMUNICATION ACROSS BARRIERS, COMMUNICATION STYLES (2007), <http://www.combarriers.com/CommunicationStyles>.

⁴⁶ *Id.*

Generational poverty behavior often involves the inability to follow directions and extreme disorganization.⁴⁷ In addition, arguing loudly and the use of inappropriate language are frequent. Distrust of authority, feeling that the system is unfair, and reliance on a casual register of communicating all contribute to behavioral issues.⁴⁸ The type of voice an authority figure uses in speaking to an individual may be received as offensive and lead to a shut down.⁴⁹ One judge, who handled eviction cases regularly, quizzed poor tenants whether they had cable television in their households. The quizzing was selective, judgmental, and demanding. Litigants regularly were offended. Judicial and non-judicial figures should address all litigants in a non-judgmental and non-negative “adult voice” and not a “parental voice,” which is authoritative, directive, judgmental, evaluative, demanding, and sometimes punitive and threatening. Communication style is particularly significant when dealing with a poor person.

The challenge to the justice system in dealing with the implications of generational poverty is how to make a system that is based on print culture and formal register language responsive to individuals who are faced with dealing with life-altering legal issues in an environment that is confusing. These litigants will have trouble preparing for their cases due to disorganization and may have trouble producing paperwork necessary to prove their cases. Litigants whose poverty is generational will have difficulty conveying their stories in the linear fashion that judges and lawyers are accustomed to hearing. They more than likely will be repetitive in making their points, without a final point, exhausting judges and the time available to resolve busy calendars. Just as important, they may not comprehend or be able to read written orders, decisions or agreements. Oral orders, decisions, and agreements, unless plainly stated and repeated, may also not be comprehended. Directions or follow-up steps may not be followed. Judges in particular and non-judicial personnel speak often in a “parent voice,” leading litigants to shut down or becoming resistant to authority.

Other practical life barriers can prevent impoverished persons from obtaining justice. Some individuals will not be able to get to the courthouse due to lack of transportation. Either money for public transportation or long distances inaccessible by public transportation can be a barrier, particularly for the rural poor. Lack of daycare or inability to take off from work can result in missed court dates. Poor litigants may not have appropriate clothing for court. Some individuals may not have the money to buy appropriate clothes. Other individuals who live in poverty simply may not know what is appropriate. Middle class individuals dress to be accepted into the norm of middle class society. In poverty, individuals see clothing as an expression of personality and individual style, not as a way to comply with the norm.⁵⁰ Sexually explicit clothing is often observed in courtrooms where low-income individuals have cases. T-shirts with inappropriate language and hats may also be seen. Intolerant judges have been known to post rules based on middle class norms prohibiting entry into courtrooms of individuals deemed to be dressed inappropriately. Individuals who are sent home can be defaulted or can fail to return for their next court dates.

The challenges to ensuring that individuals who live in poverty receive equal justice are numerous and complex. Solutions depend on adequate financial resources and require working with non-

⁴⁷ PAYNE, *supra* note 9, at 110 (rev. ed. 2009).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 44-45.

legal professionals to treat the legal and social services issues of impoverished communities holistically. The most significant challenge is to change a justice system that is rooted in tradition, but requires change to meet the needs of the public. The final section of this essay makes suggestions on how to meet some of the challenges.

Meeting the Challenges

As long as millions of individuals appear in court with low literacy skills and limited English proficiency, and without attorneys, an adversarial system is unjust. An adversarial system by definition presupposes that both parties have advocates who are able to present their cases to a person who will primarily remain neutral and passive.⁵¹ The system is built more on winning than the search for the truth.⁵² An unrepresented individual who doesn't understand procedure or substantive law has little chance of winning or airing the truth, particularly if the judge is passive.

There is little chance that our system will evolve completely to another type of justice system, but some changes can assure more justice in the present system. Liberal interpretation of pleadings would allow individuals to have their issues heard. Open and mandatory discovery would provide more information for fact finders to discern the truth. Relaxed procedures and rules of evidence would ease the process for unrepresented litigants.⁵³ A neutral but engaged judge in place of a passive one could insure more justice.⁵⁴ The judge should explain how the settlement conference, hearing or trial would proceed, tell both sides what is needed to establish their claims, and ask questions.⁵⁵

Simplification of the system will benefit low-income individuals by making the system more understandable. It would also make litigation less expensive.⁵⁶ Procedures must be simplified and streamlined. Forms must be offered for use by the public both in print and online. These forms and applications must be written in plain language and on a fifth grade reading level to reach most litigants. Forms should be translated into languages prevalent in the community. Online interactive programs can provide guidance in filling out forms and can have an oral component which can be translated into different languages.⁵⁷ Courts should offer more audio opportunities for low literacy litigants to hear information and receive directions. Court decisions and orders should be written in plain language and, if feasible, be delivered orally as well. Lawyers must be trained in law school to write in plain language and be prepared to deal ethically and effectively with culturally diverse, low literate, unrepresented adversaries. Legislatures should strive to pass plain language laws.⁵⁸

⁵¹ Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714-740 (1983).

⁵² *Id.*

⁵³ CYNTHIA GRAY, *REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS* (2005), available at <http://www.courts.ca.gov/partners/documents/ReachingOutOverreaching.pdf>.

⁵⁴ NATIONAL CENTER FOR STATE COURTS, *MODULE A: JUDGES, ETHICS, AND THE SELF-REPRESENTED LITIGANTS-THE LAW TODAY* (2013), available at <http://www.ncsc.org/-/media/Microsites/Files/access/Module%20A%20Guide%20Draft%208-13.ashx>.

⁵⁵ *Id.*

⁵⁶ Richard Zorsa, *Some Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845 (2013); NATIONAL CENTER FOR STATE COURTS, *RULES AND PROCESS SIMPLIFICATION*, <http://www.ncsc.org/microsites/access-to-justice/home/Topics/Rule-and-Process-Simplification.aspx>.

⁵⁷ See NEW YORK STATE COURTS, *DIY FORMS*, <https://www.nycourts.gov/courthelp/diy/index.shtml>.

⁵⁸ Plain Writing Act of 2010, 5 U.S.C. § 8301 (2010).

Community courts in locations where residents of poor communities have difficulties traveling to traditional courts would provide better access to justice. Mobile courts,⁵⁹ video appearances,⁶⁰ more online interactive programs,⁶¹ and electronic filing would also make it easier for poor people to commence their cases, file answers, and make their court dates. While impoverished individuals may not have Internet or home computers, 43 percent had smartphones in 2013.⁶² Access to computers could be obtained in public libraries, places of worship, and other accessible facilities. The use of technology, particularly with smartphones, can bring more justice to the poor.

Integrating social service professional services into systems for resolving legal problems is essential for impoverished communities. Preventative measures would help to keep legal issues from ripening. Social service professionals could be armed with diagnostic tools and legal information to assist in issue spotting and obtaining resources to head off encounters with the legal system. Courthouses should open their doors and house relevant social service agencies. In New York City, courts host social workers and other workers who provide services in the courthouses to those receiving or needing public assistance, the mentally ill, domestic violence victims, and the elderly. The problem-solving court concept must be expanded from the criminal side to the civil side.

Community outreach and engagement is required to address the distrust that impoverished individuals have for the legal system. Speaker bureaus, community law days, tours of courts by schools, and library programs could go a long way to building trust.⁶³

None of the solutions to the challenges faced by impoverished individuals in the justice system can succeed, however, without the opening of minds and hearts of the prime movers of the system: judges, lawyers, non-judicial employees, and the bodies that fund civil legal services and courts. Unless we destroy our current adversarial system completely, we must have funding for civil legal services for every poor person who needs full representation. Other forms of legal assistance must be provided when full representation is not required. Anything less will doom the United States to continued low rankings on access-to-justice surveys and continue to grow distrust of the legal system in poor communities. Courts require adequate funding to meet the needs of the public, especially impoverished communities. Most importantly, there must be an awakening by judges and non-judicial personnel to the new reality of the legal system. The new reality is that millions of unrepresented, culturally diverse, and low-literacy individuals will continue to flood the courts. A great many of these litigants will be poor. They often do not receive justice. Funding is not required to start the change. Leadership is, however, necessary to insure that courts understand that the needs of poor people they serve are vast and different. To accomplish this

⁵⁹ Nicholas Spangler, *Courthouse on Wheels Makes Rounds in Miami-Dade County*, THE LEDGER (April 21, 2003, 7:21 AM), <http://www.theledger.com/article/20030421/NEWS/304210365>.

⁶⁰ *Video Technologies Resource Guide*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/Topics/Technology/Video-Technologies/Resource-Guide.aspx>.

⁶¹ A2J Author® is an example of an online software program geared toward improving access to justice for self-represented litigants. See *A2J Author®*, IIT CHICAGO-KENT COLLEGE OF LAW, IL INST. OF TECH., <https://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author>. The New York State Unified Court System uses A2J Author® to produce DIY forms.

⁶² Aaron Smith, *Smartphone Ownership 2013*, PEW RESEARCH CENTER (2003), <http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/>.

⁶³ *Courts and Community Center*, NEWYORKCOURTS.GOV, http://www.nycourts.gov/ip/nya2j/Courts_Community_Center/index.shtml.

goal, communication experts, poverty experts, and poverty simulations should be used to educate those who manage the legal system and start the awakening.⁶⁴

Mahatma Gandhi reportedly said, “Be the change that you wish to see in the world.” Change is needed now for impoverished people. We must each search our hearts and minds to determine what we have within our power to do. •

⁶⁴ New York State has made all three efforts. See also *Community Action Poverty Simulation*, MISSOURI ASS'N FOR COMMUNITY ACTION, <http://www.communityaction.org/poverty%20simulation.aspx> (the poverty simulation program New York used to educate judges and non-judicial personnel).

Income Inequality Hits Home

Steven W. Bender¹

Much has been written about the subprime mortgage crisis of recent years, with considerable attention paid to allocating blame among participants in the home loan and securitization structure stretching from Main Street to Wall Street. Many politicians and pundits have pointed fingers at residential borrowers, particularly blaming borrowers of color, for alleged improvident behavior. Their accusations connect to longstanding stereotypes and derogatory constructions of people of color as unworthy for other financial opportunities such as college admission.²

This essay isolates a less discussed catalyst for the breakdown of the American dream of homeownership in the subprime morass—income inequality. Reaching employers and residents in almost every zip code and shaking the foundations of the American dream, income inequality threatens that iconic goal. Highlighting the role of income inequality in the mortgage meltdown adds fresh urgency to the imperative of reversing the runaway rise in inequality in recent decades, in the interest of preserving equality of opportunity toward the human right to decent housing and what has been regarded as a cornerstone of the American dream—that through hard work U.S. residents can achieve and maintain homeownership.³

Income inequality played a considerable role in the design and eventual implosion of vast numbers of loans during the subprime lending era of the 1990s and early 2000s. Mortgage loans during the subprime era encompassed an array of “exotic” loan programs and relaxed qualifying standards, in many cases offering these new programs to borrowers with subpar credit histories who previously might have been denied mortgage financing. These loans failed at staggering rates, ousting millions of borrowers from stable housing. Apparent in the aftermath of the subprime foreclosure crisis is the reality that many borrowers, particularly borrowers of color, who received high-cost mortgage loans with significant fees or an above-market interest rate, or both, in fact

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² See generally andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141 (2011) (debunking the myth of minority fault as causing the subprime mortgage crisis).

³ This American Dream of homeownership has been racially skewed through much of its history by public and private actors, bolstering the White privilege of homeownership. Among the most destructive racial housing policies and practices were those of the federal Home Owners Loan Corporation and the Federal Housing Administration (FHA), the latter created in 1934 to spark development of residential neighborhoods through government mortgage insurance. The FHA disdained inner-city investment and rehabilitation, and encouraged White flight to the suburbs by promoting new construction in residential subdivisions. As its most blatant policy, the FHA once promoted racially restrictive neighborhood covenants barring nonwhite buyers thought to impair property values. High-risk lending neighborhoods were designated by federal officials as those with Black, Mexican, or Asian residents. Resultantly, most federally-backed loans were made to White buyers in middle-class suburbs. See generally STEVEN W. BENDER, *TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING* 45-47 (2010).

qualified for conventional market terms and thus overpaid for their mortgage loans.⁴ But it is also true that given superheated investor demand for residential mortgage-backed securities, many borrowers with bruised credit histories or inadequate income or down payments under conventional lending standards nonetheless were given home loans in exchange for higher fees and interest than prime rate borrowers paid.

Because home prices in most U.S. locations had risen considerably during the previous decades, the subprime lending model was infeasible under traditional mortgage lender underwriting standards. Higher interest rate loans meant higher monthly loan payments, thereby imperiling the traditional lender insistence on a debt-income ratio that capped home-related expenses, such as mortgage loan payments, property insurance and taxes, and condominium or homeowner association fees, at a reasonable amount in relation to anticipated income to ensure the borrower had adequate monthly income for her other living expenses. Higher loan fees meant either borrowers needed a larger savings account to pay the costs at closing, or that the fees, added to the loan balance and paid over the life of the loan, would increase the monthly payments and thus imperil debt ratio standards.

All would be well if borrower incomes and savings, inexorably connected, were rising sufficiently to keep mortgage loan payments in balance with what had been seen as a comfort zone for the borrower's home debt and total debt from other sources in relation to monthly income—typically between 30 and 40 percent.⁵ But at the same time that home prices and mortgage loan costs were rising, employee wages for the last few decades stagnated or even decreased.⁶ With wages stagnating at a time of rising consumer prices not just in the housing market but across the marketplace to encompass gasoline, utilities, and food prices, savings accounts also suffered.

Inadequate income and savings lurk behind much of the subprime loan experience. As an example of this dynamic, a 2007 Oregon appeals court decision awarded compensatory and punitive damages to borrowers duped by a subprime lender into an unfair refinance of their home loan.⁷ The borrowers, both Mexican immigrants, had emigrated from Mexico in the late 1980s and

⁴ For discussion and statistics on the disproportionate subprime borrowing of Latino/Latina and Black residents, see Vicki Been et al., *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 *FORDHAM URB. L.J.* 361, 362, 364 (2008) (discussing how U.S. Blacks were almost three times more likely to receive a subprime home purchase loan than Whites, and Latinos/Latinas 2.6 times more likely; also addressing that high-cost loans were much more often issued to borrowers of color in New York City than White borrowers); andré douglas pond cummings, *Families of Color in Crisis: Bearing the Weight of the Financial Market Meltdown*, 55 *HOW. L.J.* 303, 310-12 (2012); RAUL HINOJOSA OJEDA, ALBERT JACQUEZ & PAULE CRUZ TAKASH, *THE END OF THE AMERICAN DREAM FOR BLACKS AND LATINOS* (2009).

⁵ See generally Jason Hahn, *Debt to Income Ratios, Diving Deeper* (June 17, 2010), <http://realestate.aol.com/blog/2010/06/17/home-affordability/> (suggesting some lenders may allow even greater total-debt ratios). These numbers varied widely over time and by lender and loan program, and by the borrower's credit score and income level. Traditionally, most lenders also deploy a front-end ratio in which the total housing expenses (exclusive of other debt such as credit card balances, student loans, and car loans) do not exceed a smaller percentage of income, typically around 28 to 30 percent. *Id.* For purposes of the new ability to repay standard adopted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, the mortgage lender generally must not allow the back-end, total debt, ratio to exceed 43 percent in order for the loan to be a qualified mortgage that presumptively satisfies the new ability to repay standard.

⁶ See DAVID CAY JOHNSTON, *DIVIDED: THE PERILS OF OUR GROWING INEQUALITY* x-xiii (David Cay Johnston ed., 2014) (detailing the stagnation or shrinkage of income for most U.S. residents in recent years); Dave Johnson, *9 Photos That Reveal America's Obscene Division of Wealth*, *ALTERNET* (Jan. 6, 2015), <http://www.alternet.org/economy/9-photos-reveal-america-obsene-division-wealth> (discussing how between 1979 and 2008 real incomes rose 73 percent for U.S. families in the top 5 percent of income, whereas they decreased 4.1 percent for families in the lowest income fifth, and the rest of U.S. families saw stagnant or very little increase in real income).

⁷ *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940 (Or. Ct. App. 2007).

worked in the same Portland factory for more than a decade, making wages at or barely above minimum wage despite their long tenure at the factory.⁸ Although they were frugal enough, albeit with help from friends and family, to purchase a modest home financed by a prime rate home loan, their meager income left them unable to save for necessities such as home maintenance.⁹ Resultantly, they borrowed money from Beneficial Oregon to finance the purchase of a vacuum cleaner, which prompted Beneficial to send them solicitations for its home loans.¹⁰ When the borrowers needed a new roof, they sought additional financing from Beneficial, which combined the roof loan with the vacuum cleaner loan and their other debts into a second priority (junior) home loan of \$17,948, carrying a 23 percent interest rate despite the borrowers' good credit history.¹¹ Still, the lender wasn't done. Next, the lender defrauded them (by means of their limited English) into a replacement loan for all their debt, specifically the prime rate first priority home loan.¹² Despite the lender's representations of overall savings, the replacement loan was a worse bargain than what they were paying before.¹³ At the time of the fraud trial in 2004, both Mexican immigrant borrowers earned only about \$7.75 an hour,¹⁴ a touch above the \$7.05 state minimum wage at the time.¹⁵ No doubt, these low wages brought them into the clutches of a lender that practiced deceit. Had the borrowers been compensated in the workplace for their experience and loyalty, or been paid a living wage, perhaps they would have been able to afford a cash purchase of the vacuum cleaner and to have either paid for routine roof maintenance to extend the life of their roof, or amassed a savings account sufficient to afford its replacement without financing.

Something had to give for millions of similarly-situated borrowers in a climate of unaffordable homes and stagnant wage growth. Either mortgage loan costs and interest had to come down, wages (income) had to increase, or lenders needed to relax their approval standards and develop new loan structures to account for the affordability problem of high home loan payments constituting a higher than customary percentage of the borrower's income. Wages were stuck in neutral, and with the originating lender quickly selling the mortgage loan and its loan sales people earning hefty bonuses based on the fees charged, there was little incentive to reduce loan fees. So lenders chose the last alternative, and an array of subprime loan features and programs followed that, for the most, failed spectacularly. •

⁸ *Id.* at 943.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 944. (The loan documents were in English but the loan discussions were in Spanish. The replacement loan did not contain an escrow account for real estate taxes and insurance. Therefore, the overall monthly loan payment on the consolidation loan, which was facially cheaper than the total payments on the prior senior home loan (that included a tax and insurance escrow) and the junior home loan, disguised that the overall replacement loan was more expensive. The borrowers discovered they had been defrauded when their annual tax bill arrived and they realized the lender was not collecting escrow monies to pay the taxes as part of their regular monthly payment.)

¹⁴ *Id.* at 943.

¹⁵ U.S. Dep't of Labor, Wage & Hour Div., *Changes in Basic Minimum Wages in Non-Farm Employment Under State Law: Selected Years 1968 to 2013*, U.S. DEP'T OF LABOR (revised Dec. 2014), <http://www.dol.gov/whd/state/stateMinWageHis.htm>.

The Variety of Subprime Loan Approaches to Bridging the Affordability Gap¹⁶

Adjustable rate mortgages were one of the artifices used to qualify borrowers with high debt-to-income ratios. Adjustable rate mortgages arrived on the scene in the late 1970s and early 1980s, when double-digit prime lending rates imperiled the affordability of consumer credit. By offering a rate floating by reference to a market index, lenders could reduce the cost of the initial interest rate, as the rate no longer needed to account for the risk of inflation throughout the life of the loan.¹⁷ Thus, adjustable rate loans were invented with the aim of lowering the cost of mortgage financing, at least initially. Of course, from the borrower's perspective, if inflation and other factors such as reduced investor demand drove up rates during the life of the loan, the adjustable loan could end up more expensive than a fixed rate loan. Also, because there is not necessarily a correlation between upward adjustments in the market interest rate over time and the borrower's wages, it is dangerous to approve the borrower for a loan using the initial interest rate to calculate affordability, as later rate increases might outpace any wage increases. Adopting this model of qualifying borrowers for financing based on the initial adjustable interest rate, subprime lenders upped the dangerous ante by offering teaser/special introductory interest rates. Teaser rates (which might be in the low single digits) were effective at the outset of the loan for a defined period, often from one to three years, after which the loan would reset to a specified adjustable rate formula producing a rate considerably in excess of the teaser percentage, without regard to actual fluctuations of interest rates in the marketplace, in order to compensate the lender for the below-market introductory rate. By qualifying the borrower at an introductory interest rate of (say) 3 percent instead of a prevailing market fixed rate of interest of 6 percent, the mortgage lender could approve an adjustable rate applicant with considerably less income than a fixed market-rate loan applicant. But beware the date of the reset, as no doubt the borrower cannot expect a salary bonanza at her work coinciding with the reset that might more than double the previous monthly loan payment.

Other innovations stemmed from the desire to artificially lower the monthly loan payments. Rather than lowering the interest portion of the payment, monthly payments could be reduced by stretching out the loan amortization period or eliminating amortization of principal entirely by means of interest-only payments for the life of the loan. Traditionally, home mortgage loans (at least in the modern era after the creation of the Federal Home Administration) offered the borrower thirty years to pay off the loan, with each monthly payment including the accrued interest and a portion of the loan principal amount calculated so that after the same monthly payment amount over 360 months the loan balance would be fully repaid. Reducing the loan period to fifteen years for a fully amortized loan would significantly boost the monthly payment amount, yet lessen the lender's risks of default collectability and inflation, resulting in a lower interest rate. But instead of encouraging such a reduction of the loan repayment period, some subprime lenders stretched the loan term in the opposite direction beyond thirty years, offering forty-, forty-five-, and fifty-year repayment periods, with the goal of reducing the monthly payments despite the potential for a slightly higher interest rate to cover the additional risk of

¹⁶ For further discussion of subprime mortgages, see generally BENDER, *TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING*, *supra* note 3, at 45-56.

¹⁷ Still, the rate needed to account for the risk of default and the prospect of the lender failing to realize the full balance of the loan through its enforcement remedies (in theory this risk can be spread across a variety of loans to compensate the creditor for just those loans that fail, which traditionally has been a small percentage for residential lending outside of the subprime mortgage crisis and the Great Depression), as well as the lender's cost of borrowing the funds it in turn lent to the borrower, and a reasonable rate of return on the lender's investment in lending the funds.

the extended loan period and minimal principal repayment in early loan years. Moreover, some lenders introduced the interest-only home loan, whose loan payments encompassed only accrued interest and no repayment of principal during the life of the loan, resulting in a balloon payment at loan maturity of the entire original loan balance. Presumably the borrower would have to refinance the debt or sell her home to surmount that balloon payment obligation.

Best showcasing the affordability problems of subprime mortgage loans was the introduction of so-called pay-option or flex-payment mortgage loans. Mortgage lenders took the concept from credit card issuers who offered some card holders the discretion to occasionally skip a month's payment, or to pay a lesser amount, as determined by the borrower, than the regular monthly payment. In the mortgage loan context, mortgage brokers or loan officers might appease a worried borrower, having stretched her budget to make the loan payments and concerned about the lack of a rainy day fund for emergencies or of the stability of her income, by pointing to the flex feature that allows the strapped borrower periodically to skip a payment or reduce the full payment to a more desirable amount. To the extent the borrower's skipped or reduced payment does not fully satisfy the accrued interest since the prior monthly payment, that unpaid interest is added to the principal balance, potentially resulting (particularly for an otherwise interest-only payment loan) in a new principal balance that exceeds the original loan balance.

Even with these techniques to lower the borrower's monthly payment, oftentimes the high loan fees and interest rate bumped up against the traditional standards for a prudent debt-to-income ratio, particularly as wages remained stagnant and house prices rose dramatically as more money entered the mortgage market. Addressing this disconnect was the no-doc or stated-income loan, a mainstay of home mortgage financing in the subprime era. Rather than verifying income with the borrower's employer, or relying on a steady history of past self-employment income, lenders offered a loan program whereby the borrower might supply any salary or income figure (typically an amount necessary to comfortably satisfy the lender's debt-income ratio) and not face its verification by the lender with her employer or other income records, such as bank statements, paychecks, and tax returns. The derogatory moniker of liar loans, suggesting borrower fraud, was a misnomer in many instances, as oftentimes the borrower had no idea of the actual income amount filled in the loan application by the mortgage broker or loan officer. Even when approached more overtly, the conversation with the no-doc borrower addressing income might begin along the lines, as it did once for me with a mortgage broker, of "How much do you think you could earn next year if you had to do whatever it took to earn as much money as possible from any source?" Of course, as an alternative to the hijinks of stated income loans, lenders might maintain their rigor of income verification, but simply relax their income qualification standards, as many did. One mortgage broker suggested to me that for clients with high credit scores, a lender might be willing to allow a total debt-to-income ratio exceeding 50 percent.¹⁸

Even if the borrower earns enough income to meet required debt-to-income ratios, the applicant may run afoul of the lender's loan-to-value requirement. Customarily, home buyers were required to make a down payment of at least 20 percent of the purchase price. The Garn.-St. Germain Depository Institutions Act of 1982¹⁹ prohibited home lenders from refusing consent to subsequent home equity loans obtained by the borrower. It became commonplace

¹⁸ It makes sense to allow more leeway in the debt ratio for higher incomes, as some expenses, such as gasoline, utilities, and food, might be similar for differently situated income-earners, therefore allowing the higher earner more leftover income to devote to housing and other recurring credit expenses.

¹⁹ Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.

for homeowners to borrow additional monies on the value of their home as needed, even up to the full appraised value of the home, albeit at a higher interest rate to reflect the greater risk under a junior loan if foreclosure and collection proved necessary. During the subprime lending heyday, lenders dispensed with the formality of deferring borrowing on the home's equity value until after closing the purchase loan, and began making so-called 80-20 loans—a first mortgage loan for 80 percent of the home purchase price, and a simultaneous loan, ultimately securitized in a different loan pool, for the remaining 20 percent of the purchase price. The upshot is that a borrower, living paycheck to paycheck on wages that were insufficient to accumulate a nest egg for any down payment, was nonetheless able to surmount the loan-to-property value requirement without having saved any down payment whatsoever. But what about the closing costs of the loan (such as upfront points) and the home purchase (e.g., escrow agent fees), and the costs of moving into the new home and any utility deposits or transfer fees owing to a condo or homeowner's association? Lenders had that scenario covered, too, for the borrower with insufficient savings—an initial combination of home loans exceeding the purchase price, predicated on the assumption that property values would surely rise over time, which might even put cash back into the home buyer's pocket to use toward furniture or other move-in expenses.

In sum, mortgage lenders, at least temporarily, developed loan products to confront the disconnect between home affordability and U.S. wages stuck in neutral. But those loan programs were not sustainable. Waves of foreclosures swept across the country and prompted lenders to abandon many of these programs as imprudent and unlikely to appeal to ultimate purchasers in the securitization markets once they appreciated the strong likelihood of default. Federal legislation addressing the crisis (the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010²⁰ as interpreted by Consumer Financial Protection Bureau regulations²¹) now prohibits or discourages subprime lenders from using some of these devices once used to bridge the affordability gap. For example, the borrower ability to repay standard under the Act, satisfied by so-called qualified mortgages, generally means that home lenders will be verifying income and discontinuing interest-only loans, loans that result in balloon payments or negative amortization (such as flex loans that add skipped payments to the loan balance), and loan terms that exceed thirty years.²²

Looking Ahead

Now that the subprime artifices introduced by financial markets to overcome wage stagnation are disappearing due to diminished investor demand or new rules on ensuring loan affordability, it is time to confront the structural roots of the affordability problem that extend to income and wealth inequality, particularly for borrowers of color who were the lifeblood of the exploitative subprime mortgage market. Whether immigrants or native-born, Latinos/Latinas (and Black

²⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended at 12 U.S.C. § 5301 (2012)).

²¹ See *Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, U.S. CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/regulations/ability-to-repay-and-qualified-mortgage-standards-under-the-truth-in-lending-act-regulation-z/#rule> (last visited June 7, 2015).

²² CONSUMER FINANCIAL PROTECTION BUREAU, SHOPPING FOR A MORTGAGE? WHAT YOU CAN EXPECT UNDER THE FEDERAL RULES (2014), available at http://files.consumerfinance.gov/f/201401_cfpb_mortgages_consumer-summary-new-mortgage.pdf (addressing teaser introductory interest rates that often reset one to three years after the loan was made; the Dodd-Frank Act requires the lender to assess affordability based on the maximum interest rate the borrower would have to pay in the first five loan years).

residents) earn less than White workers, but even for White residents there is a growing divide between the working class and the wealthy. Structural reform benefitting these diverse residents comes slowly, if at all, and presents a daunting challenge to those desiring fair and equal housing opportunity. Elsewhere I have detailed a blueprint for achieving housing equity for the working class, particularly low-wage workers.²³ Encompassing educational initiatives, job creation, and living-wage reform, and accomplished through interracial and ethnic coalitions that forge antipoverty alliances among voters in lower economic classes, structural reform is vital to restore the luster and feasibility of the American dream of homeownership.²⁴ Failing that, more U.S. residents will occupy the serf class of tenants beholden to the dictates of wealthy landowners, with subprime lending in retrospect the closest grasp of many to the brass ring of homeownership that ultimately came up empty. •

²³ See BENDER, TIERRA Y LIBERTAD (suggesting reforms for Latina/os and other groups).

²⁴ Critiques of the value of homeownership include A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L. REV. 189 (2009); Dorothy Brown, *How Home Ownership Keeps Blacks Poorer Than Whites*, FORBES (Dec. 10, 2012), <http://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/> (confronting the lack of appreciation in values in segregated Black neighborhoods, in contrast to majority White neighborhoods and the benefits of the stock market, the province of Whites). An affordability crisis exists too for rents, such as revealed in a New York University Furman Center for Real Estate and Urban Policy 2012 report that concluded that, between 2007 and 2011, New York City's median household income decreased by 6.8 percent while its rents rose 8.6 percent. Meredith Bennett-Smith, *New York City, Income Inequality Capital of America, Now Facing Soaring Rent Prices: Report*, HUFFINGTON POST (July 31, 2013), http://www.huffingtonpost.com/2013/07/30/new-york-income-inequality-rent_n_3678746.html?utm_hp_ref=new-york.

Shoe Stories: Civil Rights and the Inequality of Place

Elise C. Boddie¹

A friend who is an educator told me recently of two young children who were fighting during school. The fight started after one child poked fun of the other's shoes, which were so torn that his feet were slipping through the cracks. As the fight was breaking up, the child explained through tears that he did not want to give up the shoes. His father had bought them for Christmas. And though it was just February and the shoes were no match for the winter cold, his father's gift was for him a source of family pride.

The school I refer to is located in Newark, New Jersey. Like many post-industrial cities, Newark is predominantly Black and Brown and has a high population of low-income people.² Though we might use the term "poor" to describe them, it would be a mistake of course to assume that folks lack for either pride or resiliency, as the "shoe story" indicates. Yet in listening to it, I could not help but focus on how deeply poverty intertwines with place. A kid in the suburbs might find himself in the same predicament, but in that particular Newark school of approximately 700 kids, there are hundreds of shoe stories. The scale of inequality is different in both kind and degree.

Newark is a complex city and, like most places, it cannot be reduced to a single narrative. But it is beset by problems of concentrated poverty that would trap even the most talented and determined among us. We commonly refer to the problems of race and class as if they are distinct, but in the United States they tend to be inextricable.³ Of course, this is no accident. Rather, their tangled relationship is the tragic result of decades of federal, state, and local policies—replicated and reinforced by private actors over time—that intentionally segregated and isolated Blacks in particular, as well as other "undesirable" groups, from Whites.⁴ Years later, the effects of these government policies persist, stubbornly entrenched throughout our cities and neighborhoods.

Most of us have no idea how implicated all levels of government are in our racialized landscapes.⁵ Instead, we presume that these distressed places are the cumulative result of individual choices and, therefore, that affected communities should bear the consequences alone.⁶ Worse, because our communities are so rigidly separate, the human toll is almost entirely invisible to the wealthier and better-resourced people on the other side of the jurisdictional walls we have created. Our equilibrium is inequality. As the shoe story subtly reveals, the impact is both pernicious and intergenerational, generating trauma and pain on matters both large and small.

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² See ROBERT CURVIN, *INSIDE NEWARK: DECLINE, REBELLION, AND THE SEARCH FOR TRANSFORMATION* 9 (2014) (noting that "over half of the [Newark] population is black," with a Latino population of 33.8 percent, and that 28 percent of the city's population "lives below the poverty line").

³ DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* 11 (2014).

⁴ See CURVIN, *supra* note 2, at 16-21; THOMAS SUGRUE, *THE ORIGINS OF THE URBAN CRISIS* (1996) ("Urban inequality is the result of the mapping of understanding of racial differences onto the geography of a city—and the power of racial difference to create racial hierarchies that shaped housing patterns, workplace practices, private investment, and the public policies that reinforced them."); see also generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987).

⁵ CURVIN, *supra* note 2, at 19.

⁶ *Id.*

As a nation, we have achieved notable progress in expanding individual civil rights. However, as the challenges of Newark and other cities demonstrate, these gains have been undermined by the racial and class divides across our metropolitan areas.⁷ The sad and troubling fact is that our fortunes in life are often geographically determined.⁸ The quality of our public schools and housing, our access to jobs, our level of income and wealth, and our social networks all depend to a significant (and underappreciated) degree on where we live.⁹ Thus, our prized individual civil rights have been disabled by the seemingly bottomless inequities of place. The American dream of upward economic mobility through persistence and hard work has been thoroughly sabotaged.¹⁰

It is easy to be fatalistic, as the systems that created these racial and economic injustices have been designed to reproduce them.¹¹ For example, our racially segregated and underfunded schools are tied directly to residence laws that require students to attend school in the poor, segregated neighborhoods where they live. Profound wealth gaps among Black, Brown, and White communities discourage racial and class integration, entrenching both the racialized privileges of wealth and the disadvantages of poverty. Persistent isolation compounds the social and economic devastation in neighborhoods that are starkly poor, spawning policies that further degrade local public schools, housing, and the environment. Hostile policing practices fuel a corrosive criminal justice system that destroys community infrastructure. As we have seen recently in cities like Ferguson, Baltimore, and Detroit, the accumulated effects are devastating and span generations, from cradle to grave.

What then can we do? We should begin by conceptualizing a legal and statutory framework designed both to promote place-based opportunity and to disrupt the systems that reproduce racialized, concentrated poverty. Such a project requires confronting head-on certain articles of faith about local control and disabling the systems that allow (mostly White) communities to hoard wealth and opportunity. For example, we have good reason to believe that we will never conquer public school segregation—and its associated social and economic harms—unless we change residence laws that require students to attend school where they live. But this kind of shift would mean that Black and Brown students would be able to attend schools outside their district—which is often a third rail for education policy.

Litigation can be useful for sparking change, though there are limits to its effectiveness. Race-targeted remedies that might be secured through litigation are severely constrained by federal constitutional doctrine.¹² Moreover, federal statutes that further racial equity are under sustained attack.¹³ At the time of this writing, the future of the most powerful tool available under the

⁷ See generally DAVID D. TROUTT, *THE PRICE OF PARADISE: THE COSTS OF INEQUALITY AND A VISION FOR A MORE EQUITABLE AMERICA* (2014); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* (2013).

⁸ See generally RAJ CHETTY ET AL., *WHERE IS THE LAND OF OPPORTUNITY? THE GEOGRAPHY OF INTERGENERATIONAL MOBILITY IN THE UNITED STATES* (2014) (describing the geographic disparities that undermine individual mobility), available at http://www.equality-of-opportunity.org/images/mobility_geo.pdf.

⁹ See generally *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* (Xavier de Souza Briggs ed., 2005).

¹⁰ See CHETTY ET AL., *supra* note 8.

¹¹ See ROITHMAYR, *supra* note 3.

¹² See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (limiting use of race-specific voluntary student assignment policies in public schools); *Milliken v. Bradley*, 418 U.S. 717 (1974) (limiting availability of interdistrict school desegregation remedies).

¹³ See, e.g., *Ricci v. Destefano*, 557 U.S. 557 (2009) (creating barriers to the implementation of policies designed to avoid disparate impact challenges under Title VII).

federal Fair Housing Act—disparate impact—is uncertain.¹⁴ Some highly notable examples of state litigation can be cause for optimism, but the remedies are often decades in the making due to lack of political support.¹⁵

Community organizing may be more fruitful for achieving fundamental change over the long term. Law can shape social and cultural expectations that, over time, shift social norms.¹⁶ But such outcomes also depend on mobilizing support at the grassroots level and building social movements that can leverage the power of legal discourse.¹⁷ Place advocates, in other words, need a ground game. Movement-building and a sophisticated communications operation are especially important for conveying the significance of place. Explaining why place-based equality matters and how it connects to an individual's lifelong opportunities—the shoe stories—takes some unpacking. Therefore, we require a language that is user-friendly.

Community organizing is critical for another reason. A key political barrier to neighborhood equality is that it depends on the approval (or acquiescence) of the very people who *want* (and benefit from) segregated neighborhoods. Law tends to facilitate segregation by enabling higher-income communities to exclude outsiders,¹⁸ effectively forcing poor people of color to live in places of concentrated poverty and deprivation. Governments that serve these communities rarely have the fiscal wherewithal to fund policies and programs that can meaningfully improve the lives of local residents. Nor do they have the legal leverage to force their wealthier neighbors—who have helped to create the problem—to share the burden.

Without law to intervene in the political processes that reinforce these racialized boundaries, we default to segregation. The problem is so longstanding that we have come to regard our separateness as natural. It appears that the only way to upset this equilibrium is through organized social action—carried out by affected communities and people of good will—that pressures state and local legislatures to dismantle the systems that created, and perpetuate, this mess.

All this suggests that redressing place-based inequality may be decades beyond us. But the problems demand our dedicated attention now. Our divided neighborhoods continue to divide us as a people and as a nation. They sap our talent and deplete the human spirit. We should treat the “right” to place—the right not to have geography determine one's destiny—as the new “civil right.” And we should commit ourselves to this project so that future generations can fully realize the promise of meaningful racial equality. •

¹⁴ See Emily Badger, *The Supreme Court May Soon Disarm the Single Best Weapon for Desegregating U.S. Housing*, WASH. POST (Jan. 21, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/21/the-supreme-court-may-soon-disarm-the-single-best-weapon-for-desegregating-u-s-housing/> (discussing most recent challenge to disparate impact standard under the federal Fair Housing Act).

¹⁵ See, e.g., Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (declaring *de facto* racial segregation in public schools unconstitutional under state constitution); Southern Burlington Cty. NAACP v. Twp. of Mt. Laurel, 336 A.2d 713 (N.J. 1975).

¹⁶ See, e.g., MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 48-91 (1994) (describing role of “legal rights discourse” as a catalyst for social change in the context of a movement for pay equity).

¹⁷ *Id.*

¹⁸ See *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997).

The Price of Equal Justice: How Establishing a Right to Counsel for People Who Face Losing Their Homes Helps Tackle Economic Inequality

Andrew Scherer¹

New York City is at the epicenter of the astoundingly large and growing divide between rich and poor in the United States. This wealth gap is a source of major concern, and the current city administration has, with good reason, made tackling economic inequality one of its primary policy objectives. One particularly troublesome result of disparity in wealth is disparity in access to justice. The equation is simple: no money, no counsel;² no counsel, no access to justice. This essay argues that the City is well-positioned to guarantee a right to counsel for low-income households that face losing their homes in legal proceedings and that, among other compelling reasons to do so, establishing the right to counsel will significantly further the administration's goal of tackling economic inequality.

The New York City Council and the administration of Mayor Bill de Blasio are considering adopting legislation that would make New York City the first jurisdiction in the United States to guarantee a right to counsel for low-income people who cannot afford legal help and who face loss of their homes in eviction and foreclosure proceedings.³ For many reasons, it would be sound social and fiscal policy for the City to establish this right. The right to counsel would protect affordable housing and stabilize low-income families and communities. The right to counsel would stem the tide and rising costs of homelessness. And the right to counsel would vindicate the important constitutional rights of due process and equal protection. These and other arguments have been addressed at length elsewhere.⁴ However, the literature on the right to counsel has not yet addressed the relationship of the right to counsel to income inequality and wealth-based access to justice.

Establishing the right to counsel in eviction and foreclosure cases will help ameliorate economic inequality, both concretely and symbolically. It will greatly enhance people's ability to avoid

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² Or, at best, people without money have severely limited access to counsel through free legal assistance programs.

³ See Intro. 214 (City of New York 2014), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=ID>. The Right to Counsel NYC Coalition, a citywide coalition of housing and other advocacy groups, academic institutions, legal services providers and others, was formed in 2014 to advocate for a right to counsel for households facing eviction in NYC and has been actively supporting the legislation.

⁴ See, e.g., *Panel Discussion: International, National, and Local Perspectives on Civil Right to Counsel, An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 *Touro L. Rev.* 81 (2009); Raymond Brescia, *Sheltering Counsel: Toward a Right to a Lawyer in Eviction Proceedings*, 25 *Touro L. Rev.* 187 (2009); and other articles in the same volume, available at http://www.tourolaw.edu/LawReview/uploads/pdfs/_7_WWW_PanelDiscussion_SM_Final_12.23.08_.pdf; Andrew Scherer, *The Importance of Collaborating to Secure a Civil Right to Counsel*, 30 *N.Y.U. Rev. L. & Soc. Change* 675 (2006), available at <http://courts.state.ny.us/ip/partnersinjustice/right-to-counsel-collaboration.pdf>. The National Coalition for a Civil Right to Counsel also maintains a comprehensive bibliography on the civil right to counsel. *Civil Right to Counsel Bibliographies*, Nat'l Coal. for a Civil Right to Counsel, <http://civilrighttocounsel.org/resources/bibliography> (last visited June 5, 2015).

homelessness and displacement, and it will protect their ability to remain in their homes and communities. A home is, for most of us, and particularly for those with low incomes, our most important material possession. It serves as the center of our lives as family members and community members. It attaches us to schools, work, friends, and health care. It enables us to vote and otherwise participate in the political process. Helping people retain this all-important asset helps them retain whatever wealth they have managed to accrue and gives them a perch from which to access additional wealth. At the same time, guaranteeing a right to counsel addresses the inequitable distribution of justice and conveys a strong and sorely-needed message of respect for the rights and dignity of the city's low-income residents.

The statistical data on growing economic inequality keeps mounting. Between 1979 and 2007, incomes of the wealthiest 1 percent in the United States rose 275 percent, more than fifteen times the increase for households in the poorest 20 percent.⁵ Income disparity in New York City is particularly extreme. In 2013, the wealthiest 20 percent of households in the City had incomes more than twenty-six times greater than the poorest 20 percent.⁶ In Manhattan, the wealthiest 20 percent had incomes *more than forty-two times* those of the poorest 20 percent, giving Manhattan the dubious distinction of being the county with the highest disparity in income in the United States.⁷ And the American wealth divide has pronounced racial and ethnic dimensions. In 2009, the median net worth of White households in the United States was twenty times that of Black households and eighteen times that of Latino households.⁸

Because we have an adversarial system of dispute resolution that contemplates that both sides will be represented by counsel, in most litigation, a litigant needs an attorney to have meaningful access to the court system. Yet meaningful access to justice is denied to those who cannot afford counsel. The importance of counsel to the fair administration of justice has long been recognized by the United States Supreme Court, which said, finding a right to counsel in death penalty cases in 1932, that “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.”⁹ And in another context in 1964, the Supreme Court stated that “[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries.”¹⁰

Access to justice is, in effect, a commodity, and like other commodities, it can be bought if one has the financial resources and can be denied if one does not. In other words, disparities in wealth also dictate disparities in access to justice. This commodification of justice has led to a yawning justice gap that parallels the wealth gap. In 2010, New York State Court of Appeals Chief Judge Jonathan Lippman established The Task Force to Expand Delivery of Legal Services in New York, which has, since it was convened, issued an annual report that tracks the justice gap in New York. The Task Force's 2014 report found, for example, that in 2013 more than 1.8 million people in

⁵ CONGRESSIONAL BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007 ix (2011), available at https://www.cbo.gov/sites/default/files/10-25-HouseholdIncome_0.pdf.

⁶ Andrew Beveridge, *Tackling Inequality: Some Data on Changing Inequality in NYC*, IMPACT CENTER FOR PUBLIC INTEREST LAW AT NEW YORK LAW SCHOOL (APRIL 17, 2015), <http://www.nyls.edu/impact-center-for-public-interest-law/wp-content/uploads/sites/140/2013/07/Income-and-Wealth-CLE.pdf>.

⁷ *Id.*

⁸ Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics: Twenty-to-One*, PEW RESEARCH CENTER (JULY 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

⁹ *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

¹⁰ *Bhd. of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964).

New York State had to litigate without representation, and that in New York City, 99 percent of tenants are unrepresented in eviction proceedings.¹¹ These local figures reflect the state of access to justice nationally as indicated by an American Bar Association finding that, in 2005, only 1 percent of the lawyers in the U.S. worked in “practice settings” in which they provided civil legal services or criminal defense to low-income people (and that fraction is diminishing: in 1980 the figure was 2 percent).¹²

Wealth-based disparity in access to justice has profound implications, particularly in legal matters involving issues of fundamental human need, such as legal proceedings at which one’s home is at stake. In eviction cases, denial of counsel can, and often does, result in loss of the respondent’s home. Counsel makes a determinative difference in the outcome of eviction proceedings. One study of New York City’s Housing Court found that tenants who were represented by counsel had fewer defaults, fewer judgments and warrants of eviction against them, and greater success in obtaining services and repairs from their landlords.¹³ A recent study of the impact of representation in eviction proceedings by the Boston Bar Association found that represented tenants were able to remain in their homes twice as often as unrepresented tenants and that represented tenants received a financial benefit in the litigation that was five times greater than that received by unrepresented tenants.¹⁴

Evictions, in turn, have devastating short- and long-term consequences for those who are evicted. Low-income households that are evicted in New York City face a housing market that presents them with practically no options because of the severe lack of affordable housing. *Housing New York*, a Five-Borough, Ten-Year Plan for affordable housing, released by the Mayor in May of 2014, reported that “[t]here are nearly one million households who earn less than 50 percent of Area Median Income (AMI), or just under \$42,000 for a family of four,” yet there are only 425,000 housing units available in the City with rents suitable for that income level.¹⁵ No wonder that more than one-third of the families entering the homeless shelter system report “eviction” as the precipitating factor for their homelessness.¹⁶ Families who experience homelessness have a very tough time in life.¹⁷ But families suffer deeply from the experience of eviction as well. One recent study of the consequences of eviction found that:

. . . eviction has negative effects on mothers in multiple domains. Compared to those not evicted, mothers who were evicted in the previous year experienced more material hardship, were more likely to suffer from depression, reported worse health

¹¹ THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 20 (2014), available at <https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS%20TaskForce%20Report%202014.pdf>.

¹² See AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS 2010 (2011), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf.

¹³ See Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 428 (2001).

¹⁴ BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS REPRESENTATION: A REPORT ON THE BBA RIGHT TO COUNSEL PILOTS 2 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

¹⁵ THE CITY OF NEW YORK, HOUSING NEW YORK A FIVE-BOROUGH, TEN-YEAR PLAN 2, available at http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf.

¹⁶ NEW YORK CITY INDEPENDENT BUDGET OFFICE, ESTIMATE OF THE COST OF LEGAL COUNSEL IN HOUSING COURT AND POTENTIAL SHELTER SAVINGS DUE TO AVERTED EVICTIONS 5 (2014), available at <http://www.ibo.nyc.ny.us/lboreports/2014housingcourtleter.pdf>.

¹⁷ NANCY SMITH ET AL., UNDERSTANDING FAMILY HOMELESSNESS IN NYC, AN IN-DEPTH STUDY OF FAMILIES BEFORE AND AFTER SHELTER (2005), available at http://www.nyc.gov/html/dhs/downloads/pdf/vera_Study.pdf.

for themselves and their children, and reported more parenting stress. Some evidence suggests that at least two years after their eviction, mothers still experienced significantly higher rates of material hardship and depression than peers. Our findings indicate that to fully understand the lives of disadvantaged women, we should examine not only events related to work, welfare, and family, but also those related to housing, eviction being among the most consequential of them.¹⁸

Access to commodities is, to a greater or lesser extent, generally understood to be dictated by the economic marketplace—one can only get what one is able to pay for. However, access to justice is commonly understood—as it should be—in other than market-based terms. “Equal justice for all” is a bedrock principle of our democratic culture and values and a notion that shapes legitimate expectations about fairness and meaningful access in our legal system. This concept that justice is neutral, fair and impartial, and available to all without regard to ability to pay is deeply embedded in the foundation of American jurisprudence. Just recently, Justice Roberts, writing for the Supreme Court majority and upholding restrictions on judicial fundraising in *Williams-Yulee v. Florida Bar*, explained that bedrock ideological, philosophical notion as follows:

Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to the Magna Carta, which proclaimed, “To no one will we sell, to no one will we refuse or delay, right or justice.” [] The same concept underlies the common law judicial oath, which binds a judge to “do right to all manner of people . . . without fear or favour, affection or ill-will,” [] and the oath that each of us took to “administer justice without respect to persons, and *do equal right to the poor and to the rich*,” [](emphasis added and internal citations in endnote).¹⁹

Wealth-based access to justice presents a jarring contrast between our fundamental ideology and our actual practice. Indeed, when the rhetoric of equality in justice is belied by the inequitable distribution of justice and its relationship to wealth, these lofty principles are defiled. And, this wealth/justice gap is a direct consequence of government policy, both what government does and what it fails to do. Government certainly has the power to foster a more equitable distribution of justice by guaranteeing and funding a right to counsel. In New York, government has done so in a number of areas, including criminal defense (as have all the states following *Gideon v. Wainwright*),²⁰ civil commitment and child custody matters. In 1993, New York City created a right to counsel for respondents in court proceedings where the City seeks removal or detention due to tuberculosis infection.²¹

Yet, not only does government fail to make access to justice available on an equitable basis, all too often, government exacerbates the inequitable distribution of justice by, in fact, supporting and subsidizing access to the judicial system for the rich to a far greater degree than for the poor. For example, it is clear that tax deductions for the wealthy for legal expenses result in loss of

¹⁸ MATTHEW DESMOND & RACHEL TOLBERT KIMBRO, *EVICTION'S FALLOUT: HOUSING, HARDSHIP, AND HEALTH* (2015), available at http://nlhrc.org/sites/default/files/DesmondKimbro_Evictions_Fallout_SF2015.pdf.

¹⁹ *Williams-Yulee v. Florida Bar*, No. 13-1499, 2015 U.S. LEXIS 2983, at *19-20 (U.S. 2015) (quoting Cl. 40 (1215), in W. McKECHNIE, *MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 395 (2D ED. 1914); 10 *ENCYCLOPEDIA OF THE LAWS OF ENGLAND* 105 (2D ED. 1908); 28 U. S. C. § 453 (2012)).

²⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²¹ 24 R.C.N.Y. § 11.21(e)-(f) (2015).

government revenues that greatly outweigh government's expenditures on legal services for the poor. Although there is no available disaggregated hard data on the amount of those tax deductions, a very rough approximation of the federal tax system subsidy for legal expenses for the wealthiest 1 percent of the U.S. population can be arrived at by estimating the amount of legal expenses deducted by the wealthiest Americans and the approximate tax deductions taken based on those legal expenses. A conservative estimate of the tax benefit is approximately \$23.6 billion annually. This figure is arrived at by looking at the self-reported revenues of the top 100 revenue-grossing law firms, considering that figure a very rough proxy for the deductions taken by the 1 percent, and applying the income tax rate for earners in the highest income bracket.²² In contrast to this figure of \$23.6 billion in tax forgiveness for the wealthy, the federal government funds legal services for the poorest 25 percent of the U.S. population at under \$400 million annually.²³ This all translates into a per capita benefit of \$11 for each poor person,²⁴ contrasted with a (very approximate) per capita tax subsidy for legal assistance for the wealthiest 1 percent of \$754,²⁵ or—based on these rough, but conservative estimates—almost seventy times as much federal assistance for legal services per person in the top one percent as for each person living in poverty. New York City's taxation of individual and corporate income follows the federal practice of allowing legal expenses to be deducted from income, and, although the disaggregated figures for deductions for legal expenses are not available either, it can be assumed that New York City similarly forgoes enormous amounts of revenue in order to subsidize legal expenses for the wealthy.

Of course, because the integrity of the justice system is a cornerstone article of faith, the dissonance between ideology and practice created by wealth-based access to justice severely undermines faith in the justice system. Faith in the civil justice system is particularly challenged by the experience tenants have in defending themselves, unrepresented, in eviction proceedings in New York City. A significant number of New York City's low-income households are exposed to the civil justice system through their experience with eviction proceedings. About 11.5 percent of the city's low-income households are served with eviction proceedings every year.²⁶ About a third of the people

²² Under the Internal Revenue Code, legal expenses of corporations and other businesses are tax deductible. 26 U.S.C. § 162. According to American Lawyer, gross revenue for the 100 highest grossing law firms in the U.S. in 2010 was 67.42 billion (and 17 law firms grossed over \$1 billion). Available (for charge) at <http://almlegalintelligence.com/>. Using that \$67.42 billion as a very rough (but very conservative) proxy for the legal expenses of the top 1 percent and applying the 35 percent income tax rate for earners in the highest income bracket (<http://www.irs.gov/pub/irs-pdf/i1040tt.pdf>), the U.S. treasury foregoes \$23.6 billion in tax revenue, in effect subsidizing legal assistance for the 1 percent to the tune of \$23.6 billion.

²³ See Legal Services Corporation, Fact Book 2010 (2011), available at http://lsc.gov/sites/default/files/LSC/pdfs/LSC_2010_Fact_Book.pdf.

²⁴ Id. (Dividing the 2010 federal Legal Services Corporation budget of \$394,582,437 by the 36,0013,627 people in poverty, we arrive at a figure of about \$11 per poor person).

²⁵ U.S. Census Bureau, U.S. and World Population Clock, U.S. Department of Commerce (May 28, 2015), <http://www.census.gov/main/www/popclock.html> (One percent of the U.S. population in 2012 is about 3.13 million people, the \$23.6 billion in tax revenues forgone by the government divided by number of one percenters is \$754.).

²⁶ This 11.5 percent figure is arrived at as follows: 3,345,154 people in NYC were living below 200 percent of poverty in 2013 (citing U.S. Census Bureau, American Community Survey, 2013, NYC Pop. Data 2013 ACS_13_1YR_B17002). There were 248,732 cases in Housing Court in 2013. See STATISTICAL REPORT OF ACTIVITY OF L & T CLERK'S OFFICE, ST-30-L&T CLERK'S OFFICE (MARCH 6, 2014), available at http://cwtfhc.org/wp-content/uploads/2014/03/Case_Filings_2013.pdf. 59.5 percent of the Housing Court litigants are too poor to afford a lawyer. See COMMUNITY TRAINING AND RESOURCE CENTER, HOUSING COURTS, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF PROVIDING A RIGHT TO COUNSEL IV (1993), available at <http://cwtfhc.org/wp-content/uploads/pdf/donaldson.pdf>. There are thus 147,995 Housing Court cases of people too poor to afford counsel (59.5 percent of 248,732). The average number of people per household in NYC (2009-2013) is 2.61, so there are 386,267 people too poor to afford counsel who have housing court cases in one year (147,995 x 2.61), or 11.5 percent of the City's poor population (386,267/ 3,345,154). U.S. Census Bureau, STATE AND COUNTY QUICK FACTS: NEW YORK CITY, NEW YORK, U.S. DEPARTMENT OF COMMERCE (April 22, 2015), <http://quickfacts.census.gov/qfd/states/36/3651000.html>.

served with eviction proceedings each year show up in court to defend themselves,²⁷ and the vast majority of them are low-income people who are forced to defend their homes without any access to counsel²⁸ in complex legal proceedings in which the rules of evidence apply and that are governed by a host of substantive and procedural rights. Close to 30,000 families end up evicted each year—one family is evicted about every 4.5 minutes of the workweek.²⁹ As one low-income tenant put it, describing her Housing Court experience, “what we are asking for is respect and dignity. We want to live like everyone else in the world. We have a right to have housing, to be able to participate in the society as citizens. The question is, do they just want all people of color to pack up and get out of the city?”³⁰

The sentiment expressed by Ms. Cortes about her experience with Housing Court echoes a broader current of concern in New York City’s communities and in the country about the justice system in general. The deaths of Eric Garner on Staten Island, Michael Brown in Ferguson, Missouri, and Freddy Gray in Baltimore, among others, have heightened the perception that we have “two systems of justice,” in which race and economic status lead to vastly different treatment. The message to poor litigants (mostly people of color) in Housing Court that they can be removed from their homes by an armed City Marshal, pursuant to an order of a judge, as a consequence of a complex and technical legal proceeding in which they are deprived of the benefit of legal counsel, is unmistakable: Your homes, your families, and your lives don’t really matter.

Studies have shown that most people believe there already is a “right to counsel” in legal matters such as eviction proceedings.³¹ This misconception is probably related to the fact that there actually is a right to appear by counsel. The right to appear in court by counsel is a longstanding right that precedes the founding of the nation.³² People with the financial means to hire counsel can exercise that right. People who do not have the financial means cannot. At best, they can obtain free legal assistance—if and when it is available—not as a matter of right, but rather through government-funded and/or privately-funded programs, or from attorneys who are willing to provide representation on a *pro bono* basis. However, a right cannot be dependent on the largesse of government, the beneficence of the private sector, or the good graces of a volunteer.³³ Legal scholarship confirms what most people intuitively understand: a right is a “claim[] that a

²⁷ STATISTICAL REPORT OF ACTIVITY OF L & T CLERK’S OFFICE, ST-30-L&T CLERK’S OFFICE (MARCH 6, 2014), available at http://cwtfhc.org/wp-content/uploads/2014/03/Case_Filings_2013.pdf.

²⁸ *Supra* note 11.

²⁹ The estimate of an eviction every 4.5 minutes was arrived at as follows: there were 26,857 residential evictions in 2014. NYC DEPARTMENT OF INVESTIGATION, SUMMARY OF EVICTIONS, POSSESSIONS & EJECTMENTS CONDUCTED: JAN. THROUGH DEC. 2014 (2015), available at <http://cwtfhc.org/wp-content/uploads/2015/03/Evictions-by-Marshals-2014--DOI.pdf>. There are 52 weeks and 5 work days per week each year; subtracting an estimated 10 holidays leaves 250 work days, or 2000 hours, or 120,000 minutes. (8-hour days = 2000 hours x 60 = 120,000 minutes in the work days per year). 120,000 minutes divided by 26,857, the number of evictions = 1 eviction every 4.5 minutes.

³⁰ Maria Cortes, *What the Experts are Saying*, IMPACT CENTER FOR PUBLIC INTEREST LAW AND COALITION FOR A RIGHT TO COUNSEL IN HOUSING COURT, available at https://d3n8a8pro7vnm.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1433269447/FINAL_expert_report.pdf?1433269447.

³¹ BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS REPRESENTATION: A REPORT ON THE BBA RIGHT TO COUNSEL PILOTS 1 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

³² See generally Julian Cook, *Rule 11: A Judicial Approach To An Effective Administration Of Justice In The United States*, 15 OHIO N. UNIV. L. REV. 397, 409 (1988).

³³ While there are important measures in New York to expand the availability of *pro bono* resources for delivery of legal services, such as the recently implemented rule requiring fifty hours of *pro bono* work for admission to the New York bar (see 22 NYCRR § 520.16 (2015)), these measures are no substitute for a government guarantee and adequate funding of representation.

government is obligated to respect.”³⁴ The U.S. Supreme Court has described a statutory right as having three attributes: 1) it must be intended to benefit the claimant; 2) it must create a binding, mandatory obligation on the government; and 3) it must be “sufficiently specific and definite” to be judicially enforceable.³⁵

Funding for access to counsel for those who cannot afford to pay, of course, helps. A huge influx of New York City appropriated funds for eviction-prevention legal assistance is expected in 2015, as is passage of legislation creating an Office of the Civil Justice Coordinator. These measures will help enormously by expanding the availability of counsel and placing much-needed focus on the importance of civil legal services. But funding, unaccompanied by a “right,” keeps the funder and the organizations that provide legal services as the gatekeepers to the justice system rather than shifting power to the people who are affected themselves. If there is no right and the money runs out or the funding is reduced, or if nonprofit legal services organizations are without sufficient staff resources to take another case, access can be denied. To truly shift the balance and change the justice paradigm, there must be a right to counsel.³⁶

The inequitable distribution of justice is a result of the actions and inactions of all levels of government, and while the federal, state, and city governments all do something to address that inequity by funding civil legal services in fluctuating amounts, no level of government does enough. New York City has the legal authority, compelling policy, and fiscal reasons and the growing political will to do something much more significant—and game-changing—about it. New York City has the power. Its powers are delegated to it from the State, through the New York State Constitution and the Municipal Home Rule Law, both of which grant the City the power to adopt local laws for the “protection, order, conduct, safety, health and well-being of persons or property”;³⁷ and the right to counsel certainly protects New Yorkers and advances their well-being. New York City has compelling fiscal and policy reasons. Establishing a right to counsel furthers several of the administration’s key objectives: it keeps people out of the shelters and saves money otherwise spent on sheltering people;³⁸ it mitigates the growing housing crisis by enabling low-income people to stay in affordable housing; and it sends a strong message that we are one New York City that strives to address inequality and matters of fundamental justice. And New York City has the political will to take this action. New York City’s current political leadership—Mayor Bill de Blasio, City Council Speaker Melissa Mark-Viverito, and the members of the City Council—have clearly recognized the importance of access to counsel for those who face losing their homes, in both their words and their deeds. A large majority of the Council has co-sponsored the pending legislation that would create the right to counsel.³⁹

³⁴ Sarah H. Cleveland, *The Legacy of Louis Henkin: Human Rights In The “Age of Terror,”* 38 COLUMBIA HUMAN RIGHTS L. REV., 499 (2007).

³⁵ *Wilder, Governor of Virginia, et al., v. Virginia Hospital Ass’n*, 496 U.S. 498, 510 (1990).

³⁶ A right to counsel would, of course, lose its meaning unless it is implemented through a system that provides high-quality representation. Critiques of state criminal defense systems are instructive on this point. See generally THE JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

³⁷ New York State Constitution Article IX § 2(c)(ii); N.Y. MUN. HOME RULE § 10(1)(iii)(A)(12) (2015).

³⁸ NEW YORK CITY INDEPENDENT BUDGET OFFICE, ESTIMATE OF THE COST OF LEGAL COUNSEL IN HOUSING COURT AND POTENTIAL SHELTER SAVINGS DUE TO AVERTED EVICTIONS (2014), available at <http://www.ibo.nyc.ny.us/iboreports/2014housingcourtleter.pdf>. (Note that while this IBO report finds that the savings from a right to counsel would exceed the cost of providing counsel, the report assumes that those savings would be shared by the state and federal governments, while the cost of counsel would be solely the responsibility of the City.)

³⁹ See *supra* note 3. As of publication, Intro 214 had 39 sponsors, including NYC Public Advocate, Letitia James. There are 51 members of the City Council. Council members Mark Levine and Vanessa Gibson have led the legislative push within the Council.

New York City has a rich history of leading the nation in protecting and advancing the rights of its residents, particularly around housing, discrimination, and due process. The list of the City's accomplishments is long and includes the first housing code (1905), the first public housing program (1934), and some of the strongest tenant protection anti-discrimination legislation in the country. New York City's current political leaders now have a unique and timely opportunity to take a bold step, lead the nation, and create a lasting legacy by changing the paradigm around the wealth-based distribution of access to justice and establishing a right to counsel in court proceedings for people who face losing their homes. To paraphrase the much-quoted words of a religious philosopher of more than two millennia ago, "if not now, when, and if not the current New York City leadership, who?" •

Criminal Records in the Post-“Great Society”

Michael Pinard¹

Over the last year or so, many in the United States have reflected on the half century that has passed since President Lyndon B. Johnson launched the Great Society programs in the mid-to-late 1960s. In addition to landmark civil rights and voting rights legislation, these initiatives included an assortment of statutes and related programs aimed at assisting poor and working class individuals and families to simply live and to ascend. These programs were intended to sustain families, eliminate discrimination in critical features of American life, and, overall, make the American dream a reality for those to whom it was pure myth. Thus, President Johnson and Congress worked hard to, among other things, “reduce poverty and economic inequities by putting progressive polices in place, rais[e] the minimum wage and expand[] access to health insurance and housing for the poor and elderly.”²

President Johnson was deeply concerned about the economic plight of all individuals, including, of particular note, those incarcerated in U.S. prisons. On March 9, 1966, President Johnson gave a Special Message to Congress on Crime and Law Enforcement. In his message, President Johnson discussed the importance of providing meaningful job opportunities to individuals leaving prison and, as critical, not to exclude individuals from these opportunities. As he told Congress, “[t]he best correctional programs will fail if legitimate avenues of employment are forever closed to reformed offenders.”³

Thus, President Johnson, through these various programs, was wedded to reducing poverty in all of its dimensions and opening up doors of economic opportunity that were previously cemented shut. Today, however, fifty years or so after he and Congress committed the country to providing resources and opportunities to help individuals live and climb economically, the onslaught of criminal records has hardened poverty by excluding individuals who have been through the criminal justice system from these programs and opportunities. This is especially true for the poor individuals of color—Blacks and Latinos—who disproportionately and overwhelmingly encounter the criminal justice system and bear the permanent mark of a criminal record.

This essay offers a snapshot of how criminal records exclude individuals from some of the critical Great Society programs: the Food Stamp Act of 1964, the Higher Education Act of 1965, and the Fair Housing Act of 1968. While criminal records implicate several other programs, this essay focuses on these three programs because they impact survival, economic mobility, and families. The essay then revisits President Johnson’s Special Message to Congress and details some of the ways in which individuals with criminal records are shut out from employment opportunities and are not able to achieve the economic stability that President Johnson envisioned. In sum, the essay demonstrates that criminal records contribute to and exacerbate economic inequality in the United States.

¹ Professor, University of Maryland Francis King Carey School of Law. I am grateful to Randy Hertz for his comments. I am indebted to Bryan Riordan for his excellent research assistance and to Susan McCarty, Managing Research Fellow, for tracking down various sources.

² Benjamin Jealous, *America’s Yawning Racial Wealth Gap*, POLITICO (July 11, 2013), <http://www.politico.com/story/2013/07/americas-yawning-racial-wealth-gap-94048.html>.

³ President Lyndon B. Johnson, Special Message to Congress on Crime and Law Enforcement, 1 PUB. PAPERS 291 (Mar. 9, 1966) [hereinafter Special Message].

I. The Proliferation of Criminal Records and Collateral Consequences Post-Great Society

In 1964, 111 out of 100,000 United States residents were incarcerated in federal and state prisons.⁴ That year, 65 percent of the men and women admitted to U.S. prisons were White, while 33 percent were Black.⁵ In the subsequent fifty years, incarceration rates soared to historic levels. In 2013, 480 out of 100,000 U.S. residents were incarcerated in a state or federal prison.⁶ As of December 31, 2013, 37 percent of prisoners were Black, 32 percent were White, and 22 percent were Latino/a.⁷ According to a Washington Post analysis, the United States currently has more jails and prisons than colleges and universities, and, in the South, more people live in prison than on college campuses.⁸

The numbers of individuals with criminal records has also increased greatly over time. One-third of individuals in the United States are arrested by twenty-three years of age for a juvenile or adult offense that is *not a minor traffic violation*.⁹ For Black and Latino males, the arrest rates stand alone. Nearly 49 percent of Black males and nearly 44 percent of Latino males are arrested by twenty-three years of age, compared to nearly 38 percent of White males.¹⁰ Overall, estimates of the number of adults in the U.S. who have a criminal record range from 65 million to 100 million.¹¹

As many scholars have detailed, criminal convictions bring with them a host of “collateral consequences.”¹² These consequences are the legal penalties that attach to convictions but are imposed by agencies that rest outside of the criminal justice system. The consequences are wide-ranging and impact all aspects of life for the poor defendants who comprise the overwhelming majority of individuals who travel through the criminal justice system.

Below are some consequences, both formal and informal, that are specific to the Great Society programs. Unlike collateral consequences, informal consequences are not rooted in law, but

⁴ CAROL B. KADISH, U.S. DEP’T OF JUSTICE, PRISONERS 1925-1981 2, tbl.1 (1982), available at <http://www.bjs.gov/content/pub/pdf/p2581.pdf>.

⁵ PATRICK A. LANGAN, U.S. DEP’T OF JUSTICE, RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926-86 5, tbl.2 (1991), available at <http://www.bjs.gov/content/pub/pdf/rpasfi2686.pdf>.

⁶ E. ANNE CARSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2013 1 (REVISED SEPT. 30, 2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf> [hereinafter PRISONERS IN 2013].

⁷ *Id.* at 8.

⁸ Christopher Ingraham, *The U.S. Has More Jails Than Colleges. Here’s a Map of Where those Prisoners Live*, WASH POST WONK BLOG (Jan. 6, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/06/the-u-s-has-more-jails-than-colleges-heres-a-map-of-where-those-prisoners-live/>.

⁹ Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012).

¹⁰ Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQUENCY 471, 478 (2014).

¹¹ See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012 14, tbl.1 (2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> (100,596,300 individuals were listed in state criminal history files as of December 31, 2012); MICHELLE NATIVIDAD RODRIGUEZ & MAURICE ENSELLEM, THE NATIONAL EMPLOYMENT LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 & n.2 (2011), available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1 (estimating that 65 million adults have a criminal record, which the authors consider to be a “conservative national estimate”).

¹² For a detailed discussion of collateral consequences, see generally MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CONVICTIONS: LAW, POLICY AND PRACTICE (2013).

rather policies, practices, attitudes, feelings, and biases. They include the policies and practices of employers and landlords to exclude individuals with criminal records from their businesses and dwellings.¹³

a. Food Stamps—The Supplemental Nutritional Assistance Program

*The Food Stamp Act of 1964 was designed to provide a way for individuals and families to survive, specifically “to provide for improved levels of nutrition among low-income households.”*¹⁴ To meet this need, the Act established food stamps, which are now known as Supplemental Nutritional Assistance Program (SNAP) benefits. However, in 1996, still in the midst of the “war on drugs” and “tough on crime” movements, Congress passed, and President Clinton signed into law, the Personal Responsibility and Work Opportunity Reconciliation Act.¹⁵ One component of this Act makes individuals convicted of any federal or state drug conviction ineligible to receive these benefits.¹⁶ This ban extends to benefits from a separate program, Temporary Assistance to Needy Families (TANF), which comprises cash benefits.¹⁷

The statute gives states the option to adopt the ban in full, in part, or not at all. Soon after the law’s passage, several states enforced these bans in full. In recent years, however, several states have moved away from full enforcement. The majority of states, though, continue to enforce both the SNAP and TANF bans partially or, to a lesser extent, fully.¹⁸ States enforce the bans partially by conditioning the benefits in a variety of ways, such as requiring recipients to enter drug rehabilitation programs or pass drug tests.

The Sentencing Project has shown that these bans overwhelmingly fall on women and, particularly, Black and Latina women.¹⁹ Women are nearly twice as likely as men to receive SNAP benefits.²⁰ According to a recent Pew Research Center survey, nearly 40 percent of Black women have received SNAP benefits at some point in their lives, compared to 21 percent of Black men.²¹ Also, 31 percent and 14 percent of Latino women and men received SNAP benefits,²² respectively, compared to 19 percent of White women and 11 percent of White men.²³

As the percentages of women and individuals of color who receive SNAP benefits sometime in their lives are higher than Whites, so too are the percentages of women and individuals of color

¹³ For a discussion of informal consequences, see Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

¹⁴ The Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703.

¹⁵ Personal Responsibility & Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

¹⁶ 21 U.S.C. § 862(a)(2).

¹⁷ *Id.* § 862(a)(1).

¹⁸ See THE SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS 4 (2013), available at http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf (as of 2013, thirty-four states enforced the SNAP ban in full or in part, and thirty-seven states did the same with TANF benefits).

¹⁹ *Id.* at 4.

²⁰ RICH MORIN, PEW RESEARCH CTR., THE POLITICS AND DEMOGRAPHICS OF FOOD STAMP RECIPIENTS (2013), available at <http://www.pewresearch.org/fact-tank/2013/07/12/the-politics-and-demographics-of-food-stamp-recipients/>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

who are incarcerated for the drug offenses that render them actually or potentially ineligible for these benefits in many states. As of December 31, 2012, 24.6 percent of women in state prison were incarcerated for a drug-related offense, compared to 15.4 percent of men.²⁴ On this same date, Blacks and Latinos were slightly over 57 percent of individuals incarcerated for drug offenses—the percentages were 37.7 percent and 19.5 percent, respectively—compared to 30.8 percent of Whites.²⁵

Also, Congress recently expanded the categories of convictions that exclude individuals from SNAP benefits. In 2014, Congress enacted the Agricultural Act of 2014. Part of the Act amended the Food and Nutrition Act of 2008 by disqualifying “[c]ertain [c]onvicted [f]elons” from these benefits.²⁶ An individual convicted at the federal level of aggravated sexual abuse, murder, sexual exploitation, and other abuse of children, or of any state offense that the Attorney General determines to be “substantially similar to” these offenses, or of any federal or state offense involving sexual assault “as defined in 40002(a) of the Violence Against Women Act of 1994” cannot receive SNAP benefits, but only if he or she is not compliant with his or her sentence terms or is fleeing prosecution or custody for a felony offense under the applicable state’s law or, for New Jersey, a high misdemeanor offense.²⁷

b. Access to Higher Education

President Johnson signed the Higher Education Act of 1965 into law to, in part, “assist[] the people of the United States in the solution of community problems such as housing, poverty, government, recreation, employment, youth opportunities, transportation, health and land use.”²⁸ This Act created various forms of student financial aid, including Pell grants.²⁹

Prior to 1994, prisoners used Pell Grants to access higher education through college and graduate school courses. However, in 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act, an expansive omnibus bill with a provision that amended the Higher Education Act of 1965 by eliminating these grants for individuals incarcerated in state and federal prisons.³⁰

Four years later, Congress, again focusing on drug offenses and as part of the reauthorization of the Higher Education Act of 1965, declared that individuals were not eligible to receive federal student financial aid (“grant, loan or work assistance”) if they were convicted of any felony or misdemeanor drug offense.³¹ The ban applied to prospective students, students who were convicted while receiving aid, and students who were convicted but not receiving aid. A

²⁴ PRISONERS IN 2013, *supra* note 6, at 15, tbl.13.

²⁵ *Id.* at 16, tbl. 14.

²⁶ Agricultural Act of 2014, Pub. L. No. 113-179, § 4008, 128 Stat. 649, 788.

²⁷ *Id.* § 4008(a).

²⁸ The Higher Education Act of 1965, Pub. L. No. 89-329, § 101, 79 Stat. 1219, 1219.

²⁹ Title IV of the Higher Education Act of 1965, Pub. L. No. 89-329, §§ 401-409 (codified as amended at 20 U.S.C. § 1070a).

³⁰ Pub. L. No. 103-222 § 20411, 108 Stat. 1796, 1828 (codified as amended at 20 U.S.C. § 1070a(b)(6)). Two years earlier, Congress amended the Higher Education Act to exclude from the Pell Grant Program individuals sentenced to life without parole or to death. Higher Education Act Amendments of 1992, Pub. L. No. 102-325 § 305, 106 Stat. 448, 481.

³¹ Higher Education Amendments of 1998, Pub. L. No. 105-244, § 483(f)(1), 112 Stat. 1581, 1735.

2006 amendment narrowed the ban to students convicted of these offenses while receiving these types of financial assistance.³² The ineligibility periods range depending upon the number of prior convictions as well as whether the conviction(s) involved sale or possession. Thus, the ineligibility period for a first possession offense is one year, and a third offense results in an indefinite ban.³³ For sale, the ineligibility period for a first offense is two years, and the second offense results in an indefinite ban.³⁴ However, a suspended student may be reinstated prior to the expiration of the ineligibility period if he or she completes a drug rehabilitation program and passes two unannounced drug tests.³⁵

c. Housing

The Fair Housing Act of 1968³⁶ was implemented to prevent the discriminatory use of race, religion, gender, and national origin in housing determinations. Congress later amended the Act to include disability and familial status.³⁷ Generally, the Act applies to federally owned or operated properties, properties that the federal government aided with loans or grants, either directly or by otherwise insuring or guaranteeing, and properties redeveloped with “[f]ederal financial assistance for slum clearance or urban renewal.”³⁸ The Act also generally applies to sales or rentals by individuals who own more than three single-family homes at one time as well as to landlords who rent to more than four families in a dwelling.³⁹

In the 1980s and 1990s, Congress passed a series of laws that impose significant hurdles for individuals with criminal records who reside in or apply to live in federally-assisted housing. These laws require that individuals convicted of manufacturing methamphetamine on federally-assisted housing premises or of a sexual offense that requires lifetime registration be banned permanently.⁴⁰ Housing authorities may also end tenancies for “drug-related criminal activity” on or off housing premises by any household member or household guests, or for any other criminal activity that “threatens the health, safety or right to peaceful enjoyment of the premises by other residents.”⁴¹ Outside of these categories, local housing authorities have the power to determine the eligibility of tenants or prospective tenants who have criminal records.⁴² Across the U.S., housing authorities have used this power to enact policies that exclude *anyone* with *any* type of conviction, for varying time periods depending on the nature of the conviction,⁴³ or to deny individuals convicted of

³² Pub. L. No. 109-171 § 8021, 120 Stat. 4, 178 (amending 20 U.S.C. § 1091).

³³ 20 U.S.C. § 1091(r)(1).

³⁴ *Id.*

³⁵ *Id.* § 1091(r)(2)(A)-(B).

³⁶ Pub. L. No. 90-284, §§ 801-901 (1968).

³⁷ Pub. L. No. 100-88, § 6(b), 102 Stat. 1619, 1622.

³⁸ 42 U.S.C. § 3603(a)(1)(A)-(D).

³⁹ *Id.* § 3603(b)(1)-(2).

⁴⁰ 24 C.F.R. § 966.4(l)(5)(i)(A) (methamphetamine conviction); 42 U.S.C. § 13663(a) (lifetime registration).

⁴¹ 24 C.F.R. § 966.4(l)(5)(iii)(A).

⁴² 42 U.S.C. § 13661(c).

⁴³ Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 31 U. Tol. Rev. 545, 566 (2005) (housing authorities “have, in effect, adopted. . . ‘zero tolerance’ policies”).

certain types of offenses.⁴⁴ In many instances, authorities also exclude individuals based on arrests alone.⁴⁵

Individuals with criminal records do not fare better in the private housing market, as landlords often refuse to rent apartments to individuals with criminal records.⁴⁶ Thus, “the experience of incarceration and the stigmatizing effect of a criminal record erect formidable barriers to accessing safe, affordable housing.”⁴⁷

As Blacks and Latinos are arrested, convicted, and otherwise accumulate criminal records disproportionately, they must overcome particular hurdles to access private housing.⁴⁸ This is especially so because technological advances have made criminal records more accessible than ever, often available on the Internet as well as through commercial data brokers that provide consumer-related data, including criminal history information, to decision makers, such as landlords and employers, who use the information to decide whether or not to rent to or hire the person to whom the data belongs.⁴⁹ As a result, landlords often rely upon criminal records with vigor to exclude individuals from their properties.

II. Employment and Economic Mobility

President Johnson’s Special Message to the Congress on Crime and Law Enforcement in 1966 focused on the impact of crime on individuals and families throughout the United States. He discussed the financial and psychological costs of crime, as well as the need for “Congress and the nation” to join in the fight against crime, and to “weld[] together the efforts of local, state and federal governments to do so.”⁵⁰

⁴⁴ See MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING IX (2015), available at <http://povertylaw.org/sites/default/files/images//publications/WVMD-final.pdf> (blanket prohibitions “against applicants with past felony charges and convictions. . . can be found all over the country”).

⁴⁵ See REBECCA VALLAS & SHARON DIETRICH, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 16 (2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> (“[M]any local housing authorities will evict or deny housing to an individual or even to an entire household if one household member has an arrest without conviction or pending criminal charges.”).

⁴⁶ See *id.* at 19 (“Many landlords refuse to rent to individuals with criminal records based on concerns about public safety or the perception that tenants with criminal histories are less likely to meet rental obligations.”).

⁴⁷ Merf Ehman & Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 1-2 (Mar. 3, 2015), <http://www.nyuipp.org/wp-content/uploads/2013/03/Ehman-Reosti-2015-nyujlp-quorum-1.pdf>.

⁴⁸ As a result, landlord policies or practices that ban individuals with criminal records wholesale potentially violate the Fair Housing Act, given the disparate impact on Black and Latino applicants. As of this writing, The Fortune Society, an organization that provides a range of services for and advocates on behalf of individuals with criminal records has filed a lawsuit challenging a landlord’s rental ban. Mireya Navarro, *Lawsuit Says Rental Complex in Queens Excludes Ex-Offenders*, N.Y. Times, Oct. 30, 2014. Also at the time of this writing, the United States Supreme Court has yet to decide *Texas Department of Housing and Community Affairs et al. v. The Inclusive Communities Project Inc.*, argued on January 21, 2015, which involves the question of whether disparate impact claims are cognizable under the Fair Housing Act.

⁴⁹ For a detailed discussion about private companies that sell criminal background check information to landlords, employers, and other industries, see JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 70-90 (2015). See also Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 970 (2013) (“The automation and availability of criminal record data have made it easier for landlords and employers to conduct criminal background checks.”).

⁵⁰ Special Message, *supra* note 3.

President Johnson then talked about the steps his administration had taken to help address these issues. Here, he mentioned the passage of the Prisoner Rehabilitation Act in 1965, which he described as “the most significant legislative reform in modern American penology.”⁵¹ He focused on employment. He stated that as a result of this Act, “hundreds of prisoners already are working in daytime jobs as they finish their sentences at night...[l]earning job skills that will bring dignity to themselves and support to their families.”⁵² Later in his message, President Johnson called for reexamination of “the policies of all federal departments and agencies regarding the hiring of released ‘good risk’ offenders,” and “urge[d] the states, local governments and private industry to do the same.”⁵³

Fifty years later, the employment prospects and economic mobility for individuals who have exited U.S. prisons or otherwise have criminal records are dismal. A well-regarded analysis found that through forty-eight years of age, incarceration reduces the lifetime earnings of formerly incarcerated White men by 52 percent, Latino men by 41 percent, and Black men by 37 percent.⁵⁴ The “lost earnings associated with incarceration” equal 9 percent of total Black male earnings, 6 percent of total Latino male earnings, and 2 percent of total White male earnings.⁵⁵

Those with criminal records must confront the collateral consequences that attach to each and every criminal conviction in the U.S. (obviously in varying degrees based upon type and classification of crime). These consequences reach into the tens of thousands, the majority of which apply to employment.⁵⁶ Criminal convictions bar individuals from numerous professions. Also, licensing authorities have vast discretion to determine whether or not to issue job-related licenses to individuals with criminal records.⁵⁷

In addition to the legal restrictions, private employers simply do not like to hire individuals with criminal records. They particularly do not like to hire Black men who have criminal records. While criminal records reduce employment opportunities significantly for *all who have one, they have particular impact on Black men looking for work.*⁵⁸ One study has found that an arrest

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 12, tbl.1 (2010), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf.

⁵⁵ *Id.*

⁵⁶ See Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 2012 NAT’L INST. JUST. J. 42, 44 (the American Bar Association, as part of an effort to collect the various collateral consequences rooted in federal and state laws, at one point identified over 38,000 consequences, 80 percent of which involved employment).

⁵⁷ Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 492-93 (2010) (“Scores of jobs require occupational licenses, and state and municipal licensing agencies often have authority to conduct background checks with discretion to deny licenses based on an applicant’s criminal history.”)

⁵⁸ *E.g.*, DEVAH PAGER, MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION 58-59 (2001) (Milwaukee study found that criminal record reduced callbacks by 50 percent for White testers and 60 percent for Black testers); Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Am. Acad. Political & Soc. Sci. 195, 199 (2009) (New York City study found that criminal record reduced callback or job offer for White men by 30 percent and for Black men by 60 percent).

record (without an actual criminal conviction) impacts Black men more significantly.⁵⁹ Of even more importance, a pair of studies found that Black men *without* a conviction record or arrest record were *less likely* to receive a callback than White men with the respective records.⁶⁰ An additional study in New York City included Latinos and found that “the white applicant with a criminal record...does just as well, if not better, than his minority counterparts with no criminal background.”⁶¹

Conclusion

From 2010 to 2013, the median wealth of White households increased from \$138,600 to \$141,000.⁶² During this same time period, the median wealth of Latino households decreased from \$16,000 to \$13,700, and of Black households from \$16,600 to \$11,000.⁶³ While there are many factors that contribute to the racial wealth gap,⁶⁴ criminal records play a significant role, given the overwhelming numbers of Blacks and Latinos who are introduced to the criminal justice system and leave it with records that choke educational opportunities, housing, employment, financial savings, and intergenerational wealth.

The breadth of collateral consequences that were enacted in the 1980s and 1990s and the easy access to criminal records make moving past a criminal record today more difficult than perhaps at any point in U.S. history, particularly for poor individuals of color. These consequences have unraveled, in very significant ways, some of the historic 1960s laws that strove to make life more bearable, durable, and sustainable for those who were struggling and suffering. One half century later, the multiple stigmas that attach to race and criminal records stand in the way of participating in the Great Society. •

⁵⁹ This study took place in Minneapolis/St. Paul and examined the impact of a low-level arrest on employment opportunities. The criminal record consisted solely of a disorderly conduct arrest, with no subsequent charge or conviction. The callback rate for White testers who reported the arrest was 34.7 percent while the callback rate for Blacks was 23.5 percent. Christopher Uggen et al., *The Edge of Stigma: An Experiential Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 637 (2014).

⁶⁰ PAGER, *supra* note 58, at 56 (17 percent of White testers with the record received a callback, compared to 14 percent of Black testers without the record); Uggen, *supra* note 59, at 638, fig. 3 (34.7 percent of White testers with the arrest record received a callback compared to 27.5 percent of Black testers without the arrest record).

⁶¹ Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOCIOLOGICAL REV. 777, 785 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2915472/>.

⁶² Rakesh Kochar & Richard Fry, *Wealth Inequality Has Widened along Racial, Ethnic Lines Since End of Great Depression*, PEW RESEARCH CENTER (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

⁶³ *Id.*

⁶⁴ One key factor over the last several years has been the foreclosure crisis that has devastated Black homeowner equity disproportionately. *E.g.*, Kimbriell Kelly et al., *Broken by the Bubble: In the Fairwood Subdivision, Dreams of Black Wealth Were Dashed by the Housing Crisis*, WASH. POST, JAN. 25, 2015, <http://www.washingtonpost.com/sf/investigative/2015/01/25/in-fairwood-dreams-of-black-wealth-foundered-amid-the-mortgage-meltdown/> (Prince Georges County, Maryland, “the wealthiest majority-black county in the United States . . . was also the epicenter for mortgage crises in Maryland”).

Shackles Beyond the Sentence: How Legal Financial Obligations Create a Permanent Underclass

Spearlt¹

In the depths of poverty in America, among the poorest of the poor, are prisoners and ex-prisoners. Sociological studies demonstrate that those convicted of crimes tend to be greatly disadvantaged prior to conviction.² The majority of individuals in American jails and prisons are functionally illiterate,³ and 68 percent of prisoners nationwide lack a high school diploma.⁴ In prison, if an inmate works, it is generally below minimum wage, usually for pennies on the dollar.⁵ Once released, ex-prisoners are largely excluded from meaningful employment; or if they luck out and find work, it is characterized by low mobility and high turnover.⁶ The struggle for solvency under such conditions is always survival-mode; yet when courts attach “legal financial obligations” (“LFOs”) to a felony conviction, the aggregate effect is a class of citizen that is always indebted to the state—a financial slave in a system where it is virtually impossible to “pay” one’s debt to society.

Poverty concentrates in ethnic minority communities. As ethnic minorities have the highest rates of incarceration⁷ and make up the majority of prison inmates,⁸ this story of class necessarily emphasizes disadvantage along color lines. That felons are burdened by heavy debt, in turn, burdens their communities disparately; the reintegration of economically debilitated ex-prisoners burdens communities whose market conditions are already characterized by under-resourcing and high unemployment.

LFOs add to an array of legal consequences that create a permanent underclass. Such penalties keep a lock on individuals long after they leave prison. It is a schema that serves little social or penal purpose, and instead embodies the worst of bad policy undermining the criminal justice system.

This essay argues that such financial penalties literally make the poor pay for failed criminal justice policy. Reliance on mass imprisonment has created a financial vortex, which sucks away the

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² Alexis Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010).

³ *Literacy Statistics*, BEGIN TO READ, www.begintoread.com/research/literacystatistics.html (last visited May 26, 2015).

⁴ CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS (revised Apr. 15, 2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf>.

⁵ Sara Flounders, *The Pentagon and Slave Labor in U.S. Prisons*, GLOBAL RESEARCH (Feb. 4, 2013), <http://www.globalresearch.ca/the-pentagon-and-slave-labor-in-u-s-prisons/25376>.

⁶ BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 123-25 (2007).

⁷ These figures were calculated by the Prison Policy Initiative, which showed incarceration rates for Whites at 380, Latinos at 966, and Blacks at 2207 per 100,000 in the population. Peter Wagner, *United States Incarceration Rates by Race and Ethnicity*, 2010, PRISON POLICY INITIATIVE (2012), <http://www.prisonpolicy.org/graphs/raceinc.html>.

⁸ E. ANN CARSON, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (revised Sept. 30, 2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf> (The Bureau of Justice Statistics calculated that male Blacks and Latinos made up 59 percent of state and federal inmates).

majority of over \$50 billion spent on corrections by the states alone.⁹ This penal entrenchment has pushed legislatures to devise ways to make criminals help foot the bill,¹⁰ with LFOs representing a modern iteration of state and local fundraising. Despite these efforts, total fee collections thus far have been modest, and in worst-case scenarios, it is uncertain whether there is any contribution at all to criminal justice budgets due to the unaccounted costs involved in administering LFOs.¹¹ Despite such gaps in knowledge, states have growingly turned to imposing such penalties against criminal offenders.

States Increasingly Imposing LFOs

Although research on the subject is sparse,¹² imposing financial obligations upon criminals is a growing trend.¹³ These sanctions may include fees, fines, restitution orders, and other legal obligations imposed by the courts and other criminal justice agencies.¹⁴ Other penalties may include fees for supervision, program participation, electronic monitoring services, jail/prison costs, and health care, and other fees levied in addition to any civil penalties and child support obligations.

Fines are nothing new in terms of punishment, although they have been imposed more in some eras than others.¹⁵ The Eighth Amendment of the U.S. Constitution forbids “excessive fines,” yet the Supreme Court has not created a robust jurisprudence in the area, ruling only once that a forfeiture violated the Constitution.¹⁶

Today, the various fees are numerous. In some states, judges may impose nearly twenty fees and fines on felony defendants at the time of sentencing.¹⁷ In addition, criminal justice agencies,

⁹ NAT’L ASS’N OF STATE BUDGET OFFICERS, STATE SPENDING FOR CORRECTIONS: LONG-TERM TRENDS AND RECENT CRIMINAL JUSTICE POLICY REFORMS 1-2, available at <https://www.nasbo.org/sites/default/files/pdf/State%20Spending%20for%20Corrections.pdf>.

¹⁰ See, e.g., ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4, (2010), available at <http://csjjusticecenter.org/wp-content/uploads/2010/10/2010-Brennan-Center-CJ-Debt-Barrier-to-Reentry.pdf> (describing how “[c]ash-strapped states have increasingly turned to user fees to fund their criminal justice systems, as well as to provide general budgetary support.”); see also Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUBL. POL’Y 505 (2011).

¹¹ See, e.g., BANNON ET AL., *supra* note 10, at 10 (describing a fifteen-state study in which “none of the fifteen states studied had any kind of process for measuring the impact of criminal justice debt and related collection practices on former offenders, their families, or their communities. And even though fees are imposed as a revenue-generating measure, none of the fifteen had a statewide process for tracking the costs of collection.”).

¹² See Harris et al., *supra* note 2, at 1753 (“little is known about the frequency with which monetary sanctions are actually imposed across the United States”).

¹³ *Id.* at 1755-56 (finding that “monetary sanctions are now imposed by the courts on a substantial majority of the millions of U.S. convicted of felony and misdemeanor crimes each year”); see also Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 2, 2012, http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html?smid=pl-share&_r=0.

¹⁴ See Harris et al., *supra* note 2, at 1756. For a recent compilation of LFO studies, see *Legal Financial Obligations (LFOs)*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, <http://csjjusticecenter.org/courts/legal-financial-obligations/>.

¹⁵ See Harris et al., *supra* note 2, at 1758.

¹⁶ United States v. Bajakajian, 524 U.S. 321, 324 (1998); for a brief survey of Court jurisprudence, see also Steven Toscher & Barbara Lubin, *When Penalties Are Excessive-The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty*, J. TAX PRAC. & PROC. 69, 69 (2010), available at http://www.taxlitigator.com/main/images/stories/Articles/FBAR_Penalty.pdf.

¹⁷ See e.g., Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 SEATTLE J. FOR SOC. JUSTICE 963, 964 note 5 (2013).

including departments of corrections and private prison companies, are authorized to charge inmates for the cost of their imprisonment, supervision, and court-mandated tests.¹⁸ Other agencies may charge collection fees as well as interest on delinquent accounts. The net effect of these burdens is concentration of financial failure in the most depressed segments of society.

Drawing Blood from Stones: Impoverishing the Poor

Understanding monetary sanctions is critical to understanding how the justice system creates inequality. The existing research paints an ominous picture for convicts and their communities due to the harsh effects of incarceration and financial penalties. As most felony convicts are indigent prior to incarceration, LFOs aim for pockets that are already empty.

Imposing monetary sanctions on offenders is a little studied, yet powerful, means of reproducing inequality.¹⁹ The amounts can be significant in respect to the average annual earnings for ex-prisoners, with a substantial majority—80 to 90 percent—of individuals charged with crimes eligible for free court-appointed counsel. This means that sanctions are relatively large in respect to expected earnings.²⁰ Black males have borne, and continue to bear, the brunt of mass imprisonment, comprising 37 percent of all prisoners in 2013, the largest portion of male inmates under state or federal jurisdiction.²¹

The combination of indigence and debt leads to an array of economic setbacks. Prominent among these are unemployment, depressed credit ratings, heightened housing instability, and homelessness. Many cannot open traditional bank accounts and may be compelled to borrow on less favorable terms, paying more for loans, services, and goods.²²

In some states the LFO penalty scheme is harsh. In Washington, for example, “sentencing courts may impose many LFOs without determining whether offenders are able to pay.”²³ The sanction begins accruing interest from the date of conviction at 12 percent until the LFOs and interest are paid in full.²⁴ Courts cannot defer interest during incarceration,²⁵ and neither LFOs nor interest can be discharged in bankruptcy.²⁶ Once released, offenders may then apply for a waiver or reduction of the interest they have accrued on LFOs.²⁷ Moreover, under some circumstances, offenders may be jailed for failing to pay their LFOs.²⁸ The repayment period can be lengthy, as one commentator has calculated:

¹⁸ See Harris et al., *supra* note 2, at 1759.

¹⁹ *Id.* at 1755.

²⁰ See Beckett & Harris, *supra* note 10, at 516.

²¹ See CARSON, *supra* note 8, at 1.

²² See Harris et al., *supra* note 2, at 1763.

²³ Michael L. Vander Giessen, *Legislative Reforms for Washington State's Criminal Monetary Penalties*, 47 GONZ. L. REV. 547, 550 (2012).

²⁴ WASH. REV. CODE § 10.82.090 (amended 2015).

²⁵ State v. Claypool, 45 P.3d 609, 610 (Wash. Ct. App. 2002) (construing WASH. REV. CODE § 10.82.090 (AMENDED 2015)).

²⁶ 11 U.S.C. § 523(a)(7)(Supp. IV 2010); See also Kelly v. Robinson, 479 U.S. 36, 50 (1986); See also State v. Cunningham, 69 P.3d 358, 358 (Wash. Ct. App. 2003).

²⁷ WASH. REV. CODE § 10.82.090(2) (amended 2015).

²⁸ AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 81 (2010), available at <http://csgjusticecenter.org/wp-content/uploads/2013/07/2010-ACLU-report.pdf>.

The mean LFO assessment for a single conviction is \$2,540 and the median is \$1,347. Add the additional LFOs assessed by probationary or correctional departments and multiple convictions, and most offenders owe around \$7,234. At that level, and with the accumulation of interest, offenders who pay fifty dollars per month will still have debt in thirty years.²⁹

The Darkest Shades of Poverty

Because ethnic minorities make up the majority of convicted felons, they are statistically more likely to be subject to LFOs. As relocation patterns are not random, people leaving prison are more likely to return to places where they have family or friends.³⁰ As such, the penalties not only work against the poorest in society, but also work disproportionately against minority communities since they are forced to absorb more returning felons.

The amount of these debts in some situations is striking. For example, in one county in Washington, offenders owe more than \$500 million in outstanding LFO debt,³¹ with Latino defendants in this state receiving significantly greater LFOs than similarly situated non-Latino defendants.³²

These communities suffer a dual blow since the high debt occurs in places already suffering from other collateral consequences of felony convictions. Such places are home to politically impotent populations, which include many disenfranchised offenders. The offender is thus resigned to such a neighborhood permanently or, as is too often the case, winds up in prison again.

Monetary sanctions contribute to a cycle that devastates across class and color lines, and such penalties must be reconsidered. Offenders already pay with imprisonment and time away from their lives, family, and society; imposing financial sanctions beyond only contributes to a system of indentured servitude.

Thinking Forward

Countering the underdevelopment of communities demands a bold course of action. Conviction and incarceration already reduce the employment prospects and earning capacity of those with criminal records.³³ Adding unpayable LFOs to this burden divests an individual from the greater society.³⁴ At worst, it helps set conditions for the individual to resort to extralegal means of sustenance and sets the conditions for return to prison.

²⁹ See Giessen, *supra* note 23, at 552.

³⁰ See Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 845 (2006).

³¹ Susan Kelleher, *Unpaid Court Costs Can Bring Cycle of Debt, Threat of Jail, ACLU Warns*, THE SEATTLE TIMES, OCT. 3, 2010, available at http://seattletimes.com/html/localnews/2013066985_debtor04m.html.

³² TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, PRELIMINARY REPORT ON RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM 1, available at http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_030111.pdf.

³³ See generally Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as Labor Market Institution*, 104 AM. J. SOC. 1030 (1999); see also Devah Pager, *Marked: Race, Crime and Finding Work in an Era of Mass Incarceration* (2007).

³⁴ Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349 (2012).

It is first critical to recognize that LFOs do not operate in a vacuum, but in a greater system of collateral consequences. The two are indeed intimately connected in jurisdictions that make restoration of civil rights hinge on full payment of LFOs. As repayment of LFOs can take some decades, the restoring of civil rights can take equally long.³⁵ Hence, on their own, LFOs have the potency to create an underclass. Yet even if there were no such thing as an LFO, the collateral consequences of a felony conviction present many obstacles to successful reintegration. Thus, reforming LFOs sits within the broader need to rethink collateral consequences as a whole. Such laws have made survival on the outside a difficult feat, even though legislation like the Second Chance Act provides federal funding to local governments to run reentry programs; the legislation will ring rhetorical as long as releases remain chained to poverty.³⁶

The decision to attach financial penalties is particularly harmful since prisoners have few self-improvement opportunities in prison. Since the passing of legislation in 1994 barring Pell grant funding to state and federal prisoners, there are few opportunities for higher education or even vocational training in prison. As degrees are often required for meaningful employment, LFOs and lack of education combine to cripple individuals from ever moving beyond last-class status. Moving forward politically will entail scaling back LFOs and collateral consequences, and reducing the number of obstacles for felons to reintegrate into society.

Finally, the constitutional question of whether a fine is excessive needs revisiting. According to the Court, the prohibition on excessive fines has never been fully incorporated against the states.³⁷ Although the excessive fines clause has been in existence for over two hundred years, the Court has failed to make this meaningful against a state's application of fines as punishment.

It is time for the Supreme Court to review this aspect of its Eighth Amendment jurisprudence, and do the right thing by incorporating excessive fines against the states. It has been only very recently that Excessive Fines Clause jurisprudence has experienced a revival.³⁸ However, it still seems conspicuous that the bill of rights—in its near entirety—has been incorporated against the states, while there are still seemingly no limits to financial punishments. This omission, authorized by the judicial branch of government, breeds an heir of suspicion.

Furthermore, the Court must settle the issue of whether one's ability to pay should factor into what is "excessive." Circuits are split on the issue. Some hold that the penalty must not be "grossly disproportionate in relation to" the offense, and have generally not regarded an offender's ability to pay the fine as relevant in the Eighth Amendment context.³⁹ The emerging approach requires courts to consider an additional factor as well—whether "the contemplated fine or forfeiture [will] be so severe as to destroy a defendant's livelihood."⁴⁰

This essay urges the Court to settle this score and hold that "excessive" is relational and, in addition to the level of crime committed, must respect the offender's ability to pay. The financial

³⁵ *Id.* at 390 (summarizing appellate court decisions that have concluded that payment of LFOs before the restoration of voting rights is constitutional, regardless of a persons ability to pay.).

³⁶ See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (providing federal funding for state and federal reentry programs).

³⁷ *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 765 n. 13 (2010).

³⁸ Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013).

³⁹ *Id.* at 834-35.

⁴⁰ *Id.* at 835 & n.7.

costs must be weighed in light of the offender's employment prospects and restrictions that bar felons from other rights and privileges. For these individuals, the harm is "excessive," but this aspect is subsumed by objective, one-size-fits-all fining schemes; fines, interest, capitalization, and cross-collateralization, are only punitively sensible with respect to a person's financial worth and prospects for paying. As what is manageable for one could be financial death for another, failure to consider the defendant's position can sanction punishment so severe that it destroys hope for a livelihood. In this ongoing economic slaughter, all branches of government wear stains, including a judiciary that is reluctant to make "excessive fines" meaningful as a mode of redress.

The inability to enforce this provision is engulfing communities in poverty and class bias. As scholars have argued, the imposition of monetary sanctions is "incompatible with policy efforts to enhance reintegration, lacks a convincing penological rationale, and raises numerous concerns about justice and fairness."⁴¹ For those struggling to set their lives straight after release, it spells ruin. This has been the understanding of at least one state that decided against additional inmate fees, finding that the burden would lead "to a host of negative and unintended consequences."⁴²

If monetary sanctions are to be effective, they must be structured in a way that makes sense, such that offenders can actually pay.⁴³ Toward this end, it has been recommended that "consistent guidelines regarding determination of indigence and policies for assessing and collecting LFOs should be implemented in every jurisdiction to guard against arbitrary or racially skewed discrepancies in punishment."⁴⁴ LFOs may be most effective when instituted under principles of day fine systems. Such fining systems typically impose fines with respect to the offender's actual financial situation and often *in lieu of incarceration*.⁴⁵ Under such a scheme, the individual has a means of finding a job and can begin immediately paying the fine, while taxpayers are spared the burden of processing, housing, and maintaining another inmate.

Today's courts, however, impose harsh financial penalties in addition to imprisonment. Present policies force offenders to spend their time idly, watching their debt grow into a master that will enslave long after the body is free. The state's failure to equip offenders with education or vocational training as a strategy to pay the penalties reveals a breakdown in the system. •

⁴¹ See Beckett & Harris, *supra* note 10, at 509-10.

⁴² MASSACHUSETTS EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY, REPORT OF THE SPECIAL COMMISSION TO STUDY THE FEASIBILITY OF ESTABLISHING INMATE FEES, INMATE FEES AS A SOURCE OF REVENUE REVIEW OF CHALLENGES 4 (July 1, 2011), available at http://www.prisonpolicy.org/scans/inmate_fee_final_7-1-11.pdf.

⁴³ See, e.g., ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOL KIT FOR ACTION 33-36 (2012), available at <https://www.brennancenter.org/sites/default/files/legacy/publications/Criminal%20Justice%20Debt%20Background%20for%20web.pdf> (offering recommendations for better penalty structures).

⁴⁴ See AM. CIVIL LIBERTIES UNION, *supra* note 28, at 11.

⁴⁵ See generally, EDWIN W. ZEDLEWSKI, NATIONAL INSTITUTE OF JUSTICE, ALTERNATIVES TO CUSTODIAL SUPERVISION: THE DAY FINE (May 2010), available at <http://csgjusticecenter.org/wp-content/uploads/2013/07/2010-day-fines.pdf>.

Their Debt to Society

Erika L. Wood¹

On August 4, 2014, in broad daylight on a hot summer day in the small Midwestern city of Ferguson, Missouri, an unarmed Black teenager was shot dead in the street by a white police officer. The incident was shocking. Protests erupted and the media descended. Similar events have happened too many times in the past; and they have already repeated in the months since. But this shooting, at this moment, got the country's attention. In the split second it took for Michael Brown to be killed, the Ferguson police department and its tangled web of municipal courts and local politics came under the national spotlight.

That spotlight, intensified by a Department of Justice ("DOJ") investigation, revealed an intricate penal system where laws and punishments were deployed to simultaneously raise revenue for town coffers and oppress the Black community. The DOJ found that Ferguson's law enforcement practices "are shaped by the City's focus on revenue rather than by public safety needs."² According to the DOJ, this emphasis on revenue contributed to a pattern of unconstitutional policing and frequent due process violations by its municipal court system. And race played its part. The DOJ declared that Ferguson's police and municipal court practices "reflect and exacerbate existing racial bias, including racial stereotypes."³

But Ferguson is not unique. During its investigation, the Department of Justice peeled back the layers of municipal bureaucracy to reveal a criminal justice system that is both nefarious and common. Studies of other states and localities before and since Ferguson expose intricate systems where fines and penalties are levied and enforced so that the local police department, courts, jails, and probation officers are all financed on the backs of the defendants brought before them. In other words, the more defendants brought into the system, the more revenue is generated to pay for salaries, pensions, uniforms, and equipment. The system's purpose is no longer public safety; it is money. In the words of the DOJ report, Ferguson officials "consistently set maximizing revenue as the priority for Ferguson's law enforcement activity."⁴

A criminal conviction brings with it a package of financial obligations that fall into three basic categories: fines, restitution, and fees. Fines are intended to be part of the punishment, defined and detailed in the criminal code and incurred as part of the criminal sentence. Restitution is intended to help compensate victims for harm suffered. But fees have the sole purpose of generating revenue, and they have increased dramatically in both type and amount in recent years.⁵

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² U. S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (March 4, 2015) [hereinafter "DOJ Report"], available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

³ *Id.*

⁴ *Id.* at 9.

⁵ ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7 (2010), <http://csgjusticecenter.org/wp-content/uploads/2010/10/2010-Brennan-Center-CJ-Debt-Barrier-to-Reentry.pdf>; see also Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR, May 19, 2014, <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> (since 2010, 48 states have increased criminal and civil court fees.).

User fees, those fees charged to defendants involved in (or “using”) the criminal justice system, vary widely by jurisdiction.⁶ They are imposed by the municipality, county, state, or all three.⁷ Some jurisdictions charge a defendant a fee just to apply for a public defender. Once a person is approved for a public defender, a determination that necessarily hinges on the individual’s proof of indigence, he or she may be charged a reimbursement fee for the costs of defense services.⁸ Some jurisdictions even charge fees to reimburse the state for the cost of *prosecuting* the defendant.⁹

Most states have a wide range of “surcharges” and administrative fees that are imposed at various times throughout the process. If the defendant is sentenced to incarceration, he or she may be charged a “pay to stay” fee intended to defray the cost of incarceration.¹⁰ If placed on probation or other community supervision, individuals may then be charged a monthly fee intended to help cover the cost of supervision.¹¹ Some jurisdictions charge an administrative fee to set up a payment plan for those who cannot afford to pay the entire debt at once.¹²

Thirteen states contract with private companies to manage probation.¹³ These companies offer their services free to a municipality and then charge the individuals under supervision to make their profit, with incarceration as the penalty for nonpayment. The system is known as “offender funded.”¹⁴ One advertisement for the Georgia-based company Freedom Probation Services states, “If your municipality is looking to reduce incarceration rates and increase the collection of fines and court costs in the municipal court, please give our office a call today.”¹⁵ Similarly, Alabama Court Services, another private company, declared, “All services are provided at no charge to the courts that we serve. . . . All programs are offender funded.”¹⁶

In addition to the fees themselves, many jurisdictions charge interest, collection fees, and penalties for late payments. The state of Washington charges 12 percent interest assessed annually on outstanding criminal justice debt.¹⁷ Individuals in Michigan are charged a 20 percent late fee after fifty-six days.¹⁸ In Alabama, individuals must pay a collection fee of 30 percent of the amount due if their payments are ninety days overdue.¹⁹ Florida law authorizes private collection agencies to charge individuals up to a 40 percent surcharge on the amount collected.²⁰

⁶ BANNON ET AL., *supra* note 5, at 7-11; see also *State-by-State Court Fees*, NPR, <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees> (last visited Jun. 1, 2015)

⁷ *Id.*

⁸ *Id.* at 12; see also Adam Liptak, *Debt to Society Is Least of Costs for Ex-Convicts*, N.Y. TIMES, Feb. 23, 2006, http://www.nytimes.com/2006/02/23/national/23fees.html?pagewanted=all&_r=0.

⁹ Shapiro, *supra* note 5.

¹⁰ NPR, *State-by-State Court Fees*, *supra* note 6.

¹¹ *Id.*

¹² BANNON ET AL., *supra* note 5, at 14, 18.

¹³ Tina Rosenberg, *Out of Debtors’ Prison, with Law as the Key*, N.Y. TIMES, Mar. 27, 2015, http://opinionator.blogs.nytimes.com/2015/03/27/shutting-modern-debtors-prisons/?_r=0 (last visited Jun. 1, 2015).

¹⁴ Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit from Injustice?*, THE NEW YORKER, Jun. 23, 2014, <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc> (last visited Jun 1. 2015).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ AM. CIVIL LIBERTIES UNION, MODERN DAY DEBTORS’ PRISONS 4 (Feb. 2014), available at <https://aclu-wa.org/sites/default/files/attachments/Modern%20Day%20Debtor%27s%20Prison%20Final%20%283%29.pdf>

¹⁸ BANNON ET AL., *supra* note 5, at 17.

¹⁹ *Id.*

²⁰ *Id.*

Not surprisingly, these fees add up quickly. And with interest and penalties, individuals find themselves deep in debt. A 2010 report by the Brennan Center for Justice includes a docket sheet for a Pennsylvania woman convicted of a drug crime. She incurred 26 different fees, including \$100.00 for the cost of “police transport” after her arrest and a “service charge” of \$230.00.²¹ Altogether, her fees totaled \$2,464: an amount three times larger than both her fine and restitution combined.²² Similar stories echo in towns and cities across the U.S.

Being in debt to the criminal justice system is serious. Enforcement is not limited to annoying calls from creditors or threatening letters in the mail. Rather, collection of criminal justice debt is levied by law enforcement. In many states, driver’s licenses are suspended for missed payments, causing those who are employed to miss work and then to fall further behind in their payments.²³ In several states, probation and parole can be revoked, or default can result in re-arrest on the charge of failing to pay.²⁴

Although, in theory, debtors’ prison has been outlawed in the U.S. for two centuries, it remains a reality for poor people entangled in the criminal justice system. The Brennan Center report identifies four common paths to debtors’ prison: (1) denial or revocation of probation or parole; (2) civil or criminal enforcement proceedings that result in incarceration; (3) “choosing jail” — some programs “allow” defendants to pay down their debt by spending time in jail; and (4) arrest and pre-hearing incarceration, when an individual is arrested for failure to pay and is incarcerated pending a hearing on his or her ability to pay.²⁵

The New York Times recently featured the story of Jack Dawley from Norwalk, Ohio, who was released from prison in 2007 with \$1,400 in debt to the municipal court.²⁶ Mr. Dawley paid down his debt steadily for four years, but a back injury in 2012 caused him to miss a payment. He was arrested and jailed for ten days. When he got out, he had ninety days to make a payment. He failed and went back to jail. Later in 2012, he got a job as a cashier. He was on his way to cash his first paycheck when he was again arrested for failing to make a payment and sent back to jail. He missed eight days of work and lost his job. Jail. Default. Jail. Repeat.

A closer look at these paths to debtors’ prison reveals that there is something motivating these enforcement tactics besides just money. Incarceration is expensive. In 2012, the Vera Institute of Justice estimated that the average annual cost of incarceration in the U.S. was \$31,286 per inmate.²⁷ The Ohio Department of Rehabilitation and Correction reports that its daily cost per inmate is \$164.²⁸ That means Ohio spent about \$3,300 to incarcerate Mr. Dawley for two ten-day periods, more than twice the amount of his original 2007 debt. Why spend more to incarcerate someone than could possibly be recouped in the process? From a purely budgetary perspective, it just does not make sense.

²¹ *Id.* at 9.

²² *Id.*

²³ *Id.* at 24.

²⁴ *Id.* at 25

²⁵ *Id.* at 20.

²⁶ Rosenberg, *supra* note 13.

²⁷ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAX PAYERS 9, (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

²⁸ Ohio State Penitentiary, *Institutional Information*, OHIO DEP’T OF REHAB. & CORR. (last visited May 27, 2015), <http://www.drc.ohio.gov/public/osp.htm>.

The answer lies in our country's long and troubled history of mass incarceration. The "tough on crime" movement and the politicization of criminal justice policies in the 1960s and '70s resulted in increased policing and mandatory drug sentencing laws. The result of these policy changes is no surprise. Incarceration rates skyrocketed, increasing by more than 500 percent between 1970 and 2000. Today the United States is the world's leader in incarceration, with 2.2 million people currently in the nation's prisons or jails. Our country has become over-reliant on incarceration, making it the usual default response to wrongdoing.

These new policies are not color blind. This rise of incarceration has fallen heavily on Black communities. The DOJ report found that the effects of Ferguson's police and court practices are experienced disproportionately by Black people. The Report includes some startling statistics: Blacks make up 67 percent of Ferguson's population, but from 2012 to 2014 they accounted for 85 percent of vehicle stops, 90 percent of citations, and 93 percent of arrests.²⁹ Of those subjected to one of the most severe actions Ferguson imposes—actual arrest for an outstanding municipal warrant—96 percent were Black.³⁰ The DOJ describes a phenomenon in Ferguson that is replicated in municipalities large and small across the country:

African Americans experience the harms of the racial disparities identified [in the report] as part of a comprehensive municipal justice system that, at each juncture, enforces the law more harshly against Black people than others. The disparate impact of Ferguson's enforcement action is compounding: at each point in the enforcement process there is a higher likelihood that an African American will be subjected to harsher treatment; accordingly, as the adverse consequences imposed by Ferguson grow more and more severe, those consequences are imposed more and more disproportionately against African Americans.³¹

While the disparities listed in the DOJ Report are striking, they are not unusual. Nationwide, Black people are 13 percent of the general population but make up nearly 40 percent of the prison population.³² In Missouri, Black people are 12 percent of the population but 38 percent of the prison population.³³ In Mr. Dawley's home state of Ohio, Black people are 12.5 percent of the total state population, but 44 percent of the state's prison population.³⁴ The disparity is even greater in Pennsylvania, where the woman incurred 26 different fees for a drug arrest; there Blacks make up 11.5 percent of the state population but 48 percent of the prison population.³⁵

In local towns and cities across the country, law enforcement practices have increasingly focused on generating revenue rather than protecting public safety. This emphasis on revenue, coupled

²⁹ DOJ Report, *supra* note 2, at 4.

³⁰ *Id.* at 5.

³¹ *Id.* at 63.

³² U.S. CENSUS BUREAU, *STATE AND COUNTY QUICKFACTS* (APR. 29, 2015), available at <http://quickfacts.census.gov/qfd/states/00000.html>; THE SENTENCING PROJECT, *Facts about Prisons and People in Prisons* (Jan. 2014), available at http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf.

³³ U.S. CENSUS BUREAU, *Missouri QuickFacts* (Apr. 22, 2015), available at <http://quickfacts.census.gov/qfd/states/29000.html>; MISSOURI DEP'T OF CORR., *A Profile of the Institutional and Supervised Offender Population on June 30, 2014* at 13, available at <http://doc.mo.gov/Documents/publications/Offender%20Profile%20FY14.pdf>.

³⁴ U.S. CENSUS BUREAU, *Ohio QuickFacts* (Apr. 22, 2015) available at <http://quickfacts.census.gov/qfd/states/39000.html>; OHIO DEP'T OF REHABILITATION & CORR., *Institution Census 2015*, available at <http://www.drc.ohio.gov/web/Reports/InstitutionCensus/Institution%20Census%202015.pdf>.

³⁵ U.S. CENSUS BUREAU, *Pennsylvania QuickFacts* (Apr. 22, 2015), available at <http://quickfacts.census.gov/qfd/states/42000.html>; Pennsylvania Dep't of Corr., *Annual Statistical Report 12* (2013), available at <http://www.cor.pa.gov/Administration/Statistics/Documents/Reports/2013%20Annual%20Statistical%20Report.pdf>.

with the long history of over-reliance on incarceration and implicit and explicit racial bias, has created a system that no longer recognizes the due process and equal protection that our Constitution guarantees for every citizen. Put simply, punishment should not hinge on one's race or one's wealth. When discussing punishment, Americans often resort to a common platitude that those who do wrong must "pay their debt to society." But this phrase both legitimizes the use of wealth to determine punishment, and absolves us of responsibility for the wealth-based criminal justice system that we have created: The wealthy who do wrong incur less debt, pay their debt quickly, and never look back; while the poor remain trapped in the cycle: Jail. Default. Jail. Repeat. •

The Overincarceration of America's Poor: The Return of Debtors' Prisons

Reginald T. Shuford¹

The shooting death of Black teenager Michael Brown, by White police officer Darren Wilson, shone a national spotlight on some deeply troublesome practices in Ferguson, Missouri. Brown's death sparked outrage and helped fortify a movement—#BlackLivesMatter—launched after the acquittal of Trayvon Martin's killer. BlackLivesMatter, which gained momentum after Brown was killed, demands an end to the unnecessary killing of Black men and accountability when those deaths transpire, particularly at the hands of law enforcement. Brown's death further spawned an investigation by the United States Department of Justice, which, while exonerating Wilson, nevertheless concluded that "Ferguson law enforcement practices are directly shaped and perpetuated by racial bias."² The scathing report found, among other things, that 85 percent of people subjected to vehicle stops are Black.³ Ninety percent of people hit with citations and 93 percent of people arrested are Black, despite Black people comprising only 67 percent of Ferguson's population.⁴ Notably, Black residents were 26 percent less likely to be found with contraband than White residents.⁵

As rare as findings of intentional racial discrimination are these days, another finding was also striking: the Ferguson Police Department works in concert with city officials and the municipal court system to criminalize and generate revenue from Ferguson's Black residents through excessive ticketing and fines. The investigation concluded that the primary goal of Ferguson's law enforcement apparatus is not public safety. Rather, it is generating revenue for the city's coffers:

City officials routinely urge [Police] Chief [Thomas] Jackson to generate more revenue through enforcement. In March 2010, for instance, the City Finance Director wrote to Chief Jackson that "unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year . . . Given that we are looking at a substantial sales tax shortfall, it's not an insignificant issue." Similarly, in March 2013, the Finance Director wrote to the City Manager: "Court fees are anticipated to rise about 7.5 % I did ask the Chief if he thought the PD could deliver 10 % increase. He indicated they could try." The importance of focusing on revenue generation is communicated to FPD officers. Ferguson police officers from all ranks told us that revenue generation is stressed heavily within the police department, and that the message comes from City leadership.⁶

¹ Executive Director, American Civil Liberties Union of Pennsylvania. I would like to thank my colleagues for their support, wisdom, and inspiration, and most especially their unwavering commitment to fighting for full equality and justice for all Americans. Special thanks to Ryan Very and Devin N. Weber for their research and assistance with this essay.

² U.S. DEP'T OF JUSTICE: CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 70 (2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

³ *Id.* at 4.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 2.

Ferguson's municipal court system features prominently in this shakedown scheme. The court "does not act as a neutral arbiter of the law or as a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City's financial interests."⁷ The court issues arrest warrants, not on the basis of public safety, but as "a routine response to missed court appearances and required fine payments. In 2013 alone, the court issued over 9,000 warrants on cases stemming in large part from minor violations such as parking infractions, traffic tickets, or housing code violations."⁸ The municipal court issued warrants in these situations despite the fact that the underlying code violations themselves hardly justified jail time. And, "until recently, Ferguson also added charges, fines, and fees for each missed appearance and payment."⁹ Ferguson's municipal court is, in essence, no more than a collection agency.

These practices wreak havoc on the lives of Ferguson's poorest and most vulnerable, and cause disproportionate harm to Black residents.¹⁰ Tonya DeBerry's experience is illustrative. Last year, Ms. DeBerry was arrested for failure to pay multiple traffic tickets. She spent two nights in jail until her daughter could post bond of \$300, which she was required to borrow from a neighbor. Ms. DeBerry is unable to work and relies on disability and food stamps. Of course, having to pay bond made it harder to pay the underlying traffic tickets.¹¹ Thus begins the never-ending cycle of debt and despair, indignity and incarceration, for Ms. DeBerry and far too many others, who insist they would pay the fines and fees if they could afford to do so. In another case chronicled in the report, an unnamed Black woman received two citations and a ticket in 2007 for having an illegally parked car. The total cost was \$151. The woman, who was in and out of homelessness for years, was unable to pay the fine. Over the next seven years, she missed several deadlines and court dates. That led to more fees, more deadlines, and more charges. The woman ultimately spent six nights in jail. And she is not done. Despite having paid \$550 in fines and fees, as of December 2014, she still owes \$541, notwithstanding that the initial fine was just \$151.¹²

Ferguson is not unique in these practices. In St. Louis County alone, there are ninety municipalities, many of which sprung up and were zoned to prevent the influx of Black residents. All but a few have their own police force, mayor, city manager, and town council. Eighty-one have their own municipal court.¹³ There are too many towns and not enough taxpayers to sustain them all, so, they resort to petty fines and fees to generate revenue. Some towns derive up to 40 percent of their annual budgets from fines and fees collected by the municipal courts. In 2013, court fines and fees funded nearly 25 percent of Ferguson's municipal budget, netting the city \$2.6 million, its second-largest source of income.¹⁴ While most of the fines are for traffic offenses, there are many

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ Rachele Blidner, *Ferguson Sued for 'Grotesque' Debtors Prison: Lawsuit*, N.Y. Daily News (Feb. 10, 2015), <http://www.nydailynews.com/news/national/ferguson-sued-grotesque-debtors-prison-lawsuit-article-1.2109381>.

¹² Terrence McCoy, *Ferguson Shows How a Police Force Can Turn Into a Plundering 'Collection Agency'*, WASH. POST (March 5, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/ferguson-shows-how-a-police-force-can-turn-into-a-plundering-collection-agency/>.

¹³ Radley Balko, *How Municipalities in St. Louis County, Missouri, Profit From Poverty*, WASH. POST (Sept. 3, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>.

¹⁴ Blidner, *supra* note 11.

other ways to run afoul of the law, including “fare-hopping on [the metro], loud music and other noise ordinance violations, zoning violations for uncut grass or unkempt property, violations of occupancy permit restrictions, trespassing, wearing ‘saggy pants,’ business license violations and vague infractions such as ‘disturbing the peace’ or ‘affray’ that give police officers a great deal of discretion to look for other violations.”¹⁵ Like Ferguson, many of these municipalities issue nearly as many arrest warrants as there are residents, with some issuing more warrants than residents, including one town (Pine Lawn) that issued 7.3 warrants per resident.¹⁶

A National Problem

This trend of aggressively raising revenue from and incarcerating those who cannot pay is hardly limited to St. Louis County, Missouri. It is, in fact, a nationwide phenomenon, arguably more pronounced in southern states, suggesting the resurgence of modern-day debtors’ prisons throughout the country. According to an analysis by the American Civil Liberties Union, “[i]n some Ohio counties, more than one in five bookings are related to failing to pay fines.”¹⁷ In Washington state, as in other places, courts “impose a system of fees, fines and restitution,” all of which “accrue interest and put people at constant risk” of incarceration.¹⁸

Like many states, Tennessee started suspending driver’s licenses for unpaid debts stemming from criminal cases, both misdemeanors and more serious felonies. Kenneth Seay, of Lebanon, Tennessee has lost at least four jobs after being jailed for his inability to pay fines and costs related to a revoked driver’s license.¹⁹ In addition to the court costs, those who lose their license must pay a reinstatement fee. Like Mr. Seay, many cannot afford these fees and costs but drive anyway, either to get to work or due to poor public transportation. Getting caught restarts the cycle of accumulating fines and fees, jail, and unemployment.

Walter Scott’s fatal shooting by Officer Michael Slager on April 4 in North Charleston, South Carolina, stunned the nation and the world. The incident was caught on video, and Officer Slager has been charged with murder. Mr. Scott’s family has since speculated that he fled out of fear of being jailed for being behind on child support payments. Like municipal fines, child support is another driver of the debtors’ prison phenomenon. Mr. Scott had reason to fear. He had been incarcerated before for back child support, as far back as 2008 and at least twice thereafter.²⁰ At the time of his death, he owed just over \$18,000.²¹ According to his brother, Rodney, “Every job he has had, he has gotten fired from because he went to jail because he was locked up for child support. He got to the point where he felt like it defeated the purpose.”²²

¹⁵ Balko, *supra* note 13.

¹⁶ *Id.*

¹⁷ Natalie Hopkinson, *War On The Poor*, STAND, Winter 2015, at 13, 14.

¹⁸ *Id.*

¹⁹ Shaela Dewan, *Driver’s License Suspensions Create Cycle of Debt*, N.Y. TIMES (Apr. 14, 2015), http://www.nytimes.com/2015/04/15/us/with-drivers-license-suspensions-a-cycle-of-debt.html?_r=0.

²⁰ Mark Hensch, *Documents Show No Warrant for Walter Scott’s Arrest*, THE HILL (Apr. 10, 2015, 10:40 AM), <http://thehill.com/blogs/blog-briefing-room/238427-documents-show-no-warrant-for-walter-scotts-arrest>.

²¹ Frances Robles & Shaela Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <http://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html>.

²² *Id.*

Kevin Thompson's incarceration for five days in December 2014 due to his inability to pay \$838 in traffic fines and fees to DeKalb County, Georgia, and a private probation company, Judicial Correction Services (JCS), Inc., represents a trend where for-profit companies are stepping in to assume the role traditionally played by municipal courts in overseeing probation. When Mr. Thompson showed up to court, the judge gave him 30 days to pay his fine and put him on "probation" with JCS. When he was unable to pay the court fines and JCS fees, JCS charged him with violating probation.²³ Mr. Thompson spent five days in jail. He felt sad, scared, and ashamed and, even after being released, feared being arrested and jailed again for no good reason, other than for being poor.²⁴

"Offender-funded" justice is another driver of debtor's prisons:

Beyond bail, unfair fees and fines—and the rising trend of "offender-funded" justice—act as another set of bars keeping defendants locked up. A rash of state and local governments have responded to budget squeezes by forcing the costs of courts and jails onto defendants, charging them for services like room and board in jail, medical care, and even the use of a public defender. (These practices imitate those of private probation, detention, and bail bonds companies.)²⁵

When defendants are unable to pay all of these costs, many states offer the opportunity to be on payment plans. Those do not come cheap either. At least 44 states charge fees to participate in payment plans.²⁶

The Law

Whether for petty municipal violations, driver's license revocations, child support back payments, or being forced to pay costs traditionally borne by the court system, many poor people get ensnared into a vortex of fines and fees, escalating debt that they are unable to pay off, lost jobs, and incarceration. Their own lives and livelihoods, not to mention their families', are seriously impacted. Beyond devastating the lives of many people, these practices run counter to well-established law.

Debtors' prisons were banned under federal law in 1833.²⁷ A century and a half later, the Supreme Court of the United States affirmed in *Bearden v. Georgia* that a "state cannot impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."²⁸ While courts are permitted to incarcerate

²³ Kevin Thompson, *For Profit Companies Are Helping to Put People In Jail for Being Poor. I Should Know, I Was One of Them*, AM. CIVIL LIBERTIES UNION (Jan. 29, 2015, 10:50 AM), <https://www.aclu.org/blog/speakeasy/profit-companies-are-helping-put-people-jail-being-poor-i-should-know-i-was-one-them?redirect=blog/criminal-law-reform-racial-justice/profit-companies-are-helping-put-people-jail-being-poor-i-sh>.

²⁴ *Id.*

²⁵ Marshall Thomas, *The Overincarceration of America's Poor*, AM. CIVIL LIBERTIES UNION OF N. CAL. (Feb. 24, 2015), <https://www.aclunc.org/blog/overincarceration-americas-poor>.

²⁶ HBO, *LAST WEEK TONIGHT WITH JOHN OLIVER: MUNICIPAL VIOLATIONS*, YOUTUBE (March 22, 2015), <https://www.youtube.com/watch?v=0UjpmT5noto>.

²⁷ Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq>.

²⁸ *Bearden v. Georgia*, 461 U.S. 660, 667 (1983) (quoting *Tate v. Short*, 401 U.S. 395 (1971)).

those who willfully refuse to pay fines, those who lack the resources to meet their court-imposed financial obligations cannot be incarcerated for failing to do so. Jailing those who cannot afford to pay fines produces an “impermissible discrimination that rests on the ability to pay” that is forbidden by the Equal Protection Clause of the Fourteenth Amendment.²⁹ Accordingly, the U.S. Supreme Court has made clear that no individual may be incarcerated for failure to pay fines unless the court first “inquire[s] into the reasons for failure to pay.”³⁰

Pennsylvania

In Pennsylvania, where I live, it is similarly against the law to incarcerate someone who is unable to pay court fines and fees. Under the Pennsylvania Code, “[a] court shall not commit the defendant to prison for failure to pay a fine or costs unless it appears after hearing that the defendant is financially able to pay the fines or costs.”³¹ Rule 456 of the Pennsylvania Rules of Criminal Procedure sets out specific procedures that the court must follow when a defendant defaults on the payment of fines and costs, including notice to the defendant at least ten days prior to issuing a warrant for the defendant’s arrest and a hearing to determine whether the defendant is financially able to pay as ordered.³² At the conclusion of the hearing, the court must advise the defendant of the right to appeal within thirty days for a hearing *de novo* in the court of common pleas and that if an appeal is filed, the execution of the court’s order, including any order of imprisonment, will be stayed pending a decision on the appeal.³³ Pennsylvania case law buttresses these statutory protections.³⁴

Despite what appears to be a strong set of legal protections, not all judges are getting the message, and people are, in fact, being incarcerated in Pennsylvania essentially for being poor. One way to get around the law is to spin the violation as “contempt of court,” rather than jail for failure to pay fines. Among the most prominent—and heartbreaking—cases in Pennsylvania is that of Eileen DiNino. Ms. DiNino was a mother of seven, who was sent to jail for owing \$2000 in fines and court costs that accrued from fifty-five truancy violations amassed by her children for failure to attend school. On June 7, 2014, Ms. DiNino was found dead in a Berks County jail cell, halfway through a forty-eight hour sentence that would have erased at least a portion of the costs.³⁵ In the wake of Ms. DiNino’s death, the *Reading Eagle* reported that more than “1600 people have been jailed in Berks County alone—two-thirds of them women—over truancy fines since 2000.”³⁶ No charges were filed in Ms. DiNino’s death.

During the fall of 2013, the ACLU of Pennsylvania represented a twenty-one-year-old man who we believe was incarcerated for failure to pay parking fines without regard for his ability to pay

²⁹ *Williams v. Illinois*, 399 U.S. 235, 241, 244 (1970).

³⁰ *Bearden*, 461 U.S. at 672.

³¹ 234 PA. CODE § 7.706 (2015).

³² 234 PA. CODE § 4.456 (2015).

³³ *Id.*

³⁴ *See, e.g., Commonwealth ex rel. Parrish v. Cliff*, 304 A.2d 158, 161 (Pa. 1973) (“[A] state is prohibited from committing its citizens for fines without a reasonable opportunity being afforded to allow them to meet the court’s directive consistent with their respective financial situation.”); *Commonwealth v. Farmer*, 466 A.2d 677, 677-78 (Pa. Super. Ct. 1983) (district justice who imprisoned woman for failure to pay parking tickets despite her claim that she was indigent and without assigning counsel violated Pennsylvania Rules of Criminal Procedure).

³⁵ Crimesider Staff, *Woman Jailed Over Truancy Fines Found Dead in Cell*, CBS News (June 13, 2014), <http://www.cbsnews.com/news/woman-jailed-over-truancy-fines-found-dead-in-cell/>.

³⁶ *Id.*

and without appointment of counsel or the obligatory stay of sentence to allow an appeal. Our client was arrested on a bench warrant for failure to pay \$1,613 in parking fines and costs. He was sentenced to fifteen days in jail, despite having told the constable who arrested him that he was unable to pay the full amount. On November 5, 2013, we sent a letter to the judge who sentenced him, reminding her of his constitutional and statutory rights.³⁷ Although the judge, through counsel, denied wrongdoing in our client's case, the Administrative Office of Pennsylvania Courts forwarded our correspondence to the Chair of the Criminal Procedural Rules Committee "for further consideration and discussion."³⁸ Moreover, on November 26, the Court Administrator of Pennsylvania sent a memorandum to "All Magisterial District Judges" informing them of our concerns "regarding the incarceration of defendants in summary cases" without: conducting payment determination hearings on the ability to pay; notice to defendants of their right to counsel if there is a reasonable likelihood of incarceration; providing information about the right to appeal and stay of sentence to allow the appeal; and sending default notices.³⁹

During a panel presentation on debtors' prisons at the Pennsylvania Bar Association's Twenty-seventh Annual Minority Attorney Conference on April 10, 2015, a judge from Lancaster County lamented that he felt like a collection agency. He noted that the court issued 10,000 warrants last year for failure to pay and recognized that serving these warrants cost money. He said, "You have to pay money to get money." He further lamented the lack of guidance in determining who cannot pay costs versus who refuses to pay. The judge conceded that not all judges are suited to make these assessments. While judges have discretion over whether to incarcerate someone and can barter with defendants, they have no authority over arrest warrants that are automatically generated when someone does not pay or makes a late payment. A very real problem, according to the judge, is that missed payments mean the city has less revenue, bills do not get paid, and the county is stuck with debt. A fellow panelist and legal practitioner recalled a recent study, which concluded that for every \$4,000 collected, it cost \$7,000 to collect.⁴⁰

Recommendations

If a silver lining can be found at all in Michael Brown's tragic death, it might be the revelation of some unsavory and racist practices in Ferguson. With respect to the "orchestrated racket" of shaking down poor, mostly Black, residents to finance the city's municipal operations, the news is not all bad. There are a few ready fixes to stem the tide of jailing poor people based upon their inability to pay fines and fees, in Ferguson and beyond. Below are a few modest recommendations:

³⁷ Letter from Sara J. Rose, Staff Attorney, & Witold J. Walczak, Legal Director, ACLU of Pennsylvania, to The Honorable Mary P. Murray, Magisterial District Judge (November 5, 2013) (on file with the author).

³⁸ Letter from A. Taylor Williams, Legal Counsel to the Court Administrator of Pennsylvania, to Sara J. Rose, Esquire, ACLU of Pennsylvania (November 26, 2013) (on file with author).

³⁹ Memorandum from Zygmunt A. Pines, Esq., Court Administrator of Pennsylvania, to All Magisterial District Judges (on file with author).

⁴⁰ Pennsylvania Bar Association's Twenty-seventh Annual Minority Attorney Conference in Pittsburgh, PA (April 10, 2015), *agenda available at* <http://www.pabar.org/public/committees/MIN01/meetings/Minority%20Attorney%20LetterAgenda.pdf>.

- Support legislation to codify the requirement of *Bearden v. Georgia* that judges should conduct meaningful indigency hearings and consider alternatives to incarceration prior to jailing people for failure to pay fines;
- Adopt a “bench card” that provides judges with instructions on affording counsel to defendants charged with failure to pay, provides meaningful indigency assessment hearings that comport with the law, includes directions on how to inform people of their rights, and instructs on how to conduct assessment or ability-to-pay hearings;
- Provide legal representation for appeal of indigency assessment;
- Increase alternatives to incarceration, including community service;
- Provide indigence exceptions to qualify for diversionary programs;
- Inform indigent defendants of alternatives to incarceration;
- Train court personnel on a probationer’s right to counsel in revocation proceedings and right to an indigency hearing;
- Revise probation revocation forms to inform people of their right to court-appointed counsel in probation revocation proceedings, and right to request a waiver of any public defender fees they cannot afford;
- Ensure notice to appear forms inform indigent defendants that they will not be sent to jail if they do not have money but they still need to appear;
- Limit the use and better oversight of private, for-profit probation companies;
- Change parole rules so that anyone who is incarcerated is not kept in jail for unpaid fines;
- Provide legal representation at bail hearings;
- Base child support orders on actual rather than imputed (what someone would be expected to earn with a full-time, minimum-wage or median-wage job) income;
- Provide legal representation for appeal of child support orders;
- Cap court costs and fines;
- Waive additional costs and fines for indigent defendants;
- Cease suspension of driver’s licenses for failure to pay court costs and fees;
- Provide adequate state funding for courts, eliminating the need for revenue generation;
- Exempt indigent defendants from user and public defender fees;
- Eliminate “poverty penalties,” such as payment plan fees, late fees, collection fees, and interest;⁴¹
- Tailor debt collection efforts to an individual’s ability to pay;
- Provide adequate state funding for indigent defense; and
- Highlight and bring awareness to how ineffective and costly it is to lock up indigent people.

⁴¹ See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, THE HIDDEN COSTS OF CRIMINAL JUSTICE DEBT (2010).

Conclusion

Profiting off of the impoverished, propping up municipalities by generating revenue on the backs of the poorest among us, and incarcerating those who are unable to pay excessive fines and fees should be forbidden in a civilized society. That Blacks are special targets of the modern-day debtors' prisons is both shameful and unsurprising. Writer and social critic Ta-Nahisi Coates has labeled those engaged in these shakedown schemes as the "Gangsters of Ferguson,"⁴² behaving more like corporate shareholders than public servants.⁴³ No one is suggesting that those who willfully avoid paying fines and fees should get off scot-free. The concern is for those who genuinely cannot pay these costs. The system is clearly broken when popular comedians like John Oliver devote valuable airtime mocking it for being absurd, fiscally unsound—often costing more to track down and incarcerate someone than is likely to generate revenue from someone who can't afford to pay—and racist. Oliver even launched a faux Twitter campaign, #ShutDownTheF**kBarrel, his terminology for what happens when the poorest people lose everything, or even wind up in jail, over what started as a very small, but for them unaffordable, fine for a minor offense.⁴⁴ It's anything but funny, obviously, for those who get caught up in snowballing debt due to fines, court costs, and penalties. The good news, however, is that there are ready fixes to the debtors' prison juggernaut. It is our collective responsibility to make those changes happen, so that Michael Brown's, Walter Scott's, and Eileen DiNino's deaths will not have been in vain. •

⁴² Ta-Nehisi Coates, *The Gangsters of Ferguson*, THE ATLANTIC (March 5, 2015), <http://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/>.

⁴³ McCoy, *supra* note 12.

⁴⁴ Ed Mazza, *Help John Oliver #ShutDownTheF**kBarrel*, THE HUFFINGTON POST (March 23, 2015), http://www.huffingtonpost.com/2015/03/23/john-oliver-fuck-barrel_n_6921650.html.

Crime and Incarceration: A Future Fraught with Uncertainty

Ronald F. Day¹

Over the past four decades, incarceration's net has widened considerably, ensnaring individuals in efforts to "promote public safety." Policymakers around the country embraced Stop and Frisk and Broken Windows policing and other "tough on crime" measures, including harsh sentencing laws like mandatory minimums, truth-in-sentencing, three-strikes, and life-without-possibility-of-parole ("LWOP").² As a result, there are nearly 80 million people in the U.S. with a criminal record on file,³ 2.3 million in jail or prison, and another 4.7 million or so on some form of community supervision.⁴

Although public safety has been the mantra, there is sufficient evidence that the incarceration spike is not a byproduct of crime. In spite of prevailing perceptions, the link between incarceration rates and crime rates is complex. For example, during the past two decades, crime rates have been on a steep decline, while incarceration rates in many states have, until recently, continued to climb.⁵ According to a report by the National Research Council, "The best single proximate explanation of the rise in incarceration is not crime rates, but the policy choices made by legislators to greatly increase the use of imprisonment as a response to crime."⁶

Social scientists have determined that there is a direct correlation between poverty and high incarceration rates, with the overwhelming majority of people entangled in the criminal justice system being Black and Latino males from inner-city neighborhoods.⁷ Once saddled with these criminal convictions, they find it exceedingly difficult to recuperate. Devah Pager put it this way: "The negative credential associated with a criminal record represents a unique mechanism of stratification, in that it is the state that certifies particular individuals in ways that qualify them for discrimination or social exclusion."⁸ Family members often share this burden, increasing the likelihood of fractured families and social disorder. While other groups campaign to diminish *income* inequality, these goals are overshadowed by notions of fairness, equality, and social justice

¹ Associate Vice President of the David Rothenberg Center for Public Policy, The Fortune Society. Special thanks for research and editing assistance to JoAnne Page, President and Chief Executive Officer, The Fortune Society; Lucy Gubernick, a second-year law student at Fordham Law School; and Kevin Tang, a senior at Macaulay Honors College at Hunter College.

² Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503 (Nov. 2014).

³ Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J., Aug. 18, 2014, <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

⁴ LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES (Dec. 2014), available at <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

⁵ *Prison and Crime: A Complex Link*, THE PEW CHARITABLE TRUST, Sept. 2014, http://www.pewtrusts.org/~media/Assets/2014/09/PSPP_crime_webgraphic.pdf?la=en.

⁶ NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis et al.) 1736 (2014).

⁷ Christopher Muller & Bruce Western, *Mass Incarceration, Macrosociology and the Poor*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 166 (2013), available at http://scholar.harvard.edu/files/brucewestern/files/mass_incarceration_macrosociology_and_the_poor.pdf.

⁸ Devah Pager, *The Mark of a Criminal Record*, 108 A. J. Soc. 937 (2003).

for people with criminal histories. Governments are responding incrementally to this protestation by implementing measures to reduce discrimination and spawn fairer treatment toward people who have had brushes with the law.

Although arrests are ostensibly meant to protect the public, a large percentage of them have been for low-level misdemeanors, as much as 10 million a year. In the words of law professor Alexandra Natapoff: “If you ever enter the American criminal justice system, odds are it will be for a misdemeanor. They may be seen as small-time offenses, but collectively how we process misdemeanors represents an immense and influential public institution.”⁹ A significant portion of these charges are dismissed and many end up in a plea bargain with no jail time. With the latter, there is a criminal conviction nonetheless. A criminal record alone, even when it does not accompany jail time, poses a significant challenge to individuals already struggling to stay afloat. Indeed, people are denied jobs, turned down for housing, have credit applications rejected, and may even be denied public benefits or financial aid based on criminal records. One of the more chilling aspects of this discrimination is that the information relied upon is often inaccurate. Studies have determined that at least 30 percent of criminal history reports contained inaccuracies,¹⁰ with the U.S. Bureau of Justice Statistics referring to this problem as “the single most serious deficiency affecting the nation’s criminal history record information system.”¹¹

For those who serve time incarcerated, the penalties are more pronounced. Prior to incarceration, these individuals most likely had low educational attainment and feeble ties to the labor market, with many unemployed at the time that they were arrested.¹² Further, opportunities to access educational and vocational programs have shrunk, as jails and prisons have cut back drastically on rehabilitative programming: electrical, welding, carpentry, Adult Basic Education (“ABE”), GED, and much more.¹³ Even college prison programs, which have strong evidence of cost-savings and lower recidivism rates, have been severely curtailed because they appear soft on crime and a way to “coddle criminals.”¹⁴

As the price of housing is skyrocketing in many urban communities, it has become nearly impossible to identify safe and affordable housing, particularly supportive housing for people transitioning out of confinement.¹⁵ On a regular basis, landlords turn away applicants because of a criminal record, even when these denials violate state law.¹⁶ Public housing is usually off limits too.

⁹ Alexandra Natapoff, *Why Misdemeanors Aren’t So Minor*, SLATE, Apr. 27, 2012, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html.

¹⁰ CUNY Investigative Team, *The Rap-Sheet Trap: Mistaken Arrest Records Haunt Millions*, CITY LIMITS.ORG, March 3, 2015, <http://citylimits.org/2015/03/03/the-rap-sheet-trap-mistaken-arrest-records-haunt-millions/>.

¹¹ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE*, (revised 2001), available at <http://www.bjs.gov/content/pub/pdf/umchri01.pdf>.

¹² DEVAH PAGER AND BRUCE WESTERN, U.S. DEPARTMENT OF JUSTICE, *INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN* (Oct. 2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>.

¹³ Jamie Lillis, *Survey Summary: Education in U.S. Prisons—Part Two*, 19 *Corrections Compendium* 10-16 (April 1994).

¹⁴ Jean Trounstein, *The Battle to Bring Back Pell Grants for Prisoners*, BOSTON MAGAZINE, Mar. 4, 2013, <http://www.bostonmagazine.com/news/blog/2013/03/04/the-battle-to-bring-back-pell-grants-for-prisoners/>.

¹⁵ CORINNE CAREY, HUMAN RIGHTS WATCH, *NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING* (2004), available at <http://www.hrw.org/reports/2004/usa1104/usa1104.pdf>.

¹⁶ Mireya Navarro, *Lawsuit Says Rental Complex in Queens Excludes Ex-Offenders*, N.Y. TIMES, Oct. 30, 2014, http://www.nytimes.com/2014/10/31/nyregion/lawsuit-says-rental-complex-in-queens-excludes-ex-offenders.html?_r=0.

Indeed, housing authorities generally have policies that strictly prohibit allowing someone with a criminal record to reside in public housing.¹⁷ Violating these policies has subjected families to termination of their lease. Moreover, the Housing and Urban Development (“HUD”) definition of homelessness excludes many people being released from jails/prisons, since homelessness is restricted to people who served 90 days or less *and* were “living in an emergency shelter or place not meant for human habitation immediately before entering that institution.”¹⁸

Another particularly challenging issue for formerly incarcerated people is securing gainful employment. Employers routinely overlook qualified job seekers who have spent time incarcerated because they are seen as a potential liability. Race is often a factor, since African-American men, who have the highest representation in the criminal system, are viewed with skepticism. One study found that a black man *without* a criminal record was less likely to receive a call back or interview than a white man *with* a criminal record.¹⁹ The denial of employment consigns many formerly incarcerated people to a life on the margins, as many of them have to accept off-the-books jobs, or to those with low wages and minimal if any benefits. Even for those who secure decent employment, the effect on earnings is substantial. A report by the Pew Charitable Trust notes that: “past incarceration reduced subsequent wages by 11 percent, cut annual employment by nine weeks and reduced yearly earnings by 40 percent,”²⁰ thereby perpetuating the cycle of poverty.

The discrimination, stigma, and poverty associated with incarceration have acted as a perennial juggernaut for individuals, families, and communities. Communities that have a large swath of men incarcerated are more likely to be impoverished, as women are left to raise children in single-parent households. Indeed, family income is significantly lower without a father’s contributions.²¹ More men in prison also means that children are often left unsupervised in communities with limited resources, underfunded schools, and few extracurricular activities. A majority of these men (54 percent) are parents of minor children (2.7 million children).²² The lives of the children are impacted in a myriad of ways, including that they have far higher suspension and expulsion rates than other children.

Moreover, families routinely carry the load when a loved one is locked up, which can include visits to facilities far from their homes, paying sometimes exorbitant fees for phone calls, and shouldering the burden of fines and fees associated with a conviction.²³ When the prison doors swing open, the hope is for a successful transition. This hope can be dashed relatively quickly when the consequences of a criminal conviction exceed the judicial penalty. In a recent expungement decision out of the Eastern District of New York, Judge John Gleeson opined that: “I sentenced [petitioner] to five years of probation supervision, not to a lifetime of unemployment.”²⁴

¹⁷ Mireya Navarro, *Ban on Former Inmates in Public Housing is Eased*, N.Y. TIMES, Nov. 14, 2013, <http://www.nytimes.com/2013/11/15/nyregion/ban-on-former-inmates-in-public-housing-is-eased.html>.

¹⁸ SANDRA B. HENRIQUEZ, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, NOTICE PIH 2013-15 (PA) (June 10, 2013), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=pih2013-15.pdf>.

¹⁹ Pager, *supra* note 8, at 937.

²⁰ THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY, (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1.pdf.

²¹ *Id.*

²² *Id.*

²³ MITALI NAGRECHA ET AL., CENTER FOR COMMUNITY ALTERNATIVES, FIRST PERSON ACCOUNTS OF CRIMINAL JUSTICE DEBT: WHEN ALL ELSE FAILS, FINING THE FAMILY (2015), available at <http://www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf>.

²⁴ Memorandum and Order, *Doe v U.S.*, 14-MC-1412 (JG) (E.D.N.Y. May 21, 2015), available at <http://cases.justia.com/federal/district-courts/new-york/nyedce/1:2014mc01412/362518/9/0.pdf?ts=1432297334>.

All too often, people who are returning home from incarceration need to access public benefits. The longer they go without securing adequate employment, the greater the likelihood that they will remain tethered to the welfare system, unable to take care of themselves or their family. Under these circumstances, frustration can set in and cause people to relapse, or engage in activities, sometimes illegal, to supplement the modest benefits received from public assistance.

Advocates for criminal justice reform have called for drastic changes to the existing policies that allow discrimination against people with criminal records. There appears to be a consensus that tough-on-crime policies exacerbated poverty, and have, in the words of former Attorney General Eric Holder, sent “too many Americans to too many prisons for far too long, and for no truly good law enforcement reason.”²⁵ Jurisdictions around the country are now examining multiple ways to reform the system, including:

- Reducing the number of people going to jail by reducing or eliminating the use of Stop and Frisk and Broken Windows policies;
- Fixing a bail system in desperate need of repair, as thousands of people languish in jails because of an inability to pay a modest bail, even when they pose no threat to public safety;
- Requiring companies that conduct criminal background checks to verify that the information they retrieve is correct and requiring employers to permit job seekers to contest information deemed inaccurate;
- Assessing if people have the ability to pay fee and fines, rather than generating revenue at the expense of having poor people cycling in and out of the jail;
- Expanding access to education, particularly post-secondary education, alternatives to incarceration, and substance use and mental health services;
- Reevaluating blanket policies that deny access to housing for people with criminal records.

Because employment is vital for people to take care of themselves, policymakers have funded initiatives that bond individuals with criminal records, thus shielding employers from liability; they have implemented wage subsidy programs that reimburse employers for wages when they hire someone with a criminal record under a specific criteria; the federal Department of Labor and many states, through funding from the Second Chance Act, have issued grants to programs that provide job training, job placement assistance, mentoring, and a host of wrap-around services to people in the reentry process; and the Equal Employment Opportunity Commission (“EEOC”)²⁶ and some states have offered guidelines on how to properly screen people for employment and licensures.

A policy that has made significant inroads around the country is Ban the Box, an initiative that requires employers to remove the question about a criminal record from the job application. This fair chance policy is designed to increase the employment outcomes of people with criminal records by allowing hiring managers to screen for job skills, qualifications, and suitability before inquiring about criminal history and conducting a background check. Hence, a suitable formerly

²⁵ Eric Holder, Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates, United States Department of Justice (Aug. 12, 2013) (transcript *available at* <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>).

²⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

incarcerated candidate could be offered a job, unless the background check and inquiry determines that the candidate poses a risk to safety or property, or there is a direct relationship between the job or licensure sought and the prior conviction (the specific criteria depends on the state).

To date, there are 17 states and over 100 U.S. localities that have embraced Ban the Box.²⁷ Hawaii passed a Ban the Box provision in 1998; in the following decade, 14 other jurisdictions adopted fair chance reforms. In 2014 alone, 42 jurisdictions elected to Ban the Box. In 2015, even Georgia and Virginia joined the fray. Ban the Box most often applies to jobs in the public sector but some localities have broader provisions that apply to private-sector jobs, and a few even extend to housing.²⁸

Based on the initiatives mentioned above, there is room for optimism. A groundswell of support for change has reverberated in the halls of policymakers. The principal impetus for this change has been budget deficits, as cities and states can ill-afford to sustain the criminal justice system that has evolved over the past four decades.

A word of caution is necessary, however. Policies are not static entities; they require proper implementation and monitoring. Indeed, courts can still impose fines and fees without due consideration to a person's ability to pay; landlords can continue to arbitrarily deny housing to an otherwise suitable person simply because of a criminal record; and hiring managers can circumvent state laws and Ban the Box provisions by doing Internet searches for job-seekers and by asking questions during initial interviews that act as a proxy for the question about criminal history.

Legislators are reticent about requiring employers to collect data about new hires with criminal records. Consequently, despite the popularity of Ban the Box, there is a dearth of evidence that it is achieving its desired effect. Former New York City Mayor Michael Bloomberg, who signed a Ban the Box provision in New York City,²⁹ has famously cautioned that, "In God we trust. Everyone else, bring data." To that extent, New York City has gathered preliminary data on Ban the Box. The Fortune Society intends to assess the data, as well as talk with hiring managers, city officials, policymakers, and the formerly incarcerated, to determine if this initiative has improved the employment outcomes of people with criminal records. In the final analysis, we would like to dispel the notion that Ban the Box may be just another feel-good measure. We need the data to affirm that the policy actually makes a difference for thousands of individuals and their families. •

²⁷ Michelle Natividad Rodriguez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NATIONAL EMPLOYMENT LAW PROJECT (May 26, 2015), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

²⁸ MICHELLE NATIVIDAD RODRIGUEZ, NATIONAL EMPLOYMENT LAW PROJECT, BAN THE BOX (2015), *available at* <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

²⁹ See NYC Executive Order No. 151 (2011), *available at* http://www.nyc.gov/html/records/pdf/executive_orders/2011EO151.pdf. The Executive Order applied to hiring procedures in many New York City agencies, with some exceptions. At the time of this writing, Ban the Box legislation that would cover private employers has been passed by the New York City Council. NYC Introduction No. 318-2014 (passed the City Council on June 10, 2015), *available at* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1739365&GUID=EF70B69C-074A-4B8E-9D36-187C76BB1098>.

Inequality and the Texas Photo ID Law

By J. Gerald Hebert¹

This essay examines the significant role that evidence of inequality played in the legal challenge to the Texas photo ID law (“Senate Bill 14” or “SB 14”) enacted in 2011.² This law, the most restrictive photo ID law in the nation, requires all Texas voters to present one of seven specified types of photo ID, such as a driver’s license or a passport. The list of acceptable IDs is very limited and targeted to benefit Anglo voters and disadvantage poor and minority voters. For instance, although the law allows voters to present a concealed handgun permit—disproportionately held by Anglos—the law does not allow voters to present a student ID or a state- or federal-government employee ID—all disproportionately held by minorities. According to unrefuted expert witness testimony, over 600,000 registered Texas voters lack SB 14-compliant ID.

Although Texas created a new form of photo ID, the supposedly free Election Identification Certificate (“EIC”), for voters lacking SB 14 IDs, these EICs are available only at Department of Public Safety (“DPS”) offices, which are often located far from public transportation and urban areas. Moreover, every EIC applicant must show an accurate certified copy of his or her birth certificate. Acquiring such a certificate generally requires visiting a county records office (or, if the voter was born outside Texas, contacting and perhaps even visiting their state and county of birth). Until very recently Texas charged everyone seeking a certified birth certificate at least \$2 (some had to pay over \$50). The Texas Legislature passed a law in late May 2015 that has purportedly waived these fees for voters born in Texas who know to ask at the county records office for a reduced-cost election birth certificate, but that law provides no benefit to voters born outside Texas and still requires voters seeking certified birth certificates to know about the reduced-cost option, visit county records offices in person, and ask.³

The lawsuit challenging S.B. 14, *Veasey v. Abbott*, is currently pending before the United States Court of Appeals for the Fifth Circuit.⁴ Most of the press coverage regarding photo ID laws has discussed either how those measures will affect election results or whether those measures have racially disparate impacts. The Texas case illustrates a third important theme: how the poor, who are disproportionately minorities in Texas, are especially burdened and harmed by laws such as photo ID requirements. In her opinion invalidating the law, U.S. District Court Judge Nelva Gonzales Ramos found that “SB 14 disproportionately burdens the poor,” noting that “[t]he draconian voting requirements imposed by SB 14 will disproportionately impact low-income Texans because they are less likely to own or need one of the seven qualified IDs to navigate their lives.”⁵

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² Texas S.B. No. 14 (2011), available at <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=SB14>.

³ Texas S.B. 983 (2015), available at <http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=84R&Bill=SB983> (amending Section 191.0046 of the Texas Health and Safety Code).

⁴ As a matter of full disclosure, I serve as co-counsel to the lead plaintiffs (Congressman Marc Veasey, *et al.*) in the consolidated lawsuits *Veasey v. Abbott*, challenging the Texas photo ID law. Many of the points made in this essay were derived from Plaintiffs’ Proposed Findings of Fact filed in those consolidated cases.

⁵ *Veasey v. Perry*, No. 13-CV-193, 2014 U.S. Dist. LEXIS 144080, at *24 (S.D. Tex. Oct. 9, 2014). An emergency stay was immediately sought by Texas. Based on then-upcoming elections, without addressing the merits of the case, the Fifth Circuit Court of Appeals granted a stay pending appeal, *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014), which the Supreme Court declined to lift, *Veasey v. Perry*, 135 S. Ct. 9 (2014). Under FRCP 25(d), Greg Abbott was automatically substituted for Rick Perry upon Abbott’s election as Governor and thus the style of the case is now *Veasey v. Abbott*.

The evidence of socioeconomic inequality presented to the court in *Veasey* touched many aspects of everyday life: education, income, health, housing, transportation, and employment. Of course, it is no surprise that, as evidence at trial demonstrated, Texas’s long and ongoing history of official discrimination has left in its wake vast differences in the socioeconomic condition of minority Texans on the one hand and Anglos on the other. What was not obvious, however, and what came out at trial, is how those socioeconomic differences adversely affect the ability of Blacks, Latinos, the poor, and the elderly to obtain photo IDs so they can vote.

Evidence linking poverty to the inability to obtain an S.B. 14-compliant photo ID is important—and was important at trial—to understanding the pernicious nature of Texas’s photo ID law. Such proof undermines the common (but incorrect) assumption that, in this day and age, everyone possesses a photo ID; after all, most people believe a photo ID is needed to board an airplane, buy Sudafed, or even rent a movie (in fact, none of those things require a photo ID).

As noted above, Judge Ramos found that the evidence before her showed conclusively that the Texas photo ID law harmed the poor, who were disproportionately minorities, and that those who enacted the law “fail[ed] to appreciate that those living in poverty may be unable to pay costs associated with obtaining SB 14 ID. The poor should not be denied the right to vote because they have ‘chosen’ to spend their money to feed their family, instead of spending it to obtain SB 14 ID.”⁶ The remainder of this article details the evidence of inequality presented to the court in *Veasey* and how that evidence (and other evidence in the record) led the court to strike down Texas’s photo ID law as unconstitutionally discriminatory and violative of the Voting Rights Act.

I. Demographics

Let’s begin with putting the evidence of socioeconomic disparity in the context of Texas’s demographics. It goes without saying that Texas is a large state. What many may not know, however, is that Texas is also a majority-minority state. Indeed, the 2010 census revealed that Texas has a total population of 25,145,561, of whom 45.3 percent are non-Hispanic White (often referred to as “Anglo” in Texas), 37.6 percent are Hispanic, and 11.8 percent are Black. And Texas’s minority population is increasing rapidly: between 2000 and 2010, Hispanics and Blacks accounted for nearly 90 percent of Texas’s total population growth.⁷

According to the 2010-2012 American Community Survey released by the U.S. Census Bureau, Hispanics and Blacks in Texas rank lower on virtually all key socioeconomic indicators than non-Hispanic Whites:⁸

⁶ *Id.* at *127.

⁷ Plaintiff’s and Plaintiff-Intervenor’s Proposed Findings of Fact and Conclusions of Law ¶ 1, *Veasey*, 2014 U.S. Dist. LEXIS 144080, No. 13-CV-193 ECF No. 610.

⁸ *Id.* ¶ 5 (citing the United States’ Request for Judicial Notice, ECF No. 252).

	Non-Hispanic White	Hispanic	Black
Lack High School Diploma (age 25 and older)	7.6%	39.5%	13.4%
Poverty Rate	9.4%	26.9%	24.7%
Median Household Income	\$62,426	\$38,600	\$37,041
Median Per Capita Income	\$35,598	\$14,768	\$19,133
Unemployment Rate	6.7%	9.2%	14.1%
Occupied Housing Units With No Available Vehicle	3.9%	7.0%	12.9%

II. Income

All of the general demographic evidence was part of the trial record. In addition, the trial record included specific evidence of income disparities, nearly all of which were undisputed. Although Anglos in Texas have an approximate poverty rate of 9.4 percent, the Hispanic poverty rate, 26.9 percent, is almost three times as high, and the Black poverty rate, 24.7 percent, is similar to the Hispanic rate.⁹ Moreover, Black Texans have lower incomes and less wealth than Anglo Texans. In 2010, the median Anglo Texan earned \$52,392 annually, approximately 68 percent more than the median Black, who earned only \$31,104.¹⁰ The median household income in Texas is approximately \$62,426 for Anglo households but only \$38,600 for Hispanic households and \$37,041 for Black households.¹¹ The median household wealth of the Anglo population in Texas is \$97,800, more than seven times larger than the median household wealth of the Black population (\$11,961).¹²

The evidence also showed that most job opportunities available to poorer Texans pay relatively low hourly wages, and many are part-time, temporary, or seasonal.¹³ Many poorer Texans, therefore, must work multiple jobs to pay the rent and put food on the table. Other evidence reinforced the sizeable income and wealth gap between minorities and Anglos in Texas. One expert, Dr. Coleman Bazelon, found that one-quarter of all Black Texans live below the poverty line—a rate that is two-and-a-half times higher than the poverty rate for Anglos.¹⁴ Similarly, according to the same American Community Survey, the share of Hispanic and Black households receiving Supplemental Nutrition Assistance Program (“SNAP”) benefits (23.2 percent and 22.8 percent, respectively) is three times the share of Anglo households (6.6 percent).¹⁵

Undisputed expert testimony in the case found that the ease of obtaining a photo ID increases as income increases. For one thing, Texans who live in poverty often do not have reliable incomes,

⁹ *Id.* ¶ 5.

¹⁰ *Id.* ¶ 421.

¹¹ *Id.* ¶ 478.

¹² *Id.* ¶ 421.

¹³ *Id.* ¶ 369.

¹⁴ *Id.* ¶ 422 (citing ¶ 67 (Bazelon Second Am. Rep.); 11 (Bazelon Am. Trial Demonstratives); 119:21-120:2 (Bazelon Trial Tr.)).

¹⁵ *Id.* ¶ 477 (citing U.S. Request for Judicial Notice ECF No. 252 ¶¶ 9, 18).

a fact that affects their resource expenditures, including whether they want to spend precious financial resources to obtain a photo ID (including paying for necessary supporting documents such as a certified birth certificate) or to feed their family.¹⁶ For another, poorer Texans, who generally work in jobs that do not offer paid leave, are less likely to be able to forgo income and take time off work to obtain identification during business hours, when the state offices that issue IDs are open.¹⁷ It is thus unsurprising that, as one expert found, poorer Texans will face significant difficulty obtaining photo identification if they do not already have it.¹⁸ And, because Hispanics and Blacks are disproportionately represented among Texans living in poverty, Hispanics and Blacks who do not already possess an acceptable and current form of photo identification will face greater burdens in obtaining SB 14 ID than Anglos will face.¹⁹

III. Transportation and Vehicle Ownership

In a state as large as Texas, transportation issues can place special burdens on the poor. Many Texans living in poverty do not own any vehicles, let alone reliable vehicles. Those that do own vehicles often lack the financial resources necessary to maintain and insure their vehicles, so many vehicles owned by those with low incomes do not run reliably. Moreover, poor Texans often lack the option of relying on a car owner for a ride to a location that accepts photo ID applications. In urban areas, poorer families making use of housing assistance have been scattered across Texas cities—very few poor urban residents have a reliable car. In rural and small-town Texas, geographic distances can be a substantial obstacle. To add to the problem, many low-income Latino and Black families experience frequent and sudden relocation when they are unable to afford rent or utility payments, cutting them off from individuals who might otherwise provide assistance.²⁰

In addition, out of all fifty states, Texas ranks last in per capita investment in public transportation. This lack of investment has a significant disparate impact on the poor who, as explained above, are substantially less likely to possess motor vehicles.²¹ Thus, many low-income Texans travel on foot or rely on limited mass transit options, leaving them both less likely to need a driver's license and more likely to face mobility challenges when seeking to apply in person at state offices for a photo ID.²²

Again, expert testimony demonstrated that transportation burdens and vehicle ownership disparities have a direct impact on the ability of minorities and the poor in Texas to obtain a photo ID. Dr. Gerald Webster, for example, took a look at demographic and socioeconomic data and specifically found greater poverty rates and lower vehicle access rates among members of racial minority groups in Texas. Looking specifically at the three largest Texas cities—Houston, San Antonio, and Dallas—Dr. Webster found that Latinos and Blacks were most likely to lack access to a motor vehicle and thus, faced a far greater burden in obtaining a Texas photo ID. In these cities, the share of Black households lacking vehicle access was at least twice the share of Anglo households lacking vehicle access.²³

¹⁶ *Id.* ¶ 159.

¹⁷ *Id.* ¶ 158.

¹⁸ *Id.* ¶ 176.

¹⁹ *Id.* ¶¶ 357-363.

²⁰ *Id.* ¶ 374.

²¹ *Id.* ¶ 480.

²² *Id.* ¶ 373.

²³ *Id.* ¶ 393.

Expert testimony by Dr. Bazelon showed that while Anglo registered voters who lack sufficient ID need to pay on average \$26.66 in travel costs to obtain one, similarly situated Latino voters need to pay \$48.10, a significant racial disparity. Dr. Bazelon's economic analysis established that the average Black registered voter must expend a share of his/her wealth on such costs that is more than four times higher than the share required of the average Anglo registered voter in Texas.²⁴

In sum, because the evidence showed that minority voters must travel longer distances to obtain a photo ID to vote, and because minorities are less likely than Anglos to own a vehicle, the travel costs to obtain a photo ID bear more heavily on minorities and are more difficult to overcome.

IV. Health Disparities

The evidence of health impairment among minorities compared to Anglos was similarly dramatic. Based on survey data from the U.S. Centers for Disease Control, Blacks and Hispanics are much more likely to report being in only "fair" or "poor" health, to lack a personal doctor, to lack health insurance, and to have not visited a doctor in the past year due to the cost. Furthermore, Hispanic and Black Texans, particularly those who are low-income, experience higher levels of health impairment than Anglo Texans. They are also disproportionately likely to have to manage a family member's disability. Those in poor health or who have to manage a family member's poor health have greater burdens to bear in everyday life, and these burdens are often a direct result of a long history of discrimination.²⁵

Social, electoral, and historical conditions in Texas that interact with SB 14 further burden the ability of minority citizens without SB 14 ID to obtain that ID. These conditions include, among other things, the fact that: a) voter participation rates among Latinos and Blacks remain behind Anglo rates; b) Texas has a long history of racial discrimination in voting, that has continued to the present day; and c) minorities in Texas suffer from the ongoing effects of discrimination in other areas, which has led to stark socioeconomic differences between the minority and Anglo populations, including poor health and lower incomes.²⁶ These health burdens often restrict low-income minority Texans' ability to obtain and maintain documents, even ones that relate to government benefits. In Texas, as in many communities, those who must bear the impact of extreme poverty and who suffer from poor health or disabilities face a far greater burden in obtaining and maintaining documents such as birth certificates, which cost money, must be obtained in person, and are necessary to receive S.B. 14-compliant IDs.²⁷

V. Education

Education helps individuals navigate convoluted bureaucracies, such as the administrative maze Texas has forced those seeking S.B. 14-compliant IDs to navigate. Moreover, education provides voters with a sense of confidence in the electoral process.²⁸ The evidence of educational disparities between minorities and Anglos in Texas is dramatic, and again, a continuing effect linked directly

²⁴ *Id.* ¶ 419.

²⁵ *Id.* ¶ 375.

²⁶ *Id.* § XI.

²⁷ *Id.* ¶ 375.

²⁸ *Id.* ¶ 474 (citing U.S. Request for Judicial Notice ¶ 10).

to a long history of official discrimination in Texas. *De jure* educational segregation in Texas existed from the first year of Reconstruction until *Brown v. Board of Education*, and the end of legal segregation was met with a policy of official resistance to desegregation of public schools. The intervention of federal courts was often necessary in an effort to bring an end to continued segregation and widespread discrimination.²⁹

According to the Census Bureau's 2010-2012 American Community Survey ("ACS"), approximately 7.6 percent of Anglo Texans lack a high school diploma or equivalent. That figure is five times higher for Hispanics (39.5 percent) and nearly twice as high for Blacks (13.4 percent). This disparity continues into higher education: 58 percent of Black Texans do not have an undergraduate degree (as compared to 51 percent of Anglo Texans).³⁰

VI. Employment

Voters with higher levels of unemployment and lower incomes are less likely to participate in the political process. Evidence demonstrated that minorities face significant employment burdens in Texas.³¹ Racial discrimination in employment by Texas state or local agencies continues to disadvantage Black and Hispanic residents of Texas. In the last two decades, the Texas Department of Family and Protective Services, Matagorda County, the City of El Paso, and the City of Houston have all entered into extensive consent decrees that required them to change their practices to address claims of employment discrimination.³²

There was also expert testimony regarding the disparity in unemployment rates for Black and Anglos in Texas. Dr. Bazelon reported that the unemployment rate of Black Texans, for example, is more than twice the unemployment rate of Anglos.³³ According to the Census Bureau's 2010-2012 American Community survey, the State of Texas has an unemployment rate of 8.4 percent within the civilian labor force. The unemployment rate is 6.7 percent for Anglos, 9.2 percent for Hispanics, and 14.1 percent for Blacks.³⁴

The ability of minority voters to participate equally and effectively in the political process is a key element of the plaintiffs' claim under the "discriminatory results" prong of Section 2 of the Voting Rights Act. Black and Hispanic people in Texas with higher levels of unemployment and lower incomes are less likely to participate in the political process. Disparities between Anglos and minority voters in unemployment rates, and other socioeconomic indicators, make it more difficult for Hispanic and Black voters in Texas to overcome the increase in the cost of voting caused by the implementation of SB-14.³⁵

²⁹ *Id.* ¶ 472.

³⁰ *Id.* ¶ 474.

³¹ *Id.* ¶ 476 (citing U.S. Request for Judicial Notice ¶ 13).

³² *Id.* ¶ 475.

³³ *Id.* ¶ 423 (citing ¶ 68 (Bazelon Second Am. Rep.)).

³⁴ *Id.* ¶ 476.

³⁵ *Id.* ¶ 476.

V. Housing

Texas enacted a statewide zoning statute in 1927 in order to facilitate local housing segregation, and official segregation persisted into the last decade (the 2000s) through local zoning, restrictive covenants, and policies of municipal housing authorities. The establishment of these segregated communities yielded present housing segregation throughout Texas, as measured by several academic studies concerning Anglo/Black segregation and Anglo/Latino segregation in cities as recently as 2010.³⁶

Persistent housing segregation greatly contributes to the lack of access for Latino and Black Texans to get to state Department of Public Safety (“DPS”) offices in Texas where photo IDs are issued.³⁷ Many neighborhoods with concentrated minority communities have no DPS office, such as Dallas’s southeast quadrant. Often these minority population concentrations are the legacy of housing segregation. Public transit from Dallas’s southeast quadrant to the DPS office in downtown Dallas takes two to four hours, round trip.³⁸ The more distance that persons have to travel from their home to a polling place, the less likely they are to vote. Similarly, because minority voters must travel longer distances to obtain the photo ID necessary to vote, and minority households are less likely than Anglos to own a vehicle, SB 14’s travel-related costs bear more heavily on minorities and are more difficult to overcome.³⁹

Conclusion

We do not know at this time the ultimate result of the Texas photo ID litigation. But, what we do know is that the overwhelming evidence in the case detailing the inequality among Texas’s population, measured by all of the standard socioeconomic indicators, pointed to the same conclusion—low-income minorities in Texas are disproportionately likely to face some combination of the following impediments to obtaining photo identification: loss of wages, lack of access to transportation, lower educational attainment levels, adverse housing conditions, more significant health problems, and lack of accurate underlying documents needed to obtain a photo ID.

Stark economic disparities persist in Texas between Anglos, on the one hand, and Latinos and Blacks, on the other. These disparities are the direct result of a continuous and long-standing pattern of racial discrimination by Texas authorities against Latino and Black residents in all areas of public life, particularly education, employment, housing, and transportation. Because racial discrimination produces cycles of socioeconomic disadvantage, the effects of which are slow to fade from minority communities, these ongoing socioeconomic disparities have a profound effect on the ability of low-income Texans and racial minorities to participate effectively in the political process.

America is the world leader in promoting democracy. If we are going to show the way for democracy around the globe, we should first correct the imperfections in our own democracy here at home. Ensuring that *all* persons have full and free access to voting in our country would seemingly be one democratic policy and American value with which we should all be able to agree. •

³⁶ *Id.* ¶ 479.

³⁷ *Id.* ¶ 479.

³⁸ *Id.* ¶ 189.

³⁹ *Id.* ¶ 480.

Reproductive Rights and Women's Economic Security: Pieces of the Same Puzzle

Janet Crepps and Kelly Baden¹

Headlines from Texas and Mississippi all the way to Capitol Hill make clear that our constitutionally-protected rights to abortion are under threat. Yet the steady dismantling of reproductive rights must also be recognized as an attack on women's economic lives. In order to advance reproductive freedom and justice, it is imperative that we understand and address the connection between the erosions of reproductive rights, access to health care, and poverty.

Low-Income Women in the United States

Between 2012 and 2013, the U.S. poverty rate fell for the first time since 2006; but while rates fell for both women and men, women are still disproportionately likely to live in poverty in the U.S. as compared to men.² Troubling racial disparities in household wealth have become more pronounced. Between 2010 and 2013, the median wealth of non-Hispanic white households increased by 2.4 percent while that of Hispanic households fell by 14.3 percent and non-Hispanic black households' median wealth fell by a shocking 33.7 percent.³ Many women in the U.S., and especially women of color, are experiencing precarious personal economic situations, which make their ability to receive and afford comprehensive reproductive health care all the more crucial.

Deciding whether and when to have a child is one of the most profound economic decisions a woman makes in her lifetime, and her existing economic circumstances impact her reproductive health care decisions. While the cost of having and raising a child varies, depending on income level, a two-parent family making less than \$61,530 a year can expect to spend on average \$176,550 on a child from birth up to age 18.⁴ Middle or higher-earning families can expect to spend on average \$245,340 or \$407,820.⁵ Not only do our economic circumstances impact our reproductive health care decisions, but our health care decisions impact our economic lives.

The centrality of reproductive health to women's lives—and that of their children and families—means that traditional reproductive rights issues like access to family planning services and abortion care are only part of the puzzle when considering women's economic security. Issues like paid family leave, paid sick leave, and pregnant women's health and rights are also crucial to combatting the inequalities faced by low-income women. The barriers to family planning and abortion care that already exist and especially impact low-income women may be compounded

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² CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE U.S.: 2013* 12, 15 (Sept. 2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

³ Rakesh Kochhar & Richard Fry, *Wealth Inequality has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CENTER (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

⁴ MARK LINO, USDA, *EXPENDITURES ON CHILDREN BY FAMILIES: 2013* 14 (Aug. 2014), available at http://www.cnpp.usda.gov/sites/default/files/expenditures_on_children_by_families/crc2013.pdf.

⁵ *Id.* at 26.

by other public policies that limit one's economic prosperity and potential; no woman makes reproductive health care decisions in a vacuum. The economic circumstances of her life impact her reproductive decisions, just as her reproductive decisions have a personal economic impact.

Access to Family Planning

At least half of American women will experience an unintended pregnancy by age 45, and three in ten of those unintended pregnancies end in abortion.⁶ But these general statistics hide the very real disparities that exist for women for whom the economic costs of childbearing are most difficult. Women with incomes at or below the federal poverty level are five times more likely to experience unintended pregnancy than are women with the highest income levels.⁷ Unintended pregnancy rates are three times higher for women without a high school degree than for college graduates, and twice as high for Black and Hispanic women as that of White women.⁸

The rates underscore the need for publicly-funded family planning services, which include contraception, screenings and treatment for sexually-transmitted infections, cervical cancer screening and prevention services, and other reproductive health care. In 2010, almost nine million women received publicly-funded family planning services.⁹ Further, publicly funded family contraceptive services helped women by preventing 2.2 million unintended pregnancies.¹⁰ Between 2000 and 2012, there was an 11 percent increase in the number of women of reproductive age who needed contraceptive services and supplies, with a disproportionate increase in need being experienced by low-income women, younger women, Latino women, and Black women.¹¹

Despite the demonstrated demand for and benefit of contraceptive access for women and their families, funding for family planning programs continues to be at risk. Over the last several years, funding cuts, insurance coverage restrictions, and reproductive health center closures have all threatened women's ability to obtain contraceptive services. Since 2010, multiple states have made drastic cuts to family planning programs, resulting in huge decreases in the number of women served.¹² Funding restrictions also impact the ability of providers to offer a full range of contraceptives, with half of the facilities receiving public funding reporting that they were unable to offer certain methods due to cost.¹³ In Congress, lawmakers have threatened to defund Title X—the nation's family planning funding program—multiple times and have almost shut down the federal government in their attempts to do so.¹⁴ The expansion of contraceptive equity in

⁶ *Unintended Pregnancy in the United States*, GUTTMACHER INSTITUTE (Feb. 2015), <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>.

⁷ *Id.*

⁸ Adam Sonfield et al., *Moving Forward: Family Planning in the Era of Health Reform*, GUTTMACHER INSTITUTE 9, <http://www.guttmacher.org/pubs/family-planning-and-health-reform.pdf>.

⁹ *Id.* at 4.

¹⁰ *Id.* at 21.

¹¹ Jennifer J. Frost et al., *Contraceptive Needs and Services, Update*, GUTTMACHER INSTITUTE 7 (Aug. 2014), <http://www.guttmacher.org/pubs/wir/contraceptive-needs-2012.pdf>.

¹² Rachel Benson Gold, *Besieged Family Planning Network Plays Pivotal Role*, 16 GUTTMACHER POLICY REVIEW 1, 16, (2013), <http://www.guttmacher.org/pubs/gpr/16/1/gpr160113.html>.

¹³ *Publicly Funded Family Planning Services in the United States*, GUTTMACHER INSTITUTE (Oct. 2014), http://www.guttmacher.org/pubs/fb_contraceptive_serv.html.

¹⁴ Gold, *supra* note 12.

health insurance plans under the Affordable Care Act means that millions of women can now access contraception without the barrier of a co-pay, a stunning public health and public policy achievement with a proven economic benefit for women; however, fully funding family planning programs continues to be essential to ensuring contraceptive access for everyone.

Further, expanding the joint federal-state Medicaid program improves family planning access, as Medicaid accounts for the vast majority of public funds expended on family planning.¹⁵ So far, only 28 states and the District of Columbia have expanded Medicaid coverage as allowed under the Affordable Care Act, thereby rejecting an opportunity to improve access to family planning for low-income women, largely on political grounds.¹⁶ Politicians cannot honestly claim to be slashing family planning budgets in order to be fiscally responsible, as investing in public family planning services consistently yields net savings for governments.

Access to Abortion Care

The disparities that exist in rates of unintended pregnancies understandably translate into disparities in rates of abortion. Despite an overall 11 percent decrease in the abortion rate between 1994 and 2000, low-income women saw their abortion rate rise 25 percent.¹⁷ Women living below the poverty line have an abortion rate of 52 per 1,000 women of reproductive age, while higher-income women (with family incomes at or above 200% of the poverty line) have a rate of nine abortions per 1,000.¹⁸

Meanwhile, there has been an explosion of bills in state legislatures aimed at restricting access to abortion. The resulting laws, passed under the guise of protecting women's health and safety, actually undermine women's health by reducing access to services. State-enacted barriers to safe abortion care can be difficult for anyone to navigate, but they are especially burdensome for low-income women, as such legislative barriers often raise the cost of abortions, increase the time it takes to receive the procedure, and increase the distance women must travel. These laws contribute to abortion stigma and undermine women's lived experiences and decision-making capabilities.

One of the most obvious examples of how public policy decisions make it more difficult for low-income women to access abortion care is the exclusion of coverage for abortion care for women who qualify for public health insurance, through the Medicaid program. Since 1976, the so-called Hyde Amendment has banned federal Medicaid coverage for abortion except in the most narrow of circumstances.¹⁹ Currently, abortion coverage using federal Medicaid dollars is available only if the woman's life is endangered by continuing the pregnancy or if the pregnancy is the result of rape or incest.²⁰ Medicaid-eligible women in 32 states and the District of Columbia suffer under these unfair restrictions.²¹

¹⁵ Adam Sonfield et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*, GUTTMACHER INSTITUTE 4 (Mar. 2013), <http://www.guttmacher.org/pubs/social-economic-benefits.pdf>.

¹⁶ *Where the States Stand on Medicaid Expansion*, THE ADVISORY BOARD COMPANY (Feb. 11, 2015), <http://www.advisory.com/daily-briefing/resources/primers/medicaidmap>.

¹⁷ Rachel K. Jones & Megan L. Kavanaugh, *Changes In Abortion Rates between 2000 and 2008 and Lifetime Incidence of Abortion*, 117 OBSTETRICS & GYNECOLOGY 1358 (June 2011), http://journals.lww.com/greenjournal/Fulltext/2011/06000/Changes_in_Abortion_Rates_Between_2000_and_2008.14.aspx.

¹⁸ *Id.*

¹⁹ Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, GUTTMACHER INSTITUTE 1 (June 2009), <https://www.guttmacher.org/pubs/MedicaidLitReview.pdf>.

²⁰ *Id.*

²¹ *Id.*

Of course, in practice, obtaining Medicaid coverage even in the very limited circumstances allowed under the Hyde Amendment is often difficult or impossible. Unreasonable and confusing claims procedures, combined with inaccurate information suggesting that extensive documentation is required for reimbursement in cases of rape, can delay or even prevent reimbursement altogether. As a result, some abortion providers have stopped seeking reimbursement for services or refuse to accept patients on Medicaid, which further limits access to reproductive health services for low-income women.²²

As women of color are more likely to experience unintended pregnancy and more likely to seek abortion care—while also being more likely to qualify for public insurance—they are especially impacted by unjust bans on abortion coverage. Additionally, immigrant women are more likely to be born into poverty than women born in the U.S.; immigrant women who otherwise qualify for Medicaid cannot receive federal Medicaid benefits for their initial five years of residence, nor can they purchase health insurance coverage in their state marketplaces at full price.²³ Women of color and immigrant women are bearing disproportionate burdens of this short-sighted policy, threatening their health and that of their families.

In addition to the Medicaid restrictions, 21 states have restricted or banned abortion coverage in insurance plans for public employees, whose ranks may include teachers, firefighters, and other government employees.²⁴ And many states also have banned coverage in private insurance plans, including plans offered through state health care exchanges under the Affordable Care Act.²⁵ In fact, in the five years since the passage of the Affordable Care Act, half of all states have restricted insurance coverage of abortion in plans sold in state health insurance marketplaces or exchanges.²⁶ It is unconscionable that politicians are holding back coverage for essential health care from a woman just because they disagree with her decision to have an abortion.

The impact of these restrictions are real. Poor women who seek abortions are often delayed up to three weeks in receiving the procedure while they raise the necessary funds, delays that can drive up the cost and may increase the risk of the procedure.²⁷ For many low-income women, trying to raise the necessary funds means forgoing basic necessities such as food, rent, or utilities.²⁸ For some women, the lack of coverage makes accessing abortion impossible. Research demonstrates that due to funding restrictions, approximately one in four women who would have obtained an abortion if Medicaid funding was available instead carry an unwanted pregnancy to term.²⁹ While researchers continue to study the effects of carrying an unwanted pregnancy to term on a family's economic status, it is unconscionable that politicians can make it harder for low-income women to get abortion care just because of where they get their insurance.

²² *The High Cost of State Bans on Abortion Coverage*, CENTER FOR REPRODUCTIVE RIGHTS 2, <http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/The%20High%20Cost%20of%20State%20Bans%20on%20Abortion%20Coverage.pdf>.

²³ *Id.* at 3-4.

²⁴ *Id.* at 2.

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ Heather Boonstra & Adam Sonfield Boonstra, *Rights without Access: Revisiting Public Funding of Abortion for Poor Women*, 3 THE GUTTMACHER REPORT ON PUBLIC POLICY n.2, 10 (April 2000), <http://www.guttmacher.org/pubs/tgr/03/2/gr030208.html>.

²⁸ *Id.*

²⁹ Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, GUTTMACHER INSTITUTE 1 (June 2009), <https://www.guttmacher.org/pubs/MedicaidLitReview.pdf>.

The restrictions on coverage, which by themselves represent significant and at times insurmountable obstacles for low-income women, are compounded by additional state abortion restrictions. For example, eleven states currently require women to travel to a clinic and receive state-mandated information at least twenty-four, forty-eight, or even seventy-two hours prior to an abortion.³⁰ These two-trip requirements fall especially hard on low-income women who may work multiple jobs; have difficulty arranging time off; cannot afford to lose daily wages; do not have access to reliable transportation; and can ill-afford extra child care expenses.

In addition, states continue to enact regulations targeting abortion providers (“TRAP” laws) that impose medically unnecessary yet onerous regulations that drive up the cost of abortion and reduce the number of providers. Laws that require physicians providing abortions to have admitting privileges at a hospital near the abortion facility have been enacted in more than half a dozen states in recent years.³¹ Where they have been allowed to take effect, they have shuttered numerous clinics because hospitals may refuse to grant privileges for reasons having nothing to do with the physician’s qualifications. One recent study in Louisiana analyzed a new law that could close all of the state’s abortion facilities by requiring providers to have hospital admitting privileges, thus forcing 75 percent of Louisiana women to travel 150 miles or more each way for abortion services.³² The researchers noted that forcing Louisiana women to travel further for abortion care would likely add to financial difficulties they already face when trying to pay for or access abortion services.³³ Other TRAP schemes require abortion clinics to meet expensive physical plant and staffing requirements that are not imposed on facilities doing comparable procedures,³⁴ forcing some clinics to close. And when clinics have to close due to these unnecessary requirements, women lose access not only to safe abortions, but also other reproductive health care services including contraceptives.

Not content with making early abortion harder to access, some states have enacted restrictions on later abortions.³⁵ Since 2010, 13 states have passed unconstitutional laws banning abortion at 20 weeks,³⁶ further punishing women who were delayed by a need to raise funds to pay for an abortion and/or couldn’t navigate existing legislative and geographic barriers to care. While each of these restrictions imposes burdens that fall especially hard on low-income women, their cumulative impact puts abortion effectively out of reach for some women. For a woman struggling to manage two trips to an abortion provider and facing additional travel distances because TRAP laws have reduced the number of providers and increased the costs of procedures at those clinics that

³⁰ *Counseling and Waiting Periods for Abortion*, GUTTMACHER INSTITUTE 2 (May 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

³¹ *State Policies in Brief: Targeted Regulation of Abortion Providers*, GUTTMACHER INSTITUTE 1 (May 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf.

³² Liza Fuentes, *Implications for Women of Louisiana’s Law Requiring Abortion Providers to Have Hospital Admitting Privileges*, IBIS REPRODUCTIVE HEALTH 4 (Feb. 2015), http://www.researchgate.net/publication/273154856_Implications_for_women_of_Louisianas_law_requiring_abortion_providers_to_have_hospital_admitting_privileges.

³³ *Id.*

³⁴ *Targeted Regulation of Abortion Providers (TRAP)*, CENTER FOR REPRODUCTIVE RIGHTS (Mar. 5, 2009), <http://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap>.

³⁵ *State Policies on Later Abortion*, GUTTMACHER INSTITUTE 2 (May 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf.

³⁶ Those states include Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, and Texas. *Abortion Bans Throughout Pregnancy*, NARAL PRO-CHOICE AMERICA, <http://www.prochoiceamerica.org/what-is-choice/fast-facts/abortion-bans-after-12-weeks.html> (last visited May 29, 2015).

remain, the right to abortion guaranteed under the Constitution has no meaning. Unfortunately, for a low-income woman, whether she will have access to abortion is determined both by where she lives and by her bank balance.

The Health and Rights of Pregnant Women and Mothers

Contraception and abortion are part of the continuum of women's reproductive health care needs, and the effect of income inequality on other reproductive health outcomes unfortunately follows the same trend line as it does for abortion. Far from the headlines surrounding a new abortion restriction signed into law in Kansas, or a sneaky amendment passed in Congress, the United States has a maternal mortality crisis. Maternal mortality rates have more than doubled in the United States between 1990 and 2013.³⁷ This alarming increase is nothing less than a human rights crisis and is especially troubling given that during the same time period, an overwhelming majority of other countries saw maternal mortality rates decline.³⁸ The Centers for Disease Control and Prevention estimates that at least half of maternal deaths in the United States are preventable.³⁹ Further, there are stark disparities when it comes to the populations most affected. Black women are four times more likely to die from pregnancy related complications than White women.⁴⁰ As maternal mortality outcomes are closely related to women's overall health and pre-existing conditions, low-income women are at a considerable disadvantage.

Working women, especially those working low-wage jobs, deserve to earn a living in a job that offers stability and benefits and allows for them to preserve their health and that of their families. Working mothers are the primary or sole source of income for 40 percent of families with children under the age of 18.⁴¹ And women in the U.S. are working in low-wage jobs in large numbers; in fact, women comprise 76 percent of workers in the 10 largest low-wage job categories (such as child care workers, housekeepers, personal care aides and food servers); Hispanic women, Native American women, and Black women are all disproportionately represented among low-wage workers in the U.S.⁴² Yet women working low-wage jobs are less likely to have access to job protections should they become ill or pregnant, or if they need time off to care for a sick child or family member.⁴³ With women as both primary family caregivers and the majority of low-wage workers, paid family and medical leave can be critical to their family's economic survival and to their health.

³⁷ REPRODUCTIVE INJUSTICE: RACIAL AND GENDER DISCRIMINATION IN U.S. HEALTH CARE—A SHADOW REPORT FOR THE UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, CENTER FOR REPRODUCTIVE RIGHTS ET AL. 12, (2014), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/CERD_Shadow_US_6.30.14_VWeb.pdf.

³⁸ *Id.*

³⁹ STEPHEN J. BACAK ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, STATE MATERNAL MORTALITY REVIEW—ACCOMPLISHMENTS OF NINE STATES 1 (2003), available at <http://www.cdph.ca.gov/data/statistics/Documents/MO-CDC-ReportAccomplishments9States.pdf>.

⁴⁰ Francine Coeytaux et al., *Maternal Mortality in the United States: A Human Rights Failure*, 83 CONTRACEPTION J. 189 (2011), <http://www.arhp.org/publications-and-resources/contraception-journal/march-2011>.

⁴¹ Wendy Wang et al., *Breadwinner Moms*, PEW RESEARCH CENTER 1 (May 2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>.

⁴² Joan Entmacher et al., *Minimum Wage: Women are 76 Percent of Workers in the 10 Largest Low-Wage Jobs and Suffer a 10 Percent Wage Gap*, NWLC (April 2014), http://www.nwlc.org/sites/default/files/pdfs/women_are_76_percent_of_workers_in_the_10_largest_low-wage_jobs_and_suffer_a_10_percent_wage_gap_april_2014.pdf.

⁴³ *44 Million U.S. Workers Lacked Paid Sick Days in 2010: 77 Percent of Food Service Workers Lacked Access*, IWPR 2, (Jan. 2011), <http://www.iwpr.org/publications/pubs/44-million-u.s.-workers-lacked-paid-sick-days-in-2010-77-percent-of-food-service-workers-lacked-access#sthash.UV6GZ4pU.dpuf> (noting majority of workers in food preparation and serving and personal care services were not eligible for paid sick leave).

Moreover, despite some existing federal protections for pregnant workers, some women are still denied reasonable accommodations in the workplace, and as a result may be fired or forced to leave their jobs. No woman should have to choose between her job and her pregnancy, especially when her family is dependent on that job to make ends meet or to receive health insurance. Although many women can work without adjustments or accommodations during their pregnancy, others cannot. Women who are pregnant while working deserve to have employers provide reasonable accommodations for medical needs so that they can keep the jobs that are critical to the well-being of their families.⁴⁴ The recent Supreme Court decision in *Young v. UPS*⁴⁵ provided a broader reading of existing pregnancy protections, but further action is needed.⁴⁶ Protecting the ability of pregnant women to keep their jobs is essential to women's economic security and health.

Solutions for Local, State, and Federal Lawmakers

The United States has significant room to improve when it comes to ensuring low-income women have equitable and affordable access to comprehensive reproductive health care, as well as the ability and support to make personal decisions about whether or not to parent. Unfortunately, many legislators seem to be more focused on playing politics with women's health care and restricting abortion than on addressing the real health care and economic challenges faced by their constituents. It's especially outrageous that recent trends in state abortion restrictions have been advanced under the guise of protecting women's health and safety. Legislators in Texas,⁴⁷ Mississippi,⁴⁸ Louisiana,⁴⁹ and other states have boldly claimed to be focusing on protecting women's health when pushing for sham laws that would actually harm women's health by closing clinics and making abortion harder to access for low-income women. Meanwhile, research shows "an inverse relationship between a state's number of abortion restrictions and a state's number of evidence-based policies that support women's and children's well-being."⁵⁰ Politicians laser-focused on legislating abortion out of existence are doing so at the expense of addressing the crucial health and socioeconomic challenges their constituents face.

Reproductive rights are crucial to women's ability to live healthy, full, and dignified lives. But rights aren't always enough. Economic status is intertwined with existing inequalities in health care access and outcomes, and specifically in reproductive health care access. While these challenges may seem insurmountable, there are realistic and attainable solutions. First, state, federal, and

⁴⁴ NATIONAL WOMEN'S LAW CENTER & A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS (2013), available at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf.

⁴⁵ *Young v. UPS*, 135 S. Ct. 1338 (2015), <http://www.supremecourt.gov/opinions/slipopinion/14>. See also *Legal Momentum Applauds Supreme Court Decision in Young v. UPS and Calls for Stronger National Legislation*, LEGAL MOMENTUM (March 25, 2015), <https://www.legalmomentum.org/press/legal-momentum-applauds-supreme-court-decision-young-v-ups-and-calls-stronger-national>.

⁴⁶ *Id.*

⁴⁷ Chris Tomlinson, *Texas House Passes Abortion Bill, Senate to Vote Next*, THE HUFFINGTON POST (July 10, 2013), http://www.huffingtonpost.com/2013/07/10/texas-house-abortion-vote_n_3573953.html?ncid=edlinkusaolp00000003.

⁴⁸ *Gov. Bryant Signs Measure to Ban Abortions at 20 Weeks*, GOVERNOR PHIL BRYANT (Apr. 23, 2014), <http://www.governorbryant.com/gov-bryant-signs-measure-to-ban-abortions-at-20-weeks/>.

⁴⁹ *Vitter Calls for Investigation into Baton Rouge Abortion Clinic*, U.S. SENATOR DAVID VITTER (May 20, 2014), <http://www.vitter.senate.gov/newsroom/press/vitter-calls-for-investigation-into-baton-rouge-abortion-clinic>.

⁵⁰ BURNS, BRIDGIT ET AL., CENTER FOR REPRODUCTIVE RIGHTS, IBIS REPRODUCTIVE HEALTH, EVALUATING PRIORITIES: MEASURING WOMEN'S AND CHILDREN'S HEALTH AND WELL-BEING AGAINST ABORTION RESTRICTIONS IN THE STATES 3(2014), available at http://www.ibisreproductivehealth.org/sites/default/files/files/publications/lbis%20and%20CRR_Priorities_Project_FINAL_2014.pdf.

local legislators can join the more than two dozen states and cities that have made local progress on paid sick days,⁵¹ and ensure paid family leave so workers can take paid leave to recover from serious illness or care for a sick or new family member. Fully-funding family planning programs and affirmatively addressing the underlying causes of maternal mortality are additional necessary steps governments should pursue to eliminate the shortfall that low-income women experience in reproductive health care. In Congress, that means advancing existing legislation like the 21st Century Women's Health Act,⁵² the Pregnant Workers Fairness Act,⁵³ and the Family and Medical Insurance Leave Act.⁵⁴

The abortion access crisis in the states can be reversed. From repealing existing restrictive policies that make life harder for women,⁵⁵ to advancing proactive policies that actually seek to expand services and access,⁵⁶ states can and should move in a new direction. And opportunities to do so aren't limited to state governments. Local city and county officials can also take a stand to improve reproductive rights for low-income women and all people by enacting programs and policies that support their constituents, ranging from improving contraception access and screening for sexually-transmitted infections, to regulating the harmful practices of deceptive crisis pregnancy centers,⁵⁷ to calling on Congress to take action.⁵⁸

To counter state abortion restrictions that are closing clinics and making it harder for everyone—and for low-income women especially—to access needed abortion care, members of Congress can advance the Women's Health Protection Act.⁵⁹ This groundbreaking legislation recognizes that any single state abortion restriction can have a devastating impact on the women affected by it. But when all of these various roadblocks to abortion access work together, the effect can be catastrophic—making this essential reproductive health care virtually impossible to obtain for far too many women. The Women's Health Protection Act creates federal protections against government restrictions that fail to protect women's health and intrude upon personal decision-making. Under the Act, states would be prohibited from enacting abortion restrictions that single out abortion from other health care procedures and make it subject to additional unnecessary requirements, such as TRAP laws, requirements that patients must make one or more medically

⁵¹ NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, STATE AND LOCAL ACTION ON PAID SICK DAYS (2014), <http://www.nationalpartnership.org/research-library/campaigns/psd/state-and-local-action-paid-sick-days.pdf>.

⁵² 21st Century Women's Health Act of 2015, S.674, 114th Cong. (2015), available at <https://www.congress.gov/bill/114th-congress/senate-bill/674/titles>.

⁵³ Pregnant Workers Fairness Act, S.942, 113th Cong.(2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/942>.

⁵⁴ Family and Medical Insurance Leave Act of 2013, H.R.3712, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/3712>.

⁵⁵ Tara Culp-Ressler, *Virginia Governor Takes the First Step Toward Repealing 'Extreme' Abortion Clinic Restrictions*, THINKPROGRESS (May 12, 2014), <http://thinkprogress.org/health/2014/05/12/3436860/virginia-governor-trap-review/>.

⁵⁶ Reid Wilson, *California Expands Early Abortion Access, Defying National Trend*, WASHINGTON POST (Oct. 10, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/10/california-expands-early-abortion-access-defying-national-trend/>.

⁵⁷ *Crisis Pregnancy Centers*, URBAN INITIATIVE FOR REPRODUCTIVE HEALTH, NIRH, <http://www.urbaninitiative.org/BuildingAMovement/CrisisPregnancyCenters> (last visited May 20, 2015).

⁵⁸ *#ActForWomen Municipal Resolutions: The Women's Health Protection Act of 2015*, DRAW THE LINE, <http://www.drawtheline.org/act-for-women/municipal-resolutions/> (last visited May 20, 2015).

⁵⁹ H.R.488, Women's Health Protection Act, 114th Congress (2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/448?q=%7B%22search%22%3A%5B%22women%27s+health+protection+act%22%5D%7D>.

unnecessary in-person visits to the provider, and abortion bans prior to viability.⁶⁰ The abortion access crisis in the states requires a bold response, and the Women's Health Protection Act is a crucial step toward protecting and respecting a woman's personal decision-making, no matter her address or economic status.

Additionally, policymakers at the state and federal level can restore full coverage for abortion no matter where a woman gets her insurance. By removing bans on public insurance coverage for abortion and repealing state bans on coverage in private plans, abortion will be rightfully recognized as an essential part of reproductive health care for all women, of all incomes.

The ideological agenda driving restrictions on women's access to abortion, contraception, and other critical reproductive health care services is taking its highest toll on low-income people. Women, their families, and society all suffer when these medically-unnecessary and politically-motivated abortion restrictions impede women's ability to access their constitutionally-protected reproductive rights. The ongoing erosion of reproductive rights cannot be halted and reversed without also addressing the barriers faced by low-income women to parenting and providing for their families. The legal promise of reproductive rights can be fully realized only when the economic barriers that currently prevent women from freely choosing the course of their reproductive lives are removed. •

⁶⁰ *Id.*

Relative Care Within a Public Health Paradigm

Kele M. Stewart¹

The beleaguered child welfare system is the primary means by which poor families obtain legal custodial rights and state support to allow a relative to care for a child. Kinship care, in which children are raised by relatives or someone else with an emotional connection, is an important resource when parents struggle with poverty-related stressors such as substance abuse, incarceration, mental illness, and homelessness.² Legal custody, which allows the relative to fulfill parenting functions such as participating in school or authorizing medical care, may be difficult to access through private family law proceedings. The relative may not be able to care for a niece or grandchild without financial assistance and services that, with the diminution of the welfare state, are less available outside of the child welfare system. This assistance comes at an onerous cost as families must subject themselves to the punitive child welfare system. A public health approach has been proposed as an alternative paradigm to provide a continuum of community-based services to children and families, and relegate the current crisis-oriented child welfare system to fewer situations with severe maltreatment.³ Legal scholars have only recently begun to explore how the law can shape and support a public health paradigm for child well-being. This essay contributes to that project by examining the legal structure needed to help relatives care for children in a public health paradigm. The law should make it feasible for families to get custody orders that meet their specific needs, and provide need-based support and services to relatives without having to enter the child welfare system.

I. Public Health Paradigm as an Alternative to Child Welfare

a. The Failings of the Child Welfare System

The child welfare system uses an adversarial model in which the state has the power to investigate reports of abuse and, for substantiated reports, remove children from their home and assume custody. Mandatory reporting laws encourage high-volume reports, and much of the system's resources are devoted to investigating and proving parental fault. Services are provided to parents, who must quickly get their lives together, or risk permanently losing custody of their children.

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² Marc Winokur et al., *Kinship Care in the United States: A Systematic Review of Evidence-Based Research*, Soc. WORK. RES. CTR. 1, 2 (2005), available at <http://www.ssw.chhs.colostate.edu/research/swrc/files/KinshipCareSystematicReview.pdf>.

³ Public health describes a complex system that draws on knowledge from multiple sciences, and includes services, programs, and policies that focus on health and safety on a broad scale. It is rooted in the social-ecological view that "a complex interplay of biological, behavioral, psychological, social and environmental factors contribute to health outcomes." Theresa Covington, *The Public Health Approach for Understanding and Preventing Child Maltreatment: A Brief Review of the Literature and a Call to Action*, 92 CHILD WELFARE, n. 2, 22 (2013). As applied to child maltreatment, public health strategies: address the range of conditions that place children at risk for abuse or neglect; provide prevention efforts at different levels—individual, family, community, and societal; operate in a range of community settings that serve children; and are implemented through a continuum of services that are targeted to the level of risk involved. *Id.* at 22; Francine Zimmerman & James A. Mercy, *A Better Start: Child Maltreatment Prevention as a Public Health Priority*, 30 ZERO TO THREE (j), n. 5, 4-6 (2010), available at http://vetoviolence.cdc.gov/apps/phl/docs/A_Better_Start.pdf.

The system's myriad failures are well documented.⁴ Critics argue that the system undermines family relationships and is ineffective because the state attempts to help much too late, after families are already in crisis.⁵ Despite recent declines in the overall number of children in foster care, the system lacks the capacity to provide appropriate case management, services and supports to its large caseloads.⁶ The response to complex family circumstances is often cookie-cutter. The system does not adequately protect children, exemplified by the alarming number of child deaths of system-involved children.⁷ Children in foster care often do not receive appropriate educational, medical, and therapeutic care, and remain in foster care for too long, increasing the likelihood of exacerbated emotional and behavioral problems. At the same time, deteriorating relationships with biological families means that children lack opportunities to develop nurturing support systems. The poor outcomes of many teens who age out of foster care—homelessness, lack of academic and employment skills, and high rates of incarceration and mental illness—stand as testimony that the state is a poor substitute parent.

The system is over-inclusive, intervening in situations that do not warrant the coercive force of public intervention.⁸ The majority of cases in the child welfare system are for neglect, relating to issues such as unstable housing, lack of child care, inadequate mental health and medical services, and substance abuse.⁹ Poor children are more likely to be reported to child protection agencies, removed from their homes, and experience lengthy stays in foster care.¹⁰ The disproportionate representation of poor children in foster care has caused some scholars to conclude the poverty equates with a finding of neglect.¹¹ Although their overall numbers have declined, Black children are still over-represented in foster care.¹² Professor Dorothy Roberts and other scholars have written about the ways in which concentrated child welfare involvement in already distressed neighborhoods disrupts, restructures, and polices families and communities.¹³

⁴ See e.g., U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY (1990); Sandra Bass et al., *Children, Families and Foster Care: Analysis and Recommendations*, 14 THE FUTURE OF CHILDREN 1 (Winter 2004), available at http://www.princeton.edu/futureofchildren/publications/docs/14_01_FullJournal.pdf.

⁵ CLARE HUNTINGTON, FAILURE TO FLOURISH 92-95 (2013); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 228-240 (2002).

⁶ Sandra Bass et al., *supra* note 4, at 6; U.S. HHS CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2008-2011: REPORT TO CONGRESS, EXECUTIVE SUMMARY, available at https://www.acf.hhs.gov/sites/default/files/cb/cwo08_11_exesum.pdf.

⁷ AP Examines Deaths of Kids Known to Child Protective Services, JSONLINE.COM (Dec. 18, 2014), <http://www.jsonline.com/news/wisconsin/ap-examines-deaths-of-kids-known-to-child-protective-services-b99410970z1-286276231.html> (reporting that over 6 years at least 786 children died of abuse or neglect after contact with child welfare agencies).

⁸ Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, 8 THE FUTURE OF CHILDREN 107 (Spring 1998), https://www.princeton.edu/futureofchildren/publications/docs/08_01_06.pdf.

⁹ In 2013, 79.5 percent of substantiated reports nationwide were the result of neglect. CHILDREN'S BUREAU, CHILD MALTREATMENT 23 (2013); ROBERTS, *supra* note 5 at 27-47.

¹⁰ ROBERT B. HILL, CENTER FOR THE STUDY OF SOCIAL POLICY, *SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE* (2006), available at <http://www.cssp.org/reform/child-welfare/other-resources/synthesis-of-research-on-disproportionality-robert-hill.pdf>.

¹¹ The relationship between child maltreatment and poverty are complex, and theories about the association include that maltreatment is indirectly caused by parental poverty, detected because of poverty, or defined by parental poverty, ROBERTS, *supra* note 5 at 27-47; LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 38-45 (1989).

¹² In 2012, 26 percent of children in foster care were Black, although only 13.9 percent of children in the country were Black. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 36, 76 (2014), available at <http://www.childrensdefense.org/library/state-of-americas-children/2014-soac.pdf>.

¹³ Dorothy Roberts, *The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 191 (2009); Annette Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System*, 48 S.C. L. REV. 577 (1997).

b. A Public Health Paradigm

A public health paradigm offers an alternative approach in which families get needed supports—such as mental health services for parents and children, drug treatment, and housing assistance—in the community, and the current “coercive model” is reserved for a smaller subset of high-risk families.¹⁴ The goal is to reduce the number of families inappropriately referred to the child welfare system, thereby sparing low-risk families unnecessary intervention and freeing scarce child welfare resources for families in which removal is absolutely necessary.¹⁵

Josh Gupta-Kagan has identified several core elements in a public health approach to child welfare.¹⁶ There is a focus on prevention and a continuum of interventions depending on the level of risk or severity of child maltreatment. The public health approach would rely on data to identify the most effective interventions, individually tailor interventions, and use the most invasive interventions only when necessary. The approach considers the child in her full context—as part of a family and wider community, and may seek to preserve or strengthen the positive elements of a child’s environment and use them to help improve the harmful elements.

In a public health paradigm, the current child welfare agencies share responsibility for child well-being with a wide range of community partners to provide a more differentiated response to children at risk of maltreatment. Progress toward this paradigm must by necessity proceed along two tracks: improve the capacity of the current child welfare system to respond effectively to cases that need coercive intervention, and enhance the capacity of community partners to help children at all stages of the risk continuum. As we build the infrastructure to address the diverse needs of children and their families, the responsibility to respond at the lower end of the risk spectrum will increasingly shift to other public and private agencies.

The idea that we should focus on prevention and provide services to children and families in the communities where they live is not new.¹⁷ However, many earlier critiques of the child welfare system were framed squarely within the current child welfare paradigm and merely recognized the need for a more robust social safety net, without exploring the complexities of truly offering community-based services. A convergence of factors suggests that we may finally be at a turning point. Renewed research interest in systems change and the significance of geography is influencing policy-making.¹⁸ Policymakers in different arenas have at least in theory embraced a public health

¹⁴ Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 600 (2005) (providing justification for a public health perspective); Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897 (2014), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1222&context=nlr>.

¹⁵ Waldfogel, *supra* note 8 at 109.

¹⁶ Gupta-Kagan, *supra* note 14 at 920-927.

¹⁷ See e.g., U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, *supra* note 4.

¹⁸ Systems Change, within the field of community psychology, focuses on all aspects of complex and dynamic systems with the goal of fostering social change. Pennie G. Foster-Fishman & Teresa R. Behrens, *Systems Change Reborn: Rethinking our Theories, Methods, and Efforts in Human Services Reform and Community Based Change*, AM. J. COMM. PSYCHOL. 39:191-196 (2007), available at <http://systemexchange.msu.edu/upload/systems%20change%20reborn.pdf>. Researchers studying the impact of place focus on the complex and interconnected ways that social context and neighborhood characteristics affect outcomes for children and youth. SUSAN J. POPKIN ET AL., THE URBAN INSTITUTE’S PROGRAM ON NEIGHBORHOODS AND YOUTH DEVELOPMENT, UNDERSTANDING HOW PLACE MATTERS FOR KIDS (2009), available at http://www.frbsf.org/community-development/files/S_Popkins.pdf.

approach.¹⁹ Moreover, community-based initiatives such as Promise Neighborhoods, and years of experience with local experimentation in child welfare suggest that certain components of a public health paradigm are starting to develop.²⁰ New York's Community Schools initiative, making certain schools a hub for health and social services to at-risk children, is an example of an initiative consistent with a public health approach.²¹

II. The Current Legal Framework for Relative Caregiving

a. The Child Welfare System

Federal policy prioritizes relatives to provide temporary care when children are removed from the home,²² but relatives may still be excluded as temporary caregivers. If a child is removed from the parent's home, the child protection agency typically tries to identify a relative with whom the child can stay while the juvenile court case unfolds. The relative might become the child's foster parent and receive monthly foster care payments. The state has legal custody of the child, while the relative is delegated physical custody and authority to make day-to-day decisions. Federal rules preclude foster care payments for relatives who do not meet specific eligibility requirements,²³ and states vary as to whether they will use state funds for relatives who are ineligible for federal payments. Licensing requirements also may bar some relatives by, for example, requiring that no adult in the home have a criminal record or requiring a certain amount of space in the home. In some cases, relatives who are ineligible for foster care payments or choose not to complete the process, may be given temporary legal custody of the child but remain under court and agency supervision.

The end-goal of the child welfare case is to find permanency, a permanent home, for the child.²⁴

¹⁹ The National Institute of Mental Health has adopted a "system of care" philosophy that emphasizes coordination among various child-service public agencies. JANICE L. COOPER ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, UNCLAIMED CHILDREN REVISITED: THE STATUS OF CHILDREN'S MENTAL HEALTH POLICY IN THE UNITED STATES 6 (2008), available at http://www.nccp.org/publications/pub_853.html.

²⁰ For example, the Annie E. Casey Foundation had an 18-year initiative to develop a community-based model of foster care called "Family to Family" that draws on community resources so that children can be placed with families and receive services in their home communities. *Family to Family*, THE ANNIE E. CASEY FOUNDATION, <http://www.aecf.org/work/past-work/family-to-family> (last visited May 28, 2015). Casey Family Programs seeks to safely reduce the need for foster care. The MacArthur Foundation Models for Change Initiative seeks to reform the juvenile justice system through a series of community-based initiatives including the provision of mental health services.

²¹ *De Blasio Administration Announces \$52 Million Investment to Launch Community Schools*, NYC (June 17, 2004), <http://www1.nyc.gov/office-of-the-mayor/news/292-14/de-blasio-administration-52-million-investment-launch-community-schools>.

²² The Adoption Assistance and Child Welfare Act of 1980 required states to place children in the "least restrictive (most family like setting)." 42 U.S.C. § 675(5)(A). The Adoption and Safe Families Act of 1997 explicitly requires states to "consider giving preference to an adult relative over a nonrelated caregiver when determining temporary placement for a child." 42 U.S.C. § 671(a)(19).

²³ 42 U.S.C. 672(a)(1)(2014); Meredith Alexander, *Harming Vulnerable Children: The Injustice of California's Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L. J. 381, 410-413 (2010). One example of a federal eligibility requirement that might exclude relatives is the provision stating that if a child is placed with a relative pursuant to a voluntary agreement, to be eligible for foster care payments, there must be a judicial determination within six months that the placement is in the child's best interests. As a practical matter, if the child was physically placed with the relative more than six months before court adjudication, the relative is not eligible.

²⁴ The Department of Health and Human Services defines permanency as "a legal, permanent family living arrangement, that is, reunification with the birth family, living with relatives, guardianship or adoption." A REPORT TO CONGRESS ON ADOPTION AND OTHER PERMANENCY OPTIONS FOR CHILDREN IN FOSTER CARE: FOCUS ON OLDER CHILDREN, HHS, WASH. D.C. CHILDREN'S BUREAU (2005), available at http://www.acf.hhs.gov/sites/default/files/cb/congress_adopt.pdf.

Guardianship is often used to allow relatives to become long-term caregivers. Unlike adoption, guardianship does not require termination of parental rights and allows the birth parent to retain certain rights and responsibilities. The Adoptions and Safe Families Act, which made permanency the predominant child welfare goal, identified guardianship or placement with a fit and willing relative as acceptable permanency options.²⁵ It, nonetheless, prioritized adoption over these options through procedural requirements and funding incentives. The Fostering Connections to Success and Increasing Adoptions Act of 2008 (“Fostering Connections”) helped to fix the misaligned incentives by providing funding to subsidize guardianships.²⁶ Once a case results in guardianship, the court transfers custody from the state to the relative, and there is minimal further involvement by the state. Some caregivers choose to adopt their relative children. Because adoption is often the agencies’ preferred option, relatives may be encouraged to adopt over permanent guardianship.

Some states have subsidized guardianship programs so that relatives continue to receive a subsidy after the case closes. The Fostering Connections Act encourages the use of subsidized guardianships by allowing states the option to use Title IV-E for guardianship assistance programs. Prior to this, aside from limited Title IV-E waivers,²⁷ federal child welfare funding was available only for foster care and adoption, creating strong disincentives for states to pursue guardianships. Although some states had subsidized guardianship programs prior to Fostering Connections, these were primarily funded through state and local funds, general public benefit programs such as Temporary Assistance for Needy Families (“TANF”) or Title XX block grants, or in select states through the Title IV-E waiver.²⁸ The effect of having to cobble together funding is that these programs were often underfunded and underutilized. As of May 2014, thirty-two states, including New York, were approved to offer Fostering Connections guardianship assistance programs.²⁹ Children in foster care—or who exit foster care—get other services and benefits such as Medicaid, priority for other types of disability benefits, and independent living benefits for children who “age out” of the foster care system.

The costs of using the child welfare system as the primary means to support relative care are high. There is no guarantee that children will be placed with relatives or that the family will get needed services. Rigid licensing and adoption standards rule out some family members who would be wonderful caregivers from a psychological perspective. In some cases, relatives are not eligible for financial assistance. Whether relatives get assistance or are selected for placement turns on the specifics of state rules, availability of services, or discretion of child welfare agencies. Even when children are placed with relatives, the focus on assigning fault and penalizing parents puts stress on the very familial relationships that are an invaluable support system for the child. Children remain bonded to their biological parents, even when it may be best for them to remain under the care of another relative. The trauma of separation and court involvement itself has psychological

²⁵ 42 U.S.C.A. § 675(5)(C), (E).

²⁶ Public Law 110-351 (codified at 42 U.S.C.A § 675(1)(D)).

²⁷ Title IV-E waivers allowed states to apply to the federal government to use Title IV-E money to fund innovative demonstration projects including subsidized guardianships, community-based supports for families, and post-adoption assistance to families, such as therapy and case management. U.S. HHS, ACF, SYNTHESIS OF FINDINGS: SUBSIDIZED GUARDIANSHIP CHILD WELFARE WAIVER DEMONSTRATIONS (2011), available at http://www.acf.hhs.gov/sites/default/files/cb/subsidized_0.pdf.

²⁸ Grandfamilies State Law and Policy Resource Center, *Judge’s Role in Implementing Fostering Connections: Relative Caregiver Provisions*, 31 No. 6 CHILD L. PRAC. 88 (June 2012).

²⁹ National Resource Center for Permanency and Family Connections, NRCPCF, http://www.nrcpcf.org/fostering_connections/state_gap.html (last visited April 9, 2015).

consequences, and the system may actively disrupt the parent-child relationship once it gives up on helping parents.

Families must also endure the invasive control and vagaries of the child welfare system during a lengthy permanency planning process, during which reunification efforts must be attempted and adoption must be ruled out.³⁰ For example, in New York, a child is eligible for kinship guardianship assistance payments only after the fact-finding hearing and first permanency hearing have been completed.³¹ To receive financial assistance, a relative must submit an application for approval, and enter an agreement with the local social service agency, before obtaining a guardianship order from the court.³² Without functioning subsidized guardianship programs, relative foster parents may not be able to forfeit foster care payments in favor of unsubsidized permanency.³³

b. Outside of the Child Welfare System

If a relative wants legal authority and financial assistance to care for a child without child welfare involvement, he must navigate two distinct processes—judicial and public benefits. Legal custody may be obtained through private guardianship or other types of custody proceedings. Relatives may be reluctant to bring private cases for fear of drawing attention from child welfare officials. Moreover, poor families may have limited access to private family proceedings because of high filing fees, or the difficulty of navigating the court process without an attorney. Because of the presumptions in favor of parental custodial rights, even if a relative brings a case, the substantive legal standard may be difficult to meet in some circumstances. For financial assistance, relatives must apply through the state's public benefits programs. Financial and other assistance for relative caregivers is lower or non-existent outside of the child welfare system. While all states provide relatives with TANF assistance for children in their home, these benefits are lower than foster care payments. Depending on the state, there may or may not be other services available for either the relative or the child.

Probate guardianships are the traditional way, outside of the child welfare context, for a relative to obtain legal authority to care for a child. Most probate courts appoint guardians when parents are deceased, are incapacitated, are out of the picture, or consent.³⁴ States vary as to whether probate courts have jurisdiction to appoint a guardian over the objection of a biological parent.³⁵

³⁰ Cynthia Godsoe, *The Permanency Puzzle* 2013 MICH. ST. L. REV. 1113, 1116-1118 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461397.

³¹ N.Y. SOC. SERV. LAW § 458-b, 1(e).

³² N.Y. SOC. SERV. LAW § 458-b, 2(b)&(c); Merrill Sobie, N.Y. FAMILY COURT ACT § 661, Supplementary Practice Commentaries, (2012).

³³ *Id.* There is research showing that children in relative foster care are less likely to achieve permanency as defined by the child welfare system, but more recent data suggest that these differences may not be as significant as once thought. Eun Koh, *Permanency Outcomes of Children in Kinship and Non-Kinship Foster Care: Minimizing the Effects of Selection Bias with Propensity Score Matching* 5, 8 (Jan. 2008), OSU KNOWLEDGE BANK, https://kb.osu.edu/dspace/bitstream/handle/1811/32041/20_4koh_paper.pdf;jsessionid=2ACE1ECAC6E293C07BBA176B99611CBA?sequence=2; Iryna Hayduk, *The Effect of Kinship Placement on Foster Children's Well-Being* (Mar. 2014), https://research.stlouisfed.org/conferences/moconf/2014/Hayduk_paper.pdf.

³⁴ See e.g., FLA. STAT. 744.3021 (2015).

³⁵ Neil Knuppel, *Custody in Probate Guardianships: Different Venue, Same Rules*, 45 FEB-ORANGE COUNTY LAWYER 44 (2003) (describing California law allowing appointment of guardianships over objection of parents based on a finding of detriment to the child).

Relatives may also petition for legal custody in family court.³⁶ Although many states offer both family court custody and probate guardianships with different procedural requirements and substantive standards, the distinction between the two is not always clear, and both afford the relative similar custodial rights delineated by the judge.³⁷ They grant the relative power to make decisions about a child's living arrangements, health, education, and care, but do not typically extinguish the natural parent's rights. If parental rights are still intact, the parent remains liable for child support, and the order can contain specific visitation arrangements with the biological parent. Following the appointment, probate courts retain jurisdiction over the minor, but there is typically very little ongoing court involvement. Anyone, including the biological parent, can ask the court to review or revoke the appointment at any time.

Biological parents must be afforded notice and an opportunity to be heard in any proceeding involving their children. If the parent objects to the relative's care, the legal standard used to resolve the dispute must afford the parent deference, in accordance with the firmly established constitutional principle that parents are entitled to care, custody, and control of their minor children.³⁸ In the child welfare context, the initial adjudication of parental fault gives the court wide latitude to make decisions to protect the child. Outside of the child welfare context, the court must make a finding of parental unfitness or detriment to the child before it can overrule a parent to place a child with a relative.³⁹ Courts may be more reticent to do so without the machinery of the child welfare system to prove the allegations.

Relatives may obtain financial assistance through public benefits programs such as TANF, Food Stamps, Supplemental Security Income, Medicaid, and the Children's Health Insurance Program. TANF is the most common source of financial assistance. The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") created TANF to, among other things, provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives.⁴⁰ A relative may receive child-only TANF benefits for a needy child in their care. If the relative otherwise meets the eligibility requirements for TANF, they may receive TANF for themselves, but must then comply with PRWORA's rigid work requirements.⁴¹ TANF child-only payments are typically less than other TANF grants, foster care, or subsidized guardianship payments. Moreover, PRWORA imposes a five-year life-time maximum on benefits.

III. Toward a Legal Framework that Supports a Public Health Model

In a public health model, families should be able to reapportion custodial rights and responsibilities, as well as obtain support and services, without having to enter the child welfare system. When a parent experiences challenges, a relative should be able to step in so that the child can remain in the family and community. This might be a temporary arrangement until a parent

³⁶ See e.g., N.Y. FAMILY COURT ACT § 661 (2015)(granting the family court concurrent jurisdiction over guardianships).

³⁷ Merrill Sobie, N.Y. FAMILY COURT ACT § 661, Supplementary Practice Commentaries, (2012); Knuppel, *supra* note 35.

³⁸ See e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).

³⁹ See e.g. *Ortiz v. Winig*, 82 A.D.3d 1520 (N.Y. App. Div. 2011)(a biological parent has a right to custody of his or her child superior to that of a nonparent in the absence of unfitness or extraordinary circumstances).

⁴⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2106 (1996).

⁴¹ Meredith L. Alexander, *Harming Vulnerable Children: The Injustice of California's Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L. J. 381, 414-417 (Summer 2010).

gets treatment, finds suitable housing, or returns from prison, or it might be a more long-term arrangement whereby a parent shares child-rearing responsibilities with one or several relatives. Unlike the child welfare model that threatens loss of parental rights if family problems are not resolved within a year, this approach recognizes that complete management of mental illness or recovery from substance abuse is a long-term process that may require multiple treatment episodes.⁴² During that time, the family should be empowered to decide on the best arrangement to meet the needs of the child.

The process should be simple and easily accessible. Poor families may not be able to access courts due to high filing fees, complicated procedures, and the inability to afford lawyers. Families should be able to complete the process on their own. For more complicated cases, the state should provide lawyers. This cost would still likely be less than the high costs of multiple attorneys in the current state adversarial model. The case should not involve on-going court oversight, but the family should be able to access the court again at any point to rearrange custody. There should be a single access point or coordinated mechanism to allow families to reassign custody and, if needed, also obtain financial assistance and services.

The legal standard in a public health approach would have to contend with the legal rights focus of child custody disputes. There is an ongoing debate in family law about the proper balance between parents' rights, children's rights, and state authority. The traditional child-welfare framing of this debate pitted state intervention and swift adoption,⁴³ on the one hand, against family preservation, on the other hand. This debate left us squarely within the child welfare paradigm because even family preservation occurs after a family breakdown significant enough to trigger child welfare action. And third-party custodial rights are subordinate to parental rights absent a showing of harm to the child.⁴⁴ Some legal scholars have started pushing us in a direction that better accommodates a public health paradigm.⁴⁵ For example, Clare Huntington has written that a rights-based model does not adequately protect parents or children, and should be shifted, although not abandoned altogether, in favor of a more holistic problem-solving model.⁴⁶ As Professor Huntington wrote:

[R]ights obscure the role of poverty in abuse and neglect, and relying on rights does not ensure poor parents will get the help they need. Additionally, rights will never be the primary way to produce good results for families because the rights-based model creates, or at least perpetuates, an adversarial process for decisionmaking. This adversarial process impedes the thoughtful group collaboration among parents, children, and the state that is essential to devising beneficial solutions The reality is that the emphasis on rights has led to the wrong kind of involvement in the lives of troubled families, resulting in over- and underprotection of everyone's rights and a serious misallocation of resources.⁴⁷

⁴² Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL'Y & L. 590, 631 (2005).

⁴³ ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER CARE DRIFT AND THE ADOPTION ALTERNATIVE 7 (1999).

⁴⁴ Josh Gupta-Kagan, *Children, Kin and Court: Designing Third Party Custody Policy to Protect Children, Third Parties and Parents*, 12 NYU J. LEGIS. & PUB. POL'Y 43 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119983.

⁴⁵ Gupta-Kagan, *supra* note 14 at 927; Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 639-640 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=868542; Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 423 (2005), available at http://heinonline.org/HOL/Page?handle=hein.journals/vajsplw12&div=20&g_sent=1&collection=journals.

⁴⁶ Huntington, *supra* note 45, at 640-641.

⁴⁷ *Id.* at 639-640.

The debate is complex and nuanced, but must continue to explore how the law can better support families in developing creative solutions to care for children.

The law should also accommodate a range of options that reflect the diverse needs of family. For example, concurrent or non-exclusive guardianships should be options. The relatives do not necessarily need to supplant the parent, but might share caregiving in a manner that protects the child, while preserving the child's connection to their parent. Family courts have creatively divided time-sharing and parental decision-making between parents. In the child welfare context, courts are comfortable apportioning rights and responsibilities between the state (which has ultimate decision-making), parents (who may have some decision-making, visitation rights, and child support obligations), and custodians (who are delegated day-to-day decision-making authority). Yet, we typically view guardianships as an exclusive transfer of rights from the parent to the third-party caregiver. Courts should come up with creative solutions that reflect the realities of caregiving in diverse families.

The model should allow alternative dispute mechanisms to help families determine the right solutions. Some families may voluntarily agree to the rearrangement of rights, particularly when permanent termination of parental rights is off the table. For some families, mediation or family conferencing models can be used to empower families to figure out the best approach.⁴⁸

There should also be equal access to need-based assistance regardless of whether the child was ever involved with the child welfare system. In the current paradigm, relatives who obtain custody via the child welfare system are eligible for higher subsidies and a wider range of services. For example, Title IV-E-funded guardianship assistance programs like the one in New York can be used only to subsidize guardianships for children who exit foster care.⁴⁹ Restrictions on the expenditure of federal funds must be eliminated, and one pool of flexible funding should be created for states to spend on all costs associated with preventing child maltreatment. The Pew Commission has proposed to combine Title IV-E and IB-B funds to create a new pool of flexible funding for states to use toward a variety of purposes.⁵⁰ But funding would need to go further, and de-link current eligibility requirements that require state-coerced removal from the home or foster care placement as a prerequisite for assistance.

Conclusion

Federal and state policies that encourage relative caregiving for children in the child welfare system are beneficial to children and families. However, current policies provide easier and more support to relative caregivers only when child welfare intervenes in its heavy-handed and often harmful way. To move toward a public health paradigm for child well-being, relatives should be able to obtain legal custodial orders and equivalent financial support and services without coercive child welfare involvement. •

⁴⁸ *Id.* at 640-641.

⁴⁹ *Subsidized Guardianship: Summary and Analysis*, GRANDFAMILIES, <http://www.grandfamilies.org/SubsidizedGuardianship/SubsidizedGuardianshipSummaryAnalysis.aspx> (last visited May 28, 2015).

⁵⁰ BILL FRENZEL ET AL., PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCY AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13, 20 (May 2004), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf. (arguing for the creation of a Safe Children, Strong Families Grant which combines the Title IV-B program with the administration and training components of Title IV-E).

Changing the School to Prison Pipeline: Integrating Trauma-Informed Care in the New York City School System

Ellen Yaroshefsky and Anna Shwedel¹

In the past decade, national, state and local, attention has focused sharply on the various ways in which our country's education and criminal justice systems fail our youth, notably youth of color who fall at or below the poverty line. The term "school to prison pipeline" spotlighted the connection between school suspensions and court involvement. The phenomenon has been well documented.² Beginning in the 1970s with the implementation of zero tolerance in schools, the rates of suspensions of young people skyrocketed through 2012.³ In New York City alone, the numbers and percentages of suspensions were alarming. The relationship between suspension and criminal justice involvement was made clear. The suspensions disproportionately affect Black and Latino youth, notably those who come from low-income districts.⁴ Students with special needs are disproportionately suspended.⁵

In the last five years, New York State—among others—has focused upon the middle to end of the pipeline: juvenile detention and jail facilities. It has devoted significant resources in an attempt to change the culture and practice in the so-called "juvenile justice" system.⁶ The studies and data overwhelmingly demonstrate that the punitive approach that was operational for scores of years is counterproductive and dangerous, and all but ensures that these children are doomed to failure as measured by any criteria—education, jobs, family, and community involvement.

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² The term "school to prison pipeline" refers to the process and practices, exacerbated by zero tolerance policies, where children are funneled from public schools suspensions into the juvenile and criminal justice system. *What is the School-to-Prison Pipeline?*, ACLU (Apr. 14, 2015), <https://www.aclu.org/what-school-prison-pipeline?redirect=racial-justice/what-school-prison-pipeline>. In recent years, many have challenged the term and instead use the term "School climate" to refer to ways in which the school system needs improvement to reduce suspensions. See *City Announces School Climate Reforms*, NYC DEP'T OF EDUCATION (Feb. 13, 2015), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2014-2015/City+Announces+School+Climate+Reforms.htm>.

³ Fernanda Santos, *Sharp Rise in Suspensions at City's Schools is Cited*, N.Y. TIMES, Jan. 27, 2011, <http://www.nytimes.com/2011/01/28/nyregion/28suspend.html>. See also NYC COMPTROLLER JOHN C. LIU, *THE SUSPENSION SPIKE: CHANGING THE DISCIPLINE CULTURE IN NYC'S MIDDLE SCHOOLS 1* (2013), available at http://comptroller.nyc.gov/wp-content/uploads/documents/NYC_MiddleSchools_Report.pdf.

⁴ Data from the 10-year period covering 1999-2000 to 2008-2009 show that while Black students make up only 33 percent of the city's public school population, they constitute more than half of the suspensions every year. NEW YORK CIVIL LIBERTIES UNION, *EDUCATION INTERRUPTED 8* (Jan. 2011), available at http://www.nyclu.org/files/publications/Suspension_Report_FINAL_noSpreads.pdf.

⁵ Over the course of the 2012-2013 school year, students with special needs accounted for 34.1 percent of the suspensions, despite only being 12 percent of the overall population. Shoshi Chowdhury, *New Data Show Decrease in NYC School Suspensions, But Next Mayor Still Has Work to Do*, DIGNITY IN SCHOOLS (Nov. 1, 2013), <http://www.dignityinschools.org/press-release/new-data-show-decrease-nyc-school-suspensions-next-mayor-still-has-work-to-do>. Further, on Wednesday, May 20, 2015, Advocates for Children settled a class action lawsuit with the New York City Department of Education. The lawsuit alleged that children with special needs were unlawfully denied certain legal protections after suspension and were excluded from certain activities in school. *E.B. et al. v. New York City Dep't of Education et al.*, Stipulation and Agreement of Settlement, No. 02 CV 5118 (ENV/MDG) (May 13, 2015) available at http://www.advocatesforchildren.org/sites/default/files/library/eb_stip_may_2015.pdf?pt=1.

⁶ Anecdotally, observers contrast the existing case-processing system with one that actually provides a measure of justice and assistance to those snared within its confines.

Facing high rates of recidivism, a lack of rehabilitation and increasing numbers of juvenile incarceration, New York and other states have adopted therapeutic models in youth detention facilities.⁷ These include behavior management programs, as well as trauma-informed care. Trauma-informed care calls for us to examine the underlying trauma in a child's life and the ways that incarceration contributes to the impact of trauma. Its implementation leads to an examination of ways to provide services to youth in lieu of punitive detention.⁸

As a part of juvenile and criminal justice reform, the State closed down seven of its state prisons⁹ and developed the Close to Home program in 2012.¹⁰ That program, which is yet to be fully implemented, is a sea change in the way in which New York City treats its court-involved youth. The fundamental notion is that a rehabilitative, rather than a correctional model, is the appropriate and necessary approach to improve the lives of these youth. Close to Home facilities use a range of rehabilitative and evidence-based programs. These include therapeutic methods designed to provide youth with the skills and abilities to manage their lives, providing necessary rehabilitative programs and resources during and after their stay in the Close to Home facility. The programs include the use of trauma-informed care.¹¹

The NYC Administration for Children's Services worked in partnership with nationally recognized hospitals and mental health services to establish state of the art trauma-informed mental health screening and programs in the juvenile detention facilities. Bellevue Hospital Center's Child Study Center established these programs to "immediately help traumatized children and young people by providing effective screening and counseling and . . . [by providing] a framework to train and educate staff within juvenile detention facilities to ensure more successful outcomes."¹²

Similar rehabilitative programs are in the process of being implemented for the 16- and 17-year-olds who are housed in the notorious, draconian jail facility at Rikers Island.¹³ That adult facility is based upon a punitive correctional model. Despite more than a decade-long attempt to "raise

⁷ ELLEN YAROSHEFSKY, YOUTH JUSTICE CLINIC, BENJAMIN N. CARDOZO SCHOOL OF LAW, RETHINKING RIKERS: MOVING FROM A CORRECTIONAL TO A THERAPEUTIC MODEL FOR YOUTH 29-39 (January 2014), available at https://cardozo.yu.edu/sites/default/files/YJCFeb2_0.pdf.

⁸ Sue Burrell, *Trauma and the Environment of Care in Juvenile Institutions*, NATIONAL CHILD TRAUMATIC STRESS NETWORK 2 (Aug. 2013) [hereinafter Burrell], http://www.nctsn.org/sites/default/files/assets/pdfs/jj_trauma_brief_environmentofcare_burrell_final.pdf.

⁹ *Governor Cuomo Announces Closure of Seven State Prison Facilities*, GOVERNOR ANDREW M CUOMO (June 30, 2011), <https://www.governor.ny.gov/news/governor-cuomo-announces-closure-seven-state-prison-facilities> (press release); see also Thomas Kaplan, *New York Has Some Prisons to Sell You*, N.Y. TIMES, May 27, 2012, http://www.nytimes.com/2012/05/28/nyregion/closed-new-york-prisons-prove-hard-to-sell.html?_r=0.

¹⁰ Liz Robbins, *Last Chance for Mone't: Program Keeps Troubled New York Youth Close to Home*, N.Y. TIMES, May 3, 2013, http://www.nytimes.com/2013/05/05/nyregion/program-keeps-troubled-new-york-youth-close-to-home.html?pagewanted=all&_r=0; Jennifer Jensen Ferone et al., *The Close to Home Initiative and Related Reforms in Juvenile Justice*, VERA INST. OF JUSTICE (January 2014), <http://www.vera.org/sites/default/files/transition-brief-placement-juvenile-justice-reform.pdf>.

¹¹ NYC ADMINISTRATION FOR CHILDREN'S SERVICES, CLOSE TO HOME: AN OVERVIEW OF NON-SECURE PLACEMENT 1, available at http://www.nyc.gov/html/acs/downloads/pdf/Close_to_Home_12.pdf. See also RICHARD MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION, 5-12 (2011), available at <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>.

¹² *Mayor Bloomberg Announces Partnership With NYU Langone Medical Center And Bellevue Hospital To Improve Trauma Services In City's Child Welfare And Juvenile Justice Systems*, NYC (Feb. 12, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/060-13/mayor-bloomberg-partnership-nyu-langone-medical-center-bellevue-hospital-to> (press release, quoting Dr. Jennifer F. Havens, Director, Child and Adolescent Psychiatry, Bellevue Hospital Center).

¹³ See *De Blasio Administration Ends Use of Punitive Segregation for Adolescent Inmates on Rikers Island*, NYC (Dec. 17, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/566-14/de-blasio-administration-ends-use-punitive-segregation-adolescent-inmates-rikers-island#/0> (press release).

the age,” New York remains one of two states continuing to process 16- and 17-year-old youths as adults in the criminal justice system.¹⁴ Hopefully, such rehabilitative programs will be effectively implemented at Rikers Island.

With increased attention focused upon the need for rehabilitative justice measures for court involved youth comes the recognition that restorative, rather than suspension and other punitive, measures should be adopted in our school systems.¹⁵ Of course, programs that are necessary and appropriate in detention facilities may not be those readily adopted in schools. However, the concepts underlying trauma-informed care and other programs addressed to emotional and behavioral change are comparable. At the very least, our educational systems should implement effective approaches as early as possible in children’s lives to assist them in coping with traumatic experiences. Necessarily, each school, city, district, and state will have a unique approach depending on the needs of the institution and its students.

This essay describes trauma-informed care approaches that have been utilized successfully in schools in other jurisdictions and argues that this, among other approaches, should be adopted in the educational system in New York City. Waiting until youth enter a jail setting is too late. Of course, each school, city, district, and state will have a unique approach depending on the needs of the institution and its students.

New York City’s education system has the largest school district in the country, with over 1,800 public schools serving 1.1 million students.¹⁶ Some of those students are able to access an innovative, successful, and competent education.¹⁷ However, many students do not have these same opportunities, notably students in low-income areas of Brooklyn and the Bronx. Schools face increasing cuts in resources and aids, with spending on arts and drama cut and support staff laid off.¹⁸ There is a stunning lack of coordinated services, a high reliance upon suspensions, and

¹⁴ North Carolina is the other state that continues to treat 16- and 17-year-olds as adults, although there is proposed legislation to change this. Campaign Fact Sheet, *Raise the Age Campaign Fact Sheet*, RAISE THE AGE NY, <http://raisetheageny.com/get-the-facts> (last visited June 7, 2015).

¹⁵ SHAENA M. FAZAL, ESQ., YOUTH ADVOCATE PROGRAMS, POLICY AND ADVOCACY CENTER, SAFELY HOME (June 2014), available at <http://www.yapinc.org/Portals/0/Documents/Safely%20Home%20Preview/safelyhome.pdf> (explaining the importance of community-based programs and their effectiveness over traditional incarceration models).

¹⁶ *About Us*, NYC DEP’T OF EDUCATION, <http://schools.nyc.gov/AboutUs/default.htm> (last visited Apr. 18, 2015).

¹⁷ Many of the city’s top public schools, including the so-called “exam schools” (such as Stuyvesant, Brooklyn Tech, and Bronx Science) as well as specialty art schools provide top-notch educations to New York City children. However, these schools have a selective admissions program and lack diversity. The overall New York City public school system has almost 30 percent Black students and about 40 percent Latino. However, of the 5,103 students who were offered admission into the eight specialized high schools for the 2015-2016 entering year, only 5 percent were Black students and 7 percent were Latino. Elizabeth Harris, *Lack of Diversity Persists in Admissions to New York City’s Elite High Schools*, N.Y. TIMES, Mar. 5, 2015, http://www.nytimes.com/2015/03/06/nyregion/lack-of-diversity-persists-in-admissions-to-selective-new-york-city-high-schools.html?_r=0; Alia Wong, *The Cutthroat World of Elite Public Schools*, THE ATLANTIC, Dec. 4, 2014, <http://www.theatlantic.com/education/archive/2014/12/the-cutthroat-world-of-elite-public-schools/383382/>.

¹⁸ Fernanda Santos, *Lessons in Austerity: How City Principals Make Budgets Work*, N.Y. TIMES, Aug. 17, 2011, <http://www.nytimes.com/2011/08/18/nyregion/five-new-york-city-school-principals-talk-budget-cuts.html>; *Accelerating Arts Education Funding Cuts and Loss of Arts Teachers Paint Grim Picture for City Schools*, THE CENTER FOR ARTS EDUCATION (June 2011), <http://www.cae-nyc.org/sites/default/files/docs/Research-Brief-Accelerating-Arts-Education-Cuts-June-2011.pdf>.

few community-based resources where students and parents can turn for assistance.¹⁹ Many of these students live in poverty. It is estimated that 31 percent of children in New York City live in poverty; it is 45 percent in the Bronx and 35 percent in Brooklyn.²⁰

As schools and their students struggle with these inequities, trauma-informed care has emerged as a partial measure to address economic inequality. While trauma is prevalent everywhere, there is a higher exposure to trauma in low-income communities that can have devastating effects in its community. Trauma-informed care presents an opportunity to address the combination of the factors of poverty, lack of assistance, and deteriorating urban education institutes. When children are exposed to better ways of learning through investments in early education, there are long-term and short-term intellectual and academic gains for the youth's well-being and benefits to the community as a whole.²¹

Zero Tolerance Policies and Juvenile Justice

Zero tolerance policies in schools are a major factor contributing to the cycle of ineffective schooling and students' interaction with the criminal justice system. Zero tolerance includes punitive disciplinary codes, security measures in schools including policing and metal detectors, and suspensions and arrests. It has been termed the "criminalization of school discipline" because our society treats student misbehavior as we treat adult criminal conduct.²² On average, more than 3 million children are suspended from school yearly nationwide.²³ Of these suspensions, students of color are disproportionately represented.²⁴ Because of zero tolerance policies, "disruptive behavior" and "other" violations are the basis for suspensions. These violations include significant numbers of students charged with being defiant and being disruptive.²⁵ Many of the violations involve subjective or discretionary judgments by teachers or school administrators; Black students are disproportionately suspended for these behaviors.²⁶

¹⁹ Donna Lieberman, New York Civil Liberties Union Executive Director, *The Impact of School Suspensions, and a Demand for Passage of the Student Safety Act*, NYCLU (Jan. 23, 2008), <http://www.nyclu.org/content/impact-of-school-suspensions-and-demand-passage-of-student-safety-act> (testimony before the New York City Council Committees on Education and Civil Rights; discussing the over reliance on suspensions and poor quality of Alternative Learning Centers with reports of "inappropriate or non-existent learning materials, overcrowding, and lack of supervision"). See MICHAEL HOLZMAN, THE SCHOTT FOUNDATION FOR PUBLIC EDUCATION A ROTTING APPLE: EDUCATION REDLINING IN NEW YORK CITY 15 (Apr. 17, 2012), available at <http://www.schottfoundation.org/docs/redlining-full-report.pdf>.

²⁰ THE INSTITUTE FOR CHILDREN, POVERTY & HOMELESSNESS, ON THE MAP: THE ATLAS OF HOMELESSNESS IN NEW YORK CITY 13 (Oct. 2014) [hereinafter ON THE MAP], available at http://www.icphusa.org/PDF/reports/OnTheMap_TheAtlasofFamilyHomelessnessinNewYorkCity.pdf. This report analyzes a combination of the 2012 United States Census Data and data from the New York City Department of City Planning.

²¹ Cynthia Hudley, *Education and Urban Schools*, THE SES INDICATOR (May 2013), <http://www.apa.org/pi/ses/resources/indicator/2013/05/urban-schools.aspx>.

²² Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 NORTHWESTERN J. L. & SOC. POL'Y 58, 60 (2013).

²³ NEW YORK CIVIL LIBERTIES UNION, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE 8 (Oct. 2013) [hereinafter A, B, C, D, STPP], available at http://www.nyclu.org/files/publications/nyclu_STPP_1021_FINAL.pdf.

²⁴ Carla Amurao, *Fact Sheet: How Bad Is the School-to-Prison Pipeline?*, TAVIS SMILEY REPORTS, (Mar. 28, 2013), <http://www.pbs.org/wnet/tavis-smiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/>.

²⁵ Jane Ellen Stevens, *Trauma-Sensitive Schools Are Better Schools, Part 2*, THE HUFFINGTON POST, June 27, 2012, http://www.huffingtonpost.com/jane-ellen-stevens/trauma-sensitive-schools_b_1625924.html; Jane Ellen Stevens, *Massachusetts, Washington State Lead U.S. Trauma-Sensitive School Movement*, ACESTOO HIGH NEWS, May 31, 2012, <http://acestoohigh.com/2012/05/31/massachusetts-washington-state-lead-u-s-trauma-sensitive-school-movement/>.

²⁶ A, B, C, D, STPP, *supra* note 23, at 8-9.

Further, there is a clear link between suspensions and children who require special education. Black students with special needs face the highest suspension rate of all groups.²⁷ In fact, zero tolerance extends to even the youngest children in the New York City educational system. In the 2010-2011 school year, ninety-three four-year-olds were suspended, and a third of them had an individualized education plan.²⁸ Even though the rate of New York City school suspensions has decreased in the past few years, the existing rate of suspensions evidences a need to reexamine the approaches to learning and to discipline.²⁹ Individuals and organizations, including the New York Civil Liberties Union and the Dignity in Schools campaign, have long advocated for significant changes in the disciplinary code and its implementation. Notably, there have been proposals to change or delete B-21, the “insubordination” provision, from the code.³⁰ In spring 2015, there were changes to the disciplinary code in the definition of B-21 as well as changes to require schools to get approval from the Department of Education before authorizing a suspension and requiring the Police Department to track the use of handcuffs.³¹ There is hope that the 2015 changes are “just a start.”³²

Once a student has been suspended, the student’s chances of dropping out or entering the criminal justice system increase drastically.³³ With each subsequent suspension, the chances increase.³⁴ When youth are jailed and put into detention centers, they develop or exacerbate a negative self image that they are “bad,” worthless, and incapable of change. Once court involved, it is difficult for any youth to break that negative cycle without coordinated and targeted services to address each individual’s specific and unique needs. A punitive model of juvenile detention

²⁷ *Id.* at 1.

²⁸ *Id.* at 24.

²⁹ Beth Fertig, *New York City Schools Chief Outlines Discipline Changes That Scale Back Suspensions*, WNYC (Feb. 13, 2015), <http://www.wnyc.org/story/schools-chancellor-proposes-ways-reduce-suspensions/>.

³⁰ *Fact Sheet: School Discipline and The Pushout Problem*, DIGNITY IN SCHS., http://www.dignityinschools.org/files/DSC_Pushout_Fact_Sheet.pdf (nationally “[t]he majority of suspensions are for minor misbehavior, including ‘disruptive behavior,’ ‘insubordination,’ or school fights, which can be interpreted in subjective and biased ways (even unintentional)’” (citing RUSSELL SKIBA ET AL, *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? A REPORT BY THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE* (2006); A, B, C, D, STPP, *supra* note 23. The pre-2015 B-21 infraction is for “Defying or disobeying the lawful authority or directive of school personnel or school safety agents in a way that substantially disrupts the educational process.” The April 2015 B-21 infraction is “Defying or disobeying the lawful authority or directive of school personnel or school safety agents in a way that substantially disrupts the educational process and/or poses a danger to the school community.” NYC DEP’T OF EDUCATION, *CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES 25* (2013), *available at* <http://schools.nyc.gov/NR/rdonlyres/188AF3E2-F12B-4754-8471-F2EFB344AE2B/0/DiscCodebooklet2013final.pdf>. The 2015 revision indicates that this behavior does not include uncooperative/noncompliant or disorderly such as using profane language or wearing prohibited clothing or bringing prohibited items to school. NYC DEP’T OF EDUCATION, *CITYWIDE BEHAVIORAL EXPECTATIONS TO SUPPORT STUDENT LEARNING 28* (2015), *available at* <http://schools.nyc.gov/NR/rdonlyres/CD69C859-524C-43E1-AF25-C49543974BBF/0/DiscCodebookletApril2015FINAL.pdf> .

³¹ Elizabeth A. Harris, *Suspension Rules Altered in New York City’s Revision of School Discipline Code*, N.Y. TIMES, Feb. 13, 2015, http://www.nytimes.com/2015/02/14/nyregion/suspension-rules-altered-in-new-york-citys-revision-of-school-discipline-code.html?_r=0.

³² *Id.* (quoting Kim Sweet, Director, Advocates for Children).

³³ Rachel Wilf, *Disparities in School Discipline Move Students of Color Toward Prison*, CENTER FOR AMERICAN PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/issues/race/news/2012/03/13/11350/disparities-in-school-discipline-move-students-of-color-toward-prison/>; *see also* SAFE QUALITY SCHOOLS, A PROGRAM OF THE ADVANCEMENT PROJECT (last visited Mar. 31, 2015), *available at* <http://safequalityschools.org/>.

³⁴ *Id.*

and incarceration not only fails to prevent recidivism, but it increases the chances of recidivism.³⁵ Advocates, officials, and the public at large must embrace new models for students at an earlier stage to effectively educate them and reduce their chances of becoming court involved.

Recently, the De Blasio administration created the NYC School Climate and Discipline Leadership Team.³⁶ Among its tasks is to examine the appropriate programs and practices to create an improved school climate.³⁷ These include forms of restorative justice, collaborative problem-solving, and—as this paper discusses—trauma-informed care.

Several other states and districts have begun to implement trauma-informed care into their schools with positive effects. There are several approaches to incorporating these programs into schools, but all are dependent upon increased awareness and education about the need for trauma-informed care. This conversation must begin in New York City: principals, advocates, lawyers, educators, social workers, teachers, counselors, psychologists, city officials, and mental health practitioners must form an interdisciplinary coalition and begin to discuss how we can reform our schools—particularly our troubled schools—to better address children’s needs.

Trauma and Trauma-Informed Care

Trauma is defined as a response to a stressful experience where a person’s ability to cope is dramatically undermined.³⁸ It impacts children from a wide variety of backgrounds and manifests in varying degrees for different reasons. Traumatic events can include not only physical threats but also emotional maltreatment, neglect, abandonment, and devastating loss.³⁹ Many more children are traumatized than educators and advocates realize. A 2011 U.S. Department of Justice-funded survey showed that more than 60 percent of youth (birth to age seventeen) in this country had been exposed to violence in the past year and that nearly 50 percent of children had been assaulted in that time frame.⁴⁰

³⁵ In *Roper v. Simmons*, 543 U. S. 551, 577 (2005), the Court recognized that, because of their lack of maturity and underdeveloped sense of responsibility, juveniles make “impetuous and ill-considered actions and decisions,” and are unlikely to consider the possible punishment before acting. See also BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 5 (2006).

³⁶ The impetus for school climate reforms was the result of a School-Justice Partnership Task Force under the leadership of the Hon. Judith S. Kaye, former Chief Judge of the New York Court of Appeals. The May 2013 Task Force Report recommended a Mayoral initiative and a series of programs. NEW YORK CITY SCHOOL JUSTICE PARTNERSHIP TASK FORCE, KEEPING KIDS IN SCHOOLS AND OUT OF COURT: REPORT AND RECOMMENDATIONS (May 2013), available at <https://www.nycourts.gov/ip/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>. In February 2015, Mayor De Blasio created the New York School Climate and Discipline Leadership Team. It is a collaborative effort, composed of principals, parents, students, and union representatives, as well as representatives from the Department of Education, the NYPD, and various other governmental city agencies. The team is led by two co-chairs: the Senior Advisor to the Mayor’s Office of Criminal Justice Vincent Schiraldi and Department of Education Chief of Staff Ursulina Ramirez. The co-chairs report to several public officials directly as well as to the public. *City Announces School Climate Reforms*, NYC DEP’T OF EDUCATION (Feb. 23, 2015), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2014-2015/City+Announces+School+Climate+Reforms.htm>.

³⁷ *Id.*

³⁸ SUSAN F. COLE ET AL., HELPING TRAUMATIZED CHILDREN LEARN: SUPPORTIVE SCHOOL ENVIRONMENTS FOR CHILDREN TRAUMATIZED BY FAMILY VIOLENCE (2005) [hereinafter HTCL].

³⁹ *Id.* at 18.

⁴⁰ Allison Hyra and Jessica R. Kendall, *Op-Ed: Translating the Science of Childhood Stress into Youth Service Practice*, JUVENILE JUSTICE: INFORMATION EXCHANGE (Apr. 29, 2015), http://jjie.org/translating-the-science-of-childhood-stress-into-youth-service-practice/108667/?utm_source=JJIE+Website+Updates&utm_campaign=46e6f576da-Weekly-Newsletter_April_30_2015&utm_medium=email&utm_term=0_a8f2f6272f-46e6f576da-129157253

Psychological trauma can result from a wide range of conditions and factors under which children live, including the effects of growing up in poverty and neighborhoods with high incidents of crime, parental loss and abuse, neglect, alcoholic parents, and forms of harassment.⁴¹ There are between 78,000 and 80,000 homeless school-age children in New York City. They sleep in New York City streets, the subway system, public spaces, and the municipal shelter systems, where they face these kinds of psychological triggers.⁴² Resulting trauma from these life circumstances can affect the child's brain development.

The results of trauma may be extreme. In the immediate, children encounter difficulty processing information, understanding how to approach threatening situations, moderating their emotions, and trusting adults. Many children feel helpless and overwhelmed.⁴³ Post-trauma diagnoses can range from attention-deficit-hyperactive disorder, anxiety, oppositional defiant disorder, and depression, among others.⁴⁴ Children may exhibit behaviors of being withdrawn, defiant, impulsive, reactive, and aggressive. In the longer term, children who are exposed to trauma are linked with a higher rate of chronic diseases as adults.⁴⁵

Trauma-informed care is generally defined as a systematic way of responding to individuals who have a history of trauma, and recognizing the role, presence, and effect from that trauma that is pervasive in the individual's life.⁴⁶ As a model of care, it addresses the effects of this trauma and aims to be collaborative, supportive, and skill-based.⁴⁷

There are three factors that improve the ability of traumatized children to function. These are (1) increasing the strength of parent-child/ surrogate caregiver relationships, (2) providing and improving cognitive skills, and (3) giving children the ability to self-regulate their attention, emotion, and behavior.⁴⁸ Attention to each of these factors is important in considering how to best assist children in school and to implement trauma-informed care processes.

⁴¹ Ashlee Loughan and Robert Perna, *Neurocognitive Impacts for Children of Poverty and Neglect*, AMERICAN PSYCHOLOGICAL ASSOCIATION (July 2012), <http://www.apa.org/pi/families/resources/newsletter/2012/07/neurocognitive-impacts.aspx>

⁴² The Institute for Children, Poverty & Homeless determined that there were 77,915 homeless students in the New York City school districts. ON THE MAP, *supra* note 20, at 8. See also Andrea Elliott and Rebecca R. Ruiz, *New York is Removing Over 400 Children from 2 Homeless Shelters*, N.Y. TIMES Feb. 21, 2014, <http://www.nytimes.com/2014/02/21/nyregion/new-york-is-removing-over-400-children-from-2-homeless-shelters.html>, COALITION FOR THE HOMELESS, <http://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/>.

⁴³ HTCL, *supra* note 38, at 55-56.

⁴⁴ *Id.* at 21. Other diagnoses include ADD, conduct disorders, phobias, and borderline personality disorders. *Id.*

⁴⁵ Jane Ellen Stevens, *Massachusetts, Washington State Lead U.S. Trauma-sensitive School Movement*, ACES TOO HIGH NEWS, May 31, 2012, <http://acestoohigh.com/2012/05/31/massachusetts-washington-state-lead-u-s-trauma-sensitive-school-movement/> (citing *Adverse Childhood Experiences Study*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 13, 2014), <http://www.cdc.gov/violenceprevention/acestudy/>). The chronic diseases included heart diseases, lung cancer, diabetes, autoimmune diseases, depression, violence, being a victim of violence, and suicide.

⁴⁶ CONNECTICUT DEP'T OF CHILDREN AND FAMILIES: TRAUMA-INFORMED CARE PRACTICE GUIDE (Sept. 2012), available at http://www.ct.gov/dcf/lib/dcf/trauma-informed_care/pdf/trauma-informed_care_-_policy__september_2012.pdf.

⁴⁷ ANN JENNINGS, MODELS FOR DEVELOPING TRAUMA-INFORMED BEHAVIORAL HEALTH SYSTEMS AND TRAUMA-SPECIFIC SERVICES (2004), available at <http://www.theannainstitute.org/MDT.pdf>.

⁴⁸ HTCL, *supra* note 38, at 43 (citing child psychologists Marsten and Coastworth).

Trauma-Informed Care in Schools

It is particularly important that any trauma-informed care program be applied to all children and not focus solely on children identified with trauma exposure: there is a correlation between achievement levels for all students when there is cohesion in the classroom, where the trauma-informed care approach has been adopted for the entire school. It produces less conflict and disorganization.⁴⁹ Consequently, the trauma-sensitive approach will benefit all children in the school, not only those who have been subject to traumatic experiences.

One program that has achieved considerable success is the Trauma and Learning Policy Initiative (“TLPI”). TLPI, in collaboration with Massachusetts Advocates for Children and Harvard Law School, has developed a framework (the “Flexible Framework”) that provides schools and educators with the tools for incorporating trauma-sensitive approaches. The approach has six key elements: 1) developing a schoolwide infrastructure and culture; 2) training staff; 3) developing relationships with mental health professionals; 4) incorporating academic instruction for children; 5) utilizing non-academic strategies; and 6) strengthening the school policies, procedures, and protocols.

These six factors provide the framework to establish trauma-informed schools. Additionally, the TLPI has a series of four key questions that assist a school in establishing the infrastructure and processes to be undertaken to set up such a program. The TLPI stresses that each school’s program is unique and that it is essential that the school engage in its own internal process to determine priorities and resolutions.⁵⁰

TLPI identifies key components for any successful program.⁵¹ First, it is critical that the principal be an enthusiastic actor in order to effectively implement trauma-sensitivity into the school. Then there must be a coalition and strategic team in the school as well as advocates on the outside who are supportive of the transition. The school and district must assess their own resources, issues, priorities, and capabilities before even attempting to implement the framework.

In building the coalition and team, there must also be a sense of urgency. TLPI’s guide for *Creating and Advocating for Trauma-Sensitive Schools* stresses that this sense of commitment to change amongst a wide range of stakeholders is essential in transitioning to a trauma-sensitive school. Engaging in the process allows teachers, staff, and community members to transform the framework into actual program for positive change they may see within the school.⁵² The framework needs careful development within each school.

One essential aspect of trauma-informed schools is the creation of stable and supportive classrooms that are linked with mental health providers. The framework recommends a practicum model “in which staff interact with each other and with a mental health clinician who has expertise

⁴⁹ UCLA CENTER FOR MENTAL HEALTH IN SCHOOLS, SCHOOL ENGAGEMENT, DISENGAGEMENT, LEARNING SUPPORTS, & SCHOOL CLIMATE 17, available at <http://smhp.psych.ucla.edu/pdfdocs/schooleng.pdf>.

⁵⁰ SUSAN F. COLE ET AL, TRAUMA LEARNING POLICY INITIATIVE: HELPING TRAUMATIZED CHILDREN LEARN, VOLUME 2, CREATING AND ADVOCATING FOR TRAUMA-SENSITIVE SCHOOLS 28 (2013) [hereinafter HTCL Vol. 2].

⁵¹ This summary of TLPI’s recommendations is, by no mean, exhaustive. TLPI’s materials discuss the steps to create programs in greater detail, *Helping Traumatized Children Learn*, and *Creating and Advocating for Trauma-Sensitive Schools*. We have chosen to highlight several points that have particular relevance to NYC schools.

⁵² HTCL Vol. 2, *supra* note 50, at 37.

in trauma and its impact in the classroom. In these sessions, staff can review difficult cases and process their own experiences, learning from each other and from the clinician.”⁵³

The actual programs and skills that are necessary and effective in implementing trauma-informed care include those where staff learns de-escalation techniques, and behavior management techniques, including how to reduce bullying. Staff will develop opportunities to role-play communications with parents, and create lesson plans. Additionally, teachers will learn to present material in several different ways to appeal to different learning styles, and identify a child’s “island of competence.”⁵⁴ They will certainly utilize nonverbal approaches to learning.

Staff training includes clarifying the different roles of the mental health professional and the teacher.⁵⁵ The flexible framework does not intend for teachers to become therapists. Rather, it teaches educators to recognize the signs of trauma, and asks what support (both externally and internally) the staff may need in order to work with traumatized children.

Once teachers are given tools to control the classroom and utilize a standard of trauma-informed care, they must also engage and re-engage their students who are no longer connected to the classroom. Some students who have disengaged from the learning process can develop or have already developed behavioral, emotional, and/ or learning problems. There are a variety of strategies for re-engagement, but some include: discussing openly with the student why, specifically, they have disengaged from learning, eliminating testing and performance standards that leads to scaled evaluation of students, highlighting student accomplishments, and creating opportunities for decision-making.⁵⁶

In addition to trauma-informed care, schools may adopt a range of restorative justice and behavioral models to improve the school climate. Restorative justice models seek to build students’ social and emotional skills through collaborative, community building processes. One example is restorative circles where harm has occurred to individuals in the school. These circles provide students with a sense of belonging and responsibility. Restorative justice programs also provide alternative interventions in lieu of punitive suspensions.⁵⁷

There are also evidence-based positive behavior management programs and collaborative problem-solving models that can be utilized effectively in conjunction with trauma-informed care in schools.⁵⁸

⁵³ HTCL, *supra* note 38, at 58.

⁵⁴ These are just a few of the examples that *Helping Traumatized Children Learn* suggests.

⁵⁵ HTCL, *supra* note 38, at 52.

⁵⁶ UCLA CENTER FOR MENTAL HEALTH IN SCHOOLS, *supra* note 49, at 8. Performance-based standards in lieu of the national testing focus mandated by No Child Left Behind may be extremely effective for all students, not only those who have disengaged.

⁵⁷ See, e.g., Belinda Hopkins, *Restorative Justice in Schools*, 17 Support for Learning 3 (2002), available at [http://www.morningsidecenter.org/publications](http://www.transformingconflict.org/system/files/libraryfiles/Doc%20-%20Restorative%20Justice%20in%20Schools%202002%20-%20Support%20; Morningside Center for Teaching Social Responsibility, <a href=).

⁵⁸ See, e.g., Positive Behavior Management Strategies <http://www.safeandcivilschools.com/>; Dr. Ross Green, LOST AT SCHOOL (2014) (discussing Collaborative Problem Solving in schools)

Discipline Policies

Finally, a particularly important aspect of reforming schools is the reexamination of the existing school discipline policies with a trauma-based lens. Because of the differences between a school that is trauma-sensitive, and one that is not, TLPI specifically recommends that new policies may have to be created in order for schools to truly be compatible.⁵⁹

The framework focuses on holding children accountable for their inappropriate behavior but *balancing* their actions with an understanding of traumatic behavior. This will likely result in changes to the discipline policies by addressing infractions and their corresponding punishments. By teaching rules, following routines, and minimizing educational disruptions, schools can address behavior before it spirals out of control.⁶⁰

Community Integration

As schools reconsider their existing policies, they must consider effective collaboration with the community. This is a recommendation that has, like many others, been echoed repeatedly by advocates who have effectively implemented trauma-informed care in school systems. Notably, TLPI recommends that schools reach out and establish connections with other organizations, individuals or resources before a referral is necessary, therefore laying the groundwork for future cases.⁶¹ Additionally, each school should appoint a liaison from its staff who communicates with “health and mental health providers, the department of social services, law enforcement, the court system, and other state agencies.”⁶²

Community integration in New York City is particularly difficult, as oftentimes educators who work at the schools are not in fact from the local communities. Further, effective provision of services outside the school is an ongoing challenge for the largest school system in the country. Outside services are often unavailable; sometimes educators may be unsure of issues of confidentiality and avoid referrals altogether. Developing sufficient outside resources is a challenge that is essential for many children. Since 2014, the Mayor’s Office and the Department of Education have been working on developing and significantly increasing the numbers of Community Schools.⁶³ These schools are designed to support the “whole needs” of the child, including social, emotional, physical, and academic needs.⁶⁴ It is hoped that these schools will offer comprehensive services so that their students, notably in low-performing schools, will have significant opportunities to thrive.

⁵⁹ HTCL, *supra* note 38, at 68.

⁶⁰ *Id.* at 69.

⁶¹ *Id.* at 75.

⁶² *Id.* at 76.

⁶³ *De Blasio Administration’s First 45 Community Schools Get Paired with Community Partners and Prepare for 2015 Launch*, NYC DEP’T OF EDUCATION (Dec. 1, 2014), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2014-2015/De+Blasio+Administration%E2%80%99s+First+45+Community+Schools+Get+P>.

⁶⁴ *Chancellor Fariña Announces Creation of New Office of Community Schools*, NYC DEP’T OF EDUCATION (Jan. 21, 2015), <http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2014-2015/Chancellor+Fari%C3%B1a+Announces+Creation+of+New+Office+of+Community+Schools.htm>.

A Successful Example of a Trauma-Sensitive School

The school district of Brockton, Massachusetts, is a success story for integrating trauma-sensitive care into their schools. The director of pupil personnel services within the district, Sal Terrasi, learned about the link between childhood trauma and later adult diseases, as well as the impact of trauma on the brain. Armed with this type of data, Mr. Terrasi pushed to create a trauma-informed school district.⁶⁵

Initially, the entire school worked with the local law enforcement, the Department of Child and Family Services, the Department of Mental Health, the Department of Youth Services, and a group of local counseling agencies. Mr. Terrasi was an enthusiastic leader. He held meetings with TLPI, parents, and educators, and carefully considered their feedback. The school combined several models, including collaborative problem-solving and positive behavioral support interventions.⁶⁶ Twenty-three schools instituted plans that utilized these processes, and, as a result, suspensions and expulsions have significantly dropped. One elementary school saw a 40 percent drop in suspensions among its 826 students in kindergarten through fifth grade.⁶⁷

Brockton has created ways for local police and counselors to work together, identifying children in whose homes and families the police have been involved. The police notify school personnel of circumstances in which they believe that students may be experiencing trauma at home. Reports indicate the success of this integration and sharing of information.

By applying a trauma-sensitive lens to their school district, Brockton was able to increase insight and responsive behavior for students, teachers, and administrators and to unite the community. Upon employing this lens, they combined behavioral intervention and collaborative problem-solving models for their school.

Next Steps for Applying Trauma-Sensitive Care in New York City

Adopting trauma-sensitive care in New York City schools will take a considerable amount of advocacy, passion, and collaboration. In order for TLPI's process to truly take hold, there must be a true culture change within the system, and trauma-sensitivity must be woven into its fabric.

Initially, the adoption of trauma-informed care is dependent upon the formation of a coalition within New York City of people passionate about instituting such a change. Before any school district has been able to successfully adjust to a trauma-sensitive lens, there was an interdisciplinary coalition pushing for the change on all levels: with the legislature, policy-makers, non-profit organizations, educators, principals, academics, and mental health professionals.

Because of the sheer size of New York's educational system, such programs simply cannot be immediately worked into entire New York City school districts. Rather, it must be introduced slowly and within an initial pilot program. Such a pilot program should utilize effective data about individual schools to determine which of the 172 schools are open to, and could benefit from, such support. That support may not be limited to trauma-informed care, but might include

⁶⁵ Stevens, *supra* note 45.

⁶⁶ Jane Ellen Stevens, *Trauma-Sensitive Schools Are Better Schools, Part 2*, THE HUFFINGTON POST, June 27, 2012, http://www.huffingtonpost.com/jane-ellen-stevens/trauma-sensitive-schools_b_1625924.html.

⁶⁷ Stevens, *supra* note 45.

other holistic approaches such as restorative and collaborative justice models. One method is unlikely to work for all schools. Any program must be individualized and tailored to its students, teachers, principal, parents and community.

It remains clear that the current educational system is an amalgamation of dysfunction for many New York City children. By adopting a version of restorative justice models that may integrate trauma-informed care, coordinate services across communities, and change ineffective and damaging discipline policies, New York City can develop a more positive school environment. Hopefully, the work of the Mayor's Leadership Team on School Climate will make strides toward the adoption of approaches to assist children to be safe and to grow and learn.⁶⁸ •

⁶⁸ Hopefully there will be a collaborative effort to implement such trauma-informed care in the schools without litigation. Community efforts in Los Angeles resulted in a recently-filed lawsuit seeking to compel a school district to implement trauma-informed care. *Students, Teachers file Landmark Federal Class Action Complaint Demanding School Address Learning Needs of Children Affected by Violence and Trauma*, PUBLIC COUNSEL (May 18, 2015), <http://www.publiccounsel.org/stories?id=0172>.

Ending Child Poverty in New York

Melanie Hartzog and Patti Banghart¹

Current state of child poverty and inequality

Nationally, nearly 15 million children in the United States lived below the official poverty line—\$23,834 for a family of four—in 2013.² Despite having the world’s largest economy, the United States has the second highest relative child poverty rate among 35 industrialized nations.³ Worse yet, income inequality in the U.S. is growing. The total income share going to the top 1 percent of earners rose from 10.5 percent in 1964 to 22.5 percent of overall income in 2012.⁴

New York has the fifth highest child poverty rate in the nation, at 20 percent, according to the U.S. Census Bureau’s Supplemental Poverty Measure (“SPM”), which takes into account the cost of living and the impact of public benefits.⁵ Not counting most government supports, more than one in five New York children—958,610—were poor in 2012.⁶ Poverty also disproportionately impacts children of color in New York. Nearly one in three Black children (32.8 percent) and more than one in three Hispanic children (35 percent) in New York were poor in 2012, compared to 13.9 percent of White children.⁷ Moreover, the youngest, most vulnerable, children in New York were the poorest age group, with over one in four children under the age of six (346,565) living in poor families in 2012.⁸

The cost of child poverty

Growing up poor has lifetime negative consequences on a child’s development. Child poverty creates gaps in cognitive skills starting from infancy; it decreases the likelihood of graduating from high school; poor children are more likely to be involved in the criminal justice system; child poverty increases the likelihood of becoming a poor adult; and poor children suffer from worse health outcomes.⁹

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² THOMAS GABE, CONGRESSIONAL RESEARCH SERVICE, POVERTY IN THE UNITED STATES: 2013 2 (Jan. 2015), available at <https://www.fas.org/sgp/crs/misc/RL33069.pdf>.

³ *Child Well-being in Rich Countries*, UNICEF OFFICE OF RESEARCH-INNOCENTI (2013), [HTTP://WWW.UNICEF-IRC.ORG/REPORT-CARD-11/](http://www.unicef-irc.org/REPORT-CARD-11/).

⁴ ESTELLE SOMMEILLER & MARK PRICE, EPI, THE INCREASINGLY UNEQUAL STATES OF AMERICA: INCOME INEQUALITY BY STATE, 1917 TO 2012 5 (Jan. 26, 2015), available at <http://www.epi.org/publication/income-inequality-by-state-1917-to-2012/>.

⁵ ANNIE E. CASEY FOUNDATION, MEASURING ACCESS TO OPPORTUNITY IN THE UNITED STATES 3 (2015), available at <http://www.aecf.org/m/resource/doc/aecf-MeasuringAccessToOpportunityKC2-2015.pdf>.

⁶ CHILDREN’S DEFENSE FUND, CHILDREN IN THE STATES: NEW YORK 1 (May 6, 2014), available at <http://www.childrensdefense.org/library/data/state-data-repository/cits/2014/2014-new-york-children-in-the-states.pdf>.

⁷ CHILDREN’S DEFENSE FUND, THE STATE OF AMERICA’S CHILDREN 4 (2014), available at <http://www.childrensdefense.org/library/state-of-americas-children/2014-soac.pdf>.

⁸ *Id.*

⁹ GREG J. DUNCAN & JEANNE BROOKS-GUNN, CONSEQUENCES OF GROWING UP POOR 12 (1999); Greg J. Duncan & Jeanne Brooks-Gunn, *The Effects of Poverty on Children*, 7 THE FUTURE OF CHILDREN 2 (Summer/Fall 1997), https://www.princeton.edu/futureofchildren/publications/docs/07_02_03.pdf; Greg J. Duncan et al., *How Much Does Childhood Poverty Affect The Life Chances Of Children?*, 63 AM. SOC. REV. 406-23 (1998), available at http://www.jstor.org/stable/2657556?seq=1#page_scan_tab_contents.

Child poverty also has substantial economic costs. Research shows that the reduced productivity and extra health and crime costs resulting from child poverty add up to roughly \$500 billion a year, or 3.8 percent of the GDP.¹⁰ Additionally, other studies point to the economic gains of investing in children early—before the age of five. One study found that eliminating child poverty between the prenatal years to age five increases lifetime earnings by up to \$100,000 per child, equaling a benefit of \$20–\$36 billion for all babies born in a given year.¹¹

What Works:

1. Ending Child Poverty Requires Boosting Resources of Poor Families with Children and Ensuring Children’s Basic Needs are Met.

Safety net programs lift many families out of poverty, giving their incomes a boost, and they can have long-term benefits. Federal safety net programs such as the Earned Income Tax Credit (“EITC”) and food stamps—the Supplemental Nutrition Assistance Program (“SNAP”)—improve child outcomes. Children from families whose income received a boost from such programs have better birth outcomes, higher test scores, higher graduation rates, and higher college attendance rates.¹² Children who received access to SNAP before the age of five were also more likely to have better health as an adult and have better financial stability.

The Children’s Defense Fund (“CDF”) sought to identify policy improvements—ways to improve the economic circumstances of poor children—that would reduce child poverty and alleviate its harm and high costs immediately. With the understanding that these safety net policies lift families out of poverty and improve child outcomes, CDF asked the question: *“How close could the nation get to ending poverty for today’s children by simply investing more in approaches that work?”*

The CDF report, *Ending Child Poverty Now*,¹³ addresses this question. An analysis by the Urban Institute, included in the report, models the effects of policy improvements on child poverty using the SPM and 2010 Census and administrative data. The model does not limit the policy improvements to families below 100 percent poverty but is more inclusive since so many families living just above the poverty line also struggle financially and since many safety net programs are available to families above the poverty line. The model looks at the effects on child poverty if the nation were to make the following nine program and policy improvements:

- Increase the EITC for lower-income families with children;
- Increase the minimum wage from \$7.25 to \$10.10;

¹⁰ HARRY J. HOLZER ET AL., CENTER FOR AMERICAN PROGRESS, THE ECONOMIC COSTS OF POVERTY: SUBSTANTIAL EFFECTS OF CHILDREN GROWING UP POOR 1 (Jan. 24, 2007), available at https://www.americanprogress.org/wp-content/uploads/issues/2007/01/pdf/poverty_report.pdf.

¹¹ GREG J. DUNCAN ET AL., ECONOMIC COSTS OF EARLY CHILDHOOD POVERTY 4 (Issue Paper #4, Partnership for America’s Economic Success 2008), available at <http://readynation.s3.amazonaws.com/wp-content/uploads/Economic-Costs-Of-Early-Childhood-Poverty-Report.pdf>.

¹² Chuck Marr et al., *EITC and Child Tax Credit Promote Work, Reduce Poverty, And Support Children’s Development, Research Finds*, CENTER ON BUDGET AND POLICY PRIORITIES, (updated Apr. 3, 2015), <http://www.cbpp.org/research/eitc-and-child-tax-credit-promote-work-reduce-poverty-and-support-childrens-development>.

¹³ CHILDREN’S DEFENSE FUND, ENDING CHILD POVERTY NOW (2015), available at <http://www.childrensdefense.org/newsroom/mediasources/ending-child-poverty-now.pdf> [hereinafter “CDF Report”].

- Create subsidized jobs programs for unemployed and underemployed individuals between the ages of 16 and 64 in families with children;
- Make child care subsidies available to all eligible families below 150 percent poverty;
- Make the Child and Dependent Care Tax Credit refundable with a higher reimbursement rate;
- Base SNAP benefits on the USDA’s Low-Cost Food Plan for families with children;
- Make the Child Tax credit fully refundable;
- Make housing subsidies available to all households with children below 150 percent poverty for whom the fair market rent exceeds 50 percent of their income; and
- Require child support to be fully passed through to Temporary Assistance for Needy Families (“TANF”) families, fully disregarded for TANF benefits, and partially disregarded for SNAP benefits.¹⁴

The analysis revealed that if the nation were to make all of these nine policy and program improvements, **child poverty could be reduced by 60 percent, lifting 6.6 million children out of poverty.**¹⁵ Moreover, it would reduce poverty among Black children, who suffer the highest child poverty rates, by 72 percent, and reduce poverty by 64 percent for children under three, who are the most vulnerable to poverty’s harmful effects. Reducing child poverty by 60 percent would cost the nation \$77.2 billion (in 2010), only 2 percent of U.S. government spending or 0.5 percent of the 2010 U.S. Gross Domestic Product (“GDP”), and only 15 percent of the estimated \$500 billion the nation spends every year for the costs associated with children growing up poor.¹⁶ Just over half of the \$77.2 billion (54 percent) would go to families below 100 percent of SPM poverty, and 84 percent would go to families with incomes below 150 percent of poverty.¹⁷

The same policy improvements would reduce child poverty by an impressive 73 percent in New York, having a bigger impact—more than 10 percentage points—than in the other three largest states (California, Florida, and Texas).¹⁸ New York State policymakers have the opportunity to work with Congress to significantly reduce child poverty in New York, which was 0.6 million according to the SPM in 2010,¹⁹ by investing in effective state programs and policies that are shown in CDF’s analysis to have the biggest impact on reducing child poverty. Table A compares the top, most effective, policy and program improvements for ending child poverty in both New York State and the nation, which includes: expanding housing subsidies, increasing SNAP benefits, increasing EITC and the Child Tax Credit, and supporting parents’ employment through subsidized jobs and child care subsidies.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 7-8.

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 30.

¹⁸ *Id.* at 45. It is likely that the larger impacts projected for New York arise because the state has a lower prevalence of undocumented immigrants compared to the three other states (3.2 percent in New York vs. 4.5 percent in Florida, 6.7 percent in Texas, and 6.8 percent in California). *Id.* at 35.

¹⁹ *Id.* at 35.

Table A. Comparison of Child SPM Poverty Impacts in New York and at the National Level²⁰

	New York	National
Child Poverty rate	0.6 million (13.7%)	10.9 million (14.6%)
Child poverty reduction with all policy changes	-72.7%	-60.3%
Child poverty reduction with housing subsidy expansion	-38.1%	-20.8%
Child poverty reduction with SNAP increase	-15.7%	-16.2%
Child poverty reduction with EITC increase	-14.5%	- 8.8%
Child poverty reduction with Child Tax Credit increase	-13.5%	-11.6%
Child poverty reduction with subsidized jobs	-11.1%	-10.7%
Child poverty reduction with child care subsidy expansion	-4.2%	- 3.1%

Expanding housing subsidies: As is shown in Table A, **expanding housing subsidies to all households with children below 150 percent poverty for whom the fair market rent exceeds 50 percent of their income, would have the biggest impact in New York, reducing child poverty by over 38 percent alone.** This large impact is most likely due to the high cost of housing in New York as a significant contributor to the state’s high poverty rate. In 2013, more than three full-time minimum wage jobs were necessary to be able to afford a fair market rent two-bedroom apartment and still have enough left over for food, utilities, and other necessities.²¹ New York’s housing affordability crisis has driven many families with children into homelessness. **New York ranks 49th (with 50th being the worst) among states in the extent of its child homelessness, with more than 258,000 children (ages 0-17) homeless in 2012-2013.**²² The state has also failed to address affordable housing, ranking 41st in state policy and planning for homeless children and families.²³ In March 2015, there were over 14,000 families with nearly 25,000 children sleeping in a New York City municipal shelter each night.²⁴

Recent investments and advancement of proposals to provide more equitable housing policies, such as rent stabilization, at the state level and the New York City level mark significant steps in the right direction, but more must be done.

Increase participation in New York’s SNAP program: Children made up 39 percent of SNAP recipients in New York in 2014.²⁵ The program is a critical support for the many families and

²⁰ Id. at 45 (Table A3.5).

²¹ CHILDREN’S DEFENSE FUND, *supra* note 6.

²² AMERICAN INSTITUTES FOR RESEARCH, AMERICA’S YOUNGEST OUTCASTS: A REPORT CARD ON CHILD HOMELESSNESS 55 (Nov. 2014), available at <http://www.homelesschildrenamerica.org/mediadocs/280.pdf>.

²³ *Id.*

²⁴ *New York City Homelessness: The Basic Facts*, THE COALITION FOR THE HOMELESS, http://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/NYCHomelessnessFactSheetMARCH2015_2.pdf (updated May 2015).

²⁵ *New York Supplemental Nutrition Assistance Program*, CENTER ON BUDGET & POLICY PRIORITIES (Feb. 27, 2015), <http://www.cbpp.org/sites/default/files/atoms/files/NY.pdf>.

children facing hunger, providing an average of \$426 per household with children per month for groceries. Over 3 million New Yorkers (16 percent of the population) relied on SNAP benefits in 2014,²⁶ with about 80 percent of all eligible persons participating.²⁷

According to the CDF's report, **an increase in the federal budget for SNAP benefits would have the second largest effect in New York and would result in a 15.7 percent reduction in child poverty.**²⁸ Federal cuts in SNAP benefits in 2013 and 2014 hurt many families and increased the number of food- insecure households. While recent state level investments for aid to emergency food providers have helped alleviate immediate hunger needs, additional funding for expanding eligibility and streamlining application processes can help improve access to food stamps. New York can increase access to SNAP by raising the Gross Income Test level (currently set at 130 percent of poverty) for working families or families with children up to 18 who do not incur dependent care costs. It can also increase participation by sharing eligibility information across benefit programs to make it easier for families to apply to SNAP.

Expand the refundable state EITC: The federal EITC is a refundable tax credit that is one of the nation's most effective tools for reducing child poverty among working families. It encourages work by providing a credit to low-income working families and increases with higher earnings up to a maximum. A substantial body of research shows that the federal EITC provides work, income, educational, and health benefits to its recipients and their children.²⁹ According to the CDF's report, **expanding the federal EITC would have the third largest impact of the policy improvements in New York, reducing child poverty in the state by 14.5 percent.**³⁰ New York currently is one of about half of the states that also offers a state EITC that builds on the federal credit—offering a refundable 30 percent state credit.³¹

While New York's most recent budget does not include an increase for the State EITC, the EITC is one of the best ways to “make work pay” for low-income families. The EITC also positively impacts children: research shows that the children of EITC recipients do better in school and are healthier. At a time when income inequality in New York continues to grow, it is important that the State support working families by increasing the EITC to 40 percent of the federal benefit. According to the Fiscal Policy Institute, by increasing the EITC to 40 percent of the federal benefit, New York State would effectively increase EITC benefits by one-third for all recipients. The average NYS EITC benefit would rise from about \$690 to \$920, an increase of \$230, at a cost of about \$370 million. Such an increase would provide a much-needed boost to the incomes of 1.6 million low- and moderate-income families and improve the well-being and life chances for two million children.³²

²⁶ FOOD RESEARCH & ACTION CENTER, SNAP (2015), available at http://frac.org/wp-content/uploads/2011/01/snapdata2014_nov.pdf.

²⁷ USDA, REACHING THOSE IN NEED: ESTIMATES OF STATE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PARTICIPATION RATES IN 2012 (Feb. 2015), available at <http://www.fns.usda.gov/sites/default/files/ops/Reaching2012.pdf>.

²⁸ CDF Report, *supra* note 13, at 45.

²⁹ MARR, *supra* note 12.

³⁰ CDF Report, *supra* note 13, at 45.

³¹ *Id.* at 46.

³² NYS Can Help Low-income Working Families with Children by Increasing its Earned Income Tax Credit, FISCAL POLICY INSTITUTE (2014), <http://fiscalpolicy.org/nys-can-help-low-income-working-families-with-children-by-increasing-its-etc>.

Expand the number of child care slots for low-income children: Making high-quality child care affordable to families reduces child poverty by enabling parents to work, and it helps prevent poverty in the long run by promoting the safe, nurturing, and stimulating environments that improve children's development and future academic success. However, many New York families lack access to affordable, high-quality child care and the demand for subsidized child care far exceeds available supply. Fewer than 25 percent of all eligible children receive a child care subsidy due to funding restrictions.

In the CDF's estimate, **investments in child care subsidies would reduce child poverty by over 4 percent.**³³ This is also likely underestimating the impact, since the Supplemental Poverty Measure only captures changes in families' out-of-pocket child care costs and not the total value of the care paid for by the subsidies. In recent years, New York only made modest additional investments to expand child care subsidies.³⁴ Much more must be done to reach families eligible but unable to receive subsidies, and help raise the eligibility to be 200 percent poverty for every county in New York, since many are unable to serve all of these families.

2. Expanding opportunities for poor children to help them succeed and reverse the effects of poverty.

While improving the immediate economic circumstances for poor children helps lift them out of poverty in the near term and helps interrupt the cycle of poverty in the long term, other investments are also crucial to ensure that poor children can escape poverty as adults. The cradle to prison pipeline that disproportionately affects children of color must be replaced with a pipeline to college and career readiness. Children need access to affordable health care, high-quality early development and learning opportunities, after-school programming, high-performing schools and colleges, economic opportunities as young adults, and youth justice services that ensure justice-impacted young people are treated in age-appropriate ways that meet their rehabilitative needs and ensure their safety while in the system and decrease the likelihood that they will reenter the system in the future. New York State has made progress in several of these areas.

Investments in universal preschool: It is well documented that quality early care and education have the ability to eliminate disparities for disadvantaged children; their benefits include improved academic achievement, better health outcomes, and reduced need for costly social spending. Investments in quality early care and education programs provide an economic return to society at a rate of 7 to 10 percent per year.³⁵

New York State's recent investment in the well-being and success of young children through the expansion of its public prekindergarten programs is a positive step toward ending child poverty. In the 2015-16 school year, an expected 70,000 four-year olds will have access to high quality, full-day pre-K in New York City,³⁶ and districts across the State have the opportunity to expand pre-K

³³ CDF Report, *supra* note 13, at 45.

³⁴ *Id.* at 21.

³⁵ *Investing in Early Childhood Development and Learning is Key to the Success of Our Children and Our Nation's Long-Term Economic Growth*, CHILDREN'S DEFENSE FUND (July 2014), <http://www.childrensdefense.org/library/data/early-childhood-short.pdf>.

³⁶ *See Pre-K for All: 22,000 Families Apply for Pre-K on First Day*, NYC (Mar. 17, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/174-15/pre-k-all-22-000-families-apply-pre-k-first-day#/0>.

to three-year-olds in high-need communities. The next step is to realize the goal of achieving universal access to all four-year-olds by investing needed funding to reach the 90,000 four-year-olds outside of New York City who still lack access to any type of preschool program.

Access to affordable health care coverage: Affordable health insurance coverage provides families direct relief from the full costs of medical services and fosters greater economic self-sufficiency. A study by the National Bureau of Economic Research found that children in states with more generous Medicaid and Children’s Health Insurance Program eligibility levels earned more as adults, on average, than their peers in states with lower eligibility levels, and these adults paid more in taxes offsetting much of the government investment in expanded eligibility levels.³⁷

New York has a strong track record of providing robust, affordable health care coverage to all children regardless of immigration status or family income. Before the full implementation of New York’s health insurance marketplace, NY State of Health (“The Marketplace”), fewer than 4 percent of New York children were uninsured.³⁸ Since then, thousands of children have newly enrolled in Medicaid, Child Health Plus, or private coverage.³⁹ New York recently expanded affordable coverage to families and working adults by deciding to implement a Basic Health Program (“BHP”).⁴⁰ The BHP will help bring financial stability to working low- and moderate-income families who earn too much to qualify for Medicaid but still find the costs of private health insurance out of reach. By offering more affordable coverage through new programs like the BHP, the Marketplace, and existing programs like Medicaid and Child Health Plus, New York is sparing families the burden of potentially bankrupting health care costs, and protecting them from the anguish of choosing one necessity, such as food and shelter, over another.

School-based health delivery: For New Yorkers to fully realize the economic benefits of improved access to health care, coverage must directly lead to the receipt of high-quality care, which, in turn, must result in improved health status. One of the most unique and promising vehicles for connecting newly insured children to care is the delivery of health care services within schools.

In recent years, schools have swiftly developed the capacity to provide preventive and primary care services along with robust chronic disease management, all while keeping a child from missing precious academic seat time. Each year, children miss about 14 million school days because of problems associated with asthma alone.⁴¹ School-based health services can effectively treat issues like asthma and reduce the number of school days a child has to miss. Children who are absent less often are more likely to graduate and attain higher levels of education. Improved educational outcomes better position children for lifelong success and boost their future earning potential, all while equipping them to escape the cycle of poverty.

³⁷ DAVID W. BROWN ET AL., NBER, MEDICAID AS AN INVESTMENT IN CHILDREN: WHAT IS THE LONG-TERM IMPACT ON TAX RECEIPTS? (Jan. 2015), available at <http://www.nber.org/papers/w20835>.

³⁸ CHILDREN’S DEFENSE FUND, *supra* note 7, at 57 (Table F–3, “Children Uninsured, Enrolled in Medicaid/CHIP, or Eligible but not Enrolled”), available at http://www.childrensdefense.org/library/state-of-americas-children/2014-soac.pdf?utm_source=2014-SOAC-PDF&utm_medium=link&utm_campaign=2014-SOAC.

³⁹ NEW YORK STATE OF HEALTH, 2014 OPEN ENROLLMENT REPORT (2014), available at http://info.nystateofhealth.ny.gov/sites/default/files/NYSOH%202014%20Open%20Enrollment%20Report_0.pdf

⁴⁰ *Press Release: NY State of Health Announces the Expansion of Private Health Insurance Coverage through Innovative New Program*, NEW YORK STATE OF HEALTH, April 17, 2015, <http://info.nystateofhealth.ny.gov/news/press-release-ny-state-health-announces-expansion-private-health-insurance-coverage-through>.

⁴¹ U.S. HHS, U.S. DOE, MANAGING ASTHMA: A GUIDE FOR SCHOOLS (revised July 2003), available at http://www.nhlbi.nih.gov/files/docs/resources/lung/asth_sch.pdf.

Investments in the programs described above help children escape poverty and the cradle to prison pipeline. Expanding each program also contributes to more positive child health and well-being, higher academic and life success, and less costly social spending.

Conclusions

New York has the opportunity to end child poverty now. Using a two-generation approach—simultaneously helping parents and children with their needs to help them thrive—child poverty could be dramatically reduced in New York (by 73 percent) if there were federal investments in the programs described above. CDF-NY recommends that the State make the following investments to further reduce child poverty:

1. Expand state housing subsidies available for low-income families and enact rent control and stabilization policies statewide that protect affordable housing;
2. Increase participation in SNAP by expanding eligibility levels and increasing access to the program by integrating enrollment with other benefit enrollment systems;
3. Expand the refundable state EITC to 40 percent of the federal credit;
4. Expand child care subsidies to serve all eligible children in the state up to 200 percent poverty; and
5. Expand programs to poor children that help improve their outcomes, including increasing access to universal pre-K, health care, etc.

If the above policy improvements were made, children from families whose income received a boost from these investments would also reap benefits such as: better birth outcomes, higher academic achievement rates, higher high school graduation rates and higher college attendance rates, better health outcomes, and better financial stability as an adult. Moreover, if policy efforts to increase the economic resources of poor families were supplemented by policies that ensure children and families have access to quality early learning and affordable and accessible health care, New York would further break the cycle of poverty for many of its children. •

Building a City of Equal Opportunity

Jennifer Jones Austin¹

Economic inequality is often overly simplified. It can be appreciated as the unequal distribution of income and wealth, or the gap between rich and poor. But to truly understand economic inequality, you have to move beyond this static definition and fully assess its impact. A simple subway ride is a good place to start.

Looking at one of the richest communities in the city, in the *country*, the Upper East Side, and one of the poorest, the South Bronx, only separated by a short subway ride—ten to fifteen minutes—you get a clear picture. On the Upper East Side, the median household income is \$101,417. The unemployment rate is less than 7 percent.² But in parts of the South Bronx, the median income is \$20,867 and the unemployment rate is 17.9 percent.³ Home ownership, one of the most effective means of building assets and wealth, looks vastly different in these communities. The median sales price for homes on the Upper East Side last year was 88 percent higher than those of South Bronx.

With higher incomes and higher home values come better health care access and education systems. On the Upper East Side, only 6 percent of adults over the age of eighteen self-identify as being in poor health.⁴ But in some South Bronx neighborhoods, 43 percent of residents identify themselves as in poor, or at best, fair health. There the HIV-related death rate is the third highest in the city.⁵

Sixty years after *Brown v. Board of Education*,⁶ the Department of Education's District Two, which includes the Upper East Side and where less than one-third of the students are Black or Hispanic, had a proficiency rate of 56 percent on the English Language Arts assessments given to all students in grades three to eight.⁷ But in the South Bronx's District Seven, which is nearly 98 percent Black and Hispanic, English Language Arts proficiency—defined as a 3 or 4 score—was achieved by only 9 percent of students⁸ in grades three to eight.⁹

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² NYC Dep't of City Planning, *DP03 Selected Economic Characteristics 2010-12 ACS Survey 3-Year Estimates, New York City Manhattan Community Dist. 8 (Upper East Side)* (2014), http://www.nyc.gov/html/dcp/pdf/census/puma_econ_10to12_acs.pdf#mn08.

³ NYC Dep't of City Planning, *DP03 Selected Economic Characteristics 2010-12 ACS Survey 3-Year Estimates, New York City Bronx Community Dist. 1 & 2 (Hunts Point, Longwood & Melrose)* (2014) http://www.nyc.gov/html/dcp/pdf/census/puma_econ_10to12_acs.pdf#bx01and02.

⁴ NYC DEPARTMENT OF HEALTH AND MENTAL HYGIENE, COMMUNITY HEALTH PROFILES – TAKE CARE NEW YORK: UPPER EAST SIDE 3 (2d ed. 2006) available at <http://www.nyc.gov/html/doh/downloads/pdf/data/2006chp-305.pdf>.

⁵ NYC DEPARTMENT OF HEALTH AND MENTAL HYGIENE, COMMUNITY HEALTH PROFILES – TAKE CARE NEW YORK: HUNTS POINT AND MOTT HAVEN 3 (2d ed. 2006) available at <http://www.nyc.gov/html/doh/downloads/pdf/data/2006chp-107.pdf>.

⁶ 347 U.S. 483 (1954).

⁷ NYC GEOG DIST # 2 - MANHATTAN 3-8 ELA Assessments (2013 - 14), <http://data.nysed.gov/assessment38.php?year=2014&subject=ELA&instid=800000048410>.

⁸ NYC GEOG DIST # 7 - BRONX 3-8 ELA Assessments (2013 - 14), <http://data.nysed.gov/assessment38.php?year=2014&subject=ELA&instid=800000046647>.

⁹ NYC DEPARTMENT OF EDUCATION, PROGRESS REPORTS 2012-13.

Economic inequality is inextricably linked with income, health, and education. And income, health, and education inequality results in opportunity inequality, which then results in less upward mobility, which then reinforces economic inequality.

Creating upward mobility for a family in our city doesn't just seem impossible. Given the shifting economy of rising costs and inadequate income, *it is* virtually impossible. The average cost of living in New York City has risen by 48 percent since 2000, while the median earnings of working adults have increased by only 17 percent.¹⁰ What this means is that no matter how hard you work, no matter how intelligently you plan, it's not even possible to stay in place.

If a child in a lower-income community does not have access to quality public schools, his chances of moving up—of improving his education—are iffy at best. If a child growing up in a low-income household lacks access to quality health care, her chances of thriving—of becoming prosperous—are iffy at best. Growing inequality decreases the likelihood of individuals, children, and families moving up the income ladder and building wealth.

Economic inequality is bigger than income inequality. It's more than an individual or family problem. It results from and is experienced by society. The time has come for us to reframe our thinking.

Take an example: To be self-sufficient as a household in Queens with basic needs met, with no inclusion of recreation or savings of any kind, a family of two adults with a preschooler and a school-aged child must earn \$76,376. In South Manhattan, the most expensive of the boroughs, the cost would be \$98,836. In the Bronx, the lowest: \$70,319.¹¹

How then is self-sufficiency to be achieved in New York City today?

These are the hard facts faced every day for a whopping 42 percent of New York households.¹² Nearly half of our fellow residents find themselves in an ever-tightening bind, one that will not allow them a fair chance at the American promise of upward mobility and shared prosperity. Now more than ever, if you are born poor, you are likely to stay poor.

We can and we must do better.

Remember, we are talking about working families who need to have the minimum means to survive in the city independently. For households in New York City with incomes that fall below the self-sufficiency standard, 83 percent have at least one family member who works.¹³ This means that, for a shockingly unacceptable number of New Yorkers, having a job does not guarantee the ability to support their own families.

Why is this happening in a city with so many resources? The fact is that good jobs have been disappearing while living costs have increased. Public policies have focused primarily on assisting people to get low-wage jobs, rather than on creating education and vocational training opportunities, and good jobs that enable upward mobility. We are applying Band-Aids when a tourniquet is needed to stop the inter-generational bleeding.

¹⁰ DIANA M. PEARCE, *OVERLOOKED AND UNDERCOUNTED: THE STRUGGLE TO MAKE ENDS MEET IN NEW YORK CITY* 43 (2014) available at https://b3cdn.net/unwaynyc/d2ef3c2becabe1a6ea_7dm6igxy0.pdf.

¹¹ *Id.*

¹² *Id.* at 37 (noting that New York City's "rate of income adequacy is 42 percent, higher by far than any state in this comparison, before or after the recession.").

¹³ *Id.* at 36.

The fact is economic hardship is perpetuated by deliberate policy choices. Only a change in those choices will result in eliminating the present double bind that so many New York families face now.

Poverty persists today, and even increases, because present policies work to manage rather than eradicate inequity. Families face the challenge of rising costs and stagnant income, and are no longer well served by safety net policies—that is, policies that help people meet their basic needs but don’t do much more. To seek to manage, rather than to eradicate, poverty is not just to stand still but, given the reality of present day economics, to go backwards at an alarming rate.

A “safety net” strategy is not enough. We must certainly preserve and maintain support for a safety net that ensures that individuals have the means to feed themselves and their families—the means to maintain their dignity and basic livelihood.

But to be truly effective, any support given must aid families in regaining—and retaining—self-sufficiency. We can’t just help a family from day to day. We have to earnestly apply policies designed and implemented to move people out of poverty into independence and self-sufficiency.

We must eradicate poverty, not just alleviate its symptoms.

To work toward this end, we must commit to building a city of equal opportunity. Because income directly correlates with opportunity, impacting current and future generations, we need a full-scale effort to develop policies and programs that materially improve wages, educational experiences, and living conditions. There are three tenets we must work toward in order to create the opportunity we need: reduce poverty by ensuring individual and families across generations can meet their basic needs; advance upward mobility by driving a policy agenda that promotes the ability of the unemployed, underemployed, and low-wage workers to move up the economic ladder during their lifetime; and create shared prosperity by increasing fairness, opportunity, and equity in jobs, career pathways, education, and health.

Accepting our shared values and interests in creating a just and caring society compels us not only to weave a concrete safety net, but also to work to identify a path that enables our most needy neighbors to achieve economic stability.

We have research demonstrating that, with appropriate and targeted investment in a combination of policies, we can begin to meaningfully alleviate poverty while opening the doors to opportunity. A recent study and report, commissioned by the Federation of Protestant Welfare Agencies with Catholic Charities of New York and United Jewish Appeal Federation, and conducted by The Urban Institute, analyzed six existing public policies and simulated a new tax policy to inform federal, state, and city government policymakers on how to effectively invest in anti-poverty programs, both to reduce and, dare we dream, eradicate poverty.¹⁴

The report utilized 2012 American Community Survey (“ACS”) data and the TRIM3 (“Transfer Income Model version 3”) microsimulation model to determine baseline data that served as the foundation of the poverty analysis. Using this baseline data, we were able to assess the impact of seven policies, three directly tied to employment and earnings, three in-kind benefits, and one new tax credit for non-workers.

¹⁴ LINDA GIANNARELLI, LAURA WHEATON & JOYCE MORTON, RESEARCH REPORT: HOW MUCH COULD POLICY CHANGES REDUCE POVERTY IN NEW YORK CITY? (2015) available at <http://fpwa.org/wp-content/uploads/2014/10/Anti-Poverty-Report-Final.pdf>.

- A transitional jobs program was tested with different assumptions about how many people would take a transitional job and what the wage would be.
- Various options for earnings supplements were tested, including changes to the existing state and city Earned Income Tax Credits (“EITCs”) as well as full implementation of the Paycheck Plus program currently piloted in New York City.
- A higher minimum wage was tested up to \$15 per hour.
- Increased benefits from the Supplemental Nutritional Assistance Program (“SNAP,” also known as food stamps) were tested, specifically the impact of increasing SNAP benefits by 31 percent.
- More housing vouchers were tested with increases equal to one-quarter or one-half of the current waiting list for public or subsidized housing.
- Guaranteed child care subsidies were tested, assuming that a subsidy would be provided to any family eligible under the current rules who wanted it.
- A tax credit for senior citizens and persons with disabilities was tested as a new program bringing seniors and people with disabilities up to a poverty-level income.

What we discovered is just how much return on investment there can be with targeted, combined policies. By funding a package of policies aimed at providing job training, economic security, and support for working families, our research found reductions in poverty by more than two-thirds. That’s over 1.2 million New Yorkers lifted out of poverty. These reductions were seen in all age subgroups of New York City’s population, with poverty rates reduced by as much as 72 percent for children and 85 percent for seniors.¹⁵

The outcomes of this research demonstrate that a targeted government investment in a set of coordinated policies can have a profound effect on people of all ages in New York City. The individual policies examined, as simulated, hold the potential to reduce poverty significantly. Three policies that demonstrate an especially strong impact are the transitional jobs program, the minimum wage increase, and the senior and disability tax credit, each having the potential to reduce poverty by 16 to 26 percent.¹⁶ “Combining them multiplies their impact: each policy combination that was tested shows reductions in poverty even more significantly, ranging from 44 to 69 percent.”¹⁷

The impact that can be achieved through a targeted investment is clear. These policies support a connection to work, aiming to make work pay, and providing for those who cannot enter the workforce.¹⁸

We know what’s needed: Targeted and combined policies and programs that help individuals and families to sustainably improve and grow their income. Policies and programs that strengthen children and families. Policies and programs that strengthen communities. Equal opportunity in New York City will be achieved only if policies and programs that promote and sustain the

¹⁵ *Id.* Appendix D, Table D2: Poverty Rate and Numbers in Poverty.

¹⁶ *Id.* Appendix D, Table D1: Summary.

¹⁷ *Id.* at VII.

¹⁸ *Id.*

economic well-being of vulnerable New Yorkers of all ages are implemented and complemented with increased personal responsibility and community empowerment. The community we live in is the community we create, together. We know that eradicating poverty in New York City will require a significant commitment of city, state, and federal resources. We know that achieving such a massive change in the trajectory of how we deal with struggling families is not easy. It requires the support of everyone: the city's elected leaders, community-based organizations, the nonprofit sector, philanthropy, businesses, and faith and community leaders.

But the return on our investment shall be more than worth the effort, for everyone will profit from the resulting increase in personal and community wealth that will result. And if we invest wisely, we may not have to invest again.

We have fought a good fight against poverty in the past. But we must do better in the future. We can do better. New York can do better. America can do better.

As a City of Equal Opportunity, New York City can show America the way. •

On April 17, 2015, the Impact Center for Public Interest Law at New York Law School held a symposium called “Tackling Inequality.” The symposium addressed one of the most pressing and vexing issues of our time, and the subject of this collection of essays: how to address the rapidly growing disparities of income and wealth in the United States. The efforts of the de Blasio administration in New York City to address economic inequality were a primary focus of the symposium, and panels included top officials of the administration as well as prominent academics, policy analysts, and nonprofit leaders. We are printing below the remarks given by NYC Human Resources Commissioner Steven Banks at the symposium about his agency’s role in addressing economic inequality in New York City.

The New York City Human Resources Administration’s Role in Fighting Poverty and Income Inequality and Preventing Homelessness

Remarks of Steven Banks Commissioner of the New York City Human Resources Administration

As you know—every day in all five boroughs—the City’s Human Resources Administration (“HRA”) is focused on carrying out the Mayor’s priority of fighting poverty and income inequity and preventing homelessness. With an annual budget of \$9.7 billion and a staff of 14,000, HRA provides assistance and services to some three million low-income children and adults, including:

- Economic support and social services for families and individuals through the administration of major benefit programs (cash assistance, Supplemental Nutritional Assistance Program benefits (food stamps), Medicaid, and Child Support Services);
- Homelessness prevention assistance; educational, vocational, and employment services; assistance for persons with disabilities; services for immigrants; civil legal aid; and disaster relief; and
- For the most vulnerable New Yorkers: HIV/AIDS Services, Adult Protective Services, Home Care, and programs for survivors of domestic violence.

HRA is about more than cash assistance; we help low-income workers stay on the job and we work to prevent homelessness. While most of the public focus tends to be on how many people receive cash assistance, it is important to note that a large number of the New Yorkers receiving some assistance from HRA are already working and that HRA’s support helps them remain in the workforce. Living in a very expensive city, low-income workers, who are generally struggling to begin with, can be derailed by a variety of emergencies and unexpected expenses. Among other assistance, HRA provides these key work supports:

- 2.5 million New Yorkers receive Medicaid through HRA, and tens of thousands more through the new State health insurance exchange;
- 1.7 million New Yorkers receive Supplemental Nutrition Assistance Program (“SNAP”) food assistance and millions of meals served through food pantries and community kitchens;
- 700,000 New Yorkers receive home energy assistance every winter; and
- 100,000 New Yorkers receive one-time cash assistance each year to prevent evictions and utility shutoffs or provide assistance with other emergencies.

For all these New Yorkers, these supports can be critical in maintaining employment. Having health insurance means workers can stay healthy and working and avoid the economic disaster that severe illness can impose on those with no insurance. Food and energy assistance, child support, and the Earned Income Tax Credit strengthen households and help families survive on low-income jobs. Emergency cash assistance and services to prevent homelessness can also stabilize families and individuals and keep them from losing employment in the face of sudden emergencies. Clearly, efforts aimed at keeping low-income workers in the workforce are much less expensive and more efficient than having to help New Yorkers return to the workforce, especially after an extended absence.

HRA also helps thousands of the most vulnerable New Yorkers, providing shelter and supportive services to families recovering from the trauma of domestic violence, support for people living with HIV and AIDS, protective services for adults unable to care for themselves and home care services for seniors and individuals with physical or mental disabilities, and legal services to address the harassment of tenants, avert homelessness, and help immigrants.

Reforms

For the past year, we have been focused on implementing significant reforms to better serve low-income New Yorkers. As part of this ongoing process, I met with frontline staff in all five boroughs, created staff focus groups and surveys, and reorganized the senior level of HRA's management to move the reform process forward. We also looked to our external stakeholders soliciting input from clients and engaging the advocates, community-based organizations, and legal representatives to seek input.

Our reforms focused on addressing HRA policies that harmed clients, were barriers preventing New Yorkers from accessing assistance, had an adverse impact on staff workload and morale, and subjected the City to potential financial penalties for unnecessary fair hearings. With more than two dozen key reforms in place, we continue our work to ensure that those in New York City who need to access our programs and services are able to do so and that relief is effective and assists low-income New Yorkers in working toward more permanent stability.

These reforms have had no impact on the most accurate measure of the number of people receiving public assistance. The annual unduplicated caseload of New Yorkers receiving recurring cash assistance has remained steady at 500,000 during the past year, as it has since at least 2008.

The number of people receiving cash assistance during any given month fluctuates around 360,000. As one would expect, ending the policy of churning clients on and off the caseload, which artificially reduced the monthly number, has resulted in a small variance in that number. Since the churning of people on and off the caseload subjects the City to a potential \$10 million New York State penalty for unnecessary fair hearings, keeps clients from participating in job training, and is associated with shelter applications, reducing churning is good, fiscally sound public policy. An analysis of the Department of Homeless Services ("DHS") shelter applications during a six-month period in 2013 found that 23 percent of the applicants had an HRA case closing or case sanction within the prior 12 months.

Three representative new initiatives highlight the impact of the ongoing reform efforts.

Employment Plan

HRA spends approximately \$200 million a year on employment programs. Every two years, we are required to file with the New York State Office of Temporary and Disability Assistance an employment plan for how we will be using those funds to help our clients. We submitted a new plan last year, and it was approved by the State on December 31, 2014. It will take us about two years to replace all of the current contracts and completely implement the new program.

The new plan reflects a new approach based on these principles:

- **Improving assessments** to address each client's actual strengths and needs. This will improve outcomes compared to the prior one-size-fits-all approach, which resulted in one out of every four clients who received employment assistance returning to the caseload within 12 months.
- **Maximizing education, training, and employment-related services**, which will open job opportunities and create the basis for building career pathways out of poverty.
- **Eliminating unnecessary punitive and duplicative actions** that lead to preventable negative actions and fair hearings (and that subject New York City to potentially \$10 million in financial penalties). This will allow staff to focus on more effective problem solving and allow clients to avoid delays in accessing services, finding jobs, and moving into sustainable employment.

Of the approximately 360,000 New Yorkers receiving assistance in any given month, most are not subject to work requirements, according to the same state and federal rules applied by prior Administrations. That is because about half are children and many more are seniors or clients who have barriers to employment because of either permanent or temporary disabilities.

Moreover, of the approximately 90,000 clients who are subject to work requirements, 25,000 actually have jobs; however, they make so little they still qualify for cash assistance. This underscores why the Mayor's call for an increase in the minimum wage is so important for addressing poverty and income inequality—as well as for reducing our caseload.

During the phase-in of our Employment Plan:

- Our overall goal is to ensure HRA's employment and training programs are effective in connecting and/or reconnecting New Yorkers to the workforce.
- We want to maximize education, training, and employment-related services.
 - 60 percent of employable clients lack a high school diploma or equivalent degree, so we will allow recipients up to age 24 to participate in full-time basic education.
 - As permitted under a 2014 state law that we supported, we will allow participation in a four-year college-degree program. And we are putting supports in place to help clients successfully complete their education.
 - We will increase access to targeted training for jobs in high-growth industries and utilize available Career Pathway programs.
- As noted, instead of one-size-fits-all, we are creating new employment strategies for youth, clients with limited English proficiency, shelter residents, those with work limitations, those with justice system involvement, and older clients.
- We are also working to enhance program participation and the resolution of disputes before a fair hearing is requested.

One specific goal is to phase out the Work Experience Program (“WEP”) because it required public assistance recipients to work for no compensation in jobs that provided little or no job training or valuable job training. We intend to replace WEP with more effective and sustainable work activities. Our Employment Plan provides for a two-year WEP phase-out period. HRA has already collaborated with the City University of New York (“CUNY”) to implement a paid work-study program to phase out WEP for CUNY students who are receiving cash assistance and need to meet an HRA work requirement. As a result of this collaboration, we have phased out approximately 500 CUNY WEP slots, about 10 percent of the total number of WEP slots throughout the City.

Legal Services

The provision of legal services is an important program to address poverty and income inequality; civil legal aid, for example, was a significant initiative in the War on Poverty. At the beginning of our current fiscal year on July 1, 2014 (FY ’15), the Mayor consolidated legal services from the DHS, the Department of Housing Preservation and Development (“HPD”), the Department of Youth and Community Development (“DYCD”), and the Mayor’s Office of Criminal Justice (“MOCJ”) and placed them under the administration of HRA in order to enhance coordination and effectiveness.

Contracted services include: anti-eviction and anti-harassment tenant protection, immigration assistance, representation of domestic violence survivors, help securing federal benefits, and other legal assistance. We are also developing a study of the unmet needs in Housing Court to evaluate what programs will be most effective in preventing homelessness.

The civil legal services programs and the \$18.8 million in associated funding in the City’s baseline budget that were consolidated at HRA in FY ’15 are as follows:

- \$13.5 million for anti-eviction legal services, which represents an increase of \$7.1 million above the previous funding levels, as part of the Mayor’s new initiatives to prevent homelessness that were announced in September; and
- \$5.3 million for legal assistance for immigrants, including legal services for survivors of domestic violence, immigrant workers, and immigrant City residents with legal needs involving citizenship and permanent residency.

During the course of this fiscal year, the Administration’s support for legal services has further increased with the development of these new programs at HRA:

- A new program that will provide access to legal assistance for community residents identified as victims of tenant harassment in order to prevent displacement, keep families and individuals in their homes, and maintain affordable housing—when fully implemented this program will fund \$31 million in civil legal assistance and \$5 million in HRA support services on an annual basis;
- A new program to assist children and adults with disabilities obtain federal disability benefits in place of state and local public assistance—when fully implemented this program will be funded at more than \$2 million on an annual basis for Appeals Council Review and Federal Court Services; and
- A new \$660,000 program in FY ’15 to support legal assistance to help New Yorkers benefit from the President’s Executive Action for immigrants.

In addition to the Administration’s commitment of resources in the baseline budget, as part of the FY ’15 budget agreement between the Mayor and the City Council, \$17.6 million in

discretionary funding has also been added to HRA’s budget for this year for civil legal services, including citywide civil legal services, legal services for low-income workers, legal assistance to obtain unemployment insurance benefits and federal disability benefits, legal services for survivors of domestic violence, legal services for veterans, anti-eviction and SRO housing legal services, an Unaccompanied Minors Initiative, and a Family Unity Project to keep immigrant families together and avert deportation.

In combination, as New York State Chief Judge Jonathan Lippman has done for the New York State Judiciary’s civil legal assistance initiative, these programs prioritize civil legal assistance in core matters involving the “essentials of life”—legal problems in the areas of:

- Housing (including evictions, foreclosures, and homelessness);
- Family matters (including domestic violence, children, and family stability);
- Access to health care and education; and
- Subsistence income (including employment wages, disability and other basic benefits, and consumer debts).

Homelessness

As part of the de Blasio Administration’s effort to reduce homelessness, there has been a substantial expansion of HRA’s homelessness prevention services.

For the first time, HRA has a Homelessness Prevention Administration, bringing together and coordinating all our existing and new programs. It includes the following:

- Homelessness Diversion Units (“HDUs”) located at all HRA Job Centers and at the Department of Homeless Services’ PATH intake facility are now utilizing new diversion tools that include short-term financial support.
- On-site staff are working at DHS Homebase offices around the City and at the New York City Housing Authority’s administrative hearings office in addition to staff at the Housing Courts.
- There is an Early Intervention Outreach Team (“EIOT”) for outreach to families and individuals in need of legal assistance or emergency rental assistance based on early warning referrals from the Housing Court.
- Because landlords are essential to fighting homelessness, we created the Landlord Ombudsman Services Unit (“LOSU”) to address the needs and concerns of landlords and management companies that provide permanent housing for families and individuals receiving public assistance.
- A Rental Assistance Program was formed to implement the Administration’s new Living in Communities (“LINC”) rental assistance initiatives.
- The Legal Assistance Initiatives Program now manages all the legal assistance programs that have been consolidated at HRA to enhance coordination and effectiveness.

HRA also recently created the Family Independence Administration’s Central Rent Processing Unit to centrally process, issue, and deliver emergency rental assistance payments to landlords to prevent evictions.

As these three examples highlight, we have accomplished a great deal over the past year, and we will continue with our reform initiatives during the coming year. •

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The Advisory Council of the Impact Center for Public Interest Law is composed of leading public interest law practitioners and public officials who support and help guide the work of the Impact Center and who, in turn, draw upon the resources and expertise of the Impact Center to further their work. Advisory Council members come from a wide range of nonprofit public interest organizations and public-sector and private-practice settings; a number of the members are alumni of New York Law School. The members work with the Impact Center in a variety of capacities—including collaborative advocacy, experiential learning and pro bono opportunities for students, continuing legal education, and conferences and other events.

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