CRIMINALIZATION OF POVERTY:  
MUCH MORE TO DO

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The politics of mass incarceration have changed. Multiple candidates running for President in 2020 called for reform.1 President Trump signed the First Step Act to reform (a little) the federal criminal laws.2 And when Hillary Clinton ran for President in 2016, she changed her position about the 1994 federal crime act.3 The climate for reform is quite different from when President Clinton signed the act with a flourish.

The heart of the reason behind the change is that crime rates have decreased. Though the number of people in prisons and jails has changed little, the air is filled with change. We are starting to witness a true movement toward decarceration.

Mass incarceration is now front and center on most policy reform agendas, which suggests that the door is open to accelerate the attack on fines and fees, money bail, and other causes of the criminalization of poverty. Policies have gradually changed for the better over the past five-plus years, but the criminalization of poverty has not yet been center stage. It should be. Criminalization of poverty, a junior sibling to mass incarceration, is wreaking havoc all on its own. Advocacy movements in several states have made headway and provide important examples for reform. Yet, these localized movements have not scaled on the federal level, nor have they resulted in calls for sweeping reform across the country. So, there is much more to do.

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I. The History

Mass incarceration began in the 1970s, but the seeds of criminalization of poverty were not sown until President Reagan was elected. In 1981, President Reagan and the Republicans, along with enough scared Democrats in the House of Representatives, reduced the top marginal tax bracket from 70 percent to 50 percent. Unsurprisingly, many states and municipalities went along with the political flow and cut taxes. These tax cuts caused many states and municipalities to face financial struggles over lost revenue. It was not long before exorbitant fines and fees began to plug the revenue holes.

Claiming that President Reagan asked him to create it, Grover Norquist founded Americans for Tax Reform in 1986 at the age of twenty-nine. Indeed, Norquist claims he invented the Antitax Pledge Claims as a gift to President Nixon in 1968 when he was twelve years old. By the time George W. Bush came to the White House, his organization had grown phenomenally, counting 700 corporation and trade association members. Norquist repeatedly said that he wanted to reduce government “down to the size where we can drown it in the bathtub.” The antitax rebellion was powerful. Governments cut budgets with an axe, and when no more cuts were available, they went after revenue wherever they could.

No doubt there were always speed traps to garner funds in small towns all over the country. Every year my father told us on our way

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10. Id.
through northern Minnesota that he had to drive with extra care to avoid arrest from speed traps. That was in 1947. By 1996, Florida added twenty new fees (now numbering at 115 fees and surcharges), and by then such fines and fees were ubiquitous across the nation.11 States and municipalities needed money, badly, and jacking up fines and fees was attractive, even though many people would not be able to pay the price.

The situation became national, but it was not understood as a national issue until much later. Of course, victims knew. One by one, those who could pay did pay and grumbled, but they did not know the issue was rife. Those who could not pay knew they were in a bad situation, but they did not know millions were in similar situations. Some small towns and inner city neighborhoods knew it was not a fair financing system, but they did not know there were many other places being hit in the same way. Some journalists wrote about it, but mostly about particularly mean judges or particular towns. Some lawyers began to take cases. Some judges knew. As did some legislators. Even the lawyers who represented people in the individual cases did not see the full pattern at first, although they began to win settlements that forced counties or towns to stop the harmful policies.

The events in Ferguson, Missouri, in 2014 awakened the country. Only because of a push from President Obama’s Department of Justice did people begin to see the exorbitant, unfair system of fines and fees as a national phenomenon. Along with that awakening, lawyers, legislators, journalists, and others began to challenge the worst fines and fees, money bail systems, and drivers’ license suspensions.

At the end of the decade, more than five years following the post-Ferguson awakening, the picture is considerably different. There are extensive victories in litigation and legislation, impressive new organizations, both legal in nature and policy-oriented, and more lawyers in existing entities. There is greater public awareness about the problem. The arc is surely bending in the right direction.

Consequently, we see insights and examples that point toward the right next steps. We see ways to undertake multidimensional approaches. We understand that the issues nest in larger frames with broader perspectives that demand wider strategies.

II. CRIMINALIZATION OF POVERTY

For far too long America’s poor have been criminalized by intersecting systems that impact low-income individuals at all levels, including the school-to-prison pipeline, chronic nuisance orders, public housing shortages, anti-homelessness ordinances, claims of welfare fraud, and inadequate mental health systems. The punishing fines and fees that often result from a low-income individual’s interaction with these systems have exacerbated the cycle of poverty. Decriminalizing poverty defines the required work ahead, beyond the reform of fines and bail.

Local and state governments still face a revenue shortage in many parts of the nation. Proponents of fines and fees, bail, and other aspects of the status quo criminal justice system cling to the need for money and use fearmongering tactics to scare people into thinking that eliminating these processes will raise crime rates. We have the data to prove the latter claim false, if we can reach those people, but the funding issues remain a challenge. The fact is that the cost of administering fines and fees and money bail is expensive, and we can lay out the facts. The net from the system is much less than the gross, and at least larger states and municipalities are beginning to adopt alternative financing strategies.

The school-to-prison pipeline is a prime example of the criminalization of poverty. Sending low-income schoolchildren to court instead of a principal’s office after a scuffle on the playground is criminalizing poverty, and it is national in scope. There is a reason for school security, certainly. Columbine was the stimulus. But placing School Resource Officers (“SROs”) in three thousand schools with federal funding did more harm than good.12 In Texas, for example, close to one hundred thousand children faced criminal truancy charges before advocates took action.13 Across the nation, too many children are still sent to the courts.14 Children need protection, but sad to say, SROs in many schools have caused thousands of children to acquire

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juvenile court records that changed their lives. Sending children to court for minor issues is not necessary. There are school systems around the country that train their SROs properly and professionally, and achieve results that are supportive and constructive, but this success is not widespread.

The children who are sent to court are disproportionately children of color and children with disabilities, another example of the disparate impact across each instance of the criminalization of poverty. There can be a role for police in schools, but it is too often a detriment. Police have become far too involved in many aspects related to the criminalization of poverty, from mental health problems to policing homeless people who are not in shelters.

Of all the examples of the criminalization of poverty, chronic nuisance ordinances are perhaps the most stunning. The police misuse these ordinances because of inadequate budgets and the poor attitudes of officers and their supervisors. A woman, terrified because her husband or boyfriend constitutes real danger, calls 911 and is told that she has used up or is about to use up her allocated calls, usually about three. If she exceeds the limits, then the police can command the landlord to evict the woman. Those evicted are typically low-income women of color.

Fraud prosecutions of public benefits are far too often another form of the criminalization of poverty. The so-called welfare reform in 1996 was in major part a plan to reduce the number of recipients receiving cash assistance under Temporary Assistance for Needy Families (“TANF”). As a result of the 1996 reform, TANF welfare rolls shrank dramatically from over fourteen million in 1993 to less than three million today. In addition to work requirements and arbitrary


18. See PETER EDELMAN, SO RICH SO POOR: WHY IT’S SO HARD TO END POVERTY IN AMERICA 3 (1st ed. 2012) (“In October 2007, there were 3.9 million mothers and children receiving TANF, down from more than 14 million in the early 1990s.”); GENE FALK & PATRICK A. LANDERS, CONG. RESEARCH SERV., THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES
qualifications, prosecutions or threats of prosecutions for “fraud” were used to scare individuals from enrolling in benefits programs. Depending on the state, mistakes in applying for or reporting income while receiving assistance often lead to an accusation of fraud. Similarly, individuals receiving food stamps, Supplemental Security Income, and other public benefits can draw a charge of fraud, depending on the state involved. Again, the targets are mainly people of color.¹⁹

Persecuting the homeless is the criminalization of poverty. Many cities short on revenue have enacted even more ordinances in recent years designed to get homeless individuals to leave the city or otherwise suffer repeated stints in jail.²⁰ The typical ordinance prevents public sleeping—barring sleep in one’s car, in the park, or lying down anywhere. These ordinances send a message: if you are homeless, get out of town. Yet, homeless individuals often face intersectional challenges relating to income, housing, and mental health needs. Being homeless is just the tip of the iceberg. Public housing shortages and unaffordable housing options leave many individuals with no option other than sleeping on the streets. Homeless individuals have disproportionate rates of mental illness and often go without treatment.²¹ Instead of providing necessary services to tackle these issues, ordinances targeting homeless individuals create responsibilities for the police, who should not be asked to handle such problems.

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²¹ See Kaya Lurie, Breanne Schuster & Sara Rankin, HUMAN RIGHTS ADVOCACY PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS 25, 30 (2015), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1002&context=hrap [https://perma.cc/K747-4SP5] (noting that homeless individuals are more likely to have severe mental illnesses than the general population and face substantial barriers to seeking healthcare treatment).
What we have done to mental health as a nation is yet another form of the criminalization of poverty. The mental health system, if you can call it one, is composed disproportionately of jails and prisons. Again, this is an example of poverty criminalization that affects predominantly people of color and an area where police are authorized and relied upon to handle tasks that should not be in their portfolios.

Finally, collateral consequences further the cycle of the criminalization of poverty. People who return from prisons and jail run into a total of 45,000 laws—at all levels of government.22 These laws restrict jobs, housing, voting, education, and many other aspects of daily life. For example, individuals with a criminal record are typically denied access to public housing for a period of time.23 With no affordable options for housing, these individuals experience homelessness at disproportionate rates.

These harmful policies are not only about money. They are also about race and class. The most dangerous intersection in America is the combination of race and poverty. And it cuts across all of the criminalization of poverty.

It is also important to emphasize again that inappropriate police roles are woven throughout the criminalization of poverty. We have become too much of a police state. We arrest people for actions that should not be crimes at all (like sleeping outside or calling 911 “too frequently”), but even actions that should be sanctioned—like broken window crimes—should not lead to individuals being held for an inability to pay bail or incarcerated for minor infractions. We need to look at all of the inappropriate police roles together—in schools, in handling the homeless epidemic, in responding to 911 pleas, and in serving those with mental health issues. Looking at all of these intersecting systems together emphasizes the significance of the issue. Addressing the whole problem is necessary to combat the criminalization of poverty.

Additionally, for-profit entities are more far-reaching than many people understand. An increasing number of them operate and further

22. See generally Shaila Dewan, The Collateral Victims of Criminal Justice, N.Y. TIMES (Sept. 6, 2015), https://www.nytimes.com/2015/09/06/sunday-review/the-collateral-victims-of-criminal-justice.html [https://perma.cc/O5PQ-OLVK] (citing a database compiled by the American Bar Association of 45,000 regulations that prevent individuals with a criminal background from engaging in basic civic activities, such as voting and finding employment).

entrench the criminalization of poverty. When private entities profit from these systems, changing the rules becomes even more complicated. For-profit organizations do far more than operate prisons. They cut across the entire criminal law system. Diversion and electronic ankle bracelets are run by for-profit companies, who charge for their services. Medical services in prisons and jails are widely run by for-profit companies. Probation agencies operate on a for-profit basis in thirteen states. Yet, public probation agencies charge too—thirty-one states and numerous counties charge for probation. Many states and counties charge for room and board. The proprietary sector finds money in all corners of the criminal law system. The breadth and depth of the private–public relationship is everywhere and needs to be shown in the light of day.

III. STRATEGIES FOR THE NEXT PHASE

The strategies and guidelines for the next wave of reform require legislation, litigation, messaging, and national organizing. Solutions must be multipronged, collaborative, and at the largest scale. Wherever possible, leaders must think offensively and defensively, and they must oppose profitmaking throughout.

A. Prioritize Reform at Scale

We need to cover as much ground as possible. National solutions should be pursued when they are possible, and opportunities for national reform are not out of the question. Conservatives and libertarians have joined with liberal reformers in some states and even occasionally in Washington, as was seen with the recent First Step legislation. On the litigation front, Supreme Court cases are now dangerous and must be approached with great care, but particular lower federal courts have been fruitful and some still can be. Going to the state courts, however, would generally be wiser where possible. States can make important progress, not only in their own domains, but also by paving the way for other states and priming our thinking about ideas that can become possible nationally.


1. California: Proposition 47

The big wins tend to be on the state level, at least in the blue states that are consistently more promising across the board in courts, legislatures, and voter initiatives. Proposition 47 in California is a prime example of state-level coordination among legislators, organizers, and the people. The result was a large reform in state statutes to reduce sentences and change felonies to misdemeanors, and an intention to move saved funds to localities to invest in jobs and other services to help people succeed when they are not sent to prison. Proposition 47 involved big thinking.

2. New York: Bail Reform

More recently, the New York Legislature enacted money bail reform in 2019. The reformers tried for years without success simply because the legislature was not responsive. In 2019, both houses became Democratic for the first time in many years. That was key, but reform was far from automatic. There was strong opposition among district attorneys and law enforcement. Moreover, the reformers did not agree on some of the details. And there was negotiation with the governor and the leaders in the legislature. The organizers and lobbyists thus had to push legislators, negotiate on the details among supporters with different views, and sell among opposition who had to be convinced to vote yes. It is a good story, although a less-blue legislature down the road could try to repeal or undermine key pieces of the structure. The politics are fierce. The bail bond people are unhappy now and they have clout, and some elements of the law enforcement community are unhappy, too.

Arguments during negotiation, which are typical in such legislation, were mainly related to mandatory releases, presumptive releases, presumptive detention, and defining the process for individuals. Other arguments centered on what crimes would be covered and which of those could be held as a “current threat” justifying pre-trial detention.

26.  *See generally Judicial Council of Cal., Early Impact of Proposition 47 on the Courts* (2016), [https://www.courts.ca.gov/prop47.htm](https://www.courts.ca.gov/prop47.htm) [https://perma.cc/P5GV-JRLG].

The big success was the inclusion of second degree robbery and second degree burglary, neither of which are violent crimes, in the category for mandatory release without money bail.\textsuperscript{28} In contrast, violent felonies are handled largely as they were before, with money bail, but the judge must consider unsecured or partially secured bond for these cases, and the courts must issue findings on the record to justify their decision-making.

Not everything is perfect. At the beginning of 2020, just days after the law went into effect, pushback mounted in response to an anti-Semitic, knife-bearing attacker who was released pending trial.\textsuperscript{29} Opponents of the law reignited the same fear-messaging tactics, hoping to scare voters and legislators. They claim the law puts the public at risk and, to support this claim, embellished the story of a person with a mental health disorder alleged to have committed a minor infraction after she was released without bail.\textsuperscript{30} Although it is true that the new law does not give judges discretion to consider the “dangerousness” of a person in pretrial release hearings, legislators made this choice for a reason: unchecked judicial discretion often leads to disparate racial impacts. Furthermore, judges can consider other factors, like whether the individual poses a flight risk.\textsuperscript{31} Nonetheless, some of the state’s leaders are considering a change to the law, caving to the unjustified fears of constituents.\textsuperscript{32} The fight goes on.

3. Pennsylvania: Expungement

Clean Slate is a different example of good work accomplished on a statewide scale. Sharon Dietrich of the Community Legal Services of Philadelphia is the indomitable leader of expungement in Pennsylvania, and now nationally. When I visited her in 2015 to see how her work was done, Sharon and her colleagues explained they had expunged 90,000 records in the state cumulatively, and 8,500 in

\textsuperscript{28} See id.


\textsuperscript{32} See id.
Philadelphia in 2015.\textsuperscript{33} The Administrative Office of Pennsylvania Courts estimates that thirty million cases and forty million charges will be sealed because of Clean Slate.\textsuperscript{34} With an auto-sealing process, 2.5 million cases can be expunged in one month.\textsuperscript{35} It is a stunning accomplishment. Beyond Pennsylvania, with funding from the Chan Zuckerberg initiative, Clean Slate has helped Utah enact two statutes, and has active campaigns in Michigan, California, and North Carolina, with more in the works.\textsuperscript{36}

Expungement is vital. There are around 45,000 statutes covering collateral consequences across the country.\textsuperscript{37} While it would take decades to repeal all of these statutes, expungement does the work necessary to eliminate the collateral consequences for each individual. It is crucial. Sharon and her colleagues figured out how to do it.

In the past, expungement and sealing had to be accomplished on a case-by-case basis in court. Clean Slate uses database technology to identify millions of eligible cases and seal them without any action from the applicant or the courts.\textsuperscript{38} Seal by automation can change the lives of millions of people.

The Pennsylvania Clean Slate campaign that led to legislative policy change is impressive. Supporters included the Republican legislature and the Democratic governor, advocates on all sides, active people speaking in local communities, businesses, law enforcement personnel, and even members of the Philadelphia Eagles.\textsuperscript{39} There were

\begin{thebibliography}{99}
\bibitem{edelman} See Edelman, supra note 24 at 161–62.
\bibitem{id} Id.
\end{thebibliography}
only two dissents in the Pennsylvania General Assembly. And national supporters ranged from the Center for American Progress to Koch Industries.

Press coverage was also extensive, from the governor on down, with multiple editorials and widespread television, radio, and newspaper reports. The campaign was covered nationally as well. Community Legal Services reached thousands by way of their website, and the Pennsylvania Bar Association was exceptionally active. There was even an animated explainer on Facebook. This campaign is a wonderful example of ways new media can tell the story of the criminalization of poverty and mobilize a movement with a new generation of advocates.

B. Use a multipronged strategy, including offensive and a defensive tactics

Reform often requires both litigation and legislation. Litigation can stimulate legislation, which is often broader and more detailed. Organizing, media, and politics stimulate legislation, and the creativity of lawyers is crucial for both structural litigation and legislation. The progress made in several places has proven that there is no one-size-fits-all solution; rather, effective change requires multipronged efforts by many actors.

The success in bail reform in Harris County, Texas, which includes Houston, is an excellent example of three-dimensional advocacy. It is a case where lawyers and an outstanding judge did an excellent job litigating the issue in court, which encouraged a grassroots movement for legislative change, including a crucial election victory.

The effort began as litigation. Alec Karakatsanis and the Civil Rights Corps (“CRC”) filed the case and brought in the Texas Fair Defense Project. Because enlisting local partners is crucial to


developing the case and to enabling CRC to take on more cases, Karakatsanis also brought in the Texas-based law firm Susman Godfrey, which added, pro bono, a small army of lawyers to the case. After starting in 2008 as a federal public defender in Alabama, Karakatsanis gradually built CRC into an organization with a dossier of amazing size, always partnering with local public interest organizations and private firms.44

Harris County has the third largest county population nationally.45 The case is important for its size alone, but the specifics of the county jail policies were shocking, too. The court did not bring accused people to the courtroom. Instead, individuals would communicate with a judge by Skype with hearings typically lasting about one or two minutes. The judges set bail below $500 for only four people out of nearly 51,000 cases in which bail was used.46 Some judges said awful things to the accused, especially people with disabilities. The use of Skype recording meant everything could be seen later by U.S. District Judge Lee Rosenthal who handled CRC’s case.47 Having observed that material, the judge wrote a 193-page opinion with extensive examples of how things were handled, holding that the system was unconstitutional and ordering a preliminary injunction to change policies immediately.48 Not only was the judge shocked, but the Court of Appeals in the conservative circuit saw, too, and upheld the trial judge’s preliminary


47. See O’Donnell v. Harris County, 251 F. Supp. 3d 1052, 1061 (S.D. Tex. 2017) (“The parties submitted nearly 300 written exhibits, in addition to 2,300 video recordings of bail-setting hearings conducted within the last year in Harris County, all admitted without objection.”).

48. Id. at 1168.
injunction. The injunction prevented almost 13,000 people from being held for bail in just one year.

Nonetheless, the county continued with its appeal of the injunction. But then another important factor appeared in the story, which helped shut the door on the opposition. No doubt influenced by President Trump, nineteen African American women ran and won seats on the county bench. Among the many consequences of that remarkable event, the new judges played an integral role in dropping the appeal to the preliminary injunction and achieving a settlement. The agreement enables 85 percent of misdemeanor defendants to be released on cash-free bail immediately after arrest, and the rest to be considered for hearing promptly on the least restrictive nonmonetary conditions possible. The plaintiffs contemplate pretrial release for about twenty thousand arrestees a year who would have been detained just two years ago.

C. Persistence, Despite Victory

From recent efforts in New Jersey and California, we have learned that even with victories, the bad actors will keep coming back. There are too many entrenched systems with profiting actors for a lasting victory to come easily. Therefore, we cannot be shortsighted. We must be continually mobilized and vigilant on all fronts to shut out bad actors who seek to profit off of the criminalization of poverty.

1. New Jersey: Bail Reform

New Jersey’s impressive bail reform legislation is an example of continuing opposition after legislation is enacted. The New Jersey statute is perhaps the most effective statewide decision on money bail in the country. It now has over two years of experience, and it is doing very well. It has critics, for sure, especially on the law enforcement side, but it has strong support from both prosecutors and defense

49. See O’Donnell v. Harris County, 892 F.3d 147, 166-67 (5th Cir. 2017) (vacating the preliminary injunction as overbroad and remanding to the lower court to craft a narrower injunction).


51. See id.

52. See id.

53. See Joint Statement in Support of Settlement Agreement, CIVIL RIGHTS CORPS (July 30, 2019), https://cdn.buttermcs.com/PTbK6m3xzuSk0kJYCHUha [https://perma.cc/K4MF-NAKC].
attorneys. In 2018, two-thirds of defendants were automatically released based on their charges. Half of the remaining third were released on recognizance after one court appearance, or otherwise had their cases concluded. The most dangerous defendants, those held in detention, consisted of just six percent. Overall, the New Jersey State Police Uniform Crime Reporting Data reported no reason to believe that there was any cost to the safety of the people of the state. In 2017, the Pretrial Justice Institute gave New Jersey the only “A” grade in the nation, calling its system “phenomenal.” Nonetheless, the bail industry brought a lawsuit, claiming that the statute is unconstitutional. But the state won in federal court. The Third Circuit rejected the challenge and the Supreme Court declined to take the case.

2. California: Bail Reform

Another obvious example is the need for persistence in California over the bail reform battle. The story starts with the state courts ruling unconstitutional the state money bail system. As a decision based on the state constitution, it covers the whole state and it will not be at risk of being undercut by the Supreme Court of the United States. But, in an unsurprising decision, the court tasked the legislature with writing a statute to deal with the details of its decision. Courts, it said, are not in the business of legislating.

54. See id.
62. See In re Humphrey, 228 Cal. Rptr. 3d 513, 525-26 (Ct. App. 2018) (holding that cash bail is unconstitutional when courts fail to make findings regarding an individual’s ability to pay).
63. See id. at 516, 545 (challenging the legislature to reform the bail system).
The trouble began here in two ways, despite excellent leadership in the legislature, great outside advocates, a supportive press, and arguably the nation’s most progressive voters.

First, some law enforcement officers, prosecutors, and judges quibbled with legislators. Their proposal was to give judges broad discretion as to who can be held on the basis of an individual’s flight risk or his or her likelihood to commit a crime. They won in the legislature. There is thus no longer any money bail in California, but in its place is the concern that some judges will hold people of color disproportionately. The state’s public defenders, the ACLU, and others say the bill was unacceptable because of this compromise for judicial discretion. Nonetheless, Governor Brown signed the bill. The advocates inside and outside the legislature are still working for a better bill.

Second, the bail bond and the insurance industries attacked legislators and voters from a different angle. They have succeeded in setting up an initiative in 2020 to get the people of the state to repeal the new statute and return to the old bail system. Many bail agencies are owned by private equity firms, and they raised $3 million to get on the ballot. The initiative, called “Californians Against the Reckless Bail Scheme,” obtained almost six hundred thousand signatures. The bad actors do come back, and we must be prepared.


66. See Fuller, supra note 64, at 64.


3. Missouri: Fines and Fees

The Missouri legislature, supported by the new Republican governor and attorney general, passed a number of new good statutes.\(^\text{70}\) The outside support came from both the right and left, including the Koch Brothers–funded Americans for Prosperity, as well as the ACLU.\(^\text{71}\) Additionally, local journalist Tony Messenger, who writes a column every week on criminal law reform, provided important press coverage.\(^\text{72}\)

One of the new laws prevents the further incarceration of people who cannot pay room and board in jail.\(^\text{73}\) Of course, people should not have to pay for room and board in jail, but this measure was at least an improvement. However, rural judges and jails have been reticent to obey the law. But the good people fight back; in this case, Matthew Mueller at the state public defender’s office. Mueller is working hard to ensure compliance.

Mueller helped to uncover the rural “pay to stay” system. His client, George Richey, was put in jail for a $116.50 fine that he was unable to pay, which led to a ninety-day sentence at the end of which he owed another $3,165 for room and board, and then another $2,275 for ninety more days.\(^\text{74}\) Mueller won a decision in favor of Richey in the

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72. See, e.g., Messenger, supra note 70.


Missouri Supreme Court. This victory led to the legislature’s statute. Now he is going after the counties that are not obeying the law.

The Missouri Supreme Court also promulgated a series of new rules, including one that waives fees for ankle bracelets and drug and alcohol testing for indigent defendants. This story is especially galling. Despite legislation and judicial rules, lower courts claim they are unauthorized to waive costs imposed by for-profit companies and have therefore refused to hold those companies accountable. This is a gigantic setback for the state’s legislative victory.

The defiance covers a significant number of counties, and it involves considerable sums of money. Whether the person is set to be held on bail, probation, or parole, the defendants ordinarily have to have this equipment installed prior to release. This is an enormous setback with massive financial implications. The Eastern Missouri Alternative Sentencing Services (“EMass”) charges individuals ten dollars a day for their services. Even worse, individuals have to pay thirty days of “rent” for $300 at the outset plus a fifty dollar installation fee. Those that cannot pay go back to jail. Mueller plans to sue and challenge those fees.

4. Oklahoma: Fines and Fees

Oklahoma is an egregious state in the land of fines and fees and is home to another story about persistence. The state has fifteen fees tacked on to fines that are sky-high, including a law library fee and a forensic science assessment. But lawyers who are representing

75. State v. Richey, 569 S.W.3d 420, 425 (Mo. 2019).
77. See Letter from Matthew Mueller, supra note 76.
78. See id.
80. See Letter from ArchCity Defenders, supra note 79.
81. Letter from Matthew Mueller, supra note 76 (on file with author).
82. See generally MYESHA BRADEN ET. AL., LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ENFORCING POVERTY: OKLAHOMA’S RELIANCE ON FINES & FEES FUELS THE STATE’S
plaintiffs attacking the structures that squeeze people who are unable to pay the enormous fees, public officials, and journalists are fighting back. This complex picture is like that in many states. This effort is operating in a truly three-dimensional way, much more than even five years ago. And these individuals, who are leaders in the Oklahoma legislature and on the bench, among other advocacy practitioners who bring cases, are persistent—really persistent. Among other things, they all have achieved successes while representing people in ability-to-pay cases.

Additionally, two major cases are pending in Oklahoma with pro bono assistance from local private firms and national nonprofit organizations, including Lawyers Committee for Civil Rights Under Law, Arch City Defenders, Advancement Project, CRC, and the Institute for Constitutional Advocacy and Protection at Georgetown Law. One of the cases is against a company called Aberdeen Enterprises II, Inc., which demands fines and fees statewide regardless of an individual’s ability to pay. The second is also a statewide case against the Oklahoma Indigent Defense System (a contracted system in seventy-five of the seventy-seven counties), which routinely fails to investigate an individual’s ability to pay, as do many local judges.

83. Kris Steele is a Republican who was in the Oklahoma House for twelve years, including two as Speaker, and he was passionate about criminal law reform. Now he is the Chair of Oklahomans for Criminal Justice Reform. See Kris Steele, We Know Who’s Holding Up Criminal Justice Reform—Prosecutors, TULSA WORLD (Feb. 26, 2018), https://www.tulsaworld.com/opinion/kris-steele-we-know-whos-holding-up-criminal-justice/article_2331b85c-c7b6-5ad2-9d3f51f05eb7f62.html [https://perma.cc/PSN4-DSZ6]. Judge Dana Kuehn on the Court of Criminal Appeals has written two dissents on ability to pay fines and fees. See Conroy-Perez v. Oklahoma, 440 P.3d 64, 69-69 (Okla. Crim. App. 2019) (Kuehn, J., dissenting); Winbush v. Oklahoma, 433 P.3d 1275, 1280-85 (Okla. Crim. App. 2018) (Kuehn, J., dissenting). Judges Donald Easter (retired then) and April Collins in Oklahoma County, and Chief Judge Michael Tupper in Cleveland County, are trial judges who work regularly for improvement in the courts. And lawyers are visible in many places Adrienne Watt (my student at Georgetown years ago) and Ed Wunch at Legal Aid Services of Oklahoma; Jill Webb, Director of Litigation at ACLU; Ryan Gentzler at Oklahoma Policy Institute; and Aisha McWeay, the Executive Director of Still She Rises, and many others. See generally Letter from Adrienne Watt, Staff Attorney, Legal Aid Oklahoma, to author (July 31, 2019) (on file with author).


85. See Letter from Mary McCord, supra note 84.
5. Texas: School-to-Prison Pipeline & License Expulsions

In Texas, Chief Justice Nathan Hecht is a leader on many matters, and there are allies like Senator John Whitmire in the legislature, local government, and the press. In a big state like Texas, there need to be many partners, including people across party lines covering numerous issues.

Deborah Fowler, Mary Schmid Mergler, and Brett Merfish of Texas Appleseed are the prime example of persistence. Texas Appleseed continues to fight for the stunning number of children who are sent to court instead of to a principal’s offices after a dust-up on the playground. With Chief Justice Hecht, Senator Whitmire and others, the number of children brought to court for truancy—which is in adult court—was reduced from 100,000 to 10,000 annually, and the “crimes” were reduced to a civil process. Cases occurring in schools have been reduced from 158,000 to 53,000, although these cases are still in adult court and are considered criminal matters. The fight goes on.

In Texas, driver’s license suspensions have been controversial for almost ten years in part because the collections were used to fund the state trauma hospital, making it difficult to break the setup. Consequently, about 1.5 million people were without their licenses at any given time. The knot was finally broken in 2019 when the conservative Public Policy Foundation joined with Texas Appleseed and others, who together persuaded the influential chair of the House Appropriation Committee to find another way to pay for the hospitals. General revenue was out of the question, so the state traffic fine was increased from thirty dollars to fifty dollars, a new special fine was added for all DWI cases, and a consumer fee on auto insurance policies was increased from two dollars to four dollars. As of

88. See Letter from Deborah Fowler, supra note 86.
90. See id.
September 1, 2019, a large number of suspended licenses were reinstated.

The work goes on. Appleseed is collaborating with the University of California, Berkeley, to eliminate juvenile fines and fees. A money bail bill is moving along in the legislature, modeled from Houston’s success in Harris County. Efforts to end criminal juvenile curfews with major fines are going on city by city, with success decriminalizing fines in Austin and San Antonio, and also continue work in Houston.

6. Louisiana: Criminal Justice Reform, Fines and Fees

The Orleans Parish Defenders and other players in New Orleans and Louisiana are the epitome of persistence. The wins and losses there are like a ping pong game. Two big reform lawsuits on bail and fines and fees, led by the MacArthur Justice Center and CRC with pro bono lawyers from private firms, were affirmed by the U.S. Court of Appeals for the Fifth Circuit. Jail size reduction has resulted in historically low jail populations. Nonetheless, fear mongering continues, with people claiming that individuals released in lieu of being held for inability to pay bail are in the streets committing crimes. On the other side, the New Orleans Saints football players and the league’s commissioner came to court for an entire case to underscore what the criminal justice system is really like for those it impacts. Danny Engelberg of the Orleans Parish Defenders says continued community and political organizing is desperately needed: “I’ve seen real limits to the litigation. We need political and community pressure for true change. I can’t find a progressive slate to run against our local criminal judges, so many judges will just waltz into reelection.”

92. See Letter from Deborah Fowler, supra note 86.
93. See Letter from Mary Schmid Mergler, supra note 89.
94. See Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018); aff’d 937 F.3d 525 (5th Cir. 2019).
97. See Letter from Danny Engelberg, Staff Attorney, Orleans Public Defenders, to author (Sept. 9, 2019) (on file with author).
7. Civil Rights Corps and Leadership Conference on Civil and Human Rights: License Suspensions

In the fall of 2019, CRC and the Leadership Conference on Civil and Human Rights founded the Free to Drive campaign with the goal of ending the gross misuse of driver’s license suspensions in forty-four states around the country. In a matter of weeks, one-hundred fifteen ideologically diverse organizations joined the campaign to fight back against legislation that makes daily life impossible for millions of people. When low-income people are hit for fines and fees they are unable to pay, the result is typically a driver’s license suspension. This suspension often cascades the individual into further debt that the individual cannot tackle. States like California, Virginia, and a few others have begun to help individuals dig out of the mountain of debt from license suspensions, but Free to Drive appears to be the first national campaign.

8. ACLU: Nuisance Ordinances

Sandra Park is leading the charge at national ACLU by fighting back against nuisance ordinances that are used to order landlords to evict women who have asked “too often” for police to protect them from husbands or boyfriends who are likely to injure them. Park and colleagues like Kate Walz of the Sargent Shriver National Center on Poverty Law began their campaign with individual cases and policy advocacy in individual states but have now mobilized efforts into a campaign, led by Park, named “I Am Not a Nuisance.” Over the past five years, seven states have passed laws addressing this issue. The most recent was in New York as part of its “Right to Call 911 law.” Successful court decisions helped individual victims in three states


99. See id.


enact legislation, and five settlements in four states have been crucial victories, too.\footnote{See I Am Not A Nuisance: Local Ordinances Punish Victims of Crime, ACLU (Feb. 2, 2020), https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime [https://perma.cc/VN8K-6G8D] (listing filed litigation that later led to success in the courts).}

CONCLUSION

The strategy of these efforts often begins with litigation and other local advocacy activities to establish precedents and mobilization at the state level to push ultimately where a federal legislative response is appropriate. Litigation efforts also educate people in communities, which in turn stimulates local political action. Campaigns like “Free to Drive,” and “I Am Not a Nuisance,” accelerate movement forward. That said, the pathway to victory is neither clear, nor straight forward. Nonetheless, these pieces begin to make clear the larger puzzle we must solve. The totality of these efforts has resulted in a visibility that did not exist five years ago. These victories should serve as a model for the rest of the nation and future multipronged policy efforts.

Across the board, the criminalization of poverty has accumulated a consciousness that is far from where it was when Ferguson took place, and concrete actions are occurring in multiple areas both in substance and form. Litigation, legislation, administrative steps, and community action have brought about positive change. Now, we must grow the movement to fill in the remaining pieces of the puzzle and end the criminalization of poverty. We have much more to do.