TOWARD A DEMOSPRUDENCE OF POVERTY

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ABSTRACT

This Article describes the rift between a due-process-focused jurisprudence on legal–financial obligations—the centerpiece of the current fight against criminalization of poverty—and the substantive and structural problems of poverty criminalization. It argues that judges can help address this disconnect while still operating within the scope of their authority by engaging in a demosprudence of poverty—"a democracy-enhancing jurisprudence" that actively seeks to learn from poor people themselves and movements for economic justice. This Article builds from demosprudential theory to offer guidance for judges in their reason-giving, rulemaking, and courtroom management practices.

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INTRODUCTION

In the waning days of his administration, President Barack Obama published a commentary in the *Harvard Law Review* outlining his vision of the president's role in criminal legal reform.[1] In this essay, President Obama discussed a "sustained focus" of his administration: "Eliminating the Criminalization of Poverty" by "addressing excessive fines and fees, inadequate legal representation, the imposition of excessive bail, and other egregious abuses in too many state and local justice systems."[2]

President Obama was not the only one to link the "criminalization of poverty" with issues of fines, fees, bail, and other "legal financial obligations."[3] For many, this conversation was spurred by the 2014 police shooting of Michael Brown in Ferguson, Missouri.[4] Subsequent

1. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 843 (2017).

2. *Id.*

3. *See, e.g.*, Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS'N (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs [https://perma.cc/25BE-2PR8] (describing a continuing legal education program linking the criminalization of poverty to fines, fees, and bail issues); *Case Search*, C.R. LITIG. CLEARINGHOUSE, https://www.clearinghouse.net/search.php [https://perma.cc/JB3H-SQN4] (naming, in a database of civil rights litigation, a "Special Collection" of cases "Fines/Fees/Bail Reform (Criminalization of poverty)").

4. *See* Jonathan Capehart, Opinion, *How the Justice System Criminalizes the Poor—And Funds Itself in the Process*, WASH. POST (Jan. 29, 2019, 6:01 AM), https://www.washingtonpost.com/opinions/2019/01/29/how-justice-system-criminalizes-poor-

investigations by journalists and a U.S. Department of Justice report revealed the extortionary dynamics of criminal legal debt in Ferguson and other localities across the country.[5] Indeed, President Obama himself tied the criminalization of poverty to Ferguson's judicial policies, noting that the city's practice of "us[ing] its justice system as a cash register" was "[t]he most glaring example, but by no means an outlier" among American localities.[6]

But the criminal legal system's[7] entanglements with the lives of those living in poverty begin long before a defendant is first booked

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funds-itself-process [https://perma.cc/YED7-BK6U] (referencing how "the nation was shocked to learn" about Ferguson's criminalization of poverty).

5. *See, e.g.*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter DOJ FERGUSON REPORT]; Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. TIMES MAG. (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html [https://perma.cc/FJD5-F4D8] (outlining how the imposition of criminal fines has affected poor individuals).

6. Obama, *supra* note 1, at 844.

7. This Article tends to use "criminal legal system" instead of the current standard term of art, "criminal justice system." We view "criminal legal system" as a more objective way of describing the legal components of current American institutions of control and punishment. These institutions—criminal lawmaking, policing, courts, prison, probation, and more—do not come together to constitute a system of "justice"; they collectively function primarily as a means of control and often perpetuate profoundly unjust management of populations. *See, e.g.*, Sharon Dolovich & Alexandra Natapoff, *Mapping the New Criminal Justice Thinking*, *in* THE NEW CRIMINAL JUSTICE THINKING 1, 2–4 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (describing essential elements of "the criminal system"); *see also* Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619, 620 (2018) ("Given the widely articulated concerns about structural inequality and the massive U.S. prison population, is 'criminal justice' an accurate or appropriate description of the nation's model of criminalization, policing, prosecution, and punishment?"). At their best, these institutions constitute a system of law. Even as we retain the word "system," we also recognize that the criminal legal system is not a single system. We share other scholars' concern that the language of "system," a relic of late 1960s functionalist theories, may obscure context, complexity, and irrationality within and between particular criminalizing institutions and limit imaginings about new frameworks for justice. *See* Sara Mayeux, *The Idea of "the Criminal Justice System,"* 45 AM. J. CRIM. L. 55, 66–76, 86–88 (2018); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993) ("[T]he criminal justice 'system' is not a system at all. This particular mirror of society is a jigsaw puzzle with a thousand tiny pieces. No one is really in charge."); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUDS. 419, 421 (2018) ("The decision to conceptualize and then analyze a criminal justice system, for instance, rather than another metaphorical system such as the racial equality system, will necessarily assign certain political values . . . and relegate other political values to the margins."); *cf.* Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 THEORETICAL CRIMINOLOGY 422, 423–26 (2017) (identifying similar problems with more recently popularized terms—"the penal state" and "the carceral state"). Nonetheless, we find some value in system language because it allows us to speak comprehensively about the cumulative effects of particular multiple interlocking

into jail or appears in court—when questions of bail, fines, and fees first arise. Rather, understanding the criminalization of poverty requires examining why someone is labeled a "criminal" in the first place. This requires scrutinizing what society chooses to criminalize and what structures are put in place to enforce those norms. American states and localities criminalize poverty by, among other things, prohibiting conduct engaged in largely by poor individuals, such as selling loose cigarettes;[8] selectively enforcing vague quality-of-life laws—like anti-loitering ordinances—against poor individuals;[9] and imposing additional obligations on and surveilling those who apply for or receive public benefits.[10] In this way, the criminal legal system punishes and exerts control over poor individuals and communities, resulting in the reinforcement of multiple, interlocking social hierarchies.

Contemporary scholarship about and litigation over the constitutionality of the most abusive practices associated with legal–financial obligations ("LFOs")—the fines, fees, and other costs imposed by courts—has been written against the backdrop of these social realities. But what we refer to as the "substantive" and "structural" elements of the criminalization of poverty have generally not been central to litigants' claims against fines, fees, or bail systems, nor have courts extensively grappled with these issues in their discussions of the status quo.

Doctrinal path dependency is at least partially responsible for this focus. Much of the litigation around the criminalization of poverty focuses on LFOs; much of this in turn builds off of the Supreme Court's central holding in *Bearden v. Georgia*[11] that states may not "imprison a person solely because he lacked the resources to pay" a fine, fee, restitution, or bail.[12] Though *Bearden* would appear to provide a broad

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institutions, even though the sum of those institutions does not meet the formal definition of a system.

8. *See* Emily Badger, *Alton Sterling, Eric Garner and the Double Standard of the Side Hustle*, WASH. POST (July 7, 2016, 10:19 AM), https://www.washingtonpost.com/news/wonk/wp/2016/07/07/alton-sterling-eric-garner-and-the-double-standard-of-the-side-hustle [https://perma.cc/4A2R-WVZ7] (noting that Eric Garner was selling loose cigarettes when he was detained by the police).

9. Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Poverty Perpetuates Homelessness*, 2019 SOC. PROBS. 1, 2–3.

10. *See infra* Parts I.A.1.b and I.A.2.b (describing legal systems that both penalize and scrutinize public-benefits recipients).

11. Bearden v. Georgia, 461 U.S. 660 (1983).

12. *Id.* at 667–68. For analogous analysis in the civil context, compare *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971) (holding that the Due Process Clause prevents a state from denying

substantive defense against the criminalization of the impoverished, in the realm of LFOs, the Court has instead adopted a *process*-oriented framing that places the problem of the criminalization of poverty within the court system at the level of an individual criminal or civil case. In essence, the Court demands that "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay" to ensure that an individual's financial circumstances are not overlooked and thus lead to indiscriminate incarceration.[13] It is within this context that discussions about access to legal counsel, court fines and fees, pretrial detention, and bail are paramount. But these discussions only begin when the defendant passes through the courthouse doors.

However, there is a way for courts to recognize substantive and structural matters of poverty while staying within the ostensible confines of current doctrine. The concept of demosprudence, originally developed by Professors Lani Guinier and Gerald Torres, is a way to understand the interaction of law and social movements in ways beyond traditional rights claims-making in courts, in which marginalized people seek recognition of legal rights from judges, and judges either bless their legal claims or not.[14] In a traditional civil rights framework, the audience for rights claims is ultimately the courts, and the propriety of a conversation about the existence or scope of a right is determined by how a court may rule or has ruled on it. Demosprudence, in contrast, sees rights as a marker for an iterative process that may include courts and legal elites but is not primarily defined by them. Demosprudence sees regular people as agentic co-laborers in a collective project of rights recognition and problem-solving. As Professors Guinier and Torres explain:

> Whereas jurisprudence examines the extent to which the rights of discrete and insular minorities are protected by judges interpreting ordinary legal and constitutional doctrine, demosprudence explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems. Rather

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access to the only adjudicative forum in which an indigent person's dispute can be resolved), with *United States v. Kras*, 409 U.S. 434, 449–50 (1973) (holding that it does not violate the Due Process Clause for a state to require indigent litigants to pay bankruptcy court fees because bankruptcy court is not the only forum available).

13. *Bearden*, 461 U.S. at 672.

14. *See generally* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014) (introducing and articulating the demosprudence paradigm).

> than turning over their agency to lawyers, they must find a way to integrate lawyers not as leaders but as fellow advocates.[15]

Although the earliest version of the concept focused on the capacity of judges to behave demosprudentially,[16] the degree to which judges can engage in demosprudence is currently unsettled.[17] This Article reaffirms the capacity of judges to engage in "democracy-enhancing jurisprudence," shoring up the idea that demosprudence is in part *a conversation* between the public and the courts.[18] Judges are not the central actors or audience within a demosprudential framework—the people are. Yet, judges can play multiple roles in a demosprudential framework.

This Article proceeds in three parts. Part I describes the rift between due-process-focused jurisprudence on LFOs—the centerpiece of the current fight against the criminalization of poverty—and the substantive problem of poverty criminalization. Part II argues that judges can help address this disconnect while still operating within the scope of their authority by engaging in a demosprudence of poverty—"a democracy-enhancing jurisprudence" that includes "legal practices that inform and are informed by the wisdom of the people."[19] Part III identifies two possible critiques to a demosprudential approach to judging and responds to each.

I. THE LIMITS OF LEGAL DOCTRINE: PROCEDURAL DUE PROCESS AND THE SUBSTANTIVE CRIMINALIZATION OF POVERTY

This Part seeks to reintegrate an understanding of what, whom, and how we punish into current discussions of criminal legal debt and to illuminate the ways in which a process-based approach to these issues has largely failed. Section A outlines three ways that substantive laws and enforcement patterns have criminalized and reproduced poverty in the United States. First, criminalization punishes the poor for their poverty. For example, the system sanctions those who either fail to meet prevailing middle-class notions about work and family or

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15. *Id.* at 2479 (internal quotation omitted).

16. *See* Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 16 (2008) [hereinafter Guinier, *Demosprudence Through Dissent*] (exploring "the democratic potential of dissenting opinions").

17. *See infra* note 194 (noting sources that explore demosprudence by nonjudicial actors).

18. *See* Guinier, *Demosprudence Through Dissent*, *supra* note 16, at 50 (identifying one element of demosprudential dissent as "facilitat[ing] an ongoing public conversation").

19. *Id.* at 15–16.

require government aid to support their families. Second, criminalization creates a means of control over these individuals and communities. For instance, criminal legal institutions both surveil recipients of social benefits and condition aid on the acceptance of a "criminal" status. Finally, criminalization enforces and entrenches hierarchies—of race, class, gender, and more. By doing so, criminalization stigmatizes those without privilege and ensures that they can never gain the means to overcome that status. Together, these "web[s] of state policies"[20] violate ostensible norms of equal treatment before the law, well before any litigant steps inside a police station or courtroom.

Section B discusses the origins and development of a separate, process-based framing of the criminalization of poverty. It explores how the Supreme Court's foundational decisions addressing LFOs have emphasized procedural due process as the appropriate framework with which to approach the criminal legal system's potential to disparately impact poor defendants. It then surveys the scholarship and advocacy reinforcing this procedural approach in the wake of Ferguson.

A. Substance and Structure in the Criminalization of Poverty

Questions concerning what and whom we punish have not gone entirely unacknowledged, especially post-Ferguson. In its report on policing and criminal legal practices in Ferguson, for instance, the U.S. Department of Justice observed that disparate policing and onerous court costs "impose[d] a particular hardship upon Ferguson's most vulnerable residents, especially upon those living in or near poverty."[21] Courts grappling with legal challenges to policies burdening impoverished individuals have similarly recognized these policies' disparate impact. For example, when the Southern District of Texas found Houston's bail practices unconstitutional in *ODonnell v. Harris County*,[22] the court noted that bail was denied "in the vast majority of cases" concerning "[t]hose arrested for crimes relating to poverty, such as petty theft, trespassing, and begging, as well as those whose risk

20. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 (2009) [hereinafter Gustafson, *Criminalization of Poverty*].

21. DOJ FERGUSON REPORT, *supra* note 5, at 3–4.

22. ODonnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017), *aff'd in part, rev'd in part*, 892 F.3d 147 (5th Cir. 2018).

scores are inflated by poverty indicators, such as the lack of a car."[23] In other words, those living in poverty not only *feel* policies governing bail more acutely but also are *subject* to these practices more often. These practices and policies help trap people in poverty,[24] which in turn makes them more susceptible to the same or similar practices and policies in the future.

But as the *ODonnell* decision demonstrates, courts and policymakers grappling with the procedural rights afforded to those lacking the ability to pay have not centered their work on the underlying substantive patterns of criminalization. This emphasis has, perhaps inadvertently, moved the discussion away from an existing wealth of scholarship and case law explicitly exploring the impact of disparate patterns of criminalization and policing on poor individuals and communities. The next Subsection explores some of that research and case law, which we believe is essential to understanding the context in which LFOs operate.

1. *Criminalization as Punishment.* Choices of what to criminalize and how to enforce criminal provisions often result in the punishment of the poor because of their poverty. Two major aspects of the punishment of poverty are worth noting. First, these laws stigmatize people based on their status—sanctioning those who engage in otherwise ordinary acts but do so while poor. Second, these laws penalize those who rely on public benefits to gain the resources needed to obtain middle-class status. In both cases, it is an individual's economic means—not their conduct—that entangles them and their community with the criminal legal system.

a. Punishing Poverty. Criminal codes throughout the United States have long punished those who fail to adhere to social norms because of their poverty. For much of American history, vagrancy laws were the prototypical example. As legal historian Dean Risa Goluboff explains, "vagrancy laws made it a crime to be a certain type of person."[25] These laws "subject persons, whose habits of life are such as

23. *Id.* at 1130.

24. *See* Sara S. Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. U. L. REV. 753, 756 (2019) [hereinafter Greene, *A Theory of Poverty*] (calling for a broader poverty law "that considers how the cumulative effect of laws—particularly state and local laws—may be a mechanism through which poverty is created, perpetuated, and exacerbated").

25. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 2 (2016).

to make them objectionable members of society, to police regulations promotive of the safety or good order of the community in which they are found."[26] For instance, one such ordinance in Jacksonville, Florida, criminalized those who fit one of twenty different descriptors, including "[r]ogues and vagabonds," "common drunkards," "disorderly persons," and even those who just "wander[ed] or stroll[ed] around from place to place without any lawful purpose or object."[27] The effect of such laws, the U.S. Supreme Court noted in *Papachristou v. City of Jacksonville*,[28] was to place "unfettered discretion . . . in the hands of the . . . police,"[29] who could criminalize the acts of "poor people, nonconformists, dissenters, [and] idlers"[30] merely for engaging in "activities [that] are historically part of the amenities of life as we have known them."[31] The Court objected to the "presumption" that those who transgress these middle-class standards "are to become future criminals"—which it found "too precarious for a rule of law."[32] Therefore, the Court found the Jacksonville ordinance unconstitutionally vague.[33]

Since *Papachristou*, the U.S. legal system has moved away from laws that explicitly criminalize low status using vague vagrancy standards. However, the criminalization of low status has reemerged in new forms in the intervening decades.[34] For example, one increasingly common tactic effectively targets homelessness through local ordinances by outlawing the performance of otherwise uncontroversial activities in public. These include bans on sleeping, sitting, and lying down in public; prohibitions forbidding camping or living in vehicles; and limits on "loitering" or "loafing."[35] These laws effectively punish

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26. 91 C.J.S. *Vagrancy and Related Offenses* § 4 (2012); *see also* GOLUBOFF, *supra* note 25, at 2 (citing the 1955 edition of *Corpus Juris Secundum*).

27. Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972).

28. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

29. *Id.* at 168.

30. *Id.* at 170.

31. *Id.* at 164.

32. *Id.* at 171.

33. *Id.* at 162.

34. *See* GOLUBOFF, *supra* note 25, at 338–39 (noting the evolution and persistence of vagrancy laws since *Papachristou*); *see also* Risa L. Goluboff, *Starbucks, LA Fitness and the Long, Racist History of America's Loitering Laws*, WASH. POST (Apr. 20, 2018, 6:00 AM), https://www.washingtonpost.com/news/post-nation/wp/2018/04/20/starbucks-la-fitness-and-the-racist-history-of-trespassing-laws [https://perma.cc/J3EX-QHZ2] (explaining how law enforcement found new outlets for discrimination in the absence of vagrancy laws).

35. TRISTIA BAUMAN ET AL., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10 (2018),

some of the most vulnerable individuals—those who are homeless—for having nowhere else to go. When asked to directly address the validity of these ordinances, courts have occasionally found the enforcement of such laws unconstitutional, at least when they "harass[] and otherwise interfer[e] with homeless people for engaging in basic activities of daily life—including sleeping and eating—in the public places where they are forced to live."[36] For example, in 2019 the Ninth Circuit held that the enforcement of such ordinances in Boise, Idaho—a city with a shortage of shelter beds—violated the Eighth Amendment's prohibition on cruel and unusual punishment because they "criminalize conduct that is an unavoidable consequence of being homeless."[37]

Despite these potential constitutional limits, laws criminalizing being poor in public are common. A recent survey of 187 cities from the National Law Center on Homelessness and Poverty found that, between 2006 and 2016, the number of city-wide anticamping ordinances increased by 69 percent, while the number of laws prohibiting sleeping in public city-wide increased by 31 percent.[38] Other new and increasingly common criminal prohibitions include "crime-free housing ordinances" and housing-code enforcement regimes, both of which label many ordinary acts of life in poorer communities as "nuisance."[39] These laws can lead to a vicious cycle of criminalization. For example, 9-1-1-abuse ordinances—which criminalize the perceived "overuse" of emergency-response systems, no matter the reason—effectively punish those seeking to impose order in lower-income, high-crime neighborhoods.[40]

Legal structures criminalize the act of living in poverty more explicitly as well. For instance, across the United States the child-welfare system "penalizes poverty conditions" by labeling lack of food, shelter, or clothing as "environmental neglect."[41] Like vagrancy laws,

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https://nlchp.org//wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf [https://perma.cc/FR5G-WSNR].

36. Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992).

37. Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006)), *cert denied*, No. 19-247, 2019 WL 6833408 (U.S. Dec. 16, 2019).

38. BAUMAN ET AL., *supra* note 35, at 10.

39. *See* Greene, *A Theory of Poverty*, *supra* note 24, at 771 ("This can include things ranging from bright lights, disturbing the peace, loitering, vagrancy, major health hazards, and a wide range of other actions and situations.").

40. *Id.* at 772–73.

41. *Id.* at 778–79.

child-welfare statutes define neglect and abuse only in general terms, giving social workers extraordinary discretion.[42] Professor Sara Greene notes that states can impose such broad standards without public outcry because "they tend to be employed almost exclusively in poor communities."[43] This lack of publicity also allows states to mete out more extreme punishments for the same "offense" when crimes in question are "committed by a poor parent in an area of high concentrated poverty."[44]

Punishment via the child-welfare system is often used as a threat against poor families. For example, in July 2019 one Pennsylvania school district sent letters threatening to institute child-welfare proceedings to parents whose children had accumulated school-lunch debt.[45] The inability to pay for public-school lunch, the letter claimed, constituted "a failure to provide [a] child with proper nutrition[,] . . . neglecting [that] child's right to food."[46] After local politicians faced an onslaught of negative publicity, they quickly disavowed the letter and acknowledged their missive "weaponize[d]" the county's welfare system and "terrorize[d]" families for the noncriminal act of failing to pay a debt.[47]

Although appealing to law-and-order advocates, punishing people for being poor does little more than impose new barriers to upward mobility. In the homelessness context, for instance, studies have found that public-space ordinances are counterproductive—at least if their purpose is to deter the conduct deemed criminal. A study of antihomeless enforcement in San Francisco found that "consistent punitive interactions"—such as move-along orders, citations, property confiscation, and threats of arrest—at best created only a "spatial churn" in the city.[48] Those told to move had only one option: finding a new public place to stay. The study authors concluded that such enforcement "systematically limit[s] homeless people's access to

42. *Id.*

43. *Id.* at 779 (quoting Michelle Goldberg, *Has Child Protective Services Gone Too Far?*, NATION (Sept. 30, 2015), https://www.thenation.com/article/has-child-protective-services-gone-too-far [https://perma.cc/LQ4W-TV4L] (statement of Martin Guggenheim, New York University law professor and co-director of New York University Law School's Family Defense Clinic)).

44. *Id.*

45. Derrick Bryson Taylor, *Children Face Foster Care over School Meal Debt, District Warns*, N.Y. TIMES (July 20, 2019), https://www.nytimes.com/2019/07/20/us/school-lunch-bills-overdue-payment.html [https://perma.cc/6UWG-CKPX].

46. *Id.*

47. *Id.* (quoting Luzerne County Manager C. David Pedri).

48. Herring et al., *supra* note 9, at 1.

services, housing, and jobs, while damaging their health, safety, and well-being."[49] In other contexts, too, researchers have long noted that the collateral consequences of criminal convictions—including ineligibility for government-funded housing and aid—merely perpetuate the cycle of poverty for low-income offenders.[50]

b. Punishing Public Benefits. While some laws punish the poor explicitly for their poverty, others penalize those who must rely on government aid to survive. Programs to punish beneficiaries of government aid most captured public attention in the 1980s with President Ronald Reagan's invocation of the "welfare queen"—a narrative that stereotyped poor, typically Black, women on welfare as both "uneducated, lazy, and irrational" and as "hyperrational" actors gaming the system for profit.[51] In the decades since, this pervasive myth has helped spawn a number of mechanisms of control and reprimand, including invasive inquiries into eligibility and extensive policing for "fraud."[52] As Professor Kaaryn Gustafson contends in her studies of public-benefits recipients, in the United States "[t]he public desire to deter and punish welfare cheating has overwhelmed the will to provide economic security to vulnerable members of society."[53]

Scrutiny of welfare recipients and punishment of those perceived as "cheating" serve as gatekeeping mechanisms: they set up barriers to accessing benefits, label those who cannot overcome them as criminal, and keep those who did qualify in constant fear of failing out of the system. One of the primary barriers to entry is the byzantine set of eligibility requirements for federal and state aid applicants, such as work stipulations that require onerous levels of reporting.[54] Such

49. *Id.*; *see also* BAUMAN ET AL., *supra* note 35, at 13–14 (criticizing the criminalization of homelessness).

50. *See* KAREN DOLAN WITH JODI L. CARR, INST. FOR POL'Y STUD., THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 6–8 (2015), https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf [https://perma.cc/SDK9-5NQN].

51. KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 36 (2011).

52. *Id.* at 56–57 ("The 1996 federal welfare reform legislation required states to institute fraud prevention programs.").

53. Gustafson, *Criminalization of Poverty*, *supra* note 20, at 644.

54. A review of studies on TANF and SNAP work requirements from the Urban Institute found that red tape—including requirements for beneficiaries to track and case workers to verify working hours—often "cause people to lose access to vital supports, even when they are working or should be exempt" from the requirements. HEATHER HAHN, URB. INST., WHAT RESEARCH TELLS US ABOUT WORK REQUIREMENTS 2 (2018), https://www.urban.org/sites/default/

eligibility criteria not only make it more difficult to gain access to benefits, but also make it harder to keep them. More than two million individuals lost access to the Temporary Assistance to Needy Families ("TANF") program between 1997 and 2018 because they failed to meet work requirements.[55] In many cases, individuals lost coverage not because they did not work, but rather because they worked irregular hours or simply could not keep up with the record-keeping requirements these programs impose.[56] Even for those who clear the hurdle of proving general eligibility, regular sanctions—usually in the form of benefit reductions—are now an expectation for benefits-program participants. In the years following the implementation of TANF, some researchers have estimated that between one-third and one-half of all recipients were sanctioned.[57]

Beyond these reporting requirements, scholars have argued that high levels of punishment result inevitably from the very structure of safety-net systems—which severely limit benefit levels but also render ineligible those with too much additional income. In effect, the system itself makes it impossible to both comply with program requirements and provide for a family.[58] As of 2010, the maximum federal benefits under the Supplemental Nutrition Assistance Program ("SNAP") and TANF could not raise a family above the federal poverty line.[59] Therefore, recipients must often engage in some level of cheating—generally by misreporting income—to survive.[60] In effect, the welfare system both produces and punishes law breakers because, as Professor

files/publication/98425/what_research_tells_us_about_work_requirements_4.pdf [https://perma.cc/Q4NL-ZMHJ]; *see also* HEATHER HAHN ET AL., URB. INST., WORK REQUIREMENTS IN SOCIAL SAFETY NET PROGRAMS 1, 10 (2017), https://www.urban.org/sites/default/files/publication/95566/work-requirements-in-social-safety-net-programs.pdf [https://perma.cc/8LMJ-E6LS].

55. LADONNA PAVETTI, CTR. ON BUDGET & POL'Y PRIORITIES, TANF STUDIES SHOW WORK REQUIREMENT PROPOSALS FOR OTHER PROGRAMS WOULD HARM MILLIONS, DO LITTLE TO INCREASE WORK 2 (2018), https://www.cbpp.org/sites/default/files/atoms/files/11-13-18tanf.pdf [https://perma.cc/T8LD-33VR].

56. *See* HAHN ET AL., *supra* note 54, at 6.

57. Gustafson, *Criminalization of Poverty*, *supra* note 20, at 663.

58. *Id.* at 681.

59. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 305 (2013) [hereinafter Gustafson, *Degradation Ceremonies*].

60. Gustafson, *Criminalization of Poverty*, *supra* note 20, at 681–82. This welfare dynamic is not new; the 1996 introduction of TANF intensified it. *See* KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 43–45 (1997).

Gustafson explains, "everyday activities of making ends meet amount to crime."[61]

Punishments for such "cheating" go beyond mere reductions in aid, largely due to the increasingly blurred boundaries between the criminal and social-welfare systems. As of 2011, more than one-third of California's fifty-eight counties had moved welfare-fraud investigations to District Attorney offices, while another nine housed satellite D.A. offices within the welfare office.[62] Although welfare investigations still generally lead to noncriminal administrative proceedings, recipients—with no right to counsel—can make admissions with criminal consequences.[63] Professors Spencer Headworth and Shaun Ossei-Owusu have found that, in practice, the legal environments poor people encounter in criminal adjudications and welfare-fraud proceedings do not differ; in both, "adverse consequences are largely a foregone conclusion for the accused poor."[64]

Again, as with laws that punish the very acts of living while poor, systems that penalize benefits recipients do little to further stated goals of reducing disorder. According to a 2002 federal oversight report of those dropped from Social Security, SNAP, and TANF rolls after the state identified them as "fugitive felons," a full quarter of the beneficiaries kicked out of these programs had been cited for parole or probation violations alone.[65] Likewise, these benefits systems do not appear to meet any stated good-governance goals. For instance, a 2011 Florida law requiring mandatory drug testing for TANF applicants cost the state more in testing fees than it saved by cutting benefits to ineligible applicants.[66] Notwithstanding their irrationality, these laws continue to punish the poor.

2. *Criminalization as Control.* Laws and enforcement patterns further criminalize poverty to control low-income individuals and

61. Gustafson, *Criminalization of Poverty*, *supra* note 20, at 682.

62. *Id.* at 686.

63. *Id.* at 709–10.

64. Spencer Headworth & Shaun Ossei-Owusu, *The Accused Poor*, 44 SOC. JUST. 55, 58 (2017).

65. Gustafson, *Criminalization of Poverty*, *supra* note 20, at 667.

66. Gustafson, *Degradation Ceremonies*, *supra* note 59, at 315. The Florida law in question was enjoined by a federal district court, a decision upheld by the Eleventh Circuit in *Lebron v. Secretary, Florida Department of Children & Families*, 710 F.3d 1202 (11th Cir. 2013).

communities. They do so by both surveilling and setting explicit boundaries around the lives of the poor.

a. Surveilling Poor Communities. Disparate enforcement of general criminal prohibitions in poor communities is one way the criminal legal system gains control over those with few financial and social resources. Beginning in the 1970s, "the diffusion of crime control techniques into the everyday lives of low-income African Americans intensified as all urban social programs were increasingly integrated into the bureaucracies, institutions, and industries at the heart of the carceral state."[67] The result was what historian Heather Ann Thompson calls the "criminalization of urban space"—"a process by which increasing numbers of urban dwellers—overwhelmingly men and women of color—became subject to a growing number of laws that not only regulated bodies and communities in thoroughly new ways but also subjected violators to unprecedented time behind bars."[68] Stop-and-frisk policing, concentrated in low-income neighborhoods of color, is one visible example of this pattern.[69] The imposition of these disparate policing and enforcement practices creates greater scrutiny over the everyday lives of individuals in poor communities. Because enforcement often leads to incarceration, surveillance and enforcement policies can—and did—result in increased state physical control over poorer, less educated, and non-white individuals.[70]

The controlling effects of such policies, however, go beyond mere imprisonment because contact with the criminal legal system diffuses through low-income communities. For example, widespread misdemeanor charging has led to "ongoing entanglements with and obligations to various organs of the criminal legal system—from police to courts to private social service providers,"[71] ultimately allowing the penal power of the state to gain control over individuals as they live their lives in the community. Probation and its attendant threats of

67. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 16 (2016).

68. Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 706 (2010).

69. *See* Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2438 (2017).

70. *See, e.g.*, BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 40–43 (2006) (noting that rates of violence and drug dealing fell among youth from poor families between 1980 and 2000, even as the incarceration rate of those individuals rose).

71. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 10 (2018).

incarceration particularly trap poor individuals. At its peak in 2007, the state and federal probation population soared to nearly 4.3 million people.[72] The probation system continues to account for more than half of all those under correctional control in the United States.[73] And the obligations it imposes can be particularly difficult for poor and disadvantaged probationers, who may have trouble finding required full-time employment, taking time off work to attend needed appointments, and paying the mandatory supervision fees.[74] As a result, probation effectively offers "a bifurcated pathway, diverting relatively more privileged defendants toward community supervision . . . while their less advantaged counterparts are funneled deeper into the criminal legal system."[75]

In part because of disparate policing practices, criminal surveillance and enforcement is particularly concentrated in poor communities. This is especially true in the context of public housing, where the state acts as both property owner and police. Scholars have noted that recipients of housing aid have "particularly circumscribed" Fourth Amendment rights.[76] These residents "are subject to extensive scrutiny by law enforcement in the hallways, stairwells, courtyards, and other common spaces of their homes—encounters that are simply unimaginable in residences of the well-heeled and wealthy."[77] In 2014, for example, the New York Police Department set up massive, blinding floodlights at some of the city's public-housing projects.[78] The purpose, as Mayor Bill de Blasio starkly put it, was to convey police's

72. Michelle S. Phelps, *Mass Probation and Inequality: Race, Class, and Gender Disparities in Supervision and Revocation*, *in* 2 HANDBOOK ON PUNISHMENT DECISIONS: LOCATIONS OF DISPARITY 43, 43 (Jeffery T. Ulmer & Mindy S. Bradley eds., 2017).

73. *Id.* at 46.

74. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 350 (2016); *see also* Phelps, *supra* note 72, at 48–49 ("For relatively disadvantaged probationers, supervision may more often serve as a 'piling on' of sanctions that ultimately ends with imprisonment.").

75. Phelps, *supra* note 72, at 56.

76. *See, e.g.*, Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RES. L. REV. 669, 670–71 (2019).

77. *Id.* at 671; *see also* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003) ("Fourth Amendment protection varies depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision- and sound-proof doors and walls.").

78. Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance*, CENTURY FOUND. (Dec. 21, 2017), https://tcf.org/content/report/disparate-impact-surveillance [https://perma.cc/W98S-2S7H].

"omnipresence" in these communities.[79] As with ordinances that criminalize homelessness, policing practices that target public housing ensure that those without the means to pay market rent "do not enjoy the same freedom to move about their daily lives that most Americans expect."[80]

b. Scrutinizing Public-Benefits Recipients. The pervasive surveillance of low-income individuals and communities extends even to areas where the state has no reason to suspect wrongdoing at the outset. Primary among these is the oversight of public-benefits recipients. Governments now require lengthy interviews as a condition of receiving aid, drug test aid applicants, and routinely use the public-benefits system as a source of information for general law enforcement purposes. These means of control become so punitive that Professor Gustafson calls them a kind of "degradation ceremony."[81]

For decades, courts have grappled with the constitutional limits of the inspection and oversight requirements that states and localities impose on benefits recipients. In 1971, the Supreme Court held in *Wyman v. James*[82] that New York's practice of requiring mandatory but preannounced home visits from social workers as a condition of receiving support did not violate Fourth Amendment prohibitions on unreasonable searches and seizures—and perhaps did not even constitute a search at all.[83] The Court explicitly left open whether more invasive practices—such as "early morning mass raid[s] upon homes of welfare recipients"—might nonetheless be unconstitutional.[84]

But in the decades since, states have continued to intrude extensively on the privacy of benefits recipients, occasionally with the blessing of the courts. In *Sanchez v. County of San Diego*,[85] for instance, the Ninth Circuit held that the Public Assistance Fraud Division of the county's D.A. office could constitutionally use unannounced,

79. *Id.*

80. Karteron, *supra* note 76, at 673–74.

81. Gustafson, *Degradation Ceremonies*, *supra* note 59, at 301–04 (referencing the work of sociologist Harold Garfinkel and "his notion of degradation ceremonies").

82. Wyman v. James, 400 U.S. 309 (1971).

83. *Id.* at 317–24 ("[W]e are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term.").

84. *Id.* at 326.

85. Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006).

warrantless visits to verify an applicant household's eligibility.[86] Although applicants were not required to allow the investigators into their homes, withholding consent generally would result in a denial of benefits.[87] In a forceful dissent, Judge Fisher objected to the majority's favorable citation of case law from the criminal context—which "suggest[ed] that welfare applicants may be treated the same as convicted criminals."[88] Invasive oversight has permeated new contexts in recent years, as aid recipients continue to be subject to criminal scrutiny. For example, the Social Security Administration has announced plans to use social media surveillance to identify potential fraudulent disability claims.[89]

These patterns of scrutiny extend to many means-tested benefits programs that serve indigent Americans. For example, Professor Khiara Bridges has identified similar invasions of privacy in programs offering prenatal care to poor women, who must endure "all-encompassing" interviews with invasive questions about home life, romantic partnerships, mental health problems, drug use, employment status, and more.[90] As Bridges notes, comparing poor recipients of Medicaid to the often relatively wealthy recipients of farm subsidies, "if the state treated other persons who receive government benefits the same way that the state treats poor mothers who receive government benefits, there would be a general sense of outrage."[91] Similar dynamics underlie the Earned Income Tax Credit ("EITC"), the federal government's largest antipoverty program.[92] EITC recipients, who earn on average less than $20,000 annually, now face the second-highest IRS audit rate of any group of taxpayers—only slightly behind the top 1 percent of all earners.[93] These audits can lead to months-long

86. *Id.* at 919–20, 923 ("[Although] the home visits do not constitute searches under *Wyman*, we agree with the district court that even if the home visits are searches under the Fourth Amendment, they are reasonable.").

87. *Id.* at 919.

88. *Id.* at 932 (Fisher, J., dissenting).

89. Robert Pear, *On Disability and on Facebook? Uncle Sam Wants To Watch What You Post*, N.Y. TIMES (Mar. 10, 2019), https://www.nytimes.com/2019/03/10/us/politics/social-security-disability-trump-facebook.html [https://perma.cc/SA4M-WBZ6].

90. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 4 (2017).

91. *Id.* at 5.

92. Elizabeth Kneebone, *Economic Recovery and the EITC: Expanding the Earned Income Tax Credit To Benefit Families and Places*, BROOKINGS (Jan. 26, 2009), https://www.brookings.edu/research/economic-recovery-and-the-eitc-expanding-the-earned-income-tax-credit-to-benefit-families-and-places [https://perma.cc/T6QL-3B4D].

93. Paul Kiel, *It's Getting Worse: The IRS Now Audits Poor Americans at About the Same Rate As the Top 1%*, PROPUBLICA (May 30, 2019, 10:16 AM),

delays in refund processing and tend to discourage even eligible individuals from reclaiming the much-needed credit.[94]

Law enforcement has used the reduced privacy rights of benefits recipients to its advantage by focusing disproportionate amounts of investigative resources on poorer individuals and communities. Welfare records are available to law enforcement upon request, without any probable cause requirement.[95] Police and prosecutors use such information to search for "fugitive felons"—further entangling poor individuals with the criminal legal system and ultimately leading those with very real economic need to lose access to benefits programs.[96] At times, law enforcement and welfare offices have even more explicitly used the benefits system to ramp up law enforcement activities against these poor recipients. In the late 1990s, for instance, Operation Talon used food-stamp offices in thirty states and D.C. as the site for criminal sting operations.[97] These entanglements both criminalize the act of receiving public benefits and ensure that those poor enough to need such support face greater legal scrutiny.

Benefits programs' eligibility requirements have also trained additional law enforcement scrutiny on the poor. For example, states have increasingly mandated drug testing as a condition for aid[98]—capturing otherwise undetectable criminal acts when committed by the poor. As Professor Gustafson has noted, drug-test requirements "particularly highlight[] the conflation of poverty and crime and the widespread assumption that poor women of color are the causes of crime."[99] For this reason, courts have, under the Fourth Amendment, put limits on some of the most extreme drug-testing regimes. For example, a federal district court enjoined the application of Michigan's

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https://www.propublica.org/article/irs-now-audits-poor-americans-at-about-the-same-rate-as-the-top-1-percent [https://perma.cc/VKS2-MBB3].

94. *Id.*

95. Gustafson, *Criminalization of Poverty*, *supra* note 20, at 669.

96. *Id.* at 667.

97. U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-716, WELFARE REFORM: IMPLEMENTATION OF FUGITIVE FELON PROVISIONS SHOULD BE STRENGTHENED 13 (2002); Gustafson, *Criminalization of Poverty*, *supra* note 20, at 669–70.

98. Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 774 (2011) (noting that over half the states considered drug-testing legislation between 2007 and 2009); *Drug Testing for Welfare Recipients and Public Assistance*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 24, 2017), http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx [https://perma.cc/M6HS-XKU5] (listing fifteen states that have enacted laws requiring drug testing or screening).

99. Gustafson, *Criminalization of Poverty*, *supra* note 20, at 680.

broad testing statute in 2000,[100] a decision that was affirmed following an evenly split en banc rehearing in the Sixth Circuit.[101] Likewise, in *Lebron v. Secretary, Florida Department of Children & Families*,[102] the Eleventh Circuit invalidated a Florida law that would have required drug testing for TANF applicants.[103] The court explicitly addressed the assumption of criminality underlying the policy, explaining "there is nothing inherent to the condition of being impoverished that supports the conclusion that there is a 'concrete danger' that impoverished individuals are prone to drug use."[104] Even with these potential constitutional limitations, more than a dozen states have passed legislation to drug test aid applicants or recipients, with some regimes applying only to applicants the state has a "reasonable suspicion" might engage in illegal drug activity, and others applying more broadly.[105]

Such drug-testing laws affect more than the applicants themselves. The structures of benefits policing create, in effect, a system of community control. In many cases, state and local enforcement agencies—whether prosecutors or social-service workers—explicitly rely on a network of informants to identify rulebreakers. As SNAP fraud enforcement officers have reported, uncovering evidence of intentional rulebreaking—which brings the harshest sanctions—requires "creatively exploiting clients' social networks," either by "exploit[ing] bad blood to cultivate cooperation" or otherwise "directly co-opt[ing]" even positive interpersonal relationships.[106] Other state programs have offered rewards for community members who provide useful tips for fraud investigators.[107] By exploiting social

100. *See* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1144 (E.D. Mich. 2000) ("The Court hereby . . . enjoins Defendant from conducting suspicionless drug testing of . . . applicants or recipients, such a practice being an unconstitutional infringement of Plaintiffs' Fourth Amendment rights." (emphasis omitted)).

101. *See* Marchwinski v. Howard, 60 F. App'x 601 (6th Cir. 2003).

102. Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202 (11th Cir. 2013).

103. *Id.* at 1218.

104. *Id.* at 1213 (quoting Chandler v. Miller, 520 U.S. 305, 319 (1997)).

105. *See Drug Testing for Welfare Recipients and Public Assistance*, *supra* note 98.

106. Spencer Headworth, *Getting To Know You: Welfare Fraud Investigation and the Appropriation of Social Ties*, 84 AM. SOC. REV. 171, 173 (2019).

107. *See* Gustafson, *Degradation Ceremonies*, *supra* note 59, at 308–09 (describing a Riverside County Department of Social Services newspaper advertisement that functioned as a "shaming device" by listing names of individuals convicted of welfare fraud and offering $100 rewards for tips).

ties, these programs entangle entire communities in the mechanisms of the criminal legal system.

Programs that condition aid on the imposition of criminal scrutiny justify these invasions in three ways. First, defenders argue that even the criminal-surveillance aspects of these programs ultimately aid beneficiaries. The Supreme Court contemplated such a justification in *Wyman v. James*, when it upheld a program mandating interviews with Department of Social Service workers as a condition of aid.[108] The Court emphasized that, under federal and state law, the visiting social workers' "primary objective is, or should be, the welfare . . . of the aid recipient"—including a focus on assistance and rehabilitation.[109] Second, these programs rely on the fiction that beneficiaries voluntarily consent to scrutiny by mere participation in the program. But, as the dissenting Ninth Circuit judge noted in *Sanchez*, "where government aid is an important means of providing food, shelter and clothing to a family, the coercive nature" of invasive requirements like home visits may "render[] the notion of consent effectively meaningless."[110] Finally, some of these programs justify excessive scrutiny by offering access to social-services benefits only to those who have already admitted criminal wrongdoing. For instance, prosecutorial diversion programs, which may offer clinical interventions on mental health and addiction, often condition access to classes and counseling on a preliminary admission of guilt.[111] These programs effectively condition receipt of necessary aid on an admission of criminal guilt. In turn, these extracted confessions can then be used against participants who fail out of the program—often for something as minor as missing an expensive drug test or failing to pay the hefty fees imposed by private providers.[112] In an even more extreme

108. Wyman v. James, 400 U.S. 309, 326 (1971).

109. *Id.* at 319, 322–23.

110. Sanchez v. County of San Diego, 464 F.3d 916, 942 (9th Cir. 2006) (Fisher, J., dissenting); *see also* Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202, 1217 (11th Cir. 2013) (rejecting a Florida law that "essentially require[d] a TANF applicant to choose between exercising his Fourth Amendment right against unreasonable searches" and "life-sustaining financial assistance").

111. *See* Lee Romney, *Private Diversion Programs Are Failing Those Who Need Help the Most*, REVEAL (May 31, 2017), https://www.revealnews.org/article/private-diversion-programs-are-failing-those-who-need-help-the-most [https://perma.cc/KTV3-GFT9] (describing one man's choice between completing the diversionary program or being charged with a felony).

112. *Id.*; *see also* Rebecca Burns, *Diversion Programs Say They Offer a Path away from Court, But Critics Say the Tolls Are Hefty*, PROPUBLICA ILL. (Nov. 13, 2018, 4:00 AM), https://www.propublica.org/article/diversion-programs-illinois-criminal-justice-system-bounceback-

example, legislators who supported a 2013 Tennessee "fetal assault" law—criminalizing the in-utero transmission of illegally obtained opioids—explicitly cited the provision of social support and rehabilitation as a justification for a new substantive criminal prohibition.[113] Here, again, the state uses the criminal process to control poor individuals by offering the carrot of necessary aid alongside the stick of surveillance and punitive sanctions.

3. *Criminalization as Hierarchy*. Mechanisms of criminal legal enforcement that disproportionately punish and control the poorest Americans work to solidify hierarchies based on class, race, and gender. Social ossification has been an implicit function of a wide range of criminal legal regimes. The loitering and vagrancy laws struck down in cases like *Papachristou* are one example. These deliberately vague laws became "the go-to response to anyone who threatened to move 'out of place' . . . whether that be socially, culturally, politically, racially, sexually, economically, or spatially."[114] These "roving license[s] to arrest"[115] have fallen out of constitutional favor.[116] But mechanisms to check those who threaten the social order remain central to the criminalization of low-income parents, beneficiaries of government programs, and other people living in poverty who are forced to live in the shadow of criminal control.

In particular, the criminalization of poverty has long been used as a mechanism to enforce America's racial caste system. Vagrancy laws and other widely applicable criminal prohibitions served this purpose throughout the nineteenth and twentieth centuries. Before the Civil War, vagrancy laws in southern states either explicitly targeted or imposed harsher punishments on free Blacks, who posed a threat to the racial order underpinning slavery.[117] Even after the official fall of slavery, southern counties continued to deploy disproportionate criminal sentences to effectively reinforce racial hierarchy in the

correctivesolutions [https://perma.cc/WD6G-V7KG] (expressing concern that diversion programs create an unequal system between poor defendants and those able to pay the fees).

113. Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 843–44 (2019).

114. Risa L. Goluboff, *Before Black Lives Matter*, SLATE (Mar. 2, 2016, 12:21 PM), https://slate.com/news-and-politics/2016/03/vagrancy-laws-and-the-legacy-of-the-civil-rights-movement.html [https://perma.cc/9CJP-AYL3].

115. *Id.*

116. GOLUBOFF, *supra* note 25, at 338–39.

117. *Id.* at 115.

postbellum period.[118] As Professor Christopher Muller found in his study of post–Civil War Georgia, the system of "convict leas[ing]" was most prevalent in areas where the racial caste system was most under siege—"[w]here African-Americans achieved a degree of economic independence by moving to cities or acquiring land," thus "threaten[ing] the ideology and economic position of poor whites and elite white landowners alike."[119]

Throughout the twentieth century, too, vagrancy laws that criminalized poverty were enforced most stringently against those who sought to upend the Black–white hierarchy. Some were used to police interracial sex: four of the defendants in *Papachristou*, for example, had been arrested for vagrancy while traveling in the car in a mixed-race, mixed-gender group.[120] Others were deployed to punish those who attacked the racial hierarchy more explicitly. For example, civil rights leader Reverend Fred Shuttlesworth was arrested for loitering and sentenced to 180 days of hard labor, a $100 fine, and costs.[121] Between 1958 and 1966, sixty-five separate cases concerning sit-ins and civil rights protests—many involving challenges to vagrancy, loitering, or breach-of-peace arrests—reached oral argument at the Supreme Court.[122] The number and context of these challenges to vagrancy arrests demonstrates how they served as a means of enforcing hierarchy—whether based on class, gender, race, or political point of view.

With the constitutional downfall of both vagrancy laws and explicit racial segregation, legal structures that recreate race–class hierarchies have taken on new forms. For instance, enforcement of local quality-of-life ordinances to target recipients of housing-choice vouchers—which subsidize low-income families' rental of private

118. Christopher Muller, *Freedom and Convict Leasing in the Postbellum South*, 124 AM. J. SOC. 367, 375–78 (2018).

119. *Id.* at 377, 396.

120. *See* GOLUBOFF, *supra* note 25, at 304 (noting that although the four occupants of the vehicle were arrested for vagrancy, had the two white female occupants been the only two present there was "no doubt they would not have been arrested").

121. *Id.* at 139. In a narrow opinion, the Supreme Court found that the city ordinances had been unconstitutionally applied to Reverend Shuttlesworth and invalidated his convictions. *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87, 92, 95 (1965).

122. GOLUBOFF, *supra* note 25, at 139, 141 (quoting NAACP Legal Defense Fund lawyer Jack Greenberg's reflection on "so many trespass, breach of the peace, disorderly conduct and weight of evidence cases" the Supreme Court heard during the height of the civil rights movement).

housing[123]—can be used to code and maintain white spaces.[124] Professor Norrinda Brown Hayat argues that a range of overlapping policies allow neighborhoods and towns to defend whiteness—including "surveillance, levying of fines, criminal investigations and prosecutions, denial of public services, and the institution of ordinances designed to penalize landlords for renting to voucher holders."[125] Hayat thus posits that these facially neutral policies designed to "enforce" municipal codes serve the same function as the "[o]vertly racist conduct designed to intimidate black newcomers" that the Fair Housing Act outlawed.[126]

At base, laws that criminalize the lives of impoverished Americans have a cyclical effect. They punish individuals for failing to comply with full participation in the profoundly precarious and insecure low-wage labor market while imposing restrictions that make such conformity impossible, if it were desirable.[127] Scholars have identified mechanisms of hierarchical control in nuisance laws, occupational-licensing regimes, and the child-welfare system.[128] Through this "systemic phenomenon" of largely local and state laws, these policies "stunt[] upward mobility and contribut[e] to the perpetuation of poverty."[129]

B. The Procedural Approach to the Criminalization of Poverty

In this Section, we discuss how due-process-based analyses became the central constitutional pathway for redress of poverty

123. *See* Emily Badger, *How Section 8 Became a 'Racial Slur*,' WASH. POST (June 15, 2015, 7:53 AM), https://www.washingtonpost.com/news/wonk/wp/2015/06/15/how-section-8-became-a-racial-slur [https://perma.cc/YLU4-WCH2].

124. *See* Williams v. City of Antioch, No. C 08-02301, 2010 WL 3632197, at *2–3 (N.D. Cal. Sept. 2, 2010) (describing allegations that the City of Antioch and its police department created a special unit to deal with "quality of life" issues, with enforcement targeted at Section 8 voucher recipients).

125. Norrinda Brown Hayat, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL'Y 61, 69–70 (2016).

126. *Id.* at 64.

127. *See, e.g.*, Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 930–35 (2016) (describing community supervision, criminal legal debt, and child-support enforcement as ways that current law provides authority to incarcerate people for nonwork and to subsequently force them to work). Other scholars have explained that engagement in formal paid work has become a moral requisite for welfare receipt. *See, e.g.*, David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2060 (2004); Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550, 560–61 (2012). It is also, correspondingly, necessary for avoiding criminal legal surveillance.

128. *See, e.g.*, Greene, *A Theory of Poverty*, *supra* note 24, at 771, 775, 778.

129. *Id.* at 758.

criminalization and describe how civil rights litigators have creatively used the Due Process Clause to address some aspects of poverty criminalization post-Ferguson. We applaud those successes but also point out the fundamental conceptual and practical shortcomings of these approaches.

1. *The Development and Shortcomings of a Language of Process*. The mid-twentieth century marked what some scholars have dubbed the Supreme Court's "egalitarian revolution,"[130] characterized by the Court's "broadening and deepening [of] the constitutional significance of our national commitment to Equality."[131] During this period, "[t]he growing influence of egalitarianism [was] . . . exemplified by decisions concerning the administration of criminal justice."[132] A particular focus was the equality of access to justice. For instance, in *Stack v. Boyle*,[133] the Court held that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of *that* defendant,"[134] including "the financial ability of the defendant to give bail and the character of the defendant."[135] This case was an early example of the Court's emphasis on individualized adjudication as the primary protection for the poor against arbitrary punishment. Later, in cases like *Gideon v. Wainwright*[136] and *Griffin v. Illinois*,[137] the Court began to speak more broadly of the importance of "[p]roviding equal justice for poor and rich."[138] In each of these cases, the Court emphasized notions of "equal justice,"[139] which here meant

130. Philip B. Kurland, *The Supreme Court 1963 Term: Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 144–45 (1964).

131. Archibald Cox, *The Supreme Court 1965 Term: Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966).

132. *Id.* at 92.

133. Stack v. Boyle, 342 U.S. 1 (1951).

134. *Id.* at 5 (emphasis added).

135. *Id.* at 5 n.3 (quoting FED. R. CRIM. P. 46(c)).

136. Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent defendants have a constitutional right to the assistance of state-provided legal counsel in a criminal trial).

137. Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the failure to provide defendants with transcripts necessary to pursue an appeal free of cost implicated due process and equal protection concerns).

138. *Id.* at 16; *see also* Douglas v. California, 372 U.S. 353, 355 (1963) (identifying "discrimination against the indigent" due to a lack of counsel as an impermissible "evil").

139. *Griffin*, 351 U.S. at 19 ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *accord Gideon*, 372 U.S. at 344 ("[E]very defendant stands equal before the law.").

ensuring that criminal defendants were afforded appropriate procedural protections and access to the resources of the justice system to avail themselves of their substantive rights.

The Court built on this framework in a series of 1970s-era decisions that established today's procedural limits on the ability of LFOs to result in the imprisonment of indigent defendants. In *Williams v. Illinois*,[140] the Court held that the extension of a maximum prison term due to a defendant's inability to pay a fine "work[ed] an invidious discrimination solely because he is unable to pay the fine."[141] The Court concluded that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[142] Later, in *Tate v. Short*,[143] the Court employed the same equal protection analysis to find that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent."[144]

Thus, at the outset the guarantors of "equal justice for poor and rich" were the "constitutional guaranties of due process *and* equal protection[,] both [of which] call for procedures in criminal trials which allow no invidious discriminations between persons."[145] But when the Court had the opportunity to extend a general grant of protection based purely on notions of equality to state practices that disproportionately harmed the indigent, it declined to do so. Instead, in the well-known case of *San Antonio Independent School District v. Rodriguez*,[146] the Court held that the Equal Protection Clause did not require applying strict scrutiny to instances of wealth-based discrimination.[147] This limit upon equal protection doctrine[148] left due

140. Williams v. Illinois, 399 U.S. 235 (1970).

141. *Id.* at 242.

142. *Id.* at 244.

143. Tate v. Short, 401 U.S. 395 (1971).

144. *Id.* at 398 (quoting Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

145. Griffin v. Illinois, 351 U.S. 12, 17 (1956) (emphasis added).

146. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

147. *Id.* at 55.

148. *Id.* at 29 ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . ."); *see also* Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (finding, in a case where welfare recipients were unable to afford the necessary filing fee to challenge a reduction of their benefits, that "[n]o suspect classification, such as race, nationality, or alienage, is present").

process as the central viable alternative pathway toward constitutional protection of the poor.

In *Bearden v. Georgia*, the Court solidified its reliance on procedural safeguards to secure protections for indigent defendants. *Bearden* involved a challenge by a defendant, Danny Bearden, who was sentenced to probation and ordered to pay a $500 criminal fine and $250 in restitution.[149] Bearden was able to make the first two payments on his debt after borrowing $200 from his parents, but shortly thereafter Bearden lost his job.[150] Though he continued to search for work, he quickly fell behind on his payments.[151] Consequently, Bearden notified his probation officer that "he was going to be late with his [next] payment because he could not find a job."[152] Three months after the missed payment, the state filed a petition to revoke Bearden's probation based on his failure to pay the balance of his court costs.[153] After an evidentiary hearing before a trial judge, his probation was revoked.[154]

The Supreme Court found that the trial court had improperly revoked Bearden's probation because the court failed to make any findings about Bearden's ability to pay his outstanding debt.[155] The Court explained its ruling in terms of the deficiency in the process the trial court afforded Bearden:

> A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigency in this context is a relative term rather than a classification, fitting "the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished[.]" The more appropriate question is whether consideration of a defendant's financial background in

149. Bearden v. Georgia, 461 U.S. 660, 662 (1983).

150. *Id.* at 662–63.

151. *Id.*

152. *Id.* at 663.

153. *Id.*

154. *Id.*

155. *Id.* at 674 ("By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.").

> setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.[156]

To be sure, the Court acknowledged that its analysis is *informed* by principles of equality. The Court also explained that "[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into" the government's ends and means.[157] At base, however, the Court determined that, as a practical matter, the equality of rich and poor would be enforced through procedural safeguards, rather than freestanding notions of equality.

Today, following the Court's lead, much of the discourse on the "criminalization of poverty" is written in the language of due process. In both litigation and in the academic literature, process-based values do much of the work in identifying and addressing problems with the criminalization of poverty. This shift embodies an increased emphasis on *individualized liberty* over *collective equality* as the operative protection for defendants. Yet the promise of meaningful equality via a process-based approach remains largely unrealized, in part because of the conceptual limits of an individualized-liberty-based approach.

Recent research has catalogued the numerous recurring procedural failures that have contributed to the continued prevalence of "modern-day debtors' prisons" despite the protections laid out in *Bearden*.[158] The ACLU, for instance, has identified five particular practices that result in the poor being jailed for failure to pay off LFOs.[159] These include offering defendants "the false 'choice' of immediately paying a certain amount of money in fines and fees or

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156. *Id.* at 666 n.8 (citation omitted) (quoting North Carolina v. Pearce, 395 U.S. 711, 723 (1969)).

157. *Id.* at 666–67 (footnote omitted). For a broader discussion of the interplay between equal protection and due process in the Court's *Bearden* decision, see generally Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309 (2007) (describing more generally the analytic process of reading rights clauses together to expand traditional rights). *See also generally* Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2020) (examining the relationship between wealth, equal protection, and due process).

158. *See* Jaclyn Kurin, *Indebted to Injustice: The Meaning of "Willfulness" in a* Georgia v. Bearden *Ability To Pay Hearing*, 27 GEO. MASON U. C.R. L.J. 265, 267 (2017) (cataloging procedural defects after *Bearden* that have resulted in increased incarceration of the poor).

159. NUSRAT CHOUDHURY, AM. CIVIL LIBERTIES UNION, WRITTEN STATEMENT BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS, HEARING ON MUNICIPAL POLICING AND COURTS: A SEARCH FOR JUSTICE OR A QUEST FOR REVENUE 8–11 (2016), https://www.aclu.org/sites/default/files/field_document/aclu_statement_usccr_03182016_municipal_courts_and_police_choudhury.pdf [https://perma.cc/TT6M-U4RB].

going to jail" without an ability-to-pay hearing; threatening defendants with immediate courthouse detention for failure to pay after sentencing; the use of for-profit probation companies; execution of failure-to-pay warrants; and forcing debtors to perform manual labor to cover LFOs without an appropriate ability-to-pay hearing.[160] For each of these practices, it appears that the procedures required by *Bearden* have failed to promote the individualized attention for indigent defendants that they were intended to. Thus, *Bearden*'s emphasis on procedure fails to promote equality partly because it does not ensure that the procedures themselves are consistent enough to fulfill the Supreme Court's desire that sufficient process can act as a defense against arbitrary punishment of the poor simply for being poor. On a much broader level, a process-based approach offers little possibility of relief for the substantive and structural criminalization of poverty that we describe in Section A: due process addresses procedural issues once a case is before the court. It does not at this point offer redress for substantive and structural issues that criminalize poverty by dictating who is before the court.[161]

2. *Process and Litigation in the Post-Ferguson Era.* After the Department of Justice's investigation in Ferguson, the criminalization-of-poverty framework has increasingly focused on the specific issue of incarceration due to bail, fines, and fees. Although the consequences of financial penalties in criminal cases had been studied before,[162] Ferguson for the first time prominently revealed to the world the ways in which cash-strapped cities might try to fund their survival by charging residents steep fines and fees and incarcerating them when they cannot pay. As a consequence, the criminalization-of-poverty framework has increasingly emphasized the entanglement of criminal law, impoverished defendants, and the reinforcing effects of these

160. *Id.*; *see also* Kurin, *supra* note 158, at 277–82.

161. *See, e.g.*, Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 8–15 (2018) [hereinafter Bell, *Hidden Laws*] (exploring "the myriad pathways through which poverty and involvement in the carceral state are linked").

162. *See, e.g.*, Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 335–39 (2009); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 381–84 (2012); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012) [hereinafter Chin, *The New Civil Death*].

monetary sanctions.[163] Now, a new wave of litigation has sprung up to challenge local practices that incarcerate low-income debtors who cannot afford to pay their criminal sanctions.[164] The resulting court decisions, and much of the academic and advocacy community's analysis of them, adopt and thus reinforce the procedural lens through which the criminalization of poverty is conceptualized.

For example, in *Stack v. Boyle*, the Supreme Court held that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant,"[165] including "the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."[166] This standard comports with the Court's doctrinal emphasis on procedure and individualized adjudication as the mechanisms through which indigent defendants can ensure equality in their criminal-legal-system outcomes despite the inequality in their status.

However, recent studies in pretrial detention and bail raise concerns about whether the procedures defendants receive actually live up to this standard. For example, pretrial detention and bail hearings have been reported to last only a few minutes in some

163. The criminalization-of-poverty framework has frequently emphasized two distinct but related phenomena in which the poor find themselves entangled in the criminal legal system by mere fact of being poor and then, in turn, become poorer due to these brushes with the system. Professor Kaaryn Gustafson's scholarship examines the first issue by highlighting the introduction of criminal legal and surveillance paradigms into the distribution of means-tested benefits such as cash welfare. *See* Gustafson, *Criminalization of Poverty*, *supra* note 20, at 646 (describing the motivation and effects of this entanglement). Professor Alexandra Natapoff's research focuses on the second issue, exploring ways in which criminal lawyers and civil servants reflect the tight connection between criminalization and poverty, reinforcing the role that the criminal system plays in the lives of the poor. *See generally* Alexandra Natapoff, Gideon*'s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445 (2015).

164. *See, e.g.*, Walker v. City of Calhoun, 682 F. App'x 721 (11th Cir. 2017); Bice v. La. Pub. Def. Bd., 677 F.3d 712 (5th Cir. 2012); Buffin v. City & County of San Francisco, No. 15-cv-04959, 2016 WL 6025486 (N.D. Cal. Oct. 14, 2016); Cain v. City of New Orleans, 184 F. Supp. 3d 349 (E.D. La. 2016); Rodriguez v. Providence Cmty. Corr., Inc., 155 F. Supp. 3d 758 (M.D. Tenn. 2015); Thompson v. Moss Point, No. 1:15-cv-00182, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); Pierce v. City of Velda City, No. 15-cv-570, 2015 WL 10013006 (E.D. Mo. June 3, 2015); Fant v. City of Ferguson, 107 F. Supp. 3d 1016 (E.D. Mo. 2015); Class Action Complaint, Jenkins v. City of Jennings, No. 4:15-cv-00252 (E.D. Mo. Feb. 8, 2015).

165. Stack v. Boyle, 342 U.S. 1, 5 (1951).

166. *Id.* at 5 n.3 (quoting FED. R. CRIM. P. 46(c)).

jurisdictions,[167] often without the aid of counsel.[168] Such practices frequently result in disproportionate levels of pretrial detention for poor defendants[169] and people of color.[170] Pretrial detentions then often lead to severe collateral consequences, including loss of employment, housing, or child custody.[171] Such detentions also have a significant substantive impact on trial outcomes, including length of incarceration and non-bail court fees owed.[172]

Academics and advocates alike have largely responded to concerns about pretrial detention by further embracing a language of procedure. Organizations such as the Pretrial Justice Institute encourage courts to rely on actuarial pretrial risk assessments to determine bail and pretrial detention.[173] In an article about the effects

167. *See* James Asher et al., *Unequal Treatment: A Series: Bent on Bail*, INJUSTICE WATCH (Oct. 14, 2016), http://injusticewatch.org/interactives/bent-on-bail [https://perma.cc/NS2F-VSHB] (noting that bail hearings in Illinois's Cook County often took less than two minutes and, at times, lasted less than one minute); *Length of a Bail Hearing in North Dakota: 3 Minutes*, NAT'L CTR. FOR ACCESS TO JUST. (Jan. 25, 2013), http://ncforaj.org/2013/01/25/length-of-a-bail-hearing-in-north-dakota-3-minutes [https://perma.cc/BZR2-T7QZ] (noting that North Dakota bail hearings last three minutes on average).

168. PRETRIAL JUSTICE INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 45 (2009), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5baadb7d-8fba-c259-c54d-4c6587e03201&forceDialog=0 [https://perma.cc/5ND2-M5JW] (finding that over half of pretrial court appearances occurred over video without the presence of defense counsel).

169. MARIE VANNOSTRAND, LUMINOSITY, NEW JERSEY JAIL POPULATION ANALYSIS 13 (2013), http://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf [https://perma.cc/6XMX-FDG4] (finding that 12 percent of the entire pretrial population of New Jersey jails was unable to make bail of $2500 or less—and often could not afford amounts of $500 or less—resulting in their detention prior to trial).

170. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, at 1 (2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf [https://perma.cc/VZ9L-XSU6] (finding that Black and Latinx Americans together represent 50 percent of all pretrial detainees in the United States).

171. Chin, *The New Civil Death*, *supra* note 162, at 1791.

172. *See* Megan T. Stevenson, *Distortion of Justice: How the Inability To Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 513 (2018) (finding that pretrial detention leads to a 42 percent increase in the length of the incarceration sentence and a 41 percent increase in the amount of nonbail court fees owed); *see also* Barker v. Wingo, 407 U.S. 514, 533 (1972) ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."). For a review of the empirical studies examining the effects of pretrial detention on criminal legal outcomes, see Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 724–29 (2017).

173. *(Evidence-Based, Actuarial Pretrial) Risk Assessment*, PRETRIAL JUST. INST. (Aug. 9, 2017), https://www.pretrial.org/evidence-based-actuarial-pretrial-risk-assessment [https://perma.cc/83GN-AXHU]. *But see* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 216–23 (2007) (critiquing the

of pretrial detention in misdemeanor cases, Professors Paul Heaton, Sandra Mayson, and Megan Stevenson also argue that pretrial bail-setting hearings should be considered a "critical stage" of a criminal proceeding, thereby guaranteeing a right to effective assistance of counsel for the accused.[174]

Others have similarly argued for the expansion of procedures earlier in court processes. For example, Professor Beth Colgan's work on graduated economic sanctions[175] and the Excessive Fines Clause[176] calls for a reexamination of the Court's historically narrow conceptualization of the Eighth Amendment's prohibition against excessive fines. Colgan argues for new policies that would take into account the accused's ability to pay at the outset with the calculation of the initial fine.[177] Proposals like these promote the procedural value of individualized adjudication, explicitly taking into account each defendant's income and means from the very beginning of adjudication.

Another focus, both in the literature and in litigation, has been on the failures of process related to collateral consequences of fine and fee nonpayment. One area of litigation concerns state laws that permit the suspension of drivers' licenses for failures to pay traffic fines, to appear in court, or even to provide child support.[178] Because drivers' licenses are protected property interests, the procedures for revoking them are subject to procedural due process requirements under the Fourteenth Amendment.[179] As such, many of the challenges against state policies that suspend drivers' licenses for nonpayment of LFOs have focused

racial bias embedded within the actuarial risk assessment tools used at the pretrial stage, even those that have appeared to produce progressive reform); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2224 (2019) (critiquing prediction at a more general level because it uses the past to predict the future). Note that numerous scholars have offered a similar critique of actuarial risk assessment at other stages of the criminal legal process—far too many to cite adequately in this short Article.

174. Heaton et al., *supra* note 172, at 777.

175. Beth A. Colgan, *Graduating Economic Sanctions According to Ability To Pay*, 103 IOWA L. REV. 53, 54–57 (2017).

176. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 337–47 (2014).

177. *Id.* at 345–47.

178. *See* MARIO SALAS & ANGELA CIOLFI, LEGAL AID JUST. CTR., DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 1 (2017); Joseph Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, NPR (Jan. 5, 2015, 3:30 AM), https://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor [https://perma.cc/A4EV-25BP].

179. Bell v. Burson, 402 U.S. 535, 539 (1971).

on *Bearden* and the procedural due process balancing test articulated in *Mathews v. Eldridge*.[180] The Department of Justice has also argued that "suspending the driver's licenses of those who fail to pay fines or fees without inquiring into whether that failure to pay was willful or instead the result of an inability to pay may result in penalizing indigent individuals solely because of their poverty" in violation of *Bearden*.[181]

Importantly, some courts have begun to take note of some of the disparate impacts of pretrial detention and bail on poor defendants and have taken steps to address them through a process-based approach. A prominent example is *ODonnell v. Harris County*, in which the Fifth Circuit observed the unequal treatment that impoverished defendants face:

> [T]ake two . . . arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. . . . One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.[182]

The Fifth Circuit ultimately found that Harris County's cash-bail system violated the Due Process Clause.[183] Although local rules required individualized assessment of bail, the "unwritten custom and practice that was marred by gross inefficiencies[] did not achieve any individualized assessment in setting bail, and was incompetent to do so."[184] Other courts have similarly held local cash-bail schemes to be impermissible on due process grounds. For example, the Ninth Circuit found that due process requires a *Bearden*-like inquiry into a detainee's financial circumstances when setting their conditions of release.[185]

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180. Mathews v. Eldridge, 424 U.S. 319, 348 (1976). For example, in a challenge brought in North Carolina, plaintiffs unsuccessfully argued that the state's law, which does not require a predeprivation hearing before revocation of a driver's license, violates equal protection as well as due process under *Bearden*. Johnson v. Jessup, 381 F. Supp. 3d 619, 623 (M.D.N.C. 2019), *appeal filed*, No. 19-1421 (4th Cir. Apr. 19, 2019). For a more in-depth discussion of the due process and equal protection arguments at play in these cases, see generally Garrett, *supra* note 157.

181. Statement of Interest of the United States at 1–2, Stinnie v. Holcomb, 396 F. Supp. 3d 653 (W.D. Va. 2019) (No. 3:16-cv-00044), 2016 WL 6892275.

182. ODonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018).

183. *Id.* at 152.

184. *Id.* at 153.

185. *See* Hernandez v. Sessions, 872 F.3d 976, 990–91 (9th Cir. 2017) ("Is consideration of the detainees' financial circumstances, as well as of possible alternative release conditions, necessary

Sociologist Nicole Gonzalez Van Cleve argues that, in Chicago-area criminal courts, court proceedings are a mere "'ceremonial charade,' in which due process is reduced to ceremony without substance for those deemed to be undeserving."[186] Individualized assessment through ability-to-pay hearings is important, and we support advocacy to expand its scope. But individualized assessment does not intervene upon the most powerful mechanisms through which the legal system penalizes poverty. These hearings are not necessarily "charades" in all cases. However, they may sometimes be red herrings.[187]

While the procedural lens is sometimes helpful in securing relief for indigent litigants and offers promise in some additional areas of criminal law related to fines and fees, the central concern of this Article is that it is woefully incomplete. The remedies available in these cases cannot reach the deeper structural and substantive issues of poverty criminalization described in Section I.A. The language of process often leaves courts without a vocabulary that would demand eradication of the substantive link between poverty and legal social control. When the legal debate turns solely upon issues of process, process-based and jurisdictional claims compete on similar moral terrain with the process-based concerns of poor litigants.[188] Courts can grant or deny relief to indigent defendants without having to address—or even mention—the weighty issues of substantive and structural inequality that are truly at the heart of the cases before them.

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to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings? We conclude that the answer is yes." (footnote omitted)); United States v. Parks, 89 F.3d 570, 572 (9th Cir. 1996) (finding a due process violation where points were added to a defendant's criminal history for sentencing-guideline purposes solely because of the defendant's inability to pay LFOs).

186. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 73 (2016).

187. The entire system of indigent defense can be criticized as designed to imprison the poor:

> The reason that prisons are filled with poor people, and that rich people rarely go to prison, is not because the rich have better lawyers than the poor. It is because prison is for the poor, and not the rich. . . . This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice.

Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

188. *See, e.g.*, Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2322 (2018) (explaining that jurisdictional federal court doctrines have sometimes been deployed to prevent courts from hearing substantively meritorious criminalization-of-poverty claims).

II. SKETCHES OF A DEMOSPRUDENCE OF POVERTY

This Part moves from the diagnostic to the normative and considers how judges can use the tools immediately at their disposal to meet their ethical obligation to promote substantive justice.[189] Judges of course cannot, on their own, address the morass that we describe in Part I. We write this Article with recognition and appreciation of the indispensability of movements that would fundamentally restructure poverty in America and the carceral institutions that punish and reproduce it. Yet, from a pragmatic perspective, we recognize that in the status quo, judges are powerful system actors that can—while adhering to current doctrine—work in important ways to recognize and lay a foundation for disentangling substantive and structural poverty criminalization. Accordingly, we do not intend to offer a comprehensive plan of action for these problems. Rather, this proposal is the start of a much longer conversation about concrete ways legal elites can engage in analytic and case-management strategies that observe and address the realities of poverty even when traditional doctrine truncates the possibility of legal intervention.

This Article draws from the concept of "demosprudence"[190] to propose that judges use multiple platforms to acknowledge the deep interconnection between conditions of poverty and the substantive, structural, and procedural pathways of legal marginalization. Judging is not merely the rendering of decisions based on preexisting legal rules; it can also encompass the articulation of legal values, the management of courtrooms, the making of rules about broader judicial operation, and the representation of the ethical principles of the legal system. While judges are bound to apply the law, judges also have an ethical obligation to prevent systematic bias in the legal system on the basis of poverty.[191] Our analysis to this point has underscored that systematic bias is pervasive in courtrooms and in the legal system generally and shown that this bias is structured in a way that current doctrine does not recognize and thus cannot remedy. The prescriptions we sketch below are a first step toward meeting the often-overlooked duty of bias reduction.

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189. *See* Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 24–36 (2007) (describing judges' ethical obligation to promote actual justice).

190. *See* Guinier, *Demosprudence Through Dissent*, *supra* note 16, at 47–52; Guinier & Torres, *supra* note 14, at 2749–56.

191. *See* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 144–46 (2013).

A. Demosprudence Revisited

This Section situates demosprudence within judicial theory and judicial ethics. The relationship between judging and demosprudence is murky. This murkiness is partly due to concerns about institutional roles and competencies, which are discussed further in Part III. However, this murkiness is also a product of demosprudential theory's general ambivalence toward adjudication. Professor Guinier's initial articulation of the theory described demosprudence as "a democracy-enhancing jurisprudence" that "describes lawmaking or legal practices that inform and are informed by the wisdom of the people."[192] Yet, later articulations defined demosprudence *in opposition* to jurisprudence. Most notably, Guinier and Professor Gerald Torres, in a 2014 essay, contrasted liberal civil rights jurisprudence—which "examines the extent to which the rights of 'discrete and insular' minorities are protected by judges interpreting ordinary legal and constitutional doctrine"—with demosprudence—which "explores the ways that political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems."[193] Instead of focusing on the actions of judges, Guinier and Torres explain, demosprudence "requires us to ask two overarching questions: (1) How and when do disadvantaged or weak minorities . . . mobilize to protect their own rights in a majoritarian democracy?; and (2) Does the mobilization of these constituencies have a democracy-enhancing effect?"[194]

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192. Guinier, *Demosprudence Through Dissent*, *supra* note 16, at 15–16. Corresponding ideas focus on processes of legal mobilization through cultural change in community, or what Professor Robert Cover famously referred to as "jurisgenesis." *See* Robert M. Cover, *The Supreme Court 1982 Term: Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 11–14 (1983); *see also* George I. Lovell, Michael McCann & Kirstine Taylor, *Covering Legal Mobilization: A Bottom-Up Analysis of* Wards Cove v. Atonio, 41 LAW & SOC. INQUIRY 61, 61 (2016) ("[C]oncepts of jurisgenesis and jurispathy can enrich the legal mobilization framework for understanding law and social change.").

193. Guinier & Torres, *supra* note 14, at 2749.

194. *Id.* An important body of work in the field of law and social movements has taken up the mantle of exploring demosprudence by nonjudicial actors, including movement lawyers. *See, e.g.*, I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1280 (2017) (arguing that videos of police stops represent a way that technology can be used demosprudentially to educate judges about how police stops actually occur); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1654–60; Justin Hansford, *Demosprudence on Trial: Ethics for Movement Lawyers, in Ferguson and Beyond*, 85 FORDHAM L. REV. 2057, 2062–66 (2017) [hereinafter Hansford, *Demosprudence on Trial*]; Anthony Michael Kreis, *Marriage Demosprudence*, 2016 U. ILL. L. REV. 1679, 1683 (describing how social movements helped shape family law); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 986–87 (2010)

This Article proposes a midrange alternative between a perspective that treats judges as the quintessential legal-rights protectors and one that shifts analytic focus away from judges altogether. Our alternative returns to Guinier's earlier approach to demosprudence. In that view, demosprudence "is not concerned primarily with the logical reasoning or legal principles that animate and justify a judicial opinion" and "is instead focused on enhancing the democratic potential of the work of lawyers, judges, and other legal elites."[195]

Guinier originally described judicial opinions, specifically oral dissents, as demosprudential if they satisfied one or more of the following characteristics: (1) the opinion "probes or tests a particular understanding of democracy" by "engag[ing] with a core issue of democratic legitimacy, democratic accountability, democratic structure, or democratic viability"; (2) it breaks from the usual logical structure of judicial opinions, perhaps engaging in storytelling, using poetic language, or developing some other emotionally stirring rhetorical technique; and (3) it is directed to tasks beyond resolution of a single case and speaks to legal actors outside the courts.[196] Several scholars have described dissenting opinions by Supreme Court Justices as acts of demosprudence, given their frequent criticism of highly

(describing movement lawyers' decisions to litigate marriage-equality cases between *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as reflecting a position that "[l]oss, rather than the litigation itself, crystallizes the deprivation of rights and the unequal treatment that the movement is fighting"); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 621–22 (2017) (describing collective organizing to create community bail funds as a form of demosprudence that inserts a community perspective into criminal court processing); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 287 (2019) (describing demosprudence in part as "laypeople join[ing] collectively to contest meanings of justice").

195. Guinier, *Demosprudence Through Dissent*, *supra* note 16, at 16.

196. *Id.* at 49; *see also* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 540–42 (2009) (describing the demosprudential dissent by Justice Ruth Bader Ginsburg in the Lilly Ledbetter case on sex discrimination in pay for employment). In the "public story" aspect of demosprudence, Guinier drew from storytelling scholar Marshall Ganz's insight that effective narratives speak to shared experiences that connect the speaker—here, the court—with the listener—here, the public—and thus bridge the usual divides in social life. This allows the listener to connect emotionally, thus making public narratives more motivational and normatively powerful than other forms of storytelling. *See* Marshall Ganz, *Public Narrative, Collective Action, and Power*, *in* ACCOUNTABILITY THROUGH PUBLIC OPINION: FROM INERTIA TO PUBLIC ACTION 273, 280–81 (Sina Odugbemi & Taeku Lee eds., 2011); *see also* Cover, *supra* note 192, at 10 ("The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. . . . The part that you or I choose to play may be singular, but the fact that we can locate it in a common 'script' renders it 'sane' . . . .").

formalistic approaches to legal analysis that omit relevant social context.[197]

Other scholars have expanded on this definition of demosprudence by focusing on the behavior of judges or the interpretation of current law. For example, Professor Brian Ray argues that judicial demosprudence extends to the use of rhetoric in majority opinions to "invok[e] the tragic consequences of insufficient policies" and to construct narratives that promote long-term policy deliberation between the political branches and the government.[198] He contends that this judicial demosprudence is highly valuable to social movements in countries with relatively young constitutional cultures, such as South Africa.[199] Professor Justin Long has applied the concept of demosprudence to interactive federalism between state and federal courts, focusing on state constitutional decisions that expand notions of individual rights and equal protection beyond those that prevail in the federal courts.[200] Professor Seth Davis offers an expansive reading of the Thirteenth Amendment as a demosprudential pathway for a movement toward collective self-determination in Black American communities.[201]

Although several scholars locate demosprudence within scholarship on popular constitutionalism and constitutional culture,[202] demosprudence need not be centrally concerned with the interpretation of the U.S. Constitution. Indeed, there are many ways that judges, at multiple levels, can support and enhance the democratic capacity of the public. Judges might engage in demosprudence simply by acknowledging the world as it is in a way that members of the public can see and understand,[203] such as by engaging in pathetic, emotion-

197. *See* Hansford, *Demosprudence on Trial*, *supra* note 194, at 2058, 2078 (describing a demosprudential dissent by Justice Sonia Sotomayor in the policing case *Utah v. Strieff*, 136 S. Ct. 2056 (2016)); *see also* Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 698–702 (2015) (describing judicial absolutist rhetoric, which is often found in dissenting opinions, as sometimes emanating from efforts to engage in demosprudence).

198. Brian Ray, *Demosprudence in Comparative Perspective*, 47 STAN. J. INT'L L. 111, 144–45 (2011).

199. *Id.*

200. *See generally* Justin R. Long, *Demosprudence, Interactive Federalism, and Twenty Years of* Sheff v. O'Neill, 42 CONN. L. REV. 585 (2009).

201. Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88, 89 (2019).

202. *See, e.g.*, Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1752 n.116 (2017).

203. *See* Robert Post, *Marshall as a Judge*, 88 FORDHAM L. REV. 1, 7 (2019) (describing Justice Thurgood Marshall's judicial philosophy as one that "appeal[ed] to the basic democratic

resonant argumentation and not merely logical argumentation in writings.[204] Judges who write opinions can give voice to the context of the poverty-related cases before them.

For judges who do not write opinions—as is the case in many state civil and criminal courts—demosprudence could mean interrogating relevant topics in court so that information appears in trial transcripts. Demosprudence could also mean using the judicial rulemaking process to establish principles and ethical standards that aim to reduce systematic socioeconomic bias. Judges can interpret legal doctrine and apply normal rules of court while simultaneously acknowledging that the deeper solutions to the marginalization and criminalization of the poor are not likely to be found only in courts. Judges who manage courtrooms and dockets can do so in ways that educate themselves and their staff about the context of poor people's lives, so they are more conscientious about the stakes and limitations of their decision-making processes. Judges who set rules for the courts can start from the vantage point of poor people's day-to-day lives, rather than a top-down, status-quo-oriented lens for rules development. What these notions have in common is a view that judges can ethically act to promote participatory public dialogue even if current legal doctrine or process do not permit direct intervention.[205]

B. Paths toward a Demosprudence of Poverty

1. *Judges as Authors*. It is well understood that judicial opinions and orders fulfill purposes other than applying preexisting rules to specific sets of facts to notify litigants of the outcomes of their cases.[206] Some of those broader purposes can include acknowledging the harms at the root of the dispute, educating the public about various harms,

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structure of American government"); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 558 (Marshall, J., dissenting) (scolding the majority for "clos[ing] its eyes to . . . constitutional history and social reality").

204. *See generally* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013) [hereinafter Greene, *Pathetic Argument*].

205. *See, e.g.*, Charles C. Bridge, Comment, *The* Bostic *Question*, 126 YALE L.J. 894, 904 (2017).

206. *See, e.g.*, Ruggero J. Aldisert, Meehan Rasch & Matthew P. Bartlett, *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 17–20 (2009) (identifying "primary consumers" and "secondary markets" for opinions, and placing all interested parties other than the trial court, the litigants, and the appellate courts in the less important secondary category); Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–14 (1961).

recognizing the human interests at the root of the case,[207] and engaging discursively with contemporary social movements. Written orders and opinions give judges space to engage in both logos and pathos in multiple ways, including by recounting important contextual information from the record.[208] Reason-giving—the sine qua non of opinion writing—is also a democracy-enhancing form of jurisprudence that judges can engage in that empowers the public to pursue substantive justice.[209]

Because judges serve as the official voice of the courts, judges are uniquely well positioned to undertake analyses that deeply engage with the historical and social context of substantive law, procedural issues, and the litigants themselves. While doctrine constrains judicial orders, it need not always constrain judicial language. For instance, judges can

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207. *See, e.g.*, Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 24, 27 (1996) (arguing that judges should use "a language that is expressive of the kind of imagination that's capable of perceiving the individual humanity of the people involved and their circumstances" and that "both empathetic identification accompanied with a kind of critical external assessment are crucial" to judging).

208. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 73–85 (2006); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 134–36; Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 164–66 (2012); Keith J. Bybee, *Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making*, 8 ANN. REV. L. & SOC. SCI. 69, 73–75 (2012); Arie Freiberg, *Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice*, 3 PUNISHMENT & SOC'Y 265, 267–68 (2001); Greene, *Pathetic Argument*, *supra* note 204, at 1393–97; Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575–77 (1987); Susanne Karstedt, *Emotions and Criminal Justice*, 6 THEORETICAL CRIMINOLOGY 299, 300–02 (2002); Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 201–03 (2013); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1265 (2012); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1488 (2011) [hereinafter Maroney, *Emotional Regulation*]; Sharyn Roach Anleu & Kathy Mack, *Judicial Authority and Emotion Work*, 11 JUD. REV. 329, 345–47 (2013); Sharyn Roach Anleu, David Rottman & Kathy Mack, *The Emotional Dimension of Judging: Issues, Evidence, and Insights*, 52 CT. REV. 60, 61–63 (2016); Jennifer A. Scarduzio, *Maintaining Order Through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges*, 25 MGMT. COMM. Q. 283, 305–07 (2011); Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41, 46–57 (2014).

209. *See* Cravens, *supra* note 189, at 36–40. Critics of reason-giving as a solution might claim that stated legal reasons are not the true determinants of judges' decisions, and instead the demographic characteristics of judges, including their ideology or political party, are more important to understanding the decisions they render. This is the classic debate between formalist and realist visions of judging. This critique oversimplifies motivational processes in judicial decision-making. Law sets forth a dialogical terrain that interacts with, though certainly does not fully overcome, demographic factors. *See* Bybee, *supra* note 208, at 80; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007).

use dicta demosprudentially.[210] Judges can also recount facts and context in the record in sufficient detail to recognize and reveal the scope of injustice associated with poverty criminalization.[211] They can make linguistic choices that shed light not just on due process and blamelessness among some of the criminalized poor, but also on the structural dynamics of poverty criminalization that function independently from process and blameworthiness. Judges can, subtly or directly, convey disdain or even horror at the injustices of poverty criminalization. In doing so, they can perhaps help weaken the legal estrangement that flows in part from poverty criminalization.

Judge Lee Rosenthal's opinion and order at the preliminary injunction stage of *ODonnell* is representative of a judicially demosprudential approach to opinion writing in both its strategy of reason-giving and its rhetorical style. While Judge Rosenthal carefully limited her legal analysis to the procedural aspects of the case, she also richly contextualized her analysis. The opinion and order takes stock of the historical development of bail at the federal and state levels.[212] It describes various efforts to reform bail, including contemporary successes of bail reform throughout the nation.[213] Drawing from evidence in the record, Judge Rosenthal sheds light on the arbitrariness of the pretrial detention processes from the defendants' point of view, expressing, for example, concern about the confusing questions during pretrial assessments.[214] The opinion carefully and laboriously describes the full pretrial process for defendants. When the opinion describes probable cause hearings, it emphasizes the bureaucratic and programmatic qualities of the process.[215] It points out that up to forty-

210. *See* Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 166–68 (2011) (describing a range of different types of dicta with different justifications, including influence upon the future development of the law).

211. The point that the facts that judges bring into opinions must be in the record is key. In many ways, a proposal for demosprudence is a proposal that also runs toward advocates. Demosprudential advocacy must include, among other requirements, a strategy of building out rich records and setting forth arguments in the papers that position the judge to engage in demosprudential opinion writing. Judicial opinion writing is actually a collaborative process between judges, clerks, and advocates. Therefore, advocates representing the poor can enhance a demosprudence of poverty by developing a rich record for judges to draw upon in their opinion writing. *See* Peter Friedman, *What Is a Judicial Author?*, 62 MERCER L. REV. 519, 521–35 (2011).

212. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1073–78 (S.D. Tex. 2017), *aff'd in part, rev'd in part*, 892 F.3d 147 (5th Cir. 2018).

213. *Id.* at 1070–84.

214. *Id.* at 1090–91.

215. *Id.* at 1092–1101; *see also* KOHLER-HAUSMANN, *supra* note 71, at 60–98 (describing intensive managerial processes in New York misdemeanor courts that do not fall into an

five arrestees might be heard for only one or two minutes total during the same probable cause hearing.[216] She also points out that arrestees must "stand[] on a marked square in the center of the room and face[] a screen showing the Hearing Officer and Assistant District Attorney."[217] This additional detail is demosprudentially salient because it emphasizes the heightened dehumanization in the misdemeanor pretrial process: arrestees interact with a human adjudicator and the government official who is prosecuting them, but only through a screen. Meanwhile, the arrestee is made to stand on an "X" before a live audience, demonstrating the embodied characteristics of display and degradation that can come along with status as a criminal defendant. Because the hearing officer and prosecutor are not present in the room, they do not have the type of proximity to the proceeding that would allow them to feel the weight of this humiliating process.[218]

In *United States v. Bannister*,[219] federal district judge Jack Weinstein sentenced twelve impoverished Black and Latinx men to long prison terms for conspiring to sell crack cocaine.[220] Sentencing is a challenging but routine act for a federal trial judge presiding over criminal cases.[221] Nonetheless, the opinion that emerged from this

assembly-line model, given that their goal seems to be persistent management rather than speedy conviction).

216. *ODonnell*, 251 F. Supp. 3d at 1092; *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 1328–30 (2012).

217. *Id.*

218. It is worth noting here that Judge Rosenthal does not use lofty rhetoric in the opinion. But this fact does not make the opinion any less demosprudential. Indeed, some of our most celebrated American writings evoke passionate emotional responses *because* they use unadorned language to render visible some aspect of the world that usually goes unrecognized or unanalyzed. One thinks of Gwendolyn Brooks' "We Real Cool," Langston Hughes' "Harlem," or Mary Oliver's "The Summer Day"—all poems that use stark, spare language. Judges engaging in a demosprudence of poverty through opinion writing will vary in their aesthetic choices. Perhaps the "safest" strategy, for those concerned about being perceived as emotional or activist, is to draw upon facts in the record to reveal substantive and structural injustice, even when—as here—dehumanization is not a Due Process Clause violation. Perhaps this straightforward writing strategy might be especially effective as demosprudence. *See* Aldisert et al., *supra* note 206, at 39.

219. United States v. Bannister, 786 F. Supp. 2d 617 (E.D.N.Y. 2011).

220. *Id.* at 623–24.

221. *See* U.S. v. Faison, No. GJH-19-27, slip op. at 2 (D. Md. Feb. 18, 2020) ("The sentencing of defendants in federal court is such a common occurrence that it is important to occasionally pause and remember what is at stake. . . . [I]t is crucial that judges give careful consideration to every minute that is added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.").

commonplace task provides another powerful example of a demosprudential approach to poverty criminalization.

Judge Weinstein did what he seemed to feel was required of him as a federal judge presiding over a criminal case: he sentenced each man to prison, meeting the statutory minimum sentences for each.[222] He raised questions about the constitutionality of mandatory minimums but perhaps believed he could not find them unconstitutional.[223] However, before moving to the sentencing portion of his opinion, Judge Weinstein wrote nearly fifty pages about the complex social and legal conditions that brought these twelve defendants before the court for sentencing. The opinion begins with a description of concentrated poverty in pregentrification Bedford-Stuyvesant, Brooklyn and the physical and social characteristics of the low-rise public-housing project where the drug ring operated—including a photograph.[224] Judge Weinstein had taken the unusual step of visiting the neighborhood where the defendants grew up before issuing his sentencing decision, and his brief experience there shaped how he wrote the opinion.[225]

The *Bannister* opinion also includes a lengthy section on "History and Sociology" that explores the structural roots of Black segregation and unemployment in urban America; the insufficiency of federal poverty interventions such as public housing and welfare policy; the educational, health, familial, and other conditions that emerge from segregation and economic dispossession in urban America; the structural roots of crime; the conditions under which Congress adopted the Anti-Drug Abuse Act of 1988, which created the crack–cocaine sentencing disparity; the roots of mass incarceration; and more.[226] Judge Weinstein also describes the "terror" residents of the housing project felt because of the drug ring,[227] and he acknowledges the defendants' baseline level of agency—although poverty creates

222. *Bannister*, 786 F. Supp. 2d at 688.

223. *Id.* at 670, 688.

224. *Id.* at 624–28.

225. Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 552; Tom Hays, *Veteran Federal Judge Visits Drug Gang's NYC Turf*, USA TODAY (Mar. 5, 2011, 8:13 AM), http://usatoday30.usatoday.com/news/topstories/2011-03-05-3103728283_x.htm [https://perma.cc/752R-WHRK] (explaining Judge Weinstein's rationale for the visit, which was that he likes to visit some places where defendants live as a "reality check" to keep the analysis from getting too "abstract").

226. *Bannister*, 786 F. Supp. 2d at 630–62.

227. *Id.* at 623, 644.

conditions that increase crime, individuals often have some control over participation in criminalized behavior.[228] Some of the language Judge Weinstein uses to describe the men's familial situations and "[s]ocial [v]alues"[229] hearkens to anachronistic "culture of poverty" arguments.[230] Yet it is nonetheless clear that Judge Weinstein is using the opinion as an opportunity to render visible the probabilistic pipeline between poverty and imprisonment and to affirm the basic humanity of these convicted men.[231]

In the conclusion of his opinion, Judge Weinstein notes that as a sentencing judge he is required to apply controlling law to the case, even if he plainly sees it as unjust. He writes:

> Several of the sentences in this case, imposed only because of statutory minima, are disproportionate to the crimes committed and the backgrounds of the defendants. Their excess causes particular concern when applied to youthful defendants. That concern is multiplied by the imposition of these sentences upon young defendants subject to abuse, poverty, drug and alcohol addiction, unemployment, illiteracy, and learning disability, largely attributable to their backgrounds.[232]

Judicial recognition of these structural conditions in a criminal case—despite the judge's inability to resolve them with the tools directly before the court—is a type of demosprudential analysis.[233] Although the *ODonnell* and *Bannister* opinions take radically different approaches, both are emblematic of a style of judging that remains solidly within the bounds of the judge's role and competence while also enhancing the judiciary's democratic potential.

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228. *Id.* at 669.

229. *Id.* at 641–42.

230. For a distillation of the debate over "culture of poverty" arguments in sociology and social policy since the 1960s, see WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 95–111 (2009).

231. For example, Judge Weinstein notes that the defendants had mothers, friends, romantic partners, and other loved ones present in the courtroom. *Bannister*, 786 F. Supp. 2d at 623.

232. *Id.* at 688 (citations omitted).

233. As evidence of *Bannister*'s demosprudential potential, one of this Article's authors (Bell) learned of the *Bannister* case from a man who was currently incarcerated during a teaching experience in prison. The man, who was himself from a high-poverty neighborhood similar to pregentrification Bed-Stuy, applauded Judge Weinstein's rich sociological analysis. The opinion's description of interlocking social and legal conditions rang true to him, while most opinions he was reading in the prison's library seemed to ignore the context of the cases they analyzed.

2. *Judges as Managers*. At both the federal and state levels, judges spend considerable amounts of time managing cases and dockets, with deep involvement in motions practice and the discovery process.[234] In part because of growing concerns about the legitimacy of the courts, judges and judicial reformers have been advocating for state trial judges to be even more involved and proactive in case management.[235] While this Article does not attempt to identify the full range of possibilities for judicial case management, we identify two primary ways that case management can serve demosprudential functions that can reduce systemic and substantive bias against the poor.

The first example is "active judging" in the state civil trial courts.[236] A growing number of state trial judges are assisting unrepresented individuals by ensuring that their claims are made in ways—and with the level of detail—that a court can hear.[237] Under an active-judging framework, judges do not merely sit as passive, seemingly disinterested arbiters when poor, unrepresented litigants stand before them. Instead, they actively intervene to ensure that the legal claims of poor litigants find expression in their courtrooms.[238] This approach is especially useful in a legal environment where so many people are unrepresented: most active judging takes place in the state civil courts—so-called

234. *See, e.g.*, Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 253, 262 (describing this change in the state courts); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674–84 (2010) (describing a thirty-year rise of trial judge case management in the federal courts); James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 17–19 (1997) (explaining that the rise of active judicial case management in the federal courts is largely attributable to the 1990 Civil Justice Reform Act, which required each federal district to develop a civil case-management plan); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 29 (2003).

235. *See, e.g.*, Jennifer D. Bailey, *Why Don't Judges Case Manage?*, 73 U. MIAMI L. REV. 1071, 1071 (2019).

236. Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 667–72 (2017); Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1059–60 (2017). Some advocates for active judging juxtapose it with civil *Gideon*, arguing that active judging is preferable to advocating for a right to counsel in civil cases. Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1231 (2010); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 985 (2012). We do not view active judging as trading off against civil *Gideon*; we argue instead that active judging is one of many tools that judges might use to meet their ethical obligations. An analysis of the value of active judging is not relevant to whether there should be a right to counsel in civil courts.

237. Carpenter et al., *supra* note 234, at 253, 262.

238. *See* Carpenter, *supra* note 236, at 667–72.

"poor people's courts"—that handle matters in family law, housing, small claims, consumer issues, and so forth, and thus "perform the function of ceremonial degradation in the civil system."[239] Recent scholarship has called for the expansion of the active-judging model, including spreading the practice of diversionary "problem-solving" drug courts in state criminal courts to state civil courts.[240] The problem-solving model relies upon judges to set benchmarks for arrestees and then monitor them.[241] Although diversionary-problem-solving courts in the criminal system have faced growing criticism from reformers for increasing managerial surveillance and reducing procedural protections for vulnerable people,[242] the same concerns might not arise in the civil context.[243]

Some critics see active judging as a step away from the neutral or passive position that a judge is meant to occupy.[244] However, supporters of active judging seem to have won the debate, for the most part. For instance, Comment 4 to the 2007 revisions to the Model Code of Judicial Conduct clarifies that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[245] Some analysts and supporters of active judging claim that it is a way of meeting judges' ethical commitment to "true neutrality," which in the pro se context

239. *See* Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 499–503 (2015). While many poverty law scholars focus only on these functions within civil courts, it would be reasonable to also classify state criminal courts as poor people's courts given the substantive and structural relationship between poverty and criminal punishment. *See supra* Part I; *see also* Bell, *Hidden Laws*, *supra* note 161, at 8–15. While more affluent people also have some legal problems that are heard in these courts, they can usually avoid, for example, appearing in family court.

240. Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1581 (2018).

241. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 423 (2009); *see also* Richard C. Boldt, *A Circumspect Look at Problem-Solving Courts*, *in* PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? 13, 13–28 (Paul Higgins & Mitchell B. Mackinem eds., 2009); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2071 (2002).

242. *See, e.g.*, Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1657–73 (2012).

243. Steinberg, *supra* note 240, at 1624–31.

244. *See, e.g.*, Drew A. Swank, *In Defense of Rules and Roles: The Need To Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1564–69 (2005).

245. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (AM. BAR ASS'N 2007).

"often requires a form of engagement that may seem inconsistent with traditional expectations for the appearance of neutrality."[246]

One unfortunate aspect of the scholarly and policy literature on active judging, however, is that it is not well defined, nor is it specific about the details of the practice.[247] Some active-judging practices are squarely focused on procedural fixes, such as relaxing procedural requirements for pro se litigants or carefully explaining court processes in ways that laypeople will more readily understand.[248] However, other active-judging methods—chiefly, judicial questioning that seeks to add more information to the record, enshrined in the trial transcript—hold more promise for addressing substantive poverty punishment and systemic bias. By building out the record, the judge can elicit contextual information about poverty that might be useful in rendering a demosprudential opinion.

The second mode of judicial case management that we see as potentially democracy-enhancing is for judges to seek proximity and real-world experience within communities in their jurisdictions where the correlation between poverty and punishment is highest. It might not always be appropriate for judges to visit the community where defendants or poor litigants in their court come from during a major case, but judges, and their clerks, can nonetheless proactively familiarize themselves with impoverished communities in their jurisdiction when they are not in the midst of a major case that affects that neighborhood. Judges could ask their clerks and staff to spend a designated amount of time engaged in community-oriented work in low-income neighborhoods as part of their job duties. They could also use demonstrated familiarity with issues affecting poor litigants and poor defendants as hiring criteria. This set of demosprudential court management options is less discussed in the literature than active

246. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 426 (2004). Zorza disaggregates judicial neutrality from judicial passivity, claiming that "there are two dimensions on these issues (neutral or non-neutral and engaged or passive) rather than one (passive or non-neutral), and therefore four possible judicial behavior choices rather than two." *Id.* at 429. This is a different framework from that of Professor Justin Hansford, who has argued for "cause judging," which unlike judicial activism, embraces the rule of clear law but rejects the idea of pure judicial neutrality. Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1, 16 (2014).

247. Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1146 (2019).

248. Carpenter, *supra* note 236, at 667–72; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2049 (1999).

judging in civil courts, but it is potentially even more transformative, as it aims to present decision-makers with a more visceral, tangible experience of many of the dynamics discussed in Part I.

3. *Judges as Rulemakers*. Judges also make rules for how courts will operate and how judges will behave. Much of the scholarship on judicial rulemaking has focused on procedural rulemaking in the federal courts, especially those processes that created the Federal Rules of Civil Procedure.[249] However, state court rulemaking may have greater capacity to influence the cases and systems in which poverty penalization is most obvious.[250] In many states, state court judges—especially the chief judge of the states' courts of last resort—have a central role in the court rulemaking process.[251] We suggest that state courts adopt rules that facilitate demosprudential judging with respect to poverty.

For example, a rulemaking that better defined what it means for an indigent defendant or litigant to have the ability to pay would have a substantial demosprudential impact. As described in Part I, ability-to-pay hearings have been one of the chief measures of success within the movement against LFOs. Yet, what it means for an indigent litigant or defendant to be "able" to pay is poorly defined. Some states have adopted statutes that specify the aspects of a defendant's background that are relevant to the ability-to-pay determination, such as their

249. *See generally* Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010) (describing the evolution of the Federal Rules of Civil Procedure and the author's role in shaping them); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447 (2013) (proposing changes to the rulemaking process for the Federal Rules of Civil Procedure); Carrie Leonetti, *Watching the Hen House: Judicial Rulemaking and Judicial Review*, 91 NEB. L. REV. 72 (2012) (discussing the making of federal courts' local rules and general orders); Jordan M. Singer, *The Federal Courts' Rulemaking Buffer*, 60 WM. & MARY L. REV. 2239 (2019) (emphasizing the importance of procedural rulemaking by federal courts); *see also* Mila Sohoni, *The Power To Privilege*, 163 U. PA. L. REV. 487, 546–48 (2015) (noting the virtues of the federal judicial rulemaking process).

250. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1868–76 (2001) (describing key differences between state courts and federal courts, including the greater degree to which state courts have judicial authority over court administration, that might justify distinctive state court rulemaking processes).

251. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1384 n. 241 (2018). State constitutions often set out this process. *See, e.g.*, ALA. CONST. art. VI, §§ 149–150; ARK. CONST. amend. 80, §§ 2–3. Emblematic exceptions include California, which since statehood has had a principle of legislative control over court rulemaking rooted in the Field Code, and New York, which also adheres to legislative primacy in court rulemaking because of the Field Code. Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 464–66 (1997).

assets and public benefits.[252] Courts are also supposed to consider the defendant's expenses.[253] Yet, in general, there has been little guidance offered to judges from on high about *how* to make an ability-to-pay determination.[254]

If judges create and revise rules from the perspective of how people *actually live*, they might develop different rules that would make the courts more procedurally and substantively accessible for poor litigants. How are judges supposed to know how any specific litigant lives, and how well their individual life situations map onto the structural conditions of poverty? Some analysts have argued that privately developed technological assessment tools can help judges truly assess a litigant's ability to pay.[255] These tools are ostensibly easy for litigants to access and better promote the accurate assessment of the amount a poor litigant is able to pay than the current scattered group of regimes.[256] However, evidence of more accurate outcomes to date is still limited, and it is not yet clear what the unintended consequences of this tool might be.[257] Ultimately, the measure of this tool's success should not primarily be whether it was easy for indigent litigants to use, but rather whether it produces the best substantive, contextually rich information about a litigant's ability to pay.

Among other factors, ability-to-pay hearings should consider the potential hardship to families in their assessments of affordability. Even if an indigent defendant can scrape together enough money to cover a fee, that does not necessarily mean it is reasonably "affordable." Recognizing that poor defendants must often pool familial resources in order to pay court fines, and taking note of the well-known racial disparities in criminal punishment, one commentator has argued that ability-to-pay hearings merely facilitate

252. *See* Theresa Zhen, (*Color)Blind Reform: How Ability-To-Pay Determinations Are Inadequate To Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 202 (2019) (describing, among others, Alabama, which makes litigants list the value of assets like motor vehicles, and New Hampshire, which inquires into litigants' public-assistance income).

253. *Id.*

254. Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1853–54 (2015).

255. *See, e.g.*, Meghan M. O'Neil & J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability To Pay*, 82 LAW & CONTEMP. PROBS. 199, 225 (2019) (discussing the authors' empirical study on an online ability-to-pay assessment tool and the finding that it improves the accuracy of the ability-to-pay determination).

256. *Id.* at 221–22.

257. *See id.* at 225 (citing the limited sample size of the empirical study into the online ability-to-pay assessment and pointing out the potential for both litigant manipulation and judicial shirking).

a regressive tax upon poor Black families.[258] Instead of borrowing money for subsistence, indigent defendants are borrowing money to pay for court fees—thereby reducing their ability to rely on these ties in the future for true needs.[259] The ability-to-pay analysis should take account of the networked lives of poor people, and they should take care not to assume that it is cost-free for the litigant to seek financial support from friends. Courts should be aware that poverty contributes to the fragility of poor people's social networks because of the difficulty of resource sharing, and they should aim to preserve those networks for survival and social well-being, rather than paying off court debt.

Broader approaches that incorporate research-based knowledge about the substantive conditions of poverty and the problems poor people encounter in courts might go further toward ending poverty criminalization than invasive and technical individualized assessment tools. Judges can read contextual empirical works about the daily experiences of people living in poverty as part of the rulemaking process. Qualitative approaches can augment the quantitative information received from technological assessment tools, allowing the court to gain more systematic and collective knowledge about how people in their jurisdiction navigate life and complex institutions like courts and other bureaucracies. Judges and court staff can even follow the example of Judge Weinstein described above by spending time in the neighborhoods in their jurisdictions where poor litigants reside.

In individual cases, lawyers introduce information on the record. However, judges in rulemakings do not have the benefit of reviewing a record produced by litigants. Therefore, judges enacting rulemakings should be more proactive in gaining relevant information about how poor people interact with the courts and how courts can exacerbate punitive responses to poverty. Indeed, incorporating this type of information within court processes in ways that affect judges' mental frameworks about the rulemaking process can reduce the hardships attached to highly invasive court processes in individual cases.[260] Judges should go through the steps of articulating how they think people live

258. Zhen, *supra* note 252, at 193, 200.

259. *See* Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 722 (2019) (discussing the burden that poverty places on friendships); Matthew Desmond, *Disposable Ties and the Urban Poor*, 117 AM. J. SOC. 1295, 1318–21 (2012) (discussing how financial stress among the urban poor can fracture support relationships).

260. *See* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1503–04 (2019) (describing the level of detail required on the forma pauperis forms); *see also supra* Part I.A.2.b (discussing the high level of scrutiny imposed on public-benefits recipients).

in the world as they design court rules, rather than relying upon assumptions about poor people's ways of life, especially given judges' generally elite backgrounds.[261] A demosprudential perspective on poverty, then, might also reveal the value of class–origin diversification of the bench. Judges who have personally experienced poverty and marginality might be best suited to see the concerns of litigants in their courtrooms, to educate other judges about their blind spots on substantive aspects of poverty criminalization during training and deliberation, and in so doing to promote collective judicial impartiality.[262]

Judicial rulemaking and commentary can also acknowledge judges' obligation to root out bias in the courts, including systemic socioeconomic bias. The Model Code of Judicial Conduct specifically directs judges to avoid various forms of bias, including socioeconomic-status bias, in the administration of their duties.[263] Yet, as described in Part I, judges preside over cases within larger systems that are deeply biased in ways that judges can easily detect. There is some debate about what judges may ethically do to respond to this bias without crossing over into partiality. Yet, as the scholarship on active judging suggests, to call current judicial practices "unbiased" or "neutral" is to ignore reality in a way that itself raises ethical questions.[264] Engaging in searching inquiries that expand the contextual record to better recognize how substantive and structural conditions of poverty operate

261. *See* Neitz, *supra* note 191, at 140 (noting how wealthy judges may make decisions disadvantageous to poor litigants without meaning to, simply because they cannot understand poor litigants' circumstances); Lisa R. Pruitt, *Who's Afraid of White Class Migrants? On Denial, Discrediting, and Disdain (and Toward a Richer Conception of Diversity)*, 31 COLUM. J. GENDER & L. 196, 252 n.194 (2015) (discussing how judges across the country are disproportionately upper class).

262. *See* Carlton W. Reeves, U.S. District Judge for the Southern District of Mississippi, Prepared Remarks: Defending the Judiciary: A Call for Justice, Truth, and Diversity on the Bench, at 12 (Apr. 11, 2019), https://lawprofessors.typepad.com/files/4-11-19-judge-reeves-speech.pdf [https://perma.cc/43FL-E8P8] ("Filled only with the experiences of prosecutors and state court judges, of Big Law partners and corporate counsel, of a single religion or sexual orientation, our courts will fail to find the many truths justice must see. We need a judiciary as diverse as our country – as diverse as 'We the People.'"); *see also* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000) (arguing that diversity on the bench leads to impartiality); Maya Sen, *Diversity, Qualifications, and Ideology: How Female and Minority Judges Have Changed, or Not Changed, over Time*, 2017 WIS. L. REV. 367, 370 (describing the ideological gap between female and minority judges and their white male counterparts).

263. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (AM. BAR ASS'N 2014).

264. *See* Zorza, *supra* note 246, at 428 (discussing how a judge who appears neutral by acting passively can actually enable nonneutral outcomes given extrinsic forces pushing against neutrality).

in a case is not to be biased; in fact, it may increase the aggregate neutrality of the system.

III. TWO POTENTIAL CRITIQUES OF A JUDICIAL DEMOSPRUDENCE OF POVERTY

Despite the promise of judicial demosprudence, there are several possible criticisms of this approach. This Part briefly identifies and responds to two such critiques.

A. Opinion Writing

One critique of the approaches outlined above might be that one of the central demosprudential techniques, writing opinions, is not available to many judges—especially those who most consistently confront substantive and structural aspects of poverty criminalization in their courtrooms. Opinion writing is a routine activity for some judges, but it is an infrequent practice among others. Through the multiple steps in litigation, judges usually issue orders without a detailed explanation of their reasoning.[265] Even in the final disposition of the case, judges consider the relative impact of a potential opinion on other parties not before the court, and may issue something less than a signed, published opinion.[266] Also, few cases are decided through formal adjudication. In the criminal system, a massive number of cases are resolved through plea agreements—so many that the criminal justice system might reasonably be labeled "a system of pleas."[267] In the rare circumstance that a state court fully adjudicates a criminal case, there is considerable state-level heterogeneity in whether a jury of the defendant's peers or the judge will ultimately decide the case.[268]

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265. *See* David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (finding that written reason-giving is scarce in the federal trial courts).

266. *See* Aldisert et al., *supra* note 206, at 11 (stating that the majority of U.S. Courts of Appeals opinions are nonprecedential memorandum opinions designed for the parties only); Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1731–32 (2015) (describing the use of the summary order in Illinois appellate courts as well as the limit imposed on the number of precedential opinions allowed to be issued); *see also* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1197 (2012) (arguing that courts overuse per curiam opinions and proposing their curtailment for purposes of transparency and judicial accountability).

267. Crespo, *supra* note 251, at 1388.

268. T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 192 (2012).

In civil courts, most cases are decided through settlement processes.[269] Even when a judge resolves a case through a bench trial, the length of state trial dockets can weigh against writing a detailed opinion in cases where it might otherwise be valuable. All of these characteristics of adjudication mean that this particular demosprudential tool is not truly available across all judges, in all courts.

There are, indeed, significant limits to a model of demosprudence that relies primarily on judicial opinions. It is for this reason that the approach advocated in this Article expands the notion of demosprudence beyond its usual parameters, reaching into the other types of daily work judges do. Most previous work that discusses judicial demosprudence has focused on constitutional rights, international law, federalism, and other topics that may be more likely to result in judicial opinions and to be litigated in federal courts.[270] As described in Parts II.B.2 and II.B.3, thinking about demosprudence from a poverty lens demands attention to other tools, especially tools that might be more available to judges who confront poverty in "poor people's courts" and misdemeanor courts.[271] One contribution of this Article is to bring to light the democratic possibilities within aspects of judging that tend to receive less attention than opinion writing in legal scholarship, such as court management and rulemaking.

B. The Roles of Judges

Some would reject the idea that judges should take demosprudential approaches to their work. Critics might argue that judging is an act of detachment and formal independence from the concerns of regular people—a job that should rigorously avoid normative visions of justice that do not emanate directly from current law or doctrine.[272] Professor Terry Maroney has helpfully referred to

269. *See* Jeffrey A. Parness, *American General Jurisdiction Trial Courts: New Visions, New Guidelines*, 55 U. KAN. L. REV. 189, 189 (2006) (noting the changing role of trial court judges, from running trials in court to overseeing settlements outside of court); *see also* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (analogizing the then-growing phenomenon of civil settlement to plea bargaining and arguing that both are troublesome because of potential coerciveness, their lack of appealability, their decentering of judicial authority, and their prioritization of docket trimming over justice); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 999 (2000) (critiquing a similar phenomenon in the federal courts).

270. *See supra* notes 200–02 and accompanying text.

271. *See* text accompanying note 245 *supra*.

272. *See* Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help from Ordinary Citizens)*, 80 MARQ. L. REV. 1, 17–18 (1996)

this idea as "the cultural script of judicial dispassion": a deep-rooted and resilient Western notion that judging, properly done, is as insulated from human life and emotion as possible.[273]

This vision of judging, however, is at best quixotic. It relies upon assumptions about judging that ignore the ineluctable interplay between law, legal interpretation, and cultural change.[274] It also fails to represent the actual daily labor of judging, especially in the trial courts where poverty criminalization is most consistent and apparent. It omits the mundane difficulty of judging. It overlooks the emotional labor associated with issuing binding decisions on important matters affecting real people.[275] Only in the rarest of circumstances is judging a purely theoretical exercise—and, arguably, judging should never be thought of as detached from human wisdom or experience.[276] Judge Denny Chin of the U.S. Court of Appeals for the Second Circuit argues that, although empathy "should play no role in a judge's determination of *what* the law is," empathy and even emotion are nonetheless "essential . . . in the real-world, day-to-day administration of justice."[277]

(discussing the view that judicial decision-making should be an objective process). Justice William Brennan famously rejected this conception of judging, arguing in contrast that emotional sensitivity, passion, and empathy were indispensable to judging even at the appellate level. *See generally* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law*,*"* 10 CARDOZO L. REV. 3 (1988).

273. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 631, 634 (2011) [hereinafter Maroney, *Persistent Cultural Script*].

274. *See* Guinier, *Demosprudence Through Dissent*, *supra* note 16, at 60 (describing how changes in constitutional understanding stem from the interactions between citizens and the judiciary); Robert C. Post, *The Supreme Court 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (same).

275. *See* Maroney, *Persistent Cultural Script*, *supra* note 273, at 643 (discussing judges' regular engagement with emotion); Judith Resnik, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31, 36–37 (1990) [hereinafter Resnik, *Feminism*] (describing a feminist analysis of judging that recognizes that "judges are socially and culturally imbedded (and should be)," analyzes "judging as a painful and difficult activity," and acknowledges that "[c]ompassion is constantly an activity that judges and juries engage in, often without a vocabulary to describe and discuss it").

276. *See* Resnik, *Feminism*, *supra* note 275, at 35–36 (noting the interconnectedness of judges); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 911 (2015) ("Troubling or not, judges' emotional reactions are inevitable. Judges are not computers. By design, the justice system is a human process . . . .").

277. Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1563–64 (2012). To be sure, emotion should not run unchecked and unregulated through the judicial system, not least because judicial emotion could increase bias, not reduce it. *See* Laurie L. Levenson, *Judicial Ethics: Lessons from the Chicago Eight Trial*, 50 LOY. U. CHI. L.J. 879, 902 (2019) (emphasizing the danger of uncontrolled judicial anger); Maroney, *Emotional Regulation*, *supra* note 208, at 1501–04 (discussing the need to regulate emotion based on the environment); *cf.* GONZALEZ VAN CLEVE, *supra* note 186, at 15–49 (describing implicit and explicit judicial bias in criminal courts in

Recognition of the human condition, including by acknowledging evidence of the multifaceted relationship between poverty and legal marginalization, is not only permissible but also *necessary* to good judging—assuming that democracy enhancement and truth telling are goals of the judicial process.[278]

Critically, judges cannot, working alone, produce demosprudential results or solve the problem of poverty criminalization. Scholarship on demosprudence often examines other parts of the ecosystem of lawmaking and democracy building.[279] More importantly, the theory of change that undergirds our argument is not judge-centric or focused solely upon top-down decisions by elites. It is too naïve, however, to say only that movements should organize and political branches should act; scholars must also examine, deconstruct, and redirect the role of judges and other legal elites in the current poverty criminalization ecosystem.

CONCLUSION: FROM COURTS TO MOVEMENTS

Although this proposal focuses on judges, the deeper change needed to eradicate the criminalization of poverty does not begin or end with judges. Demosprudence employs a different theory of change

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Cook County, Illinois); Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 353 (2016) (describing judges' bias-mitigating strategies). Indeed, given most judges' elite backgrounds, some have hypothesized—though at this point with scant empirical support—that they are more likely to sympathize with well-off litigants than poor ones. *See, e.g.*, Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 275–81 (1995) (describing an empirical analysis about how judges' own characteristics affect outcomes in civil rights cases); *see also* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1463–65 (1998) (finding that attending an elite law school correlates with practical reasoning for judges). *But see* Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 27–28 (2001) (discussing how judges who went to elite law schools are more likely to sympathize with a disadvantaged party). A challenge for this empirical research is that a blunt variable might not easily capture the aspects of an elite background that would be most relevant to judicial decision-making. Also, because judging is an elite position within the elite legal profession, perhaps the relevant question is not whether judges with the *most* elite backgrounds judge differently from those with somewhat less elite backgrounds; instead, it is whether a less socioeconomically hierarchical judiciary would, in the aggregate, produce a legal decision-making apparatus that is less likely to penalize poverty. Measures should, at the least, focus on the collective characteristics of judicial systems, not the individual characteristics of particular judges.

278. *See* Greene, *Pathetic Argument*, *supra* note 204, at 1452–56 (describing pathetic argument as democratic).

279. *See supra* note 194 (discussing the scholarship on demosprudence by nonjudicial actors).

than traditional jurisprudence does: it recognizes that although legal elites like judges can and should promote democracy and social engagement, legal elites cannot be at the *center* of these movements. It does not repudiate rights claims but instead sees rights and courts as flawed and incomplete aspects of legal architecture that would nevertheless be unwise to ignore in practical movements for power redistribution and justice.[280]

Judges are one class among many institutional actors that operate together to produce the system. As Professor Robert Cover described, "[w]hen [judges] oppose the violence and coercion of the other organs of the state, judges begin to look more like the other jurisgenerative communities of the world."[281] A judge working in service of justice today is, by necessity, conversant with the burgeoning social movement against poverty criminalization. An iterative relationship between judges and social movements is a precondition of a demosprudential perspective. The judicial demosprudence we describe here offers practical ways that judges can intervene in legal violence against the poor,[282] and in so doing, better meet their ethical obligations as judges. More broadly, a judicial demosprudence of poverty protects the fundamental interests of equal and equitable justice under law.

280. *Compare* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 445–47 (2018) (discussing how social movements are necessary to expand the concept of rights), *and* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1370–71 (1984) (arguing that rights themselves are not important but the politically effective action that preceded them is), *with* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410 (1987) (arguing that the rhetoric of rights is important in itself), *and* Valeria M. Pelet del Toro, Note, *Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America's Colony*, 128 YALE L.J. 792, 839–42 (2019) (discussing the use of rights to protect social movements in Puerto Rico).

281. Cover, *supra* note 192, at 57–58.

282. *See* Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOC. 1380, 1387 (2012) ("Legal violence . . . is embedded in the body of law that, while it purports to have the positive objective of protecting rights or controlling behavior for the general good, simultaneously gives rise to practices that harm a particular social group.").