

## Judicial Responsibility Conference – 4/6/17

GOOD MORNING. In 2003, I became a trial judge in San Diego. Because I had been a civil litigator for my entire legal career, my first assignment was, of course, in a criminal trial department. I didn't know much about criminal justice. But I had good and kind judicial colleagues who helped whenever I asked, and both the prosecutors and defense attorneys who appeared before me taught me the ropes. When I left the bench in 2013 to work for the Justice Department, I assumed every state criminal trial court worked the way San Diego did. Bail was set according to a schedule; unpaid fines and fees were subject to a civil collection process which included the suspension of your driver's license if you didn't pay; lawyers – either private counsel or a public defender – were present at every stage of a criminal proceeding from arraignment to sentencing - for

felonies and misdemeanors. Plea bargaining was the norm – and for misdemeanors, the majority of defendants pled guilty at arraignment with a public defender standing by their side. And I assumed that the criminal justice system I had worked in was fair, just, and certainly constitutional. I was wrong on all counts.

I want to share with you 3 short stories – all reported in the media – that challenged my assumptions about the state of criminal justice in the states, including my home state.

The first story comes from the Washington Post in December of last year. Shannan Wise, was working two temp jobs and attending school for medical billing in Baltimore, Maryland. She recounted the countless calls she made from Central Booking in Baltimore, praying that her friends and family would come up with the \$1000 she needed to get out of jail. She told her sisters to pawn her television set. They

would try to pawn their laptops. One friend offered \$25; another pitched in \$100. Wise, 27, had never been in jail before October 2015, when a police officer arrived at her home and said he had a warrant for her arrest. Her younger sister, who suffers from mental illness, had filed an assault charge against her. Wise, a single mother of two, stayed in jail for five days before she was able to post bail. If the money had not been scraped together, Wise would have been detained until January 2016 – 2 months after her arrest - when her first hearing was held and the charges were dismissed.

National Public Radio reported the second story in November 2014. Sharnell Mitchell was arrested in January 2014 at her home in Montgomery, Alabama for failure to pay traffic tickets she received in 2010. The single mother was handcuffed in front of her children, 1 and 4 years old, and sentenced to 58 days in jail to “sit out” her unpaid fines – she was credited

with \$50 a day and an additional \$25 a day if she agreed to clean the jail. Mitchell, who also cared for her disabled mother, had made a couple of small payments but fell behind because she had little income, less than \$14,000 a year that she made from her occasional work styling hair.

The third story dated October, 5, 2016, comes from the Marshall project. An insurance attorney, Ryan Goodwin, found himself in the visiting area of the Caddo Correctional Center in Shreveport, La., bracing for an awkward conversation. He had to tell his new client – a 16 year old who was facing life in prison for stealing someone’s wallet and cell phone at gunpoint that, “I don’t do criminal defense.” Goodwin typically represents insurance companies in litigation following car accidents. He has no criminal law experience. But because the Caddo Parish public defender’s office was suffering from a critical lack of funding, it could no longer provide counsel to

hundreds of its poor clients. To fill the void, judges were randomly assigning lawyers to defendants from an alphabetical list of every lawyer with a professional address in the parish, who were ordered to represent their new clients without pay.

All three of these stories have elements in common. All of the defendants were poor. Reflecting the demographics of poverty in the United States today, two of three were people of color. Regardless of whether the offense was a “minor misdemeanor” - the consequences to the individuals and their families were serious and long-lasting. All 3 of these individuals – and their friends, families and communities – lost faith and confidence in our justice system.

These stories have another element in common – a judge. A judge - like me - who imposed bail without considering whether the defendant needed to be detained pretrial or what amount of bail the

individual could afford, a judge who sentenced a woman to jail without considering whether her failure to pay fines and fees was willful, a judge who conscripted an insurance lawyer to represent an indigent criminal defendant without considering whether the lawyer could effectively represent him.

I am going to talk about the state of our state justice system this morning using 3 examples: bail, fines and fees, and access to counsel. These are by no means the only problems in our criminal justice system, but they are widespread and pernicious – and they are areas where judges have a particular role to play – they can by their actions perpetuate or ameliorate injustice.

My goal this morning is not only to talk substantively about these issues but to challenge you – as I was challenged - to think critically about the role of the judge, to consider what judges can and should do to right a pendulum that is listing

perilously to one side. We're all here today because we care deeply about justice – justice for our communities and justice for the individual men, women and children who appear before us. We believe in the rule of law, we believe in fundamental fairness. But to be a just judge today, we can't just be judges uncritically accepting the system we work in. We need to change the culture of our courts – to shift the paradigm of the judge from an umpire dispassionately calling balls and strikes to what I call neutral engagement. A judge who is impartial – but passionate about doing justice – about ensuring that our system truly provides equal justice for all.

As I noted at the outset, San Diego County, like all California counties, is required by law to adopt a bail schedule. Each offense is paired with a dollar amount. If you are arrested, for example, for assault on a parking control officer – something I'm sure all of us have been tempted to do, your bail is \$5000; if

you're arrested for assault with a firearm, bail is \$20,000. If you or your family can afford to pay make bail, you are released and given a date to come back to court. If you can't afford a bail bond, you stay in jail. People with money go home; people without money go to jail.

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

And it seems that until quite recently, few policy makers have thought much about bail since Congress passed the federal Bail Reform Act fifty-five years ago. The Act, which applies only in federal court, requires a judge to make an individualized assessment of two factors – whether the defendant is a flight risk and whether the defendant is a risk to public safety. If the judge finds that a defendant is a risk to public safety, the judge can impose conditions



on the defendant's release or in rare instances where no conditions can protect the public, detain a defendant pretrial. If the judge finds the defendant is a flight risk, the judge can set a financial condition but only after giving meaningful consideration of the individual's ability to pay and alternative methods of securing the individual's appearance at trial. Why? Because bail was never supposed to be a mechanism for keeping people in custody; when bail was first invented in England in the Middle Ages, its purpose was to let people get out of jail pretrial. Somehow, some time between the Middle Ages and now, the paradigm shifted. Despite the United States Supreme Court's unequivocal declaration that "[i]n our society, liberty is the norm, and detention prior to trial . . . the carefully limited exception," we started to view detention as the norm and pretrial release as the exception.

The number of people incarcerated pretrial has increased dramatically since the 1980's. Roughly 60% of the jail population nationally is comprised of pretrial defendants – up from 50% in 1996 and 40% in 1986. Since 2000, 95% of the growth in the overall jail inmate population has been due to the increase in the population of defendants held pretrial. Most of those detained pretrial are accused of nonviolent offenses. Disproportionately, they are people of color. African-Americans and Hispanics are at least twice as likely as Whites to be detained pretrial for non-violent drug arrests.

And the overwhelming majority are poor because of course only people who cannot afford bail are held in custody pretrial. And just a few days in jail can make a defendant even poorer. As little as 3 days in custody increases the likelihood that a person will lose their job, their housing, be forced to abandon their education, or be unable to make their child

support payments. The consequences of pretrial detention are not only borne by the individual in jail, but also by their family and the community. A child whose single parent is taken into custody not only is deprived of the emotional and financial support of their parent, they may be placed in foster care or move in with a relative and be forced to change schools. Even a temporary disruption in a child's life can have harsh and long-lasting consequences. The cost to taxpayers of this system is enormous. In the United States, we spent \$9 billion on pretrial detention last year.

We also know, that a decision to detain or release a defendant pretrial affects the outcome of a case. In state criminal cases, if a conviction can result in a jail sentence, people who are detained pretrial are four times more likely to be sentenced to jail and their sentences are three times longer than defendants who are released pretrial. If a conviction can result in a

prison sentence, people who are detained pretrial are three times more likely to be sentenced to prison and their sentences are twice as long as someone released pretrial. And people detained pretrial are more likely to plead guilty – whether that’s because they are guilty or because they simply want to go home.

Finally, bail does not make our communities safer. Perversely, pretrial detention is actually a gateway to deeper and more lasting involvement in the criminal justice system. Defendants detained more than 24 hours are more likely to commit new crimes after they are released than defendants charged with the same offense who are released pretrial.

We have created a bail system in the United States that not only punishes people for their poverty, it makes people accused of crimes, their families and their communities poorer still. And it’s being done by

judges, -- just like me -- in violation of the United States Constitution.

In briefs filed in district Court and the 11<sup>th</sup> Circuit, the Department of Justice stated unequivocally that “Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay.”

Just as the number of defendants detained pretrial has increased dramatically since the mid-1980's, so has the amount of fines and fees imposed by the justice system. The two are not unrelated, and both are a cause and a consequence of mass incarceration. Since 1980, the number of people incarcerated in the United States has quintupled. Because the vast majority of those incarcerated are held in state and local jails and prisons, the cost of incarceration has been born overwhelmingly by state and local governments. From 1979 to 2013, total state and local corrections expenditures increased by

324 percent – from \$17 to \$71 billion. By comparison, during that same period, state and local education spending – from pre-Kindergarten through high school - increased 107 percent. The cost of corrections does not include the cost of adjudication, that is, the cost of operating courts nor does it include associated costs like public defenders, prosecutors, police, or probation services. In order to defray these costs, as well as, in some cases, simply to provide additional general fund revenue, state and local legislators have demanded that courts impose steep fines and fees on defendants.

Since 2010, every state except Alaska, North Dakota and the District of Columbia has increased civil and criminal fines and fees. To cite just one example, in my home state, the fine for rolling through a stop sign is \$35. But the additional fees the legislature has imposed brings the total cost of the ticket to \$349. As state and local governments have

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

Many Americans first heard or read about fines and fees as a result of the Justice Department's investigation of the Ferguson, Missouri police department. In 2015, 23% of the city of Ferguson's revenue came from court fines and fees, and they were excessive: \$302 for jaywalking, \$427 for disturbing the peace, and \$531 for allowing high grass or weeds to grow on your lawn. When people could not afford to pay these fines and fees, they were arrested, jailed and faced payments that far exceeded the cost of the original ticket. In one case, a woman who was ticketed on a single occasion when she parked her car illegally was arrested twice, spent six days in jail, paid the court \$550 dollars in fines and fees, and still owed the City of Ferguson \$541.

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

Without question, states have a fundamental interest in punishing people – rich and poor – who violate the law. And courts must have the authority to punish people who willfully refuse to pay a fine. But before a court can incarcerate someone for nonpayment of court debt, a judge must first determine that the failure to pay was in fact willful, and that means determining that the person had the ability to pay the amount owed. To do otherwise, according to the United States Supreme Court, would amount to the unconstitutional practice of “imprisoning a person solely because he lacks funds to pay a fine.” For those who cannot afford to pay, the



court must consider alternatives to incarceration, such as community service.

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

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

So why does this happen? We are supposed to have an adversarial system where the prosecutor argues for the state, defense counsel makes the case for the accused and the judge weighs the arguments – considers the facts and the law – and reaches a just decision. Certainly, one contributing factor is that a

critical piece of that equation is often missing – and it's defense counsel.

In Louisiana, the public defender system has been so chronically underfunded that last year, 33 out of 42 public defender districts restricted services because defender caseloads were 3-4 times the state public defender board's caseload standards. Judges began taking drastic measures, including like in Caddo Parish, conscripting lawyers with no criminal experience whatsoever to represent defendants. Other judges held mass plea and sentencing hearings with groups of 50 defendants represented by a single public defender. Some judges put defendants on waiting lists for public defenders, and if the accused could not afford bail, they remained in jail until a lawyer was available – in some cases for months.

Wholesale violations of the sixth amendment right to counsel are not just a problem in Louisiana. In New York state, Washington state, Pennsylvania, and

Georgia advocates have brought cases arguing that the 6<sup>th</sup> amendment right to counsel has been violated because defense counsel are so overworked and under-resourced that they are lawyers in name only. The Department of Justice has weighed in arguing that if the facts are as the plaintiffs claim, the defender systems are unconstitutional. Similar cases are pending in California among other states.

In Utah, according to a report prepared for the Utah Judicial Council, trial courts do not uniformly provide counsel at all critical stages of criminal cases. Many defendants, particularly those facing misdemeanor charges, never speak with an attorney. According to the Report, “The challenge of providing effective representation for each client can be exacerbated by excessive caseloads that reduce the time a lawyer can spend on an individual’s case and the lack of appropriate independence from undue state and local government interference in securing

the necessary resources to put the state's case to the test.”

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

And the problem pervades not just adult systems, but also juvenile proceedings. In Cordele Circuit in Georgia, in 2013, of 661 juvenile delinquency cases, children were represented by counsel in just 19. The remaining children “waived” their right to counsel – without being counseled by a lawyer first. Again, this is not just a problem in the South. The same practice has been documented in other states.

The problem is particularly acute pretrial despite the Supreme Court's holding in *Powell v. Alabama* 85 years ago – “During perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the

beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.”

In 8 states, lawyers are never present at first bail hearings; in 17 states, lawyers appear infrequently or in only a token number of courts, in 11 other states, a defendant has only a 50% chance of obtaining counsel at first appearance.

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

To be sure, the US Supreme Court has not held definitively that the Constitution requires counsel at

first appearance or at a civil contempt hearing or if incarceration is not a possible punishment for the offense – but justice does. The consequences of pretrial detention, the consequences of a civil contempt proceeding, the consequences of any criminal conviction are enormous. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great. Going to jail for even a few days may result in loss of professional licenses, exclusion from public housing, inability to secure student loans and other forms of credit, and today, it will almost certainly result in deportation for noncitizens. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings at taxpayers' expense. For many people, our nation's misdemeanor courts are the first

and often the only place they come into contact with our criminal justice system. People's confidence in the courts as a whole – their faith in the state's ability to dispense justice fairly and effectively – is framed through these initial encounters. It's not surprising then that, as former Attorney Loretta Lynch observed, “too many of our fellow citizens, especially low-income Americans and Americans of color experience the law not as a guarantee of equality, but as an obstacle to opportunity.”

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



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

In 1886, Frederick Douglass gave a speech commemorating the 24<sup>th</sup> anniversary of the Emancipation Proclamation. Speaking nine years after the Federal Army was withdrawn from the South and Reconstruction era reforms had largely been reversed, Douglass focused on the justice system and warned that “where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an

organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.”

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