JUSTICE NEWS

Director Lisa Foster of the Office for Access to Justice Delivers Remarks at ABA's 11th Annual Summit on Public Defense

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Thank you, and good afternoon.

Thirteen years ago, in a courthouse just about a mile from here, I was sworn into office as a California Superior Court Judge. I became a judge because, like most of you, I believed that the law could be a force for good – for equal justice - and that the courts were the place where that aspiration was achieved. Ten years as a trial court judge – including during the worst of the great recession – cemented my belief in the former and profoundly upset my faith in the latter. Informed by my judicial experience and by what I have come to learn since joining the Justice Department 18 months ago, I now know that in far too many places in the United States, courts perpetuate and exacerbate poverty and inequality.

I'm going to talk today about how that occurs, addressing two issues – bail and fines and fees – in some depth and then touching briefly on the civil justice system – I know, not a typical topic of conversation in the defense community, but one with which, in my view, we need to contend.

Although I had been a civil litigator for my entire legal career, soon after I became a judge I found myself presiding in a criminal trial department. I didn't know much about bail. I didn't have to. The county, like all California counties, had adopted a bail schedule, and it was easy to use. Each offense was paired with a dollar amount and multiple charges were stacked. There were lots of bail bond companies close to the courthouse and the jail. Some of the defendants whose cases were assigned to me were out on bail; most – particularly those charged with felonies – were in custody. At the end of every preliminary hearing – California proceeds by preliminary hearing not by indictment in the overwhelming majority of cases – if I determined there was sufficient cause to bind a defendant over for trial, I was trained to say, "Bail review waived, counsel?" And the answer was almost always, "yes." 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, not the public defenders.

And it seems few policy makers have thought much about bail since Congress passed the federal Bail Reform Act 50 years ago. When President Johnson signed the bill into law, he described the bail system as "archaic and cruel." "Because of the bail system," he said, "the scales of justice have been weighted not with fact nor law nor mercy. They have been weighted with money. But now we can begin to insure the defendants are considered as individuals and not as dollar signs."

Unfortunately, the Bail Reform Act was not the beginning of a movement to reform bail nationwide – it was, practically speaking, the end. Until recently, very few states adopted statutes comparable to the Bail Reform Act. To the contrary, bail, like many aspects of the criminal justice system, changed in the 1980s and 1990s in ways that policy makers only now see as deeply troubling. At the same time that police and prosecution practices and longer sentences resulted in mass incarceration, at the same time that fines and fees imposed on criminal defendants exploded – the number of people incarcerated pretrial also increased. Today, roughly 60 percent of the jail population nationally is comprised of pretrial defendants – up from 50 percent in 1996 and 40 percent in 1986.

And the overwhelming majority of those people are poor. Bail exacerbates and perpetuates poverty because of course only people who cannot afford the bail assessed or to post a bond – people who are already poor – are held in custody pretrial. As a consequence, they often lose their jobs, may lose their housing, be forced to abandon their education, and likely are unable to make their child support payments. We also know, and we have known for 50 years – that a decision to detain or release a defendant pretrial may be a critical factor affecting the outcome of a case. Most

disturbingly, there, is in the words of Professor Caleb Foote who wrote an article in the University of Pennsylvania Law Review in 1965 entitled "The Coming Constitutional Crisis in Bail" "an extraordinary correlation between pretrial status and the severity of the sentence after conviction." We have known about bail's pernicious ability to undermine the principle of equal justice under law for 50 years. We have known for 50 years that, as former Attorney General Robert Kennedy said, "the rich man and the poor man do not receive equal justice in our courts." And, as I noted at the outset, there has been little done about it in the states.

But that has changed, especially recently. And that change is significant, suggesting strongly that we are reaching a tipping point on the issue of bail. The Justice Department has been actively advocating bail reform in the states for many years. The department convened the National Symposium on Pretrial Justice in 2011 and began to fund the Pretrial Justice Working Group. In 2014, the department funded Smart Pretrial grants, the first pretrial demonstration project supported by the Justice Department in 30 years. Attorney General Loretta Lynch and former Attorney General Eric Holder both have spoken out about the injustice of incarcerating the accused pretrial simply because they are poor.

Last year, the department filed a statement of interest in *Varden v. the City of Clanton*, advising the District Court that: "Fundamental and long-standing principles of equal protection squarely prohibit bail schemes based solely on the ability to pay." I am happy to report that not only did the Varden case settle shortly after our statement of interest was filed, but the brief has been cited by public defenders in individual cases and appended to cases challenging bail systems around the country, including one filed here in California late last year.

In Varden, the Justice Department sought to make the legal claim that fixed sum bail systems are unconstitutional and to advance policy arguments for why cash bail defeats the very policy objectives it purports to advance. Now some have misinterpreted the department's position in Varden, arguing that it only addresses fixed-bail systems – or bail schedules like the one used here in California. That would be a crabbed reading of the department's brief. To be sure, the facts in Varden were that the city of Clanton employed a fixed-bail schedule, and so our brief addresses that fact squarely. But the constitutional principles at work are much broader than that. As we say in the very first sentence of our brief: "[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the equal protection clause of the 14th Amendment." A system that results in this disparate treatment will violate the Constitution regardless of the manner in which it does so. Where there is a pre-fixed menu of bail prices, this result is inevitable. But the same constitutional violations arise in other money bail systems, including those in which judges set cash bail amounts in one case after another without due consideration of a person's ability to pay. However the system is designed or administered, if the end result is that poor people are held in jail as a result of their inability to pay while similarly situated wealthy people are able to pay for their release, the system is unconstitutional. Although it may be theoretically possible to design a money bail system that does not regularly violate the Constitution, we haven't seen it yet.

The department's efforts are not unique. In fact, each of the accomplishments I've just cited – the National Symposium, the Smart Pretrial program and the brief in Varden – depends on the work of other advocates. You will hear from some of them on this afternoon's panel, and so I will leave it to them to talk more about all of their extraordinary work to reform bail in the states – through litigation, legislation, education and with the notable assistance of foundations like Public Welfare, Arnold and MacArthur.

Let me turn now to another way in which the justice system perpetuates and exacerbates poverty – one which truly exemplifies President Johnson's concern that defendants are treated as dollar signs: fines and fees. As most of you know, in the aftermath of the uprising in Ferguson, the Justice Department launched an investigation into the Ferguson Police Department. The report, issued by my colleagues in the Civil Rights Division, included a section on the Ferguson municipal court. Because Missouri law allowed municipalities to keep a percentage of the revenue they collect from fines and fees imposed by the city's municipal court, the police were pressured to cite people for multiple and often trivial violations of local laws. Emails produced during the investigation talked about the need to "fill the revenue pipeline" officers were instructed to take ticketing to "the next level" or risk disciplinary action. The municipal court - which is only in session one day a week – imposed fees and fines without ever inquiring about a defendants ability to pay, and then issued warrants for the arrest of people who didn't pay, resulting in thousands of people being arrested and incarcerated only because of their inability to pay these amounts.

As journalists, advocates, including many of you here today, and others have uncovered, the problem is not confined to Ferguson or to Missouri. The breadth and depth of the problem is difficult to overestimate. There are in the United States today, approximately 6,500 municipal courts operating in 34 states, although they often go by different names such as city courts, justice courts or mayor's courts. Some states have just a handful; some states, like Texas and New York have over 1,000. Generally, they are courts of limited jurisdiction – most have authority only to adjudicate traffic and municipal code violations; some also have jurisdiction over minor misdemeanors, some have full misdemeanor jurisdiction and a couple also have some felony jurisdiction – although that tends to be only for arraignment.

Many of the municipal courts are part time, and in 28 states, one does not have to be a lawyer to be a judge. Some state courts are unified – the highest state court has oversight and supervisory authority over all courts. In some states municipal courts are independent.

As you all know, because your clients contend with them every day, the problem of fines and fees is not simply a municipal court problem. As they have incarcerated more and more people, state and local jurisdictions have turned to criminal defendants to finance criminal justice, including in juvenile courts where many jurisdictions are enforcing orders against the parents or guardians of justice-involved youth to pay court – and incarceration-related costs. Those fines and fees are assessed typically without any inquiry into a defendant's ability to pay, and when they fail to pay, they can be reincarcerated.

That same problem affects some civil proceedings as well, including most notably child support.

Last December, the department and the White House convened a two-day meeting of advocates, judges legislators, court administrators and federal officials to address the problem of, and air potential solutions to, fines and fees. I can report that most court leaders were as surprised and appalled as we were at the practices that had become routine. There are places around the country where some reforms already have been implemented, and we at the Department of Justice are committed to doing what we can to gather and disseminate best practices and encourage reform. We will soon be announcing several efforts that we hope will help local and state jurisdictions make serious and significant changes.

Finally, let me say just a brief word about the civil justice system, where, frankly more people are adversely affected by their inability to access justice than the criminal justice system, and where there is significant – consequential – overlap with the criminal system. And it is to that overlap that I want to speak. Criminal defendants often have critical civil legal needs. The average parent released from prison owes between $10,000 and $15,000 in delinquent child support. They likely owe hundreds if not thousands of dollars in criminal fines and fees – some stemming from the offense for which they were incarcerated; some from traffic violations. They may not have a valid driver's license; it was likely suspended as a result of the unpaid fines and fees or unpaid child support. Their Medicaid benefits may have been terminated while they were in prison. A parent may have lost custody of her children; she may need a domestic violence restraining order to protect her from a former girl or boy friend. And, as you all know, there is no civil right to counsel.

Most of us divide the work rigidly: defenders do criminal work; legal aid lawyers do civil work. To be sure, a handful of defender offices offer holistic services, and some organizations, like National Legal Aid & Defender Association, house both. But we are siloed – even while our clients don't distinguish between civil and criminal justice. To them, it's all one justice system, and it isn't working. We need to be talking together more and working together more. Let me give you just one example. The Department of Health and Human Services has promulgated child support enforcement rules that would help parents in custody. The rules – as currently drafted – would require child enforcement authorities either to automatically recalculate child support for a parent the state knows to be in custody or provide a mechanism for a parent in custody to easily modify a child support order from prison. Effective enforcement of that rule will require public defenders to work with legal aid providers, who know the system, and child enforcement authorities to design forms and procedures that work. If we don't solve poor people's civil legal problems, they will never get a second chance, and we will never see an end to inequality.

I want to close with a quote from Attorney General Lynch, who though she could not be here today, spoke in December at the White House Convening on Incarceration and Poverty. Attorney General Lynch began her remarks by asking "What is the price of justice?" Here's how she ended her speech:

"What is the price of justice? Let me now point out [that] the fundamental error in the question I posed. . . is that it is a question at all. The fundamental error of the question . . . is in thinking of justice as a commodity that can be quantified rather than a right inherent to all who stand under the sheltering arm of our constitution. Because to reduce this essential ideal, this precious idea, that I know means as much to me as it does to you, to try and reduce this idea to mere coin is an effort not only doomed to fail but ultimately is an effort that cheapens us all."

Thank you.

Topic: Access to Justice

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Speaker:

Lisa Foster, Director of the Office for Access to Justice

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