human rights
A PUBLICATION OF THE AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

ECONOMIC JUSTICE
Addressing Economic Justice in the Face of Increasing Inequality

By James J. Pierson

The basic principle and justification for economic justice set forth in Article 22 of the Universal Declaration of Human Rights (UDHR) is that "everyone, as a member of society, . . . is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

In the United States, which remains the largest economy of the world with GDP (nominal) over $20 trillion in 2018, the U.S. Census Bureau reports the number of people in poverty in 2018 was 38.1 million, and the official poverty rate was 11.8 percent. The burden of poverty is crushing to anyone impacted, but it falls unevenly, as evidenced by the poverty rate for children (16.8 percent), the disabled (25.7 percent), and those without a high school diploma (25.9 percent).

Poverty rates by race in 2018 were: non-Hispanic whites, 8.1 percent; blacks, 20.8 percent; Hispanics, 17.6 percent; and Asians, 10.1 percent. In 2018, of those in poverty, 45.3 percent—an astonishing 17.3 million people—met the Census Bureau definition for deep poverty.

The U.S. Census Bureau also reports the Supplemental Poverty Measure (SPM), which gauges the effects of transfers and taxes and other necessary expense (medical and expenses related to work) as a measure of economic well-being. The SPM rate for 2018 was 12.8 percent, a full 1 percent higher than the official poverty rate. Significantly, Social Security transfers and refundable tax credits prevented 27.2 million and 8.9 million individuals, respectively, from falling into poverty. But medical expenses pushed 8 million more people into poverty.

Another important measure of those struggling financially is called ALICE, an acronym for Asset Limited, Income Constrained, Employed. It is used by United Way and various academic and state organizations in 20 states to identify people who do not earn enough to afford necessities and may not be eligible or earn out of various government benefits or tax credits. For example, the ALICE 2019 Pennsylvania report noted that of Pennsylvania’s 5 million households, 

continued on page 5
Taxing Poor Kids
By Francine J. Lipman and James E. Williamson
A newborn is delivered into poverty every minute of every day, and the negative effects of poverty span a lifetime in the form of hunger, illness, crime, stress, and educational disadvantages. However, there are ways to mitigate childhood poverty by investing resources in vulnerable kids.

Criminal Justice Debt Problems
By John Mathews II and Felipe Curiel
Our legal system punishes poor people far more often and more harshly than the wealthy, often through pretrial detention and cash bail. An ongoing critical evaluation of the criminal justice system has resulted in cash bail systems across the country being eliminated.

ABA Bail Policy: Taking Steps to Achieve Reform
By Malia Brink
Resolution 112C, which urges jurisdictions to release defendants unless secured bond is necessary to ensure appearance in court, was adopted by the ABA House of Delegates in August 2017. Since then, the ABA continues to take a leading role in bail reform.

Roadmap to Economic Justice: Enhancing Protections for Auto Consumers
By James J. Pierson
Auto consumers must navigate around discrimination issues, dealer markups on loans, data collection dead-ends, blind curves on add-on products, uncertain Unfair and Deceptive Acts and Practices enforcement, and consumer education potholes in the rough terrain of auto consumer protection.

Your Money’s No Good Here: Combating Source of Income Discrimination in Housing
By Antonia K. Fasanelli and Philip Tegeler
Source of income discrimination mainly affects renters of color, women, and persons with disabilities, resulting in perpetually racially segregated communities and neighborhoods with concentrated poverty.

Fair Housing Under the Trump Administration
By Stephen M. Dane
Under the Trump administration, HUD policies and regulations designed to eliminate discrimination and reduce racial segregation are at risk of being eliminated. Over the past several years, HUD has been eliminating, delaying, or revising its fair housing regulations in ways that are at odds with the intent of the Fair Housing Act and in conflict with longstanding federal housing policy.

Solve Hunger with Anti-Poverty Policies, Not Anti-Hunger Policies
By Alexandra Holden
We in the United States do not treat food access as a basic human right, with our government remaining indolent about the hunger crisis and even threatening to cut hunger safety net programs.

Economic Rights: Are They Justiciable, and Should They Be?
By Rotem Litinski
Economic rights guarantee adequate sustenance, housing, education, health, and employment. These essential human rights are often relegated to a second-class status compared to civil and political rights. Courts must take on a greater role in recognizing the justiciability of economic rights to secure economic justice.

Human Rights Heroes: Maria Foscarinis, Eric Tars, and the National Law Center on Homelessness & Poverty
By Mathew Mecoli
The National Law Center on Homelessness & Poverty and its leaders have advocated for millions over the past 30 years and, through their landmark legal victories, have forever changed the way the homeless are treated.
Every day in its annual spinning rotation around the sun, the Earth moves from darkness into light. During these 24 hours, more than 1,700 American babies are born into poverty. One newborn is delivered into poverty every single minute of every single day in America. About 900 of these beautiful new lives are born into extreme poverty, struggling to survive on less than $9 a day. In one of the richest countries on Earth, more than 12 million American children live in poverty, including 5 million kids who live in extreme poverty. Poverty statistics are even more deplorable for children of color. Nearly 33 percent of African American children and 25 percent of Latino children live in poverty. Our youngest children, those who are under five years old, whose brains and bodies are still developing, suffer the highest rate of poverty of any age group. While this annual data is profound, the problem is even deeper and broader across their lifetimes. Nearly 40 percent of all children in America spend at least a year in poverty, and more than 10 percent spend at least one-half their childhoods in poverty. Starting at birth, up to and through adulthood, childhood poverty plagues, impacts, limits, and destroys lives.

Poverty costs America almost $700 billion every year as it tears away at bodies, minds, hearts, souls, and communities. Poverty is associated with hunger, homelessness, health, educational hazards, toxic stress, crime, and violence. Food insecurity causes lower reading and math scores, physical and mental health problems, and higher incidence of emotional and behavioral problems. Limited access to healthy, nutritious food can threaten children’s birth weight and physical and mental development and increase the risks of obesity. Infants suffering from poverty demonstrate cognitive deficiencies as early as nine months that often worsen with age. These early disadvantages are hard to overcome even if the cycle of poverty is broken.

Children who experience housing and food insecurity are more likely to suffer chronic health problems and violence. Exposure to financial adversity over a prolonged period can trigger toxic stress that rewires children’s brains, disrupts their social development, and undermines their ability to learn and succeed. Research shows stress increases the likelihood of low educational achievement, unstable employment, adult poverty, and involvement in the criminal justice system. Ninety percent of children who have never experienced poverty graduate from high school, while only 62 percent of children who spend at least one-half their lives in poverty complete high school by age 20. This is not surprising given that these children are more likely to be suspended and expelled for myriad poverty-related issues, including absenteeism and habitual tardiness.

Given the devastating consequences...
of poverty, individuals who experienced poverty at any point during childhood are more than three times as likely to be poor at age 30 than those who were never poor as children. The longer a child suffers poverty, the greater her risk of becoming a poor adult. A 2017 Urban Institute report found that 80 percent of children who spend at least one-half their childhoods in poverty were neither in school nor consistently working in their 20s. Moreover, the more toxic childhood experiences a person suffers, the greater their likelihood of health problems in adulthood, including heart disease, hypertension, diabetes, substance abuse, and depression.

“There is nothing new about poverty. What is new, however, is that we have the resources to get rid of it.”
—Reverend Dr. Martin Luther King Jr., 1964 Nobel Peace Prize Award Ceremony

Fortunately, scholars, advocates, and researchers have demonstrated that we can meaningfully mitigate childhood poverty by investing presently available resources in vulnerable kids. Nobel Prize–winning economist Professor James Heckman from the University of Chicago has found that investing in comprehensive quality programs for economically disadvantaged children from birth to age five generates a notably high return on the investment of 13 percent. Programs that provide health care from pre-birth forward and quality early learning produce a significantly higher return on investment per child every year than investing in preschool alone. Heckman has established through decades of research and studies that these programs pay for themselves many times over. Investments in vulnerable children can produce permanent gains in health and well-being, social-emotional skills, and IQ. The increases in parental income of these children after only five years have paid for entire early childhood programs. Heckman, an award-winning expert in the economics of human development, warns that “[t]he cost of inaction is a tragic loss of human and economic potential that we cannot afford.” See www.theheckmanequation.org.

Proposed remedies for poverty often include enhancing existing federal income tax credit provisions, such as the Earned Income Tax Credit (EITC), the Child and Dependent Care Credit, and the Child Tax Credit (CTC). In 2018, refundable tax credits (the EITC and refundable portion of the CTC) lifted almost 9 million Americans out of poverty, including 4.7 million children. Without these tax credits, child poverty would be almost 6.5 percent higher than its already too high rate. The Tax Cut and Jobs Act (TCJA) passed by Congress in December 2017 and rushed into law in 2018 purportedly doubled the CTC from $1,000 to $2,000. However, rather than follow the proven policies laid out by Heckman, Marian Wright Edelman, American Progress, Tax Policy Center, National Women’s Law Center, Center on Budget and Policy Priorities, and countless other experts and child advocates to target investments in vulnerable children, Congress did nothing to invest in our poorest kids, but rather created a windfall for income-rich households. This article describes the failure of the TCJA changes to the CTC.

Under the TCJA, the CTC was increased ostensibly from $1,000 to $2,000 per qualifying child under age 17. However, this statement is deceiving because under the TCJA (and before) the poorest households in America with one or more qualifying children receive a CTC of $0. However, under the TCJA, income-rich households received an increase in their CTC of $2,000 per qualifying child with no cap. How could this be you might be wondering? Well it is because the refundable CTC requires earned income. This article will expose the devil in the details of the CTC before and after the TCJA. Fortunately, the fix is obvious and easy given current tax practices and economic policy.

**HOW THE CTC WORKS AND DOESN’T WORK**

Under the TCJA, the CTC is a federal income tax credit designed as workfare for households with U.S. citizen children. Specifically, for tax years 2018 through and including 2025, the credit is up to $2,000 for each “qualifying child.” For this purpose, a “qualifying child” is a child, grandchild, brother, sister, niece, nephew, or descendant of any of these relatives who is under age 17 as of December 31 of the relevant tax year. A “qualifying child” has to have lived with the taxpayer for more than one-half the taxable year and must have a Social Security number that authorizes work. Prior to the TCJA, a “qualifying child” only had to have a taxpayer identification number. As a result, children who do not have a Social Security number could qualify for the CTC before the TCJA and may qualify after the TCJA changes expire. This change alone has caused taxpaying households with 1 million children to no longer qualify for the CTC.

The CTC is a partially refundable federal income tax credit. What this means is that the CTC reduces a taxpayer’s income tax liability dollar for dollar down to zero and even below zero (generating a cash refund) under certain circumstances, but the refundable portion of the CTC is limited to only $1,400 (indexed for inflation) of the full $2,000. The refundable portion of the credit depends on the amount of the taxpayer’s earned income (e.g., wages, salary, compensation, self-employment income, and tips). Thus, if a household’s earned income is zero, the refundable CTC is zero regardless of the number of qualifying children in the household. Specifically, after the TCJA, a family with one or more children with earned income below $2,500 would not receive any CTC. This was true for the CTC even before the TCJA because the refundable CTC has always depended on earned income. Indeed, the threshold
for the refundable CTC was actually $3,000 before the TCJA. As detailed below, this modest last-minute threshold change generates an additional $75 for the entire year for a poverty-level family regardless of the number of children in the household.

A family with earned income above $2,500 will receive a refundable CTC of 15 percent of any earned income in excess of this minimum threshold. Prior to the TCJA, the CTC minimum earned income threshold was $3,000. Therefore, the TCJA increased the CTC by $75 (15 percent of $3,000 or $450) for taxpayers with any number of qualifying children and poverty-level income of $2,500 (or more for up to $9,670). For example, before the TCJA, a household with one or more children and $3,000 of earned income would enjoy a refundable CTC of $0. Under the TCJA, this household would receive a $75 CTC for the tax year. This $75 increase in the refundable CTC under the TCJA is the maximum annual increase for families with one or more children and earned income of up to $9,670.

Families receive a CTC of 15 percent of earned income over $2,500 in 2018 through 2025. Thus, a family with one or more qualifying children in the household and $9,670 would receive a refundable CTC of $1,075 (($9,670–$2,500=$7,170) x 15 percent=$1,075). Before and after the TCJA, this household would receive only a $1,000 CTC ($9,670–$3,000=$6,670) x 15 percent=$900). In sum, the most vulnerable families with between zero and $2,500 of earned income receive no CTC and families with earned income between $2,500 and $9,670 receive a CTC that is 15 percent of every dollar above $2,500 up to $1,075 (($9,670–$2,500=$7,170) x 15 percent) or $75 more after the TCJA than before. This additional TCJA cash benefit is only $1.44 per week for a household of at least two poverty-level individuals.

As taxpayers have increased earned income, they begin to enjoy a CTC that exceeds the pre-TCJA CTC by more than $75. From $9,671 of earned income up to $11,833 of earned income, the refundable CTC continues to grow by 15 percent of every additional dollar of earned income up to $1,400 (($11,833–$2,500=$9,333) x 15 percent). Thus, for poverty-level households with earned income between $11,833 and $18,350 ($24,400 for a married filing jointly family), the maximum amount of their refundable CTC regardless of the number of qualifying children in their household above one is an extra $400 after the TCJA as compared to before the TCJA. This amounts to an additional TCJA cash benefit of $7.69 per week for a household of at least two poverty-level individuals.

Once earned income exceeds $18,350 for a single parent ($24,400 for a married filing jointly family), then the household begins to have taxable income and thus a federal income tax liability that will be offset with the nonrefundable portion of the CTC. Thus, from $18,351 through $24,351 for single parents with one or more children ($24,401 through $30,400 for married filing jointly families), the refundable CTC will remain at $1,400 and the nonrefundable CTC that offsets federal income tax will increase up to $600 until the taxpayers receive a full CTC tax benefit of $2,000. This amount is a $1,000 higher tax benefit after the TCJA than before the TCJA. Households supporting about 29 million children do not receive the full $2,000 CTC (post TCJA increase of $1,000) because their earned income is too low for the full refundable portion of the CTC or they owe too little in federal income taxes for a full CTC offset.

Before the TCJA, the CTC was targeted to lower- and middle-income households with children. Accordingly, the CTC began to phase out as income increased about $75,000 for single parents ($110,000 for married filing jointly taxpayers). The phase out was gradual, or $50 of a CTC reduction for every $1,000 of adjusted gross income above these income thresholds. Therefore, for a married couple with one qualifying child, their CTC would fully phaseout at $130,000 ($130,000–$110,000=$20,000/$1,000=$20) x $50 or $1,000 reduction of $1,000 CTC). Thus, for income levels at $130,000 and above, households with one child did not receive any CTC benefits. After the TCJA, this dramatically changed and created a windfall for income-rich households.

Under the TCJA, the CTC does not even begin to phase out until household income exceeds $400,000 married filing jointly ($200,000 for single, head of household, or married filing separately). Therefore, married households with one qualifying child and income levels of $130,000 up to $400,000 receive a CTC benefit of $2,000 per child greater than they would have received before the TCJA. Indeed, not until $440,000 of income does a married filing jointly household lose the CTC benefit in its entirety for one qualifying child. If these high-income households have more than one qualifying child, they continue to enjoy $2,000 of CTC for each additional qualifying child even at this high-income level. Thus, these income-rich households receive a windfall TCJA tax benefit of $2,000 per child while lower-income households receive at most a $400 increase. Moreover, under the TCJA, these income-rich households also enjoy reduced marginal income tax rates (15 percent reduced to 12 percent, 25 percent reduced to 22 percent, 28 percent reduced to 24 percent, 33 percent reduced to 32 percent, 39.6 percent reduced to 35 percent and 37 percent (rate income thresholds are not perfectly aligned from pre- to post-TCJA, so these decreases are approximate) adding to their overall tax cut when lower-income households received little or no marginal tax rate reduction under the TCJA (15 percent reduced to 12 percent and 10 percent before and 10 percent after the TCJA).

“Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life.”

—Nelson Mandela

CONCLUSION

In summary, the most vulnerable kids in America who would benefit the most from an investment receive nothing under the TCJA, and high-income households that are less likely to even spend the windfall benefit on their kids or at all receive an uncapped additional $2,000 CTC per qualifying child.

Fortunately, there is an easy fix to this upside-down investment in America’s
children, our future. If Congress follows the recommendation of many child and anti-poverty advocacy groups and makes the CTC fully refundable (not dependent on earned income), all households with no-, low-, and middle-income will receive an investment. This is similar to the Canadian Child Benefit of about $5,600 annually, which is paid to qualifying families in monthly installments. To fund the fully refundable CTC, Congress could reduce the current phaseout thresholds from $400,000 married filing jointly down to $200,000 ($100,000 single, married filing separately, and $150,000 for head of household).

Congress may also decide to increase the CTC amount to $3,000 for children from birth to five years old given that children in this age group have the highest rate of poverty among any age group. Moreover, children from birth to five are still developing physically. Their brains and bodies are especially vulnerable to toxic stress from poverty and food and housing insecurity. The annual Canadian Child Benefit is higher for children age five and under at $6,600, and is $5,600 for children six through 17 (indexed annually for inflation). Notably, this CTC age-based enhancement is readily audited via taxpayer identification numbers and birth certificates. In short, the TCJA missed an opportunity to mitigate child poverty, reduce rising income inequality, and make an effective targeted investment in America’s future today. Instead, Congress has enacted another windfall for income-rich households that are already enjoying unprecedented wealth and well-being. This is consistent with estimates that more than 70 percent of the tax benefits under the TCJA for 2020, or $205 billion, will accrue to the richest 20 percent of all Americans. In a country where about one out of every six kids suffers poverty, Congress can and should target the CTC to benefit rather than tax our most vulnerable kids.

An expanded version of this article was recently published in Tax Notes Federal, Volume 164, Number 11.

Francine J. Lipman is William S. Boyd Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas.

James E. Williamson is Emeritus Professor of Accounting & Taxation at the Charles W. Lamden School of Accountancy, San Diego State University.

---

“Children are the living messages we send to a time we will not see.”
—John F. Kennedy

---

Introduction

continued from inside front cover

13 percent lived in poverty in 2017 and another 24 percent were ALICE households, a combined 37 percent below the ALICE threshold.

Economic insecurity is pervasive. The Federal Reserve noted in its Report on the Economic Well-Being of U.S. Households in 2018 that of adults responding to the hypothetical question of how they would face an unexpected expense of $400, only 61 percent would cover it with cash, savings, or a credit card; 27 percent would have to borrow or sell something to pay the expense; and 12 percent would not be able to cover it at all.

In this issue of Human Rights magazine, Professors Francine J. Lipman and James E. Williamson address in their article “Taxing Poor Kids” how recent tax code changes for child tax credits perversely harm our most vulnerable children, while creating a windfall for income-rich households, and how, with reform, we can stand up for children.

As Stephen M. Dane points out in our fair housing policy article, Congress passed the very important federal Fair Housing Act in 1968 with broad bipartisan support. Yet today, the responsible federal agency is taking actions to suspend, eviscerate, or eliminate laws to affirmatively promote fair housing that result in low-income families continuing to be trapped in high-poverty and racially segregated areas. In “Source of Income Discrimination in Housing,” Antonia K. Fasanelli and Philip Tegeler provide helpful strategies for advocating for source of income legislation in your home area and for your clients.

John Mathews II and Marina A. Torres skillfully point out in their “Criminal Justice Debt Problems” article that our criminal justice system physically brutalizes and imprisons people simply because they are poor. Their article crystalizes and advances the conversation of criminal justice reform and compels unified action by all human rights activists. We urgently must do better.

See also Malia Brink’s article, “ABA Bail Policy: Taking Steps to Achieve Reform,” for a critical update on legislative and judicial action subsequent to passage of ABA Resolution 112C (August 2017) on bail policy.

An aim of consumer protection is to provide transparency and fairness to enhance bargaining equality. To that end, the article “Roadmap to Economic Justice” addresses auto purchase and loan issues of discrimination, dealer markup, transparency, timely notice, and lack of data collection that treat the poor unfairly by forcing them to pay more for a critical consumer need.

Student articles by Alexandra Holden on solving hunger anti-poverty policies, not anti-hunger policies, and Rotem Litinski on the justiciability of economic rights provide useful perspectives and advance our thinking on economic justice. Finally, please see Mathew Mecoli’s column highlighting the tireless, outstanding advocacy from the staff of the National Law Center on Homelessness & Poverty, its founder Maria Foscarinis, and legal director Eric Tars. Their impressive legal victories and advocacy over a 30-year period are an inspiration.

James J. Pierson is chair, program director, and assistant professor of the Business & Entrepreneurship Department of Chatham University. He also is vice-chair of the ABA Civil Rights and Social Justice Section’s Economic Justice Committee.
THE PROBLEM—CRIMINALIZATION OF POVERTY OVERVIEW

In the United States, wealth, not culpability, often shapes outcomes. From what is defined as criminal behavior to how penalties are decided, our legal system punishes people who are poor in America far more often and more harshly than the wealthy.

No person in America should be locked up because they are poor. Yet, every day we see homeless people arrested for sleeping outside; parents who can’t afford to purchase their release from jail; and people who cycle in and out of jail because they can’t afford to pay old fines as their debt grows from new ones. Meanwhile, cities and counties fill their coffers from the fines and fees that are imposed on people who are struggling just to survive. We need a criminal justice system that puts people over profit and helps to make vulnerable people more stable, not less stable.

PRETRIAL DETENTION AND POVERTY

Kalief Browder, a 16-year-old from the Bronx, was imprisoned in Rikers Island for three years, two of them in solitary confinement, because he couldn’t afford his $3,000 bail. His alleged crime: stealing a backpack in 2010. Browder killed himself not long after he was released, traumatized by his time in prison.

The number of Americans sitting in jail without a conviction is larger than most other countries’ entire incarcerated population. After an arrest—wrongful or not—a person’s ability to leave jail and return home to fight the charges often depends on money. In most states, people are required to pay cash bail. Originally, bail was to ensure an individual’s return to court to face charges against them. However, money bail or cash bail has led to a form of wealth-based incarceration in which people of color and the less affluent languish in jail while they await trial. As many as 500,000 people are held across the country in local jails because of their inability to pay bail, mostly for low-level offenses.

Pretrial detention has a disproportionate impact on communities of color. Nationwide, more than 60 percent of jail inmates are jailed pretrial; over 30 percent cannot afford to post bail. Blacks and Hispanics are much more likely to be held on bail than white individuals. Often, those being held on bail have simply been accused of low-level offenses; for instance, 75 percent of pretrial detainees have been charged with only drug or property crimes.

Pretrial detention also has collateral consequences: It leads to people losing their jobs, not being able to care for their children, and losing contact with loved ones. Holding people in jail who do not pose a significant safety risk also exacer-
bates overcrowding, creates unsafe conditions, and places a huge financial burden on taxpayers. A study out of Kentucky found that people who are held because they cannot afford bail are 40 percent more likely to commit another low-level offense. In other words, jailing people who cannot pay bail is crimogenic.

People are also more likely to be acquitted if they pay bail, in part because they are less likely to take plea deals just to get out of jail. Being released before trial closely correlates with a not-guilty verdict, suggesting that the system is not punishing the most guilty, but rather the people who cannot afford to pay for their release. One study suggests that those people are “over three times more likely to be sentenced to prison” and “over four times more likely to be sentenced to jail” than those who are not detained pretrial. Similarly, a study from Columbia Law School found “significant evidence of a correlation between pretrial detention and both conviction and recidivism.”

Jail is expensive. Incarcerating individuals awaiting trial costs taxpayers $13.6 billion each year. This is especially wasteful in light of effective, low-cost ways of ensuring that defendants appear at trial, including a simple notification system that reminds people of their court dates.

PROSECUTING POVERTY IS WRONG

A man was arrested for standing at an Atlanta intersection holding a sign reading "homeless please help" and then was illegally jailed for more than two months because he couldn’t afford to pay $200 bail. Meanwhile, it cost the county almost $6,000 to keep him in jail.

Beginning in the '80s and increasingly used in the '90s, a controversial “broken windows” philosophy of policing was implemented in several cities across the United States. Under this criminological theory, visible signs of crime (such as public intoxication, sleeping outside, disturbing the peace, and loitering) created an environment that further encouraged crime and disorder, including more serious crimes. Prosecuting “quality of life” crimes would, under this approach, lead to a reduction in the incidence of more significant crimes. Decades later, however, many see this approach as no longer effective, and prosecutors across the country are questioning whether a different model of community policing should be utilized instead.

Hundreds of jurisdictions across the United States have criminalized homelessness, and laws criminalizing homelessness have multiplied in the last 10 years in 187 studied cities. Over half these cities prohibited camping, sitting, or lying down in certain areas, and a third banned these activities citywide. Cities often outlaw these practices without providing additional shelter beds.

Individuals who have been saddled with criminal records for engaging in survival activities like sleeping on the street face steeper challenges finding jobs, housing, or other benefits like food stamps, thus perpetuating the cycle of homelessness. Under federal law, people who have spent more than 90 days incarcerated lose their “chronic homelessness” status and are no longer a priority for permanent housing.

FINES AND FEES ARE DEVASTATING FOR POOR PEOPLE

In Georgia, a man stole a can of beer worth $2 from a corner store. The court ordered him to wear an ankle monitor for a year. A company charged him so much money that he eventually owed more than $1,000. In order to keep up with his payments, he sold plasma, but he fell behind and the judge jailed him for non-payment.

Since the unrest in Ferguson, Missouri, in 2014, public awareness of the harms of fines and fees associated with the criminal justice system has grown substantially, along with an understanding of the large scope of the problem. To help cover the high operating expenses of the criminal justice system—correctional, judicial, and law enforcement expenditures combined—many states and localities rely on fees and fines associated with the criminal and civil court fees. These fees and fines often fund the courts, criminal justice agencies, and even government activity wholly unrelated to public safety. These fees are constitutionally required. In 1983 Supreme Court ruling protecting defendants from going to jail because they are too poor to pay their fines. The United States Supreme Court in Bearden v. Georgia, 461 U.S. 660 (1983), held that courts cannot imprison a person for failure to pay a criminal fine unless the failure to pay was “willful.” Bearden v. Georgia held that a judge must first consider whether the defendant has the ability to pay but “willfully” refuses. However, courts across the country continually ignore this constitutional principal. In reality, judges rarely check a person’s economic status, and, for the most part, people have no lawyer to assist them in asserting their rights.
CASH BAIL—NEW JERSEY

On January 1, 2017, the New Jersey Criminal Justice Reform Act took effect, essentially eliminating the monetary bail system in state courts. The legislation, passed under then-Governor Chris Christie in 2014, was spurred by a March 2013 analysis of the New Jersey jail population by the Drug Policy Alliance that found that approximately 1,547 people (12 percent of the entire jail population) were held solely because they could not afford $2,500 or less in bail.

Championed by Christie, the chief justice of the New Jersey Supreme Court, and countless lawmakers, the overhaul aimed to benefit poor people too destitute to pay even small bail amounts and also empower judges to keep particularly dangerous individuals behind bars before trial. Under this risk-based system, monetary bail was to be rarely used. Judges were to no longer issue money bail to every criminal defendant and instead decide whether defendants should remain in jail before their trial based on the risk posed to the public. Lower-risk individuals would no longer be detained prior to trial for lack of financial resources. On the other end of the spectrum, higher-risk defendants determined to pose a danger to the community or pose a substantial risk of flight would no longer be able to ensure their pretrial release with bail funds. The idea was to reform New Jersey’s jail population to have fewer people in jail, with only the highest-risk defendants and those charged with the most serious offenses detained pending trial.

In just its first year of enactment, the reform legislation resulted in a 20.3 percent decline in the pretrial jail population within the state. From January 1, 2016, through 2017 (which includes the period during which prosecutors began changing their detention recommendations in anticipation of the new legislation), the pretrial detention rate fell 35.7 percent. Preliminary crime statistics from the New Jersey State Police showed no major bump in violent offenses across New Jersey, and actually showed a drop in rates for many serious crimes. Still, after the killing of a New Jersey man by a defendant out on pretrial release prompted a federal lawsuit against the Christie administration by Duane Chapman (otherwise known as “Dog the Bounty Hunter”), critics of the legislation were still unimpressed.

Two years after the implementation of the law, however, a clearer picture was presented of the legislation’s results. The New Jersey judiciary released its second annual report to the legislature and governor on the state’s historic bail reform law. Key findings of the report included:

- A decline in the state’s pretrial jail population by 43.9 percent since December 31, 2015.
- 5,600 fewer men and 600 fewer women incarcerated pretrial in 2018 (compared to 2012).
- In 2018, only 102 defendants had money bail set for them, out of a total defendant population of 44,383.

The report confirmed that the overhaul of the New Jersey bail system allowed the pretrial jail population to decline precipitously while failing to produce the increase in crime predicted by critics. Defendants under the new system were no more likely to commit a new offense or fail to show up for a court appearance than defendants released under the prior system of monetary bail. The use of bail in New Jersey is now largely relegated to people who fail to appear in court or otherwise violate the conditions of pretrial release set by a judge.

CASH BAIL—NEW JERSEY

In an effort to address criminal justice debt problems, we will examine several examples of federal and local responses to this challenge. In New Jersey, for example, almost three years have passed since a bail reform law took effect that changed how judges decide pretrial detention, and none of the fears opponents cited—recidivism, spikes in crime, and failures to appear—have materialized. In Boston, a candidate for district attorney successfully campaigned on a platform of declining to prosecute low-level “quality of life crimes.” Likewise, several states have begun outlawing the commercialization of the criminal justice system through fines and fees, and there are calls for an increased role for the federal government in such reform efforts.

SURVEY—FEDERAL AND LOCAL RESPONSES TO CRIMINAL JUSTICE DEBT PROBLEMS

In an effort to address criminal justice debt problems, we will examine several examples of federal and local responses to this challenge. In New Jersey, for example, almost three years have passed since a bail reform law took effect that changed how judges decide pretrial detention, and none of the fears opponents cited—recidivism, spikes in crime, and failures to appear—have materialized. In Boston, a candidate for district attorney successfully campaigned on a platform of declining to prosecute low-level “quality of life crimes.” Likewise, several states have begun outlawing the commercialization of the criminal justice system through fines and fees, and there are calls for an increased role for the federal government in such reform efforts.

RETHINKING QUALITY OF LIFE CRIMES—BOSTON

Many of the reform in the criminalization of poverty space is happening in prosecutors’ offices, as more district attorneys across the country seek to tackle mass incarceration. In July 2018, Rachel Rollins was running for Suffolk County district attorney when she released a list of certain crimes that she indicated she would defer prosecution upon if elected. These so-called “quality of life” crimes included trespassing, shoplifting, larceny under $250, receiving stolen property, disorderly conduct, disturbing the peace, and drug possession with intent to distribute. In a November 2018 interview with the Boston Herald, Rollins reiterated that the District Attorney’s Office needed to put its focus and resources on violent offenders in order to keep the community safe. Instead of jail, she argued for looking at other ways to hold individuals accountable to for their actions, including through community
service, graduation from substance abuse programs, civil stay-aways, and more.

Rollins’s promises to reform criminal justice and reduce racial biases in the system resulted in her landslide victory—39 percent of the vote in the primary and 73 percent in the general election. In late March 2019, Rollins released her long-awaited policy memo (the “Rollins Memo”), a data-driven document that spelled out in greater detail the reforms that she had campaigned on. Still, Rollins continues to be a lightning rod for Boston’s law enforcement and political establishments—despite a data analysis by the American Civil Liberties Union of Massachusetts showing that a majority of the cases involving charges on Rollins’ decline-to-prosecute list were diverted or dismissed by the former district attorney. A little over 10 months into her four-year term, Rollins’s first months in office show her fulfillment of her campaign promises, which many will continue to watch.

**FINES AND FEES—STATE AND FEDERAL**

In 2018, California became the first state to ban all fees for incarceration, court appearances, probation, or drug testing. The state of Washington also passed similar legislation, and bills have been introduced in Nevada and Maryland. In Colorado, Governor Jared Polis signed a bill into law (SB 191) earlier this year that removed many of the fines and fees around bond and bail. Other legislation has been introduced in several states—New York, North Carolina, Montana, Mississippi, Tennessee, and Virginia—that would end the practice of revoking driver’s licenses for unpaid fines and fees. Similarly, after reviewing their fee collection practices, Leon County in Florida closed its Collections Court and terminated 8,000 outstanding arrest warrants; Orange County, also in Florida, likewise cancelled outstanding nonpayment warrants for transient residents after a similar review.

By comparison, there has been little federal attention paid to the issue. The Department of Justice’s efforts to address fines and fees began with its investigation into the city of Ferguson, and it continues its enforcement efforts to ensure that other states and municipalities are not acting contrary to the Constitution. At the legislative level, a bill was introduced in Congress in April 2019 that sought to set the national standard for ending the practice of charging youths with administrative fees, public defender fees, and other charges. The bill, called the End Debtor’s Prison for Kids Act, would authorize up to $500 million in annual federal funds for mental and behavioral health programs in exchange for ending the practice of juvenile justice fees.

**CONCLUSION**

By disproportionately impacting those with little means, monetary bail systems, penalties, and fees have generated concerns about the fairness in the criminal justice system for the poor and for people of color. The examples above are indicative of a growing conversation of reform and a critical eye toward the status quo. Still, even reform-minded jurisdictions recognize that plenty of work remains to fix the racial disparity among incarcerated people. For instance, although New Jersey’s jail population dropped by 44 percent between the end of 2015 and 2018 as a result of eliminating cash bail, these changes had little impact on racial disparity among incarcerated people: Black men made up 54 percent of New Jersey’s jail population in 2018, the exact same share as in 2012, long before the elimination of cash bail. And more can certainly be done from the federal side, with many activists encouraging the Department of Justice to issue findings and report from jurisdictions beyond Ferguson to underscore the point that harm from reliance on municipal fines and fees are not unique to Ferguson and require further, national-level reform efforts. Overall, however, the conversation continues to move toward a critical evaluation of our criminal justice system, and one that strives for a more equitable and fair administration of justice.

John Mathews II is senior legal counsel for The Justice Collaborative, an independent, nonpartisan research and advocacy organization devoted to reforming the criminal justice system and building healthier and safer communities.

Felipe Curiel is a recent graduate of the University of California at Irvine and currently a research assistant at the Justice Collaborative. He is interested in pursuing a career in criminal justice and attending law school.
ABA BAIL POLICY: TAKING STEPS TO ACHIEVE REFORM

By Malia Brink

At the 2017 Annual Meeting in New York, the ABA House of Delegates adopted a resolution on the use of bail. Resolution 112C urges jurisdictions to release defendants on their own recognizance unless a court determines “that release on cash bail or secured bond is necessary to assure the defendant’s appearance and no other conditions will suffice for that purpose” (emphasis added). It further urges that courts be prohibited from “imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.”

In the two years since the House of Delegates passed this resolution, bail reform has been a high priority for the ABA. From urging Congress to take legislative action to supporting bail reform lawsuits by filing amicus curiae briefs, the ABA has taken a leading role in efforts to ensure that no individual is detained pretrial due to inability to afford bail or bond.

Money bail systems historically result in the detention of indigent defendants simply because they cannot pay the bond or bail set, and not because they actually pose an increased risk of harm to the public. As the ABA recently observed in a letter to Congress, “[c]urrently more than 450,000 Americans are jailed while awaiting trial simply because they cannot afford money bail.”

The use of money bail to detain the poor is unquestionably expensive for jurisdictions. The ABA reported to Congress that “State and local governments spend $14 billion a year to house this portion of the jail population alone.” Additionally, these defendants often lose their jobs during detention, jeopardizing the financial security of the families and potentially increasing dependence on social safety net programs.

Federal legislative proposals to remedy the situation have been proposed for years in both the House and the Senate. In February 2016, Representative Ted Lieu (D-Cal.) introduced a bail reform bill in the House of Representatives that sought to prohibit the payment of money as a condition for pretrial release in all federal courts in addition to rendering states that continue to utilize money bail as a condition of pretrial release ineligible for funding under the Byrne JAG Memorial Fund. More recently, Senators Kamala Harris (D-Cal.) and Rand Paul (R-Ky.) introduced the Pretrial Integrity and Safety Act to the Senate Judiciary Committee. The bill’s purpose is to provide grants to states and tribes to implement reforms to “encourage the replacement of the use of payment of secured money bail as a condition of pretrial release in criminal cases, and for other purposes.” These legislative reforms hold a lot of promise, but as yet have not gotten traction in Congress.

But legislation is not the only means of achieving reform. Recently, bail programs that deny indigent defendants release due to inability to pay have come under constitutional attack. In Houston, Texas, O’Donnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017), challenged the use of money bail to detain indigent defendants. The case was brought on behalf of single mother Maranda Lynn O’Donnell, who could not afford her $2,500 bail for driving without her driver’s license and consequently spent two days in jail. In the District Court for the Southern District of Texas, Chief Judge Lee H. Rosenthal held that Harris County’s bail system violated the equal protection and due process clauses and issued a temporary injunction. In her ruling, Chief Judge Rosenthal found that 40 percent of misdemeanor defendants in Harris County are unable to post bail and remain detained. Of those detained due to inability to post bail, 84 percent plead guilty at the first opportunity. By comparison, less than half of those in Harris County who are released on bond plead guilty. This suggests that at least some of those incarcerated due to inability to pay the set bond do so simply in order to return to their lives. On this basis, Judge Rosenthal ordered the release of all misdemeanor defendants within 24 hours of arrest if they sign an affidavit stating their inability to pay, unless subject to other warrants or holds.
A panel of the Fifth Circuit Court of Appeals heard argument on the case this fall. The ABA filed an amicus curiae brief urging the court to uphold Judge Rosenthal’s decision:

The ABA’s Standards have long rejected money bail systems that fail to consider adequately a defendant’s ability to pay. Such systems are inherently discriminatory, deleterious to the rights of the accused, unnecessary to ensure justice and public safety, and contrary to the bedrock constitutional principles that the ABA’s Standards embrace. The ABA’s current Standards—shaped by decades of exhaustive research—promote alternatives to money bail and pretrial detention, and endorse only those bail systems that adequately consider pretrial detainees’ individual circumstances.

The Court of Appeals for the Fifth Circuit issued its decision on February 16, 2018, and found the District Court’s due process and equal protection analyses largely persuasive. The court wrote:

In sum, the essence of the district court’s equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County’s current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. 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. The district court held that this state of affairs violates the equal protection clause, and we agree.

The court remanded for some minor changes to the District Court’s injunction but allowed the current injunction to remain in place until those modifications can be made. Rather than appeal, Harris County has agreed to settle the lawsuit. In addition to creating a new bail policy that will ensure automatic, no-cash pretrial release for the vast majority low-level defendants, the settlement includes provisions to establish transportation, child care and other assistance to help low-income individuals attend their court dates. The settlement is being opposed by the District Attorney in Harris County, and a hearing on final approval of the settlement was scheduled for October 28, 2019.

The ABA has filed amicus curiae briefs in bail reform cases in the 11th Circuit Court of Appeals and the Supreme Court of California. Additional lawsuits are pending in jurisdictions across the country, including Dallas, Detroit, and Jacksonville, Florida.

Malia Brink serves as counsel for public defense to the ABA Standing Committee on Legal Aid and Indigent Defendants. She may be reached at Malia.Brink@americanbar.org.
Roadmap to Economic Justice: Enhancing Protections for Auto Consumers

By James J. Pierson

For most Americans, owning an auto is a great source of individual pride, as well as an enabler of social and geographic freedom. In rural and suburban America, it is a must for work, advancing education, obtaining health care, and interacting with society. Like our health, we take it for granted until it is impaired or high cost limits access to it. The old and painful adage that the “poor pay more” scenario is often true in the purchasing and financing of consumer cars and trucks today.

Size matters. The Consumer Financial Protection Bureau (CFPB) reports there are almost 100 million auto loans outstanding totaling more than $1.3 trillion, representing the third largest consumer debt in America, trailing behind only mortgage and student debt. Beyond the dollars, the number of consumers who are originating auto loans are about three times more prevalent than student loans and more than three times more prevalent than mortgage originations. To drill down further, data for struggling consumers with high-risk Equifax scores for Q4 2015 showed that 1.5 million consumers with high-risk scores bought a car, but only about 100,000 financed a house.

It is anticipated that in 2019 there will be about 40 million used vehicle sales and about 17 million new vehicles sold. About 80 percent of cars are financed at the dealers. Numerous economics sources have noted the stagnation of wages for low- and middle-class consumers, yet the price for cars continues to increase, in part because they are bundled with add-on products and costly financing terms for many low-income consumers. To be able to afford the loan, car borrowers sign up for longer loans and higher balances. It is not surprising then that the Federal Reserve Bank of New York reported that at the end of 2018, a record level of 7 million consumers were 90 days or more behind on their auto loan payments, which is 1 million more troubled borrowers than in 2010, when unemployment hit 10 percent and the auto loan delinquency rate peaked.

The United Nations Guidelines for Consumer Protection, revised and adopted by the General Assembly in resolution 70/186 of December 22, 2015, provide useful principles and guidance as we consider the auto loan market. The guidelines alert us to be mindful of the imbalance between the consumer and the dealer as to economic terms, educational levels, and bargaining power. Specifically, as part of good general business practices, consumers should not be subject to unethical, discriminatory, or deceptive practices. There should be fair and equitable treatment with consumers, particularly with respect to vulnerable and disadvantaged consumers. United Nations Guidelines for Consumer Protection (July 2016). These aspirations embedded in the UN principles of consumer protection had its genesis in a landmark speech on March 15, 1962, by President John F. Kennedy, in his “special message to the United States Congress of America on protecting the consumer interest.”

In America, we rely today on the federal Equal Credit Opportunity Act (ECOA), state fair credit laws, and the Unfair and Deceptive Acts and Practices (UDAP) federal and state statutes to enforce the aspirations and principles set forth in the UN Guidelines. In practice on everyday main street, the economic terms and conditions received by many low-income consumers in auto deals raises serious questions as to whether our current fair lending and UDAP laws are effectively protecting our most vulnerable citizens.

An example is the risk of discrimination in auto lending through dealer markups (also called dealer participation or dealer reserve) on the minimum loan rate provided by indirect lenders in arranging dealer financing for the borrower. Dealers have an incentive to find the sweet spot or increasing the loan rate to the highest amount possible, without losing the sale, as it will increase their profits. The impact of this practice, however, for an African American or Latino borrower, with a similar or more favorable credit worthiness history as compared to a white borrower, is the heightened risk that they will pay a higher dealer markup on the auto loan.

This has been borne out in expansive studies by Yale Law Professor Ian Ayres and Vanderbilt Business Professor Mark A. Cohen, as well as a more recent study by the National Fair Housing Alliance, that documents consistent and pervasive evidence that the color of your skin can result in your incurring hundreds to
At the end of 2018, a record level of 7 million consumers were 90 days or more behind on their auto loan payments.

thousands of extra dollars in costs for financing cars (https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf). The general premise is that auto dealers and lenders want to serve all consumers fairly as a matter of ethics, respect for the law, and good business practice. Yet, the research studies have raised meritorious issues of potential disparate impact claims that may warrant consideration based on the impact of the structural issues and practices prevalent in the auto buying experience today.

The threshold challenge exists from the inability to obtain the data necessary to meet the evidentiary burden to file a lending discrimination suit under a disparate treatment or disparate impact claim. Regulation B, which implements the ECOA, generally prohibits nonmortgage lenders from asking about or documenting characteristics such as a consumer’s race or national origin (12 C.F.R. Sections 1002.5(a) (2) and 1002.13). Although the rationale for the prohibition is the collection of the data may enhance discrimination, a growing band of advocates and legislators believe reporting such data may in fact assist in stopping discrimination. Without the data, consumer advocates and legislators argue it’s very difficult or expensive to prove a discrimination claim.

In the absence of data, proxy methodologies for race and/or ethnic origin have been implemented and used by federal agencies in other contexts, such as by the Federal Reserve Bank for fair lending exams. An example is the Bayesian Improved Surname Geocoding (BISG) proxy methodology, whereby researchers substitute surname and place of residence variables as proxies for race and ethnic origin (https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf). Yet, politicians and lobbying groups for the auto industry in Congress have vigorously opposed this reasonable alternative. The CFPB utilized such BISG methodology for their support in issuing CFPB 2013-02, a supervisory bulletin providing guidance that the CFPB intended to hold indirect auto lenders accountable for discriminatory markups (https://files.consumerfinance.gov/f/201303_cfpb-marchАвто-Finance-Bulletin.pdf). CFPB Bulletin 2013-02 received fierce resistance relative to questions of whether the bulletin represented covert rulemaking and thus an abuse of the agency’s authority, as well as substantive questions regarding the data collection methodology and the manner in handling dealer markups. Without addressing the heart of the issue of discriminatory markups, Congress determined in spring 2018 that the guidance did qualify as a rule, rather than guidance, and hence CFPB Bulletin 2013-02 was rescinded under the little-used Congressional Review Act.

In Meltdown: The Financial Crisis, Consumer Protection and the Road Forward (Praeger, 2017), Larry Kirsch and Gregory Squires point out that in auto lending, the CFPB was handcuffed at its inception in any actions against

the 65,000 auto dealers, the source of the third largest consumer debt market, because the auto industry successfully lobbied to carve out an exemption under the Dodd-Frank Act that exempts auto dealers from the rule-making, supervisory, and enforcement authority of the CFPB. To combat the issue of potential discrimination in dealer markups, the CFPB tactically chose to address the indirect lenders by asserting authority over the indirect auto lending industry with CFPB 2013-02. Unfortunately, the dealer lobbying attacks against the use of the BISG methodology seriously wounded the reputational authority of BISG as a viable proxy methodology to address issues in the auto market.

How do we solve the data collection problem? One approach is to explicitly allow a narrow exception for data collection for auto loans. This would treat auto loans like mortgage loans for data collection. Law Professor Winnie Taylor argues this can be justified by the extent of the problem and the difficult structural issues inherent in auto loans. (Winnie Taylor, Proving Racial Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit, 31 Rev. Banking & Fin. L. 199, 205 (2012)). Another approach, suggested by Kirsch and Squires, is that reasonable minds among regulators, advocates, and industry players gather and arrive at a consensus to accept some research-focused proxy methodology for gathering information on auto vehicle lending that can be utilized for meeting the evidentiary burden in discrimination claims and can be relied on by regulators and advocates in enforcing reasonable consumer protections impacting low-income consumers of protected classes.

The goal in addressing unequal treatment in lending is agreeing on how we should handle dealer markups to be fair to all consumers. The Center for Responsible Lending found in a 2011 report that dealer markups cost consumers $25.8 billion over the life of the loans (https://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Under-the-Hood-Auto-Dealer-Rate-Markups.pdf).

Before its revocation, CFPB 2013-02, and afterward, the New York State Department of Financial Services guidance issued in August 2018, under New York State’s Fair Lending Law (Section 296-a of the Executive Law) (https://www.dfs.ny.gov/docs/legal/industry/il180823.pdf), provided generally similar guidance to address unexplained pricing disparities on a prohibited basis. Collectively, they include reducing dealer discretion by placing limits on dealer markup or eliminating dealer discretion by using a different method, such as flat fees for each transaction that normally does not result in discrimination. Industry consultants have criticized the flat fee proposal, but a review by Delvin Davis and Chris Kukla from the Center for Responsible Lending noted that “if lenders did move to a flat rate compensation system, borrowers would overwhelmingly benefit” (https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl_flat_fee_savings_nov2015.pdf).

Another method to address fair
credit is an enhanced nondiscrimination compliance system, a system agreed on in a 2013 Justice Department consent (https://files.consumerfinance.gov/f/201312p_cfb_consent-order_ally.pdf) and thereafter supported by the National Association of Minority Automobile Dealers and other leading dealer associations. The proposed fair credit compliance policy and program may be an effective way to ensure a rigorous review of exceptions to a standard dealer rate to avoid credit discrimination (https://www.nada.org/faircredit). This system provides for a standard dealer rate with downward established deviations permissible for documented business reasons, such as competitive offers.

Issues on dealer markup proposals that need to be considered include whether the new systems are implemented by legislation or are voluntarily assumed broadly by the industry. If they are voluntary, transparency to the compliance systems to validate that it is being used broadly by dealers and that allowable deviations are substantive in nature should be mandated to address whether safe harbors are provided to dealers for their compliance systems and how best to structure fees on autos with varying prices so that it is equitable, such as a varying fee grid based on price of the auto.

In improving the continuum of consumer protection for disadvantaged consumers, we should continue to work together to advance solutions with regulators, advocates, and industry players. Various consent decrees were entered by the Department of Justice and financial lenders during the period 2013 to 2016 to address allegations of dealer discrimination on markups that included settlements of about $160 million. Consent decrees and settlements on selected lenders to enforce fair credit certainly benefit lenders of record and send a clear message to other market participants. However, consumer advocates should also pursue a more systemic approach across the industry through changes in compensation practices and compliance programs that provides greater uniformity in treatment for all consumers and raises the bar in consumer protection.

Another critical aspect of the overall car-buying transaction that is fraught with consumer peril is that of add-on products. The problem is add-on products typically do not have a sticker price and are not introduced until a consumer has wrapped up the car purchase negotiation. An October 2017 report from the National Consumer Law Center (NCLC) highlights the abuses and inconsistencies based on a large data set of transactions for one major add-on provider that included “almost three million add-on products, spanning over 3,000 car dealers from every state and the District of Columbia” (https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf (Pg. 46)).

These add-on “products” can be studied by looking specifically at (a) service contracts, (b) etching (security services), and (c) guaranteed asset protection (GAP) products. These three products collectively represent 50 percent of the NCLC data set and have a combined average markup of 170 percent (with markup defined as the ratio of gross profit to the wholesale price). Compare this with 2015 estimates by the National Automobile Dealers Association that found new cars had a markup of 3.4 percent in 2015 and used cars had a markup of 8.6 percent.

In looking closely at each, in 2012, the average dealer markup for etch sales (etching the vehicle ID number of one or more windows to deter theft or expedite recovery) was 325 percent (average markup of $189), GAP products had an average dealer markup of 151 percent (average markup of $378), and the average dealer markup for service contractors was 83 percent (an average markup of $859). For example, window etching was found in the study to be marked up over 300 percent and sometimes by over 1,000 percent. This poses great risk to low-income consumers about whether they are being discriminated against or whether they are receiving information timely and transparently to make an informed choice when car buying.

In fact, the NCLC report did find statistically significant markups for Hispanics as compared to non-Hispanics, using a simple proxy method of surnames alone to identify and code likely Hispanic consumers. This is a similar technique that the Federal Reserve Board uses in fair lending examinations to code for ethnicity. However, it is not as predictive for African Americans without geocoding, and thus the numbers likely underestimate the amount of discrimination as to non-Hispanic whites. A Center for Responsible Lending study has highlighted significant price disparities suffered by minorities in relation to auto add-on products. It found that African Americans and Latino consumers are about three times more likely to be told that add-ons are mandatory as compared to white consumers. Non-Negotiable: Negotiation Doesn’t Help African Americans and Latinos on Dealer-Financed Car Loans, Center for Responsible Lending, Delvin Davis, January 2014 (Pg. 12).

The crucial consumer issues at stake in add-on products are timely notice, disclosure of price, and the lack of consistency in pricing to consumers. Consumers need the ability to comparison shop among dealers and to have a better understanding before the final phases of car negotiations what the total cost will be and how much financing is required. In December 2018, the NCLC published the “Model Transparent and Consistent Pricing of Motor Vehicle Add-Ons Act,” which cites various state and local laws for support of various provisions, such as Connecticut, Maine, and New York City. The Model Act, which provides for advanced pricing that is transparent and consistent regarding add-on products, provides an important start to the dialogue consumer advocates should have in advancing consumer protection rights (https://www.nclc.org/images/pdf/legislation/model_laws/model-law-transparent-and-consistent-pricing.pdf).

In protecting consumers, can we more effectively use the powers of Unfair and
Deceptive Acts and Practices (UDAP) laws at the federal or state level to address the wrongs noted? Certainly, there were large monetary settlements by the Justice Department and CFPB in the 2013 to 2016 period, as well as some notable state attorney general actions, such as Massa- 

chusetts and Delaware in a $26 million settlement against Santander for issuing subprime auto loans to those who could not afford to pay them under an ability to repay claim. In an interesting analysis by Prentiss Cox, Amy Widman and Mark Totten, “Strategies of Public UDAP En- 

forcement,” Harvard Journal on Legislation, Vol. 55, 37 (2018), the authors lay out vari- 

ous strategies that state attorney generals have employed, including (a) outsourcing large settlements to outside counsel and (b) a street cop approach against individ- 

uals and small businesses within their jur- 

isdictions, or some combination thereof on a continuum of other options. Yet, there are significant gaps in enforcement as well, with nine state enforcers making little use of their UDAP authority in the study period, and another nine states that resolved at least two but no more than five cases per the study criteria (Pg. 84). The authors offer that “While the United States disaggregated system of consumer protection allows for wide innovation, the laboratory of democracy only functions if other enforcers are watching and aware” (Pg. 102).

Finally, the legal profession and civil rights advocates must race to address new ways to help consumers improve their financial and consumer literacy in buying and arranging a car loan. Consumers need to understand the importance of comparison shopping, the benefit of financing the car independent of the dealer, the pitfalls and lack of disclosure on many add-on products, and the impact of high interest rates and long loans on the total cost of the car.

To balance the scales of economic jus- 

tice, consumer advocates and civil rights advocates must come together to be equal- 

ly proactive and united in asserting the economic rights of low-income consumers against a strong and united auto industry. The purchase and financing of a car is one of the most critical consumer transactions of their lives—let’s help our most vulnera- 

ble citizens keep their heads above water.

Human Rights Heroes

continued from back cover

solutions by bringing together diverse partners.

Their work on human rights is equally impressive.

In 2012, the NLCHP secured—for the first time in history—an admission by the Department of Justice and the Interagency Council on Homelessness that the criminalization of homelessness implied its human rights treaty obligations under international human rights law. It was the first time any domestic agency recognized a domestic policy as a human rights violation.

Two years later, they published Human Rights to Human Reality, a 10-step guide to strategic human rights advocacy within the United States designed to help other organizations utilize human rights in their advocacy.

Their annual National Forum on the Human Right to Housing brings together hundreds of advocates and officials each year.

In viewing housing as not only a moral imperative and a key tenant of economic justice, but also as a human right, they have worked to encourage courts, legis- 

latures, and administrative agencies to consider and incorporate human rights treatises into our legal framework and jurisprudence.

Maria Foscarinis has served as exec- 

utive director of the NLCHP since she founded it 30 years ago. Maria served as a primary architect of the landmark McKinney Homeless Assistance Act of 1987 and has been a tireless advocate since. The McKinney-Vento Act has led to 500 formally vacant properties turned into housing, daycare, job training, food production, and more for more than 2 million homeless or poor persons every year. Maria has testified before Congress, published extensively, and litigated precedent-setting cases, all on behalf of the legal rights of homeless persons.

Eric Tars is the legal director of the NLCHP and the counsel of record on many of its cases. Eric is a chief architect of the strategy of using human rights to form an enforceable right to housing and has led national efforts including a campaign to repeal anti-panhandling laws, given testimony before UN entities, and spearheaded the launch of Housing Not Handcuffs. He also serves as the vice- 

chair of the U.S. Human Rights Network Board and teaches human rights advocacy at Drexel University Thomas R. Kline School of Law.

Both Foscarinis and Tars are influenced by the experiences of their family members during and following the devastation of World War II, a devastation that first gave rise to international human rights law with the passage of the Universal Declaration of Human Rights in 1948.

So, on the occasion of their 30th anniversary, for their work on behalf of those experiencing homelessness and poverty, their commitment to improving the conditions of those suffering from economic injustice, and their dedication to advancing human rights domestically, Human Rights magazine recognizes the National Law Center on Homelessness & Poverty, its founder Maria Foscarinis, its legal director Eric Tars, and its many tal- 

ented and dedicated staff and supporters as human rights heroes.

Mathew Mecoli is a data engineer at The Hartford. He serves as co-chair of CRSJ’s Committee on Sexual Orientation and Gender Identity and as the publica- 

tions chair on CRSJ’s Council.
YOUR MONEY’S NO GOOD HERE: COMBATTING SOURCE OF INCOME DISCRIMINATION IN HOUSING

By Antonia K. Fasanelli and Philip Tegeler

A few years ago, Jill Williams, an honorably discharged veteran of the U.S. Coast Guard, received a special housing subsidy for U.S. veterans to help her pay for housing. Williams was homeless at the time and living in the Baltimore region of Maryland. Because of her honorable service to the United States, she was entitled to a VASH voucher—a kind of Section 8 or Housing Choice Voucher—made available to homeless veterans with disabilities.

Williams took the voucher to landlord after landlord in Baltimore County—a jurisdiction that surrounds, but does not include, the city of Baltimore—seeking to rent an apartment. Williams, who has decent credit and no criminal history, was repeatedly turned away and told “we do not accept Section 8.” She estimates that she visited over 20 landlords before quickly renting an apartment in a less desirable neighborhood because she was about to lose her time-limited voucher and, therefore, her only chance at housing. In her own words, “I was good enough to serve my country, but not good enough to live in your neighborhood.” (J. Williams, “Discrimination Based on Source of Income in Baltimore County,” B. Sun (Oct. 8, 2019).)

The kind of housing discrimination Williams experienced is called “source of income discrimination” and refers to the practice of refusing to rent to a housing applicant because of that person’s lawful form of income. Often the denial of housing will serve as a pretext for a prohibited form of discrimination and disproportionately affects renters of color, women, and persons with disabilities. As a result, source of income (SOI) discrimination contributes to the perpetuation of racially segregated communities and neighborhoods with concentrated poverty.

This article discusses the history of SOI laws; recent momentum within federal, state, and local legislatures to prohibit the practice; and advocacy steps to undertake to pursue SOI bills in your local communities.

History

State and local laws prohibiting SOI discrimination began to appear in the 1970s, steadily spreading across the country, and increasing exponentially beginning in the mid-2000s. (See A. Bell et al., “Prohibiting Discrimination...
In 2018, Senators Tim Kaine (D-Va.) and Orrin Hatch (R-Utah) introduced federal legislation to add SOI protection to the federal Fair Housing Act. (Fair Housing Improvement Act of 2018, S. 3612, 115th Congress (2018).) Senator Elizabeth Warren (D-Mass.) also included SOI protection in her broader American Housing and Economic Mobility Act, S. 3503 (2018). Today, SOI laws cover 16 states and over 90 local municipalities. The vast majority of these laws protect families with Housing Choice Vouchers (HCVs), among other types of lawful income, and we estimate (based on CBPP data) that approximately half of U.S. HCV families live in areas protected by an SOI law.

Past research suggests families with HCVs have greater success using their vouchers, and thereby moving out of homelessness, and housing authorities have higher rates of HCV utilization (using all of the vouchers allocated) in jurisdictions with SOI laws. The latest research from HUD also shows dramatically lower rates of discrimination against HCV families in two areas with strong SOI protections—New Jersey and Washington, D.C. (HUD, “A Pilot Study of Landlord Acceptance of Housing Choice Vouchers,” (September 2018)).

One of the most important goals of SOI laws has been to open up higher opportunity and lower poverty neighborhoods to families with HCVs. We know the strong health, educational, and economic benefits for families and children who move from high poverty to low poverty neighborhoods. Today, housing mobility for families with HCVs is widely recognized as an important complement to neighborhood revitalization efforts. Last year, Congress included funding for a “Housing Mobility Demonstration” in the 2019 HUD budget, funding programs to recruit landlords and assist voucher families in finding units in high opportunity areas in up to 12 jurisdictions, similar to programs in Baltimore, Chicago, and Dallas that have collectively helped over 10,000 families move to areas of opportunity. (E. Julian, “Making the Case for Housing Mobility: the CMTO Study in Seattle” (Poverty & Race, May-August 2019).)

SOI laws are one of the key foundations for a successful HCV program, together with strong housing mobility programs and higher voucher rents. (Last year, HUD launched the “Small Area Fair Market Rent” rule, which directs housing authorities in 24 metro areas to raise allowable voucher rents close to the average rent in each zip code, as opposed to the average rent in the region.) Economist Raj Chetty and his team recently completed an experimental study of housing mobility in the Seattle region and demonstrated that, with assistance, a majority of voucher families were able to choose to move to high opportunity communities. (R. Chetty, et al., Creating Moves to Opportunity: Experimental Evidence on Barriers to Neighborhood Choice (Aug. 2019).) Importantly, the study acknowledged that the availability of higher voucher rents and the state’s SOI law were key to the success of the program.

**Advocacy Steps**

In developing a successful strategy to pass SOI legislation, consider the following:

1. **Build a broad coalition led by persons with lived experience.**
2. **Ensure bill language is broad and specific.** The ABA 2017 Policy & Report contains the following definition:
   1. a lawful profession, occupation, or job;
   2. any government or private assistance, grant, loan or rental assistance program, including low-income housing assistance certificates and vouchers issued under the United States Housing Act of 1937;
   3. a gift, an inheritance, a pension, an annuity, alimony, child support, or other consideration or benefit; or
   4. the sale or pledge of property or an interest in property.
3. **Include strong enforcement provisions.**
4. **Understand the perception of the local housing agencies that administer vouchers and attempt to address any challenges.**
5. **Reinforce voucher program policies.**
   - Landlords can use their regular (lawful) screening criteria and charge security deposits and regular rents.
   - Rent payments are reliable and the HCV payment is “recession proof.”

(See Alison Bell, Center on Budget and Policy Priorities, American Bar Association Webinar, “Your Money’s No Good Here” (Dec. 2018) available at [https://www.americanbar.org/events-cle/ecd/ondemand/368773728.](https://www.americanbar.org/events-cle/ecd/ondemand/368773728.))

The authors would like to acknowledge the valuable input by Jill Williams, veteran of the U.S. Coast Guard and board member of the Homeless Persons Representation Project.

Antonia K. Fasanelli is executive director of the Homeless Persons Representation Project.

Philip Tegeler is executive director of the Poverty Race and Research Action Council (PRRAC).

PRRAC maintains an up-to-date listing of all source of income discrimination laws in the United States. See [www.prrac.org/pdf/AppendixB.pdf](http://www.prrac.org/pdf/AppendixB.pdf).
Congress passed the federal Fair Housing Act with broad bipartisan support in 1968, one week after the assassination of Dr. Martin Luther King Jr. As originally enacted, the Fair Housing Act prohibited discrimination on the basis of race, color, national origin, sex, and religion. Congress also obligated the U.S. Department of Housing and Urban Development (HUD) to ensure that federal housing money is spent in ways that affirmatively further fair housing. The Act was expanded during the administration of President Ronald Reagan, again on a bipartisan basis, to include people with disabilities and families with children in the list of protected classes.

The Act remains one of the most important civil rights laws for promoting integration and freedom of choice in housing transactions. Freedom to choose where one lives is a critical component of the American dream. Yet more than 4 million instances of housing discrimination occur each year, and the vast majority are unreported. When families are denied equal access to their housing of choice, the opportunities for good jobs, quality education, and a clean and healthy environment become limited as well.

Although enforcement by private lawsuits is the primary means by which the Fair Housing Act is enforced, Congress empowered HUD and the Department of Justice to enforce the law as well. In addition to affirmative enforcement authority, Congress bestowed HUD with the authority to issue rules and regulations to “carry out” and “implement” the Act. Congress expressly mandated that HUD “give public notice and opportunity for comment with respect to such rules.”

Over the last several decades, HUD has adopted a number of significant regulations interpreting the Act, including a discriminatory effects standard, a regulation requiring local governments receiving federal funds to diagnose and overcome local impediments to fair housing, and a regulation allowing low-income families to use federal housing vouchers to move from poor and racially segregated communities to areas that provide greater opportunity in education and employment. Over the years, HUD has also adopted and published, often in conjunction with other federal agencies, scores of regulations, notices, joint statements, and policy guidance memos on topics as diverse as reasonable accommodation requests from people with disabilities, accessible design and construction standards, state and local land use laws, service and assistance animals, victims of domestic violence, and the assessment of complaints that involve sexual orientation, gender identity, and gender expression.

Under the Trump administration, however, these accomplishments are at risk of being wiped off the books—some illegally. Under the direction of Secretary Ben Carson—who has no prior experience in either civil rights or housing policy—HUD has been eliminating, delaying, or revising its fair housing regulations in ways that are at odds with the intent of the Fair Housing Act, and in conflict with longstanding federal housing policy. Below are just a few examples.

**SUSPENSION OF THE SMALL AREA FMR RULE**

Following an appropriate notice and comment period, the Small Area Fair Market Rent Rule (Small Area FMR Rule) was promulgated by HUD in 2016 after years of community input and careful study and analysis. The intent of the Rule was to allow tens of thousands of low-income families who participate in the Housing Choice Voucher (HCV) program—families that disproportionately are African American, Latino, and other racial minorities—to use their housing vouchers to move from poor and racially segregated communities to areas that provide greater opportunity in education, jobs, and more. In doing so, the Small Area FMR Rule aligns the federal government’s primary rent subsidy program with HUD’s statutory mandates to ensure fair housing and avoid contributing to concentrated poverty.

The HCV program—formerly known as the Section 8 voucher program—provides a housing subsidy to more than 2 million households nationwide, enabling them to secure affordable, decent-quality housing in the private market. A participating household generally pays 30 percent of its monthly income toward rent. An HCV covers the remainder of the total rent amount (including utilities), so long as the rent does not exceed an amount based primarily on what HUD determines is the “fair market rent,” or FMR, for a comparable dwelling in the area. By subsidizing housing through these vouchers rather than through public housing projects, the HCV program aims to provide low-income families greater geographic choice in housing. A primary objective of the HCV program is to permit low-income

---

President Donald J. Trump signs an Executive Order on establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing Tuesday, June 25, 2019, in the Oval Office of the White House.
families to settle throughout metropolitan areas, thereby avoiding the high concentrations of poverty and racial segregation that have been linked to significant adverse health, educational, and economic outcomes for children and adults.

The Small Area FMR Rule adopted by HUD in 2016 requires the public housing agencies (PHAs) that administer the HCV program locally to set voucher values in 24 metropolitan areas based on the prevailing private market rents for each distinct zip code within those regions. This methodology, which improves on the prior formula used in large metropolitan areas, recognizes the existence of very different local rental markets within each metropolitan area and calibrates vouchers more finely to the amount needed to live in various neighborhoods. It thus enables voucher holders to access a wider range of housing, outside of voucher-concentrated, racially segregated areas.

On August 11, 2017, however—and without following any notice and comment procedure as required by the Administrative Procedures Act and the Fair Housing Act—HUD abruptly announced that it would not require PHAs to implement the Small Area FMR Rule’s requirements in 23 of the 24 metropolitan areas subject to the rule. (The only area where the Small Area FMR Rule was not suspended was Dallas, where HUD implemented small area FMRs pursuant to a fair housing settlement triggered by a private complainant.) Although HUD said it would entertain applications from PHAs to use small area FMRs voluntarily in the meantime, it also made clear that it would not be assisting PHAs in implementing small area FMRs and indicated that PHAs would be unwise to do so. HUD made no attempt to follow a notice and comment procedure, but instead simply wrote letters to the PHAs and posted a notice on its website.

HUD was promptly sued for violating the Administrative Procedure Act by two HCV holders and an advocacy group. On December 23, 2017, the U.S. District Court for the District of Columbia issued a preliminary injunction against HUD, finding that it had “no authority to act without notice and comment,” and that HUD’s decision-making in the matter was “arbitrary and capricious.” Open Communities Alliance v. Carson, Case No. 1:17-cv-02192 (D.D.C., 12/23/2017). HUD subsequently backed off its attempt to delay implementation of the Small Area FMR, and on February 15, 2018, stipulated to a judgment in the plaintiffs’ favor.

**SUSPENSION OF THE AFFH PROCESS**

Since its enactment in 1968, the Fair Housing Act has required more than the avoidance of housing discrimination. It also requires the federal government and its grantees to take affirmative steps to promote residential integration, undo the legacy of racial segregation, and otherwise further fair housing. Specifically, the Act requires HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Fair Housing Act],” 42 U.S.C. § 3608(e)(5). This “affirmatively furthering fair housing” (AFFH) provision ensures that the Fair Housing Act constitutes “an obligation to do more than simply refrain from discriminating,” NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149, 155 (1st Cir. 1987), and also powers affirmative movement toward integration in communities across the country, as Congress intended. See Tex. Dep’t of Hous. & Cnty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525-26 (2015).

Although this AFFH provision has been part of the Fair Housing Act for 50 years, historically HUD permitted local jurisdictions to largely ignore that duty even as those jurisdictions collected billions of dollars in federal grants annually for housing and community development. That changed in 2015 when HUD promulgated—again following the required notice and comment process—its own AFFH Rule. That Rule requires jurisdictions to undertake a rigorous process of assessing local fair housing needs and making concrete plans to address them, including by soliciting community participation and addressing the comments submitted. A jurisdiction must memorialize its work in a detailed document called an Assessment of Fair Housing (AFH), which HUD must review. If the AFH does not meet the Rule’s requirements, HUD must reject it, explain its reasons, and then work with the jurisdiction to fashion a compliant AFH. In no uncertain terms, the Rule provides that jurisdictions that do not go through this process and emerge with HUD-approved AFHs may no longer receive federal housing and community development funds. The AFFH Rule therefore implements a key provision of the Fair Housing Act, which requires recipients of federal funds to take affirmative steps to combat racial segregation and otherwise affirmatively further fair housing.

As with the Small Area FMR Rule, HUD and Secretary Carson abruptly suspended—without notice and comment procedures—the core requirements of the AFFH Rule. On January 5, 2018, HUD suspended the AFH process and no longer required participating jurisdictions to submit AFHs or HUD to review those already submitted. Because of the existing submission schedule, the practical effect of HUD’s action is to remove the AFFH Rule’s requirements until 2024 or 2025 for most participating jurisdictions.

Once again, HUD’s action was challenged in court as a violation of the Administrative Procedure Act (APA). Unlike the Small Area FMR litigation, however, the only plaintiffs involved were advocacy organizations, which the court eventually determined did not have standing to challenge HUD’s actions. National Fair Housing Alliance v. Carson, U.S.D. Case No. 1:18-cv-01076 (D.D.C., 8/17/2018). No individuals were involved in the lawsuit as plaintiffs. Moreover, the court went on to opine that even if the plaintiffs had standing, HUD’s decision could not be challenged under the APA because HUD suspended the AFH process by withdrawing only “information collection” mechanisms, an action not subject to APA notice and comment requirements. Despite these procedural and technical findings, however, there is no dispute that HUD’s conscious delay in the adoption of an AFFH assessment tool will delay for years the effective implementation of the AFFH Rule and the promise it holds for decreasing segregation in the nation’s largest metropolitan areas.

**EVIScerATING THE DISPARATE IMPACT Rule**

Over the entire 50-year history of the Fair Housing Act, every court to face the issue has held that the Act implicitly embraces a disparate impact standard; meaning, a violation of the Act can be established
by proof that a policy or practice has an adverse and disproportionate impact on a protected class, if not sufficiently justified by business necessity. HUD also endorsed this interpretation of the Act in a regulation adopted in 2013, “Implementation of the Fair Housing Act’s Discriminatory Effects Standard” (the Disparate Impact Rule). This regulation was effective by the time the U.S. Supreme Court conclusively declared in Texas Department of Community Affairs v. Inclusive Communities Project, 135 S. Ct. 2507 (2015), that disparate impact claims are cognizable under the Fair Housing Act. Indeed, Inclusive Communities cited the regulation several times, without any indication of disapproval.

In August 2019, however, HUD issued a Notice of Proposed Rulemaking that could effectively gut the current version of this regulation under the pretext of “implementing” Inclusive Communities. This is one of the Trump administration’s most extreme moves to scuttle or delay antidiscrimination laws. The proposed rule would allow financial institutions, insurance companies, and housing providers to adopt policies and practices or engage in covert discriminatory practices by imposing additional hurdles to sustaining and proving a violation of the Act based on a disparate impact theory of liability.

Specifically, victims of discrimination will face a dramatically higher burden than previously to establish a disparate impact claim under the Fair Housing Act. Language in the proposed rule suggests that a practice or policy that is profitable could be immune from challenge for its discriminatory impact—with the burden on discrimination victims to show that a company can make at least as much money without discriminating. Disparate impact is a critical tool to rein in discrimination in the use of algorithmic models—such as credit scoring, pricing, marketing, and automated underwriting systems. These practices can have starkly discriminatory effects but can operate as a hidden box, making those discriminatory effects difficult to attribute to any person’s intentional discrimination.

Yet, the proposed rule provides special defenses for business practices that rely on statistics or algorithms. HUD’s proposed rule could effectively immunize such covert discrimination by algorithm. In addition, the proposed Rule disincents businesses to collect important data that can reveal discrimination. This means that victims of discrimination will be unable to identify whether discrimination is happening and lack the ability to challenge it if they do detect discrimination. HUD did not even attempt to defend these changes as good policy, instead justifying its actions as somehow required by the Inclusive Communities decision. But there is no support in the case law for the draconian changes being proposed.

Unlike its previous strategies, this time around HUD is following the standard public notice and comment procedure required by the APA. Final comments to the proposed rule were due on October 18, 2019. Over 45,000 comments were submitted prior to the deadline. As of the time of publication of this article, HUD had not issued a Final Rule.

**ELIMINATION OF INFORMAL AGENCY GUIDANCE**

Most recently, on October 15, 2019, President Donald Trump issued Executive Order 13891, ironically entitled “Promoting the Rule of Law through Improved Agency Guidance Documents.” 84 FR 55235 (Oct. 15, 2019). In this Executive Order, the president chastises federal agencies for having “sometimes used [their] authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA.” The Executive Order requires that all “guidance documents”—which it defines as an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation—be rescinded if the federal agency determines that it “should no longer be in effect.” Moreover, an agency head must submit a report to the director of the Office of Management and Budget with the reasons for maintaining any guidance documents the agency head determines should not be rescinded. The director is required to provide such reports to the president.

Like all other federal agencies, HUD is subject to this new Executive Order. As noted above, HUD has issued a rich treasure trove of agency guidance documents on a wide range of fair housing topics, including discrimination against victims of domestic violence, reasonable accommodation requests from people with disabilities, state and local land use laws, service and assistance animals, and the treatment of fair housing complaints that involve sexual orientation, gender identity, and gender expression. These critical HUD agency guidance documents are now at risk of being rescinded, which will leave housing providers, tenants, and others at sea as to what their rights and responsibilities are in these critical areas.

**CONCLUSION**

Civil rights and fair housing advocates never harbored high hopes that the Trump administration would enforce the Fair Housing Act with much vigor. But the extreme efforts to which the Trump administration has gone to dismantle, sometimes lawlessly and without case law support, the fair housing policies expressly established by Congress, is extremely disconcerting to civil rights and fair housing advocates. More battles to either dismantle, or to preserve, existing fair housing protections will no doubt continue throughout the remainder of the Trump administration.

*The author would like to acknowledge the valuable insights of his colleagues Michael Allen, Sara Pratt, and Sasha Samberg-Champion provided in this article.*

**Stephen M. Dane** is a partner in the civil rights law firm of Relman, Dane & Colfax PLLC. The firm was involved in several of the cases cited in this article.
Solve Hunger with Anti-Poverty Policies, Not Anti-Hunger Policies

By Alexandra Holden

According to the U.S. Department of Agriculture’s Economic Research Service, 15 million households in the United States, or 11.8 percent, suffered from food insecurity in 2017, defined as “a lack of consistent access to enough food for an active, healthy life.” In a survey conducted by the Food Research & Action Center (FRAC), 45 percent of adults surveyed consider hunger in the United States a serious problem. Eighty-six percent agreed with the statement “in the United States no one should go hungry.” Yet, 46 percent of those same adults believed that eradicating hunger is not an achievable goal. This is because the United States does not consider access to affordable, healthy food a right necessitating governmental protection.

We in the United States do not treat food access as a basic human right; we treat it as a privilege. Our hunger safety net programs do not reach everyone in need and our social safety net policies fail to recognize the need to eliminate poverty as a first step to eliminating hunger. Some levels of our government choose to remain indifferent about our hunger crisis, or even threaten to cut these programs’ funding and reduce eligibility. State and local governments routinely pass legislation to protect our nation’s hungriest, while the current presidential administration faces warranted backlash for proposing cuts to eligibility for SNAP and WIC. This comes as no surprise when we consider our historical record with human rights.

THE HISTORY OF FOOD AS A HUMAN RIGHT

The United States has had three chances to recognize food as a basic human right. In 1944, President Franklin Delano Roosevelt (FDR) proposed his Second Bill of Rights. The right to “earn enough to provide adequate food and clothing and recreation,” was included. First Lady Eleanor Roosevelt took her late husband’s draft of the Second Bill of Rights to the United Nations (UN), where it contributed to the formation of the UN’s Universal Declaration of Human Rights (UDHR).

On December 10, 1948, the UN voted to adopt the UDHR. Article 25 of the UDHR states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care…” Over 160 countries have ratified the UDHR, yet 70 years later it remains unratified by the United States.

The United States has also failed to ratify the International Covenant on Economic, Social and Cultural Rights of 1966, which demands governmental guarantees to health, education, social protection, and an adequate standard of living for all people. While President Jimmy Carter signed the Covenant in 1977, it too remains unratified.

Without ratification of the UDHR or the Covenant, the U.S. government is not required to protect the rights contained within these documents and cannot face punishment from the international community for failing to protect these rights. When someone in the United States faces hunger, their only form of assistance comes in the form of social safety net programs.

ANTI-HUNGER PROGRAMS IN THE UNITED STATES

At present, when an individual in the United States becomes food insecure and meets certain requirements, they are eligible for food safety net programs meant to provide temporary relief. These include SNAP, WIC, National School Lunch Program, Food Distribution Program on Indian Reservations (FDPIR), and many more. These programs reduce hunger by lifting families out of poverty by supplementing the income of the family to push their income over the poverty line. In 2019, the U.S. Department of Health and Human Services determined that for a family of four to be considered living in poverty, their annual income must be $25,750 or less. Many question the value of using the U.S. poverty line as a measure for determining safety net program eligibility because it does not take into consideration the cost of living and is also falling further from the median family income.

One of the most effective programs at lifting families out of poverty is the U.S. Department of Agriculture’s Supplemental Nutrition Assistance Program (SNAP), formerly known as food stamps. According to the U.S. Census, SNAP lifted 3.4 million people, including 1.5 million children, out of poverty in 2017.

THE AMERICAN DREAM DOESN’T WORK FOR EVERYONE

SNAP lifts families out of poverty by freeing up money that would otherwise go toward food, allowing it to instead go toward other necessities like clothing, housing, and medical expenses. However, while SNAP has proved immensely powerful to many, it does not lift everyone out of poverty. People both above
and below the poverty line can qualify for SNAP. This is because having a job no longer guarantees that you can stay above the poverty line and staying above the poverty line does not mean that you are no longer poor. Of the 45.7 million individuals who received SNAP benefits in the 2015 fiscal year (FY), 44 percent were children, 10.6 percent were older adults, and 9.5 percent were non-elderly adults with disabilities. The remaining 35.9 percent of SNAP benefit recipients are non-disabled, non-elderly adults. Many of those able-bodied adults worked during the 2015 FY, yet still live in deep enough poverty to qualify for SNAP. These people are known as “the working poor.”

The “working poor” is defined by the Bureau of Labor Statistics as individuals who spend at least 27 weeks of the year working or looking for work, yet still fall below the federal poverty line. Despite working full-time jobs, many find themselves in poverty due to low wages, unstable work schedules, and the high costs of living in poverty, to name only a few reasons. Costs like childcare, education, banking, transportation, housing, and medical expenses are all rising at rates such that, for many families, the minimum wage even when working full time is insufficient.

According to the Center for Budget and Policy Priorities (CBPP), the number of SNAP applications steadily rose between 2007 and 2013 by 81 percent due to the Great Recession. Though the number of people enrolled in SNAP has dropped since its 2012 high, the numbers remain above pre-recession levels. This is partly because even when the unemployment rates improve, the poverty rates tend to lag several years, keeping SNAP enrollment relatively high. A 2019 report from CBPP indicates that both the proportion and the number of individuals participating in SNAP have increased since 2007. More people have become eligible for SNAP, and utilization has increased from 2007 to 2016 as well. In 2007, 37 million people were eligible, while 69 percent participated, and in 2016, 47 million people were eligible, while 85 percent participated. Many variables could explain these increases, such as a reduction in the stigma surrounding SNAP, greater awareness of the program, and higher costs of living adding to the stress of families living at or near poverty levels.

**HUNGER IS CAUSED BY POVERTY**

Poverty exacerbates one’s food insecurity, even when food safety net programs are in place and utilized effectively. In the United States, roughly 23 million individuals in 2014 lived in a food desert, according to Move for Hunger. The USDA defines food deserts as areas where people have limited access to a variety of healthy and affordable food. For rural communities, an area is defined as a food desert if the nearest supermarket is more than 10 miles away. For urban communities, this distance is one mile. Measurements of food deserts add the caveat that the food source be an actual supermarket. Food deserts can force individuals to travel great distances, which can be expensive or dangerous, to buy food.

The South Shore neighborhood lies just south of the University of Chicago, where I am a senior. In 2015, this Chicago community had a median household income of $26,425 according to the Community Data Snapshot, only $675 above the poverty line, and no grocery stores. The community has survived with a handful of corner stores, and those with a car travel to Indiana to buy groceries. Local politicians have worked for years with supermarket executives to bring in a grocery store. Many communities in food deserts are not so lucky.

Food desert communities rely on corner stores to provide their basic sustenance. Because these stores typically have a monopoly on the food supply in an area, they can charge exorbitant prices. If a store offers fresh produce, these prices will be even higher, sometimes forcing patrons to choose unhealthy options. Often unfairly blamed for the food choices they make, low-income parents can be unjustly chastised no matter what they purchase for their children. Difficult food decisions can lead to malnutrition and undernourishment, symptoms of food insecurity.

**HUNGER AS IT AFFECTS NATIVE AMERICANS**

In 2012, 5.2 million people identified as Native American across more than 570 federally recognized tribes. One in four Native Americans face food insecurity compared to one in eight Americans overall.

Native communities face extremely high rates of poverty, and it is this poverty which is one of the largest contributors to the statistic that Native American families are 400 percent more likely than the average U.S. household to be food insecure. According to the U.S. Census Bureau, Native Americans faced a poverty rate of 26.2 percent in 2016, over twice as high as the 12.7 percent national poverty rate in 2016. Due to this intense poverty, many tribal communities lack significant economic opportunity. Resources are often far flung and public transportation is extremely limited, forcing individuals to rely on others for rides to work or the nearest store.

Food deserts are abundant across Native communities. SNAP is not the most practical program for Native Americans, given the limited availability of stores in tribal communities that can accept SNAP. While seven in ten Native Americans live in urban areas, the remaining three do not, according to the U.S. Census Bureau in 2015. The FDPIR provides monthly “commodities” boxes containing shelf-stable foods to Natives living in remote areas and cannot be used in conjunction with SNAP. The FDPIR has operated since 1973 when the commodities were high in preservatives, sugar, fat, and oils. These boxes contributed to the degradation of Native health, serving as the only source of food for many who used them, despite being designed as a supplemental source of nutrition.

**HOW MY NATION IS COMBATTING HUNGER**

My Nation (the Choctaw Nation of Oklahoma) is working to take back my people’s health in a way that my nation (the United States) is unwilling to do. Our tribal leaders advocate for healthier and more traditional items in the commodities boxes. The Choctaws have also built a chain of grocery stores across our territory in Oklahoma, carrying Native-made products, which may become SNAP retailers. We run community gardens and may adopt a program to allow SNAP recipients to spend their benefits at our Native-run farmers’ markets.

Hunger persists across tribal lands due to poverty and its malicious effects. Poverty causes crime, low academic achievement, higher costs of living, and hunger, according to the Choctaw Nation’s Promise Zone project. When hunger persists, it is not anti-hunger policy that continued on page 25
Economic Rights: Are They Justiciable, and Should They Be?

By Rotem Litinski

By definition, human rights are universal and describe those rights related to human dignity. Thus, the universal obligation to adhere to these rights arguably binds the government to be proactive in its action or inaction toward fostering human dignity. While international human rights law emboldens the fiduciary responsibilities of national governments to protect the human rights of their residents, the universality of human rights also engenders a broad interpretation of how they can be observed. This interpretation is, at times, subjectively operationalized.

Human rights scholars recognize five broad categories of rights—civil, political, social, economic, and cultural—outlined in the 1948 Universal Declaration of Human Rights, but rarely practiced in their totality. More specifically, social rights often deal with the allocation and distribution of resources, a power generally reserved for the legislature. They are regarded as "second-generation" rights protected by the government to ensure the fulfillment of basic needs like sustenance, housing, education, health, and employment. Social rights are primarily private rights requiring government intervention and sacrifice, rather than a negative right that implicates government inaction. This contrasts “first-generation” civil-political rights, which largely limit government interference, and which many claim are compromised at the expense of socioeconomic rights.

Today, economic rights are not deemed officially “justiciable,” meaning there remains significant controversy surrounding whether or not independent judiciaries should remedy a violation of the right through deeming government action or inaction unconstitutional and, to a certain extent, demanding legislative or executive response.

The obligations imposed by economic rights work must be approached in the same way as they are with respect to civil and political rights. These include providing freedoms, imposing obligations on the state regarding third parties, and imposing obligations on the state to adopt measures or to achieve a particular result (International Commission of Jurists, 2008). The enforcement of economic rights is instrumental to the amelioration of the ubiquitous and damaging economic crises domestically and abroad.

ECONOMIC JUSTICE TO COMBAT ECONOMIC STRIFE

Constitutionalizing economic rights can begin to ameliorate the gaping issues of hunger, unemployment, and poverty that disproportionately affect low-income and minority communities in the United States and abroad.

The United States, despite being among the world’s wealthiest and most resource and technology-heavy states, remains the only developed country where millions go hungry (“The State of Hunger in 2009,” Human Rights, 2009). Rates of poverty remain just as demoralizing. There are 39.7 million people living in poverty in the United States, including 12.8 million children (U.S. Census Bureau, 2018). Eighty-six percent of jobs in the food system offer very low wages at or below the poverty level, a steadily rising standard (Food Chain Workers Alliance and Solidarity Research Cooperative, 2016). Higher rates of poverty are also intimately connected with unemployment rates. Widespread and lingering unemployment yields dire consequences for both the national economy and the unemployed demographics; the former is fiscally stunted, while the latter may experience emotional and psychological destruction.

The tradition of regarding economic rights as second-class is deceptive, especially considering the fundamental nature of these rights. America has embraced and adopted the Universal Declaration of Human Rights, which states, under Article 25, that there is a “right to a standard of living adequate for the health and well-being” of each person and their family, including basic food, medical care, social services, and security in the event of unemployment or disability. It is these human rights that offer a means of articulating and fulfilling basic human needs. These needs are encompassed by the protections provided by economic rights.

It follows, then, that the judicial protection of human rights is crucial. A right without a remedy raises questions of whether it is in fact a right at all. This is not to say that judicial enforcement is the only, or even the best, way of protecting economic, social, and cultural rights. However, judicial enforcement has a clear role in developing our understanding of these rights, in remedying clear violations, and in providing decisions on test cases that can lead to systematic institutional change and prevent future rights violations.

JUSTICIABILITY AND THE SCOPE OF JUDICIAL AUTHORITY

Many have questioned whether it is constitutionally acceptable for a court
to assess the progressive realization of economic rights, which would require the actions of several mechanisms in concert. Because the responsibility of constructing and enforcing laws belongs to the legislative and the executive branches, respectively, judicial enforcement of economic rights might be misconstrued as a denigration of the checks and balances system. On the other hand, judicial review necessitates that courts evaluate the consistency of legislation and government action with constitutional ideals, aspirations, and obligations. Ensuring the human rights of individuals to shelter, food, and basic economic stability, foundational to the realization of their human dignity, is well within those constitutional bounds. Regardless, U.S. courts often gag themselves by denying their power to constitutionalize socioeconomic rights.

Due to their unelected status, the role and expanse of the courts is constantly in question. But it is this status that insulates judges from the public, enabling them to protect individuals and groups while exercising objectivity. There is an institutional bias toward preserving the public good over individual rights because the latter creates a risk that may conflict with a public interest, a risk that public officials want to minimize. Whereas public officials may base decisions on public approval, insulated judges are distanced from public sentiments and can remain consistent in their values and decisions. These factors establish the credibility needed to exercise powerful judicial review.

**ECONOMIC RIGHTS AS DERIVATIVES OF CONSTITUTIONAL PROVISIONS**

In practice, democratic constitutions often compel the court to gag itself to counteract judicial overextension and relegate jurisdiction to the State. The court has an obligation—similar to the positive duties imposed on the State—to intervene if unconstitutional legislation unreasonably infringes on the basic rights and liberties of individuals to functionally engage in society. This obligation is as rooted in human rights and economic justice as it is in the Constitution.

Economic liberty has become increasingly associated with First Amendment protections. For example, there are elements of free speech law that challenge wealth distribution. Background rules require that some public property is readily available for political activity (Weak Courts, Strong Rights, Tushnet, 2009). This “First Amendment easement” on public property granted to public demonstrators largely reconciles the reality that the capacity to tangibly influence public policy disproportionately relies on the possession of adequate resources, like money. The protection of contentious speakers during protests also requires funds composed of allocated taxpayer dollars. This reflects a commitment to emboldening both freedom of expression and economic redistribution. While the protection of First Amendment rights is important, the equal access to such fundamental rights cannot be truly operationalized without the prerequisite fulfillment of basic human rights and needs. Although all Americans have the theoretical equal right to free speech, free expression, entry into contracts, or ownership of property, these rights are not equally felt in practice. This has everything to do with economic injustice.

Laws must be established on the principle of legitimacy, rooted in a confidence that all reasonable people would be able to ascertain their merits in a legal claim. Legislation is legitimized through this public endorsement and agreement of reasonable citizens. The State cannot call on its members to accept and participate in their democratic system if it does not conduct itself in a way that properly sustains each individual as a valued contributor in social, political, and economic life.

This can be achieved through constitutionalizing social rights.

Social rights relate to the most fundamental of individual preoccupations. To the extent to which the court is entrusted with interpreting the Constitution, it must equally attend to constitutional moral goals of ensuring that individuals’ material needs are met. Thus, judges have a commitment to positive legal ordering because if the Constitution does not guarantee social rights, it is failing its moral purpose. Because legislatures make policy choices independent of constitutional law considerations, there is a clear interest in having the court police legislative actions. Further, policy review is not policymaking (UN Human Rights Office of the High Commissioner). The judiciary is not surpassing its constitutional role by making decisions pertaining to economic rights.

**VIABLE SOLUTIONS TO MISPLACED FEARS**

Generally, the concerns regarding the constitutionalization of economic rights stem from logistical and bureaucratic fears about the unprecedented expansion of a coercive judiciary and the provision of changes in wealth distribution. But the implementation of weak-form judicial review challenges the sentiment that any judicial interaction with justiciable economic rights must emerge in the form of coercive orders. Through weak-form judicial review, economic rights are “enforced through politics backed up and encouraged by the courts” (Tushnet, 2009). In so doing, rather than rendering the non-justiciable rights “legally irrelevant,” traditional fears of judicial overextension are generally allayed while the rights are rightfully granted government attention and serve foundational roles in defenses to actions of ordinary torts and contracts. This, though not directly amending government policies, does beg legislative and popular response.

On the other hand, weak substantive rights, or those rights that are recognized as judicially enforceable yet largely legislatively discretionary, also serve as a viable alternative to strong justiciable economic rights. Rather than providing relief to individual plaintiffs, the court would call for the “reasonable” protection of economic and social welfare rights, allowing and holding governments accountable to adopt...
“reasonable” programs to actualize such social welfare rights. This is the formal position taken in U.S. constitutional law.

LITIGATING ECONOMIC RIGHTS IN COURTS—GLOBAL AND HISTORICAL PRECEDENTS

Economic rights have been and continue to be litigated in courts around the world, according to the UN Human Rights Office of the High Commissioner. Much of Europe already embraces the justiciability of economic rights. The European Social Charter covers the rights to housing, social protection, education, good working conditions, health, high-quality social services, the protection of migrant workers, and the protection against poverty and social exclusion. The president of the European Committee of Social Rights, Giuseppe Palmisano, for example, has a clear intention of highlighting the connection between economic rights and civil and political ones, enshrined in the European Convention on Human Rights. He claims that “In Europe today, there is an urgent need not only to underline the importance of these rights but, above all, to avoid a narrow approach under which only some are seen as human rights.”

The United States has a long history of attending to social justice by enforcing economic rights. In the midst of the Great Depression, President Franklin D. Roosevelt implemented the New Deal, whereby the government operationalized a host of policies and programs to bolster employment, revitalize housing, and combat poverty and hunger. Decades later, the Affordable Care Act was passed in an effort to ameliorate the extreme inequalities experienced throughout the health care system. The importance of economic rights and justice also finds foundational roots in American legislative policies, state constitutions, and judicial decisions.

CONCLUDING REMARKS

Regardless of the solution, the enforcement of economic rights remains important both in ensuring the adequate and equal operationalization of individuals’ civil and political rights and in ensuring adequate standards of living. By observing, respecting, and adhering to the goals of economic justice, government actions toward protecting human dignity transition from aspirational to productive. The enforcement of economic rights through judicial channels forces us to question whether rights pertain to needs or democratic values. Choosing the latter might mean advocating for the legal need to ignore social realities or remain purposely abstract so individuals can decide if democracy should run itself or maintain a more robust structure of ensuring that rights—as operationalized—meet demands.

Rotem Litinski is a third-year student at the University of California Berkeley focusing on legal studies and political science and has interned at the Superior Court of California in San Francisco and for the ABA Section of Civil Rights and Social Justice.

Solve Hunger

continued from page 22

will help these families, it is anti-poverty policy.

WE NEED ECONOMIC JUSTICE SO WE CAN HAVE FOOD JUSTICE

Recall FDR’s Second Bill of Rights. He argued for “the right to earn enough to provide adequate food” not simply for food access. Food safety net programs are no longer enough. While we continue to successfully lift more families out of poverty each year, this number should grow considerably faster than it has. In a modern, industrialized nation like our own, no one should live in poverty. We need to improve the minimum wage, demand stability for wage workers’ schedules, and recognize that being poor is an expensive burden.

Our country has allowed poverty to become normalized rather than deciding that no person living in our country should live impoverished. People should not have to rely on the charity of food banks or kind neighbors to survive. People should be able to make living wages and afford food along with all their other necessary expenses. Food assistance is no longer enough. To end hunger, we need economic justice. We need the United States to recognize that food is a basic human right and that any person living in our country should be able to afford to put healthy food on the table.

The American Bar Association passed Resolution 107 in February 2014. This resolution urges governments to “promote the human right to adequate food and nutrition for all through increased funding, development and implementation of strategies to prevent infringement of that right.” It also urges the U.S. government to “make the realization of a human right to adequate food a principal objective of U.S. domestic policy.” The United States faces no dearth of food; it is inequitable access to this food that we suffer from.

Alexandra Holden is a fourth-year student at the University of Chicago majoring in political science and Germanic studies with a minor in human rights.
A hero for human rights in the space of economic justice could operate across many areas. The issues of economic justice are wide-ranging and far-reaching, and the causes of economic injustice span the breadth and depth of our society. At its core, economic justice is about poverty, but poverty itself is multifaceted and must often be addressed obliquely with improvements in criminal justice, fiscal policy, environmental reform, and access to health care.

To be a leader in this space and to be honored for heroics among a field of heroes, then, is to demonstrate great passion and great works both on behalf of the impoverished and also in furtherance of the tenants of human rights. It is advocacy on behalf of people and it is advocacy on behalf of an idea—an idea that the most central element of a person is their dignity.

The National Law Center on Homelessness & Poverty (NLCHP), its founder and executive director Maria Foscarinis, and its legal director Eric Tars exemplify this dedication.

Over the past 30 years, from legislatures and town halls and courtrooms across the country, they have advocated for millions through policy, education, and litigation. Their concrete and successful efforts on behalf of the homeless have improved real lives while simultaneously advancing the framework of international human rights law domestically.

Among their many major legal victories are Lampkin v. D.C., NLCHP v. Suffolk County, and A.E. v. Carlynton School District, all upholding education rights for homeless children; Martin v. Boise, a Ninth Circuit holding finding that criminalizing sleeping outside is cruel and unusual punishment in violation of the Eighth Amendment; and Norton v. City of Springfield, wherein ordinances banning panhandling were held in violation of First Amendment free speech rights.

One of their most recent initiatives, the Housing Not Handcuffs Campaign, combats homelessness through housing-based

continued on page 15