Mr. Philip Alston
UN Special rapporteur on extreme poverty and human rights
Palais des Nations
CH-1211 Geneva 10
Switzerland

October 4, 2017

Re: Criminalization of Poverty as a Driver of Poverty in the United States

Dear Mr. Alston,

The Criminal Justice Policy Program at Harvard Law School (CJPP) and Human Rights Watch (HRW) thank you for this opportunity to provide input in advance of your visit to the United States as the Special Rapporteur on Human Rights and Extreme Poverty. Our organizations hope to demonstrate how two common features of the United States criminal justice systems–money bail and exorbitant fees and fines–violate the rights of vulnerable defendants and at the same time exacerbate poverty, including extreme poverty.

Since the Special Rapporteur’s last visit to the United States, there has been a significant evolution in both our understanding of the harms from and in the momentum for reform associated with these two issues. Yet, much remains to be done as states and localities entrap poor defendants in cycles of debt, probation, and incarceration. The harms are widespread and disproportionately impact minority communities.

Many jurisdictions motivated by revenue-raising shift the costs of the criminal justice system to the poorest instead of passing politically unpopular tax increases. Unable to pay and confronted by court systems that often seem bent on ignoring that fact, individuals face the real threat of incarceration, often because of minor offenses. Many individuals are then left with damaged credit and in some states are denied the right to vote until their debts are paid. It is no surprise that many individuals rely on their families and communities to help pay their debts, and this reality further expands the circle of people who suffer harm. These systematic failures to protect political and civil rights exacerbate and help entrench poverty in communities across the country, especially minority communities that are targeted by aggressive policing.
Our submission explains how these practices implicate human rights law, and details the need for the federal government to play a greater role in ensuring that state and local jurisdictions take steps to avoid abuses and protect the rights of those living in poverty.

During your official visit in December, we urge you to raise the importance of reforming practices in the US criminal justice system regarding money bail, fees, fines, and related penalties that violate the human rights of poor Americans and exacerbate extreme poverty.

We also attach for your reference:

1) [Confronting Criminal Justice Debt: A Guide for Policy Reform](#), Criminal Justice Policy Program at Harvard Law School
2) [Confronting Criminal Justice Debt: The Urgent Need for Comprehensive Reform](#), Criminal Justice Policy Program at Harvard Law School
3) [Profiting from Probation: America’s “Offender-Funded” Probation Industry](#), Human Rights Watch
4) [The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City](#), Human Rights Watch
5) “Not in it for Justice”: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People, Human Rights Watch
6) [When All Else Fails, Fining the Family: First Person Accounts of Criminal Justice Debt](#), Center for Community Alternatives
7) “Dear Colleague” letter, US Department of Justice, Civil Rights Division, Office for Access to Justice
8) [Criminal Justice Debt: A Barrier to Reentry](#), Brennan Center for Justice
9) [Targeted Fines and Fees against Communities of Color: Civil Rights & Constitutional Implications](#), US Commission on Civil Rights
Thank you for your attention to these issues. Should you wish to discuss our submission or have any questions, please contact Komala Ramachandra at ramachk@hrw.org and Mitali Nagrecha at mnagrecha@law.harvard.edu.

Sincerely,

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Submission to the UN Special Rapporteur on extreme poverty and human rights: Criminalization of Poverty as a Driver of Poverty in the United States

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I. Introduction

After a police officer in Ferguson, Missouri shot and killed Michael Brown, the Department of Justice released a report exposing how the city routinely and disproportionately targeted poor, black residents with high fees and fines on low-level offenses, and then enforced those debts through judicial authority, warrants, and incarceration. As of December 2014, over 16,000 people
had outstanding arrest warrants in a city with a total population of approximately 21,000.\(^1\) The Ferguson Report concluded that these practices violated the Constitution and fed deep community-police mistrust as the city’s courts and police used residents to generate revenue.\(^2\)

There is evidence that policies and practices of charging exorbitant fees and fines and harsh enforcement exist across the country. There have been some recent lawsuits challenging the constitutionality of such practices that have resulted in settlements, compensation to plaintiffs, and legal reforms.\(^3\) Additional lawsuits are pending.\(^4\) We believe that such practices are prevalent, requiring further litigation, regulation, and legislative reforms.

Policymakers have taken interest. In 2016 the Conference of Chief Justices and the Conference of State Court Administrators formed a National Task Force on Fines, Fees and Bail Practices “to address the ongoing impact that these legal financial obligations (LFOs) have on economically disadvantaged communities.”\(^5\) Various states passed laws\(^6\) and amended court rules\(^7\) to address these issues, and additional bills are pending in state legislatures across the county.\(^8\) Yet much remains to be done.

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\(^{2}\) Id. at 6, 55.


\(^{8}\) See generally http://gaveltogavel.us/category/special-edition/. For more examples of state action, see National Center for State Courts, https://public.tableau.com/profile/publish/FFBP2_o/ActivitiesByType#!/publish-confirm.
II. Poor Individuals are Increasingly Burdened with High Fees and Fines

Over the last 40 years, as the United States criminal justice system ballooned, so too did the costs of funding that system. It also became increasingly difficult for state houses across the country to balance budgets. States were reluctant to raise taxes, leading many to charge individuals in the criminal justice system various fees to fund the criminal justice system and surcharges to fund the state’s costs more broadly. Many also increased fines, or penalties.9 Taken together, “fees and fines” can accumulate quickly, resulting in huge debt burdens for individuals.10 Research shows that they are imposed with increasing frequency:11 Georgia collected 20 percent more fees and surcharges in 2014 than in 200512 and in Illinois, attorney fee revenue grew over 150 percent in certain counties between 2001 and 2009.13

What’s more, many courts do not meaningfully consider an individual’s ability to pay when imposing or collecting fines, fees, and surcharges, and some do not consider it at all. Judges are either unable or unwilling to waive certain fees and fines, or to tailor payment to the individual’s ability to pay.14 A Brennan Center for Justice (“Brennan Center”) study of fifteen states concluded that none had adequate mechanisms to reduce criminal justice debt based on ability to pay.15

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11 Harris et. al., Drawing Blood from Stones, at 1769 (finding that in 2004 66% of prison inmates convicted of at least one felony offense had been assessed monetary sanctions, compared to 25% in 1991).
13 Id. at 84.
15 This study focused on state courts. Id.
The US Supreme Court held in *Bearden v. Georgia* that a sentencing court cannot incarcerate an individual who has “made sufficient bona fide efforts to pay” unless alternate measures are not adequate, and also stated that the court should evaluate “the entire background of the defendant in order to tailor an appropriate sentence for the defendant and crime.” Unfortunately, many states and municipalities have not heeded *Bearden*, and do not pay meaningful attention upfront to ability to pay. Individuals leave court with significant debt, and still face jail time when they cannot afford to pay their fines and fees. Further, the individuals involved in the United States criminal justice system are disproportionately poor and from minority groups, making the impact of these systemic failures particularly acute.

Similarly, nearly all states use the money bail system, in which they require defendants to pay money to be released from jail prior to trial. In theory, this system works as a way of securing defendants' appearance at trial and/or deterring them from committing further crimes while awaiting trial. In practice, many innocent people who a court has determined do not pose a flight risk or a threat to public safety are held in jail simply because they cannot afford bail.

For example, from 2011-2015, nearly a quarter of a million people were held in California jails due to their failure to pay bail though were ultimately nevercharged for a crime. Only a small fraction of those held pretrial can afford to pay the full bail amount, which is returned at the end of the case. Others, to the extent that they can come up with the money, pay fees to bail bondsmen to buy their pretrial liberty, which are never returned regardless of the outcome of the case.

The median bail amounts set in California are five times the national median, but even when bail is set at relatively low levels, it is the poor who suffer the most. For example, a 2008 Human Rights

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16 *Bearden v. Georgia*, 461 U.S. 672.
Watch report showed that in the overwhelming preponderance of cases in New York City that had bail set at $1,000 or less, the defendants were jailed because they were unable to post bail.\(^9\)

Individuals who cannot afford bail or a bail bond must wait in jail, with significant impact on their ability to effectively fight their cases. People who can afford to bail themselves out of jail can take their time to effectively prepare for trial, including conducting investigations, locating witnesses, meeting with attorneys, among many other advantages. Pretrial detention of people unable to afford bail may lead them to plead guilty regardless of actual guilt. People in custody plead guilty to receive probation sentences and release from jail rather than stay in to contest their cases.\(^{20}\)

Unnecessary pretrial detention also leads to a host of negative outcomes for detainees including loss of employment, loss of housing, and even loss of custody of their children.\(^{21}\) Such laws and practices often violate the prohibition against arbitrary detention, the right to equality before the law, and the need for pretrial detention decisions to be made on an individualized basis.\(^{22}\)

Policing that focuses more aggressively on poor and minority communities, including “broken windows” style enforcement, in which officers systematically arrest and cite people for minor crimes, and criminalizing homelessness intensifies the inequities of the abuses of fees and fines and money bail.

III. Harsh Enforcement Mechanisms Can Perpetuate or Cause Poverty

States resort to aggressive tactics to collect criminal debt. Payment plans, when they exist, are not always fair or effective. Most states offer limited community service options in lieu of criminal justice debt,\(^{23}\) and these programs can also lead to a spiral of debt and incarceration if not

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\(^{21}\) Bail Reform Primer at 7.

\(^{22}\) “‘Not in it for Justice’” and “The Price of Freedom.”

implemented with care.\textsuperscript{24} Courts often impose additional fees for non-payment, such as interest or late fees, “collection fees” (payable to debt collection agencies), and fees for entering into a payment plan.\textsuperscript{25} For example, Florida allows a 40 percent surcharge on debt, and Alabama charges a 30 percent collection fee.\textsuperscript{26} These “poverty penalties” turn an individual convicted of a crime into a permanent debtor.

Many states and counties use probation sentences to collect fees and fines and to pass the cost of probation supervision on to the individual, compounding financial obligations with particularly devastating impacts for those already living in poverty. Further, several states authorize local governments and courts to use private probation companies to supervise low-level offenders and to collect fees and fines. Probation companies offer their services to courts free of charge in return for the right to collect fees from probationers. The conflict of interests arising out of this arrangement, combined with little state regulation and oversight, exacerbates collection abuses.\textsuperscript{27} Many states permit extending probation terms for failure to pay debts, even if all other probation conditions are met.\textsuperscript{28} Individuals who have had their probation extended must continue to report to their probation officer and fulfill other probation conditions that may interfere with employment and family responsibilities. These “poverty traps” inhibit an individual’s ability to make a living or meet basic needs and obligations. Worst yet, as demonstrated in the Ferguson report, fees and fines lead to increasing consequences for people who are unable to make payments.

One such consequence is suspension of an individual’s driver’s license for failure to pay court costs.\textsuperscript{29} In 2016, a lawsuit was filed against the Virginia Department of Motor Vehicles challenging this practice; according to the Virginia DMV, one in six licensed drivers were under suspension for nonpayment of fines and court costs.\textsuperscript{30} Individuals with suspended licenses in areas where public

\textsuperscript{24} CJPP Policy Guide at 21-22.
\textsuperscript{25} Brennan Report at 17-18.
\textsuperscript{26} \textit{Id}. at 17.
\textsuperscript{28} Brennan Report, at 25.
\textsuperscript{29} \textit{Id}. at 24.
transportation is not available face the impossible choice of driving without a license or foregoing essential life activities such as going to work, getting to doctor’s appointments, and transporting their children to school. Aggressive collection tactics can result in additional offenses. For example, an individual whose driver’s license is revoked but needs to drive to work faces severe criminal penalties for driving with a suspended license.\textsuperscript{31}

In many states individuals face imprisonment for failing to pay criminal justice debt. There are various paths to debtor’s prison: (i) revocation of parole or probation;\textsuperscript{32} (ii) incarceration through civil or criminal enforcement proceedings; (iii) opting for jail instead of paying court-imposed debts; and (iv) arrest and pre-hearing incarceration.\textsuperscript{33} This comes at significant human cost—even an arrest or short stay in jail can result in job loss and disruption in family responsibilities.\textsuperscript{34}

**IV. Even After Debt is Paid, Individuals and Families Face Consequences**

Bail, fees, and fines have their own collateral consequences. Post-conviction, several states report lack of payment of criminal debt to credit agencies, resulting in damaged credit scores that create hurdles to finding and maintaining housing and employment.\textsuperscript{35} Individuals often rely on family and community to make bail to secure pre-trial release, and one report found that 70 percent of individuals in New York and New Jersey relied on family and friends to make ends meet because of fines and fees.\textsuperscript{36} Individuals with criminal justice debt often do not have a voice to challenge these policies: many states suspend the right to vote until one has paid off criminal justice debts.\textsuperscript{37}

\textsuperscript{31} *Id.* at 24.

\textsuperscript{32} Many states make fees and fines a condition of supervision. Failing to meet a single probation condition can lead to a probation violation charge, arrest, and jail time.

\textsuperscript{33} Brennan Report at 20.

\textsuperscript{34} Brennan Report at 27-28.

\textsuperscript{35} *Id.*, and The United States Commission on Civil Rights, “Targeted Fines and Fees against Low-Income Communities of Color.


\textsuperscript{37} Brennan Report at 29.
V. Human Rights Implications of Bail and Criminal Justice Debt

The revenue-focused implementation of criminal justice fees and fines unfairly prejudices the indigent and implicates basic human rights of poor Americans.

First, the ICCPR commits its parties to respect the civil and political rights of individuals. Article 9(1) of the ICCPR provides that “[e]veryone has the right to liberty and security of person.” Under Article 9, “deprivation of liberty must be authorized by law,” “must not be manifestly unproportional, unjust or unpredictable,” and must not be arbitrary. Incarcerating indigent defendants for failing to pay fees and fines—without opportunity to demonstrate their inability to pay as required under US law—constitutes arbitrary detention. So too can incarceration resulting from prohibitively high bail.

Article 11 of the ICCPR prohibits imprisonment “merely on the ground of inability to fulfill a contractual obligation,” including failure to pay debts. Some national courts have read Article 11 as imposing requirements that debtors can only be imprisoned for failure to pay that was willful rather than due to inability to pay. Pre-trial detention and bail systems whose practical result is to keep people in jail because they cannot afford to pay also implicate Article 9(3) of the ICCPR, which provides that pre-trial detention “should not be the general rule.”

The ICCPR also affirms equality and the prohibition of discrimination. The imposition of exorbitant bail and criminal justice debt has disproportionate impact on people living in poverty, and in many US states, also has racially disparate outcomes.

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40 “Not in it for Justice.”
Second, international law recognizes and protects a range of economic, social, and cultural rights that are often implicated by the practices described above. Incarcerating indigent offenders, extending their probationary periods, revoking their driver’s licenses and even their right to vote for the sole reason that they have failed to pay fines, court costs, and probation fees that they lack the financial resources to pay without impairing their ability to feed, clothe, house, or provide healthcare for themselves and their dependents, materially compromises these rights.

Role of Federal Government

Since the Ferguson investigation and subsequent lawsuit, the United States government has taken some steps to address some of these issues. Most significantly, the DOJ issued a Dear Colleague Letter to state judges and court administrators reiterating the constitutional obligations to protect the indigent in the enforcement of court fines and fees. The United States Commission on Civil Rights held a briefing on fines and fees targeted against low-income communities of color and released a report on the issue in September 2017.

As mentioned earlier, there is significant momentum for change, though it remains to be seen whether the Trump administration will look to continue building on it. Yet, thus far, only a few jurisdictions (and often in the wake of a lawsuit), have remedied the most egregious issues that feed human rights abuses associated with criminal justice financial obligations. As long as state and local governments have a revenue-raising interest in these fees and fines and are not

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41 “A state is also required to work towards the progressive realization of these economic, social and cultural rights over time “to the maximum of its available resources” International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc A/6316 (1966), 993 U.N.T.S. 3, entered into Force January 3, 1976, art. 2.1. The United States is not a party to the International Covenant on Economic, Social, and Cultural Rights, which elucidates these rights in the greatest detail. However, it does endorse the Universal Declaration of Human Rights, a foundational document of the United Nations that also states these basic rights, and which is commonly considered a statement of customary international law.” See also “Profiting from Probation, America’s ‘Offender-Funded’ Probation Industry.”

42 U.S. v. City of Ferguson, No. 16-180 (E.D. Mo.). The lawsuit was resolved by consent decree requiring sweeping reforms to Ferguson’s practices.

43 The United States Commission on Civil Rights, “Targeted Fines and Fees against Low-Income Communities of Color.”
subjected to effective oversight and accountability for resulting abuses, these harms will continue.

Further federal government engagement is necessary to ensure that state and local jurisdictions take steps to avoid abuses and protect the rights of those living in poverty, including people living in extreme poverty. The current administration announced the review of all consent decrees between local law enforcement and the DOJ (including with Ferguson, MO); the continued enforcement of these consent decrees is critical to protecting human rights. In addition, state and local governments should continue to revise their laws and policies to ensure human rights are protected.

In conclusion, we urge you to highlight the importance of reforming practices in the United States criminal justice system regarding money bail, fees, fines, and related penalties that violate the human rights of the poor and can perpetuate extreme poverty.

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