

The University of New Hampshire Law Review

Volume 22
Number 2 *Volume 22, Number 2 (2024)*

Article 12

6-1-2024

Criminal Legal Reform in New Hampshire: One Law Professor's Activism

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Repository Citation

22 U.N.H. L. Rev. 455 (2024).

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Albert E. Scherr

Criminal Legal Reform in New Hampshire: One Law Professor's Activism

22 U.N.H. L. Rev. 455 (2024)

ABSTRACT. Criminal legal reform is a perpetual work in progress. The system itself is, at best, maddeningly imperfect. It too often fails to produce anything close to justice. Structural problems afflict the system in a way that incarcerates too many people, particularly people of color. For example, over the last thirty years, the Innocence Project has demonstrated imperfections in the system caused by faulty eyewitness identification procedures by ineffective assistance of counsel, by prosecutorial misconduct, by shoddy forensic practices and by police behavior that produced false confessions.

That the United States has well over fifty-one independent criminal legal systems frustrates efforts at reform. Though the federal system covers the entire country other than tribal jurisdictions, it handles less than ten percent of all the criminal cases. The highly touted 2018 Second Chance Act (SCA) reauthorization primarily addressed federal criminal legal reform. Congress could only address state criminal legal reform in the SCA through grants to state, local and tribal government agencies as well as non-profits.

Momentum for criminal legal reform has increased due to such events as the shooting of Michael Brown on Ferguson, Missouri and the murders of George Floyd in Minneapolis, Minnesota and Breonna Taylor in Louisville, Kentucky. Those and other events particularly highlighted the need for police reform but also created momentum for other criminal legal reforms. But the question quickly became whether that momentum would reach the epicenter of criminal legal systems—the states—or whether it was too diffuse to have a local effect in jurisdictions untouched by Ferguson-, Floyd- or Taylor-type events.

This article addresses the progress of criminal legal reform in one state—New Hampshire—over the last seven years of which University of New Hampshire faculty and students were a significant part. It looks closely at the anatomy of such reform: its sources, its nature of its sponsors, the whys of its successes and its failures. It includes an analysis of economic justice issues like debtors' prisons, right to counsel for indigents, recoupment of cost of appointed counsel and bail reform. It analyzes post-conviction reforms in DNA testing, drug sentencing reform and fair chance hiring for the formerly incarcerated. It also analyzes systemic reforms in eyewitness identification procedures, the right to refuse to consent to a search and the recording of custodial interviews. Finally, it explains a new constitutional amendment on information privacy.

This broad spectrum of criminal legal reform efforts in the last eight years presents a set of common themes. Municipalities very often misuse the criminal legal system to address the complex challenge of homelessness. Many in the system directly or indirectly resist efforts to gather enough data to understand the presence of racism in the criminal legal system. The

criminal legal system over-punishes the economically disadvantaged simply because they are economically disadvantaged.

AUTHOR. The author has been at University of New Hampshire Franklin Pierce School of Law for thirty years. Prior to that he was a public defender with the New Hampshire Public Defender Program, litigating everything from juvenile cases to homicides. For two years during that time, he was Deputy Appellate Defender in New Hampshire, litigating court-appointed cases in the New Hampshire Supreme Court.

During that time, he litigated a substantial number of cases involving forensic DNA evidence, one of the earliest lawyers nationally to push back against the use of not-ready-for-prime-time scientific evidence. He has spoken domestically and internationally on issues of criminal legal reform, including in Morocco Armenia, the Czech Republic, Wales and Portugal. He also co-directed a five-year State Department rule-of-law project which forged a relationship between then Franklin Pierce Law Center and a law school in Vologda, a northern Russia regional capitol.

As a professor the author has taught in the “criminal space” for thirty years, including courses in Criminal Law, Criminal Procedure – Investigation, Criminal Procedure-Adjudication, Evidence, Trial Advocacy, Genetics and the Law and Expert Witnesses & scientific Evidence. He also founded and chairs the school’s asynchronous graduate program in International Criminal Law & Justice.

For the last eight years, the author has been very active as a criminal legal reform policy advocate in the New Hampshire legislature. As explained below, this effort had moral and political foundations for the author. Importantly, it was not started, nor did it continue, as primarily an extended research project or as primarily a scholarly enterprise. That said, this article is an effort to retrospectively crystallize the author’s last eight years of experience as effectively a policy advocate in the legislature for criminal legal reform and privacy issues.

As a result, throughout the article numerous assertions by the author will be footnoted with reference to conversations with legislators, non-profit advocacy groups, and clerks, judges, prosecutors, and defense lawyers in the state’s criminal legal system. These conversations were not documented as research-caliber interviews as they were not intended nor contemplated as such at the time. They do however represent the kind of cumulative sources of information and impressions that are critically important in navigating the legislative process.

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INTRODUCTION

The University of New Hampshire Franklin Pierce School of Law has a long history of training law students to “hit the ground running” when they graduate.¹ The school aspires for its graduates to be more than just grounded in the conceptual and theoretical aspects of thinking like a lawyer. In its earliest years, this effort was particularly notable in the patent space where law students practiced writing patents and learned the conceptual foundations of patent law.

The school’s commitment to practical education—training lawyers, not just law professors or judges—reached beyond intellectual property law. From its founding into the twenty-first century, about one-third of its faculty had public interest backgrounds, be it in environmental law, criminal law, or civil legal services. As the school grew, its clinical programs were at the center of the curriculum as an epicenter for a public interest focus. Unlike many law schools, the clinical and the externship programs never existed on the fringes of the law school experience.

Social justice concerns have always fueled the development of clinics and programs at the school. The Rudman Center for Justice, Leadership & Public Service was an outgrowth of an effort by some on the faculty to coalesce a variety of interests into the Social Justice Institute under Dean John Hutson.² It later morphed into the Rudman Center under Dean John Broderick.³ It now hosts public policy discussions and sponsors over thirty summer Rudman fellows, funding students working in public interest jobs around the country. The clinical programs always operated through a social justice lens by representing those who could not afford lawyers.

For some, the intersection between social justice issues and the criminal legal system has become of even more heightened concern over the last ten years. The opioid crisis, the enduring problem of homelessness, the public amplification of racial issues via the murders of Michael Brown, George Floyd, Breonna Taylor, and others, and the systemic distortions attendant to the pandemic, all made criminal legal reform an even more pressing issue.

Criminal legal reform is a perpetual work in progress. The system itself is, at best, maddeningly imperfect. It too often fails to produce anything close to justice. Structural problems afflict the system in a way that incarcerates too many people,

¹ Ellen Musinsky, *Alumni Development*, UNIV. OF N. H. FRANKLIN PIERCE SCH. OF L. (2024), <https://law.unh.edu/alumni/development> [<https://perma.cc/45RN-99EK>].

² The author was the chair of the committee, whose members also included Professors Ellen Musinsky and Jordan Budd, who developed the idea of the Social Justice Institute (SJI) and facilitated its founding. The author was one of those with whom Dean Broderick consulted in the transition from the SJI to The Rudman Center.

³ *Broderick to Lead UNH Law’s Rudman Center*, UNIV. OF N. H. (May 23, 2014), <https://www.unh.edu/unhtoday/news/release/2014/05/23/broderick-lead-unh-laws-rudman-center> [<https://perma.cc/QC5J-U62Y>].

particularly people of color.⁴ An ongoing and startling example of that imperfection is the work of the National Innocence Project (the “Project”).⁵ Over the last thirty years, the Project has demonstrated imperfections in the system caused by faulty eyewitness identification procedures, such as ineffective assistance of counsel, by prosecutorial misconduct, by shoddy forensic practices, and by police behavior that produced false confessions.⁶

The United States has well over fifty-two independent criminal legal systems, frustrating efforts at reform.⁷ Though the federal system covers the entire country other than tribal jurisdictions, it handles less than ten percent of all criminal cases.⁸ The highly touted 2018 Second Chance Act (“SCA”) reauthorization primarily addressed federal criminal legal reform.⁹ Congress could only address state criminal legal reform in the SCA through grants to state, local, and tribal government agencies, as well as non-profits.¹⁰

The recent momentum for criminal legal reform has challenged a law school committed to practical training and public service to respond in a substantive and constructive fashion. The expected tasks of a law professor—teaching, scholarship, and service to the school—quickly fill one’s time, even putting aside external service to the legal community. The University of New Hampshire (UNH) Law, founded as a less traditional law school, aspired to more practical, skill-development-oriented teaching. It also acknowledged, particularly in its first thirty years, that outside-the-school service work was important. For example, in the late twentieth and early twenty-first century, the author litigated many admissibility hearings for forensic DNA evidence in New Hampshire and Massachusetts and served as a consultant in

⁴ Michelle Alexander, *The new Jim Crow: Mass Incarceration in the Age of Colorblindness*, The New Press, Anniversary Edition, 2020.

⁵ See generally *Innocence Project*, <https://innocenceproject.org/> [<https://perma.cc/32UP-FBSE>] (last visited Feb. 20, 2024).

⁶ *Id.*

⁷ The United States has fifty separate state jurisdictions and a federal jurisdiction. The District of Columbia is administered through the federal system but has laws that apply solely in the jurisdiction.

⁸ *State Courts vs. Federal Courts*, JUD. LEARNING CTR. (2019), <https://judiciallearningcenter.org/state-courts-vs-federal-courts/> [<https://perma.cc/82HM-GT6L>].

⁹ See *The Second Chance Act*, JUD. LEARNING CTR., https://csgjusticecenter.org/wp-content/uploads/2020/02/July-2018_SCA_factsheet.pdf [<https://perma.cc/UD32-E7AV>] (last visited Feb. 20, 2024) (Passing the Second Chance Act, a first-of-its-kind legislation, enacted with bipartisan support and backed by a broad spectrum of leaders in law enforcement, corrections, courts, behavioral health, and other areas).

¹⁰ See *Available Funding*, BUREAU OF JUST. ASSISTANCE U.S. DEP’T OF JUST., <https://bja.ojp.gov/funding/current> [<https://perma.cc/BH6A-MSM9>] (last visited Feb. 20, 2024) (listing the types of entities that could be addressed through the SCA grants).

DNA cases.¹¹ This litigation involved students, for which the school expressed its support. However, those efforts were limited to what was primarily a case-by-case approach.

At an individual level, for some who lived at the margins of society, the compulsion for a professor to use one's expert knowledge, skills, and influence (as well as one's paid, discretionary time), in the criminal legal system, is powerful. As the need for criminal legal reform developed as a part of the public narrative in the second decade of the twenty-first century,¹² case-by-case work felt insufficient, at least to the author. Descending from the refuge of the ivory tower to make a practical difference as to reform became professionally important. To remain exclusively in the ivory tower, refuge increasingly felt like a moral failing.

Admittedly, a tenured law professor operates from a place of very significant privilege. They are virtually guaranteed a job until retirement and are compensated at a rate above the median income for attorneys in New Hampshire.¹³ They have minimal at-school responsibilities in the summer, during which time they may choose to write. They do not carry the relentless where's-the-next-client-coming-from burden commonly seen in private practice. They also have a strong dose of flexibility in their work week. Done well, the job is demanding yet offers guaranteed pay, substantial flexibility, and discretionary time.

One might label the instinct to engage in a form of social activism as *noblesse oblige* or invoke the adage, "with great power comes great responsibility."¹⁴ To operate from a position of power certainly has paternalistic overtones. Particularly with legislative advocacy, one may hear comments like, "who the hell do you think

¹¹ See generally *United States v. Shea*, 159 F.3d 37 (1st Cir. 1998) (noting the author was DNA counsel at the trial level and appellate counsel); *State v. Whittey*, 149 N.H. 463 (2003) (recognizing the author was counsel at the trial level for the three-day admissibility hearing). The author also had a contract with the State to litigate criminal appeals for indigent criminal defendants in the New Hampshire Supreme Court and litigated the admissibility of Horizontal Gaze Nystagmus evidence in New Hampshire courts with the then director of the Criminal Practice Clinic at the law school, Professor Keith Barnaby. See generally *State v. Dahood*, 148 N.H. 723 (2022).

¹² See generally *Radley Balko*, THE WASHINGTON POST <https://www.washingtonpost.com/people/radley-balko/>; <https://radleybalko.substack.com/> [<https://perma.cc/S6RW-N89F>] (last visited May 4, 2024) (Analyzing the writings of Radley Blake, a Washington Post journalist about the criminal legal system).

¹³ One salary website, Salary.com, says, "[t]he average Attorney . . . salary in New Hampshire is \$137,371 as of January 26, 2024, but the range typically falls between \$115,720 and \$158,720." *Attorney Salary in New Hampshire*, SALARY.COM, <https://www.salary.com/research/salary/benchmark/attorney-i-salary/nh> [<https://perma.cc/P73F-DTTX>] (last visited Feb. 20, 2024) (emphasis added).

¹⁴ An adage variously attributed to Spiderman. Brian Cronin, *When We First Met – When Did Uncle Ben First Say “With Great Power Comes Great Responsibility?”*, COMIC BOOK RESOURCES (Jul. 15, 2015), <https://www.cbr.com/when-we-first-met-when-did-uncle-ben-first-say-with-great-power-comes-great-responsibility/> [<https://perma.cc/JUD7-FRZT>]; HC Deb (28 Feb. 1906) (152) col. 1239; PERSONAL MEMOIRS OF U.S. GRANT IN TWO VOLUMES 459 (Charles L. Webster & Company, New York 1885).

you are coming in to tell us what to do,” as well as more pointed and graphic comments. Actively fostering change in the criminal legal system always comes with skepticism about motives, doubts about sincerity, accusations of dilettantism and criticisms as the inauthenticity of “speaking and acting” for those without a voice.

At another more institutional level, modeling an activist, developing a socially conscious approach for students and providing them with opportunities for involvement further amplifies the value of working on criminal legal reform projects. The hope is always to have the projects reverberate with a “faith in the individual’s ability to make a difference.”¹⁵

This article addresses the progress of criminal legal reform over the last seven years in one state—New Hampshire, through the lens of one law professor’s activities. It includes an analysis of economic justice issues like debtors’ prisons, the right to counsel for indigents, recoupment of the cost of appointed counsel, bail reform, and issues that found a surprising level of bipartisan support amidst increasing legislative polarization in the author’s opinion. It also analyzes systemic reforms in eyewitness identification procedures, post-conviction reforms in DNA testing, the right to refuse to consent to a search, and the recording of custodial interviews. Finally, it examines the passage of an amendment to the New Hampshire Constitution that protects information privacy.

These multi-faceted efforts represent the pro-active engagement of UNH Law faculty members and students in substantial criminal legal reform in New Hampshire over seven years. Students engage in data collection, legal, and other research in support of various initiatives. These efforts are also the subject of class exercises and discussions over that time. Though the results over seven years were imperfect, the efforts restored some faith in the individual’s ability to make a difference in New Hampshire’s criminal legal system.

I. ECONOMIC JUSTICES ISSUES

One of the enduring issues in criminal justice reform has been the criminal system’s treatment of those at the economic margins of society.¹⁶ In a state like New Hampshire, that group is quite diverse and may include people experiencing homelessness, those struggling with addiction, and those with mental health issues. It also includes the rural and urban poor. Additionally, some of those people are living on Social Security Disability payments. Some are single parents living on child support checks. Some are the working poor, living on checks from jobs paying \$15.00 per hour or \$30,000 per year. Though the median income in the state in 2019 was \$77,993 per year, about twenty percent of the households in the state

¹⁵ SARAH WATLING, TOMORROW, PERHAPS THE FUTURE 9 (Alfred Knopf 2023).

¹⁶ See *generally* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (The New Press 2019) (recognizing that Edelman does an excellent job describing how the criminal legal system treats the poor differently and more harshly just because they are poor).

made less than \$35,000 per year.¹⁷

Nationally, New Hampshire had the lowest poverty rate in the country at 7.3% with the threshold set at \$20,578 for a family of three with one child.¹⁸ But, an analysis of the intersection of poverty and the criminal legal system—the economic justice in the system—should not be about how many individuals fare poorly in the system because of their economic status. Rather, the issue should be the system as it is built, having an out-sized effect on those on the economic margins of society. A disproportionate and negative systemic effect on one who is poor, just because they are poor is a malfunctioning system.

Alexis Harris has vividly documented how the criminal legal system, even at the level of “lowly misdemeanors,” effectively takes over the financial lives of the poor for years.¹⁹ The system buries them in a mountain of debt that can originate in a simple misdemeanor conviction.²⁰ Margot Kushel and Tiana Moore at the University of California, San Francisco, have recently released a stunningly comprehensive study of those experiencing homelessness in California that documents statistically and qualitatively the complexity of financial challenges that plague those who are housing challenged.²¹

A. Right to Counsel at Arraignment

One of the core features of a criminal legal system that treats everyone fairly and similarly is a defendant’s access to counsel. As Justice Sutherland stated so eloquently in *Powell v. Alabama* (a.k.a. *The Scottsboro* cases):

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his

¹⁷ *Census Bureau 2019 Estimates for Income, Poverty, Housing Costs, and Health Coverage*, N. H. FISCAL POL’Y INST. (Sept. 18, 2020), <https://nhfpi.org/resource/census-bureau-2019-estimates-for-income-poverty-housing-costs-and-health-coverage/> [<https://perma.cc/X274-D7E9>].

¹⁸ *Id.*

¹⁹ *See generally* ALEXIS HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (Russell Sage Foundation 2016) (capturing well the details of how the criminal legal system gradually imposes a mountain of debt even on those who resole a small misdemeanor).

²⁰ *Id.*

²¹ *See generally* Margot Kushel et al., *Towards a New Understanding: The California Statewide Study of Those Experiencing Homelessness*, BENIOFF HOMELESSNESS AND HOUS. INITIATIVE, UNIV. OF CAL. S. F. (2023) (Surveying the unhoused efforts themselves, allowing the authors to capture the complexity of the issues).

innocence. If that be true of men of intelligence, how much truer is it of the ignorant and illiterate, or those of feeble intellect.²²

The Sixth Amendment itself makes the importance of counsel clear—“[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”²³ Moreover, the New Hampshire Constitution is even clearer:

[e]very person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.²⁴

Nonetheless, the system in New Hampshire has been imperfect. Over the last eight years, litigation and legislative reform have worked to improve at least some of the systemic imperfections involving appointed counsel *before* arraignment. For example, the availability of counsel when there is a risk of jailing for a failure to pay fines and the system for recouping money from indigents who have been appointed counsel.

In 2016, the author and the then-director of the UNH Law Criminal Practice Clinic, Professor Charles Temple, grew concerned about a common practice in district courts in which indigent defendants would be arraigned and have their bail set before they were appointed counsel. The defendant would indicate to the clerk of court either before arraignment that they wanted appointed counsel or would inform the judge during the arraignment that they wanted appointed counsel. In either instance, the judge would evaluate their financial affidavit for appointment of counsel only after the arraignment ended.

Professor Temple and the author recruited two law students to observe such practices in the state’s largest district court in Manchester.²⁵ They produced data that indicated that (1) the conduct described above was regularly occurring; (2) some defendants had bail set that resulted in them being incarcerated pre-trial until subsequently appointed counsel was able to schedule a bail review; and (3) sometimes, a defendant would make inculpatory statements at the un-counseled arraignment.²⁶

Counsel, the author and Professor Charles Temple, filed a mandamus action against the Manchester District Court based on the investigation of the court’s

²² Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

²³ U.S. CONST. amend. VI.

²⁴ N.H. CONST. pt. I, art. 15.

²⁵ These law students were Lauren Breda and Jay Duguay, now attorneys who both became public defenders upon graduation.

²⁶ Mot. To Dismiss, Nygn & a. v. Manchester District Court, No. 2011-0464 (N.H. March 16, 2012) (exemplifying the two named plaintiffs in the mandamus action filed both made inculpatory comments during their uncounseled arraignments in Manchester District Court. Each were held in jail on bail post-arraignment).

practices regarding the appointment of counsel post-arraignment.²⁷ The claim included claims that the Sixth Amendment, Part I, Article 15 of the New Hampshire Constitution. The Due Process Clauses of the United States and New Hampshire Constitutions mandated the appointment of counsel for indigents in all criminal prosecutions, including for arraignments, the Manchester District Court had no discretion as to pre-arraignment appointment of counsel.²⁸ The appointment was constitutionally mandated.

After a variety of procedural steps,²⁹ the New Hampshire Supreme Court recognized that indigent defendants had a constitutional right to appointment of counsel pre-arraignment.³⁰ The court then referred the case to the Court’s Advisory Committee on Rules for the development of Circuit Court rule amendments that would ensure that such appointment occurred.³¹ Within a year, the Supreme Court approved new rules that facilitated the appointment of counsel prior to arraignment, a discreet but quite significant improvement in the system.³²

This project—from 2011 to 2013—worked as a precursor to a more sustained focus on the complex set of barriers that plagued those on the economic margins of society as they intersected with the criminal legal system. A more direct and dramatic example of such barriers was the Debtors’ Prison Project, which launched in 2015.

The problem included people who had failed to pay their fines in criminal cases and were routinely called in front of the court. Too often, a judge would ask defendants if they were able to pay their fines that day. If the defendant said no, they were then incarcerated in the local House of Corrections. Little to no inquiry was made into why they could not pay their fine and, most often, they did not have counsel. The result ended with a “paid off” fine by being jailed at the rate of fifty dollars per day. No money was recovered; their “\$50/day jail time” was instead of paying their fine.³³

This project began by collecting hard data about the frequency of such

²⁷ *Id.* (noting a core piece of the mandamus pleading was affidavits from each of the two law students who had compiled the foundational data as to the Court’s practices).

²⁸ *Id.*

²⁹ *Id.* (acknowledging that the mandamus petition was originally filed in the New Hampshire Supreme Court, which, counsel asserted, had original jurisdiction. The Court declined the petition and counsel then filed in Hillsborough County Superior Court. After a hearing, the Superior Court denied the mandamus petition and the denial was appealed back to the Supreme Court. The Court then accepted the appeal and issued its order after oral argument).

³⁰ *Id.*

³¹ *Id.*

³² Memorandum to the N.H. Supreme Court Advisory Comm. on Rules. P 2:04 (Aug. 3, 2016); N.H. R. CRIM. P. 29(e).

³³ See ACLU-NH, DEBTORS’ PRISONS IN NEW HAMPSHIRE: A REPORT BY THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE 7 (Sept. 23, 2015).

practices.³⁴ A somewhat obscure state statute required each House of Correction to document who was incarcerated in lieu of paying their fine.³⁵ A right-to-know request to each of the state's ten counties for this information produced a wealth of data, including the names of those jailed, the jailing court, and the case number. Requests to the court system produced sample transcripts from approximately forty cases.³⁶ This comprehensive data allowed the Project to produce and publish its *Debtors' Prison in New Hampshire* in September 2016.³⁷

The report documented the extent of the debtors' prison problem in the 2013 calendar year. In the 289 cases it examined, the project found that in over fifty-one percent of the cases, "New Hampshire judges jailed people who were unable to pay fines and without conducting a meaningful ability-to-pay hearing."³⁸ It also found that:

In all of these estimated 148 cases from 2013, defendants were sent to jail without representation by counsel. In none of these cases we analyzed did the defendant have the advice of counsel when appearing before the judge. [footnote omitted] In one 2014 case handled by the ACLU-NH, a judge went so far as to reject a defendant's request for appointment of counsel even when a lawyer was available to represent her. [footnote omitted].³⁹

For example, in another case,

[t]he judge, in less than 90 seconds: (1) took the defendant's plea to a violation-level offense (a non-jailable offense having the same status as a speeding ticket); (2) fined him \$100 plus an assessment; and (3) committed him to jail for two days for payment of the fine and assessment.⁴⁰

The report identified two constitutional problems with a debtors' prison practice. First, equal protection prevents the poor from being incarcerated for an inability to pay a fine.⁴¹ A judge must first hold an ability-to-pay hearing to determine whether a defendant willfully fails to pay when they have an ability to

³⁴ *Id.* at 19. The Project was a joint enterprise of the author and the ACLU-NH, in particular their legal director, Gilles Bissonnette. Numerous UNH Law students contributed their work to the project: Kimberly Shaughnessy, Chad Wellins, Stephanie Ramirez, Elizabeth Velez, and Tish Liggett. William Stine, a professor of psychology at UNH assisted the Project in engaging in statistical sampling and formulating accurate conclusions based on appropriate sampling models.

³⁵ N.H. REV. STAT. ANN. § 618:9 (2024).

³⁶ *See* ACLU-NH, *supra* note 33, at 5–6.

³⁷ *Id.* at 1.

³⁸ *Id.* at 6.

³⁹ *Id.* (noting the report when on to note that additionally, in at least three of the thirty-nine sampled cases, the defendant was sent to jail for failure to pay a fine on an underlying case in which the defendant had not been entitled to appointed counsel and in which jail was not an available sentence because the defendant had only been convicted of a Class B misdemeanor or violation-level offense).

⁴⁰ *Id.* at 8.

⁴¹ *Williams v. Illinois*, 399 U.S. 235, 241–44 (1970); *Tate v. Short*, 401 U.S. 395, 397–98 (1971).

pay.⁴²

Secondly, as a constitutional matter, procedural due process requires that counsel be appointed when there is a threat of jail for nonpayment of a fine or fee in a criminal case.⁴³ Without counsel in such circumstances, a person is at the mercy of both the prosecutor's and judge's expertise. The report went on to recommend a set of changes to the court procedures as to fine payment.⁴⁴

The public reception to the September 2016 report release was very positive.⁴⁵ After a set of negotiations with district court leaders, they and project leaders proposed a set of court rule changes to the New Hampshire Supreme Court's Advisory Committee on Rules.⁴⁶ Subsequently, the Supreme Court adopted all the project recommendations except for the appointment of-counsel. The project leaders then asked the legislature to adopt the amended recommendations, including the counsel ones. They did so by a consent vote in each house of the legislature.⁴⁷ Notably, the result in the case was obtained not through the litigation of a specific case but through data gathering and publication of a well-researched study, through work with leaders in the court system, through lengthy conversations with the Supreme Court's Advisory Committee on Rules, and legislative drafting and advocacy.

B. Bail Reform

The Debtors' Prison Project experience suggested to its leaders that economic justice in the legal system was a non-partisan issue. In many conversations with legislators, we heard about their belief that financial status should not be a basis for how the criminal legal system works. People in the system should not be punished simply because they are poor.

In particular, the system suffered from disproportionate burdens on the economically disadvantaged at two junctures: (1) at the front end—how bail decisions over-incarcerated the poor before they had been found guilty of anything; and (2) at the back end—the fees and fines imposed on the poor without consideration of their economic circumstances. At the least, judges were treating everyone in the system the same in terms of their economic status. That approach

⁴² N.H. REV. STAT. ANN. § 604-A:2-f III (2024).

⁴³ *Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982).

⁴⁴ ACLU-NH, *supra* note 33 at 11.

⁴⁵ For example, the conservative Manchester Union-Leader was very supportive of the questions raised. *NH Debtors Prisons? ACLU Report Raises Questions*, Editorial, N.H. Union Leader, Sept. 27, 2015.

⁴⁶ Memorandum to the N.H. Supreme Court, *supra* note 32.

⁴⁷ N.H. REV. STAT. ANN. § 604-A:2-f III (2024). A consent vote means no legislator opposed the bill. Further, the legislature passed a bill that changed the amount that one serving of a fine in lieu of payment subtracted from the fine for each day served from \$50 to \$150 (RSA 618:9). N.H. REV. STAT. ANN. § 618:9 (2024).

had the appearance of neutral and fair treatment while simultaneously imposing disproportionate burdens on the economically disadvantaged.⁴⁸

For example, a judge might always set bail on a defendant charged with simple assault at \$250 regardless of the individual circumstances of the defendant. Or the judge might fine everyone convicted of simple assault \$200, again regardless of the defendant's circumstances. This practice would seemingly treat every defendant the same.

But the real effect is quite different. For those who did not even have the luxury of living paycheck to paycheck, a \$250 bail resulted in them being incarcerated on a misdemeanor until trial, often for an offense for which they would not receive a jail sentence if convicted. The defendant who had a regular paycheck or any significant financial resources, by contrast, would post the \$250 and be released.

Based on the author's experiences participating in and watching innumerable court proceedings in district court, judges seemed to have informal "schedules" for bail. This charge always got this amount of bail, and that charge, another amount. To be sure, for those who were alleged to be particularly dangerous or very likely not to appear for trial, judges were likely to set bail in an amount the defendant would not be able to meet. Jail data backed up this proposition. Information collected by New Hampshire Public Radio ("NHPR") showed that of the 735 people being held pre-trial at Hillsborough County jail, 196 of them were held on bail of \$1,000 or less. Experience suggests that if a judge wishes to ensure that a defendant is not released pending trial, bail is set at a much higher amount than \$1,000.⁴⁹ Bail of \$1,000 or less was more likely bail set based on an informal "schedule" than based on an individualized assessment.

The bail reform effort, building on the success of the Debtors' Prison Project and capitalizing on the perceived receptivity to addressing economic justice issues in the New Hampshire legislature, proposed significant changes in the existing approach to bail.⁵⁰ The changes acknowledged that societal concerns about pre-trial release existed as to those who were a danger to themselves or others if released pre-trial and as to those who were at a demonstrable risk of not appearing for trial. The changes also proposed that other than those two groups, everyone else should be released pre-trial, be it with or without conditions on such release.

The proposed legislation was effectively a truth-in-bail legislation. It sought to individualize bail decisions.⁵¹ If one could establish by clear and convincing evidence⁵² that a defendant is either a danger to themselves or others or was a flight

⁴⁸ ACLU-NH, *supra* note 33 at 7.

⁴⁹ The NHPR data showed that the average bail set in the Hillsborough County data was \$23,043.58 and the most frequent bail amount was \$10,000. (Data in possession of the author).

⁵⁰ See SB 200, 2017 Leg. Sess. (N.H.) (The author drafted the bail reform legislation that then-Senator Dan Feltes sponsored on the legislature).

⁵¹ *Id.*

⁵² Clear and convincing evidence is a constitutionally required standard. *United States v. Salerno*, 481 U.S. 739, 741 (1987).

risk, the defendant could be held preventatively—without any bail at all being set.⁵³ Otherwise, the court must set Personal Recognizance (“PR”) bail, with or without conditions.⁵⁴ The legislation, which was eventually passed by unanimous consent in both the House and state Senate, specified the types of factors a court must consider in determining whether preventive detention was appropriate: whether someone was the sole income earner in their household, whether they had dependent, or whether they were an addict.⁵⁵ It also prohibited the court from making a finding of *likely failure to appear* based solely on a defendant’s status as an unhoused person. Most directly, it said that a court “shall not impose a financial condition that will result in the pretrial detention of a person solely as a result of that financial condition.”⁵⁶

The proposal was a dramatic change in how courts would address bail. Fundamentally, it said that only provably dangerous defendants or provable substantial flight risks could be held pre-trial.⁵⁷ Every other defendant must receive PR bail. That dramatic change came almost immediately. The number of defendants incarcerated pre-trial began to decrease. For example, in Hillsborough County, on October 1st, 2017, the jail held 176 defendants pre-trial on bail of \$1,000 or less. On October 1st, 2018, one month after the bail reform bill went into effect, six defendants were incarcerated pre-trial on bail of \$1,000 or less.

Almost immediately, bail reform became a contentious political issue. Whether prosecutors and the police had not noticed the bail reform proposal as it made its way through the legislature or they had chosen to not marshal significant opposition, various entities—state senators and representatives, the New Hampshire police-chiefs association and others—made yearly and multiple efforts to undermine bail reform over the next five years.

Complaints that the new bail statute had led to too many dangerous people being released and that too many people were now failing to show up for trial were raised repeatedly. Such complaints were consistent with the pushback against bail reform nationally.⁵⁸ Over the course of the following five years, a variety of changes

⁵³ N.H. REV. STAT. ANN. § 597:1-a (2024).

⁵⁴ Note that the conditions could accompany the PR bail and violations of the conditions may result in revocation of bail.

⁵⁵ See N.H. REV. STAT. ANN. § 604-A:2-f (2024).

⁵⁶ N.H. REV. STAT. ANN. § 579:2 (2022).

⁵⁷ *Id.*

⁵⁸ See Jasmine Garsd, *New York rolls back bail reforms that gave judges more discretion*, NPR (May 4, 2023), <https://www.npr.org/2023/05/04/1174083658/new-york-rolls-back-bail-reforms-that-gave-judges-more-discretion> [<https://perma.cc/99WS-6RWW>]; Janelle Griffith, *Bail Reform Emerges as a New Flashpoint in Midterm Messaging on Crime*, NBC NEWS (Jul. 16, 2022), <https://www.nbcnews.com/politics/bail-reform-emerges-new-flashpoint-midterm-messaging-crime-rcna35165> [<https://perma.cc/YZS7-2QZQ>]; Cindy Reed, *The next wave of bail reform goes beyond ending money bail*, VERA INST. (2019), <https://www.vera.org/state-of-justice-reform/2019/bail-reform> [<https://perma.cc/9TQM-T68T>].

were made to the Bail Reform act.⁵⁹

Criminal justice data showed differently in the face of claims about the increased dangerousness to the public from bail reform in New Hampshire. By one measure, New Hampshire had the second lowest violent crime rate in the country in 2020, behind only Maine.⁶⁰ And, “[a]ccording to the FBI data compiled from New Hampshire law enforcement agencies, the violent crime rate in New Hampshire was 195.7 incidents per 100,000 people in 2017. It fell to 146.4 per 100,000 in 2020.”⁶¹ In a study published in 2023, Nashua, NH, was found to be the safest city in the United States and Manchester, NH, the twenty-fourth safest.⁶²

As the bail reform debate became increasingly polarized, both in New Hampshire and nationally, anecdotal reports tended to capture the headlines despite data to the contrary.⁶³ For example, a 2022 homicide in Manchester, New Hampshire, was blamed on the Bail Reform Act because of the continued release of a person on PR bail despite repeated arrests.⁶⁴ An examination of the facts of the case revealed that the bail reform act would have operated to detain the individual before his alleged commission of the homicide if the three different prosecutors in the case had taken account of his repeated arrests while on bail.⁶⁵

Bail reform in New Hampshire, as well as elsewhere, has been a contentious and

⁵⁹ N.H. REV. STAT. ANN. § 597:2 (2022) (Amended in 2020).

⁶⁰ *Safest States in the US*, WISEVOTER (2022), <https://wisevoter.com/state-rankings/safest-states-in-the-us/#:~:text=Safest%20States%20in%20America,-Based%20on%20the&text=New%20Hampshire%20is%20the%20safest,24%20and%2027%20homicides%20respectively> [<https://perma.cc/469H-ESF4>].

⁶¹ Damien Fisher, *After Years of Bucking National Trends, NH Murder Rate Rising – Fast*, HOLLIS BROOKLINE NEWS ONLINE (Jul. 25, 2022), <https://hollisbrooklinenewsonline.com/after-years-of-bucking-national-trends-nh-murder-rate-rising-fast-p4606-187.htm#gsc.tab=0> [<https://perma.cc/UX35-NUQ6>].

⁶² Adam McCann, *Safest Cities in America*, WALLETHUB (Oct. 9, 2023), <https://wallethub.com/edu/safest-cities-in-america/41926> [<https://perma.cc/3UMN-USZC>].

⁶³ Emily Bazelon & Insha Rahman, *There’s a Strong Case for Sticking With Bail Reform*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/opinion/sunday/bail-reform-new-york.html?searchResultPosition=11> [<https://perma.cc/YS9E-6M2Z>]; Jesse McKinley & Jeffery C. Mays, *After Anti-Semitic Incidents, New Bail Law in N.Y. Comes Under Attack*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/nyregion/cash-bail-reform-ny.html?searchResultPosition=12> [<https://perma.cc/7CC8-KMTA>]; Kylie Murdock & Jim Kessler, *Analyzing Cash Bail Reform*, THIRD WAY (Jul. 11, 2023), <https://www.thirdway.org/memo/analyzing-cash-bail-reform> [<https://perma.cc/5KVJ-5CFJ>]; Elizabeth Wydra & Justin Klawans, *Pros and Cons of Ending Cash Bail*, CONST. ACCOUNTABILITY CTR. (Mar. 30, 2023), <https://www.theusconstitution.org/news/the-pros-and-cons-of-ending-cash-bail/> [<https://perma.cc/XWL4-5M42>].

⁶⁴ Albert Scherr, *The Convenient and False Narrative About a Manchester Tragedy*, UNION LEADER (Feb. 21, 2023), https://www.unionleader.com/opinion/op-eds/albert-scherr-the-convenient-and-false-narrative-about-a-manchester-tragedy/article_2888eaa2-474d-50d4-a222-4174ece92b1b.html [<https://perma.cc/4FRH-96BJ>].

⁶⁵ *See id.*

complicated issue. The effort operates at the intersection of public safety, poverty, homelessness, substance abuse, those struggling with mental health issues, and the principle of innocent until proven guilty. The challenges of operating in that complex space were matched by a coordinated effort to pull in a mix of advocacy and other groups. The original coalition in favor of bail reform expanded to include such diverse, temporary allies as Black Lives Matter, Americans for Prosperity, the New Hampshire Liberty Alliance, and many others.

Fundamentally, bail reform was the child of the earlier Debtors’ Prison Project. At its core, the message put forward by each effort was the same: one’s financial condition should not be the cause of discriminatory treatment by the criminal legal system. Both projects uncovered some systemic features of the criminal legal system that discriminated against those who were economically disadvantaged. And again, the results came not from individual case litigation at the trial or appellate level, rather they came from sustained legislative advocacy.

C. The Office of Cost Containment

Systemic features that discriminate against the economically disadvantaged are frequently buried in the procedural minutiae of the criminal legal system. The recoupment-of-the cost-of-counsel system in New Hampshire is where some of this minutia has resided. The recoupment system seeks to recover from indigent criminal defendants the “costs” of the state providing them with court-appointed counsel.⁶⁶ Bluntly, it has been a system that requires poor people to pay back the state for lawyers appointed to represent them because they are poor—debt collection from the poor.

As a part of this debt collection system, the state established the Office of Cost Containment (the “OCC”) to manage the collection system.⁶⁷ From 2017 to 2019, the Debtors’ Prison Project team examined the debt collections practices in two ways. First, it litigated the process by which the OCC sought to potentially incarcerate those who had failed to pay their recoupment debt. Second, it proposed legislation to alter the process by which a court determined whether a defendant was one from whom OCC should be authorized to collect the recoupment debt, i.e., whether a defendant was “too poor” to be subject to the OCC collection process.⁶⁸

Historically, the system worked as follows: a court decided to appoint counsel for a criminal defendant before, at or after arraignment.⁶⁹ It then examined the defendant’s financial affidavit to determine whether they should be ordered to

⁶⁶ The system does not seek to recoup the actual cost of counsel on an individual-case-cost basis. Instead, it requires the defendant to pay back the state based on a predetermined rate depending on the type of case. N.H. REV. STAT. ANN. § 604-A:9 (2024).

⁶⁷ N.H. REV. STAT. ANN. § 21-I:7-b (2024).

⁶⁸ *Infra* notes 70–72.

⁶⁹ *See supra* text accompanying footnotes 23–33.

repay the state for the cost of counsel.⁷⁰ If so, the case was forwarded to the OCC for collection.⁷¹ The defendant was also ordered to contact the OCC, to notify them of their mailing address, and to arrange for payment.⁷² The defendant must begin such payments even while the case is pending and before any finding of guilt.⁷³ If the defendant fails to make such payment, the OCC proceeds to court and, if the defendant fails to appear for that late-payment collection hearing, a bench warrant is issued in the amount of the debt and seeking the arrest of the defendant.⁷⁴

The challenge to the system was two-fold. First, the issuance of bench warrants for the arrest of those who had failed to make their recoupment payments to OCC followed by a lawyer-free, failure-to-pay hearing was constitutionally, and statutorily deficient.⁷⁵ Second, a system that placed the determination of qualification for recoupment at the beginning of the criminal process and that recouped money from those who had been found not guilty was both inefficient and unfair.⁷⁶

The first challenge played out through litigation. The fundamental point was that a recoupment-collection hearing was the same as a fine-collection hearing under RSA 604-A:2-f.⁷⁷ Appointment of counsel was required, both statutorily and as a matter of due process.⁷⁸ In *State v. Brawley*, the New Hampshire Supreme Court agreed.⁷⁹ The court said, “we find no distinction between a defendant’s repayment obligation under RSA 604-A:9 and an ‘assessment’ under RSA 604-A:2-f, and we hold that the procedures set forth in that statute shall apply to the proceedings on remand in this case.”⁸⁰

Though a seemingly minor victory, the broader message is important. Alexis Harris has made exceedingly clear that once an economically disadvantaged person “enters” the criminal legal system, they often begin to lead a life defined financially for many years by what seems to them to be a never-ending debt obligation to the court system.⁸¹ As Harris put it,

Like the colonization of the indigenous peoples, the enslavement of people from Africa,

⁷⁰ N.H. REV. STAT. ANN. § 604-A:2-a.

⁷¹ *Id.*

⁷² *State v. Brawley*, 171 N.H. 333, 335 (2018). The author and the ACLU-NH filed a joint amicus brief (Brawley himself was unrepresented and un-reachable). The author orally argued the case.

⁷³ *Id.*

⁷⁴ *Id.* at 336.

⁷⁵ *Id.* at 340; *Id.* at 339 n.3.

⁷⁶ *Id.*

⁷⁷ N.H. Rev. Stat. ANN. § 604-A:2-a.

⁷⁸ *State v. Brawley*, 171 N.H. 333, 342 (2018).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Alexis Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor*, Russell Sage Foundation, 2016.

the Black Codes and Jim Crow laws that managed and isolated nonwhites, and convict leasing and forced labor camps for prisoners, the contemporary use of monetary sanctions is disproportionately imposed on the impoverished and socially isolated. These sanctions keep poor and racially marginalized people under constant surveillance and living in poverty and perpetual punishment.⁸²

Brawley puts in place the right to access to legal representation at what is a legal proceeding noticeable to almost no one.⁸³ Anecdotally, even those involved in the criminal legal system were infrequently aware of these very back-end debt-collection proceedings. With legal counsel, an economically disadvantaged defendant has a better chance at eliminating debt that they have no means to pay. Or it offers an opportunity for them, through counsel, to negotiate their way to a manageable end to a debt they have incurred only because they were appointed counsel because they were poor, a debt independent of whatever fine they may have received. The likelihood of the compounding of criminal system debts—fines, penalty assessments, and recoupment costs—is reduced by a simple ability-to-pay hearing with counsel.⁸⁴

The *Brawley* litigation also highlighted flaws in the recoupment system that over-extended its reach, particularly for those with limited financial resources. The seeming discretion courts had when they decided whether to order recoupment was rarely exercised. The referral to the OCC at the beginning of a case was almost automatic as it occurred at the same time as the decision to appoint counsel.⁸⁵

At that moment, the court had no sense as to whether someone would be found guilty or not nor what the amount of any fine or other financial obligation might be imposed upon conviction, if any.⁸⁶ A bit too simply, the court did not have the necessary information to distinguish between the poor still able to pay some recoupment costs and those who were so poor that an order to pay recoupment costs was an unmeetable burden.

In addition, the system raised the moral policy question as to whether it was appropriate to require someone to re-pay the state for the cost of an attorney for a charge for which they had been found not guilty or which had been dismissed. The message was: “we can arrest you; charge you; process you through the system . . . it can turn out that we were mistaken . . . but we’ll still charge you for the lawyer who helped you show us we were wrong . . .”—that message seemed more than a bit ill-conceived.

Legislatively, though bipartisan, the effort to change the recoupment system

⁸² *Id.* at p. xxii.

⁸³ 171 N.H. at 342.

⁸⁴ *See Infra* note 93.

⁸⁵ *Id.*

⁸⁶ Any determination of guilt occurs at the end of the criminal case not at the beginning, when the judge makes this decision.

was controversial.⁸⁷ Some saw proposed changes as effectively reducing the income to the state for services rendered by lawyers in the indigent defense system. Others saw changes as a reduction in defendants' moral obligation to the government for their otherwise "free" lawyers. Some were bothered by the additional burden the system placed on those already struggling financially and some recoiled at the idea that the system collected money from those who were found not guilty or whose charges were dismissed. Some simply wanted to do away with the recoupment system as an ill-conceived administrative burden that came nowhere near to making the state whole from the cost of the indigent defense system.⁸⁸ All were perspectives frequently heard in debates about the role of moral responsibility, obligation, and money in the criminal legal system.

The resolution of these debates was a set of very substantial changes. A defendant who had all charges dismissed or who is found not guilty is no longer subject to the recoupment statute.⁸⁹ A judge will determine whether a defendant is subject to recoupment only after they are convicted.⁹⁰ And, in the first instance, it is up to the sentencing judge, not OCC, as to the amount of such recoupment payments, if any,⁹¹ and the payments do not begin until after the conviction is final.⁹² Further, in assessing the ability to pay recoupment fees, the court cannot consider certain excluded income of the defendant.⁹³

These changes descend into the technical minutiae of the criminal legal system.

⁸⁷ The effort was a collaboration between the policy director at the ACLU-NH, Jeanne Hruska, and the author.

⁸⁸ Representatives from both the court system and the public defender system suggested at one study-committee hearing that somewhere around 25% to 30% of all charges in cases assigned to court-appointed counsel were either dismissed or a finding of not guilty was rendered. (a recollection of the author who attended the study-committee hearing).

⁸⁹ N.H. REV. STAT. ANN. 604-A:9, I(a): "Any payment obligation shall apply only to a defendant who has been convicted or a juvenile who has been found delinquent."

⁹⁰ N.H. REV. STAT. ANN. 604-A:9, I(b):

Upon entering a judgment of conviction or a finding of delinquency, and the issuance of sentence or disposition, the court shall enter a separate written order setting forth the reasons for the court's conclusion regarding the financial ability of the defendant or the juvenile, including any person liable for the support of the juvenile pursuant to RSA 604-A:2-a, to make payment of counsel fees and expenses, and administrative service assessment.

⁹¹ N.H. REV. STAT. ANN. 604-A:9, I(b): "In its discretion, the court may conduct an ability-to-pay hearing to assist in its determination. If the court finds that there is an ability to pay some or all of the counsel fees and expenses and the assessment, either presently or in the future, it shall order payment in such amounts and upon such terms and conditions it finds equitable . . ."

⁹² N.H. REV. STAT. ANN. 609-A:9, I(b): ". . . any payment obligation shall not commence until the conviction and sentence or the finding of delinquency and disposition has become final."

⁹³ N.H. REV. STAT. ANN. 604-A:9, I(c):

In assessing ability to pay upon or after the entering of a judgment of conviction and the issuance of a sentence, neither the court nor the office of cost containment shall consider income that is exempt from execution, levy, attachment, garnishment, or other legal process under any state or federal law, and shall be reduced only by the amount of expenses which are reasonably necessary for the maintenance of the defendant and his dependents.

But (or perhaps because of that) the overall effect of these changes is substantial. They significantly reduce the number of indigent defendants subject to recoupment.⁹⁴ One estimate suggests that the number of defendants being ordered to pay recoupment has decreased dramatically. As a result, the system is doing a much better job of not locking too many indigent defendants into a lengthy period of court-related indebtedness.

Other recent efforts at criminal legal reform in the realm of economic justice issues have not been successful. For example, New Hampshire courts and the Department of Public Safety have embedded a system to “encourage” people to show up for court and to pay their fines.⁹⁵ It works as follows: if you fail to appear in court, your name may be sent to the Department which has the power to suspend your driver’s license for that failure to appear.⁹⁶ Similarly, if you fail to pay a fine for too long a period, the court can refer that failure to the Department which again has the power to suspend your license. The court system has trumpeted this process as very effective. Threatening people who have failed to pay a fine is “strong encouragement” for them to pay—and they do so.

The problem is that it treats everyone who fails to appear or pay equally. But such a system does not distinguish well between those who have the money to pay the fine but forget about those who do not have the ability to pay. Taking away their license inhibits their ability to get a job or to go to the job they have, thereby deepening their financial hole and making it harder for them to pay the fine. Similarly, taking away someone’s license for failing to appear for a court date inhibits their ability to get to their court dates.⁹⁷

A proposal was put before the House legislative committee to eliminate this practice because it disproportionately punished those in difficult economic circumstances. The bill was adopted by the committee for the first time through the legislative process but fell by the legislative wayside during the onset of the pandemic. In the next session, the bill did not receive a positive committee vote and failed before the full House of Representatives.

A driver’s license is pivotal to everyday life in rural New Hampshire. It enables people to get to work, to do their jobs, to take care of their families, and to access medical care. Suspending a person’s driver’s license jeopardizes these every day, necessary activities. Take this one step further, the suspension of drivers’ licenses can trickle down to impacting businesses as workers struggle to get to work in a state with minimal public transit and a labor shortage.

While the above is certainly the case, the court system is often measured in the legislature, perhaps unfairly, by the amount of money they collect. Some in the legislature articulated a concern for facilitating a lack of moral responsibility in those

⁹⁴ See *State v. Brawley*, 171 N.H. 333, 340, 339 n.3 (2018).

⁹⁵ N.H. REV. STAT. ANN. 263:56-a.

⁹⁶ *Id.*

⁹⁷ *Id.*

who failed to pay or to show up. Everyone must meet their obligations, it was said.

This set of competing interests captures quite well the challenge of effectuating economic justice-related criminal legal reform. Poverty too often is viewed as a moral failing. One hears versions of, “if you only worked harder” or “if you must meet your obligations” or “if you just got a job” whenever one proposes economic justice reforms. The subtext for “helping” poor people seems sometimes paternalistic, sometimes rooted in unconscious Calvinistic instincts. The poor are viewed as the pitiful “other,” in need of either help or moral punishment to improve them.

Yet, not infrequently, some (easily labeled as conservative) are prone to understand the challenges of being poor and being involuntarily engaged in the New Hampshire criminal legal system. As a result, effectuating criminal legal reform in the context of economic justice is much more a function of building unusual coalitions behind the scenes as it is about publicly articulating ideological progressive positions. Investing time in the coalition-building process is a very personal and time-consuming enterprise of building relationships with ideological conservatives and liberals and being able to draft and agree to amend acceptable legislative proposals.

II. OTHER CRIMINAL LEGAL REFORMS

In line with this theme, partnerships have been essential in the recent progress in other criminal legal reforms in New Hampshire. Much of the economic justice-related reform over the last ten years involved successful partnerships.⁹⁸ Other partnerships were equally successful.

Over the course of several years, the National Innocence Project, the New England Innocence Project, and the author put forward criminal legal reforms designed to reduce the frequency of wrongful convictions.⁹⁹ The need for such reforms was acute. The National Innocence Project has analyzed the first 375 DNA exonerations on which they worked.¹⁰⁰ The analysis revealed a troubling level of dysfunction in the criminal legal system. Twenty-seven percent of exonerees plead guilty to crimes they did not commit.¹⁰¹ The cases of sixty-four percent of exonerees

⁹⁸ In particular, the author and the ACLU-NH lead any number of these efforts in which the author crafted legislation and then the author followed the lead of the ACLU-NH policy director, Jeanne Hruska who managed much of the lobbying effort. As a part of this partnership, the author marshalled the efforts of a number of law students as researchers and data collectors.

⁹⁹ INNOCENCE PROJECT, www.innocenceproject.org [<https://perma.cc/97LZ-PG9X>] (last visited Feb. 26, 2024); NEW ENGLAND INNOCENCE PROJECT, <https://www.newenglandinnocence.org/> [<https://perma.cc/C2NE-DBXF>] (last visited Feb. 26, 2024).

¹⁰⁰ *Research Resources*, INNOCENCE PROJECT, <https://innocenceproject.org/research-resources/> [<https://perma.cc/L5Y9-SHR2>] (last visited Feb. 26, 2024).

¹⁰¹ *Explore the Numbers: Innocence Project's Impact*, INNOCENCE PROJECT, <https://innocenceproject.org/exonerations-data/> [<https://perma.cc/774Q-BH3U>] (last visited Feb. 26, 2024).

involved some sort of misidentification, including thirty-four percent of that number being in-person identifications.¹⁰² Eighty-four percent of the misidentification cases involved a misidentification by a surviving victim.¹⁰³ All these exonerations came about by virtue of post-conviction DNA testing, sometimes occurring decades after the underlying wrongful conviction.¹⁰⁴

The proposed reforms involved efforts (1) to embed eyewitness-identification-procedure best practices into the criminal system; (2) to improve New Hampshire’s post-conviction DNA testing statute; and (3) to require that police record in some fashion all custodial interrogations. Each of these proposals addressed specific areas of the law in which the Innocence Project and others have noted either a systemic weakness that could lead to a wrongful conviction or a significant barrier to uncovering wrongful convictions.

A. Eyewitness Identification Procedures

Eyewitness identifications has always been a frequent basis of proof in a criminal case. Starting in the 1980’s, a significant body of research began to show that such identifications were not always reliable, depending on the circumstances.¹⁰⁵ Since the founding of the National Innocence Project in the early 1990s, substantial evidence has developed that many eyewitness identifications have led to wrongful convictions.¹⁰⁶ More recently, police and other researchers have developed best practices for identification procedures that would make such identifications more reliable, if not perfect.¹⁰⁷

The goal in New Hampshire was to embed such practices in police departments as much as possible. For example, asking a witness to look at photos in a one-by-one sequential way rather than in a six or eight panel array is a better practice.¹⁰⁸ Letting the witness know that the person who assaulted them may or may not be in any photo lineup reduces the effect of any unstated inference by the witness that the police “expect” that they will pick a person from the photo array.

The resulting successful legislation required police departments in the state to

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Doyle et al., *Eyewitness Testimony: Civil and Criminal* (6th ed 2023).

¹⁰⁶ ACLU-NH, *supra* note 33.

¹⁰⁷ *See generally* John Turtle et. al., *Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, 1 CAN. J. OF POLICE AND SEC. SERV. 1, (2003); National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*, (The National Academies Press, 2014); Brandon L. Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L. 1 (2014); Margaret Bull Kovera & Andrew J. Evelo, *Improving Eyewitness-Identification Evidence Through Double-Blind Lineup Administration*, 29 CURRENT DIRECTIONS IN PSYCH. SCI. 6 (2020).

¹⁰⁸ *See generally* sources cited *supra* note 107.

have a written eyewitness-identification policy in accordance with the attorney general's law enforcement manual's policy.¹⁰⁹ Though a compromise, the legislation was substantial progress from the lack of any existing legislation.

B. Post-Conviction DNA Testing

Post-conviction DNA testing has been the source of most of the National Innocence Project's uncovering of wrongful convictions.¹¹⁰ The mechanism for getting approval for such testing varies significantly around the country. In some jurisdictions, one needs only the approval of the prosecutor's office; in others, the approval of the judge through a statutory process; and in others, a combination of the above.¹¹¹ It is not unusual for prosecutors to object to any post-conviction DNA testing.

New Hampshire passed its first post-conviction DNA testing statute in 2004.¹¹² Several provisions made it particularly difficult for a convicted person to get the court's approval for post-conviction testing.¹¹³ For example, one seeking post-conviction testing had to file a petition identifying four factors in favor of post-conviction testing.¹¹⁴ They also had to do so without the assistance of a lawyer if they were indigent.¹¹⁵ A prosecutor then had the opportunity to object, and the defendant had no explicit opportunity for a hearing on the matter before the court had to make a finding by clear and convincing evidence that a sequence of nine

¹⁰⁹ N.H. REV. STAT. ANN. § 595-C:2 (2019).

¹¹⁰ The Innocence Project, *Explore the Numbers: Innocence Project's Impact*, INNOCENCEPROJECT.ORG (Feb. 28, 2024, 1:04 PM), <https://innocenceproject.org/exonerations-data/> [<https://perma.cc/73Q3-Q73X>].

¹¹¹ *See id.*

¹¹² N.H. REV. STAT. ANN. § 651-D:2 (2004) (current version at N.H. REV. STAT. ANN. § 651-D:2 (2022)).

¹¹³ *See id.*

¹¹⁴ *Id.*

I. A person in custody pursuant to the judgment of the court may, at any time after conviction or adjudication as a delinquent, petition the court for forensic DNA testing of any biological material. The petition shall, under penalty of perjury:

(a) Explain why the identity of the petitioner was or should have been a significant issue during court proceedings.

(b) Explain why, in light of all the circumstances, the requested DNA testing will exonerate the petitioner and demonstrate his or her innocence by proving that the petitioner has been misidentified as the perpetrator of, or accomplice to, the crime for which the petitioner was convicted.

(c) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing which is sought.

(d) Explain why the evidence sought to be tested by the petitioner was not previously subjected to DNA testing, or explain how the evidence can be subjected to retesting with different DNA techniques that provide a reasonable probability of reliable and probative results.

¹¹⁵ *Id.*

factors had been met.¹¹⁶ At no point in this second phase did the defendant—most often a prisoner—have access to an appointed lawyer.¹¹⁷

Successful legislation substantially updating and amending this statute passed during the 2021–2022 legislative session.¹¹⁸ Most importantly, the legislation simplified what a defendant must show to get before a judge.¹¹⁹ It also gave the defendant a statutory right to counsel once they made the preliminary showing, and it reduced the burden of proof for establishing the nine factors to a preponderance of the evidence.¹²⁰ Again, as in many of the circumstances above, the legislation focused on changing technical details that had a broader significance than immediately apparent.

C. *Recording of Confessions*

The last piece of legislation flowing from the author’s collaboration with the National Innocence Project and the New England Innocence Project was an effort to require the police to record custodial interrogations.¹²¹ That legislation provoked substantial opposition from the police chiefs’ association and from prosecutors. The goal of the legislation was quite simple: a substantial number of wrongful convictions across the country came in cases in which the defendant had confessed to a crime they had not committed.¹²² The extent to which such confessions (often by juveniles, those whose first language was not English or those with mental health issues) were recorded going forward, it would very likely reduce the frequency of false confessions.

To date, the legislation is stalled in the state Senate, hopefully only temporarily.¹²³ This effort is like successful efforts in other states, very often led by the National Innocence Project. The process is one example of the substantial value of forming partnerships with well-resourced national organizations to facilitate and empower state-based efforts for criminal legal reform.

¹¹⁶ N.H. REV. STAT. ANN. § 651-D:2 (II) (2004) (current version at N.H. REV. STAT. ANN. § 651-D:2 (II) (2022)).

¹¹⁷ *E.g.*, *State v. Breest*, 155 A.3d 541 (N.H. 2017) (a case litigated at great length by the author and Ian Dumain, Esq., New York counsel who volunteered on post-conviction DNA cases for the National Innocence Project).

¹¹⁸ N.H. REV. STAT. ANN. § 651-D (2022). This legislation was the collaborative effort of Representative Casey Connolly, the author, the National Innocence Project and the New England Innocence Project, supported by the government relations firm, the Dupont Group.

¹¹⁹ *See id.*

¹²⁰ *Id.*

¹²¹ S.B. 80, 2023 N.H.S. (N.H. 2023).

¹²² *See e.g.*, ACLU-NH, *supra* note 33.

¹²³ S.B. 80, 2023 N.H.S. (N.H. 2023).

D. Privacy Reform

Efforts at criminal legal reform in New Hampshire have also overlapped with efforts at privacy reform. Some of the privacy reform efforts have taken on the relationship between the government and a private individual and the relationship between private commercial entities and a private individual.¹²⁴ Broadly, efforts to reform the privacy relationship between commercial entities and the individual have been unsuccessful. For example, a simple proposal to modify the relationship between internet service providers (“ISPs”) so that ISPs would be required to get an individual’s consent before providing their personal data to a third party failed.

By contrast, New Hampshire has become a national leader in the protection of the personal or private information of an individual from government intrusion. In 2018, the legislature and the voters passed a constitutional amendment, Part I, Article 2b, that became the first state constitutional provision to specifically protect information privacy.¹²⁵ It states: “[a]n individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.”¹²⁶

The genesis of the amendment was the struggle of state and federal courts to account for information privacy in the twenty-first century. Information, shorn of its containers and locations, is, in many ways, the essential currency of the twenty-first century.¹²⁷ An evaluation of the privacy due to such “naked” information does not fit particularly well within the language of the Fourth Amendment and Part I, Article 19 of the New Hampshire Constitution.

When the framers of an eighteenth century federal constitution wrote the Bill of Rights, privacy was about one’s physical possessions, dwellings, and letters.¹²⁸ In the twenty-first century, privacy is about our personal information to a much greater degree.¹²⁹ The problem: eighteenth century law was not written for twenty-first century information privacy. Defending privacy rights in the twenty-first century with eighteenth century constitutional provisions is often a losing battle. To understand this, one need only look at Big Tech’s deconstruction of the barriers to

¹²⁴ *E.g.*, Biometric Information Privacy Act, 740 Ill. Comp. Statutes 14 (2008) (regulation of commercial entities); 34 U.S.C. § 40702 (regulation of government collection of DNA).

¹²⁵ N.H. CONST. Part I, art. 2-b. (The author drafted the amendment for then Representative Neal Kurk, who was the prime sponsor of the amendment in the legislature. After passing the House and the Senate by at least 3/5 vote, the amendment went on the November 2018 ballot and received over the required 2/3 of those voting).

¹²⁶ *Id.*

¹²⁷ Albert Scherr & Neal Kurk, A New State Constitutional Right to Information Privacy: The Origins Speak, (Sept. 2022) (unpublished manuscript) (on file with the author).

¹²⁸ U.S. CONST. amend. IV.

¹²⁹ *E.g.*, United State v. Jones, 565 U.S. 400 (2012); Riley v. California, 573 U.S. 373 (2014); Carpenter v. United States, 138 S. Ct. 2206 (2018).

collecting our personal and private data.¹³⁰

Part of the problem is that twenty-first century technology has exponentially expanded the ways that our personal data can be—and is—accessed, collected, consolidated, and analyzed, often without notice or permission.¹³¹ Some of those ways have simplified access to previously biologically locked data, like relatively routine access to genetic information.¹³² Some have turned that which was previously not regarded as data into accessible data, like facial recognition’s technological rendering of human faces into much more accessible data points.¹³³ Some of it has amassed previously scattered, difficult-to-collect data into revealing mosaics of data, like GPS technology’s collection of public-whereabouts data.¹³⁴

More broadly, information is being accessed and collected into innumerable types of databases.¹³⁵ Private and public medical research often create databases with a wealth of personal information beyond genetic “types.” Cellphone and internet providers act as¹³⁶ repositories for vast amounts of geo-locational information, cellphone behavior, and internet activity. Private businesses often have security cameras for their establishments and retain the videos.¹³⁷ Larger businesses collect vast amounts of data about customer behavior that they both store and sell.¹³⁸ Only some of the above occurred during most of the twentieth

¹³⁰ See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

¹³¹ *Id.*

¹³² See Albert E. Scherr, *Genetic Privacy & the Fourth Amendment: Unregulated Surreptitious DNA Harvesting*, 47 GA. L. REV. 445, 450–51 (2013).

¹³³ See generally Alan Rappoport & Kashmir Hill, *I.R.S. to End Use of Facial Recognition for Identity Verification*, N. Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/us/politics/irs-idme-facial-recognition.html?searchResultPosition=9> [<https://perma.cc/6TSZ-HJEK>]; Kashmir Hill, *New Jersey Bars Police From Using Clearview Facial Recognition App*, N. Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/technology/clearview-ai-new-jersey.html?searchResultPosition=4> [<https://perma.cc/96RN-JFRL>]; Sahil Chinoy, *The Racist History Behind Facial Recognition*, N. Y. TIMES (Jul. 10, 2019), <https://www.nytimes.com/2019/07/10/opinion/facial-recognition-race.html?searchResultPosition=15> [<https://perma.cc/DNB9-3CFN>].

¹³⁴ *United States v. Jones*, 565 U.S. 400, 403 (2012).

¹³⁵ *E.g.*, 23and me collects genetic samples from individuals and provides them with ancestral and health information. It keeps the samples and genetic profiles in a database. 23ANDME, www.23andme.com [<https://perma.cc/4QNK-N6RN>] (last visited Mar. 2, 2024); The Federal government collects DNA samples from designated number of those convicted and arrested for crimes, as well as others, and places their genetic profiles in a database accessible to law enforcement throughout the country. 34 U.S.C. § 40702.

¹³⁶ ZUBOFF, *supra* note 130.

¹³⁷ Bennett Conlin, *5 Ways Your Company can Benefit From Security Cameras*, BUSINESS.COM (Jan. 3, 2024), <https://www.business.com/articles/5-ways-your-company-can-benefit-from-security-cameras/> [<https://perma.cc/X8LJ-WENS>].

¹³⁸ ZUBOFF, *supra* note 130.

century, let alone the eighteenth century.

The federal constitution's focus is primarily and directly on the container or location of information. The Fourth Amendment speaks of "persons, houses, papers, and effects . . ." as does Part I, Article 19 of the New Hampshire Constitution.¹³⁹ Not surprisingly, it misses the mark in the twenty-first century when privacy is about the information itself, which can be readily transferred, multiplied, and shared in digital form. The product of twenty-first century technology—information exists independently of location, geographically or physically within a container.

By contrast, in the eighteenth century, information existed in containers and in some physical form (with the exception of information contained in one's thoughts, which was addressed by the right against self-incrimination in the Fifth Amendment).¹⁴⁰ Though, arguably, the essence of Article 19 and the Fourth Amendment's focus on containers is to protect the information contained therein, their language does so indirectly, at best.

Fourth Amendment jurisprudence has long sought to address this discrepancy between the eighteenth and twenty-first century challenges to privacy and the changing nature of the information through the "reasonable-expectation-of-privacy" standard from *Katz v. United States*.¹⁴¹ *Katz* took place in 1967. It involved information in the form of one end of a two-way conversation occurring in what would now be considered a traditional phonebooth. The drafters of the Fourth Amendment would not have contemplated even what now is the old-fashioned setting of a phone booth. *Katz* recognized that what merited privacy with regards to the conversation in question was the content of the relevant phone conversation in that phonebooth in which the speaker had shown an expectation of privacy, an expectation the court also decided was worthy of societal recognition.¹⁴² While the location was still important, analytically the court was beginning to distinguish information from its container.¹⁴³

Since *Katz*, courts have been struggling with reconciling constitutional language with the reality of information that was frequently container-free. In cases like *Kyllo v. United States* (information produced by a thermal imaging device), *United States v. Jones* (publicly available information), *Carpenter v. United States* (geolocation information in the hands of internet service providers), and *Riley v. California* (information within one's cellphone), the Supreme Court confronted circumstances in which their real focus was on the nature of the information—what it told us—rather than on the container itself.¹⁴⁴ It worked hard and without unanimity to find

¹³⁹ U.S. CONST. amend. IV; N.H. CONST. Part I, art. 19.

¹⁴⁰ The language of the Fifth Amendment itself demonstrates this. U.S. CONST. amend. V.

¹⁴¹ See generally *Katz v. United States*, 389 U.S. 347 (1967).

¹⁴² *Id.* at 353.

¹⁴³ *Id.*

¹⁴⁴ See *Riley v. California*, 573 U.S. 373, 378 (2014).

ways to use the language of the Fourth Amendment to address what is best viewed as the products of twenty-first century technology.

Part I, Article 2b, rids the analysis of the cumbersome analytical prism of containers. It effectively says: let's look at the nature of the information; if it's personal or private, then we will give it enhanced protection in the form of a strict-scrutiny constitutional analysis.¹⁴⁵ As the authors of the amendment have said elsewhere, the concept of private or personal information in the Amendment is quite expansive.¹⁴⁶ It contemplates the definitions of personal information in the General Data Protection Regulations (GDPR) in Europe:

'[P]ersonal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.¹⁴⁷

Moreover, Article 9 of the GDPR drills down even more specifically regarding certain types of data:

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.¹⁴⁸

In criminal cases, Part I, Article 2b will bring notable changes. In evaluating Part I, Article 19 claims—the state equivalent of the Fourth Amendment—the new amendment will substantially tip the analytical balance as to whether one has a reasonable expectation of privacy in personal or private information strongly in favor of a positive answer.¹⁴⁹ Information previously thought to be unprotected by Part I, Article 19—information in the hands of a third party, for example, will now get Article 19 protection as Article 2b lends it constitutional status. Additionally, Article 2b will also require a separate, independent analysis under its terms. A court must now decide whether the personal or private information is accessible to the government based on a compelling state interest, i.e., a strict scrutiny analysis.¹⁵⁰ Put simply, a strict scrutiny analysis is now required for any government intrusion on personal or private information.

Part I, Article 2b, has increased the privacy protection of one's personal or

¹⁴⁵ See Scherr & Kurk, *supra* note 127.

¹⁴⁶ *Id.*

¹⁴⁷ General Data Protection Regulation, art. 4, 2016 O.J. (L 119) 33. Note that, while these definitions identified here did not go into formal effect until May, 2018, the language quoted here had been available at the time of the drafting of Part 1, Article 23b.

¹⁴⁸ General Data Protection Regulation, art. 9, 2016 O.J. (L 119) 38.

¹⁴⁹ See Scherr & Kurk, *supra* note 127.

¹⁵⁰ *Id.* at 24–26.

private information from any governmental intrusion.¹⁵¹ It is unique in the United States for its exclusive focus to be on information privacy.¹⁵² It stands as a forward-looking amendment better able to sort out privacy interests amidst the advances of twenty-first century technology.

CONCLUSION

The criminal legal reforms described above represent significant changes in the criminal system in New Hampshire. The reforms came about using a lawyer's tools: litigation (*State v. Brawley*), policy papers (*Debtors' Prisons in New Hampshire*), and legislative drafting and advocacy (bail reform & Part I, Article 2b). One can debate whether an incrementalist approach to criminal legal reform is a better one than a more "abolitionist" approach.¹⁵³ Regardless of a resolution of that ongoing debate, the result of these incremental changes is that case law and statutes are more supportive of the interests of those too often gobbled up by the criminal legal system. Beyond that, the last seven years of activity reflect a law professor's and students' active engagement in positive social change—lawyering with a purpose beyond that of an individual client. It represents an evolving model of social justice activism from within a law school.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See, e.g., Dorothy E. Roberts, *Forward: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) (presenting a thoughtful analysis of the benefits of each approach).