

# Crumbling Foundations of Justice

Justice is an ideal. And justice is built from subparts that are ideals in themselves, each inextricably necessary for justice to serve both the individual and collective good of civil society: independence, impartiality, ethics, and equality. Frustration surrounds the pursuit of justice, as progress encounters regress in a struggle as endlessly certain as time itself. Because of the inherent flaws in humanity, the ideals of justice and its subparts—like any ideal—will never be fully attainable. But we must persevere through the frustration and continuously strive to get as close as humanly possible. Otherwise, the ideals will inevitably be overcome by their opposites.

The functional operation of justice is carried out by America's justice systems, powered by adjudicatory and enforcement arms at the federal, state, and local levels. The federal system is immense in national power and often the recipient of the greatest attention and resources. However, the vast majority of us—we the people—are most likely to encounter one of the thousands of state and county “lower-level” justice systems, and this likelihood is heightened for the most vulnerable among us.

The “lower-level” systems are in fact the foundations of the structure on which justice in America either stands or falls. And those systems are faltering.

This book exposes how our foundational institutions of justice are using contractual tools to harness America's history of racial and economic inequality, converting the harm into revenue through factory

operations. Rather than providing vulnerable populations with equal justice, the institutions are mining them, using commodification tools strengthened and modernized through time and technology.

The coming chapters uncover the operations. But first, this chapter sets the stage, pausing to look back at how we got here by examining the history of America's ideals of justice, then bringing us back to the present by flipping on the light switch to introduce the conveyor belt churning justice into a business.

## FOUNDATIONAL IDEALS OF JUSTICE

Justice is a paradox, permanently imperfect, requiring the permanent pursuit of perfection. The intertwined ideals described here are each crucial to the foundation of justice. However, each of these subparts was also undermined from the outset, permeated by inequality at America's beginnings.

### *Independence*

After seven years of revolutionary war against the British monarchy, the “founding fathers” and drafters of the US Constitution tried to create a structure of government to prevent tyranny, to promote the public welfare, and to pursue justice and individual liberty. Before the revolution, the colonies struggled and grew for over 160 years under the oppressive and self-serving control exercised by one entity—the British Crown. Thus, understanding all too well that tyranny is inevitable when governmental power is concentrated in a single entity, the founders created a structure built upon independence, a separation of powers between three independent branches of government so that no single branch or individual can take control. As James Madison wrote in the *Federalist Papers*, “The accumulation of all powers, legislative, executive and judiciary, in the hands of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny.”<sup>1</sup>

While drafting a structure for the pursuit of ideals, the founders recognized an inherent flaw: humanity. Thus, Madison focused his pen on human nature, seeking to form a government to protect ourselves from ourselves, which is ultimately our greatest struggle to preserve our constitutional democracy: “But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would

be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>2</sup> To account for humanity, Madison explained that the separate branches must be simultaneously intertwined with a careful overlap of checks and balances to counteract the flawed human condition, such that “[a]mbition must be made to counteract ambition.”<sup>3</sup> Therefore, attempting to prevent any one branch from usurping all power, each branch is provided with a back and forth of safety valve controls over the others. Congress can pass laws, the president can veto laws, Congress can override vetoes and can impeach the president and other governmental officials, the president appoints federal judges, Congress approves judicial appointments, the judiciary has power to review the constitutionality of all actions by the legislative and executive branch, and Congress can amend the Constitution.

Within this structure of separation of powers combined with checks and balances, the founders understood that an independent, impartial, and ethical judiciary must be at the core, reviewing the actions of the other branches. Alexander Hamilton, writing in support of the separation of powers in the *Federalist Papers*, explained that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution,” and that the constitutional structure “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”<sup>4</sup>

However, the deep human failings—which Madison described—undermined the founders’ words of protecting liberty and justice. Madison enslaved people. Although historical debates continue regarding Hamilton, he may have personally held people in slavery, and he bought and sold enslaved persons for his in-laws.<sup>5</sup> The founders also did not recognize the equal rights of women—and treated Native Americans as “merciless Indian savages.”<sup>6</sup> Yet through this disturbing irony, although the language of liberty was written into the Constitution in 1787 by flawed men who contributed to slavery, denied rights to women, and sought to destroy our Native American population, those words would provide the necessary structure for the future and ongoing struggle for equal justice.

Fast-forward almost two hundred years after the Constitution was ratified: Senator Sam J. Ervin Jr. was selected to chair the Senate

committee that investigated the Watergate scandal and led to articles of impeachment against former president Richard Nixon. Two years before the constitutional crisis that shook the nation, Senator Ervin wrote of the importance of judicial independence: “[J]udicial independence is the strongest safeguard against the exercise of tyrannical power by men who want to live above the law, rather than under it. The separation of powers concept as understood by the founding fathers assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source, and further assumed that each individual judge would be free from coercion even from his own brethren.”<sup>7</sup> Again, disturbing hypocrisy adhered to the individual who wrote words about protecting liberty. Senator Ervin labeled himself a champion of civil liberties for southerners, while he fiercely opposed civil rights for Black Americans.<sup>8</sup> In 1956, Ervin had even helped to draft the “Southern Manifesto” that encouraged defiance of school desegregation. However, ideals have the potential to overcome human failings—and the synched ideal of judicial independence with the separation of powers, which Ervin supported, allowed for the unanimous Supreme Court school desegregation decision in *Brown v. Board of Education*, which Ervin fought against.

### *Impartiality*

Impartiality almost sounds like not caring, but it is quite the opposite. The ideal requires an individual to care so deeply for the pure pursuit of justice that inherent human failings and temptations to succumb to bias, self-interest, and outside pressures are all overcome. To ensure that justice officials embrace the ideal, our Constitution requires it.

The due process clause in the Fifth Amendment, applied to the states through the Fourteenth Amendment, requires that no person shall be “deprived of life, liberty or property without due process of law.” As part of the due process requirements, as interpreted by the courts, individuals have a fundamental right to a fair trial and impartial justice systems.

Impartiality is required of all officials in the adjudicatory and enforcement arms of justice, and the ideal is most paramount in the judiciary. If our courts systemically succumb to human failings, hope for justice is lost—and if justice falls, our constitutional democracy falls. As Paul Verkuil, former president of the College of William and Mary, explains: “Conflicts of interest destroy the independence that is the hallmark of the judiciary, and by extension of all public officers. Yet the judiciary

must internalize that principle because judges are the arbiters of justice; if they fail, civil society in Locke's sense fails, and we revert to a state of nature."<sup>9</sup> Thus, US Supreme Court justice Robert Jackson explained in 1950 that the importance of impartial tribunals cannot be overstated: "The right to fair trial stands guardian over all other rights."<sup>10</sup> Also, US Supreme Court justice Hugo Black described this right in 1955 while overturning a lower court decision in which a judge acted both as the accuser in a "one-man grand jury" and as the trial court judge to rule on his own accusations: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man can be a judge in his own case, and no man is permitted to try cases where he has an interest in the outcome."<sup>11</sup> Justice Black recognized that "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."<sup>12</sup> However, he also explained that the Constitution requires that judges must avoid both actual bias and systems in which bias is perceived: "[T]o perform its high function in the best way, justice must satisfy the appearance of justice."<sup>13</sup>

Justice Black was a Supreme Court justice for thirty-four years and became known "as a champion of civil rights and liberties."<sup>14</sup> But again, this champion of justice had previously supported racialized injustice. Before becoming a US senator and later being appointed to the Supreme Court by President Franklin D. Roosevelt in 1937, Justice Black had been a member of the Alabama Ku Klux Klan (KKK).<sup>15</sup>

### *Ethics*

Ethics is the ideal that lifts humans toward ideals. Ethical codes of conduct seek to hold judges, attorneys, and other justice officials personally accountable to adhere to the professional and constitutional requirements of the positions they hold. Without ethics, the words of justice can become meaningless.

Like the constitutional ideals toward which ethics lifts us, the ethical requirements in our justice systems also grew from human failings and inequality. Alabama was the first state to adopt codes of attorney ethics in 1887, during the same time that Alabama justice systems were enforcing vagrancy laws designed to keep Black Americans in bondage of forced work after the end of the Civil War.<sup>16</sup>

Thomas Goode Jones, the drafter of Alabama's ethical codes for the legal profession, fought in the Confederate Army before becoming the state's governor in 1890. Jones carried his fight for White supremacy into his governorship: "During Jones' tenure as governor, Alabama passed laws segregating blacks and whites on common carriers" and "Jones helped draft the 1901 Alabama Constitution that established racial segregation as a fundamental principle of social organization in the state."<sup>17</sup> A subsequent Alabama governor delivered a eulogy for Jones, praising his racism with these words: "After the close of the Civil War [Jones] was one of the leaders of our people in their struggles to restore good government and maintain their civilization, and by his eloquence, his courage and his wise counsels, and statesmanship, he rendered material assistance in leading our State back from the slough of dishonor and corruption to the high secure ground of White Supremacy, security and safety."<sup>18</sup>

Thus, a man who fought for slavery and racial segregation drafted the first state codes of attorney ethics. Those ethical codes would become the model for other states and eventually were incorporated by the American Bar Association in its original Canons of Professional Ethics in 1908.<sup>19</sup>

### *Equality*

Equality is a subpart of justice so crucial that the word is carved over the entrance to the US Supreme Court. But simultaneously, the ideal of equality has been more ignored, degraded, and compromised than any other component of justice throughout America's history. The American equality deficit is deep, as it was dug with more than four hundred years of an unequal past—from when the first enslaved persons were brought to Jamestown.

America's founders struck a deal in drafting the Constitution that treated enslaved persons as less than human while simultaneously leveraging the enslaved population to give the South greater electoral power. While every state would have two senators, the number of a state's seats in the House of Representatives would depend on its population. Thus, strategizing to increase power through humans they treated as property, representatives of the southern states demanded that enslaved people be counted.<sup>20</sup> The "three-fifths compromise" was disturbingly immortalized in Article I of the Constitution: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall

be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” As a result of the three-fifths compromise, the more people a state held in slavery, the more representatives the state obtained in Congress. The impact on the political power of the South and corresponding growth of slavery was enormous. In the 1790 Census, three years after the Constitution was first signed, about 654,000 enslaved persons were held in the southern states—amounting to over one-third of the South’s total population. In Virginia, almost 40 percent of the population were enslaved persons.<sup>21</sup> By the 1860 census, on the eve of the Civil War, the southern states had expanded the enslaved population to almost four million.<sup>22</sup>

James Madison, commonly hailed as the “Father of the Constitution,” enslaved more than one hundred persons, and he advocated for the three-fifths compromise: “Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the *slave* as divested of two fifths of the *man*.”<sup>23</sup> In rationalizing his support, Madison argued that enslaved people were like property, and the Constitution should protect property, so the Constitution should therefore give greater power to enslavers.<sup>24</sup>

Madison also helped design the electoral college to support states that relied on slavery. A transcript of a public debate reported Madison’s view that the best method of electing the president would be by popular vote: “The people at large was in his opinion the fittest in itself. It would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character.”<sup>25</sup> However, Madison was concerned that southern states would be at a disadvantage if the presidential election occurred by popular vote because enslaved persons accounted for over a third of the southern population—and were not allowed vote: “There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to fewest objections.”<sup>26</sup> Therefore, to ensure enslavers had more power over presidential elections, Madison devised the electoral college system that leveraged the three-fifths compromise.<sup>27</sup> Each state’s citizens would select a number of electors based on its number of representatives in Congress, which increased as a state increased the population of people

it held in slavery, and the electors would pick the president. Thus, although the Constitution is founded on ideals of liberty and justice, the southern states harnessed their political power into the Constitution through slavery.

Hamilton also supported the electoral college and advocated for its acceptance in the northern states by appealing to elitism. In *Federalist* no. 68, written “To the People of New York,” Hamilton argued for using electors rather than the popular vote: “It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.”<sup>28</sup> As part of his argument, Hamilton included ominously incorrect predictions that the electoral college “affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications,” and that “there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue.”<sup>29</sup>

Hamilton’s elitist argument against the popular vote is even more concerning when we understand that every state already included vastly unequal treatment and disenfranchisement based on race, gender, religion, and wealth. When the Constitution was ratified, voting rights were left to be determined by the states. Both southern and northern states restricted voting to White male landowners. Multiple states only allowed Christians to vote. When George Washington was elected as the first president in 1789, only 6 percent of America’s population was eligible to vote.<sup>30</sup>

After the founders embraced wealthy White males, Andrew Jackson emerged as the first populist and champion of the “common man.” But Jackson ratcheted up the harmful hypocrisy another level. Even as he spoke of liberty and the rights of the poor, he again only sought to protect the interests of White men. He ignored the rights of women, brutally enslaved hundreds of people, and savagely sought the elimination of the Native American population. When an enslaved person escaped from bondage on Jackson’s plantation, Jackson took out an advertisement in the *Tennessee Gazette* offering a reward for his return “and ten dollars extra, for every hundred lashes any person will give to him.”<sup>31</sup> In his annual message as president, Jackson argued for White



supremacy—that Indigenous peoples should yield to the “superior race” and “ere long disappear”: “They have neither the intelligence, the industry, the moral habits, nor the desire of improvement which are essential to any favorable change in their condition. Established in the midst of another and a superior race, and without appreciating the causes of their inferiority or seeking to control them, they must necessarily yield to the force of circumstances and ere long disappear.”<sup>32</sup>

Jackson caused the slaughter and removal of tens of thousands of America’s Indigenous peoples, including on the Trail of Tears, in which Cherokee men, women, and children were rounded up, removed from their homes, and forced to walk thousands of miles at gunpoint, with thousands dying along the way.<sup>33</sup> Disturbingly, after signing the Indian Removal Act in 1830, Jackson updated Congress with these words: “It gives me pleasure to announce to Congress that the benevolent policy of the Government, steadily pursued for nearly thirty years, in relation to the removal of the Indians beyond the white settlements is approaching to a happy consummation.”<sup>34</sup>

Decades of tension between the northern and southern states over the South’s continuation and growth of slavery culminated in civil war. As the war ended in 1865, President Abraham Lincoln was considering plans for Reconstruction to reintegrate the southern states and to begin rectifying the inequalities of slavery. However, the plans were weakened when Lincoln was assassinated and Andrew Johnson became president. Also considering himself a champion of the “common man” like Jackson, President Johnson implemented Reconstruction in a manner to appease White southerners—including taking back land that had been provided to formerly enslaved persons and redistributing the land to the pre-Civil War enslavers.<sup>35</sup> Southern states began enacting laws known as “Black codes,” severely restricting the rights of Black Americans and continuing forced labor. Black adults were forced into contracts with plantation landowners. In an excerpt from the 1865 Black Codes of Mississippi, the section purposefully misnamed “An Act to confer civil rights on freedmen” explains how if a “free” Black adult tried to escape such a contract, the county justice system would force him or her back into contractual bondage:

Sec. 7. . . . Every civil officer shall, and every person may, arrest and carry back to his or her legal employer any freedman, free Negro, or mulatto who shall have quit the service of his or her employer before the expiration of his or her term of service without good cause; and said officer and person shall be entitled to receive for arresting and carrying back every deserting

employee aforesaid the sum of five dollars, and ten cents per mile from the place of arrest to the place of delivery. . . .

Sec. 8. Be it further enacted, That upon affidavit made by the employer of any freedman, free Negro, or mulatto, or other credible person, before any justice of the peace or member of the board of police, that any freedman, free Negro, or mulatto, legally employed by said employer, has illegally deserted said employment, such justice of the peace or member of the board of police shall issue his warrant.<sup>36</sup>

While Black adults were forced into contracts, the county justice systems forced Black children into “apprenticeships,” with preference given to the children’s former enslavers:

Sec. 1. . . . It shall be the duty of all sheriffs, justices of the peace, and other civil officers . . . to report to the probate courts . . . all freedmen, free negroes, and mulattoes, under the age of eighteen . . . who are orphans, or whose parent or parents have not the means or who refuse to provide for and support said minors; and thereupon it shall be the duty of said probate court to order the clerk of said court to apprentice said minors to some competent and suitable person . . . Provided, that the former owner of said minors shall have the preference when, in the opinion of the court, he or she shall be a suitable person for that purpose.<sup>37</sup>

The “master or mistress” was given the statutory authority to beat the children for purposes of “management and control,” and if the children tried to escape, the justice systems would send them back.<sup>38</sup>

Reaction to the Black codes in the northern states temporarily led to renewed congressional interest in reducing the severe inequalities. Black Americans obtained citizenship and the right to due process and equal protection through the Fourteenth Amendment in 1868, and Black men obtained the right to vote through the Fifteenth Amendment in 1870.<sup>39</sup> However, also during this time, a group of former Confederate soldiers in Tennessee formed a secret society, the KKK, which quickly grew into a paramilitary terrorist group that spread across the South, using severe violence and intimidation against the Black population, and sought to undermine Reconstruction.<sup>40</sup>

Then came the presidential election of 1876 between the northern candidate Rutherford Hayes and the southern candidate Samuel Tilden.<sup>41</sup> The results were disputed in some of the southern states because of widespread violent efforts to disenfranchise Black voters. After initially establishing an electoral commission to resolve the dispute, the North and South reached a compromise. In exchange for the southern states

agreeing to accept Hayes as president, the northern states agreed to end Reconstruction, withdrawing federal troops who were protecting the civil rights of Black Americans, and White southerners were then free to rule their states as they wished.<sup>42</sup> As a result, violently unequal treatment and lynching spread, and the Black codes were replaced with Jim Crow segregation laws that reigned across the South—and parts of the North—for almost another one hundred years, until the Civil Rights Act of 1964.<sup>43</sup>

Meanwhile, White women were denied the right to vote until 1920. Black women and other women of color had to fight decades longer for the right to vote. Asian American residents were denied citizenship with the right to vote until the Immigration and Nationality Act of 1952. The Native American population did not receive citizenship with the right to vote until 1924, and many states continued to block voting rights to Native Americans, Black Americans, and other historically disenfranchised persons until protections in the 1965 Voting Rights Act—which have since been severely weakened—and disenfranchisement efforts have now been renewed.

Still today, reverberations of inequality from America's founding are deeply felt across the country. And the reverberations are deepest in America's justice systems.<sup>44</sup>

## JUSTICE BECOMES AN INJUSTICE BUSINESS

Destabilized from the outset due to America's history of inequality, our foundational justice systems began with a desperate need for realignment toward their intended ideals. But instead, the components of these institutions of justice devolved into rattling parts of a factory business. Our lower-level justice systems have often openly embraced the poverty and inequality experienced by vulnerable litigants, developing mechanisms to abdicate the ideals of justice to generate revenue from the despair. Before exposing details of those revenue schemes in the coming chapters, this section first provides the context of the injustice business operations in which the contractual deals grew.

### *Inverted Reality: Neglected Importance of Lower-Level Justice Systems*

In addition to the impact of historical inequality, the devolution of justice into an injustice business has also been spurred by the lack of attention, resources, and reform at the state and county levels that could provide

better potential for the ideals of justice to heal and grow. Although the strength of any structure lies in its foundation, our lower-level justice systems—those that serve the masses in our circumstances of greatest vulnerability—are often the most overlooked and overwhelmed. Because the systems are “lower,” they are perceived as lesser in terms of importance. But estimates have indicated that up to 95 percent of all US cases are in state courts, not federal.<sup>45</sup> Of those cases, over 99 percent are in the state trial courts, the courts of first resort.<sup>46</sup>

Further, judges, attorneys, and other justice officials often consider lower-level justice systems stepping-stones. Prosecutors’ and public defenders’ offices frequently send their newest attorneys to juvenile courts as a place to learn, as the attorneys hope to quickly “move up.” Also, newer judges often start in our foundational courts to gain experience as they hope for assignments that they view as more prestigious.<sup>47</sup> Moreover, many law schools contribute to the problem by clambering to climb national rankings—scored by a for-profit media company—and often focusing more on perceived prestige than on the workings of our foundational systems.

Perception has impact. In 1966 Professor Monrad Paulsen—who would become the first dean of the Cardozo School of Law—described his observations and concerns with the New York Family Court, titled *Juvenile Courts, Family Courts, and the Poor Man*: “It is a poor man’s court.’ . . . Each morning a hundred stories of poverty are suggested by the faces and the personal effects of those who wait to appear before the judges. The cold atmosphere of the room only intensifies the feelings of helplessness, fear, and frustration which accompany poverty. ‘[C]ourtrooms are bare, toilet walls are defaced. The court’s waiting rooms resemble those at hospital clinics.’ . . . Impersonal attendants perform their duties with clipped routine, underscoring alienation.”<sup>48</sup> Paulsen further observed that while “[t]he poor may be the principal customers of juvenile court services,” their needs are not the focus, but rather “the chief concern of those who administer the court is to meet the convenience of the judges and the staff.”<sup>49</sup> Half a century later, the cold atmosphere of despair continues. In 2009 a New York State Senate committee noted that the Family Court “is perhaps the saddest place in New York,” and a 2016 report explains that “[e]ven the wins in Family Court are sad.”<sup>50</sup> And to the extent that change is occurring in foundational justice systems in New York or elsewhere, the focus is primarily on running like a business: increased efficiency and revenue rather than equal and impartial justice.

*Revenue and Efficiency Replace Justice*

Rather than issuing reports that focus solely on transparency and justice, county justice systems often publish annual reports and public relations communications similar to those of for-profit companies. Like presentations to prospective investors, the reports include emphasis on financial data and accomplishments in efficiency as if the justice systems are in capitalistic competition with neighboring county systems, fighting for revenue rather than collaborating for the common cause of justice.

Ohio's Lucas County Juvenile Court is one of the court systems that started contracting to generate revenue from foster care and child support, described in the following chapters. In its 2018 annual report, the court highlights its "Fiscal—Business Office" achievements as including \$2 million in foster care and child support revenue and lists its fines and fees revenue at over \$252,000.<sup>51</sup> The court celebrates how "2018 was a banner year for the Lucas County Juvenile Court" and then highlights the number of children it processes: "In 2018, our Court engaged a stunning 11,743 cases."<sup>52</sup> The court also highlights that its new mission statement includes a statement in support of equity.<sup>53</sup> But in that same year, almost 70 percent of the children that the court "engaged" into its detention center were Black youth, while the percentage of Black individuals in Lucas County is only 20 percent.<sup>54</sup>

The prosecutor's office in Cuyahoga County, Ohio, also contracts to generate millions in revenue from impoverished children and families in foster children and child support contracts.<sup>55</sup> The office explains: "Ours is a very large office with many important responsibilities . . . Last year, we handled more than 10,000 adult felony criminal cases and another 5,500 juvenile cases. That doesn't count more than 10,000 child support cases. . . . It's too big and too important to the public not to be run like a business."<sup>56</sup> The prosecutor's office further describes its business mindset as if it is in competition with other counties to show statistics of success: "We have asked our IT team to create and continually refine statistical measures of how we perform . . . Soon we will post statistics from comparable counties to provide benchmarks and to begin the hard process of setting goals. Successful businesses do that all the time."<sup>57</sup>

While county justice systems increasingly act like businesses competing for revenue, the county governments also use the justice systems—and the vulnerable children and adults pulled into the systems—to generate county general funds.<sup>58</sup> For example, a news report explains that Victoria County, Texas, has used its juvenile detention center to

maximize county revenue by jailing children from multiple jurisdictions, and the County Judge “credited the juvenile detention center as a growing source of revenue for the county that helped to offset a decline in property values.”<sup>59</sup> As the *Victoria Advocate* explains: “Victoria County is projected to almost double the revenue it brings in by housing youths from outside the county in its juvenile detention center. . . . The proposed 2019 budget for Victoria County projects that contracts at the juvenile center will bring in almost \$2.3 million for the county in the next budget year.”<sup>60</sup> The County Judge reportedly elaborated that “[w]e have a lot of improvements out at the juvenile detention center,” and “[d]ue to our work out there in improving trends, increasing populations, better payment rates, we were able to budget upward \$450,000 in revenue at juvenile detention.”<sup>61</sup> Thus, the county justice system, which should be hoping fewer children need to be imprisoned in its detention facility, instead lauded its own efforts at “increasing populations” of detained children as a means of making money.

Building business structures to focus on efficiency and revenue rather than ensuring equal justice, county justice systems often bring multiple nonjudicial services in-house that are typically intended to be independent from the court. Similar to the Ohio juvenile courts described in the introduction, a juvenile court in Tennessee provides another example of such a structure. The court is introduced here and revisited in chapter 8.

The Juvenile Court of Memphis and Shelby County heard more than forty-six thousand cases in 2019, with only one actual judge and about eleven magistrates who serve at “the pleasure of the judge.”<sup>62</sup> The court runs its own corrective and protective services departments, probation services, psychological services, collections department, a school, foster care services, foster care review board, the guardian ad litem office that is supposed to provide independent legal representation to children and parents, and multiple other programs intended to be independent but that report to the judge.<sup>63</sup> Further, the court is one of several juvenile court systems described in chapter 3 that entered interagency contracts to generate revenue when issuing and enforcing child support orders against impoverished parents.<sup>64</sup> The court describes a focus on efficiency and stated that one of the goals of its clerk’s office is “to generate revenue through collection of court ordered fines and fees, grant contracts and state reimbursement to offset the cost of court operation.”<sup>65</sup>

Focused on revenue and efficiency, the juvenile court lost sight of its intended mission of equal justice. The court asserted in its 2012 annual report that many of the court’s initiatives “have been adopted as models

for other programs in Tennessee and across the nation.”<sup>66</sup> However, the US Department of Justice’s (DOJ) Civil Rights Division also issued a report in 2012, finding that the court’s “administration of justice discriminates against Black children,” “fails to provide constitutionally required due process to children of all races,” and that the court “violates the substantive due process rights of detained youth by not providing them with reasonably safe conditions of confinement.”<sup>67</sup>

### *Judges Who Are Not Judges*

As part of increasing efficiency in their business operations, county justice systems often do not use actual judges for high-volume court proceedings that impact vulnerable populations, but rather employ lower cost officials such as magistrates, masters, hearing officers, and referees, who in some states are not even required to be attorneys. Juvenile court “referees” in New Jersey are not required to be lawyers and only need a four-year college degree.<sup>68</sup> North Carolina magistrates who decide civil and criminal cases do not need a four-year college degree.<sup>69</sup> North Carolina also allows nonattorney juvenile court counselors to order juveniles into secure and nonsecure custody.<sup>70</sup> In Alaska, magistrates who can hear all sorts of criminal, civil, and juvenile matters do not even need a high school degree but are simply required to be twenty-one and a citizen of the state.<sup>71</sup>

The situation is often not much better in states with seemingly stricter requirements. Pennsylvania does require that its juvenile court hearing officers be licensed attorneys but only requires the attorneys to receive six hours of specific juvenile law instruction before they start deciding the fate of children.<sup>72</sup> As a comparison, Pennsylvania requires six hundred hours of direct training and instruction before someone can be a licensed massage therapist.<sup>73</sup>

### *Privatization and Automation*

Continuously looking for mechanisms of efficiency, many justice systems have started privatizing and automating judicial functions. For example, as mentioned in the introduction, the juvenile court in Montgomery County, Ohio, partnered with IBM Watson. Focusing on efficiency while processing tens of thousands of children through its operations, a judge on the court’s treatment docket may have “less than 10 minutes per child to review information from many parties and make potentially life-changing decisions.”<sup>74</sup> So, the court collaborated with IBM Watson