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## FOREWORD

### FEES, FINES, BAIL, AND THE DESTITUTION PIPELINE

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#### INTRODUCTION

Although the Constitution forbids punishing people simply on account of their poverty, the judicial systems in the United States nevertheless do so in a variety of ways, both direct and indirect. It is important to recognize as a starting point that, as former Chief Justice of Arizona Scott Bales noted: “Any day in the United States about 2.2 million people are incarcerated. Another 4.4 million people are under some kind of penal supervision, probation, parole, and community supervision.”<sup>1</sup> A critical subset of this population is in jail or under supervision because they cannot pay required amounts. Thus, “fines, fees, and bail not only can contribute to cycles of poverty, they can contribute to cycles of criminalization.”<sup>2</sup> Chief Justice Bales was speaking at a panel in September 2019, at a remarkable conference convened at Duke Law School by the *Duke Law Journal*, the Bolch Institute for Judicial Studies, and the Duke Center for Science and

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1. *Conference Explores New Research on Court Fines and Fees*, BOLCH JUD. INST. (Sept. 17, 2019), <https://judicialstudies.duke.edu/2019/09/conference-explores-new-research-on-court-fees-and-fines> [<https://perma.cc/M3XR-65WJ>].

2. *Id.*

Justice that brought together judges and academics to make progress on issues of fees, fines, and bail.<sup>3</sup>

Imposing mandatory fines and fees on the indigent, regardless of their ability to pay, or denying pretrial release to individuals who cannot pay secured bail has become a subject of mounting judicial, legislative, and public concern. Court debt can take the form of fines and fees—legal financial obligations (“LFOs”)—as well as the use of cash bail to determine who is detained pretrial and who is not.<sup>4</sup> Millions of individuals each year are detained pretrial based on rigid secured bail schedules. In response to budget shortfalls, municipalities and states have turned to such fees as a revenue source, and as a result, court debt has vastly increased over the past three decades.<sup>5</sup> Researchers estimate that these court-imposed financial obligations amount to over \$50 billion in the United States.<sup>6</sup> These fines can multiply over time, resulting in mounting debt<sup>7</sup> that in turn can cause individuals to lose their employment, housing, public assistance, driver’s licenses, and voting rights. The abuses of fines and fees in cities such as Ferguson, Missouri—where court fines and fees were Ferguson’s second-largest source of income<sup>8</sup>—have drawn attention to these formerly ignored and highly localized fee practices.

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3. *See id.*

4. *See* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 1–3 (2016); Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 2, 25, 29 (2010)

5. *See, e.g.*, Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 509–10 (2016).

6. LAUREN-BROOKE EISEN, BRENNAN CTR. FOR JUSTICE, CHARGING INMATES PERPETUATES MASS INCARCERATION 1 (May 21, 2015), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Charging\\_Inmates\\_Mass\\_Incarceration.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Charging_Inmates_Mass_Incarceration.pdf) [<https://perma.cc/V5V5-AUVA>]; *see also* Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 516 (2011) (“It thus appears that tens of millions of U.S. residents have been assessed financial penalties by the courts and other criminal justice agencies.”).

7. ALEXES HARRIS ET AL., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 14 (Apr. 28, 2017), <http://www.monetarysanctions.org/wp-content/uploads/2017/04/Monetary-Sanctions-Legal-Review-Final.pdf> [<https://perma.cc/JD67-KU5W>].

8. *See* U.S. DEP’T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP’T 9 (Mar. 4, 2015) (“Ferguson generates a significant and increasing amount of revenue from the enforcement of code provisions.”); *see also* Consent Decree at 83–84, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016), <https://www.justice.gov/crt/file/833701/download> [<https://perma.cc/8SDG-BPRX>]; Mildred W. Robinson, *Fines: The Folly of Conflating the Power To Fine with the Power To Tax*, 62 VILL. L. REV. 925, 935 n.49 (2017); Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 295–303 (2015).

Today, constitutional litigation,<sup>9</sup> new policies and rulemaking by state supreme courts and bar associations,<sup>10</sup> and legislation<sup>11</sup> have increasingly addressed the problem of fines, fees, and bail as they affect civil and criminal litigants. A range of jurisdictions have recently overhauled bail and pretrial practices, created new systems to waive fees, and abolished the practice of suspending driver's licenses for unpaid traffic fees. Drawing on work being done at the intersection of law and policy, in the courts, and in the academy, this conference sought to bring together judges and academics to create a much-needed dialogue on this set of topics. The contributions to this symposium are interdisciplinary, studying the problem of court debt from a variety of perspectives. Sociologically informed work investigates the ways in which court debt burdens the poor and increases inequality. Constitutional analyses examine legal avenues increasingly used in nationwide litigation challenging fines-and-fees practices, including under the Equal Protection and Due Process Clauses. Empirical scholarship explores patterns in imposition of court fines and fees and the use of risk assessment as an alternative to bail in

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9. For bail-related litigation, see, for example, *ODonnell v. Harris Cty., Tex.*, 892 F.3d 147, 166–67 (5th Cir. 2018) (ruling regarding due process and bail determinations), *aff'g, rev'g, and modifying in part*, 882 F.3d 528, 536 (5th Cir. 2018). For driver's license suspension related litigation, see, for example, *Stinnie v. Holcomb*, 396 F. Supp. 3d 653 (W.D. Va. 2019); *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 779–80 (M.D. Tenn. 2016); *Thomas v. Haslam*, 303 F. Supp. 3d 585 (M.D. Tenn. 2018), *rev'd as moot sub nom*, *Thomas v. Lee*, 776 F. App'x 910 (6th Cir. 2019); and *Landmark Lawsuit Settled, Paves Way for Fair Treatment of Low-Income California Drivers*, ACLU N. CAL. (Aug. 7, 2017), <https://www.aclunc.org/news/landmark-lawsuit-settled-paves-way-fair-treatment-low-income-california-drivers> [<https://perma.cc/BNF4-KEGN>]. For litigation regarding fee-based diversion programs, see, for example, *Mueller v. State*, 837 N.E.2d 198, 205 (Ind. Ct. App. 2005) (“A practice of requiring payment of a fee as an absolute condition of participation in a pretrial diversion program discriminates against indigent persons in violation of the Fourteenth Amendment.”) and *Moody v. State*, 716 So. 2d 562, 565 (Miss. 1998) (en banc). For rulings denying relief in such challenges, see generally, for example, *Walker v. City of Calhoun, GA*, 901 F.3d 1245 (11th Cir. 2018) (distinguishing *ODonnell*, and finding district court abused discretion in order of preliminary injunction in favor of arrestee, regarding pretrial decision-making); *Johnson v. Jessup*, 381 F. Supp. 3d 619 (M.D.N.C. 2019) (dismissing due process claim on the pleadings and rejecting application for preliminary injunction); *Edwards v. Cofield*, 2018 WL 4101511, No. 3:17-cv-321-WKW (M.D. Ala. 2018) (denying both plaintiffs' motion for preliminary injunction and defendants' motion for summary judgment in challenge to pretrial bail practices); and *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1150 (D. Or. 2018) (denying relief on claims challenging driver's license suspension).

10. See, e.g., A.B.A., TEN GUIDELINES ON COURT FINES AND FEES 5 (Aug. 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/114.pdf> [<https://perma.cc/TM37-X4BG>].

11. See, e.g., MONT. CODE ANN. § 46-18-201(1)(a)–(6)(b) (2019) (“A person's license or driving privilege may not be suspended due to nonpayment of fines, costs, or restitution.”); 4 VT. STAT. ANN. tit. 4, § 1109 (2019) (same); WASH. REV. CODE ANN. § 46.20.289 (2019) (same).

pretrial decision-making. Administrative scholarship surveys the problem from the perspective of judicial procedures used to ensure both access to justice and mechanisms to secure sound funding for judicial functions.

### I. FINES, FEES, BAIL, AND COURT ADMINISTRATION

During the conference, Bolch Judicial Institute Director David F. Levi moderated the first set of discussions by those who are closest to the problems “on the ground”: judges and court administrators. To begin, the participants heard from Chief Justice Stuart Rabner of the New Jersey Supreme Court. Chief Justice Rabner convened a task force in 2014 that made far-reaching recommendations to overhaul the use of bail in the state, and following enactment of legislation in 2014, each court in New Jersey abandoned the use of cash bail.<sup>12</sup> Today, the courts screen defendants through the Public Safety Assessment (“PSA”) to assist them in identifying those who pose minimal risk to the community as they await a criminal trial, versus those who pose a greater risk of failure to appear or committing a new offense. The Administrative Office for the Courts provides a decision-making framework for judges using these new methods,<sup>13</sup> and the data so far suggest that there has been greatly reduced reliance on pretrial detention, without adverse consequences.<sup>14</sup> We then heard from Chief Justice Judith Nakamura of the New Mexico Supreme Court. New Mexico voters in 2016 approved a constitutional amendment to overhaul bail for the state, and after that occurred, the New Mexico Supreme Court developed new rules to implement the legislation, which a federal court just upheld.<sup>15</sup>

Mary McQueen from the National Center for State Courts (“NCSC”), described their work. This includes issuing detailed principles regarding court debt, for example, recommending that

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12. Hon. S. Rabner, *Bail Reform in New Jersey*, in TRENDS IN STATE COURTS 27–29 (2017).

13. See generally N.J. STAT. ANN. 2A:162-25(c) (2019); PUBLIC SAFETY ASSESSMENT: NEW JERSEY RISK FACTOR DEFINITIONS (Dec. 2018), <https://njcourts.gov/courts/assets/criminal/psariskfactor.pdf> [<https://perma.cc/L34G-48L9>].

14. Editorial Board, *Bail-Reform Law Continues To Show Its Effectiveness*, NORTHJERSEY.COM (Apr. 7, 2019), <https://www.northjersey.com/story/opinion/editorials/2019/04/03/editorial-nj-bail-reform-law-continues-show-its-effectiveness/3345843002> [<https://perma.cc/MR6D-PKXS>].

15. Victoria Prieskop, *Tenth Circuit Tosses New Mexico Bail Reform Challenge*, COURTHOUSE NEWS SERV. (Feb. 25, 2019), <https://www.courthousenews.com/tenth-circuit-tosses-new-mexico-bail-reform-challenge> [<https://perma.cc/KT6Q-GHYD>].

“courts should acknowledge that their fines, fees, and bail practices may have a disparate impact on the poor and on racial and ethnic minorities and their communities.”<sup>16</sup> We heard from Martin Hoshino, the Administrative Director of the California Judicial Council, which has tested a novel pilot program to use apps to better notify individuals of court appearances. Former Chief Justice Scott Bales offered his perspective, based in part on his experience convening the Arizona Task Force on Fair Justice for All. In 2016, the Task Force issued a report with sixty-five detailed recommendations to improve practices regarding fines, fees, and pretrial release, many of which resulted in substantial change as they were implemented.<sup>17</sup> We heard from former Chief Justice Mark Martin, who in North Carolina convened both an Equal Access to Justice Task Commission, to examine ways to expand access to the civil justice system, and a North Carolina Commission on the Administration of Law and Justice, which among other things recommended bail reform.<sup>18</sup> Finally, Chief Justice Maureen O’Connor of the Ohio Supreme Court shared her experiences and perspective as cochair of the National Task Force on Fees, Fines, and Bail Practices, formed by the Conference of Chief Judges and the Conference of State Court Administrators.<sup>19</sup>

## II. EMPIRICAL RESEARCH ON FINES, FEES, AND BAIL

The second set of discussions was led by academics who have been conducting noteworthy research on the topics of fees, fines, and bail. Key contributions involved empirical analysis. Will Crozier presented an article, *Driven to Failure: An Empirical Analysis of Driver’s License*

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16. NAT’L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES 5 (Dec. 2019), <https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees> [<https://perma.cc/3C4P-9UG7>].

17. TASK FORCE ON FAIR JUSTICE FOR ALL, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL: COURT-ORDERED FINES, PENALTIES, FEES, AND PRETRIAL RELEASE POLICIES (Aug. 12, 2016).

18. N.C. Comm’n on the Admin. of Law and Justice, *North Carolina Criminal Investigation and Adjudication Committee Report*, N.C. JUD. BRANCH, [https://nccalj.org/wp-content/uploads/2017/pdf/nccalj\\_criminal\\_investigation\\_and\\_adjudication\\_committee\\_report\\_pretrial\\_justice.pdf](https://nccalj.org/wp-content/uploads/2017/pdf/nccalj_criminal_investigation_and_adjudication_committee_report_pretrial_justice.pdf) [<https://perma.cc/3DYS-ES4J>]; *Equal Access to Justice Commission Staff*, NORTH CAROLINA JUDICIAL BRANCH, <https://www.nccourts.gov/commissions/north-carolina-equal-access-to-justice-commission/equal-access-to-justice-commission-staff> [<https://perma.cc/D42B-8976>].

19. Nat’l Task Force on Fines, Fees, and Bail Practices, *Resource Center*, NAT’L CTR. FOR STATE COURTS, <https://www.ncsc.org/Topics/Financial/Fines-Costs-and-Fees/Fines-and-Fees-Resource-Guide.aspx> [<https://perma.cc/65N6-2VCD>].

*Suspension in North Carolina*, coauthored with Professor Brandon Garrett, that is published as part of this symposium issue.<sup>20</sup> The piece examines data concerning driver's license suspensions in North Carolina. They found that one in seven adult drivers in North Carolina, or 1.25 million people, have an indefinite suspension for failure to pay traffic tickets or failure to appear in court.<sup>21</sup> Such a driver's license suspension remains in place until the person "disposes of the charge."<sup>22</sup> Importantly, the driver's license is suspended *before* the person has an opportunity to present information concerning their ability to pay. The authors find, first, that black and Latinx individuals are overrepresented among persons with suspended licenses relative to the population, and second, that the population of whites below poverty, and blacks above poverty, are most strongly associated with more county-level suspensions. Finally, they explore the implications of their results for efforts to reconsider imposition of driver's license suspensions for non-driving-related reasons.

Professor Jessie Smith described results from novel pilot projects concerning bail and pretrial release in North Carolina. Those efforts have extended diversion from jail and pretrial representation to rural districts in the state. The results to date are extremely encouraging, and suggest that even in districts in which there are not public defenders or pretrial services offices, new approaches toward pretrial detention can be implemented. Daniel Bowes described his work, as part of the North Carolina Justice Center, to redress court debt, including through statewide restoration efforts, policy analysis, and advocacy efforts directed at new legislation.<sup>23</sup>

### III. RETHINKING CONSTITUTIONAL IMPLICATIONS OF FINES, FEES, AND BAIL

We also had an important discussion about the constitutional implications of fines, fees, and bail. The Framers of the Constitution were deeply preoccupied with the concern that the government could

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20. William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585 (2020).

21. *Id.* at 6; see also N.C. GEN. STAT. § 20-24.1(a)(1)–(2) (2019) (providing that a person charged with a motor vehicle offense must have her license revoked if she either fails to appear or fails to pay a fine after receiving a court order for either).

22. N.C. GEN. STAT. § 20-24.1(a)(1)–(2).

23. See *Fair Chance Criminal Justice Project*, NORTH CAROLINA JUST. CTR., <https://www.ncjustice.org/projects/fair-chance-criminal-justice-project/overview/about/> [https://perma.cc/BR6M-DP77] (describing the Fair Chance Criminal Justice Project's mission and strategies).

impose abusive fines and fees upon persons. The Eighth Amendment, for example, states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>24</sup> The Fourteenth Amendment’s Due Process and Equal Protection Clauses impose protections as against unfair, arbitrary, and discriminatory practices, including regarding punishments or deprivations conditional on ability to pay.<sup>25</sup> In a unanimous ruling, the U.S. Supreme Court recently incorporated the Excessive Fines Clause as against the states.<sup>26</sup> Professor Kellen Funk described his work examining the legal history of the relationship between the requirements of probable cause and indefinite detention for failure to make bail.

Professor Sandra G. Mayson presented her essay, *Detention By Any Other Name*, published as part of this symposium issue, examining the procedural protections that the Constitution should be understood to require before a judge may impose unaffordable bail.<sup>27</sup> Mayson argues that imposing unaffordable bail is no different than ordering a detention pretrial. If it is treated as a detention, then additional substantive and procedural protections apply. Mayson sets out what those safeguards would entail for the pretrial process in order to inform courts and legislative efforts to reform pretrial detention.

#### IV. RETHINKING COURT PRACTICES

Additional noteworthy work examined how to remedy automatic fines and fees that do not account for ability to pay. Professor Beth Colgan discussed her paper, *Beyond Graduation: Economic Sanctions and Structural Reform*, also published as part of this symposium issue, examining the use of ability-to-pay tests.<sup>28</sup> Colgan notes that more graduated approaches towards fines can be far more humane and just. Yet Colgan also critiques those tests under an abolitionist heuristic, asking whether such measures, intended as reforms, can in fact perpetuate the use of regressive fines and fees that should not be

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24. U.S. CONST. amend. VIII.

25. *Bearden v. Georgia*, 461 U.S. 660, 665 (1983); *see also* Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 440–50 (arguing that both Due Process and Equal Protection Clauses, viewed cumulatively, should play a role in analysis of fines, fees, and bail).

26. *Timbs v. Indiana*, 139 S. Ct. 682, 686–87, 689 (2019).

27. Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643 (2020).

28. Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529 (2020).

imposed at all upon indigent persons. Colgan asks what it would take to eliminate any profit incentive from criminal justice, and instead redirect any such funds to the affected communities. Raising related concerns at the conference, Mitali Nagrecha described a recent report published by the Criminal Justice Policy Program at Harvard Law School concerning the proportionality of fees and fines. While advocating for ability-to-pay inquiries, the report also raised concerns that such tests not be used in a punitive or subjective manner.<sup>29</sup> Nagrecha, Sharon Brett, and Colin Doyle have contributed an online piece to this symposium, *Court Culture and Criminal Law Reform*, describing the need to address practice and culture in the courts and not just policy change. They argue that “[t]o change court practices, reformers must understand court culture—that is, precisely how judges make their decisions, and what can be done to change judicial behavior and mindset.”<sup>30</sup> Additionally, the authors call for further research on judicial culture related to issues such as fines, fees, and bail.

We also considered the role of fines and fees in the wider context of the criminalization of poverty. Indeed, Professor Peter Edelman encouraged us to take a broader approach to the problem of fines and fees and view it in the context of other ways poverty is criminalized, such as chronic nuisance ordinances, the school-to-prison pipeline, and the criminalization of homelessness and mental health problems. He encouraged us to take a multiprong approach to solving these problems, focusing on both federal court litigation and policy and litigation strategies at the state level.

Taking a law and sociology approach to the criminalization of poverty, Professor Monica Bell’s essay, *Toward a Demosprudence of Poverty*, coauthored with Stephanie Garlock and Alexander Nabavi-Noori and also published as part of this symposium issue, describes a threefold process, substance, and structure of poverty punishment.<sup>31</sup> In addition to inadequate procedures, which others have highlighted, this

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29. See SHARON BRETT & MITALI NAGRECHA, HARVARD CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 13–16 (2019), [http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions\\_layout\\_FINAL.pdf](http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf) [<https://perma.cc/H2M9-MCGC>]; see also HARVARD CRIMINAL JUSTICE POLICY PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM (2016), <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf> [<https://perma.cc/6G8J-96XR>].

30. Mitali Nagrecha, Sharon Brett & Colin Doyle, *Court Culture and Criminal Law Reform*, 69 *Duke L.J. Online* (forthcoming 2020) (draft on file with *Duke Law Journal*).

31. Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 *DUKE L.J.* 1473 (2020).

essay focuses on “substance,” by which they mean legal oversight of the everyday lives of the poor through broad regulations and laws that can permit excessive legal control over them. By “structure,” the authors mean the ways that poverty channels marginalized people into systems of both civil and criminal punishment, even when the law itself appears class neutral. They propose a new conception of the criminalization of poverty, which encourages us to not only consider the largely process oriented concerns surrounding fines and fees, but also the long historical role the legal system has played as a mechanism of social control over marginalized groups. The authors suggest how judges and courts might take better account of these substantive and structural features of the criminal system.

### CONCLUSION

As the conference and this symposium issue demonstrate, fines, fees, and bail practices have deep social impacts. People languish in prison simply because they cannot afford cash bail. People continue to have criminal records and are subjected to mounting charges for parole because they cannot pay court costs or victim restitution. People lose the ability to legally drive and face arrest for driving with a revoked license because they cannot pay traffic fees. People borrow heavily, indebting family and friends, to satisfy court debts.

Considered as a whole, the contributions to this conference and symposium issue show, from a variety of perspectives, how fines and fees can perpetuate poverty and inequality. Fortunately, awareness of the scale and severity of these costs has grown. Substantial work to remedy abusive fines, fees, and bail practices is being done by court administrators, chief judges, litigators, and others. This symposium, connecting that work to empirical, historical, sociological, and constitutional research, brings interdisciplinary insight into a complex legal and social problem.

Further, this symposium brings institutional and practical insight to the problem. By discussing with judges and court administrators how to collect better data, provide better guidelines and rules for courts, and conceptualize the problem, we hope that this conversation will help connect judges and academics on a topic of urgent public concern. New research agendas reaching court culture and court policies; empirical data concerning the roles fines, fees and bail plays; and a reconsideration of constitutional rights can all help to inform future judicial practice. We hope that the symposium discussion between

judges and academics and the articles published as part of this volume move these conversations forward in the years to come.