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## INABILITY TO PAY: COURT DEBT CIRCA 2020\*

JUDITH RESNIK\*\* &amp; DAVID MARCUS\*\*\*

Commitments to “access to justice” abound. So do economic barriers that undermine that premise. Fees, costs, fines, money bail, and other financial assessments—levied by courts, jails, and prisons—have become commonplace features of state and federal civil and criminal law enforcement.<sup>1</sup>

Yet the challenges of funding courts and the harms of debt generated through interactions with the legal system have not yet become staples of law school teaching and scholarship. This mini-symposium is one of many efforts to bring to the fore the failures of law to make good on its promises of open courts and equal treatment of civil disputants and criminal defendants. The Essays that follow contribute to a growing literature mapping the impact of

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This introduction and the Essays that follow grew out of a discussion at the AALS annual meeting in January of 2019. We have learned a great deal from the participants who are writing for the *North Carolina Law Review* (Brandon Buskey, Pamela Foohey, Gloria Gong, Paul Heaton, Cortney Lollar, and Jeffrey Selbin) and from the other presenters: Abbye Atkinson from Berkeley Law; Lisa Foster, Co-Director of the Fines and Fees Justice Center; Alec Karakatsanis, Founder and Executive Director of the Civil Rights Corps; and Maureen O’Connor, Chief Justice of the Supreme Court of Ohio and Co-Chair of the National Center for State Courts’ Task Force on Fines, Fees, and Bail Practices, all of whom joined us at the AALS Symposium, “*Court Debt: Fines, Fees, and Bail, Circa 2020*,” co-sponsored by the Sections on Civil Procedure, Tax, Bankruptcy, and Criminal Justice. We also appreciate the help from Professor Carissa Byrne Hessick and the *North Carolina Law Review* for making this mini-symposium possible, and from Alexandra Eynon, Yale Law School Class of 2019, and Stephanie Garlock, Yale Law School Class of 2020, for thoughtful and expert assistance. Finally, a caveat is in order about the footnotes to follow in this introduction. The relevant law and the scholarship are far more extensive than the few illustrations we provide here.

1. In an effort to make accessible for teaching, advocacy, and research, the Liman Center at Yale Law School edited two volumes, available as e-books without charge, that include samplings of many court decisions, statutes, law school clinical work, scholarly essays, and in-depth reports on these issues. See generally JUDITH RESNIK, ANNA VANCLEAVE, KRISTEN BELL, SKYLAR ALBERTSON, NATALIA FRIEDLANDER, ILLYANA GREEN & MICHAEL MORSE, ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW, YALE LAW SCH., WHO PAYS? FINES, FEES, BAIL, AND THE COST OF COURTS (2018), [https://law.yale.edu/sites/default/files/area/center/liman/document/liman\\_colloquium\\_book\\_04.20.18.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_04.20.18.pdf) [<https://perma.cc/9VCA-VVWD>]; JUDITH RESNIK, ANNA VANCLEAVE, ALEXANDRA HARRINGTON, JEFF SELBIN, LISA FOSTER, JOANNA WEISS, FAITH BARKSDALE, ALEXANDRA EYNON, STEPHANIE GARLOCK & DANIEL PHILLIPS, ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW, YALE LAW SCH., ABILITY TO PAY (2019), [https://law.yale.edu/sites/default/files/area/center/liman/document/liman\\_colloquium\\_book\\_combined\\_cover\\_march\\_21\\_2019.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_combined_cover_march_21_2019.pdf) [<https://perma.cc/4646-N9QQ>].

court and prison debt. This mini-symposium, in turn, offers law teachers and students a window into the breadth of research, litigation, legislation, and legal analyses aiming to understand and to stop what have become regressive tax systems that are produced by virtue of court-based fees, fines, assessments, and money bail.

Before detailing more about the Essays that follow, context is needed to show the links between the academy—focused on teaching about courts, procedure, bankruptcy, and criminal law enforcement—and the problems of courts and of the people using them. During the second half of the twentieth century, political and social movements brought into sharp relief inequalities and subordination based on race, class, gender, and many other status markers.<sup>2</sup> Activism and scholarship pushed courts and legislatures to recognize a host of rights and entitlements, ranging from protections of criminal defendants and prisoners to habitable housing, government benefits, and fair treatment in interactions with the state.<sup>3</sup>

Courts and legislatures responded in some instances with new doctrines and statutes addressing individuals interacting with criminal law enforcement systems, people seeking housing, recipients of federal benefits, and individuals harmed by various kinds of discrimination. While the United States Supreme Court declined to recognize poverty as a suspect classification,<sup>4</sup> it relied on an alchemy of due process and equal protection to recognize the need to provide resources for some low-income individuals when in conflict with the state.<sup>5</sup>

As a result, legal mandates require that, in some cases, states provide lawyers to indigent criminal defendants and, on rare occasions, to civil litigants; further, under certain circumstances, courts have to waive fees and subsidize transcripts and experts.<sup>6</sup> In addition, Congress created the Legal Services Corporation and authorized fee shifting to encourage the pursuit of civil rights

2. Many accounts illuminate these efforts. *See, e.g.*, MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973*, at 1–3 (1993); KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972*, at 9–11 (2016).

3. One example is Charles Reich's analysis in *The New Property*, 73 *YALE L.J.* 733 (1964), which framed a sequence of efforts to establish rights to security and well-being and helped to generate entitlement theory that created some buffers through procedural safeguards to the termination of government licenses and benefits. *See also* Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, in *CIVIL PROCEDURE STORIES* 473, 503–06 (Kevin M. Clermont ed., 2d ed. 2008).

4. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–18 (1973).

5. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 261–66 (1970).

6. Examples include *M.L.B. v. S.L.J.*, 519 U.S. 102, 106–07 (1996); *Little v. Streater*, 452 U.S. 1, 16–17 (1981); *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971); and *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963). For additional support, see Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One's Rights* (pt. 1), 1973 *DUKE L.J.* 1153, 1158–62; Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 *U. PA. L. REV.* 2119, 2132–37 (2000).

claims.<sup>7</sup> Both legislatures and courts shaped class actions and other forms of aggregation to permit cost sharing among litigants and to provide incentives for lawyers to represent groups.<sup>8</sup> Moreover, the U.S. Supreme Court concluded that, rather than incarcerating people who lacked resources to pay fines, a hearing was required to inquire about their ability to pay.<sup>9</sup>

During the last several decades, some of the efforts to facilitate access to courts have been cut back through changes in statutes and in judicial interpretation.<sup>10</sup> State and federal prosecutorial efforts have expanded, and the country has had economic downturns. Many jurisdictions have tried to pass the costs associated with courts, policing, and detention on to individuals. Instead of responding through raising or reallocating general revenues or by altering policies, states and the federal government have produced a welter of fees and payback obligations.

“Court debt” has become one shorthand for obligations incurred from many sources, including administrative fees, money bail, punitive fines, and victim restitution charges, as well as charges for transcripts, public defenders, detention on arrests, diversion programs, monitoring in lieu of bail, and incarceration.<sup>11</sup> In some jurisdictions, judges have become partners with law enforcement in what could sadly be termed a joint “fundraising” endeavor that treats individuals charged with offenses and infractions as sources of revenue instead of as needing to be helped and heard by law.<sup>12</sup> For example, localities

7. See, e.g., ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 19–22 (2007), <https://www.clasp.org/sites/default/files/public/resources-and-publications/files/0158.pdf> [<https://perma.cc/8JRV-GC8U>]; Civil Rights Attorney’s Fees Award Act of 1976, 42 U.S.C. § 1988(b) (2012); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 110–14 (2010).

8. David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 589–91 (2013); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 660–62 (2011); Judith Resnik, *From “Cases” to “Litigation”*, LAW & CONTEMP. PROBS., Summer 1991, at 5, 7–11.

9. See *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983); *Tate v. Short*, 401 U.S. 395, 397–99 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970).

10. Examples include revised interpretations of Rule 23 of the Federal Rules of Civil Procedure and of the Federal Arbitration Act, now read to permit employers and service providers to impose bans on collective action in courts or arbitration. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018); *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 353–55 (2011); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 123 YALE L.J. 3052, 3059–62 (2015); Symposium, *1966 and All That: Class Actions & Their Alternatives After Fifty Years*, 165 U. PA. L. REV. 1495 (2017); Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

11. See, e.g., Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1406 (2018).

12. The U.S. Department of Justice’s report on Ferguson, Missouri, and the subsequent litigation and settlement provide one of many examples. See, e.g., CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–12 (2015) [hereinafter FERGUSON REPORT], [https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/Z52X-KFTW>]. Courts have also

have assessed “registration fees” for a “free” public defender.<sup>13</sup> Some jurisdictions seek recoupment of the costs of both lawyers and trials after an individual is convicted.<sup>14</sup> And, as the United States Supreme Court detailed in *Nelson v. Colorado*,<sup>15</sup> not all jurisdictions return the assessments when individuals are acquitted.<sup>16</sup>

One focus of the burgeoning literature is on the costs imposed through criminal law enforcement. Another is on civil litigants facing a barrage of special fees, surcharges, and assessments.<sup>17</sup> For example, in the federal courts, the decision to waive filing fees is not based on a uniform standard calibrated to national guidelines on income but on the local practices of the district in which litigants allege they cannot afford to pay fees.<sup>18</sup> And, in some states, defendants obliged to reply to a lawsuit are also charged to file in court.<sup>19</sup> Another category of cases relates to immigrants. Detention in the “civil” immigration system reflects individuals’ resources. Immigrants held in detention during the pendency of their asylum or removal proceedings may not be able to afford bonds, if they are set at all.<sup>20</sup>

An aggregate picture of the different sources of “legal financial obligations” (“LFOs”) comes from an impressive array of empirical evidence that attends to the racial inequalities and that has documented how fees assessed, bail imposed, and debt associated with the legal system put individuals, families, and communities into cycles of poverty and punishment.<sup>21</sup> In some jurisdictions, driver’s licenses can be suspended because of unpaid court

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recognized incentives to impose charges. *See* *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019); *see also* *United States v. Basurto*, 117 F. Supp. 3d 1266, 1287 n.6 (D.N.M. 2015) (discussing the incentives that arise when court budgets depend on the fees that they can assess defendants).

13. *E.g.*, *State v. Brawley*, 195 A.3d 113, 117–18 (N.H. 2018).

14. *People v. Cameron*, 900 N.W.2d 658, 662 (Mich. Ct. App. 2017).

15. 137 S. Ct. 1249 (2017).

16. *Id.* at 1252–54.

17. STATUTORY COURT FEE TASK FORCE, ILLINOIS COURT ASSESSMENTS: FINDINGS AND RECOMMENDATIONS FOR ADDRESSING BARRIERS TO ACCESS TO JUSTICE AND ADDITIONAL ISSUES ASSOCIATED WITH FEES AND OTHER COURT COSTS IN CIVIL, CRIMINAL, AND TRAFFIC PROCEEDINGS (2016) [hereinafter ILLINOIS COURT ASSESSMENTS 2016], <http://www.ilga.gov/reports/special/Statutory%20Court%20Fee%20Task%20Force%20Report.pdf> [<https://perma.cc/RZ8T-AYR3>].

18. Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1497–99 (2019).

19. ILLINOIS COURT ASSESSMENTS 2016, *supra* note 17, at 10; SUPERIOR COURT OF CAL., STATEWIDE CIVIL FEE SCHEDULE (2014), <https://www.courts.ca.gov/documents/filingfees.pdf> [<https://perma.cc/SLJ4-L6CM>].

20. *Hernandez v. Sessions*, 872 F.3d 976, 981–82 (9th Cir. 2017). The decision enjoined the practice in the Central District of California of setting bonds for detained immigrants without an inquiry into ability to pay. *Id.*

21. *See* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 5–8, 11–12 (2016).

debt;<sup>22</sup> in others, voting rights can be cut off. The impact of such practices is felt most acutely by people with limited resources and by communities of color, either because they seek assistance from the legal system or because they are subjected to over-policing, prosecution, and punishment.<sup>23</sup> Moreover, rather than serving to improve public safety, court-imposed financial obligations result in locking people out of participating in programs aimed at rehabilitation. As a result, interactions with courts can lead to more social dislocation and crime.<sup>24</sup>

Vivid examples of the injuries have been encapsulated in the sad shorthand of “Ferguson,” which made national headlines in 2015.<sup>25</sup> Ferguson was not *sui generis*. Activists, researchers, members of the media, a host of local, state, and national bar associations, judicial task forces, translocal organizations of government actors, and litigators have now detailed how LFOs undermine fair and just decisionmaking.<sup>26</sup> In response, commitments to change egregious

22. *E.g.*, *Robinson v. Purkey*, Civ. No. 17-cv-1263, 2018 WL 5023330, at \*1–2 (M.D. Tenn. Oct. 16, 2018), *appeal pending*, No. 18-6121 (6th Cir. Oct. 24, 2018).

23. *See* Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 8–15 (2018); Fred O. Smith, Jr., *Abstention in the Age of Ferguson*, 131 HARV. L. REV. 2283, 2317–19 (2018).

24. *See, e.g.*, *Briggs v. Montgomery*, No. CV-18-02684-PHX-EJM, 2019 WL 2515950, at \*10 (D. Ariz. June 18, 2019).

25. *See* FERGUSON REPORT, *supra* note 12, at 1–2; *see also* Consent Decree at 1–2, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016).

26. *See, e.g.*, Mitali Nagrecha & Ranit Patel, *The Need for Proportionality in Criminal Justice Debt Practices*, in THE LIMAN CENTER REPORTS: 2018, [https://law.yale.edu/system/files/area/center/liman/document/2018\\_limn\\_report-5\\_final\\_combined\\_version.pdf](https://law.yale.edu/system/files/area/center/liman/document/2018_limn_report-5_final_combined_version.pdf) [<https://perma.cc/P2ZA-94H8>]; AM. CIVIL LIBERTIES UNION, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT (2018), [https://www.aclu.org/sites/default/files/field\\_document/022318-debtreport\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/022318-debtreport_0.pdf) [<https://perma.cc/X4R3-57M7>]; Lauren Sudeall & Ruth Richardson, *Unfamiliar Justice: Indigent Criminal Defendants’ Experiences with Civil Legal Needs*, 52 U.C. DAVIS L. REV. 2105 (2019); ALABAMA APPLESEED CTR. FOR LAW AND JUSTICE, UNIV. OF ALA. AT BIRMINGHAM TREATMENT ALTERNATIVES FOR SAFER CMTYS. (TASC), GREATER BIRMINGHAM MINISTRIES & LEGAL SERVS. ALA., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA’S RACIAL WEALTH DIVIDE (2018), <http://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf> [<https://perma.cc/HYT2-R88H>]; FINANCIAL JUSTICE PROJECT, CRIMINAL, OFFICE OF THE TREASURER & TAX COLLECTOR, CITY & CTY. OF S.F., CRIMINAL JUSTICE ADMINISTRATIVE FEES: HIGH PAIN FOR PEOPLE, LOW GAIN FOR GOVERNMENT (2018), [https://sftreasurer.org/sites/default/files/Hig%20Pain%20Low%20Gain%20FINAL\\_04-24-2019.pdf](https://sftreasurer.org/sites/default/files/Hig%20Pain%20Low%20Gain%20FINAL_04-24-2019.pdf) [<https://perma.cc/MAL3-AG99>]; FINES & FEES JUSTICE CTR., *Our Vision, Work, Campaigns, and Clearinghouse*, in ABILITY TO PAY (2019); *Data Portal*, MEASURES FOR JUSTICE, <https://measuresforjustice.org/> [<https://perma.cc/8MG9-7VH8>]; THERESA ZHEN & BRANDON GREENE, E. BAY CMTY. LAW CTR., PAY OR PREY: HOW THE ALAMEDA COUNTY CRIMINAL JUSTICE SYSTEM EXTRACTS WEALTH FROM MARGINALIZED COMMUNITIES (2018), [https://ebcl.org/wp-content/uploads/2018/10/EBCLC\\_CrimeJustice\\_WP\\_Fnl.pdf](https://ebcl.org/wp-content/uploads/2018/10/EBCLC_CrimeJustice_WP_Fnl.pdf) [<https://perma.cc/G75K-3UYW>]; N.Y. CITY BAR, NEW YORK SHOULD RE-EXAMINE MANDATORY COURT FEES IMPOSED ON INDIVIDUALS CONVICTED OF CRIMINAL OFFENSES AND VIOLATIONS (2019), <https://s3.amazonaws.com/documents.nycbar.org/files/2018410-MandatorySurchargesCriminalCharges.pdf> [<https://perma.cc/8BHV-FZ8K>]; *Driven by Debt: How Driver’s License Suspensions for Unpaid Fines And Fees Hurt Texas Families*, TEX. FAIR DEF. PROJECT & TEX. APPLESEED (2018), <http://stories.texasappleseed.org/driven-by-debt> [<https://perma.cc/8VLQ-AF5B>]; JAMES CRAVEN &

practices have grown.<sup>27</sup> New legislation and administrative actions have resulted in significant proposals for and, in some instances, enacted reforms that include limiting or ending the assessment of fees and abolishing money bail.<sup>28</sup>

The research and legislation have also helped to produce new case law. In 2019, the United States Supreme Court concluded in a case in which a person convicted under state law faced the forfeiture of his car that the Excessive Fines Clause of the Eighth Amendment applied to the states.<sup>29</sup> An amalgam of due process and equal protection analyses have prompted lower courts to hold unconstitutional the automatic suspension of driver's licenses,<sup>30</sup> the imposition of money bail for those unable to pay,<sup>31</sup> the fees levied by judges who benefit

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SAL NUZZO, JAMES MADISON INST., CHANGING COURSE: DRIVER'S LICENSE SUSPENSION IN FLORIDA (2018), [https://www.jamesmadison.org/wp-content/uploads/2018/11/Backgrounder\\_DriverLicense\\_9.12.18\\_v02-1.pdf](https://www.jamesmadison.org/wp-content/uploads/2018/11/Backgrounder_DriverLicense_9.12.18_v02-1.pdf) [<https://perma.cc/8RKA-9CRZ>].

27. See, e.g., ABA PRESIDENTIAL TASK FORCE ON BLDG. PUB. TR. IN THE AM. JUSTICE SYS., TEN GUIDELINES ON COURT FINES AND FEES (2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_ind\\_10\\_guidelines\\_court\\_fines.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf) [<https://perma.cc/6VLH-SPE3>]; NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, NAT'L CTR. FOR STATE COURTS, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES (2017), <https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx> [<https://perma.cc/RWB4-XHKD>].

28. See, e.g., Press Release, Supreme Court of Illinois, Supreme Court Announces Changes to Make Court Costs More Manageable (Feb. 13, 2019), <https://courts.illinois.gov/Media/PressRel/2019/021319.pdf> [<https://perma.cc/D8TC-SDLE>]; Application for Waiver of Court Fees & Application for Waiver of Court Assessments, ILL. SUP. CT. AMENDED R. 298, R. 404 (2019); Order, *In re: Civil Assessment Schedules*, M.R. 29741 (Ill. Feb. 13, 2019), [https://courts.illinois.gov/SupremeCourt/Announce/2019/021319\\_3.pdf](https://courts.illinois.gov/SupremeCourt/Announce/2019/021319_3.pdf) [<https://perma.cc/NXV8-T958>]; CITY & COUNTY OF SAN FRANCISCO, CAL., ORDINANCE NO. 131-18 amending the Administrative Code to abolish fees associated with probation costs, restitution, booking, the Sheriff's Work Alternative Program, the automated county warrant system, the Sheriff's Home Detention Program, and to abolish local penalties associated with alcohol testing and court-ordered penalties for misdemeanor and felony offenses (passed June 5, 2018, effective July 1, 2018); ALAMEDA COUNTY, CAL., ORDINANCE NO. 2018-67 amending the Administrative Code to eliminate probation fees; repealing resolution regarding public defender/conflict counsel fees for representation of indigent adults; and eliminating Sheriff's Work Alternative Program administrative and attendance fees (Dec. 4, 2018).

29. See *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019); Beth Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 10–13 (2018); Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin"*, 129 YALE L.J. F. 365, 367–69 (2020).

30. See, e.g., *Thomas v. Haslam*, 329 F. Supp. 3d 475, 494 (M.D. Tenn. 2018), *vacated as moot sub nom. Thomas v. Lee*, 776 F. App'x 910, 911 (6th Cir. 2019) (mem.); *Robinson v. Purkey*, Civ. No. 17-cv-1263, 2018 WL 5786236, at \*5 (M.D. Tenn. Oct. 16, 2018), *appeal pending*, No. 18-6121 (6th Cir. Oct. 24, 2018).

31. See e.g., *In re Humphrey*, 228 Cal. Rptr. 3d 513, 525–26 (Cal. Ct. App. 2018), *discretionary review granted* 417 P.3d 769 (Cal. 2018); *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1155 (S.D. Tex. 2017), *aff'd in part and rev'd in part*, 892 F.3d 147 (5th Cir. 2018); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1366 (N.D. Ala. 2018), *appeal filed*; *Buffin v. City & Cty. of S.F.*, 2019 WL 1017537, at \*16 (N.D. Cal. Mar. 4, 2019) (unpublished table decision); *People v. Dueñas*, 242 Cal. Rptr. 3d 268, 276–77 (Cal. Ct. App. 2019). *But see Walker v. Calhoun*, 901 F.3d 1245, 1259–60 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019).

from their assessment,<sup>32</sup> and the setting of bond amounts for immigrants without an inquiry into ability to pay.

That backdrop makes plain the contributions of the Essays that follow. Money bail is the focus of discussions by Paul Heaton, Brandon Buskey, and Gloria Gong. Heaton's research on the "downstream" consequences of being held in jail rather than released before trial has been central to litigation challenging money bail systems.<sup>33</sup> In his Essay, Heaton surveys how empirical studies have documented that pretrial detention puts a person at greater risks of conviction, loss of job, loss of child custody, and future prosecution.<sup>34</sup>

Further, as Buskey explains, "affordable bail" is often an oxymoron, as the amounts imposed do not reflect individuals' ability to pay.<sup>35</sup> Moreover, Buskey underscores how "risk assessment tools" are used to justify detention of individuals who, even on those metrics, are very unlikely to miss court dates or commit a violent offense.

Gong, based at the Kennedy School at Harvard University, details how the Government Performance Lab ("GPL") provides advice to localities about how to implement bail reforms effectively.<sup>36</sup> Over-supervision and the lack of provision of services can undercut individuals' capacity to succeed once released. The GPL aims to advise governments on how to invest wisely in new programs that are sustainable.

Jeffrey Selbin documents the assessments imposed by counties in California on parents of children held in detention.<sup>37</sup> His Policy Advocacy Clinic, based at UC Berkeley, exposed the perverse outcomes that the millions of dollars in these assessments have had, in terms of recidivism for young offenders and family disunity. Families of color have borne a disproportionate amount of the suffering. As Selbin's Essay describes, the clinic convinced the

32. See, e.g., *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 317 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019); *Cain v. City of New Orleans*, 281 F. Supp. 3d 624, 649 (E.D. La. 2017); *Cain v. City of New Orleans*, 327 F.R.D. 111, 121 (E.D. La. 2018), *appeal filed*.

33. See, e.g., *ODonnell*, 251 F. Supp. 3d at 1106. In July 2019, the Harris County Commissioners Court approved a settlement—to be reviewed by the district court—that institutes a new bail protocol, provides for a monitor of the new system, implements public defender services, and ultimately calls for eighty-five percent of all misdemeanor defendants to be released on personal bonds. Gabrielle Banks, *Harris County Approves Historic Bail Deal, Ends 'Irreparable Harm'*, HOUS. CHRON. (July 30, 2019, 8:19 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-approves-historic-bail-deal-ends-14253660.php> [<https://perma.cc/B4W6-NKGV>].

34. Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369 (2020).

35. Brandon Buskey, *Wrestling with Risk: The Questions Beyond Money Bail*, 98 N.C. L. REV. 379 (2020).

36. Gloria Gong, *The Next Step: Building, Funding, and Measuring Pretrial Services (Post-Bail Reforms)*, 98 N.C. L. REV. 389 (2020).

37. Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401 (2020).



state to preclude counties from imposing such charges. The clinic has also succeeded in having some counties waive the debt owed.

An Essay by Pamela Foohey highlights the intersection between court debt and the bankruptcy system.<sup>38</sup> Foohey describes the limited pathways that individuals can pursue in order to discharge court debt in bankruptcy. Drawing upon large empirical studies, she explains how disparities in access to meaningful discharge can entrench racially disparate aspects of the court-debt problem.

Cortney Lollar's contribution shows how debt subordinates and marginalizes low-wage earners, who are disproportionately members of communities of color.<sup>39</sup> Further, she traces the evolution of debtors' prisons and explains how, as debt obligations have mounted, constitutional protections against imprisonment for nonpayment have waned.

Many of us who teach about courts provide an idealized version of what the constitutional and procedural rules require. Given the impact that courts can have in shaping people's lives, the purpose of bringing together law professors from different fields at the American Association of Law Schools' annual meeting and of this set of Essays is to bring into our classes and resources the structure of courts and the experiences of the users of courts. Whether by reading case law, exercises such as drafting in forma pauperis applications, or through articles such as those in this mini-symposium, teachers of law can help students and the public understand both the impressive research and reforms of the last few years and the need for more. Given the pervasive use of fees and fines to fund court processes, the questions that ought to preoccupy us all are whether and how constitutional democracies can meet their obligations to make justice accessible.<sup>40</sup> Our hope is that, through symposia such as this one, the costs imposed by courts will become part of mainstream discussions in law schools.<sup>41</sup> The invitation to readers is to use this commentary as an entry point into thinking, teaching, and writing about how to make the legal system live up to the constitutional aspirations for fairness, justice, and equality.

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38. Pamela Foohey, *Fines, Fees, and Filing Bankruptcy*, 98 N.C. L. REV. 419 (2020).

39. Cortney E. Lollar, *Eliminating the Criminal Debt Exception for Debtors' Prisons*, 98 N.C. L. REV. 427 (2020).

40. Judith Resnik, *Courts and Economic and Social Rights/Courts As Economic and Social Rights*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 259 (Katharine G. Young ed., 2019).

41. See generally Jonathan Lippman, Matthew Diller & David Udell, *Law Schools Must Focus on Access to Justice*, 39 NAT'L. L.J. 13 (2016); Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531 (2013).