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## Symposium Introduction

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## SYMPOSIUM INTRODUCTION

*Ellen Yaroshefsky\**

On April 5–6, 2017, the Monroe H. Freedman Institute for the Study of Legal Ethics hosted its inaugural Symposium, Judicial Responsibility for Justice in Criminal Courts.<sup>1</sup> This unique two-day Symposium brought together the country's thought leaders from the bench, the academy, prosecutors' offices, and the defense bar to engage in interactive discussion to examine the role of judges in criminal courts. The Conference goal was to propose concrete suggestions for changes in judicial role, rules, and culture to improve criminal courts.

For years, numerous organizations and individuals have focused upon aspects of the dysfunction of the criminal justice system, primarily examining overburdened defense lawyers and unmanageable caseloads, insufficient resources for prosecutors' offices and their relationship with the police, as well as ineffective assistance of counsel and prosecutorial conduct. As a consequence of attention to mass incarceration, there is significant concern about the causes and remedies of this dysfunction, some of which is directed toward misdemeanor practice.

But little attention has been focused upon judges and how, despite underfunded state systems, judges could do better in delivering justice to the many individuals who first encounter the judicial system in the country's criminal courts.

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\* Howard Lichtenstein Distinguished Professor of Legal Ethics and Executive Director, Monroe H. Freedman Institute for the Study of Legal Ethics, Maurice A. Deane School of Law at Hofstra University. This Conference would not have been possible without significant financial support from the Freedman Institute, the National Association of Criminal Defense Lawyers, the Foundation for Criminal Justice, New York's Office of Court Administration, as well as the Abraham Gross Conference and Lecture Fund at Hofstra Law School. Nor could it have happened without the dedication and able assistance of three Hofstra employees, Judith Black, Director of Hofstra's events, Andrew Berman, Communications Director, Laura Lanzillotta Office of the Dean, and five Freedman Student Fellows.

1. The Legal Ethics Institute at Hofstra Law School was named for noted legal ethicist, Monroe H. Freedman, in 2016. Hofstra Law School has long sponsored symposia, but this was the inaugural Symposium following the naming of the Institute.

The Conference aspired to begin a national conversation about these issues and to produce a report<sup>2</sup> with specific recommendations for practices to improve the quality of justice delivered by judges in overburdened and underfunded state and local criminal justice systems.

The planners hope to spark interest in similar conferences in various locales around the country. This symposium issue, with provocative Essays and Articles by noted legal academics, aspires to contribute to that national conversation.

The Conference was cosponsored by the National Association of Criminal Defense Lawyers, the Foundation for Criminal Justice, the Association of Prosecuting Attorneys, the New York Office of Court Administration, and the Center for Court Innovation. The planning committee included members of each of these organizations as well as judges from the National Center for State Courts.<sup>3</sup>

Norman Reimer, Executive Director of the National Association of Criminal Defense Lawyers, and a significant partner in planning this Conference, cogently describes the Conference in his introduction.<sup>4</sup> Day one of the Conference was open to the public. Day two consisted of invitation-only working groups, described below, that grappled with difficult questions and sought to develop practical proposals for implementation.

## I. DAY ONE

The Conference keynote was delivered by retired Judge Lisa Foster, the director of the Obama Administration's Office of Justice Initiatives. Her sharply-focused presentation of the challenges facing the criminal justice system set the stage for an engaging day.<sup>5</sup>

Describing the pernicious effect of bail, fines and fees, and lack of access to counsel, Judge Foster called upon judges to think critically about their role. She noted the reforms that have been implemented over the last few years, but emphasized that policy reforms will be meaningless unless they are embraced by judges. She invited judicial Conference participants to share their best practices, learn from each other, and to become part of solutions to systemic flaws.

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2. ANDREA M. MARSH, JUDICIAL RESPONSIBILITY FOR JUSTICE IN CRIMINAL COURTS (forthcoming) (on file with author) [hereinafter CONFERENCE REPORT].

3. The planning committee included representatives of each of these organizations as well as Retired Judge Lisa Foster who was then the Director of the Obama Administration's Office of Justice Initiatives.

4. Norman Reimer, *Symposium Introduction*, 46 HOFSTRA L. REV. 19 (2017).

5. Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 21 (2017).

We can't just be judges uncritically accepting the system we work in. We need to change the culture of our courts, to shift the paradigm of the judge from an umpire dispassionately calling balls and strikes to what I call neutral engagement. A judge who is impartial, but passionate about doing justice . . . .<sup>6</sup>

Judge Foster's keynote was followed by five interactive panel discussions led by academics.<sup>7</sup> The first panel, Procedural Justice, moderated by Professor Abbe Smith, began by acknowledging that throughout the country, the accused often appear in criminal courts with no lawyer to assist them when their liberty is at stake or when a guilty adjudication may be entered. Oftentimes, the accused is not treated with respect. The panel explored traditional concepts of procedural justice and various practices that deprive individuals of fundamental due process: failure to provide attorneys, uninformed waiver of counsel, group waivers, failure to account for language barriers, and imposition of fees to obtain counsel.<sup>8</sup>

The panel participants suggested:

- Judges should get outside of their bubbles;
- Judges should use scheduling to create space for justice;
- Judges should take responsibility for treating accused individuals with respect; and
- Judges should advocate for justice outside courtrooms.<sup>9</sup>

The second panel on bail, Judicial Control over Bail, led by Professor Cynthia Jones was introduced as follows:

Avoiding unnecessary pretrial detention should be of paramount importance to every court system. Bail systems that do not consider a defendant's ability to afford bail are unconstitutional; detaining defendants pretrial is expensive; and pretrial detention often results in lost employment and housing, disruption in education, and damage to family relationships. Defendants detained pretrial plead guilty more often, are convicted more often, and receive harsher sentences.

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6. *Id.*

7. Judicial Responsibility for Justice in Criminal Courts Conference Program, Monroe H. Freedman Inst. for the Study of Legal Ethics (Apr. 5–6, 2017), <http://law.hofstra.edu/facultyandresearch/centers/isle/conferences/judicialconference/program/Zindex.html> [hereinafter Conference Program].

8. *Id.* The panel was moderated by Abbe Smith, Director, Criminal Defense and Prisoner Advocacy Clinic, and Professor of Law, Georgetown University Law Center; and included panelists David LaBahn, President and CEO, Association of Prosecuting Attorneys; Hon. Steve Leben, Judge, Court of Appeals, Kansas; Hon. Betty Moore, Judge, Shelby County General Sessions Court, Tennessee; and Norman Reimer, Executive Director, National Association of Criminal Defense Lawyers. *Id.*

9. CONFERENCE REPORT, *supra* note 2 (manuscript at 15-16).

Courts must move away from reliance on money bail and instead make individualized determinations based on the characteristics of the individual defendant and the use of validated risk assessments. This panel discussed bail reforms to reduce the number of pretrial detainees.<sup>10</sup>

Panelists described significant reforms that have reduced unnecessary pretrial detention in some states and localities in recent years, but also discussed how too many jurisdictions across the country maintain systems that result in the extended pretrial detention of low-risk defendants.<sup>11</sup>

The panel's suggestions were:

- Judges should educate themselves, their peers, and the public about pretrial detention and bail reform;
- Judges should accept risk in pretrial decision-making; and
- Judges should be cautious about replacing monetary release conditions with other types of conditions.<sup>12</sup>

The third panel, Control over the Case and Counsel, led by the author, explored the question of whether it ever is appropriate for a judge to accept a guilty plea at initial appearance.<sup>13</sup> The panel was introduced as follows:

An overwhelming percentage of misdemeanor cases are disposed of at an individual's initial appearance in court. This result often is achieved without any investigation by defense counsel, without any discovery provided by the prosecution, without the defense filing necessary legal challenges, and without judicial intervention. For cases that continue beyond arraignment, there is often little discovery provided and little defense investigation, and the prosecution may impose time conditions upon plea offers.<sup>14</sup>

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10. Conference Program, *supra* note 7.

11. *Id.* The panel was moderated by Cynthia Jones, Professor of Law, American University Washington College of Law, and included panelists Hon. Ronald B. Adrine, Administrative and Presiding Judge, Cleveland Municipal Court, Ohio; John T. Chisholm, Milwaukee County District Attorney, Wisconsin; Zeke Edwards, Director, Criminal Law Reform Project, American Civil Liberties Union; and Colette Tvedt, Director, Public Defense Training and Reform, National Association of Criminal Defense Lawyers. *Id.*

12. CONFERENCE REPORT, *supra* note 2 (manuscript at 21).

13. Conference Program, *supra* note 7.

14. *Id.* The panel was moderated by Ellen Yaroshefsky, and included panelists Michael N. Herring, Commonwealth's Attorney, City of Richmond, Virginia; Vicki Hill, City Prosecutor, City of Phoenix, Arizona; Hon. David M. Rubin, Judge, Superior Court of California, County of San Diego; and Steve Zeidman, Professor of Law and Director, Criminal Defense Clinic, The City University of New York School of Law. *Id.*

Panelists discussed variations in local practices, noting that their comfort with guilty pleas at initial appearance was linked to local practices that provided early discovery, and to particular cases. The panelists noted differences in types of cases appropriate for early pleas, ruling out guilty pleas to drug charges without laboratory reports.

Panelists concluded:

- Judges should exercise their authority over bail and case scheduling in a manner that creates space for individuals to make informed decisions about plea offers;
- Judges should reflect critically on accepted practices in their courtrooms; and
- Judges should advocate for a multi-branch response to the conditions that create incentives for pleas at initial appearance.<sup>15</sup>

The fourth panel, Case Disposition and Its Consequences, undertook the complicated issue of collateral consequences and fees, fines, and forfeiture.<sup>16</sup> Led by Professor Peter Joy, the panel began with the acknowledgement

that misdemeanor prosecutions are often accompanied by a proliferation of collateral consequences that affect jobs, licenses, housing, public benefits, voting rights, immigration status, the right to bear arms, and a host of other “silent sentences.” Many misdemeanor sentences are also subject to exorbitant fees, fines, and costs that are assessed without any consideration of defendants’ indigency status and their ability to pay — often leading to escalating debt, incarceration for non-payment, loss of jobs, and a cycle of poverty that is impossible to escape.<sup>17</sup>

The panel examined the impact of collateral consequences and fees, fines, and costs in misdemeanor courts and systemic solutions.

Its conclusions were:

- Judges should educate themselves and defendants about collateral consequences;

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15. CONFERENCE REPORT, *supra* note 2 (manuscript at 26-27).

16. Conference Program, *supra* note 7.

17. *Id.* The panel was moderated by Peter A. Joy, Henry Hitchcock Professor of Law and Director, Criminal Justice Clinic, Washington University School of Law, St. Louis, and included panelists Christopher Ervin, Community Organizer, Baltimore, Maryland; Carlos J. Martinez, Miami-Dade Public Defender, Florida; Jenny Roberts, Professor of Law, Associate Dean for Scholarship and Co-Director, Criminal Justice Clinic, American University Washington College of Law; and Hon. Edward J. Spillane, Presiding Judge, College Station Municipal Court, Texas. *Id.*

- Judges should advocate for broad and effective laws that provide for the expungement and sealing of criminal records; and
- Judges should educate legislators about the human toll of collateral consequences and advocate to eliminate collateral consequences that do not promote public safety.<sup>18</sup>

The final panel, Changing Court Culture, led by Amy Bach, examined creative and successful approaches to the difficult task of implementing changes in court practices in a range of jurisdictions.<sup>19</sup>

The panel addressed the questions, “What should judges do to implement various suggestions made by previous panels to improve systems of justice? What are the impediments to changing court culture, and what have been successful methods to change those cultures?”<sup>20</sup>

The lunchtime keynote speaker was the Honorable Kevin S. Burke, who delivered a riveting lecture entitled *Implicit Bias and the Courts*.<sup>21</sup> Judge Burke offered suggestions for improved practices including the need for judges to take responsibility to gather and examine data on fairness. Courts collect lots of data, but often do not focus their data collection efforts on the right things. They collect data that is easy to collect, such as number of cases filed, and sometimes they collect data they do not use for anything. Judge Burke suggested judges should continue to use data to examine their own performance, but they should shift their focus to data related to fairness.

## II. DAY TWO

Ninety-four judges, prosecutors, defense lawyers, and academics were participants in the conference workshops on day two of the Conference.

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18. CONFERENCE REPORT, *supra* note 2 (manuscript at 31).

19. Conference Program, *supra* note 7.

20. *Id.* The panel was moderated by Amy Bach, Executive Director and President, Measures for Justice, and included panelists Hon. Lawrence K. Marks, Chief Administrative Judge of the Courts of New York State; Hon. Andra D. Sparks, Presiding Judge, Birmingham Municipal Court, Alabama; Hon. Nan G. Waller, Presiding Judge, Multnomah County Circuit Court, Oregon; Hon. Gayle Williams-Byers, Judge, South Euclid Municipal Court, Cleveland, Ohio; and Hon. Steve Leifman, Judge, Eleventh Judicial Circuit Court, Miami, Florida. *Id.*

21. *Id.* Judge Burke is nationally known for his work on implicit bias, procedural fairness, and the courts. *See, e.g.*, Kevin Burke & Steve Leben, *Making Better Judges*, AM. JUDGES ASSOC. (Sept. 26, 2007), <http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf>.

In advance of the Conference, participants were assigned to groups and provided with an overview to guide the discussion, a reading list, and set of questions for discussion.<sup>22</sup>

The ten groups engaged in robust discussion described in the Conference Report.<sup>23</sup> The conclusions and the recommendations of the Report are summarized in the sections below.

*A. Courts Without Counsel and/or Judges Without Law Degrees*

1. Individuals accused of criminal offenses should be represented by a lawyer at every court proceeding.<sup>24</sup>

The administration of justice will be improved if individuals have a defense lawyer to present relevant information to the court, and to tell their side of the story without the risk of making unrepresented, incriminating statements. People must be represented by counsel if they could be jailed, including for failure to pay fines and fees imposed in a fine-only case.

2. The state should be represented by a prosecutor at every court proceeding.<sup>25</sup>

Both parties in a case should be represented by counsel. Judges should consider refusing to proceed with a case if the prosecutor does not appear. Courts can use technology to facilitate appearances by counsel.

3. Judges should use their convening authority to reform practices that produce injustices in misdemeanor courts.<sup>26</sup>

Judges will need the support of other criminal justice stakeholders, as well as financial resources, to provide counsel and other fundamental protections in high-volume misdemeanor courts in which due process shortcuts have become common. Judges have the moral authority and political power to begin conversations about the costs generated by these shortcuts, which range from unnecessary jail expenditures to reduced public confidence in the courts. Judges also can work to build stakeholder consensus in support of decriminalization of low-level

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22. These materials are on file with the Monroe H. Freedman Institute.

23. CONFERENCE REPORT, *supra* note 2 (manuscript at 38).

24. *Id.*

25. *Id.*

26. *Id.*

offenses and other approaches that, by reducing case volume, can free up resources to improve the delivery of justice in the cases that remain.

*B. Procedural Justice and Judicial Role in Initial Appearances*

1. Judges should explain what will happen during the initial appearance so that procedures and roles are transparent to accused individuals and their families.<sup>27</sup>

Although judges cannot control the facts of the cases before them, or many of the decisions made by prosecutors and defense counsel, they can directly improve procedural justice in their courts. It should be obvious to accused individuals and their families that the judge is in charge of the courtroom. Judges should not defer to prosecutors to run their dockets or provide legal information to accused individuals. Judges must train their staff to provide accurate information and to treat accused individuals and their families with dignity and respect.

2. Judges should increase accused individuals' sense of "voice" at the initial appearance.<sup>28</sup>

Judges should explain the potential consequences of speaking but refrain from telling the accused not to speak. Judges should consider creating room for the accused's voice after a guilty plea and sentencing, when the risks of self-incrimination are lower. Judges could let individuals tell their side of the story at that point in the case. They also could ask questions, like "How did the police treat you?" on matters that directly target potential points of distrust between the community and the justice system.

3. Judges should safeguard their responsibility to meaningfully review guilty pleas offered at initial appearance.<sup>29</sup>

Although judges should not interfere in the relationship between defense attorneys and their clients, judges should inquire about or postpone a plea if the facts known to the court raise questions about the factual basis for the plea or if the accused does not seem to understand the terms of a plea.

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27. *Id.* (manuscript at 40-41).

28. *Id.*

29. *Id.*

### C. *Implicit Bias*

1. Training on implicit bias should be a mandatory component of judicial ethics training.<sup>30</sup>

Most states require judges to receive continuing education about topics related to judicial ethics. The judicial ethics rules prohibit discrimination, so training on implicit bias should be a mandatory component of judicial ethics education programs.

2. Judges should consider obtaining data that will allow them to check for implicit bias in their decision-making.<sup>31</sup>

Data that shows patterns in decision-making can help judges perceive the effects of bias when it may be difficult to do so in individual cases. Seeing these patterns provides judges information they need to effectively counter their own biases.

3. Judges should consider adopting procedural justice practices as an anti-bias strategy.<sup>32</sup>

Practices that afford the accused individual dignity can also make it easier for judges to see the accused as individuals in ways that counter stereotypical associations. It can be difficult to adopt these practices in high-volume misdemeanor courts, but judges should consider docketing practices and other steps they can take to allow more time to individualize people accused of crimes.

4. Judges should be trained and prepared to confront bias in a manner consistent with the judicial role.<sup>33</sup>

Implicit bias training for judges should include training on what judges should do to confront implicit bias when they see its effects in their courts. Judges should consider how, consistent with their judicial role, they can respond to bias so they are prepared to do so.

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30. *Id.* (manuscript at 42-43).

31. *Id.*

32. *Id.*

33. *Id.*

### D. Bail

1. Judges should use unsecured bonds more frequently.<sup>34</sup>

Judges can use unsecured bonds in low-level cases regardless of whether they continue to use monetary bonds in other cases. Judges who do not use monetary bonds can use other tools, such as telephone reminders, to reduce the risk of non-appearance. Judges can collect data to monitor the effectiveness of various release conditions.

2. Judges that continue to use monetary bail must consider an individual's ability to pay when setting bail.<sup>35</sup>

Judges can evaluate defendants' ability to pay at the initial bail hearing, and again when an individual with a low bail amount remains in jail for more than a couple of days.

3. Defendants must be represented by counsel at initial bail hearings.<sup>36</sup>

Defense lawyers provide information that judges need to make informed pretrial release decisions.

### E. Judicial Intervention in Charging Decisions

1. Judges should use their convening authority to initiate and influence conversations about local charging policies.<sup>37</sup>

These conversations allow judges to affect front-end charging decisions at the community level without intervening in individual cases.

2. Judges should consider how their role in plea dispositions allows them to influence charging practices.<sup>38</sup>

Judges' authority over plea dispositions allows them to review the fairness of charging decisions in individual cases. Judges can use that authority to question the appropriateness of individual charges, as well as to influence charging practices.

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34. *Id.* (manuscript at 45).

35. *Id.*

36. *Id.*

37. *Id.* (manuscript at 47).

38. *Id.*

3. More states should consider adopting rules that afford judges a defined role in reviewing charging decisions prior to plea disposition.<sup>39</sup>

Some states have rules allowing judges to divert cases pre-plea or to dismiss cases when discovery does not support the charges, and more states should adopt similar rules. Judges will eventually review charging decisions at plea disposition; these rules promote efficiency and fairness by allowing them to do so earlier in the judicial process. At the same time, these policies maintain prosecutors' traditional discretion over initial charging decisions.

*F. Judicial Involvement in Plea Bargaining and Discovery*

1. Judges should conduct individual colloquies to determine that accused individuals understand the consequences of pleading guilty before accepting the plea.<sup>40</sup>

Videos and other group presentations do not adequately replace individualized inquiries.

2. Judges should question plea circumstances and terms when they have concerns.<sup>41</sup>

Although judges should not interfere with the attorney-client relationship, judges do have an obligation to examine the voluntariness and fairness of guilty pleas before accepting them. It is appropriate for judges to ask questions if the facts available to them suggest that a plea may be rushed or unduly harsh, or the accused individual does not understand the plea's consequences.

3. Judges should establish on the record before accepting a guilty plea that the prosecutor has provided discovery to the defense.<sup>42</sup>

Conditional pleas pending receipt of complete discovery may be acceptable in certain situations, such as cases involving delays for drug testing.

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39. *Id.*

40. *Id.* (manuscript at 49).

41. *Id.*

42. *Id.*

4. Judges should issue a standing discovery order or court rule that requires the prosecution to turn over all exculpatory information before the defendant enters a plea.<sup>43</sup>

An order or rule can minimize the need to litigate discovery issues in individual cases. Discovery rules should cover all exculpatory information and not be limited to information that is material or admissible.

### G. Control over Conduct of Counsel

1. Judges should set high standards for prosecutor and attorney performance in their courtrooms, and use opportunities such as plea colloquies to check whether those standards are being met.<sup>44</sup>

Judges set the ethical tone in their courtrooms, and can communicate that pleas entered without counsel, pleas entered without discovery, using bail to create pressure to plead, etc., will not be accepted as the normal course of business. Judges should ask probing questions to communicate those expectations to the accused, and to hold counsel accountable to those expectations.

2. Judges should provide performance feedback to prosecutors and defense lawyers who appear in their courtrooms.<sup>45</sup>

This feedback can be provided through justice partner meetings that include both sides and address common practices, or in individualized reviews provided to every attorney. Jurisdictions should consider implementing regular attorney reviews that provide feedback from other lawyers, court personnel, and members of the public, as well as from judges.

3. Judges should exercise their control over counsel in ways that afford equal independence to the prosecution and the defense.<sup>46</sup>

Although there are ways in which it is appropriate for judges to influence the performance of attorneys in their courts, judges should not exercise more influence over the defense than over the prosecution. Judges who work in systems that afford them more control over defense

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43. *Id.*

44. *Id.* (manuscript at 51-52).

45. *Id.*

46. *Id.*

counsel should advocate for structural reforms that place the prosecution and the defense on equal footing.

*H. Trial Issues (Bench and Jury Trials)*

1. Judges should allow lawyers to try their cases with minimal intervention.<sup>47</sup>

During trials, judges must not intervene in any manner that risks compromising their impartiality, even if the trial involves inexperienced lawyers who would benefit from judicial feedback.

2. Judges should use their rulings as opportunities to train lawyers.<sup>48</sup>

Judges should make at least brief findings of fact at bench trials.

3. Jurisdictions should adopt mechanisms to provide education and feedback to criminal trial judges.<sup>49</sup>

Judges should be provided more training on evidence, particularly if they are new to the bench and do not have extensive trial experience. Jurisdictions should create judicial review systems that provide feedback from other judges or lawyers.

4. Judges should protect the integrity of criminal trials by adopting rules that require the early delivery and review of discovery.<sup>50</sup>

Delays in fact development and discovery clog trial dockets and undermine the trial process. Earlier and more complete fact development and discovery would improve access to and the quality of trials in misdemeanor courts.

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47. *Id.* (manuscript at 53-54).

48. *Id.*

49. *Id.*

50. *Id.*

I. *Sentencing (Alternatives to Jail; Collateral Consequences and Expungement; Fees, Fines, and Forfeiture)*

1. Judges should prepare fines and fees checklists for their jurisdictions and provide the checklist to people in their court.<sup>51</sup>

These checklists will ensure that individuals understand the total financial obligation resulting from fines and fees imposed in their cases.

2. Judges should make an individualized determination of a person's ability to pay, and only assess fines and fees the person can afford to pay.<sup>52</sup>

Judges should advocate for changes in the law in jurisdictions that currently do not allow judges to modify or waive fines and fees based on ability to pay at the time of sentencing.

3. Judges should prepare collateral consequences checklists for their jurisdictions and provide the checklists to defendants at an early stage of the proceedings.<sup>53</sup>

While it may not be practical for the checklists to cover every potential collateral consequence, it can cover every major category of consequences. Judges may supplement the checklists with verbal advisals in cases involving unrepresented defendants.

4. Judges should call for the creation of task forces or commissions charged with performing a comprehensive review of all collateral consequences in a jurisdiction, focused on whether each consequence advances public safety and whether it has a positive or negative fiscal impact.<sup>54</sup>

Jurisdictions should eliminate or mitigate collateral consequences that do not serve public safety or that have a negative fiscal impact.

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51. *Id.* (manuscript at 55-56).

52. *Id.*

53. *Id.*

54. *Id.*

### J. *Changing Court Culture*

1. Judges should promote a courtroom culture of dignity and respect.<sup>55</sup>

Judges directly influence public perception of the courts through their behavior, and also set expectations for the behavior of other justice system stakeholders.

2. Judges should convene and collaborate with other justice system partners to improve court culture.<sup>56</sup>

Collaborations can produce changes to practices that do not require institutional change, but still operate to provide a foundation for cooperative institutional reform.

3. Judges should work with other justice system partners to develop a set of benchmarks for court culture.<sup>57</sup>

These benchmarks should reflect the values we want courts to promote, and be used to set goals for court improvements and as tools for court assessments.

### III. SYMPOSIUM ARTICLES & ESSAYS

The Articles and Essays in this Symposium contribute breadth and depth to the issues explored at the Conference. These are comprehensive, thoughtful, and creative approaches with practical suggestions to encourage judges to assume responsibility and exercise their discretion to improve the quality of justice in criminal courts throughout the country. Many of these pieces offer ideas that are applicable to felony as well as misdemeanor courts.

Robert Boruchowitz, in *Judges Need to Exercise Their Responsibility to Require that Eligible Defendants Have Lawyers*,<sup>58</sup> notes that “providing lawyers to poor people accused of crime can make a dent in the racial disparity in the courts.”<sup>59</sup> He discusses the constitutional and statutory obligations, the American Bar Association (“ABA”) Standards, and then details the numerous failings to abide by these laws and norms including judges who not properly advise the

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55. *Id.* (manuscript at 57-58).

56. *Id.*

57. *Id.*

58. Robert Boruchowitz, *Judges Need to Exercise Their Responsibility to Require that Eligible Defendants Have Lawyers*, 46 HOFSTRA L. REV. 35 (2017).

59. *Id.* at 39.

accused of the right to counsel and inadequate waivers of the right to counsel. Boruchowitz details specific proposals to ensure that judges accept responsibility to ensure access to counsel.

Cynthia Jones, in *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, tackles the longstanding, contentious issue of *Brady*<sup>60</sup> and discovery compliance; she provides a model for judicial oversight and regulation of prosecutorial disclosure obligations.<sup>61</sup> Her comprehensive Article discusses the obstacles to implementation of *Brady* obligations and other discovery requirements, the need for systemic judicial reform including the notion that judges must assume greater responsibility for discovery compliance. Her Article suggests the adoption of a “*Brady* checklist” and *Brady* compliance hearings.

Darryl Brown’s *The Judicial Role in Criminal Charging and Plea Bargaining* tackles the prevailing notion of “judicial impotence in plea bargaining” and argues that it is construed too broadly.<sup>62</sup> He argues that judges in state courts have greater discretion and responsibility to oversee criminal charging and disposition in plea negotiations than is commonly practiced and assumed to be true. He explores the law across states that authorizes, defines and regulates judicial authority in filing of criminal charges and pleading.

Peter Joy’s Article, *A Judge’s Duty to Do Justice: Ensuring the Accused’s Right to the Effective Assistance of Counsel*, tackles the thorny issue of the judge’s responsibility at trial to ensure that the accused has effective counsel.<sup>63</sup> Traditionally, judges are reluctant to interfere with the defense lawyer’s actions and inactions at trial stage. Joy analyzes resistance to recognizing ineffective assistance of counsel at the trial level and in post-conviction proceedings. He then examines the crisis in public defense, case overloads and how funding practices for public defense create disincentives to effective assistance of counsel as compared to effective assistance for clients with privately retained counsel. Joy carefully delineates the situations that trigger a trial judge’s duty to conduct an effective assistance of counsel hearing, and describes both the nature of the hearing and the standard the judge should apply in evaluating counsel’s effectiveness.

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60. *Brady v. Maryland*, 373 U.S. 83 (1963).

61. Cynthia Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 HOFSTRA L. REV. 87 (2017).

62. Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63 (2017).

63. Peter Joy, *A Judge’s Duty to Do Justice: Ensuring the Accused’s Right to the Effective Assistance of Counsel*, 46 HOFSTRA L. REV. 139 (2017).

Abbe Smith's *Judges as Bullies* is an engaging Essay recounting her stories of "brazenly bad behavior" by judges whose bad behavior "runs the gamut."<sup>64</sup> She acknowledges the difficult task of judging and the numerous excellent judges, but then explores the categories of different types of bullying behavior including that by "ignorant and incompetent bullies," "thin-skinned and ill-tempered bullies," "power-hungry bullies," and "biased bullies" and her experiences as a defender in zealous representation of clients before such judges.<sup>65</sup> Smith notes that the bench and the bar must take responsibility to sanction the conduct of such judges and ends with the difficult question: "What's a Defender to Do?"<sup>66</sup>

Jenny Roberts, in *Informed Misdemeanor Sentencing*, expands upon her groundbreaking work in scholarly attention to the impact of misdemeanors in criminal justice.<sup>67</sup> Noting that "there is no such thing as a low-stakes misdemeanor,"<sup>68</sup> Roberts discusses the collateral consequences of misdemeanor sentences and then explores the theory and practice of misdemeanor, as compared with felony sentencing. She notes significant differences in theory of punishment as well as the numerous "structural and systemic barriers to informed sentencing in criminal courts" beginning with the lack of counsel in such cases and the pressure upon judges to move cases quickly.<sup>69</sup> She offers perspective on what should constitute an informed misdemeanor sentence.

Steve Zeidman's Article, *Eradicating Assembly-Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards*, directs his attention to the prevailing practice of judge's acceptance of guilty pleas at arraignment and the role of defense counsel in this "visible manifestation of assembly line justice."<sup>70</sup> He focuses upon the ABA Criminal Justice Standards for the Defense Function and argues that these standards send "mixed messages" about the provision of effective assistance of counsel because the standards suggest that guilty pleas at arraignment are permissible even when defense counsel do not have discovery, have not performed any investigation, and have had minimal discussion with their clients.<sup>71</sup>

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64. Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253, 255, 257 (2017).

65. *Id.* at 257, 259.

66. *Id.* at 271.

67. Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171 (2017).

68. *Id.* at 171.

69. *Id.* at 181.

70. Steven Zeidman, *Eradicating Assembly-Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards*, 46 HOFSTRA L. REV. 293 (2017).

71. *Id.* at 295.

Jessica Roth, in *The Culture of Misdemeanor Courts*, addresses the often-elusive and difficult task of acknowledging and identifying judicial “culture” and the ways in which culture can promote or undermine best practices in misdemeanor courts.<sup>72</sup> She examines organizational theory, discusses how culture is formed in organizations, and the challenges to modifying that existing culture. She identifies certain factors that appear to be key to success. Roth then applies this knowledge to misdemeanor courts, delineating the ways in which these courts are particularly challenging places to pursue cultural change. Her Article then draws upon the experiences of selected misdemeanor courts where innovative judges, who were featured speakers at the Conference, are championing significant changes to the conventional way of doing things. These courts, highlighted as “stories of innovation,” provide guidance for other judges and court administrators.<sup>73</sup>

Finally, Keith Swisher recommends implementing 360-degree surveys as a method of evaluating defenders and prosecutors in his Essay, *Surveying Justice*.<sup>74</sup> Noting that “many businesses and other organizations” already have similar feedback systems in place, he recommends that courts adopt a similar methodology to track performance with the goal of ensuring attorney conduct that comports with ethical standards.<sup>75</sup> He argues that the information gathered could be used to make better appointment and removal decisions, and would continuously improve over time.<sup>76</sup>

Individually and as a group, these scholars offer provocative, even groundbreaking proposals to significantly improve the delivery of justice in our criminal courts.

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72. Jessica Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215 (2017).

73. *Id.* at 237.

74. Keith Swisher, *Surveying Justice*, 46 HOFSTRA L. REV. 275 (2017).

75. *Id.* at 278.

76. *Id.* at 283.