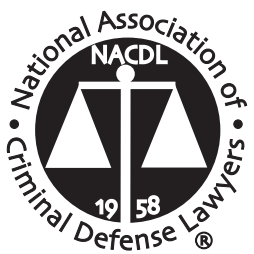


# JUDICIAL RESPONSIBILITY FOR JUSTICE IN CRIMINAL COURTS

CONFERENCE REPORT BY ANDREA M. MARSH  
LECTURER, THE UNIVERSITY OF TEXAS SCHOOL OF LAW



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# ABOUT THE CONVENING ORGANIZATIONS



*at Hofstra University's Maurice A. Deane School of Law*

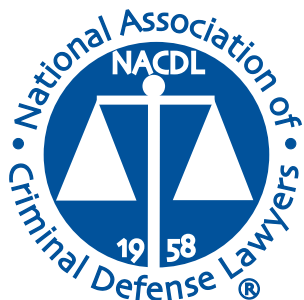
The **Monroe H. Freedman Institute for the Study of Legal Ethics** at Hofstra University's Maurice A. Deane School of Law was founded in honor of one of the profession's most influential legal scholars and seeks to focus the attention of law students, scholars, judges, and

practitioners on today's most significant issues for the legal profession. The Freedman Institute sponsors programs and conferences for scholarly inquiry and brings together practitioners, judges, and scholars to examine critical aspects of the delivery of legal services. It also trains law students to take responsibility for serving others, and it provides practical experiences to do so.



The **Foundation for Criminal Justice** preserves and promotes the core values of the National Association of Criminal Defense Lawyers and the American criminal justice system. Ongoing and recent projects include unprecedented studies of the federal public defense system, barriers to disclosure of exculpatory information, and obstacles to the restoration of rights and status after conviction; efforts to identify concrete and easily-achieved solutions to racial disparities in the criminal justice system; free training programs for

lawyers on a variety of topics including representing juveniles accused of wrongdoing and individuals facing immigration-related collateral consequences of conviction; and efforts to improve public defense in federal and state courts.



The **National Association of Criminal Defense Lawyers (NACDL)** is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's thousands of direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, active U.S. military

defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.



The **State of New York Unified Court System** hears more than three million cases a year involving almost every type of endeavor. The mission of the Unified Court System is to promote the rule of law and to serve the public by providing just and timely resolution of all matters before the courts.



## ASSOCIATION OF PROSECUTING ATTORNEYS

The **Association of Prosecuting Attorneys (APA)** is a national prosecutorial association that provides valuable resources such as training and technical assistance to prosecutors

in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and make communities safer. APA is the only national organization to represent and support all prosecutors, including both appointed and elected prosecutors, as well as their deputies and assistants, whether they work as city attorneys, tribal prosecutors, district attorneys, state's attorneys, attorneys general, or U.S. attorneys. The association's activities including acting as a global forum for the exchange of ideas, allowing prosecutors to collaborate with all criminal justice partners, conducting timely and effective technical assistance, and providing access to technology for the enhancement of the prosecutorial function.

CENTER

FOR

COURT

INNOVATION

The **Center for Court Innovation** seeks to help create a more effective and humane justice system by designing and implementing operating programs to test new ideas and solve problems, performing original research, and providing reformers around the world with the tools they need to launch new strategies. The Center's projects include community-

based violence prevention projects, alternatives to incarceration, reentry initiatives, court-based programs that seek to promote positive individual and family change, and many others.

# CONFERENCE MISSION AND OVERVIEW

On April 6 and 7, 2017, the Monroe Freedman Institute for the Study of Legal Ethics at Hofstra University's Maurice A. Deane School of Law, the Association of Prosecuting Attorneys (APA), the Center for Court Innovation, the Foundation for Criminal Justice, the National Association of Criminal Defense Lawyers (NACDL), and the State of New York Unified Court System convened a conference designed to explore the impediments to and reforms needed to ensure effective justice in all stages of the criminal process, with a particular focus on the judicial role in high-volume misdemeanor courts. The conference took place at Hofstra University in Hempstead, New York.

The conference assembled judges, prosecutors, defense attorneys, scholars, and criminal justice policy experts to identify practical reforms to improve the quality of justice in state and local criminal justice systems.

While they recognized that many of the nation's justice systems are overburdened and underfunded, conference participants shared concrete practices that courts can adopt to improve the delivery of procedural and substantive justice even with limited resources. Participants also discussed how certain customary judicial practices impose significant and avoidable costs on court systems and the public.

The conference included a day of presentations and panels in plenary session, followed by a day of work group conversations in which participants explored in greater depth barriers to justice in criminal courts and judicial practices that could remove or mitigate those barriers. Specific recommendations that emerged from the conference are detailed in this report. A number of academic articles on aspects of judges' responsibility for justice in criminal courts will be published in a supplement in the *Hofstra Law Review*.



# REPORT METHODOLOGY

This report was prepared to share discussions and recommendations that emerged from the conference's presentations, panels, and work groups. The convening organizations hope these discussions and recommendations will contribute to national, state, and local efforts to improve the delivery of justice in misdemeanor courts.

In order to promote frank discussion among judges and other conference participants, the convening organizations extended anonymity to attendees who participated in work group discussions or in the audience question-and-answer component of panels. The comments and quotations attributed in the report to conference keynote speakers and panelists were captured in detailed notes prepared by the report author. Speakers and panelists were provided an opportunity to review the comments and quotations attributed to them for accuracy before the report's publication. Speakers and panelists also had the opportunity to provide references for comments attributed to them. When provided, those references appear in the report's endnotes. The report author and the convening organizations do not vouch for the accuracy of factual statements attributed to speakers and panelists, or that appear without attribution in summaries of work group discussions.

# EXECUTIVE SUMMARY

In many of America's criminal courts, rapid dispositions represent the standard of practice and are a measure of judicial performance. Judges have become accustomed to processing cases quickly at the expense of their duty to safeguard constitutional rights and engage in appropriate, necessary, and just decision-making. Researchers have documented numerous jurisdictions in which criminally accused persons are hustled through the justice system with scant regard for fundamental constitutional rights.<sup>1</sup>

On April 6 and 7, 2017, the Monroe Freedman Institute for the Study of Legal Ethics at Hofstra University's Maurice A. Deane School of Law, the Association of Prosecuting Attorneys (APA), the Center for Court Innovation, the Foundation for Criminal Justice, the National Association of Criminal Defense Lawyers (NACDL), and the State of New York Unified Court System convened a conference designed to explore the impediments to and reforms needed to ensure effective justice in all stages of the criminal process, with a particular focus on the judicial role in high-volume misdemeanor courts. The conference assembled judges, prosecutors, defense attorneys, scholars, and criminal justice policy experts to identify practical reforms to improve the quality of justice in state and local criminal justice systems. This report summarizes the candid discussions at that conference and identifies a number of recommendations for how judges can exercise their responsibility to deliver justice in America's criminal courts.

The conference included a day of presentations and panels in plenary session, followed by a day of work group conversations in which participants explored in greater depth barriers to justice in criminal courts and judicial practices that could remove or mitigate those barriers. Common themes and specific recommendations that emerged from the conference are detailed in this report.

## COMMON THEMES

Conference speakers, panelists, and participants returned to common themes again and again during two days of conversations about a wide range of topics related to judicial responsibility for justice in criminal courts.

Participants repeatedly highlighted ways in which the tremendous volume of cases in the nation's misdemeanor courts creates problems that make it extremely difficult for those courts to deliver justice. Prosecutors cannot screen all of the incoming cases effectively at the front end. Governments cannot afford all of the defense lawyers necessary to defend people accused of crime in critical criminal proceedings. When people are represented by defense lawyers, those lawyers do not have time to meet with their clients in advance of court proceedings or to investigate cases. Judges do not have time or the individualized information necessary to determine an individual's ability to pay monetary bail, fines, or fees. Nobody has time to try

cases, and there is great pressure to dispose of cases at the initial appearance or another early stage of the criminal justice process. There are so many cases that it is difficult for any party to slow things down and see people as individuals instead of case files, or to adjudicate cases instead of process them.

Government entities see misdemeanor courts as revenue centers, which creates additional obstacles to delivering justice. Courts' performance is assessed based in part on their success at assessing and collecting fines and fees. This function focuses courts' attention on outcomes that do not effectively target the causes of criminal behavior that comes before them, and does not serve public safety. Participants acknowledged that the perception that courts are motivated by money also undermines courts' relationship with the communities they should be serving.

Despite these daunting challenges, conference participants across a number of panels and work groups identified common approaches judges can take to improve the delivery of justice.

First, judges must look critically at their court practices and their court culture. Under the pressures of high caseloads and the need to raise revenue, many courts and the lawyers who practice in them have become accustomed to taking shortcuts. These shortcuts have infected the standards of practice to such a degree that judges and other criminal justice stakeholders no longer see them for the shortcuts they are. Judges need to step back and assess all of their practices with an eye for what is just, regardless of whether it is what they have become used to doing. When they conduct this examination of their court practices, judges should not be insular; they should look to courts outside their own communities and seek external views of the justice system from the public.

Judges also must take responsibility for what they can do to improve the delivery of justice consistent with their institutional role, and not deflect criticism of the courts by focusing on where their hands are tied in dealing with counsel or where they are constrained by funders. Judges' hands are tied in specific ways, and judges are constrained by external factors. But judges control how their courtrooms are run and, most importantly, how people are treated in their courtrooms. Judges can treat every person who appears in court with dignity and respect. Judges can explain court procedures clearly and ensure that individuals accused of crime understand their rights and the consequences they will face if convicted. Judges can directly affect people's sense of whether the justice system is fair through actions that are clearly within the judicial role, and they can lead court personnel and attorneys by example.

Judges have additional ways they can influence attorney behavior in the direction of justice without violating institutional boundaries. Participants frequently cited the power of judicial questions to improve justice in individual cases. Judges can ask prosecutors about a suspect charging decision or whether they turned over discovery before a plea. Judges can ask defense attorneys why a particular agreed-upon sentence is appropriate in one case, when in a similar case a client of a different race received a different sentence. Judges can ask unrepresented defendants why they want to plead guilty without first talking to a lawyer, and offer time to

consult with a lawyer. Through these and similar questions, judges set the ethical tone of the courtroom and establish expectations for what will be normal and what will require justification. One participant labeled this type of judicial authority “leadership of expectations.”

Beyond individual cases, participants repeatedly pointed to judges’ unique ability to bring together criminal justice partners as an important opportunity to improve the delivery of justice. Judges’ convening authority allows them to initiate conversations about partners’ varied perspectives on issues facing the justice system, and to build a foundation for collaborative solutions.

Whether in convenings in their own jurisdictions, or in conversations with their peers or legislators, judges must be advocates for justice. Judges have a unique role in and perspective on the criminal justice system. While it may not be appropriate for judges to express that perspective in individual cases, it is vital that they share it with people who have the power to change state and local rules in the direction of improving justice.

## RECOMMENDATIONS

Conference participants generated many proposals for specific reforms that would improve the delivery of justice in misdemeanor courts. It is the convening organizations’ hope that participants advocate for those proposals in their home jurisdictions, and that this report spurs conversations about the proposals in jurisdictions across the country.

### PLENARY SESSION

#### Procedural Justice

- ❖ **Judges should get outside of their bubbles:** Judges should look outside their own domain and critically examine the practices to which they have become accustomed.
- ❖ **Judges should use scheduling to create space for justice:** Scheduling is one way in which judges may directly, even if unintentionally, put pressure on accused individuals to plead guilty without waiting for appointment of counsel, or for full consultation with counsel. Judges should think about how they can structure their dockets to allow more time for individual cases.
- ❖ **Judges should take responsibility for treating accused individuals with respect:** By doing so, judges can improve individuals’ experience in, and increase their respect for, the court system.
- ❖ **Judges should be advocates for justice outside the courtroom:** Judges should educate the public about problems in the criminal justice system, and can speak with the authority of their judicial role and personal experience for reforms to the system that would improve the administration of justice.

## Bail

- ❖ **Judges should educate themselves, their peers, and the public about pretrial detention and bail reform:** Judges should use that information to make changes in their own courtrooms and their state and local justice systems.
- ❖ **Judges should accept risk in pretrial decision-making:** Judges must accept risk when they make bail decisions in order to avoid imposing devastating costs on communities and taxpayers.
- ❖ **Judges should be cautious about replacing monetary release conditions with other types of conditions:** Non-monetary conditions may make some judges feel less exposed to political risk, but they do not serve a public safety purpose unless they are related to an individual's risk factors.

## Pleas at Initial Appearance

- ❖ **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 set bond in a manner that does not allow release to be traded in exchange for a guilty plea. Judges also should schedule cases so that an individual who needs more time to confer with an attorney or to wait for lab results can do so without risking additional months of pretrial detention before the next case setting.
- ❖ **Judges should reflect critically on accepted practices in their courtrooms:** Judges should regularly ask themselves whether conditions in their courtrooms truly provide an adequate foundation for an informed guilty plea at initial appearance.
- ❖ **Judges should advocate for a multi-branch response to the conditions that create incentives for pleas at initial appearance:** Misdemeanor case volume and monetary bail systems generate many of the pressures that drive the practice of pleas at initial appearance. Judges cannot dismiss cases at will, but they can speak publicly about how some of the offenses they see in their courts do not warrant arrest, pretrial detention, and the stigma of a criminal conviction.

## Collateral Consequences

- ❖ **Judges should educate themselves and defendants about collateral consequences of conviction:** Judges must educate themselves about collateral consequences in order to fulfill their responsibilities to inform people accused of crimes of the potential collateral consequences they are facing, and to investigate whether people understand that information.
- ❖ **Judges should advocate for broad and effective laws that provide for the expungement and sealing of criminal records:** Judges should educate legislators and the public about how commercial distribution of criminal records limits the effectiveness of expungement, and urge legislators to make expungement and sealing more effective by restricting the sale of criminal records and requiring commercial entities to maintain updated records.
- ❖ **Judges should educate legislators about the human toll of collateral consequences and advocate to eliminate collateral consequences that do not promote public safety**

## WORK GROUPS

### Courts Without Counsel

- ❖ **Individuals accused of criminal offenses should be represented by a lawyer at every court proceeding:** People must be represented by counsel if they will be jailed, including for failure to pay fines and fees imposed in a fine-only case.
- ❖ **The state should be represented by a prosecutor at every court proceeding**
- ❖ **Judges should use their convening authority to reform practices that produce injustices in misdemeanor courts:** Judges have the moral authority and political power to begin conversations about the costs generated by no-counsel courts and other shortcuts that have developed in response to high-volume misdemeanor courts. Judges also can work to build stakeholder consensus in support of decriminalization of low-level offenses and other approaches that, by reducing case volume, can free up resources to improve the delivery of justice in the cases that remain.

### Procedural Justice and Judicial Involvement in Initial Appearances

- ❖ **Judges should explain what will happen during the initial appearance so that procedures and roles are transparent to accused individuals and their families**
- ❖ **Judges should increase accused individuals' sense of "voice" at the initial appearance:** Judges should consider creating space for individuals to tell their side of the story.
- ❖ **Judges should safeguard their responsibility to meaningfully review guilty pleas offered at initial appearance:** 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.

### Implicit Bias

- ❖ **Training on implicit bias should be a mandatory component of judicial ethics training:** The judicial ethics rules prohibit discrimination, so training on implicit bias should be a mandatory component of judicial ethics education programs.
- ❖ **Judges should consider obtaining data that will allow them to check for implicit bias in their decision-making:** 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.
- ❖ **Judges should consider adopting procedural justice practices as an anti-bias strategy:** Practices that afford the accused individual dignity also can make it easier for judges to see the accused as individuals in ways that counter stereotypical associations.
- ❖ **Judges should be trained and prepared to confront bias in a manner consistent with the judicial role:** 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.

## Judicial Control Over Bail

- ❖ **Judges should use unsecured bonds more frequently:** Judges can use unsecured bonds in low-level cases regardless of whether they continue to use monetary bonds in other cases.
- ❖ **Judges who continue to use monetary bail must consider an individual's ability to pay when setting bail**
- ❖ **Defendants must be represented by counsel at initial bail hearings:** Defense lawyers provide information that judges need to make informed pretrial release decisions.

## Judicial Intervention in Charging Decisions

- ❖ **Judges should use their convening authority to initiate and influence conversations about local charging policies:** These conversations allow judges to affect front-end charging decisions at the community level without intervening in individual cases.
- ❖ **Judges should consider how their role in plea dispositions allows them to influence charging practices:** Judges' authority over plea dispositions allows them to review the fairness of charging decisions in individual cases.
- ❖ **More states should consider adopting rules that afford judges a defined role in reviewing charging decisions prior to plea disposition:** Judges eventually will review charging decisions at plea disposition; state rules that allow judges to divert cases pre-plea or to dismiss a case when discovery does not support the charges promote efficiency and fairness by allowing judges to play their review role earlier in the judicial process.

## Judicial Involvement in Plea Bargaining and Discovery

- ❖ **Judges should conduct individual colloquies to determine that accused individuals understand the consequences of pleading guilty before they accept the plea:** Videos and other group presentations cannot replace individualized inquiries.
- ❖ **Judges should question plea circumstances and terms when they have concerns:** Although judges should not interfere in the attorney-client relationship, 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.
- ❖ **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:** Discovery rules should cover all exculpatory information and not be limited to information that is material or admissible.
- ❖ **Judges should establish on the record before accepting a guilty plea that the prosecutor has provided discovery to the defense:** Conditional pleas pending receipt of complete discovery may be acceptable in certain situations, such as cases involving delays for drug testing.
- ❖ **States should provide judicial education on the potential immigration consequences of misdemeanor offenses:** This education is particularly important in the misdemeanor context, where many individuals plead guilty without counsel or with limited consultation with counsel, and judges may be the primary source of information accused individuals receive about those consequences.

## Control Over Conduct of Counsel

- ❖ **Judges should set high standards for prosecutor and defense attorney performance in their courtrooms, and use opportunities such as plea colloquies to check whether those standards are being met:** Judges set the ethical tone in their courtrooms, and can communicate that pleas without counsel, pleas without discovery, using bail to create pressure to plead, etc. will not be accepted as the normal course of business.
- ❖ **Judges should provide performance feedback to prosecutors and defense lawyers who appear in their courtrooms:** 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.
- ❖ **Judges should exercise their control over counsel in ways that afford equal independence to the prosecution and the defense:** 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.

## Trial Issues (Bench and Jury Trials)

- ❖ **Judges should allow lawyers to try cases with minimal intervention:** 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.
- ❖ **Judges should use their rulings as opportunities to train lawyers:** Judges should make at least brief findings of fact at bench trials.
- ❖ **Jurisdictions should adopt mechanisms to provide education and feedback to criminal trial judges:** Jurisdictions should create judicial review systems that provide feedback from other judges or lawyers.
- ❖ **Judges should protect the integrity of criminal trials by adopting rules that require the early delivery and review of discovery:** Delays in fact development and discovery clog trial dockets and undermine the trial process.

## Sentencing

- ❖ **Judges should prepare fines and fees checklists for their jurisdictions and provide the checklist to people in their courts:** These checklists will ensure that individuals understand the total financial obligation resulting from fines and fees imposed in their cases.
- ❖ **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:** 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.
- ❖ **Judges should prepare collateral consequences checklists for their jurisdictions and provide the checklist at an early stage of the proceedings:** While it may not be practical for the checklist to cover every potential collateral consequence, it can cover every major category of consequences.



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

### Changing Court Culture

- ❖ **Judges should promote a courtroom culture of dignity and respect:** Judges directly influence public experience of the court through their behavior, and also set expectations for the behavior of other justice system stakeholders.
- ❖ **Judges should convene and collaborate with other justice system partners to improve court culture:** Collaborations can produce changes to practices that do not require institutional change, as well as provide a foundation for cooperative institutional reform.
- ❖ **Judges should work with other justice system partners to develop a set of benchmarks for court culture:** These benchmarks should reflect the values communities want courts to promote, and be used to set goals for court improvements and as tools for court assessments.

# PLENARY SESSION: PRESENTATIONS AND PANELS

## INTRODUCTION

**Speaker:** *Ellen Yaroshefsky, 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*

The conference sponsors opened the proceedings by highlighting how analyses of the many dysfunctions in America's criminal justice system frequently have underemphasized the role of judges. Instead, criminal justice scholars and reformers historically have focused on the failures of and systemic pressures affecting law enforcement officers, prosecutors, and defense attorneys. More recently, observers have devoted significant attention to the social and political causes and consequences of mass incarceration, but again with only passing interest in the judicial function.



**“I also assumed that the criminal justice system I had worked in was fair, just, and certainly constitutional. I was wrong on all counts.”**

Common narratives of the criminal justice system undersell the role judges can and should play in delivering justice. They minimize judges' responsibility to supervise what happens in their courtrooms, and for ensuring the administration of justice and the integrity of convictions and sentences. Increased awareness of inequities in the bail system and in the assessment and collection of fines and fees lends urgency to the need to focus more attention on direct judicial contributions to systemic injustice.

Yaroshefsky remarked that “despite underfunding of court systems, judges can do better.” The conference organizers expressed their hope that the proceedings and this report would encourage judges to reflect on their current practices, as well as stimulate local discussions about concrete judicial reforms that would improve the quality of justice delivered in criminal courts across the U.S.

## THE STATE OF JUSTICE IN CRIMINAL COURTS IN THE U.S.

**Speaker:** Hon. Lisa Foster, Former Director, Office for Access to Justice, U.S. Department of Justice, and Judge, Superior Court of California, County of San Diego (Ret.)

Foster framed her remarks by describing how she began her career as a civil litigator, and only learned about the criminal justice system in detail when she became a superior court judge in San Diego and was assigned to a criminal court in 2003. She learned criminal law on the bench, assisted by generous judicial colleagues and experienced prosecutors and defense attorneys who appeared in her court.

When she left the bench in 2013 to work for the Justice Department, Foster assumed every state criminal court worked the way her court in San Diego did: bail was set according to a schedule; unpaid fines and fees were subject to a civil collection process and could result in suspension of the debtor's driver's license; defense lawyers were present at every stage of a criminal proceeding from an individual's initial appearance before a judicial officer after arrest<sup>2</sup> to sentencing; and plea bargaining was the norm, frequently occurring at the initial appearance in misdemeanor cases.

"I also assumed that the criminal justice system I had worked in was fair, just, and certainly constitutional," Foster remarked. "I was wrong on all counts."

### STORIES ABOUT JUDGING AND INJUSTICE

Foster's assumptions were upended by many stories of individual injustice she heard while at the Justice Department. She described three that were reported in the media.

**"We need to shift the paradigm of the judge from an umpire calling balls and strikes to what I call neutral engagement. A judge who is impartial, but passionate about doing justice."**



Shannan Wise, a 27-year-old single mother of two, was working two temporary jobs and attending school for medical billing when she was arrested in Baltimore in October 2015. Her younger sister, who suffers from mental illness, had accused her of assault. A judge set bail in

Wise's case at \$100,000, and she needed \$1,000 to secure her release through a bail bond agent. Wise spent five days in jail while her family scrambled to come up with the bail money, pawning personal possessions and accumulating small donations from friends. If her family and friends had not pitched in, Wise would have spent three months in jail, waiting for the court hearing at which the charges against her were dismissed.<sup>3</sup>

Sharnell Mitchell was arrested in January 2014 in her home in Montgomery, Alabama, for failure to pay traffic tickets she received in 2010. The single mother was handcuffed in front of her children, 1 and 4 years old, and ordered by a judge to "sit out" her unpaid fines for 58 days. She received \$50 in credit toward her ticket debt for each day in jail, and an additional \$25 per day if she agreed to clean the jail. Mitchell earned less than \$14,000 per year.<sup>4</sup>

Ryan Goodwin, an insurance attorney with no criminal law experience, introduced himself to his new client — a 16-year-old facing life in prison for stealing someone's wallet and cell phone at gunpoint — by saying "I don't do criminal defense." Goodwin lived in Caddo Parish, Louisiana, where the public defender's office was so underfunded that it could no longer provide representation to hundreds of its clients. Local judges responded by placing every lawyer in the parish on an alphabetical list and randomly assigning them to represent individuals accused of criminal offenses.<sup>5</sup>

Foster noted that these three stories of injustice have elements in common. All three of the accused individuals were poor. Reflecting the demographics of poverty in America, two of the three were people of color. All three stories involved serious consequences for the individuals and their families. And all involved a judge. "A judge — like me — who imposed bail without considering whether the defendant needed to be detained pretrial or what amount of bail the individual could afford, a judge who sentenced a woman to jail without considering whether her failure to pay fines and fees was willful, a judge who conscripted an insurance lawyer to represent an individual criminal defendant without considering whether the lawyer could effectively represent him."

The issues these stories highlight — bail, fines and fees, and access to counsel — are pernicious and involve a large role for judges to perpetuate or ameliorate injustice. Foster urged conference participants to think critically about the role of judges. "We can't just accept the systems we work in. We need to shift the paradigm of the judge from an umpire calling balls and strikes to what I call neutral engagement. A judge who is impartial, but passionate about doing justice."

## **BAIL**

When Foster was a judge in San Diego, bail was set according to a schedule that paired each offense with a dollar amount. People with money to post bail went home, while people who could not afford bail remained in jail. California state law required San Diego to adopt a bail schedule, and Foster did not question the practice.

Bail started as a mechanism to allow people out of jail pretrial, but in many state court systems it has become a mechanism that operates to keep poor people in jail. Despite the Supreme Court's declaration that "[i]n our society, liberty is the norm, and detention prior to trial . . . the carefully limited exception,"<sup>6</sup> many judges work in systems in which pretrial detention has become the norm, and pretrial release the exception.

## **Skyrocketing court costs, coupled with aggressive collection efforts, have resulted in the return of imprisonment for debt in America.**



As a result of this shift, the number of people incarcerated pretrial has increased dramatically since the 1980s. Roughly 60 percent of the jail population nationally is comprised of pretrial defendants — up from 50 percent in 1996 and 40 percent in 1986. Most of those detained pretrial are accused of nonviolent offenses. “And the overwhelming majority are poor, because only people who cannot afford bail are held in custody pretrial,” Foster stated.

Increasing rates of pretrial detention impose significant costs on individuals and communities. At the societal level, U.S. jurisdictions spent \$9 billion on pretrial detention in 2016. On the individual level, as little as three days in jail increases the likelihood that a person will lose their job, their housing, be forced to abandon their education, or be unable to make child support payments. Entire families are disrupted, most dramatically when the children of single parents detained pretrial are placed in foster care or forced to change schools when they move in with a relative.

Pretrial incarceration also distorts case outcomes. In state criminal cases, if a conviction can result in a jail sentence, people who are detained pretrial are four times more likely to be sentenced to jail and their sentences are three times longer than those of individuals who are released pretrial. If a conviction can result in a prison sentence, people who are detained pretrial are three times more likely to be sentenced to prison and their sentences are twice as long as those of people released pretrial. People detained pretrial also are more likely to plead guilty, whether that is because they are guilty or simply because they want to go home.

Foster emphasized that we are not getting a public safety return for the costs of our current pretrial detention systems. In fact, individuals who are detained more than 24 hours after an arrest are more likely to commit new crimes after they are released than defendants charged with the same offense who are released pretrial.

Foster argued that the money bail system that exists in many places in the U.S. not only punishes people for their poverty; it makes people accused of crimes, their families, and their communities poorer still. “And it’s being done by judges — just like me — in violation of the U.S. Constitution, which prohibits bail schemes based solely on the ability to pay.”

## FINES AND FEES

Just as the size of pretrial jail populations has increased dramatically since the 1980s, so has the amount of fines and fees imposed by the justice system. Foster asserted that these trends are related: state and local corrections expenditures increased by 324 percent — from \$17 billion to \$71 billion — from 1979 to 2013. State and local legislators have responded by demanding that courts impose steep fines and fees to defray increasing costs, as well as to cover other justice system expenses and supplement general revenue.

Since 2010, every state except Alaska, North Dakota, and the District of Columbia has increased civil and criminal fines and fees. The total cost for a speeding ticket in California is now \$490, or more than what a minimum-wage worker earns for an entire 40-hour work week. Skyrocketing court costs, coupled with aggressive collection efforts, have resulted in the return of imprisonment for debt in America.



**In practice, defense counsel often is missing or so underfunded and overloaded that she cannot perform her adversarial role.**

Foster cited Ferguson, Missouri, as the most prominent national example of policies that create modern debtors’ prisons. The Justice Department’s 2015 investigation of the Ferguson police department documented that 23 percent of the city’s revenue came from fines and fees. Individuals who could not afford to pay hefty fines and fees — such as \$531 for allowing high grass or weeds to grow in a private lawn — were arrested, jailed, and faced even more financial penalties. For example, one woman who was ticketed after she parked her car illegally was arrested twice, spent six days in jail, paid \$550 in fines and fees, and still owed Ferguson \$541.

Ferguson is not alone in these practices. Additional lawsuits challenging the practice of jailing people for unpaid traffic or criminal debt have been filed in Alabama, Georgia, Michigan, Mississippi, Ohio, Texas, and Washington.

Although states have a fundamental interest in punishing people — rich and poor — who violate the law, Foster pressed judges to remember that their authority to jail people who fail to pay financial penalties is limited to those individuals who willfully refuse to pay. “That means determining that the person had the ability to pay the amount owed.” Judges must consider alternatives to incarceration, such as community service, for individuals who cannot afford to pay.

## Public defenders are absent entirely from critical stages of criminal cases in some states.



Even states that do not incarcerate individuals for unpaid court debt pursue other collection tactics that exacerbate and criminalize poverty. Foster highlighted the suspension of driver’s licenses for unpaid traffic and criminal debt as one such tactic, as well as a practice that makes no sense from a public policy perspective. “If the goal is to get people to pay their court debt, why would you make it more difficult for them to get to work?” Driver’s license suspension for unpaid fines and fees affects millions of Americans, including 900,000 people in Virginia and 4.2 million people in California.

### ACCESS TO DEFENSE COUNSEL

Problems in the bail system and with the imposition and collection of fines and fees are made worse by the fact that the adversarial system is not working properly in many places. In the criminal courts, that system requires a prosecutor to argue for the state, defense counsel to make the case for the accused, and a judge to weigh both sides’ arguments and make a just decision. However, in practice, defense counsel often is missing or so underfunded and overloaded that she cannot perform her adversarial role.

Foster pointed to Louisiana as an example of this phenomenon. Thirty-three out of 42 public defender districts in Louisiana restricted services in 2016 due to chronic and severe underfunding. Public defenders had caseloads so high that they could not accept any new cases, and in some situations could not continue to represent existing clients. In response, judges conscripted lawyers with no criminal law experience to represent indigent defendants, held mass plea and sentencing hearings with groups of 50 defendants represented by a single public defender, or kept accused individuals in jail for months without representation while they languished on wait lists for public defense services.

Public defenders in other states also are so overworked and under-resourced that they are lawyers in name only. Lawsuits alleging wholesale violations of the right to counsel have been filed in California, Georgia, New York, Pennsylvania, and Washington, in addition to Louisiana.

Public defenders are absent entirely from critical stages of criminal cases in some states. Foster cited a report prepared for the Utah Judicial Council that found that many Utah defendants, particularly those facing misdemeanor charges, never speak with an attorney. Similar reports document the absence of counsel in court proceedings in Delaware, Indiana, Nevada, South Carolina, and Wyoming. In juvenile cases in the Cordele Circuit in Georgia, only 19 out of 661 children named in juvenile delinquency cases adjudicated in 2013 were represented by defense counsel.

Total absence of counsel is most common in the early stages of criminal cases. In eight states, lawyers are never present at first bail hearings; in 17 states, lawyers appear infrequently or only in a token number of courts; and in 11 other states, arrested individuals have only a 50 percent chance of receiving the assistance of counsel when bail is set. Lawyers almost never are present when courts assess fines or fees in non-jail cases, or even when they impose incarceration for nonpayment of fines and fees.

Foster argued that justice requires the appointment of defense counsel for all of these proceedings because their consequences are enormous. Even brief detention can break up families and cause economic devastation, and the collateral consequences of a misdemeanor conviction can be just as great as those of a felony, regardless of whether incarceration is imposed. Individuals convicted of a misdemeanor may lose professional licenses or student loans, be excluded from public housing, or face deportation.

## **JUDGES ARE AN ESSENTIAL PART OF THE SOLUTION**

Foster concluded with the message that judges not only can do better, despite underfunding and crowded dockets; they must do better.

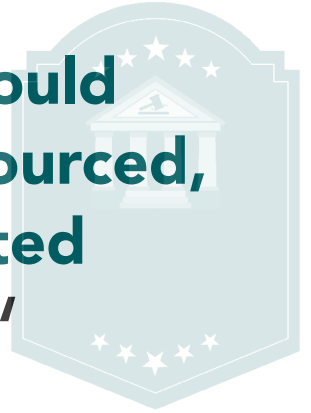
She pointed to progress over the last four years toward reform of some of the problems highlighted in her remarks, but emphasized that policy reforms “will be meaningless unless they are embraced by judges.” Foster applauded those judges who have become part of the solution, whether by changing their court operations and rules or by speaking out. She invited judicial conference participants to share their best practices, learn from each other, and do more.

Misdemeanor courts are the first and only place many people come into contact with the criminal justice system. “People’s confidence in the courts as a whole — their faith in the state’s ability to dispense justice fairly and effectively — is framed through these initial encounters,” Foster stated. “We have seen lately considerable unrest among those denied justice. And while protests largely have been focused on law enforcement, if you scratch the surface of people’s discontent, it is the entire justice system that they indict.”



**Panelists:** Abbe Smith (moderator), Director, Criminal Defense and Prisoner Advocacy Clinic, and Professor of Law, Georgetown University Law Center; David LaBahn, President and CEO, APA; Hon. Steve Leben, Judge, Kansas Court of Appeals; Norman L. Reimer, Executive Director, NACDL; Hon. Betty Thomas Moore, Judge, Shelby County General Sessions Court, Tennessee

**“The principle that defendants should be represented by effective, well-resourced, and un-conflicted lawyers is violated every day all over the country.”**



There is a commonly held view that the Sixth Amendment right to counsel ensures that accused persons never stand alone in a criminal court. That belief is belied by reality in countless courts throughout the country. Far too often, the accused appear in criminal courts with no lawyer to assist them when their liberty is at stake or when a guilty adjudication may be entered. In other cases, individuals are represented by defense lawyers who fail to fulfill fundamental professional obligations. Panelists explored traditional concepts of procedural justice and various practices that deprive individuals of fundamental due process in criminal courts. They also discussed judges' role when the justice system fails to respect the accused and shortchanges constitutional rights.

### TOO MANY CASES, TOO FEW DEFENSE LAWYERS

Norman L. Reimer, NACDL's Executive Director, kicked off the discussion by highlighting the scale of America's criminal justice system: approximately 11 million people are arrested each year. Over two million people are in jail at any given moment, and most of the jailed are pretrial detainees who are presumed innocent. Between 75 and 95 million adult Americans have criminal records. The National Inventory of Collateral Consequences has identified 40,000 collateral consequences faced by people convicted of crimes.<sup>7</sup>

In the face of this crushing volume, and despite the high stakes people face even in minor cases, justice systems are not providing the assistance of counsel “in all criminal prosecutions,” as promised in the Sixth Amendment to the U.S. Constitution. “The principle that defendants should be represented by effective, well-resourced, and un-conflicted lawyers is violated every day all over the country,” stated Reimer. It is violated when there is

no counsel at all, and when there effectively is no counsel because the assigned lawyer has an overwhelming caseload.

For example, a NACDL study of misdemeanor courts in five South Carolina counties documented that only 10 percent of accused people had lawyers. Nineteen percent of the accused went to jail, and 97 percent of those jailed had no lawyer. In Florida, NACDL looked at 22 counties and found that in those counties 82 percent of misdemeanor cases were resolved in three minutes or less, and 66 percent were resolved without lawyers. Lawsuits challenging systemic violations of the right to counsel recently have been filed or are pending in Alabama, California, Georgia, Idaho, Louisiana, Missouri, Montana, New Mexico, New York, and Pennsylvania.

Reimer conceded that some overloaded lawyers have given up and are merely going through the motions when they stand next to their clients in court. But many in the defense bar and advocacy community are fighting to protect the right to counsel. NACDL trains more than 5,000 defense lawyers annually, and in recent years also has provided targeted training to local public defense communities where there are limited resources for training. NACDL also has published 14 reports documenting problems in public defense systems and recommending reforms.



## **Judges' own sense of what is most fair or best practice may exceed the law's minimum requirements or conflict with accused individuals' assessments of their own best interest.**

While the defense bar and individual defense lawyers must do better, Reimer argued that real reform of public defense practices will not occur unless judges lead the way. Judges actively participate in some of these constitutional violations, and that must stop. Some judges do not inform people that they have a right to counsel, and in a recent Illinois case a judge ordered one public defender office to represent two co-defendants in a murder case despite the glaring conflict of interest involved. But even when judges only witness right to counsel violations, Reimer asserted they are silent too often

### **THE ROLE OF JUDGES IN CHALLENGING PROCEDURAL INJUSTICE**

The Honorable Steve Leben, a judge on the Kansas Court of Appeals, and the Honorable Betty Thomas Moore, a general sessions court judge in Shelby County, Tennessee, did not

challenge the prevalence of right to counsel violations across the country. However, they expressed discomfort with the idea of inserting themselves as judges into accused individuals' decision-making or the attorney-client relationship. Judges' own sense of what is most fair or best practice may exceed the law's minimum requirements or conflict with accused individuals' assessments of their own best interest. "If you're a judge, in some instances your hands are tied," Moore remarked.

As an example, Leben noted that Kansas has not interpreted the Sixth Amendment as attaching to all cases and at all phases. So while he personally may agree with Foster about the potential value of appointing counsel early in a case or in a fine-only case, in his role as a judge he has to follow his state's laws. Leben also pointed out that people have a constitutional right to waive the right to counsel, and as a judge it is not his job to limit that constitutional right or to keep people from doing something they have a right to do. Rather, his role is to provide people with the information they need to make informed decisions for themselves.

The judicial panelists also pointed to practical considerations that might push defendants to make choices that appear suspect to those outside the court system. Moore asked what right she had to encourage someone to wait in jail for appointment of a defense lawyer, if he wants to plead guilty and be released that day. Similarly, Leben noted that released individuals understandably may want to resolve a case without full advice from defense counsel about all potential collateral consequences, in order to avoid additional resets and missed days of work. And how can judges question counsel's advice or decisions without interfering with counsel's independence?

Moore also discussed financial constraints on judicial authority. There are steps judges can take consistent with their judicial roles to address some of these problems, but they need money to take them. Judges do not like dealing with pro se litigants and would love every defendant to be represented by an attorney, but if there is no money to appoint counsel they cannot do that. Judges who are open to releasing individuals without requiring a monetary bond need resources that help them gauge the risk involved.

## **OPPORTUNITIES FOR JUDGES TO ADVANCE PROCEDURAL JUSTICE**

Although the panelists had different positions on where the boundaries lie on judicial responsibility for ensuring fairness in the courts, some suggestions for how judges could better deliver procedural justice met with uniform agreement.

**>>> Judges should get outside of their bubbles:** Moore encouraged her judicial colleagues to look outside their own domain, both to avoid prematurely dismissing community claims of injustice just because those claims are not supported by practices they see in their own courts, and to inoculate themselves against the risk that those practices could slip into their courtrooms as part of a broader culture of injustice. David LaBahn,

the APA's President and CEO, noted that seeing other courts also may help judges think more critically about their own courts' practices and culture. LaBahn recollected an experience with a visiting judge in Orange County, California, thirty years ago who was horrified when three defense attorneys moved 100 cases in a single day, a practice to which LaBahn, then a prosecutor in that court, had become accustomed. Outside perspective made it possible to see that court practices he took for granted did not represent the norm.

- >>> **Judges should use scheduling to create space for justice:** Leben encouraged judges to reconsider how they structure their dockets and schedule cases. Scheduling is one way in which judges may directly, even if unintentionally, put pressure on accused individuals to plead guilty without waiting for appointment of counsel, or for full consultation with counsel. Judges should not load up dockets for their own or for police officers' convenience. Instead, they should think about how they can break up dockets to allow more time.
- >>> **Judges should take responsibility for treating accused individuals with respect:** Leben also discussed how judges can practice principles of procedural justice even when their state's case law on constitutional due process does not allow for representation at all of the proceedings at which defense counsel could be beneficial. Citing Tom Tyler's work on procedural justice,<sup>8</sup> Leben suggested that even when counsel is not present, judges themselves can explain people's rights, show people they have rights, and treat them as individuals. By doing so, judges can improve individuals' experience in, and increase their respect for, the court system.
- >>> **Judges should be advocates for justice outside the courtroom:** Despite their differing opinions on the role judges can play when faced with injustice in the courtroom, panelists agreed that judges should be advocates for justice outside the courtroom. Judges should educate the public about problems in the criminal justice system, and can speak with the authority of their judicial role and personal experience for reforms to the system that would improve the administration of justice.

## JUDICIAL CONTROL OVER BAIL

**Panelists:** Cynthia Jones (moderator), Professor of Law, American University Washington College of Law; Hon. Ronald B. Adrine, Administrative and Presiding Judge, Cleveland Municipal Court, Ohio; John T. Chisholm, Milwaukee County District Attorney, Wisconsin; Ezekiel Edwards, Director, Criminal Law Reform Project, American Civil Liberties Union; Colette Tvedt, former Director, Public Defense Training and Reform, NACDL

Avoiding unnecessary pretrial detention should be of paramount importance to every court system. Bail systems that do not consider a defendant's ability to pay 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, and receive harsher sentences. Panelists discussed bail reforms that are moving away from monetary bail and reducing the number of pretrial detainees in some jurisdictions. They also considered how judges can help spread these best practices more consistently across the country.

## **Jones called on each of the panelists to set bail for Mr. Smith, using the procedures of a specific jurisdiction, to demonstrate the wide variation in how bail determinations are made across the country.**



### **PRETRIAL RELEASE DISPARITIES DRIVEN BY GEOGRAPHY, NOT BY RISK**


Cynthia Jones, Professor of Law at the American University Washington College of Law, launched the panel by presenting the case of Charles Smith, a fictional arrestee typical of people who appear in front of judges at bail hearings every day. Smith was arrested by a police officer who claims he saw Smith buy drugs. Police found a small amount of cocaine and a crack pipe in Smith's pocket after the arrest. They also found a few bullets in a backpack he was carrying. Smith is 19 years old and has two prior arrests for drug possession. One drug arrest led to a case that was dismissed by the prosecutor five years ago, and Smith is still on probation for the conviction that followed the second arrest. Smith also has a prior arrest for simple assault on a prior girlfriend; that case was dismissed when the girlfriend failed to appear in court on multiple occasions. Smith has not missed any court dates for his prior cases. He also has been pretty successful on probation: he has missed a few probation appointments, had two dirty and six clean drug tests, and is on a waiting list for a GED program.

Jones called on each of the panelists to set bail for Mr. Smith, using the procedures of a specific jurisdiction, to demonstrate the wide variation in how bail determinations are made across the country.

Ezekiel Edwards, Director of the Criminal Law Reform Project at the American Civil Liberties Union (ACLU), played the role of a judge in Scott County, Mississippi, a jurisdiction in which the ACLU has studied pretrial release practices. Edwards reviewed the sheriff's bail recommendation of \$7,500 and quickly set Smith's bail at that amount. "If you waive your preliminary hearing I

might reduce that amount. If you have a preliminary hearing you need counsel, and you won't get appointed counsel until you are arraigned on the indictment in a year or more." With the threat of extended pretrial detention behind him, "Judge Edwards" urged Smith to waive his right to a preliminary hearing.

The Honorable Ronald B. Adrine, the Administrative and Presiding Judge in Cleveland Municipal Court in Ohio, set Smith's bail using the procedures he follows in real cases in his court. Adrine noted that bail hearing dockets in Cleveland often involve 50 cases, and the only information judges receive from pretrial services is an accused individual's criminal history. Adrine quickly weighed Smith's uneven probation history and the fact that he was on probation at the time of arrest against Smith's record of appearing in court and a positive release recommendation from the public defender. He then set Smith's bail at \$2,500, payable in cash, by bail bond, or a largely refundable 10 percent deposit with the court.



**The DOJ convening was transformative for Adrine. When he returned to Cleveland he shared the evidence with his judicial colleagues throughout Cuyahoga County and they collectively began to reform their pretrial release policies.**

John T. Chisholm, the District Attorney in Milwaukee County, Wisconsin, acted as a judge setting bail according to procedures common on Milwaukee prior to 2007. Chisholm noted that in his jurisdiction the case is charged as a felony because it is a subsequent offense. At Smith's fictional bail hearing, the prosecutor noted that Smith was on probation at the time of arrest and recommended bail of \$1,000. The public defender requested a personal recognizance bond so that Smith could be released if the probation violation is withdrawn. "Judge Chisholm" expressed particular concern about the bullets found in Smith's backpack and followed the state's recommendation to set bail at \$1,000.

Colette Tvedt, NACDL's former Director of Public Defense Training and Reform, assumed the role of a judge in Mesa County, Colorado, where she has been involved in a program to train defense lawyers on a new state pretrial release law. Tvedt discussed how Colorado's pretrial risk assessment tool would put Smith on the top end of risk level two with a score of 37. The tool increases Smith's risk score because he was only 14 at the time of this first arrest, he was

on supervision at the time of the current arrest, he is a high school dropout, he does not have a job, and he lives with his grandmother and is not paying for housing. Noting that Colorado judges are not required to follow the risk assessment when setting bail, “Judge Tvedt” declined to set bail at the recommended amount. She instead cited Smith’s multiple arrests and lack of prospects before setting a higher bail of \$50,000.

In the final bail hearing, Jones acted as a judge in the District in Columbia, where she previously practiced as a public defender. Jones noted that an Assistant U.S. Attorney and public defender both would be present for Smith’s misdemeanor bail hearing in DC. “Judge Jones” released Smith without conditions and ordered him to check in with pretrial services.

After the panelists reached their bail determinations, a number of judicial conference participants described how Smith’s bail would be set in their courts. These descriptions revealed even more variations in state and local bail practices across the country, including variations in the amount of bail that would be set, if any; non-financial conditions that would be imposed on Smith’s release; and whether defense counsel would be present at the bail hearing.

## THE STATE OF BAIL REFORM IN THE STATES

Panelists reflected on reforms that have succeeded in reducing 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.

**Chisholm reported that these pretrial reforms produced a dramatic reduction in Milwaukee’s pretrial jail population, and also have reduced disparities in pretrial incarceration.**



Adrine explained that his county, like many others, used a bail schedule and imposed monetary bail on low-risk defendants up until two years ago. Then, in 2015, Adrine attended the Department of Justice’s convening “A Cycle of Incarceration: Prison, Debt, and Bail Practices,” where he was exposed for the first time to the tremendous amount of research that exists on pretrial detention. The evidence is overwhelming that there is no nexus between flight risk and ability to pay bail, and that bail practices like those his county used to have harm low-risk and low-income people in ways that can be devastating even when people are detained for only three days.

The DOJ convening was transformative for Adrine. When he returned to Cleveland he shared the evidence with his judicial colleagues throughout Cuyahoga County and they collectively began to reform their pretrial release policies. Judges unanimously agreed to eliminate monetary bail for people accused of nonviolent misdemeanors if they do not have any other pending charges, and to release such people on their own recognizance. During the first year of this policy change, the pretrial jail population decreased from 167 to 67, and there was no increase in failures to appear or in new offenses involving violent behavior committed by released individuals. Judges in Cleveland also are working with the Laura and John Arnold Foundation to adopt the Public Safety Assessment (PSA) tool to give judges a higher degree of confidence in their appraisal of risk as they transition away from routine imposition of monetary bail.

Chisholm described how Milwaukee began its own bail reform process in 2007. In 2006, the Milwaukee County District Attorney's office engaged in a self-assessment focused on racial disparities. While the office found that it charged cases pretty evenly overall, it learned that the greatest disparities involved low-level offenses where information involving prior contacts with the police and supervision status affected charging decisions. At that time, the court system did not have any capacity to screen people for risk in an effective way. "In the absence of information, all you see is risk," Chisholm remarked.

In 2007, Milwaukee County obtained the resources to dramatically expand pretrial services and it implemented universal pretrial screening. Milwaukee has continued to refine its risk assessment tool, and currently is working with the National Institute of Corrections on risk assessment as part of the MacArthur Foundation's Safety and Justice Challenge. Milwaukee judges still impose monetary bail, but generally set bail within 15 percent of the amount recommended through the screening process. Defense lawyers always have represented arrested individuals at bail hearings in Milwaukee, but now they are able to make the case for release using the pretrial services report and mental health screening in addition to information provided by their clients, who may not have access to many sources of information immediately after arrest.

Chisholm reported that these pretrial reforms produced a dramatic reduction in Milwaukee's pretrial jail population, and also have reduced disparities in pretrial incarceration. Milwaukee tracks re-arrest rates among released individuals, and generally has seen good results. When the data has indicated that recidivism is increasing for a specific category of offense, such as auto thefts, Milwaukee has responded by tweaking how the screening tool assesses risk for that offense category. Chisholm emphasized that ongoing data collection has been key to Milwaukee's ability to sustain buy-in for bail reform for the past ten years.


Tvedt related her experience working on pretrial release issues on behalf of NACDL in New Jersey and Colorado. Changes to New Jersey's pretrial release laws went into effect January 1, 2017, and New Jersey now is using the Arnold Foundation PSA tool statewide. Prior to 2017, New Jersey held over 5,000 people in pretrial detention, and over 1,500 of those were being held because they could not afford to pay \$2,500 or less to obtain release. Pretrial detention has dramatically decreased under the new system; only 10 people were held on monetary



bail in New Jersey between January 1 and early April 2017. Tvedt noted that bail reform in New Jersey had proved so successful in large part because judges, prosecutors, and defense attorneys spent two years preparing for the transition, which produced widespread confidence in the new system.

Implementation of a similar bail reform effort in Colorado that began in 2013 has been more uneven, according to Tvedt. Defense lawyer training on new pretrial release practices has been strong and coordinated through the statewide public defender, but the state's judges did not receive similarly comprehensive training. Judges in some parts of the state do not fully understand or trust the new risk assessment tool, are reluctant to follow bail recommendations produced with the tool, and instead are continuing to set bail by instinct. The Denver municipal court judges had to be sued before they would agree to use the state's risk assessment tool. In Colorado jurisdictions where judges are using the state's risk assessment tool — such as in Denver, post-litigation — pretrial release rates have increased. Colorado jurisdictions that have not embraced bail reform continue to see high rates of pretrial incarceration.

**While Edwards urged jurisdictions that had not reformed their bail practices to do so, he also sounded a note of caution about how the use of pretrial risk assessment tools, a common component of reform, can perpetuate racial disparities in the criminal justice system.**



Edwards described his work in two jurisdictions that continue to use monetary bail. He started his career in the Bronx, where many individuals charged with minor offenses have bail set in amounts ranging from \$500 to \$1,000. Although the relatively low bail amounts suggest that judges do not consider these individuals to be threats to public safety, many people nevertheless remain in jail for months because they cannot afford to pay even \$500. Human Rights Watch has found that 82 percent of the people detained at Rikers Island in New York City are being held on these low bail amounts.

Of even greater concern to Edwards are jurisdictions where the ACLU works in the south, where people are detained on bail set at hearings that fail to meet the most basic requirements of due process. For example, in Scott County, Mississippi, judges set bail in felony cases without

an individualized hearing or a defense lawyer in the room. People who do not have money to post the bail amounts set at these unconstitutional hearings will be held in jail for months or even years, still without a lawyer, until they are indicted. Judges in Scott County will not appoint counsel until indictment, which is another constitutional violation, and there is no limit on how long the prosecutor can wait to indict other than the statute of limitations.<sup>9</sup>

While Edwards urged jurisdictions that had not reformed their bail practices to do so, he also sounded a note of caution about how the use of pretrial risk assessment tools, a common component of reform, can perpetuate racial disparities in the criminal justice system. Tvedt seconded his concern. As an example she flagged how Colorado's risk assessment tool — which is not the PSA tool used in many jurisdictions — relies on age of first arrest as a risk factor, even though that is not a validated factor for risk and is likely to have a disparate impact on people of color who grow up in communities with a heavy police presence. Edwards stated, "If racial equity were the primary goal of your risk assessment tool, you could construct a tool where you would weigh information differently to maximize equity. These tools don't do that. They're designed to assess risk; equity is a secondary consideration." Tvedt emphasized that risk assessment is only one tool defenders can use to better represent their clients at bail hearings. "You also need to know and tell the court about your client, and to remind the court that the presumption should be release on recognizance."

## OPPORTUNITIES FOR JUDGES TO ADVANCE BAIL REFORM

Panelists agreed on several strategies judges can follow to advance bail reform.

- >>> Judges should educate themselves, their peers, and the public about pretrial detention and bail reform:** Panelists encouraged judges to learn as much as they possibly can about bail reform and the consequences of pretrial detention, and to share that information with as many of their colleagues as they can. Judges should use that information to make changes in their own courtrooms and their state and local justice systems. Even when bail reform comes from the legislature rather than the judiciary, education plays a vital role in developing judges' trust in new tools and procedures so that reform can be implemented successfully. Several panelists also suggested judges be leaders in educating the public about what is wrong with the current system and why it must be reformed.
  
- >>> Judges should accept risk in pretrial decision-making:** Panelists acknowledged that judicial risk aversion is a barrier to bail reform; the fear of one bad case in which a released defendant commits a serious crime can make every release decision feel risky. Judges must accept that risk when they make bail decisions in order to avoid imposing devastating costs on communities and taxpayers — just as they accept risk when they sentence people to probation instead of jail. To help judges accept pretrial risk, other judges and criminal justice stakeholders must share that risk and stand up for each other when a bad outcome

occurs. Judges often cannot speak for themselves when something bad happens in one of their cases, so they rely on others who are willing to defend the practices that created the risk. Chisholm also suggested that judges consider how criminal justice systems can create formal structures that help stakeholders build trust and share risk, citing criminal justice coordinating councils as one example. Risk assessment tools are another structure that distributes risk across stakeholders.

>>> **Judges should be cautious about replacing monetary release conditions with other types of conditions:** Edwards and Tvedt both noted that they had seen some judges impose an increasing number of non-monetary conditions, such as drug testing or electronic monitoring, as a “compromise” between monetary bail and release on recognizance. These non-monetary conditions may make some judges feel less exposed to political risk, but they do not serve a public safety purpose unless they are related to an individual’s risk factors. Many non-monetary conditions also involve fees, so they can be traps for the poor and produce disparities similar to monetary bail. More fundamentally, judges cannot shortcut their obligation to make individualized pretrial release determinations by swapping out bail schedules for a standardized list of non-financial conditions.

## IMPLICIT BIAS AND THE COURTS

**Speaker:** *Hon. Kevin S. Burke, Judge, Hennepin County District Court, Minnesota*

In his keynote address, the Honorable Kevin S. Burke, a district court judge in Hennepin County, Minnesota, encouraged judges to critically examine their own practices and biases in order to move the criminal justice system closer to its ideals. “Former congresswoman Barbara Jordan said that what the people want is an America as good as its promise. I think that’s what people want from the criminal justice system too.”

Burke suggested that the first step toward fulfilling the criminal justice system’s promise to deliver justice is for judges to own up to the fact that they are “part of the mess.” Other people — including legislators, prosecutors, and defense attorneys — are part of the mess too, but judges cannot start making things better until they take responsibility for their own contributions to injustice.

One part of taking responsibility must involve gathering and examining 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. Too often courts even focus on data points, such as fine and fee collection rates, in ways that might promote unfairness. Burke suggested judges should continue to use data to examine their own performance, but they should shift their focus to data related to fairness.

As an example of how to use data to promote fairness, Burke shared the results of a survey he administered to over 550 individuals who appeared in criminal court in Hennepin County.<sup>10</sup> When asked to rate whether the judge made sure they understood the court decision on a 9-point scale, respondents provided an overall rating of 6.78. When asked to rate on the same scale whether the judge listened to their side of the story, people responded with an overall rating of only 5.65. The survey results also revealed racial disparities, with people of color providing lower ratings for whether judges explained things to them or listened to their side of the story.

Burke challenged judicial conferees to use his survey in their own jurisdictions, and to not be afraid of seeing what their practices look like from the other side of the bench. They can use the survey results to see their own biases and make their courts fairer. For example, in Burke's survey results, the individual judges who received especially high ratings for litigant understanding were those judges who believed that it was their exclusive responsibility to make people understand what was happening in court; these judges did not tell litigants that probation officers or their defense attorneys would explain it later. Judges who receive low ratings in this area can adopt similar practices to improve their performance.



## **Judges must focus attention on their own staff members, whose impact on how people perceive courts' fairness can fly under the radar because they often communicate with litigants outside of judges' presence.**

Once judges let down their own defenses to examine measures of fairness in their courts, they then need to focus on how to effectively communicate with others about these problems to solve them. Burke stated that "the converted" judges like those attending the conference must work together to find language to describe courtroom injustices that does not immediately make other people defensive. Judges must focus attention on their own staff members, whose impact on how people perceive courts' fairness can fly under the radar because they often communicate with litigants outside of judges' presence. Judges also should share best practices with new judges as soon as they get on the bench. People new to judging often are new to criminal law as well. They can become risk-averse if they are not provided with tools to help them develop confidence exercising their judgment in criminal cases, where public safety and personal liberty both are at stake.

Burke remarked that making courtrooms more fair and moving the criminal justice system closer to its promise will require a sustained effort from judges. It is easy for judges and other courtroom regulars to revert back to old habits. Burke urged judges to make that effort. “You must be all in. You can just do the best you can. But you have to do everything you can.”

## CONTROL OF THE CASE AND COUNSEL

**Panelists:** *Ellen Yaroshefsky (moderator), 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; 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; Steve Zeidman, Professor of Law and Director, Criminal Defense Clinic, The City University of New York School of Law*

An overwhelming percentage of misdemeanor cases are disposed of at an individual’s initial appearance in court after an arrest. 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. Panelists explored the question of whether it ever is appropriate for a judge to accept a guilty plea at initial appearance.


### PLEAS AT INITIAL APPEARANCE: DO VARIATIONS IN LOCAL PRACTICE MATTER?

Steve Zeidman, Professor of Law and Director of the Criminal Defense Clinic at the City University of New York School of Law, described initial appearance proceedings in New York City. In New York, initial appearance hearings are held approximately 24 hours after arrest. The judge, the prosecutor, and the defense attorney barely know anything about the case yet, and the arrestee probably has not slept, eaten, washed, or had an opportunity to talk with any family or friends about his or her arrest. Zeidman does not believe that pleas at initial appearance are ethically or constitutionally appropriate: “The only thing anyone is prepared to do at that point is process the case; no one has the information necessary to adjudicate it.”

The Honorable David M. Rubin, a superior court judge from San Diego, California, was not willing to give a categorical answer to the question of whether it is ever appropriate for a judge to accept a guilty plea at the initial appearance. In his state, many people who are arrested for misdemeanors bond out according to the local bail schedule shortly after arrest, and they do not appear in court — either personally or through counsel — until roughly a month later. Rubin performed an informal survey of approximately five counties in California, and in all of them defense attorneys receive the police report and have an opportunity to review it before the initial appearance. The timeline is very different than in New York. If the person accused of

a crime is represented by a defense attorney who has reviewed the police report, has had the opportunity to discuss the case with counsel, and wants to admit guilt and dispose of the case, then Rubin feels he must tread carefully with questions about the plea deal in order to avoid interfering in the attorney-client relationship. Rubin stated that controlling the case is part of his institutional role as a judge, but in that role he recognizes there is much he does not know about plea considerations in the cases in front of him.

Vicki Hill, City Prosecutor in Phoenix, Arizona, related how in her jurisdiction the initial appearance takes place within 24 hours of arrest. The defense attorney often meets the arrested individual for the first time in court and receives the police report and any other discovery that is available, such as a rap sheet, from the prosecutor. Many cities in Maricopa County provide discovery at the initial appearance. In Phoenix, parties sometimes will agree to guilty pleas at that proceeding.




**Delivery of the police report to defense counsel was the main factor that separated jurisdictions where pleas at initial appearance are sometimes considered appropriate from those where they generally are not.**

Michael N. Herring, Commonwealth's Attorney in Richmond, Virginia, discussed how the initial appearance in his state is primarily a notice hearing. In almost all cases, the arrested individual does not have an attorney at the initial appearance, or is represented temporarily by a public defender who will not stay on the case. Even if there is a defense attorney at the initial appearance, discovery is not ready until weeks after that hearing, and the attorney almost certainly has not spoken to the arrested individual before the hearing. Under these circumstances, "there's almost no scenario where a plea at the first appearance is appropriate unless it is a sympathy plea — for example, involving a defendant who's not going to be able to bond out," Herring remarked.

Yaroshefsky, the moderator, noted that panelists' comfort with guilty pleas at initial appearance seemed to be linked to variations in local practice, such as the timing of discovery. She pushed them to identify the specific practices, if any, which would make a plea deal at initial appearance acceptable to them.

Delivery of the police report to defense counsel was the main factor that separated jurisdictions where pleas at initial appearance are sometimes considered appropriate from those where they generally are not. For Rubin, the only judge on the panel, delivery of even this limited discovery to defense counsel marked the moment when counsel knows more about the case than he does as a judge. “I don’t know what the defense attorney may know. Maybe everybody’s trying to plead fast because there’s a problem in the case. Maybe the defendant has exposure to a more serious case that hasn’t been charged that both sides know is out there but I don’t know about,” Rubin stated.

**Rubin discussed how, in cases where he is uncomfortable with a plea, he will initiate a conversation with the parties, remind them of the goals of the judicial process, and ask them whether they can accomplish those goals by handling the case a different way.**



Zeidman challenged the premise of the moderator’s question: “We’re starting from the premise that we’re looking for a justification for this — we know it’s done a lot, so what would make it ok? We’re thinking about this wrong. It’s never appropriate to enter a guilty plea when no one in the courtroom knows much of anything about the case — about the charges, the accused, the arresting officer, or any complaining witness.” Zeidman cited stop-and-frisk practices in New York as an example of an injustice that did not come to light for too long because quick pleas, and the resultant lack of litigation, buried the story in lots of cases. Zeidman acknowledged that some people who cannot post bail may want to accept a fast plea because they see it as the only route out of jail, but argued the real issue is the coercive nature of using bail to compel someone to plead guilty. In situations like that, defense lawyers must think carefully about how they talk to clients about the impact of pretrial detention versus the risks of uninformed pleas, possibly unfounded convictions, and unknown collateral consequences.

**PLEAS AT INITIAL APPEARANCE:  
DOES THE CHARGE OR TYPE OF PLEA OFFER MATTER?**

Panelists discussed whether the type of offense, or whether the defendant was offered a diversion or other favorable disposition short of immediate dismissal, affected whether they were comfortable with taking a guilty plea at initial appearance. Conference participants actively contributed to this part of the discussion.

Cases involving people experiencing homelessness are common in misdemeanor courts. While some jurisdictions accept pleas at initial appearance in these cases, particularly if the plea is linked to a diversion program that connects homeless people to services, participants expressed concern that the difficulty homeless people have in posting any type of monetary bond created a risk they would accept an early plea offer just to get out of jail. For example, Hill stated that if she believed a homeless individual wanted to plead guilty only because he could not afford to bond out of jail, she would ask the judge to release the individual rather than accept a plea at initial appearance.

Most panelists and participants also were uncomfortable with guilty pleas at initial appearance in drug or driving under the influence cases when lab reports are not available. Attendees noted examples of cases where people had pleaded guilty to drug offenses only to have lab tests come back negative for drugs after the plea. Several judicial attendees discussed how acquittal rates at trials for driving under the influence are high in their courts if the case does not have breath or blood tests, which made them uncomfortable with early pleas in that type of case if test results were outstanding or tests had not been taken at all.

Rubin discussed how, in cases where he is uncomfortable with a plea, he will initiate a conversation with the parties, remind them of the goals of the judicial process, and ask them whether they can accomplish those goals by handling the case a different way. But if that conversation does not produce a different outcome, he feels limited in what he can do in these situations consistent with his judicial role; he has little authority to dismiss a case under state law, and he does not think it is appropriate for a judge to put pressure on parties in plea negotiations. Rubin explained that he sometimes handles these cases by accepting a contingent guilty plea that is subject to the receipt of test results and postponing sentencing until test results are available.

A number of participants from New York State debated whether adjournment in contemplation of dismissal (ACD) dispositions at first appearance are acceptable. ACDs are the most common disposition at first appearance in New York misdemeanor courts, and result in a case being dismissed and sealed in 6 to 12 months if the person does not reoffend during that period. Some participants argued that defense attorneys are able to review the complaint and rap sheet at the initial appearance, and that information is sufficient to allow them to determine whether an ACD is a good deal for the client. Other participants forcefully responded that the fact that so many people receive ACDs indicates that the cases are not serious enough to warrant being charged as crimes in the first place, and that even a disposition as seemingly innocuous as an ACD carries potential negative consequences for the accused (e.g., limiting some kinds of civil lawsuits).

## **OPPORTUNITIES FOR JUDGES TO IMPROVE JUSTICE AT INITIAL APPEARANCE**

Panelists had a variety of views about the role judges should play when presented with a guilty plea at the initial appearance, but did identify some areas of consensus.



- >>> **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:** Particularly in low-level cases in which an individual would be released upon conviction, the risk that the threat of pretrial detention will coerce an uninformed guilty plea outweighs any risk that immediate release without financial conditions would pose to public safety. Judges should set bond in a manner that does not allow release to be traded in exchange for a guilty plea. Judges also should schedule cases so that an individual who needs more time to confer with an attorney or to wait for lab results can do so without risking additional months of pretrial detention before the next case setting.
- >>> **Judges should reflect critically on accepted practices in their courtrooms:** Judges should regularly ask themselves whether early discovery or similar considerations in their jurisdictions truly provide an adequate foundation for an informed guilty plea at initial appearance, or whether they are comfortable with early pleas because that is the established culture and it is easier to seek justifications for that culture than to challenge it. Several participants encouraged judges in misdemeanor courts to consider whether their local culture inappropriately discounts the consequences of a misdemeanor conviction and tolerates practices that would not be acceptable in felony court.
- >>> **Judges should advocate for a multi-branch response to the conditions that create incentives for pleas at initial appearance:** Misdemeanor case volume and monetary bail systems generate many of the pressures that drive the practice of pleas at initial appearance. Judges cannot dismiss cases at will, but they can speak publicly if some of the offenses they see in their courts do not warrant arrest, pretrial detention, and the stigma of a criminal conviction. Judges can provide legislatures with information about how current laws are impacting real people in the courts.

## CASE DISPOSITION AND ITS CONSEQUENCES

**Panelists:** Peter A. Joy (moderator), Harry Hitchcock Professor of Law and Director, Criminal Justice Clinic, Washington University in St. Louis School of Law; Christopher Ervin, Founder and President, The Lazarus Rite Inc., and Community Organizer, Baltimore, Maryland; Carlos J. Martinez, Miami-Dade County Public Defender, Florida; Jenny Roberts, Professor of Law, Associate Dean for Scholarship, and Co-Director, Criminal Justice Clinic, American University Washington College of Law; Hon. Edward J. Spillane, College Station Municipal Court, Texas

Misdemeanor prosecutions often are 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 also are

subject to exorbitant fees, fines, and costs that are assessed without any consideration of defendants' 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. Panelists considered the role of judges in ensuring that people accused of crimes understand the collateral consequences they will face if convicted. They also discussed what judges can do to reduce the impact of collateral consequences.

## **AN OVERVIEW OF COLLATERAL CONSEQUENCES**

Jenny Roberts, Professor of Law, Associate Dean for Scholarship, and Co-Director of the Criminal Justice Clinic at the American University Washington College of Law, opened the panel by providing an overview of the many formal and informal collateral consequences that flow from criminal convictions. Formal collateral consequences are consequences that are laid out in laws and regulations. Examples of formal collateral consequences include deportation following a misdemeanor drug conviction, under federal immigration law; ineligibility for jobs in or relating to a bank following a misdemeanor theft conviction, under the Federal Deposit Insurance Act; and lifetime sex offender registration following a conviction for public urination, under California state law.



**Martinez argued that judges should directly ask people what they understand about collateral consequences, rather than asking them if they have discussed those consequences with a defense attorney.**

Informal collateral consequences arise when employers and landlords obtain criminal history information from public databases and use that information when they consider applications for employment or housing from people with criminal convictions. Use of criminal history information in this manner may violate Title VII or Title VIII of the Civil Rights Act of 1964 if it produces a disparate impact on one group with a protected characteristic such as gender or race.

Roberts explained that most of the case law concerning collateral consequences focuses on the scope of defense attorneys' and judges' responsibility to advise people facing criminal charges of those consequences. There also is some case law addressing whether certain consequences, such as parole eligibility, are collateral or direct.

## THE ROLE OF JUDGES IN ADVISING PEOPLE OF POTENTIAL COLLATERAL CONSEQUENCES

Panelists discussed the role judges play in ensuring that people who seek to plead guilty understand the collateral consequences they face and are making informed pleas.

In some cases involving people represented by defense counsel, judges attempt to discharge their responsibility to evaluate whether a plea is informed by directly asking the client and/or defense counsel about the nature and extent of the advice counsel has provided about collateral consequences. Carlos Martinez, the Public Defender in Miami-Dade County, Florida, rejected this approach, asserting that it involved an inappropriate judicial inquiry into attorney-client communications. To the extent the defense attorney's response to such an inquiry would be part of a record that could be used against a client in future proceedings, the question also pits the defense lawyer's duty of loyalty to the client against the lawyer's duty of candor to the court.

Martinez argued that judges should directly ask people what they understand about collateral consequences, rather than asking them if they have discussed those consequences with a defense attorney. In addition to being more consistent with the judicial role than delving into confidential communications, an open question into the accused's understanding is more likely to identify gaps in that understanding. It also establishes a routine that a judge can follow consistently in all misdemeanor cases, including the many misdemeanor cases in which the accused person is not represented by counsel.

The Honorable Edward J. Spillane, a municipal court judge in College Station, Texas, presides over a criminal court in which people are not facing jail time and often appear without counsel. In cases involving pro se defendants, "it's up to the judge to discuss collateral consequences," Spillane stated. He acknowledged that it is hard for judges to keep up with collateral consequences because there are so many and they frequently change, "but collateral consequences are a part of the punishment and a good judge should know what they are." Spillane recommended that judges maintain a checklist of collateral consequences, and specifically advise people of the collateral consequences most likely to impact them. For example, Spillane presides over a court that hears many traffic offenses, and devotes a lot of time to advising people about collateral consequences related to driving privileges.

Roberts flagged that judges must be careful to avoid violating the Fifth Amendment when they speak directly to defendants about collateral consequences. For example, a judge who asks if a defendant is a citizen could elicit a potentially incriminating response. Roberts suggested that judges can avoid this risk by informing all defendants of the potential collateral consequences of conviction for non-citizens. Vermont requires this approach by court rule. Roberts also noted that prosecutors may have an independent obligation to discuss collateral consequences in cases where they negotiate pleas with pro se defendants.

Panelists and attendees discussed the challenges involved in providing complete and accurate information about collateral consequences, whether a judge, defense counsel, or the prosecutor provides the information. Some defense attorneys noted that they are in a better position to provide specific and focused advice to their clients than a judge, because they have more information about the client, what collateral consequences are likely to apply in the client's situation, and what collateral consequences are most important to the client. Martinez agreed with this point, but noted that not all defense attorneys understand collateral consequences themselves, and a judicial inquiry can catch cases in which the attorney has not adequately advised the client of those consequences. Martinez and Roberts also discussed the importance of training judges on collateral consequences, so they do not provide inaccurate information to defendants. The Miami-Dade Public Defender provides a manual on collateral consequences to local judges, and Roberts' clinical students recently have raised issues relating to collateral consequences to the judge in a juvenile case.



**Spillane urged judges to advocate for expungement laws that are broad, clear, and nondiscretionary — for example, a law that would provide for the automatic expungement of most offenses committed before an individual turns 21.**

Although most of the conversation focused on providing information about collateral consequences at the time of plea, participants also discussed the importance of informing people about collateral consequences earlier in the process. Early information about collateral consequences empowers clients to ask their lawyers questions about the consequences that matter most to them before entering a plea. It also provides notice to people of what may be at stake if they are considering waiving counsel. The Uniform Collateral Consequences of Conviction Act calls for a “designated governmental agency or official” to provide notice of collateral consequences as soon as an individual is formally charged with a crime. Spillane noted that legislation pending in Texas would require judges and other magistrates to inform people about potential immigration consequences of conviction at the initial appearance.

## **THE ROLE OF JUDGES IN MITIGATING COLLATERAL CONSEQUENCES**

While expungement or sealing of criminal records is available as a matter of right in some jurisdictions under some circumstances, in other situations judges have discretion to grant or deny these mechanisms for relief from many of the collateral consequences of conviction. Panelists agreed that when judges have this discretion they should not deny expungement or

sealing because the convicted individual has not paid all of the fines and fees arising from the conviction. “The purpose of expungement is to let someone put something behind them that probably is keeping them from being able to pay fines and fees,” Roberts stated.

Several panelists wanted to move away from a discretionary expungement framework altogether. Spillane urged judges to advocate for expungement laws that are broad, clear, and nondiscretionary — for example, a law that would provide for the automatic expungement of most offenses committed before an individual turns 21. Roberts also argued in favor of automatic and free expungement, which would eliminate people’s inability to pay expungement fees and to hire expungement counsel as barriers to record relief.

Even with broader laws, however, panelists recognized that expungement provides only partial relief from the collateral consequences of conviction. For example, expungement of a conviction does not provide relief from immigration consequences. More generally, “with modern data you can’t un-ring a bell, so an expungement is not an expungement,” noted Martinez. Participants discussed how information about expunged criminal convictions often remains available on commercial databases and websites. Although there are examples of reforms that help address this problem — e.g., state laws limiting the sale of criminal records or criminalizing the disclosure of sealed records, or enforcement of laws requiring credit reporting agencies to maintain updated records — to date they have not been adopted or implemented broadly enough to stem the commercial distribution of expunged or sealed criminal records.

Given the limitations of expungement, participants emphasized other strategies that may be available to judges to curb the collateral consequences of conviction. Some judicial attendees noted how it was common in practice to accept pleas that were designed to avoid specific collateral consequences. For example, if a conviction for a minor offense would trigger sex offender registration and registration would not serve public safety, the parties can agree to and the judge can accept a plea to a different offense that does not require registration. Diversion programs, particularly if they involve pre-plea diversions, also provide a way for people to avoid conviction and thus many collateral consequences of conviction. Martinez suggested that prosecutors should not be the exclusive gatekeepers to diversion programs, and that judges should be able to make this route for avoiding collateral consequences available in cases they believe to be appropriate. He argued that judges also should be able to divert people without requiring them to enter a guilty plea, in order to make the diversion meaningful for avoiding immigration consequences.

Christopher Ervin, a community organizer in Baltimore and Founder and President of The Lazarus Rite Inc., repeatedly urged attendees to look beyond the question of how to navigate collateral consequences, and instead to advocate for their elimination. He emphasized the human impact of collaterals. “If someone can’t work because of a conviction, it affects their mental health, it affects how they eat, it affects how they treat their kids,” Ervin stated. “Collateral consequences are the punishment beyond the punishment. We should challenge the notion that there should be a life sentence for every conviction.”

Roberts responded that the legal distinction between direct and collateral consequences is punishment versus non-punishment, and as collateral consequences cannot be punishment they are legitimate only if they are justified by public safety. But in practice “there’s very little rationality as to how collateral consequences are passed and how they proliferate. There’s no demand for evidence that they advance public safety. Some go so far as to hurt public safety.” Roberts remarked. Participants provided numerous examples of collateral consequences that have no relationship to public safety.

## **OPPORTUNITIES FOR JUDGES TO IMPROVE JUSTICE FOR PEOPLE FACING COLLATERAL CONSEQUENCES**

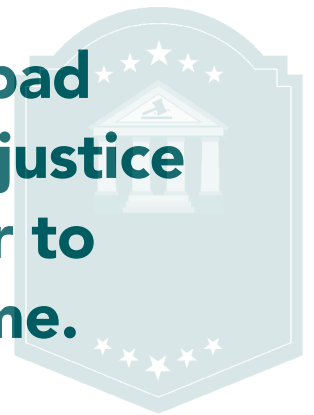
Panelists expressed several conclusions about the role judges should play with respect to the collateral consequences of criminal convictions.

- >>> **Judges should educate themselves and defendants about collateral consequences:** Judges have an independent responsibility to inform people accused of crimes of the potential collateral consequences they are facing, and to investigate whether people understand that information. In order to fulfill this responsibility, judges must educate themselves about collateral consequences. When discussing collateral consequences with defendants, judges should not delve into attorney-client communications or ask questions that might elicit incriminating statements. Judges should identify mechanisms to provide information about collateral consequences at early stages of a criminal case and not wait until a plea is being entered.
- >>> **Judges should advocate for broad and effective laws that provide for the expungement and sealing of criminal records:** Given the number and severity of collateral consequences, judges should advocate for laws that make the expungement or sealing of criminal records broadly available after people satisfy the direct punishment imposed in their cases, minus payment of fines and fees if an individual is unable to pay. Judges also should educate legislators and the public about how commercial distribution of criminal records limits the effectiveness of expungement, and urge legislators to adopt laws restricting the sale of criminal records and requiring commercial entities to maintain updated records.
- >>> **Judges should educate legislators about the human toll of collateral consequences and advocate to eliminate collateral consequences that do not promote public safety:** Legislators pass laws imposing collateral consequences in a piecemeal fashion, and often do not observe the cumulative effect of those consequences or how collateral consequences can lead to economic instability or recidivism in individual cases. Judges do see those things and should talk about them. They should advocate for changes in the law that eliminate collateral consequences that do not have a public safety purpose.

**Panelists:** Amy Bach (moderator), Executive Director and President, Measures for Justice; Hon. Steve Leifman, Judge, Eleventh Judicial Circuit Court of Florida, Miami, Florida; Hon. Lawrence K. Marks, Chief Administrative Judge of the Courts of New York State; Hon. Andra D. Sparks, Presiding Judge, City of Birmingham Municipal Court, Alabama; Hon. Nan G. Waller, Presiding Judge, Multnomah County Circuit Court, Portland, Oregon; Hon. Gayle Williams-Byers, Administrative and Presiding Judge, South Euclid Municipal Court, South Euclid, Ohio

During the final panel of the conference's first day, a group of judges reflected on suggestions made throughout the day about what judges should do to improve systems of justice. Panelists also discussed impediments to changing court culture and shared successful efforts to change court culture.

**Participants who want to change bad practices need to consider how their justice system's culture might be a barrier to change that they need to overcome.**



### WHAT IS THE CULTURE IN MISDEMEANOR COURTS?

Amy Bach, the Executive Director and President of Measures for Justice, opened by discussing what court culture is. Bach described culture as the relationship between norms and how people behave, and asserted that culture can determine case outcomes. Participants who want to change bad practices need to consider how their justice system's culture might be a barrier to change that they need to overcome. Bach asked panelists to describe the culture of misdemeanor courts and how bad practices manifest themselves in those courts.

The Honorable Lawrence K. Marks, Chief Administrative Judge of the Courts of New York State, described how the size and diversity of New York produced a variety of misdemeanor court cultures. Some misdemeanor courts have a very high volume while others do not. Statewide, nearly 50 percent of misdemeanor cases are resolved at initial appearance; in some places, that is not necessarily a bad thing because most cases are resolved by dismissals or ACDs, but in other places people are getting a conviction with little opportunity to consult with counsel or for counsel to investigate the facts of the case. Criminal trials are uncommon. Again, that may not be a problem in some places, but it becomes a problem in

a place like New York City where less than one-tenth of one percent of criminal cases go to trial. “At that point you’re going to have problems, because trials keep the system honest,” Marks stated.

The Honorable Nan G. Waller, Presiding Judge of the Multnomah County Circuit Court in Portland, Oregon, discussed how lack of self-insight is part of the culture she sees in misdemeanor courts. “Time and money are big barriers to culture change, but the biggest is lack of self-insight,” she noted. “There is a gap between what we think we are doing and what a lack of resources and time is pushing us to do.”

The Honorable Gayle Williams-Byers, the Administrative and Presiding Judge in the South Euclid Municipal Court in South Euclid, Ohio, discussed the challenges involved in getting legislators to take misdemeanor courts seriously. “The Framers didn’t write a different constitution for municipal courts, but there’s a perception that municipal courts serve a different function and are more of a profit-generating branch of government than a justice center,” Williams-Byers said. She noted that it takes a lot of courage for municipal court judges to stand up and insist on their role as part of an independent judiciary, but they must do so in order to rebuild community faith in the courts. “What happens to people at the municipal level forms their entire perception of the justice system. They get the impression that all the justice system cares about is their bank account or how many people they can shake down for money.”

The Honorable Andra D. Sparks, the Presiding Judge of Birmingham, Alabama’s municipal court, remarked that the biggest challenge he sees in misdemeanor court culture is getting people to recognize how serious misdemeanor cases are. They involve significant collateral consequences, and people facing minor charges often have other problems that could lead to more serious criminal justice system involvement if the misdemeanor is not handled correctly. “Municipal court is the front porch of the judicial system; right now we don’t starting dealing with people until they get into the back yard. We need to talk about pre-entry, not just reentry,” Sparks stated.

The Honorable Steve Leifman, a judge on Eleventh Judicial Circuit Court in Miami, Florida, agreed that judges should focus on how to prevent people from entering the system and not be satisfied with processing cases once people are already in the system. Leifman questioned the entire criminal justice model and urged judges to work with policymakers to move toward a population health model. Leifman noted that one out of every 104 adult Americans are behind bars, and 85 percent of all incarcerated people in the U.S. have a substance use disorder. Legislators have closed state hospitals and reduced spending on housing while the number of prison admissions has tripled since the 1980s. Leifman challenged the participants to ask themselves, “How do we work with all of the policymakers to help them realize this is a failed policy and hugely expensive?”



## CHANGING THE CULTURE OF MISDEMEANOR COURTS

Panelists provided examples of successful efforts to change to culture in their court systems.

Marks described New York's recent efforts to reform its town and village courts. These courts are in localities that often do not have holding facilities, so they conduct initial appearance hearings shortly after arrest. Historically, arrested individuals did not have access to defense counsel if their initial appearance in a town and village court occurred after hours. New York wanted to change this practice and make lawyers available at all initial appearance hearings, but one significant practical barrier was that some regional public defender programs covered areas that included several town and village courts and there was no way they could staff that many courts at night. Stakeholders overcame this barrier by building consensus for a successful legislative proposal that allows the state court system to designate a single town and village court in each county to conduct off-hours hearings, making it possible for public defenders to staff those centralized hearings. This approach was "a simple solution to a longstanding and serious problem," but the solution took years to emerge because it involved working across many jurisdictions and sharing judicial authority. Marks suggested participants may be able to identify similarly simple solutions that improve justice in their own court systems if they think beyond traditional boundaries and roles.

Leifman discussed how he had worked over years to reduce the arrest of people experiencing mental illness. Cases involving the mentally ill are a major contributor to misdemeanor case volume, and Leifman also finds them morally troubling: "We don't give them resources to get better, then punish them when they're not better and break the rules." Leifman first tried to change how his jurisdiction responded to the mentally ill when he was a public defender, but in that role he could not persuade other stakeholders to work with him. Once he became a judge, Leifman was in a position to get everyone to the table to discuss the problem. Through those meetings, stakeholders came to see that it was in their best interest to change. The court system developed pre- and post-arrest diversion programs for the mentally ill, and police were trained to interact with the mentally ill and avoid unnecessary arrests. The results of these new programs have been dramatic: From 2010 through 2016, the two largest Miami-Dade County law enforcement agencies responded to over 71,000 mental health calls but made only 138 arrests, the recidivism rate among the mentally ill decreased from 75 percent to 20 percent, and the local jail population decreased from 7,300 to 4,000. Leifman encouraged judges to use their moral authority to bring people together to solve problems in ways that other stakeholders cannot.

Waller talked about two recent efforts to change the culture in her court system. Waller was part of a justice reinvestment planning committee in Portland that included the district attorney, the police chief, and other judges. The committee accepted a challenge to reduce the jail population in four years. Every person on the committee had one vote, and every person had to agree to change practices in their own realm of responsibility. The committee met its goal, and as a result the state did not have to build new prisons. Portland has invested much of the money it saved through reduced incarceration into programs such as drug treatment and peer

support. Judges could not have achieved this outcome on their own. “True collaboration means that judges have to be comfortable being one of many, and working in settings where they do not have the final word,” Waller stated.

Judges in Waller’s jurisdiction also recently participated in a series of listening sessions in communities of color. “It is very hard for judges to open themselves up to community feedback, but those hours were the most profound hours I’ve had as a judge,” Waller said. In those sessions, she heard that the community does not distinguish what happens in the street with police from what happens in the courts when it thinks about the justice system; community members often do not understand what is happening to them in the justice system and no one explains it to them; and collateral consequences mean that there is never a road out of the justice system once you get in. One of the ways in which Waller’s court system is responding to community feedback is by making the court itself more welcoming to the community. The court has posted a code of expectations and trained staff to provide trauma-informed customer service. Even something as seemingly minor as providing people space to re-dress themselves after going through security signals judicial respect for the dignity of people who appear in the courts.

Sparks described his efforts to change both the public’s and legislators’ perspectives on what happens in misdemeanor courts. Last year he took the entire Birmingham municipal court staff on an overnight retreat where they focused on how to provide good customer service to everyone who interacts with the court. “People who appear in misdemeanor court are our neighbors and we should treat them that way. We’re going to see them in the grocery store and the mall,” Sparks stated. Sparks schedules late afternoon court four days a week so that people can come to court without missing work. His goal is to provide “accountability with compassion.” As an example of this approach, he cited a standing order pursuant to which he will waive all court fines and fees for people who obtain GEDs. His court also created a driver’s license recovery project through which his court pays appointed lawyers to help Birmingham residents clear holds in other cities that are preventing them from getting their licenses back and contributing to driving-with-a-suspended-license charges in Birmingham courts. Sparks noted that changing his court’s culture required communicating to city officials how waiving fees and investing more in programs benefits the community even though these practices reduce revenue from the courts.

Williams-Byers also discussed approaches to make misdemeanor courts more transparent and accessible. Her court live streams its proceedings in order to demystify court for the public, and offers regular night court so people who work day jobs do not have to miss work to attend court. “When you make people choose between feeding their kids and showing up in court, deciding to feed their kids is not a sign of disrespect to you. We just need to give people more options,” Williams-Byers said. She also described her practice of suspending fines if she thinks that community service or another alternative sentence is more likely than a financial penalty to change people’s behavior. “I don’t know why we’re taught that if you’re speeding paying money is supposed to stop you,” Williams-Byers remarked. “Judges can have a bigger impact if we don’t just take the money and run.”

# WORK GROUP CONVERSATIONS

## INTRODUCTION

On the second day of the conference, invited conference attendees participated in work group sessions designed to engage them in interactive discussions about topics raised in the first conference day's panels and presentations.

**Early case screening by prosecutors could relieve some of the pressure volume places on the administration of justice, and knowing that individuals will be represented by counsel may make prosecutors take a harder look at cases before proceeding with charges.**




Work groups addressed ten different topics related to judicial responsibility for justice in criminal courts. Each work group had two sessions, one in the morning and one in the afternoon, and an assigned leader who convened both of that work group's sessions. Each attendee participated in work group sessions on two different topics, one in the morning and another in the afternoon. Every work group session included judges, as well as other lawyers who work in the criminal justice system.

Work group sessions provided participants an opportunity to respond to many of the practices, critiques, and suggestions discussed by panelists on the first day of the conference. Work group conversations also explored some topics in more depth than was possible during conference panels. Work group leaders identified recommendations that emerged from these broader and more extended conversations. While the recommendations from each work group reflect the general consensus that developed during at least one of the work group's sessions,<sup>11</sup> they do not necessarily reflect the position of all work group participants or other conference attendees.

## COURTS WITHOUT COUNSEL AND JUDGES WITHOUT LAW DEGREES

**Work Group Leader:** Robert C. Boruchowitz, Professor from Practice and Director of the Defender Initiative, Seattle University School of Law

This work group considered a problem that exists in many states: misdemeanor courts that are overburdened with minor offenses, and in which individuals are convicted of criminal offenses without ever seeing a defense attorney or perhaps any lawyer at all.<sup>12</sup> In some cases, these lower criminal courts are used to generate fines and fees to support local government, without regard to the greater costs imposed on society. Work group participants discussed how judges can best respond when these issues present themselves in their courts, and how courts can obtain the resources needed to address these challenges at a systemic level.



**Rather than using diversion to enable only selected individuals to avoid conviction for low-level offenses, decriminalizing some offenses may provide a more transparent and equitable way to reduce the burden of low-level cases on courts and on communities.**

### DISCUSSION

A number of participants related their experiences in court proceedings, including initial appearance proceedings, in which neither the state nor the defense was represented by counsel. Unrepresented individuals often do not understand the legal issues that are relevant at a specific proceeding and, particularly if they are in custody, may not be able to gather and provide relevant information. As a result, in the absence of defense counsel, it is difficult for judges to obtain information that would allow them to make fully informed decisions on issues such as bail.

While judges have an obligation to provide individuals with information about their rights in criminal court, many participants expressed discomfort with placing judges in the position of being the sole source of legal information in the courtroom. The boundaries of judges' institutional role may not be obvious to individuals who appear before them. People who are in dialogue with a judge may not understand the risks involved in arguing their own case, or the consequences of making an incriminating statement in open court. At the same time, warning individuals about these risks may silence them and leave them without anyone to present their side of a case.

Work group participants also discussed the importance of having a prosecutor present at all judicial proceedings, particularly as it becomes more common to have defense lawyers at every proceeding. Participants expressed discomfort with scenarios in which only one party in a case is represented by counsel. Direct prosecutorial involvement earlier in cases also can help prosecutors identify weak cases and dismiss them more quickly.

The high volume of cases in misdemeanor courts was a recurring theme of the work group discussion. Participants repeatedly cited the logistical difficulties and expense involved in affording basic due process protections, such as representation by counsel, when there are so many cases. Early case screening by prosecutors could relieve some of the pressure volume places on the administration of justice, and knowing that individuals will be represented by counsel may make prosecutors take a harder look at cases before proceeding with charges. Participants also discussed diversion programs as a way to mitigate case volume. However, many participants noted that diversion programs often leave individuals exposed to collateral consequences and thus do not eliminate the need for legal counsel. Some participants also expressed concern that factors such as education level, race, and immigration status can affect which individuals are allowed to enter diversion programs. Rather than using diversion to enable only selected individuals to avoid conviction for low-level offenses, decriminalizing some offenses may provide a more transparent and equitable way to reduce the burden of low-level cases on courts and on communities.

**Judges should not tell people they cannot talk, but should remind accused individuals that anything they say can be used against them.**



Work group participants focused part of their discussion on courts that adjudicate fine-only offenses. Although these are “non-jail” cases in which individuals rarely are represented by counsel, people frequently are jailed after a period of time for failure to pay fines and fees imposed in these cases. Many judicial participants expressed their frustration at working in

environments where they do not feel they have adequate, alternative means to hold low-income people accountable when they cannot afford to pay financial penalties that are easily satisfied by higher-income individuals.

Participants did not identify an easy solution to this or other challenges, but agreed that judges should use their convening authority to start conversations about these topics in their home jurisdictions. Judges can bring stakeholders together to focus their attention on the costs current policies impose on communities and taxpayers — including, most concretely, jail costs — and to build system-wide support for adopting alternative practices shared at the conference, such as decriminalizing traffic offenses.

## RECOMMENDATIONS

- >>> **Individuals accused of criminal offenses should be represented by a lawyer at every court proceeding:** 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 will be jailed, including for failure to pay fines and fees imposed in a fine-only case.
- >>> **The state should be represented by a prosecutor at every court proceeding:** 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.
- >>> **Judges should use their convening authority to reform practices that produce injustices in misdemeanor courts:** 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 offenses and other approaches that, by reducing case volume, can free up resources to improve the delivery of justice in the cases that remain.

## PROCEDURAL JUSTICE AND JUDICIAL INVOLVEMENT IN INITIAL APPEARANCES

**Work Group Leader:** *Steven Zeidman, Professor of Law and Director, Criminal Defense Clinic, The City University of New York School of Law*

Procedural justice suggests that accused individuals' attitudes toward the justice system are tied more to the perceived fairness of the process and how they were treated than to the perceived fairness of the outcome.<sup>13</sup> Initial appearances — at which accused individuals who have been held 24 to 48 hours with limited access to family, food, and sleep first encounter a judge and, in some jurisdictions, frequently enter an immediate guilty plea — often are confusing and dehumanizing experiences. Work group participants discussed steps judges in high volume courts can take to ensure that each individual defendant is treated with dignity and respect and perceives the process as fair. They also debated how judges should respond when an individual offers to plead guilty at the initial appearance.

## DISCUSSION

Participants explored how accused individuals and their families might perceive common initial appearance procedures. Often the judge is not on the bench when proceedings begin. In many courts, defense attorneys also are not present at the initial appearance. Accused individuals receive information about what is happening from court staff or the prosecutor before the judge ever appears. The judge, concerned the accused may make incriminating statements, may warn the accused not to speak.

If defense attorneys are present, accused individuals likely meet their attorneys for the first time in court. An accused individual may have only five or ten minutes to talk to the defense attorney about the case and the prosecutor's plea offer, and the entire conversation takes place in the courtroom or a nearby hallway. If the accused decides to plead guilty, the judge will rattle off a series of questions that ask for an answer of yes or no. The defense attorney, concerned the accused may make incriminating statements, may warn the accused not to go off-script.

While these and similar initial appearance procedures make it possible for overburdened courts, prosecutors, and defense attorneys to keep up with the crushing caseload of many misdemeanor courts, work group participants agreed that accused individuals were unlikely to perceive initial appearance proceedings as fair. Accused individuals barely get to tell their side of the story to their own attorneys, and do not get to tell it to the judge at all. No one looks for evidence to support the accused's side of the story. It probably feels like the only things courtroom regulars care about are what the arresting officer said and how quickly they can get rid of the case.

Work group participants discussed how judges might increase accused individuals' sense of "voice" at the initial appearance — that is, the perception that their side of the story has been heard — while still protecting people from making incriminating statements without awareness of the consequences. Participants noted that it was important how conversations about whether and when the accused should speak occur. Judges should not tell people they cannot talk, but should remind accused individuals that anything they say can be used against them. This information can help people understand why the judge and defense attorney are concerned about what they may say in court and prevent them from feeling silenced.

Participants also discussed how judges could provide more meaningful opportunities for people to tell their side of the story at the end of a case, when the risks of speaking are lower.

Participants debated how judges should respond to guilty pleas when information available to a judge suggests that the defense attorney and accused have met only that day and for a limited period of time, and defense counsel has not had an opportunity to investigate the case. Many judicial participants were uncomfortable with any hard-and-fast rule for or against accepting guilty pleas in these circumstances. Judges cannot and should not know everything about a case or the factors affecting the accused's decision-making at the initial appearance, and judges are reluctant to interfere in the defense attorney-client relationship by questioning the circumstances of the representation too closely. Some participants related that their jurisdictions use a series of forms that force defense counsel to slow down and cover specific points, such as collateral consequences, with the accused before a guilty plea. Many judicial participants also expressed comfort with asking open questions — such as “Why is this the plea offer?” — if they have concerns about a particular plea based on the facts known to them. Judges also can pause a case if an accused appears to be confused during the plea colloquy.

## RECOMMENDATIONS

- >>> **Judges should explain what will happen during the initial appearance so that procedures and roles are transparent to accused individuals and their families:** 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.
- >>> **Judges should increase accused individuals' sense of “voice” at the initial appearance:** Judges should explain the potential consequences of speaking but refrain from telling the accused not to speak. Judges should consider creating space 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.
- >>> **Judges should safeguard their responsibility to meaningfully review guilty pleas offered at initial appearance:** 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.



# IMPLICIT BIAS

**Work Group Leader:** *Hon. Steve Leben, Judge, Kansas Court of Appeals*

The concept of implicit bias refers to stereotypical associations so subtle that people who hold them may not even be aware of them. Individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on a daily basis. These attitudes and stereotypes are attributable to acquired associations (both favorable and unfavorable), upbringing, environment, social influences, media portrayals, news, and even history. Implicit biases are triggered involuntarily, and often affect the way people perceive and treat others.

**Judicial participants stated they do not receive training on how to have the difficult conversations needed to confront bias.**



In the criminal courts, implicit biases can influence behavior and decision-making at all levels of the judicial process, including the ways in which judges and court staff interact with people accused of crime, police and prosecutors make charging decisions, and public defenders make initial case evaluations. Implicit bias can lead to disparate outcomes in areas including bail, acceptance of plea conditions, and sentencing. Work group participants discussed how judges and others in the criminal justice system can be encouraged to acknowledge their implicit biases, as well as how they can more effectively counteract the effects of those biases.

## DISCUSSION

Work group participants discussed challenges they have experienced in getting some colleagues to recognize their own implicit biases and the impact implicit bias can have in the criminal justice system. Some people hear a conversation about implicit bias as an accusation of personal racism and therefore reject the idea that implicit bias may influence them, despite the fact that implicit bias is distinct from explicit bias and racism. Acknowledging racial effects in the criminal justice system also raises questions about what it means to work within that system that are uncomfortable for some people.

Even when people accept that implicit bias exists, it can be difficult for them to acknowledge its role in their own decision-making. Judges may see the effects of implicit bias in the criminal justice system at large, but individual judges tend to trust their own judgment. Judges also

usually look at one case at a time, which can make it difficult to perceive patterns that reveal the effects of implicit bias. Several participants discussed how seeing data that documented racial disparities in decisions about matters such as bail amounts helped them confront their own implicit biases.

Data on racial disparities is not the only way to raise awareness of the effects of implicit bias. Some work group participants related how judicial performance reviews that included observation of their court interactions with different accused individuals helped them reflect on their implicit biases. Other participants endorsed the value of talking to people in the community about how they perceive the justice system, and being open to hearing where community members see examples of court bias.

Participants noted that being aware of the effects of implicit bias on judging is not sufficient to neutralize it. One of the most effective ways to counteract implicit bias is to focus on individual characteristics instead of defaulting to stereotypical associations. But it's very difficult to execute this approach in high-volume courts where cases are moving so quickly that the people in them are reduced to names and numbers. Humanizing individuals to counteract implicit bias takes time that many misdemeanor court judges do not have. Participants discussed how adopting practices associated with procedural justice, such as treating accused persons as individuals who deserve dignity and providing them an opportunity to tell their individual version of events, could mitigate the effects of implicit bias at the same time it makes individuals feel like the system is more fair.



## **Participants agreed that, where they are used, pretrial risk assessment tools should be informational and not determinative or presumptive.**

Work group participants also discussed what judges should do if they see prosecutors or defense attorneys make decisions that appear to be influenced by implicit bias. Judicial participants described witnessing examples of bias in decisions giving white defendants more frequent access to diversion programs or more favorable sentencing offers. Judicial participants stated they do not receive training on how to have the difficult conversations needed to confront bias. Also, because of their judicial role, they feel limited in their ability to inquire too deeply into charging and plea decisions. However, most participants felt they could respond to implicit bias when they saw its effects by asking why: Why are you offering this plea, when last week you offered a much higher sentence in a case that seems identical? Why are you asking for this amount of bail when two cases ago you asked for lower bail on the same charge? These

questions are within the judicial role and force prosecutors and defense attorneys to reflect on and justify their decision-making.

## RECOMMENDATIONS

- >>> **Training on implicit bias should be a mandatory component of judicial ethics training:** 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.
- >>> **Judges should consider obtaining data that will allow them to check for implicit bias in their decision-making:** 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.
- >>> **Judges should consider adopting procedural justice practices as an anti-bias strategy:** Practices that afford the accused individual dignity also can 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.
- >>> **Judges should be trained and prepared to confront bias in a manner consistent with the judicial role:** 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 they can respond to bias in a manner consistent with their judicial role so they are prepared to do so.

## JUDICIAL CONTROL OVER BAIL

**Work Group Leader:** *Cynthia E. Jones, Professor of Law, American University Washington College of Law*

Historically, pretrial detention was based on a determination of an accused's flight risk. The U.S. Supreme Court also has approved the use of pretrial detention based on future dangerousness. Today, bail officials in most state courts rarely have the information needed to assess whether a defendant is a flight or safety risk. In addition, most state courts do not determine the defendant's ability to pay a monetary bond before bail is set. As a result, jails in America are overcrowded with pretrial detainees who are charged with low-level

offenses, pose no serious flight or safety risk, and have no violent criminal history. Work group participants explored how common pretrial detention practices can be changed to avoid unnecessary pretrial detention.

## DISCUSSION

Work group participants began their conversation by enumerating the arguments most likely to persuade others to join bail reform efforts. The current monetary bail system allows high-risk people with money to buy their way out of jail, while low-risk people with limited resources fill local jails because they cannot afford to pay even small amounts to secure release. Linking pretrial liberty to wealth has a disproportionate impact on minority communities, which are overrepresented in the pretrial detainee population. Pretrial detention also sets the stage for violations of constitutional due process in later stages of criminal proceedings: individuals detained pretrial may be placed on accelerated dockets, and must choose between accepting an early guilty plea or enduring extended pretrial detention.



**Some participants argued that judges represent the community just as much as prosecutors do, and they should play a role in determining whether charges are consistent with community interests.**

Work group participants explored what pretrial release would look like if monetary bail were eliminated entirely. Participants discussed their experience with non-financial release conditions that are effective at ensuring that accused individuals return to court and do not pose a danger to the community while on pretrial release. Many participants cited the negative effect that court backlogs and delay have on appearance rates. Giving people faster settings, and reminding them of those settings by telephone, is sufficient to prompt many people to return to court. In cases where additional release conditions are necessary, judges should tailor those conditions to the individual and the case. Participants discussed the inefficiencies in pretrial release systems that impose standard conditions, such as drug testing, on every defendant. Some participants suggested rewarding people for consistently appearing in court during extended periods of pretrial release, for example by relaxing their release conditions over time or by offering a reduction in optional fees.

Work group participants also discussed examples of how some jurisdictions that have not

eliminated monetary bail are working to reduce its negative impacts. For example, some courts only set monetary bail in cases involving domestic violence and violent felonies, and release people charged with low-level offenses and misdemeanors on unsecured bond or a desk appearance ticket. Participants noted that most states already have a presumption of pretrial release that is consistent with greater use of unsecured bonds; the challenge is getting judges who have become accustomed to monetary bail to follow those statutes. Participants in jurisdictions that use unsecured bonds generally found them as effective as monetary bonds in securing appearance in court. Overall, participants agreed that collecting data on bail determinations and outcomes can help judges test their assumptions about what is effective, and make them feel more comfortable with releasing people under non-financial release conditions that have proven effective in other courts.

Participants debated the increasing use of pretrial risk assessment tools, particularly in jurisdictions decreasing their reliance on monetary bail. Several participants objected to how those tools incorporate factors that are influenced by racial bias, citing as an example prior arrest history, which is influenced by racial disparities in policing practices such as stop-and-frisk. Participants agreed that, where they are used, pretrial risk assessment tools should be informational and not determinative or presumptive. Judges must be trained on how to use them, so they do not simply replace monetary bail schedules with a similarly mechanistic formula based on risk assessment scores.

In jurisdictions that retain monetary bail for some or all cases, participants agreed that judges must consider ability to pay when setting bail. Some participants discussed how they use financial screening tools to assess ability to pay at initial bail hearings. Other participants routinely review jail records for individuals who have not posted bond in two to three days, and consider individuals' inability to pay as the basis for a "changed circumstances" finding in a de novo review of the initial bail amount.

## **Judges should scrutinize the factual basis for pleas, and be comfortable prodding prosecutors about the appropriateness of individual charges.**



Work group participants also agreed that individuals facing pretrial detention should be represented by defense counsel at their initial bail hearings. Defense attorneys are necessary to present arrestees' positions on the factors courts must consider when making pretrial release determinations. In jurisdictions that retain monetary bail, these factors include ability to pay. Defense attorneys also can present information that supplements the factors

considered by risk assessment tools and enables judges to set release conditions tailored to the circumstances of individual cases.

Participants recognized that financial considerations influence how jurisdictions are able to approach bail reform. Participants suggested that jurisdictions without a pretrial services agency can start with a pilot unsecured bond program that targets people charged with certain kinds of cases, such as non-violent misdemeanors, and perhaps use existing probation staff or community volunteers to assist with supervision. Jurisdictions also can use the savings that result from reduced jail expenditures related to pretrial detention to offset the cost of increased pretrial supervision. A number of participants expressed concern about practices that pass on the costs of pretrial supervision to released individuals, because those practices risk replacing one financial barrier to release with another.

## RECOMMENDATIONS

- >>> **Judges should use unsecured bonds more frequently:** 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.
- >>> **Judges who continue to use monetary bail must consider an individual's ability to pay when setting bail:** Judges can evaluate ability to pay at the initial bail hearing, and when an individual with a low bail amount remains in jail for more than a couple of days.
- >>> **Defendants must be represented by counsel at initial bail hearings:** Defense lawyers provide information that judges need to make informed pretrial release decisions.

## JUDICIAL INTERVENTION IN CHARGING DECISIONS

**Work Group Leader:** *Darryl K. Brown, O. M. Vicars Professor of Law, University of Virginia School of Law*

Judges traditionally play no role, supervisory or otherwise, with regard to prosecutorial charging decisions — decisions regarding which charges to pursue, or whether to charge at all. This is true both in courts that handle violent felony offenses and in high-volume misdemeanor courts that handle public order and other lower-level offenses. Judges usually have only slightly more authority when it comes to dismissing previously filed charges for reasons such as evidentiary insufficiency. Work group participants discussed the role judges can and should play in charging decisions.

## DISCUSSION

Work group participants debated whether it is appropriate for judges to play any role in front-end charging decisions in individual cases. Some participants argued that judges represent the community just as much as prosecutors do, and they should play a role in determining whether charges are consistent with community interests. Judges can reduce the costs of the criminal justice system for accused individuals, their families, and taxpayers if they can help limit unjustified prosecutions at the front end, perhaps by playing a formal role in screening charging recommendations as they are made. Other participants strongly disagreed, asserting that it is bad policy as well as impractical to involve judges in charging decisions. This group noted that prosecutors are sensitive to incursions into their gatekeeping role, and might react to the threat of judicial involvement in ways that merely push disagreements downstream and distort plea negotiations. Also, in some jurisdictions, hundreds of charging decisions are made every day, and it is not logistically possible to involve judges in all of those decisions. In many places, even prosecutors are not involved in early charging decisions, and instead wait until a later point in the criminal justice process to screen charges filed by police officers.

Although work group participants did not reach consensus on judges' appropriate role in individual charging decisions, they agreed that judges should use their persuasive authority to convene prosecutors and other criminal justice partners for general discussions about charging policies. Participants described examples of charging policy debates in their home communities: What role should the criminal justice system play in situations of teenage sexting? How can we most effectively respond to repeat offenses committed by people experiencing homelessness? How can we hold people accountable for high-volume, low-level offenses such as turnstile jumping without clogging the courts or hitting people with collateral consequences? Is a non-criminal diversion appropriate in these cases? Judges are members of the community and have unique expertise on charging policies and their consequences, and it is appropriate for judges to convene and participate in conversations about community criminal justice priorities.

Work group participants also discussed how charging decisions are subject to ongoing negotiation as individual criminal cases move through the system. Judges have a clear role in determining whether the proposed plea disposition that results from those negotiations is fair. Judges get to weigh in on the back end, even if they do not play a role in charging decisions at the front end. Judges should scrutinize the factual basis for pleas, and be comfortable prodding prosecutors about the appropriateness of individual charges. Judges should reject pleas they think are unfair. Participants discussed how judges who play an active role in vetting pleas can serve as a check when prosecutors' offices have policies that limit line prosecutors' individual discretion in plea negotiations. Judges also can influence prosecutorial charging practices by rejecting pleas that are too far below the initial charge filed, and thereby encourage prosecutors to consider the likely disposition in a case, and not only the highest available charge, when they make initial charging decisions.

Work group participants related how some states have rules that allow judge to play a larger, though still limited, role in early review of charging decisions. Some states allow judges, and not only prosecutors, to refer individuals to pre-plea diversion programs that offer conditional dismissals. Some states also allow judges to enter summary judgment-like early dismissals based on discovery or grand jury transcripts. Approaches such as these allow judges to intervene in individual charging decisions earlier in the process — before plea dispositions — in a manner that participants agreed was consistent with judges’ institutional role.

## RECOMMENDATIONS

- >>> **Judges should use their convening authority to initiate and influence conversations about local charging policies:** These conversations allow judges to affect front-end charging decisions at the community level without intervening in individual cases.
- >>> **Judges should consider how their role in plea dispositions allows them to influence charging practices:** 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.
- >>> **More states should consider adopting rules that afford judges a defined role in reviewing charging decisions prior to plea disposition:** 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 eventually will review charging decisions at plea disposition; these rules promote efficiency and fairness by allowing judges to play their review role earlier in the judicial process. At the same time, these policies maintain prosecutors’ traditional discretion over initial charging decisions.

## JUDICIAL INVOLVEMENT IN PLEA BARGAINING AND DISCOVERY

**Work Group Leader:** *Peter Joy, Henry Hitchcock Professor of Law and Director, Criminal Justice Clinic, Washington University in St. Louis School of Law*

In high-volume misdemeanor courts, many people accused of criminal offenses plead guilty without ever talking to a lawyer, while others plead guilty after only a brief interaction with a defense attorney who has not had the opportunity to conduct an investigation or review discovery. Work group participants discussed what judges should do to determine whether people have been properly counseled by their defense lawyers before they plead guilty, and whether unrepresented individuals fully understand the consequences of accepting a plea offer.



## DISCUSSION

Work group participants agreed that judges must determine that accused individuals understand the consequences of a guilty plea before accepting the plea. Judges' role in evaluating the accused's level of understanding is particularly important in cases involving unrepresented defendants, but judges cannot delegate this responsibility to counsel in cases involving attorneys. Judges should explain legal rights and procedures in accessible language that members of the community can understand. Although judges can use videos or slide shows to introduce legal concepts to groups of defendants, they also must conduct individual colloquies to determine whether each person understands the consequences of a plea. Some participants described how they used interactive strategies, such as having people complete worksheets about plea terms and consequences, to improve and test understanding. Other participants stated that reducing the intimidation community members experience in formal court proceedings could reduce people's stress to a degree that improves their understanding.

Some work group participants did not believe judges should accept guilty pleas at the initial appearance, but others were comfortable with reviewing initial appearance guilty pleas in the same manner they reviewed pleas at later stages. For example, some judicial participants approved guilty pleas at the initial appearance if the charge was for a minor offense and the plea would result in a conditional dismissal rather than a conviction and would not trigger significant collateral consequences. Participants had fewer concerns about guilty pleas at initial appearance if factors that could make plea negotiations coercive were absent: for example, if the accused individual would not be held on monetary bail, did not face an exploding plea offer, would not be hit with a trial penalty if the plea offer was rejected, and had access to discovery.

**Participants agreed that before accepting a plea judges should establish on the record that the prosecutor has supplied the defense with discovery.**



Many participants did not believe it was appropriate for judges to inquire into how the defense attorney investigated the case or counseled the client before accepting the plea, even in circumstances, such as a plea at initial appearance, that suggested that time for investigation and counseling was extremely limited. Judicial participants were reluctant to ask questions that delve into confidential communications or might interfere with the attorney-client relationship. However, participants agreed that judges should raise the issue of time in cases where they thought it might be a factor, for example by asking people if they have had enough time to consult with counsel. Questions that bring the accused's attention to timing, and open the door

to slowing proceedings down, are appropriate. Judges also should follow up with questions to the accused if they perceive a lack of understanding or signs that the plea may be involuntary.

Work group participants agreed that in most cases accused individuals should have access to discovery before they plead guilty. Participants acknowledged that pretrial detention and a desire to get court behind them create powerful incentives for some people to plead guilty before discovery is available, but nevertheless concurred that it rarely is appropriate for accused individuals to waive their right to discovery. Participants agreed that before accepting a plea judges should establish on the record that the prosecutor has supplied the defense with discovery. Some participants suggested that in cases where specific evidence is not available by the time the parties reach a plea agreement — such as cases involving drug testing — judges could accept conditional pleas pending the receipt of test results and postpone sentencing until complete discovery becomes available.

Participants discussed ways courts can streamline the discovery process and minimize disputes about what discovery must be turned over before the time of plea. Participants agreed that judges should do this by entering a standing discovery order or court rule that requires all exculpatory material to be turned over to the defense. This order or rule should mirror prosecutors' ethical obligations rather than the more limited *Brady* rule,<sup>14</sup> and cover all exculpatory information without regard to its materiality or admissibility.

Participants also discussed special issues related to pro se guilty pleas. Given the very serious immigration consequences — including deportation — that may result from a conviction or post-plea diversion for even a low-level misdemeanor offense, judicial participants expressed particular concern about the need to provide accurate information about potential immigration consequences to unrepresented individuals. Many judges did not feel adequately trained for this task. They also expressed concern that some of their colleagues did not realize that immigration consequences were a significant factor in misdemeanor cases or for certain kinds of diversions. Participants also discussed judges' obligation to question prosecutors about plea deals in which unrepresented individuals are accepting harsher sentences than are typical in cases involving people represented by defense counsel. Judges can reject pleas that are too harsh, just as they reject pleas they believe are too lenient.

## RECOMMENDATIONS

- >>> **Judges should conduct individual colloquies to determine that accused individuals understand the consequences of pleading guilty before they accept the plea:** Videos and other group presentations cannot replace individualized inquiries.
- >>> **Judges should question plea circumstances and terms when they have concerns:** Although judges should not interfere in the attorney-client relationship, judges do have an obligation to examine the voluntariness and fairness of guilty pleas before they accept

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.

- >>> **Judges should establish on the record before accepting a guilty plea that the prosecutor has provided discovery to the defense:** Conditional pleas pending receipt of complete discovery may be acceptable in certain situations, such as cases involving delays for drug testing.
- >>> **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:** 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.
- >>> **States should provide judicial education on the potential immigration consequences of misdemeanor offenses:** This education is particularly important in the misdemeanor context, where many individuals plead guilty without counsel or with limited consultation with counsel, and judges may be the primary source of information accused individuals receive about those consequences.

## CONTROL OVER CONDUCT OF COUNSEL

**Work Group Leader:** Keith Swisher, Professor of Legal Ethics and Director of the Bachelor of Law and Master of Legal Studies Program, University of Arizona James E. Rogers College of Law

Judges in high-volume misdemeanor courts operate in environments where they frequently encounter warning signs that prosecutors and defense attorneys may be in violation of their professional obligations and ethical standards. For example, judges may be aware that prosecutors are making plea offers in cases they know little about and when discovery is not yet available. Judges may witness defense attorneys meeting new clients for the first time and then representing those clients in plea proceedings later the same day. Work group participants discussed judges' role in remedying ineffective representation and prosecutorial misconduct in their courts, and how judges can contribute to improving attorney performance.

### DISCUSSION

Work group participants discussed how judges set the ethical tone in the courtroom. One way in which judges can influence attorney performance is through that ethical tone. Participants related examples of judges they had observed accepting and at times condoning rushed and

sloppy practices; they agreed that how judges react to certain scenarios that recur in their courts can determine what becomes normal in the courtroom. For example, judges should ask probing questions when an unrepresented individual offers a guilty plea to ensure the individual understands the right to counsel and the potential consequences of pleading guilty without counsel. These questions signal to the accused that uncounseled pleas are not the usual course of business, and invite the accused to ask for a lawyer. Judges also should ask questions when it appears that an accused may be pleading guilty before there has been any case preparation or discovery, perhaps because the person cannot afford to post bond and a guilty plea is the only way out of jail. By asking the prosecutor whether discovery has been turned over and asking the accused whether defense counsel has discussed collateral consequences, judges can communicate their expectations for attorney performance to attorneys and to the accused. These questions inform prosecutors and defense attorneys that guilty pleas in these circumstances will not be treated as routine and they must be prepared to justify them.

Colloquies are not judges' only tool for setting the ethical tone, and work group participants expressed that it is appropriate for judges to be more explicit and proactive in setting courtroom expectations, as well. Judges can convene justice partner meetings so that all sides can discuss issues that come up in court and their perspectives on how best to handle them. Judges can work with prosecutors and the defense to develop attorney checklists for pleas that mirror the court's plea colloquies, to ensure that both sides are prepared for everything the judge will ask. Judges also can offer to participate in training programs for the prosecution and defense, and help teach them how to meet performance expectations and comply with ethical rules.

Work group participants debated how judges should react when they witness attorneys engaging in bad practices in their courtrooms. Judges have a duty to report lawyers to state authorities when they know or have substantial information that the lawyer has violated attorney discipline rules. However, in some cases judges may suspect a violation occurred but do not have enough information to justify a disciplinary report. Judges also frequently observe bad practices that do not rise to the level of an ethical violation. In those situations, some participants were comfortable with judges calling in individual attorneys after the conclusion of a case to discuss performance concerns. Other participants suggested calling the offending prosecutor's or public defender's supervisor, to communicate the judge's concerns and invite the supervisor to monitor their line attorney's courtroom performance.

Participants agreed that prosecutors and defense attorneys do not often receive feedback about their performance, particularly from the judiciary or members of the public, and would benefit from that feedback. They suggested that attorneys receive regular reviews that capture feedback from judges, court personnel, other lawyers, and members of the public they have interacted with in court. These reviews would be similar to "360 reviews" conducted in many workplaces. For the lawyers, the reviews provide external feedback on practices that may have become reflexive habits. For judges, the reviews provide an opportunity to provide individualized feedback to attorneys in a non-disciplinary context.

Work group participants noted that many public defense systems are structured in ways that allow judges more control over the conduct of defense counsel than over the conduct of the prosecutor. For example, in many jurisdictions judges select and appoint private attorneys to represent indigent defendants and directly control the compensation paid to those private attorneys. While it is appropriate for judges to influence the practices of prosecutors and defense lawyers in certain ways, participants agreed that it is not appropriate for judges to compromise the independence of defense lawyers by exercising greater influence over them than they do over prosecutors. Judges should strive to exercise their control in a balanced manner even if they are in systems that are structurally imbalanced, and they should advocate for reforms that would provide equal degrees of independence to the prosecution and the defense.

## RECOMMENDATIONS

- >>> **Judges should set high standards for prosecutor and defense attorney performance in their courtrooms, and use opportunities such as plea colloquies to check whether those standards are being met:** Judges set the ethical tone in their courtrooms, and can communicate that pleas without counsel, pleas 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.
- >>> **Judges should provide performance feedback to prosecutors and defense lawyers who appear in their courtrooms:** 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.
- >>> **Judges should exercise their control over counsel in ways that afford equal independence to the prosecution and the defense:** 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 counsel should advocate for structural reforms that place the prosecution and the defense on equal footing.

## TRIAL ISSUES (BENCH AND JURY TRIALS)

**Work Group Leader:** Abbe Smith, Director, Criminal Defense and Prisoner Advocacy Clinic, and Professor of Law, Georgetown University Law Center

Misdemeanor trials typically are training grounds for new prosecutors and defenders. These cases also are the first and potentially only exposure that many citizens — whether defendants, victims, or witnesses — have to the criminal justice system. Experienced judges, whether in bench or jury trials, have limited time within which to try cases. Work group participants discussed how judges can provide fair trials while dealing with time pressures and issues caused by the inexperience of counsel.

## DISCUSSION

Although work group participants agreed that misdemeanor trials often are training opportunities for new prosecutors and defense lawyers, they also agreed that judges' institutional role limits how judges can contribute to that training while a trial is ongoing. Helping one attorney correct a lawyering error could harm the other side's case and compromise the judge's impartiality. Judges should uphold the rules of evidence and conduct trials fairly, but otherwise should allow lawyers to try their cases with minimal intervention. Judges should be very careful about questioning witnesses so as not to interfere improperly in a case. Several judicial participants stated that they only asked witnesses a question if they literally did not understand an earlier answer and needed clarification.

Participants concurred that one way judges can and should educate attorneys during trials is through their rulings. Some judges explain the basis for their evidentiary rulings to help train lawyers in that component of trial skills. All judges should make at least brief findings of fact at bench trials, in part to educate prosecutors and defense lawyers. Findings of fact also will help complaining witnesses, the accused, and the community better understand the trial's outcome.

Participants agreed that judges have additional opportunities to provide feedback and help train lawyers after a trial concludes, though participants diverged in the manner with which they are comfortable with judges providing that feedback. Some judges offer to discuss a trial with both the prosecution and the defense after it has concluded, only provide feedback when both attorneys are present, and limit their feedback to topics that can be discussed with both sides. Other judges invite both attorneys to receive feedback, but provide that feedback in separate meetings with the prosecution and the defense to allow for a more candid discussion. Some participants do not offer to provide feedback, but are happy to give feedback if either side asks for it after the trial.

Judicial participants stated that they would like to receive feedback about their performance as well. Judges come to criminal courts from different practice backgrounds, and some are less familiar with criminal trial procedure and evidentiary rules than others. Many jurisdictions lack mechanisms to provide information to judges that would help them learn from and improve their own performance at trial. Participants from jurisdictions that do provide feedback, whether from other judges or from lawyers, stated that they found the information in judicial reviews very helpful. Participants also agreed that new judges should have access to more training on evidence.

Work group participants discussed other challenges that, in addition to attorney and judicial inexperience, negatively impact misdemeanor trials. Prosecutors often file charges based on only limited information from the police, and do not always provide timely and complete discovery to the defense once it becomes available. Defense attorneys also may conduct limited or no independent investigation in misdemeanor cases. As a result, misdemeanor courts are flooded with low-level cases that both sides know very little about. Cases that could be dismissed or otherwise disposed of if the facts were developed instead linger. When weak cases, or cases about which few facts are known, go to trial, it consumes judicial time that could be spent trying other cases and leaves juries with a negative impression of the justice system. Participants agreed that earlier and more complete fact development and discovery would improve trial access and the quality of trials in misdemeanor courts.

## RECOMMENDATIONS

- >>> **Judges should allow lawyers to try cases with minimal intervention:** 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.
- >>> **Judges should use their rulings as opportunities to train lawyers:** Judges should make at least brief findings of fact at bench trials.
- >>> **Jurisdictions should adopt mechanisms to provide education and feedback to criminal trial judges:** 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.
- >>> **Judges should protect the integrity of criminal trials by adopting rules that require the early delivery and review of discovery:** Delays in fact development and discovery clog trial dockets and undermine the trial process. Earlier and more complete fact development and discovery would improve trial access and the quality of trials in misdemeanor courts.

## SENTENCING

**Work Group Leader:** *Jenny Roberts, Professor of Law, Associate Dean for Scholarship and Co-Director, Criminal Justice Clinic, American University Washington College of Law*

Many misdemeanor cases do not result in jail sentences. But most individuals charged with misdemeanors do face significant fines, fees, and collateral consequences. Fines and fees may trigger incarceration or driver's license suspension if a person cannot afford to pay them.

Collateral consequences from misdemeanor cases can include deportation, sex offender registration, and loss of housing and employment. Work group participants discussed judges' role in assessing and enforcing financial penalties, and advising accused individuals of collateral consequences.

## DISCUSSION

Work group participants discussed the burden fines and fees impose on people accused of misdemeanor offenses and their families. Even a minor offense can result in financial penalties that total thousands of dollars. Because case dispositions frequently involve a number of different elements, each of which may trigger a separate fee — such as booking fees, drug testing fees, diversion court fees, etc. — it can be difficult for people to understand the total amount they will be required to pay when they plead guilty. Judges should not expect people to be able to make these calculations on their own. Rather, at the time of plea or conviction at trial, judges should provide people with a checklist or similar form that advises them of their total financial obligations.

Participants also agreed that it is a waste of court resources, as well as an unnecessary burden on the community, to impose financial obligations it is obvious an individual will never be able to pay. The court system gains nothing from waiting for someone to default on an uncollectable debt, but the debtor is forced to live under the threat of incarceration or other consequences for nonpayment. Judges should evaluate each defendant's ability to pay fines and fees at the time of sentencing, and only impose those fines and fees that the person is able to pay.

Work group participants discussed challenges they face in reforming fines-and-fees practices in their jurisdictions. In many states, some fines and fees are fixed and mandatory, and judges lack discretion to waive or adjust them based on ability to pay. In jurisdictions with fixed and mandatory financial penalties, participants agreed judges should advocate for changes to state law to permit individualized assessments. Participants also noted that judges and legislators often view financial penalties in isolation and, like defendants, frequently fail to appreciate the total financial obligation that results. The same checklists that inform people of their total financial obligations may help judges think more critically about how and when they impose individual fines and fees, and focus judges' attention on all that a person is being asked to pay when they evaluate whether the person is able to pay. In turn, judges should use what they learn from this exercise to help educate legislators about the cumulative effect of statutory fines and fees.

Participants also discussed the large number of collateral consequences that accompany criminal convictions. These consequences are so numerous that, like fines and fees, it is difficult for judges to be knowledgeable about all of them, let alone for accused individuals to understand them all. This is another area in which checklists would be valuable to the court and to the accused. Some participants noted that people in their jurisdictions currently receive a written list of collateral consequences, but only at the time of plea and not at an earlier point when



it could better inform the decision whether to plead. Participants believed that judges should provide a collateral consequences checklist — which covers major categories of consequences, if not every specific possible consequence — well before the guilty plea. When an accused is represented by counsel, this information may prompt the accused to ask the lawyer more questions about consequences of particular concern, and also will reinforce the information about consequences defense counsel provides. In cases involving unrepresented defendants, the checklist may be the accused’s primary source of information about collateral consequences, and judges may wish to reinforce the checklist with additional verbal advisements.

Participants expressed that convictions result in too many collateral consequences that do not serve public safety. In fact, many collateral consequences make it more difficult for people to maintain gainful employment and stable housing, and thus undermine public safety. In addition to these negative social costs, some collateral consequences have negative fiscal costs. Participants agreed that jurisdictions should perform a comprehensive review of collateral consequences and amend laws to eliminate or mitigate consequences that have negative social or fiscal impacts.

## RECOMMENDATIONS

- >>> **Judges should prepare fines and fees checklists for their jurisdictions and provide the checklist to people in their courts:** These checklists will ensure that individuals understand the total financial obligation resulting from fines and fees imposed in their cases.
- >>> **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:** 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.
- >>> **Judges should prepare collateral consequences checklists for their jurisdictions and provide the checklist at an early stage of the proceedings:** While it may not be practical for the checklist to cover every potential collateral consequence, it can cover every major category of consequences. Judges may supplement the checklist with verbal advisements in cases involving unrepresented defendants.
- >>> **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:** Jurisdictions should eliminate or mitigate collateral consequences that do not serve public safety or that have a negative fiscal impact.

## CHANGING COURT CULTURE

**Work Group Leader:** *Alexandra Natapoff, Professor of Law and Associate Dean for Research, Loyola Law School, Los Angeles*

A court's culture — the values and behaviors that are reflected in, supported by, and reinforced in its day-to-day work — affects both the way in which judges adjudicate cases and the public's and litigant's perceptions of justice. Work group participants discussed the factors that can shape a court's culture and how judges can change court culture.

### DISCUSSION

Work group participants discussed their varying perspectives on what court culture is. Some participants associated a court's culture with the judge's temperament. In a related vein, some participants linked a court's culture to whether the judge and court personnel treat members of the public with dignity and respect. Other participants focused more on institutional pressures that drive culture. These institutional pressures include high case volumes that foster cultures of case processing, and fiscal pressures on courts to generate revenue.

Participants could not agree on a shared definition of court culture. They discussed how courtroom culture can differ from courthouse culture. Different justice system stakeholders — such as judges, court personnel, prosecutors, defense attorneys, and police officers — each have their own perspectives on court culture, as well as their own sub-cultures. Some participants asserted that it is those justice system insiders and members of the public — courthouse outsiders — who have the most significant difference in perspective on court culture, and encouraged insiders to think about what court culture looks like to the public.

Even though they had varied visions of what court culture is, participants shared some common ideas about what judges can do to influence court culture. Participants agreed that judges should affect culture by treating members of the public with dignity and, through their example, lead others in the courtroom to do so as well. Although this approach does not change institutional factors that drive court culture, it is something judges can do at little cost without waiting for institutional change and that will have a large impact on the experiences of people who appear in court. Participants also agreed that judges should convene meetings of justice system partners in order to start conversations that in turn can produce collaboration on solutions to shared problems. Again, judges can do this at little cost and without waiting for institutional reform. These convenings could help build support for and shape institutional improvements that make possible additional progress toward changing court culture.

Work group participants examined a number of barriers to changing court culture. Participants discussed the inherent tension between the traditional adversarial system, in which neutral

judges preside over adversaries, and the transparency and collaboration justice system partners must have among themselves in order to change many aspects of court culture. Participants also discussed how case volume makes it hard to change culture, and feeds on itself. Everyone could do a better job, and devote more attention to changing culture, if they were not drowning in “junk cases,” but the prosecutors are drowning too and do not have time to screen cases early in a manner that could reduce volume. Participants decried the role revenue collection plays in misdemeanor court culture, but agreed that role will be hard to change as long as courts are funded by the very fines and fees they are under pressure to collect.

Moving forward, participants agreed that it would be helpful to create a set of benchmarks for court culture that captures the values we want courts to promote. They also agreed that judges and other systems must remain mindful of who bears the burden of the case triage and institutional crises that currently influence court culture: too often the burden for these crises falls not on the institutions themselves, but rather on accused individuals and their families.

## RECOMMENDATIONS

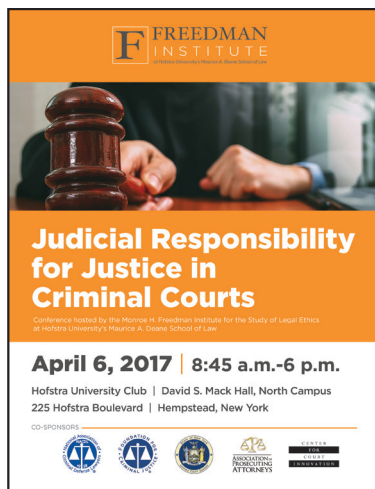
- >>> **Judges should promote a courtroom culture of dignity and respect:** Judges directly influence public experience of the court through their behavior, and also set expectations for the behavior of other justice system stakeholders.
- >>> **Judges should convene and collaborate with other justice system partners to improve court culture:** Collaborations can produce changes to practices that do not require institutional change, as well as provide a foundation for cooperative institutional reform.
- >>> **Judges should work with other justice system partners to develop a set of benchmarks for court culture:** These benchmarks should reflect the values communities want courts to promote, and be used to set goals for court improvements and as tools for court assessments. ■

# ENDNOTES

1. See, e.g., ANDREA M. MARSH, NAT'L ASS'N OF CRIM. DEF. LAW., *STATE OF CRISIS: CHRONIC NEGLECT AND UNDERFUNDING FOR LOUISIANA'S PUBLIC DEFENSE SYSTEM* (2017); ALISA SMITH, SEAN MADDAN, DIANE DEPIETROPAOLO PRICE & COLETTE TVEDT, NAT'L ASS'N CRIM. DEF. LAW., *RUSH TO JUDGMENT: HOW SOUTH CAROLINA'S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS* (2017); DIANE DEPIETROPAOLO PRICE, COLETTE TVEDT, EMMA ANDERSSON & TANYA GREENE, AM. CIV. LIB. UNION & NAT'L ASS'N CRIM. DEF. LAW., *SUMMARY INJUSTICE: A LOOK AT CONSTITUTIONAL DEFICIENCIES IN SOUTH CAROLINA'S SUMMARY COURTS* (2016); SIXTH AMEND. CTR., *THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES* (2016); ALISA SMITH & SEAN MADDAN, *THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS* (2011).
2. The proceeding at which an individual first appears before a judicial officer after his or her arrest is called a variety of names in different jurisdictions across the country, including initial appearance, first appearance, magistration, and arraignment. Conference participants used the term common in their own jurisdiction when discussing that proceeding. To avoid confusion, this report will refer to that proceeding consistently as "the initial appearance."
3. Oveta Wiggins, *She Spent Five Days in Jail Because She Couldn't Come Up With \$1,000. Bail Overhaul Advocates Say Her Story Is Not Uncommon.*, WASH. POST (Dec. 27, 2016), [https://www.washingtonpost.com/local/md-politics/she-spent-five-days-in-jail-because-she-couldnt-come-up-with-1000-bail-overhaul-advocates-say-her-story-is-not-uncommon/2016/12/27/6fe11ed4-c621-11e6-85b5-76616a33048d\\_story.html?utm\\_term=.87faa54e5826](https://www.washingtonpost.com/local/md-politics/she-spent-five-days-in-jail-because-she-couldnt-come-up-with-1000-bail-overhaul-advocates-say-her-story-is-not-uncommon/2016/12/27/6fe11ed4-c621-11e6-85b5-76616a33048d_story.html?utm_term=.87faa54e5826).
4. Joseph Shapiro, *Alabama Settlement Could Be Model for Handling Poor Defendants in Ferguson, Mo.*, NAT'L PUB. RADIO (Nov. 20, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/20/365510846/alabama-settlement-could-be-model-for-handling-poor-defendants-in-ferguson-mo>.
5. Eli Hager, *When Real Estate and Tax Lawyers Are Forced to Do a Public Defender's Job*, MARSHALL PROJECT (Sept. 8, 2016), <https://www.themarshallproject.org/2016/09/08/when-real-estate-and-tax-lawyers-are-forced-to-do-a-public-defender-s-job#.5g41Uxgz6>.
6. *Salerno v. United States*, 481 U.S. 739, 755 (1987).
7. See NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <http://niccc.csgjusticecenter.org/> (last visited June 26, 2017).
8. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).
9. The ACLU, the ACLU of Mississippi, and the Roderick and Solange MacArthur Justice Center sued Scott County over its practice of detaining people who cannot afford an attorney for as long as a year without appointing counsel and without formally charging them with a crime. That lawsuit, *Burks v. Scott County*, settled in June 2017, with an agreement by the county to appoint public defenders at the time of arrest. See *Reforms Will Speed Up Appointment of Public Defenders, Reduce Unnecessary Jail Time*, AM. CIV. LIB. UNION (June 28, 2017), <https://www.aclu.org/news/settlement-will-stop-four-mississippi-counties-jailing-people-indefinitely-without-lawyer-or>.
10. The survey instrument used by Judge Burke is included in Appendix B.
11. Attendees received a topic overview and discussion questions for each work group. Some work groups discussed all of the questions provided, whereas others focused on one or two questions. Some work groups discussed some questions in the morning session and different questions in the afternoon session.
12. See *supra* note 1.
13. See *supra* note 8.
14. The *Brady* rule refers to the holding in *Brady v. Maryland*, which requires prosecutors to disclose exculpatory evidence that is material to the guilt or innocence or to the punishment of the defendant. 373 U.S. 83, 87 (1963).

# APPENDICES

## Appendix A: Conference Day One Program and Biographies of Speakers and Panelists



### Hon. Steve Leben

*Judge, Kansas Court of Appeals*

### Norman L. Reimer

*Executive Director, National Association of Criminal Defense Lawyers*

### Hon. Betty J. Thomas Moore

*Judge, Shelby County General Sessions Court, Tennessee*

### 10:30-10:45 a.m. Break

### 10:45-12:30 p.m. Judicial Control Over Bail

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. 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 will discuss bail reforms that are reducing the number of pretrial detainees, leading to substantial savings and a society that is freer, fairer and safer.

#### Moderator: Cynthia Jones

*Professor of Law, American University Washington College of Law*

### Hon. Ronald B. Adrine

*Administrative and Presiding Judge, Cleveland Municipal Court, Ohio*

### John T. Chisholm

*Milwaukee County District Attorney, Wisconsin*

### Ezekiel "Zeke" Edwards

*Director, Criminal Law Reform Project, American Civil Liberties Union*

### Colette Tvedt

*Director, Public Defense Training and Reform, National Association of Criminal Defense Lawyers*

## PROGRAM

### 8:45-9 a.m. Introduction

### 9-9:30 a.m. The State of Justice in Criminal Courts in the U.S.

#### Hon. Lisa Foster

*Former Director, Office for Access to Justice, U.S. Department of Justice, and Judge, Superior Court of California, County of San Diego (Ret.)*

### 9:30-10:30 a.m. Procedural Justice

There is a commonly held view that the Sixth Amendment right to counsel ensures that accused persons never stand alone in a criminal court. But that belief is belied by reality in countless courts throughout the country. Far too often the accused 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. This panel will explore 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.

#### Moderator: Abbe Smith

*Director, Criminal Defense and Prisoner Advocacy Clinic, and Professor of Law, Georgetown University Law Center*

### David LaBahn

*President and CEO, Association of Prosecuting Attorneys*

## PROGRAM

### 12:30-2 p.m. Luncheon and Keynote | "Implicit Bias and the Courts"

**Hon. Kevin S. Burk**

*Judge, Hennepin County District Court, Minnesota*

### 2-3:30 p.m. Control of the Case and Counsel

An overwhelming percentage of misdemeanor cases are disposed of at arraignment. This result is often achieved without any investigation by defense counsel, without any discovery provided by the prosecution, without the defense filing necessary legal challenges, and without appropriate 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. What role should the court play regarding any of these issues?

Moderator: **Ellen Yaroshesky**

*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*

**Vicki Hill**

*City Prosecutor, City of Phoenix, Arizona*

**Hon. David M. Rubin**

*Judge, Superior Court of California, County of San Diego*

**Steve Zeidman**

*Professor of Law and Director, Criminal Defense Clinic, The City University of New York School of Law*

### 3:30-3:45 p.m. Break

### 3:45-5 p.m. Case Disposition and Its Consequences

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. This session will discuss the impact of collateral consequences and fees, fines, and costs in misdemeanor courts and solutions.

Moderator: **Peter A. Joy**

*Henry Hitchcock Professor of Law and Director, Criminal Justice Clinic, Washington University in St. Louis School of Law*

**Christopher Ervin**

*Founder and President, The Lazarus Rite Inc., and Community Organizer, Baltimore, Maryland*

**Carlos J. Martinez**

*Miami-Dade County Public Defender, Florida*

**Jenny Roberts**

*Professor of Law, Associate Dean for Scholarship and Co-Director, Criminal Justice Clinic, American University Washington College of Law*

**Hon. Edward J. Spillane**

*Presiding Judge, College Station Municipal Court, Texas*

### 5-6:15 p.m. Changing Court Culture

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?

Moderator: **Amy Bach**

*Executive Director and President, Measures for Justice*

**Hon. Elizabeth Pollard Hines**

*Judge, 15th Judicial District Court, Ann Arbor, Michigan*

**Hon. Lawrence K. Marks**

*Chief Administrative Judge of the Courts of New York State*

**Hon. Andra D. Sparks**

*Presiding Judge, City of Birmingham Municipal Court, Alabama*

**Hon. Nan G. Waller**

*Presiding Judge, Multnomah County Circuit Court, Oregon*

**Hon. Gayle Williams-Byers**

*Administrative and Presiding Judge, South Euclid Municipal Court, South Euclid, Ohio*

### 6:15-7:15 p.m. Reception

## ABOUT THE PRESENTERS

### **Hon. Ronald B. Adrine**

*Administrative and Presiding Judge  
Cleveland Municipal Court, Ohio*

Judge Ronald B. Adrine is a lifelong resident of Greater Cleveland. He graduated from Fisk University and the Cleveland-Marshall College of Law. He passed the Ohio bar in 1973. In 1974, he joined the staff of the Cuyahoga County Prosecutor as an assistant in the criminal trial division. In 1976, he entered the private practice of law with his father, the late Russell T. Adrine. Two years later, he was appointed to serve as a Senior Staff Counsel to the U.S. House of Representatives Select Committee on Assassinations. He first ran for his current seat on the Cleveland Municipal Court bench in 1981.

Judge Adrine was reelected five times to full six-year terms. He was most recently elected in November of 2011. He serves as Administrative and Presiding Judge of his Court, a position to which his peers have annually elected him since 2008.

He was honored as a Distinguished Alumni of both Cleveland State University and the Cleveland-Marshall College of Law. In 2000, he was awarded the Ohio Bar Medal by the Ohio State Bar Association, its highest honor, in recognition of his contributions to the profession and the community.

### **Amy Bach**

*Executive Director and President, Measures for Justice*

Amy Bach founded Measures for Justice in 2011 to help collect and analyze criminal justice data from county jurisdictions across the nation. The nonprofit has developed a set of over 30 performance measures to assess and compare the entire justice system in each county, from arrest to post-conviction. Once published, the Measures for Justice data portal will be one of the most comprehensive, free databases of county-level criminal justice information ever made available to the public.

In June 2011, Echoing Green, a premier seed investor for social entrepreneurs, selected Ms. Bach as a Fellow out of 3,000 candidates worldwide to support the launch of Measures for Justice. She was also a Draper Richards Kaplan Fellow in social entrepreneurship.

For her work on the book *Ordinary Injustice: How America Holds Court*, Ms. Bach received a Soros Media Fellowship, a special J. Anthony Lukas citation, and a Radcliffe Fellowship. It also won the 2010 Robert F. Kennedy Book Award.

Ms. Bach was a Knight Foundation Journalism Fellow at Yale Law School and is a graduate of Stanford Law School. In 2012, she taught Criminal Law during the spring semester at the University of Buffalo Law School as a Visiting Professor.

### **Hon. Kevin Burke**

*Judge, Hennepin County District Court, Minnesota*

The Honorable Kevin Burke is a District Judge in Hennepin County, Minnesota. He is one of the most recognized leaders within the American judiciary.

Judge Burke was elected for four terms as Chief Judge and three terms as Assistant Chief Judge. During this time he instituted social science studies and reforms to improve procedural fairness.

Judge Burke has been named one of the 100 most influential lawyers in the history of Minnesota by *Law & Politics* magazine. In 1996 he was named a Toll Fellow. The Toll Fellowship identifies emerging state leaders from all three branches of government. In 1997, he received the Director's Community Leadership Award from the Federal Bureau of Investigation. In 2002, the National Center for State Courts awarded him the Distinguished Service Award. In 2003, he was selected as the William H. Rehnquist Award recipient by the National Center for State Courts. The Rehnquist Award is presented annually to a state judge who exemplifies the highest level of judicial excellence, integrity, fairness and professional ethics. He was awarded Public Official of the Year by *Governing Magazine* in 2004. In 2005, the Minnesota Chapter of the American Board of Trial Advocates named him Trial Judge of the Year. The American Bar Association named him Judicial Educator of the year in 2010.

Judge Burke is the co-author of two American Judges Association White Papers, "Procedural Fairness: A Key Ingredient in Public Satisfaction" and "Minding the Court: Enhancing the Decision-Making Process."

### **John T. Chisholm**

*Milwaukee County District Attorney, Wisconsin*

John T. Chisholm has served as Milwaukee County District Attorney since 2007. A career prosecutor and Milwaukee resident, he is a leading advocate for criminal justice reform, community prosecution, and public integrity.

After graduating from the University of Wisconsin Law School in 1994, he was hired as a prosecutor by Milwaukee County District Attorney E. Michael McCann. Mr. Chisholm tried misdemeanor, domestic violence, and narcotics cases until 1999, when he was appointed team captain of the newly created Firearms Enforcement Unit. In this role, he oversaw the prosecutions of gun-related crime, violent crime, drug trafficking, and complex criminal conspiracies.

Since taking office as District Attorney in 2007, he has won national recognition for successes in prosecution and criminal justice reform. Under his leadership, the District Attorney's Office has won major convictions against violent offenders, human traffickers, and government officials who violate the public trust. As a reformer, he has spearheaded the creation of drug, veterans', and mental health treatment

courts and has established a community prosecution program that embeds prosecutors in the neighborhoods they serve. Mr. Chisholm has opened his office to routine review from national reform experts.

He is an active member of the Milwaukee community and the legal profession. He is a board member of Safe and Sound Milwaukee, the Milwaukee Homicide Review Commission, and the Milwaukee County Community Justice Council. He serves as a board member and past chairman of the Association of Prosecuting Attorneys and is a frequent lecturer at universities and prosecution clinics nationwide.

### **Ezekiel “Zeke” Edwards**

*Director, Criminal Law Reform Project,  
American Civil Liberties Union*

As director of the American Civil Liberties Union’s Criminal Law Reform Project, Ezekiel “Zeke” Edwards has sought to advance criminal justice reform through strategic litigation and advocacy aimed at ending mass incarceration, challenging law enforcement abuses of power, promoting racial justice, and advancing drug law reform.

As both director and previously as staff attorney, Mr. Edwards has worked on cases and campaigns on a wide variety of issues, including reducing unnecessary pretrial detention, ending abusive police and prosecutorial practices, reforming indigent defense systems, ensuring and expanding right to counsel, advocating for and protecting the decriminalization of drug laws, challenging juvenile life without parole sentences, and reducing excessive sentencing. He has written briefs in the U.S. Supreme Court in cases covering a wide array of Fourth, Fifth, and Sixth Amendment issues.

Before joining the ACLU, Mr. Edwards was a staff attorney at the Innocence Project and a leading national expert on eyewitness identification reform, a public defender at The Bronx Defenders, a Criminal Justice Fellow at the Drum Major Institute of Public Policy, and an investigator at the Capital Defender Office in New York.

He earned his J.D. at the University of Pennsylvania Law School, where he was a Public Interest Scholar, and his B.A. with honors at Vassar College.

### **Christopher Ervin**

*Founder and President, The Lazarus Rite Inc.,  
and Community Organizer, Baltimore, Maryland*

Christopher Ervin is the Founder and President of the Lazarus Rite Inc., a nonprofit organization serving returning citizens in Baltimore City.

Mr. Ervin founded The Lazarus Rite, Inc. as a continuance of his advocacy work around criminal justice reform, the constitutional nature of felony disenfranchisement, and the state of expungement in Maryland. His efforts on the

subject are well known throughout Baltimore City and the State of Maryland.

Due to Mr. Ervin’s hard work, influence, testimony and insight, which proved to have a significant impact on legislators and the Governor’s Office, recent laws were enacted in Maryland, including expungement opportunities in the Second Chance Act of 2014, Workforce Reinvestment Initiatives, and the Justice Reinvestment Act of 2016, which includes hundreds of pages of changes and reforms to help former incarcerated and convicted individuals re-enter society with greater services and opportunities.

Mr. Ervin formerly served in the U.S. Marine Corps. He studied social science at Coppin State University and Criminal Law at the University of Maryland College Park. He holds several positions in community grass-roots organizations that are directly associated with advocating for fair and equitable treatment among individuals and communities.

### **Hon. Lisa Foster**

*Former Director, Office for Access to Justice, U.S.  
Department of Justice, and Judge, Superior Court  
of California, County of San Diego (Ret.)*

Judge Lisa Foster served as the Director of the Office for Access to Justice at the U.S. Department of Justice until January 2017. Before joining the Justice Department, she served for 10 years as a California Superior Court Judge in San Diego, where she presided over criminal, civil and family law departments.

After serving as a law clerk to the Honorable Marianna R. Pfaelzer of the Central District of California, Judge Foster began her legal career as a Staff Attorney at the Center for Law in the Public Interest in Los Angeles, and later joined the Legal Aid Foundation of Los Angeles. She also served as the Executive Director of California Common Cause and was Of Counsel to the law firm of Phillips & Cohen, representing whistleblowers under the federal and California False Claims Acts. She also taught courses on sex discrimination, federal courts, and election law as an Adjunct Professor at the University of San Diego School of Law.

Judge Foster received a B.A. in American Studies from Stanford University and J.D., magna cum laude, from Harvard Law School.

### **Vicki A. Hill**

*City Prosecutor, City of Phoenix, Arizona*

Vicki A. Hill received her Bachelor of Arts degree in English Literature in 1986 from Arizona State University. She received her Juris Doctor degree from Creighton University in Omaha, Nebraska, in 1993. She is now the City Prosecutor for the City of Phoenix.

Ms. Hill is a licensed attorney in the State of Arizona



and has been a member of the State Bar since 1993. She joined the City of Phoenix Prosecutor's Office in January of 1994 as a trial attorney. She later was part of the Office's Training Bureau, eventually becoming the Bureau Chief for the Training and Technology Bureau. She supervised the Domestic Violence Unit and co-chaired the City Domestic Violence Task Force. From 2007-14, she was the Chief Assistant City Prosecutor and was head of the Trial Bureau.

Ms. Hill is a member of the City of Phoenix Human Trafficking Task Force. She has presented on the impact of body-worn cameras for prosecuting agencies and sat on a statewide legislative study committee on the issue of legislation for implementation and use of body-worn cameras.

### **Hon. Elizabeth Pollard Hines**

*Judge, 15th Judicial District Court,  
Ann Arbor, Michigan*

Elizabeth Pollard Hines was elected Judge of the 15th District Court in Ann Arbor, Michigan, in 1992. Former Chief Judge, she presides over criminal cases, including a specialized domestic violence docket, and "Street Outreach Court," a community project of the Washtenaw County criminal justice system and advocates for the homeless she helped create.

Judge Hines received her B.A., with honors, from the University of Michigan in 1974, and her J.D. from the University of Michigan Law School in 1977. She serves on the Board of the National Center for State Courts (NCSC) representing limited jurisdiction courts, the American Judges Association (AJA) Executive Committee, the Michigan Domestic and Sexual Violence Prevention and Treatment Board, the Michigan State Bar Foundation, and the State Planning Body, addressing legal services in Michigan. She represents the AJA on the National Task Force on Fines, Fees, and Bail Practices.

Judge Hines received the 2008 Distinguished Service Award from the NCSC. She was awarded the first annual Judicial Excellence Award by the Michigan District Judges Association in 2011. In 2012, the AJA created the Judge Libby Hines Award to honor each year a judge in the U.S. or Canada for effective judicial response to domestic violence.

### **Cynthia E. Jones**

*Professor of Law, American University  
Washington College of Law*

Cynthia E. Jones teaches Evidence, Criminal Law, Criminal Procedure, and a seminar on Race, Crime, and Politics at the American University Washington College of Law. She was recognized by the University with the prestigious Faculty Award for Outstanding Teaching, and she received the Teaching with Technology Award from the Center for Teaching Excellence for her animated short film

*Fighting Evidence with Evidence.*

Professor Jones' areas of scholarship and expertise include wrongful convictions, criminal discovery, bail reform, and eliminating racial disparities in the criminal justice system. She established the Pretrial Racial Justice Initiative in 2013 to address racial and ethnic disparities in bail, and she previously directed the ABA Racial Justice Improvement Project, a program to engage criminal justice officials in racial justice reform. As a frequent lecturer for the Federal Judicial Center, Professor Jones has given her innovative, multi-media presentation on the Federal Rules of Evidence to judges and lawyers across the country.

Professor Jones is the President of The Sentencing Project Board of Directors, and also serves on the governing boards of the Pretrial Justice Institute and the Civil Rights Corp. In addition, each year the Professor Cynthia E. Jones Scholarship is awarded in her honor to law student who is an aspiring public defender.

Professor Jones was a staff attorney at the Public Defender Service for the District of Columbia (PDS), served as the Executive Director of PDS, and served as the Chair of the PDS Board of Trustees.

### **Peter A. Joy**

*Henry Hitchcock Professor of Law and Director, Criminal  
Justice Clinic, Washington  
University in St. Louis School of Law*

Peter A. Joy is the Henry Hitchcock Professor of Law and Director of the Criminal Justice Clinic at the Washington University in St. Louis School of Law. He teaches Legal Profession, Comparative Legal Ethics Seminar, Trial Practice & Procedure, and the Criminal Justice Clinic.

Professor Joy co-authors an ethics column for the ABA quarterly publication *Criminal Justice* and is a co-author of *Do No Wrong: Ethics for Prosecutors and Defenders*. He is the past chair of Professional Responsibility Section and the Clinical Legal Education Section of the Association of American Law Schools (AALS). He serves on the Standards Review Committee and is a former member of the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar.

Professor Joy writes in the areas of legal ethics, access to justice, criminal justice, and clinical education.

### **David LaBahn**

*President and CEO, Association  
of Prosecuting Attorneys*

David LaBahn is President and CEO of the Association of Prosecuting Attorneys (APA), an organization representing elected and deputy or assistant prosecutors, and city attorneys.

Before forming APA, Mr. LaBahn was the Director of

the American Prosecutors Research Institute (APRI) and the Director of Research and Development for the National District Attorneys Association (NDAA). In this dual capacity, he directed APRI's Projects, including editing and teaching in the areas of child and adult sexual assault and gang violence.

Before joining NDAA, Mr. LaBahn was the Executive Director of the California District Attorneys Association (CDAA). Appointed to this position in 2003, he had responsibility for all the Association's efforts and became the primary policy strategist and spokesperson for the organization. He joined CDAA as the Deputy Executive Director in 1996 and at that time was responsible for the training and publications department, applying for and received state and federal grants, and lobbying the California State Legislature on criminal justice and budget matters.

Mr. LaBahn began his career as a deputy district attorney in Orange and Humboldt counties in California (1987-96).

### **Hon. Steve Leben**

*Judge, Kansas Court of Appeals*

Judge Steve Leben has been a judge on the Kansas Court of Appeals, a statewide intermediate appellate court, since 2007. Before that, he was a general jurisdiction trial judge for nearly 14 years and practiced law in the Kansas City area for 11 years.

Along with Minnesota state trial judge Kevin Burke, Judge Leben coauthored a white paper for the American Judges Association in 2007 on how to improve perceptions of fairness in America's courts through adherence to procedural-justice principles. Since 2007, Judge Leben has spoken to judges in 20 states on this subject; he also cofounded a website, ProceduralFairness.org, that provides background information for judges, courts, and law enforcement. Largely in recognition of this work, the National Center for State Courts in 2014 named Judge Leben the winner of the William H. Rehnquist Award for Judicial Excellence, the highest award the National Center gives to a judge.

In addition, Judge Leben has been the editor of *Court Review*, a quarterly journal for judges, since 1998, and he served as president of the American Judges Association in 2007. He is an elected member of the American Law Institute, and he teaches a class each spring on statutory interpretation at the University of Kansas School of Law.

### **Hon. Lawrence K. Marks**

*Chief Administrative Judge of the Courts of New York State*

The Honorable Lawrence K. Marks was appointed New York's Chief Administrative Judge in July 2015. In that role, he oversees the day-to-day administration and operation of the statewide court system, with a budget of over \$2.5

billion, 3,600 state and local judges, and 15,000 nonjudicial employees in over 300 locations.

He previously served as First Deputy Chief Administrative Judge (2012-15), Administrative Director of the Office of Court Administration (2004-12), and Special Counsel to the Chief Administrative Judge (1998-2003).

Before joining the state court system, Judge Marks was senior supervising attorney with The Legal Aid Society in New York City, a litigation associate with Hughes Hubbard and Reed, and law clerk to U.S. District Court Judge Thomas C. Platt.

In 2009, he was appointed by Gov. David Paterson as a Judge of the New York State Court of Claims; he was reappointed to that position in 2015 by Gov. Andrew Cuomo.

In addition to his administrative responsibilities, Judge Marks hears cases in the Commercial Division in the Supreme Court, New York County.

He has served as an adjunct professor at the law school and graduate school levels, and is the editor and co-author of *New York Pretrial Criminal Procedure* (Thomas Reuters 2007). He graduated from the State University of New York at Albany (B.A., magna cum laude) and Cornell University Law School (J.D., cum laude, law review editor).

### **Carlos J. Martinez**

*Miami-Dade County Public Defender, Florida*

Carlos J. Martinez, the first Hispanic elected Public Defender in the U.S., is Miami-Dade County's Public Defender. He was elected in 2008, and re-elected in 2012 and 2016.

Before law school, he worked his way up from being a car wash attendant to managing multiple gas stations for Exxon Company USA, including the most profitable station in the Southeast. In the Public Defender's Office, he represented thousands of clients before working as an administrator for more than a decade.

Mr. Martinez has instituted numerous programs to help troubled youth get on the right track. He has been active in addressing the crisis of minority children cycled from schools to prisons.

He serves on the National Association for Public Defense Steering Committee and is a member of the Institute for Innovation in Prosecution's Executive Session on Rethinking the Role of the Prosecutor in the Community. He chaired the Florida Bar's Legal Needs of Children Committee, was VP of the Florida Public Defender Association, and served on the Supreme Court of Florida Steering Committee on Drug Courts, the Steering Committee on Families and Children, and the Florida Blueprint Commission on Juvenile Justice.

He has served on technical assistance and training teams across the U.S. and Latin America, including the Inter-American Drug Abuse Control Commission (Dominican Republic, Chile and Mexico), the Honduran National

Office of Public Defense, and the Public Defender Offices in Schenectady County (NY), San Bernardino County (CA), Maricopa County (Phoenix), and Marion County (Indianapolis).

**Norman L. Reimer**

*Executive Director, National Association of Criminal Defense Lawyers*

Norman L. Reimer is the Executive Director of the National Association of Criminal Defense Lawyers (NACDL). He is also the publisher of NACDL's *Champion* magazine.

During his tenure, he has led NACDL to national preeminence as a leader in efforts to reform the nation's criminal justice system, and to provide resources and educational support for the criminal defense bar. He has authored over 60 articles covering issues related to criminal justice, and has given presentations on matters related to public defense reform, overcriminalization, discovery abuse, judicial independence, forensic science issues, criminal intent requirements, and collateral consequences of conviction. He has also participated in amicus curiae briefs on issues related to public defense reform, judicial independence and GPS tracking.

Earlier, he practiced for 28 years as a criminal defense lawyer. He is a recognized leader of the organized bar and a spokesperson on behalf of reform of the legal system. He is a past President of the NY County Lawyers' Association; there, he played a pivotal role in litigation against the State and City of New York that upheld the right of a bar association to sue on behalf of indigent litigants and resulted in a decision declaring New York's underfunding of indigent defense services unconstitutional. He has been a delegate to the ABA House of Delegates and the NYS Bar Association House of Delegates. He has played leading roles in reform efforts on issues such as mandatory recording of custodial interrogations, a moratorium on death penalty prosecutions, and judicial independence

**Jenny Roberts**

*Professor of Law, Associate Dean for Scholarship and Co-Director, Criminal Justice Clinic, American University Washington College of Law*

Jenny Roberts is a Professor of Law and the Associate Dean for Scholarship at American University Washington College of Law. She co-directs the Criminal Justice Clinic and teaches Criminal Law.

Her research focuses on plea bargaining, misdemeanors and the lower criminal courts, collateral consequences of criminal convictions, and indigent defense. In addition to numerous law review articles, Professor Roberts is a co-author of *Collateral Consequences of Criminal Convictions: Law, Policy, & Practice* (West 2016). Professor Roberts' work has been cited by the U.S. Supreme Court, eight state high

courts, and numerous lower state and federal courts.

Professor Roberts sits on the National Research Advisory Board for the Misdemeanor Justice Project at John Jay College and was on the board of the Mid-Atlantic Innocence Project from 2012-15. Before teaching, Professor Roberts was a public defender in Manhattan and a law clerk in the Southern District of New York.

**Hon. David M. Rubin**

*Judge, Superior Court of California, County of San Diego*

Judge David M. Rubin is a member of the San Diego County Superior Court. He was sworn in on January 8, 2007. He handles both criminal and family cases.

Judge Rubin graduated from the University of California, Berkeley in 1982 and from the University of San Francisco School of Law in 1986. He was a prosecutor with the San Diego County District Attorney's Office from 1986 through 2007.

In addition to his litigation duties at the District Attorney's Office, Judge Rubin taught statewide and nationwide on such topics as Technology in the Courtroom, Visual Trials, jury selection and psychiatric defenses.

Judge Rubin serves on the Superior Court's Technology Committee and Education Committee. He is past President of the San Diego County Judges Association and the California Judges Association. He is a member of the Judicial Council of California, the state judicial branch's policymaking body, where he is one of five internal chairs, leading both the Litigation Management Committee and the Judicial Branch Budget Committee.

**Abbe Smith**

*Director, Criminal Defense and Prisoner Advocacy Clinic, and Professor of Law, Georgetown University Law Center*

Abbe Smith is Director of the Criminal Defense and Prisoner Advocacy Clinic and Professor of Law at Georgetown University Law Center. Previously, she was Deputy Director of the Criminal Justice Institute, Clinical Instructor, and Lecturer at Law at Harvard Law School.

She teaches and writes on criminal defense, juvenile justice, legal ethics, and clinical legal education. She is the author of *Case of a Lifetime: A Criminal Defense Lawyer's Story*, co-editor with Monroe Freedman of *How Can You Represent Those People?*, co-author with Monroe Freedman of *Understanding Lawyers' Ethics*, and co-editor with Alice Woolley and Monroe Freedman of *Lawyers' Ethics*.

Professor Smith began her legal career at the Defender Association of Philadelphia. She continues to engage in indigent criminal defense as a clinical supervisor and a member of the Criminal Justice Act panel for the DC Superior Court, and presents at public defender, capital defender,

and other lawyer training programs in the U.S. and abroad.

She is a member of the Board of Directors of The Bronx Defenders, Still She Rises, and the Monroe H. Freedman Institute for the Study of Legal Ethics; a member of the Faculty Advisory Board of the Georgetown Prisons and Justice Initiative; an Adviser to the American Law Institute's Project to Reform the Model Penal Code's Provisions on Sexual Assault and Related Offenses; and a longtime member of the National Association of Criminal Defense Lawyers, American Civil Liberties Union, and National Lawyers Guild. In 2010, she was elected to the American Board of Criminal Lawyers.

**Hon. Andra D. Sparks**

*Presiding Judge, City of Birmingham  
Municipal Court, Alabama*

Judge Andra (pronounced Ahn dray) D. Sparks is a native of Birmingham, Alabama. He is a 1985 graduate of Tuskegee Institute and a 1988 graduate of the University of Alabama School of Law.

After law school, he served as a military attorney in the U.S. Army, attaining the rank of Captain. Upon leaving the Army, he became a partner in the law firm Shores, Lee, Sparks, Atha and Choy located in Birmingham, Alabama.

In March 1995, he was appointed Senior Trial Referee at Jefferson County Family Court. He was the hearing officer for Alabama's first Juvenile Drug Court from its inception in January 1996 through January 2007.

In August 2008, the Birmingham City Council appointed Judge Sparks to a newly established seat on Birmingham's Municipal Court to establish and preside over the Drug Court and Gun Court Dockets. He was reappointed in 2012 and again in 2017. In December 2010, he was appointed Presiding Judge for the City of Birmingham Municipal Court by the Mayor, William A. Bell.

Since 2004, Judge Sparks has been the Senior Pastor of Forty-fifth Street Baptist Church in Birmingham's East Lake Community.

**Hon. Edward J. Spillane**

*Presiding Judge, College Station Municipal Court, Texas*

The Honorable Edward J. Spillane has been the Presiding Municipal Court Judge of College Station, Texas, since 2002. He received his undergraduate degree in English from Harvard University and law degree from the University of Chicago. After law school he worked as an associate for the law firm of Fulbright and Jaworski in Houston, Texas, and then for eight years as an assistant district attorney in Brazos County, Texas.

Judge Spillane is on the National Task Force on Fines, Fees, and Bail Practices, is the past President of the Texas Municipal Courts Association, and also serves on the National Research Advisory Board for the Misdemeanor

Justice Project and the Research Network on Misdemeanor Justice at the John Jay College of Criminal Justice. He also served for a six-year term as a Commissioner on the Texas Judicial Conduct Commission.

Judge Spillane has written several articles on the plight of indigent defendants, most notably the article "Why I Refuse to Send People to Jail," published in *The Washington Post* in April of last year, which focused attention on the need to make sure indigent defendants' rights are enforced and alternative punishments to jail are considered.

**Hon. Betty J. Thomas Moore**

*Judge, Shelby County General Sessions Court, Tennessee*

Judge Betty J. Thomas Moore is the first elected female Judge in the history of the General Sessions Civil Court. She began her first eight-year term in 1998 and has been re-elected twice.

She spent most of her 13 years of practicing law as an Assistant Public Defender. Though offered several positions with private firms, she has always believed in being there to serve, helping those who are less fortunate and unable to hire competent counsel.

From 1994 until her election, she was assigned as one of three attorneys defending Capital Murder cases and was one of the few attorneys in Shelby County qualified to try death penalty cases. She was one of 46 attorneys nationwide selected in 1996 to attend Gerry Spence's Trial Lawyers College in Jackson Hole, Wyoming, and was invited back as a staff member the following year.

She is a member of the Ben F. Jones Chapter of the National Bar Association and the Memphis Bar Association, the Tennessee General Sessions Judges Conference, the Association of Women Judges, and the American Judges Association (AJA); she also serves on the AJA's Board of Governors and chairs its Judicial Ethics Committee. She is a board member of the Judicial Council of the National Bar Association and the Association of Women Attorneys, and serves on the Judicial Ethics Committees for the State of Tennessee and the American Judges Association. She was appointed by the Tennessee Supreme Court to serve on the Access to Justice Task Force in 2006.

**Colette Tvedt**

*Director, Public Defense Training and Reform,  
National Association of Criminal Defense Lawyers*

Colette Tvedt serves as the Director of Public Defense Training and Reform for the National Association of Criminal Defense Lawyers (NACDL). In that capacity, she is focused on developing and delivering premier training programs for public defense providers nationwide focusing on racism in the criminal justice system, police misconduct, challenging forensic evidence, and trial skills. She is also partnering with

other national organizations on projects such as pretrial release reform, public defender workload studies, and systemic state reform to ensure the best representation of all indigent defendants.

Ms. Tvedt has devoted her career over the past 25 years to representing poor people accused of crimes. She spent 18 of those years as a public defender in Massachusetts and Washington State and seven years in private practice as a partner with the Seattle law firm Schroeter, Goldmark & Bender. She has organized training programs for thousands of defense lawyers and served for several years as a Clinical Professor of Law at Suffolk University Law School in Boston. She has also served as an adjunct professor at the University of Washington School of Law and at Seattle University Law School. She is a faculty member of the National Criminal Defense College (NCDC) in Macon, Georgia.

Ms. Tvedt is an honors graduate of Rutgers University, where she also attended law school.

### **Hon. Nan G. Waller**

*Presiding Judge, Multnomah County  
Circuit Court, Oregon*

The Honorable Nan G. Waller has served as Presiding Judge for the Multnomah County Circuit Court since 2012. She was appointed to the bench in 2001.

Judge Waller serves on the Oregon State Bar's Bar Press Broadcasters Council, the Multnomah County Justice Reinvestment Steering Committee and the Local Public Safety Steering Committee (LPSCC), and the Oregon Judicial Department's Judicial Education Committee. She also chairs an LPSCC committee on Racial and Ethnic Disparities. She was one of four Executive Sponsors for Oregon eCourt. Judge Waller has been a leader in the planning for a new central courthouse in Multnomah County and in implementing a court-wide procedural justice initiative. She also serves on the Boards of Lines for Life and the Children's Institute.

Judge Waller was named National CASA Judge of the Year in 2011 and received NAMI Oregon's Gordon and Sharon Smith New Freedom Award in 2013. In 2014, she received the Wallace P. Carson Award for Judicial Excellence from the Oregon State Bar. In 2015, she was named the Classroom Law Project's Legal Citizen of the Year.

Judge Waller is a fifth-generation Oregonian. She received her B.A. from Stanford University and graduated from the University of Oregon School of Law.

### **Hon. Gayle Williams-Byers**

*Administrative and Presiding Judge, South Euclid  
Municipal Court, South Euclid, Ohio*

The Honorable Gayle Williams-Byers serves as Administrative and Presiding Judge of the South Euclid Municipal Court in Ohio. At the start of her term on

January 1, 2012, she became the first African American elected to this seat in the city's history. Judge Williams-Byers serves on the Board of Governors for the American Judge's Association (AJA), as co-chair of the Education, Domestic Violence, Access to Justice and Social Media and Technology Committees, and as a member of the Diversity and Education Committees.

Before joining the bench, she served as an Assistant Cuyahoga County Prosecutor, ending her career as Supervisor of the Cuyahoga County Grand Jury. She also was an Adjunct Professor at Cuyahoga Community College in the Law Enforcement Department, teaching courses in Juvenile, Constitutional and Criminal Law.

As Municipal Judge, she has spearheaded innovative advancements, including livestreamed court proceedings, an iOS App for instant docket access, a monthly Night Court docket to provide additional access to justice, and the only suburban Specialized Mental Health Docket in Cuyahoga County to address the needs of defendants with severe and persistent mental illnesses. She was also the catalyst in forming the first suburban Drug Court initiative in partnership with Cleveland Municipal Court, where inaugural funding of nearly \$2 million has helped to serve suburban communities in northeast Ohio.

Judge Byers received her B.A., M.N.O., and J.D. from Case Western Reserve University. She serves on the Board of New Directions, an organization that provides life-changing treatment to chemically dependent adolescents and their families.

### **Ellen Yaroshefsky**

*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*

Ellen Yaroshefsky is the Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe H. Freedman Institute for the Study of Legal Ethics at Hofstra Law. She teaches ethics courses and criminal procedure, organizes symposia, and writes and lectures in the field of legal ethics with a concentration upon issues in the criminal justice system. She also counsels lawyers and law firms and serves as an expert witness.

She is the longstanding co-chair of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers and regularly advises NACDL lawyers around the country. She is the former co-chair of the American Bar Association's Ethics, Gideon and Professionalism Committee of the Criminal Justice Section.

She serves on the New York State Committee on Standards of Attorney Conduct and on ethics committees of state and local bar associations and formerly served as a Commissioner on the New York State Joint Commission on Public Ethics.

From 1994-2016 she was a Clinical Professor of Law and the Director of the Jacob Burns Center for Ethics in the Practice of Law at the Benjamin N. Cardozo School of Law in New York. Before joining the Cardozo faculty, she was an attorney at the Center for Constitutional Rights in New York and a public defender at the Seattle-King County Public Defender Association, and then in private practice.

She has received a number of awards for litigation, and the New York State Bar Association award for “Outstanding Contribution in the Field of Criminal Law Education.”

## **Steven Zeidman**

*Professor of Law and Director, Criminal Defense Clinic, The City University of New York School of Law*

Steven Zeidman, Professor of Law and Director of the Criminal Defense Clinic at CUNY School of Law, has spent the last 30 years working in the area of criminal defense. A graduate of Duke University School of Law, he is a former staff attorney and supervisor at The Legal Aid Society. He has taught at Fordham, Pace, and New York University School of Law and was awarded the NYU Alumni Association’s Great Teacher Award in 1997 and CUNY’s Outstanding Professor of the Year honor in 2011.

Professor Zeidman is a member of the Appellate Division’s Indigent Defense Organization Oversight Committee and the American Bar Association’s Criminal Justice Section Council, and serves on the Board of Directors of Prisoners’ Legal Services and an Advisory Council created to help implement the remedial order in the *Floyd v. City of New York* stop-and-frisk litigation. He served on several statewide commissions, including the Commission on the Future of Indigent Defense Services and the Jury Project. He was a member of the Mayor’s Advisory Committee for the Judiciary in the Bloomberg and Giuliani administrations.

Professor Zeidman has made numerous presentations on a range of issues, including judicial selection, evidence, and the ethical dimensions of the effective assistance of counsel. ■

**COURT EXPERIENCES AND ATTITUDES SURVEY**

**Please respond to these first few statements about your experience in court today:**

1. *The judge made sure I understood the decision.*
2. *The judge treated me with respect.*
3. *The judge showed concern for my welfare.*
4. *The judge gave reasons for his or her decision.*
5. *The judge listened to my side of the story.*
6. *I felt listened to in court.*
7. *The judge treated my attorney just as fairly as he or she treated the prosecutor.*
8. *The judge listened to my attorney just as much as he or she listened to the prosecutor.*
9. *I felt intimidated in court.*
10. *The judge was impolite.*
11. *I felt nervous in court.*
12. *Did you get an outcome you thought was fair?*

	<i>Strongly Disagree</i>			<i>Neutral</i>			<i>Strongly Agree</i>		
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	

**Please respond to the following statements about the courts in general:**

13. *Court cases are resolved in a timely manner.*
14. *The court system does a good job handling cases from filing the case, to settlement or trial.*
15. *People who work for the court, such as court clerks, are helpful.*
16. *Most judges in my community do their job well.*
17. *The judges in my community have too much power.*
18. *Most judges in my community are dishonest.*
19. *Most judges in my community treat some people better than others.*
20. *Judges do not give enough attention and time to each individual case.*
21. *Courts are out of touch with what's going on in their communities.*
22. *Courts protect defendants' constitutional rights.*
23. *Courts do not make sure their orders are enforced.*
24. *Most juries are not representative of the community.*
25. *Judges are generally honest and fair in deciding cases.*
26. *I am generally comfortable with the authority the courts in my community have to make rulings that I have to abide by.*
27. *I would be comfortable letting the courts in my community decide a case that was important to me.*

	<i>Strongly Disagree</i>			<i>Neutral</i>			<i>Strongly Agree</i>		
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
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1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	
1	2	3	4	5	6	7	8	9	

28. The courts in my community approach their job with a strong moral code.
29. The courts in my community care about people like me.
30. The courts in my community have the skills necessary to do their job.

1	2	3	4	5	6	7	8	9
1	2	3	4	5	6	7	8	9
1	2	3	4	5	6	7	8	9

31. I was treated with courtesy and respect by the court staff (excluding judges).
32. Imagine that you received a letter from the court telling you that you have to appear in court. Are you likely to go to court?
33. Did you feel comfortable in court today?

	<i>Strongly Disagree</i>	<i>Neutral</i>	<i>Strongly Agree</i>					
1	2	3	4	5	6	7	8	9
1	2	3	4	5	6	7	8	9
1	2	3	4	5	6	7	8	9

**Please answer the following questions about yourself:**

34. As of today, how old are you? \_\_\_\_\_ years
35. Please circle the gender you identify with. Male  
Female
36. Which race(s) do you identify with (circle all that apply)? White  
African-American  
Hispanic-American  
Asian-Pacific Islander  
Native-American  
Other \_\_\_\_\_
37. I had an interpreter. Spanish  
Somali  
Other  
\_\_\_\_\_

**You have completed the survey. Thank you for your time!**

Attorney Section (to be completed by the attorney)	
<b>Purpose of Appearance</b>	
<b>Date and Time of Appearance</b>	
<b>Court</b>	Southdale _____ Brookdale _____ Ridgedale _____ City of Minneapolis _____ Adult Criminal _____ Family Court _____ Juvenile _____ Drug Court _____ Veterans Court _____ Mental Health Court _____







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