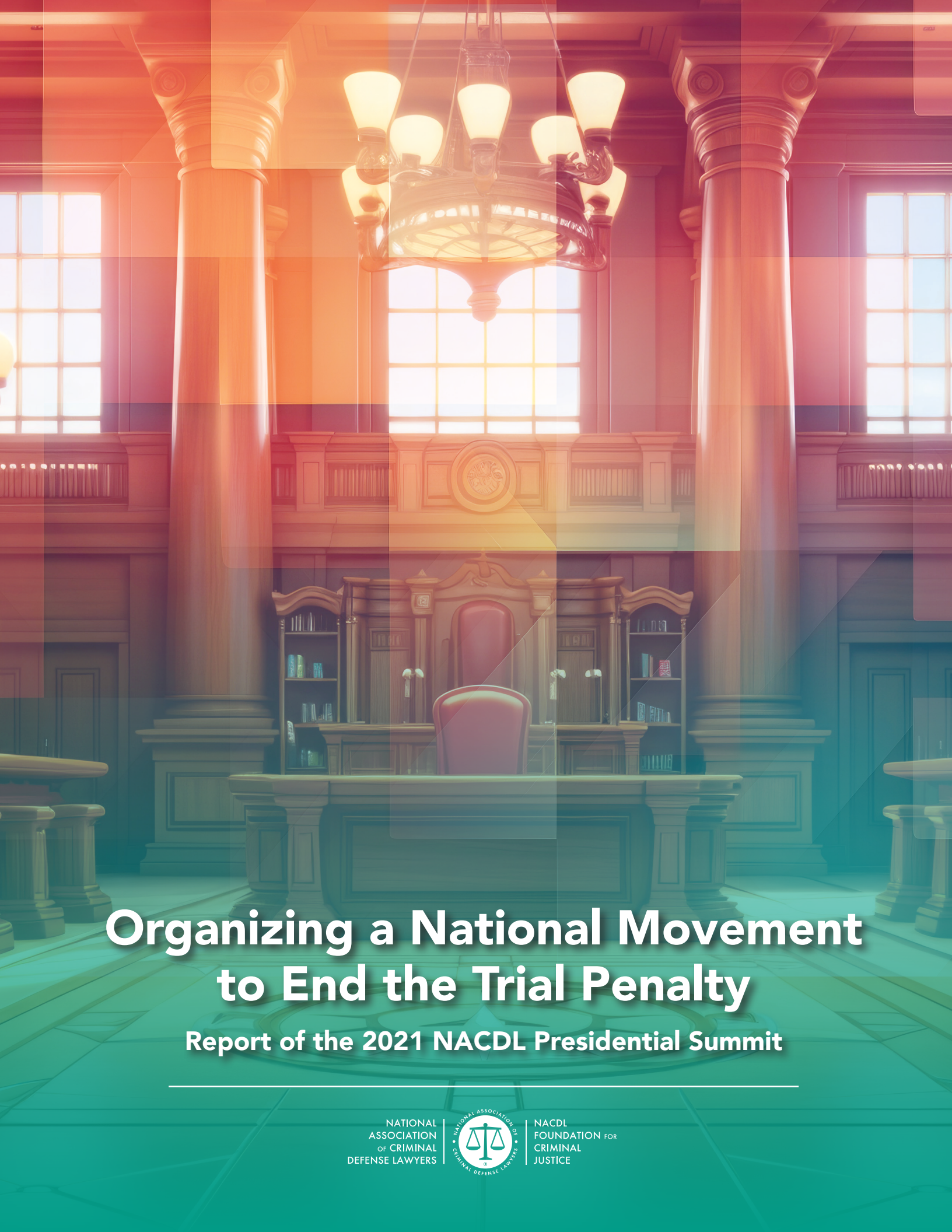

Organizing a National Movement to End the Trial Penalty

Report of the 2021 NACDL Presidential Summit

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
NACDL FOUNDATION FOR CRIMINAL JUSTICE

Organizing a National Movement to End the Trial Penalty

Report of the 2021 NACDL Presidential Summit

Michael Heiskell
President
NACDL

Cynthia Hujar Orr
President
NFCJ

Martín Antonio Sabelli
Past President, 2021-2022
NACDL

Lisa Monet Wayne
Executive Director
NACDL

Kyle O'Dowd
Deputy Director
NACDL

Nathan Pysno
Director, Economic Crime & Procedural Justice
NACDL

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS | NACDL FOUNDATION FOR CRIMINAL JUSTICE

For more information contact:

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS | NACDL FOUNDATION FOR CRIMINAL JUSTICE

National Association of Criminal Defense Lawyers®
1660 L Street NW, 12th Floor, Washington, DC 20036, Phone 202-872-8600, www.NACDL.org

This publication is available online at
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Table of Contents

NACDL and the NFCJ

About NACDL and the NACDL Foundation for Criminal Justice

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 bar to ensure justice and due process for persons accused of crime or other misconduct. NACDL envisions a society where all individuals receive fair, rational, and humane treatment within the criminal legal system. NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal justice system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level.

Founded in 1958 as the professional bar association of the nation's criminal defense attorneys, NACDL's direct membership now includes over 10,000 direct members in 28 countries, along with 90 state, provincial, and local affiliate organizations totaling approximately 40,000 attorneys NACDL members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, judges and others who work to preserve fairness within America's criminal justice system.

The NACDL Foundation for Criminal Justice (NFCJ) is a 501(c)(3) non-profit entity that supports NACDL's charitable efforts to promote reform and to preserve core constitutional principles by providing resources, training, and advocacy tools for the public, the criminal defense bar, and all those who seek to promote a fair, rational, and humane criminal legal system.

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Foreword

By Alice Marie Johnson

In 1996, I was sentenced to life plus 25 years in prison without parole for a first-time, nonviolent drug offense. Before my trial, the prosecution offered me a plea bargain: in exchange for my "cooperation" and guilty plea, I would spend three to five years imprisoned in a low-security facility. I did not take the deal. I fully admit that I was wrong to have been involved in a drug conspiracy, even if I was desperate to make ends meet at the time. My decision to act as a telephone mule in the operation was the biggest mistake of my life, and I own it. But spending even three years locked up and away from my children was unconscionable. And so, I did not take the plea deal, opting instead to exercise my constitutional right to a trial.

There is a drastic difference in sentencing for people, like me, who choose to take their case to trial instead of accepting the plea bargain. Due to federal mandatory sentencing laws, the minimum sentence I could hope for was life in prison with no chance of parole if I was found guilty at trial. The judge would not have been able to change that, even if she wanted to. Had I known the risk I was taking, I likely would never have decided to go to trial.

My story is the perfect example of what is known as the "trial penalty." This is the massive difference between the deal offered to a defendant in a pre-trial plea offer (the three to five years I was offered) and the actual sentence handed down post-trial if the person is convicted (the life plus 25 years I was sentenced to). Sadly, stories like mine are not uncommon. In large part due to mandatory minimum sentencing laws, the trial penalty is the rule in our criminal justice system — not the exception. And it has devastating consequences, especially for some of our most vulnerable citizens and their families.

The trial penalty allows prosecutors to coerce and intimidate defendants into pleading guilty by threatening to impose dramatically increased sentences if they insist on going to trial. People are, understandably, scared of ending up like me, so they often take the deal and relinquish their right to a trial by jury. But it is not just guilty people who end up giving in to coercive plea bargaining. Many innocent people also take these deals because they fear what could happen if they risk going to trial. There is too much on the line for them and their families.

In large part due to mandatory minimum sentencing laws, the trial penalty is the rule in our criminal justice system — not the exception.

The system I've just described bears no resemblance to the one that the Founders laid out in the Constitution. The right to a fair, impartial trial is a hallmark of that system, as is the assumption of innocence until proven guilty. But, as NACDL has noted in previous reports, less than 3% of criminal cases go to trial today. The rest are decided on guilty pleas, meaning that in these cases, the prosecution does not have to prove the accused is guilty beyond a reasonable doubt — and the accused is never given the chance to properly defend himself in front of an impartial jury of peers.

The trial penalty has so severely compromised the right to a jury trial that it may as well have stripped it from the Bill of Rights. And it's not just the right to a trial that people sign away when they are bullied into accepting plea deals. More often than not, these deals also include provisions that compromise the accused's other constitutional rights, such as the right to bail and the right to be free of unreasonable

searches and seizures. Many are also unaware that once a plea deal is signed, they can never file a motion challenging it. Almost without exception, plea agreements cannot later be overturned.

The trial penalty has ramifications for society at large. Low-income people and communities of color are the most victimized by it. These communities are already plagued by overcriminalization and mass incarceration, implicit and explicit bias, and underfunded community and legal resources, making them the most vulnerable to this predatory practice and the easiest to funnel through the legal system.

I lived the trial penalty. I was penalized with a life sentence for exercising my right to a trial. It was only by the grace of God that I was released in 2018 when President Trump granted me clemency and then a pardon. But others have not been as fortunate, and it is those people that I am determined to fight for. This report of NACDL's 2021 Presidential Summit on Ending the Trial Penalty will be an inspiration and a guide for doing just that. It not only sheds light on this dire and pervasive practice poisoning the justice system, but it provides ideas for comprehensive solutions that will tackle the legislative, policy, and cultural aspects of the problem. I'm also particularly excited about the End the Trial Penalty coalition that NACDL and its partners launched because it will bring together criminal justice reform advocates from across the political spectrum to work towards restoring fundamental constitutional rights. Together, we can ensure the trial penalty becomes a thing of the past. I urge you all to join us in this fight.

President's Preface

Imagine that you have been charged with a serious crime and that you face a choice: accept an offer from the prosecutor to plead guilty and receive five years in prison or run the risk of 20 years in prison after trial if you are convicted. Imagine that you have a lawyer — a good one who has a fully-resourced team behind her and who inspires your confidence. Imagine that your lawyer advises you that you have an excellent chance of success at trial but that she cannot promise you an acquittal (because no ethical lawyer can ever make such a promise no matter the evidence in the case). Imagine that you have seen the evidence against you and understand that some favors you and some does not (which is virtually always true whether you are innocent, guilty of the crime charged, or guilty of a lesser charge). Finally, imagine that you are free pending trial, enjoying the support of friends and family and able to confer with your lawyer and review the evidence thoroughly with your lawyer. Faced with the very real prospect of two decades in prison after trial, what would you do?

Now imagine that you do not enjoy the blessing of a confidence-inspiring lawyer supported by a fully resourced team who speaks encouragingly about trial and that you do not enjoy the "luxuries" of pre-trial release, the support of family and friends, and the opportunity to review all the evidence. Faced with the very real prospect of two decades in prison after trial, what would you do?

Now imagine that you are Black, Brown, or economically disadvantaged and rely on an underfunded and overworked public defender system. What would you do now, understanding the pervasive effects of individual prejudice, structural racism, and implicit biases and the limitations of many public defense systems?

Finally, imagine that you are innocent of a crime, but denied pre-trial release because you cannot post bail. Imagine that your lawyer estimates that it may be many months or even years before trial and that the prosecutor has offered to agree to your release — from an overcrowded jail rife with violence — if you plead guilty now. What would you do now in the face of the substantial difference between the pre-trial offer and the likely post-trial sentence?

We know the answer to each and every scenario above. No matter who you are, what the charges are, and whether you are rich or poor: the overwhelming majority of accused — even those who enjoy the "blessings" listed above and even the innocent — surrender to the certainty of the pre-trial offer rather than risk a severe sentence after trial. Few have the stomach to risk doubling, tripling, or quadrupling their sentence after trial no matter their innocence or guilt and no matter the words ensconced in the Sixth Amendment establishing the right to trial. What drives the system, we have learned, is not evidence of guilt or innocence, but, rather, the substantial and coercive difference between a pre-trial offer and a likely post-trial sentence – the difference between five years and two decades in several scenarios above and the difference between immediate freedom and long-term pre-trial detention in the last scenario.

The threat of a severe post-trial sentence, however, does not exist in a vacuum. In fact, these threats go hand in hand with other inherently coercive prosecutorial tactics which very rarely raise judicial eyebrows. In virtually every jurisdiction in the country, prosecutors routinely extract pleas through a variety of coercive practices including threats to indict family members or friends, to seek mandatory minimum sentences or sentencing enhancements, to seek extended pre-trial detention under inhumane conditions like Rikers Island, or to otherwise punish an accused person for exercising his or her constitutional right to trial. These coercive practices, individually and collectively, shift power from juries and judges to prosecutors at the expense of individual liberty and freedom.

In fact, this legalized coercion, which many call the trial penalty, drives the choices of virtually every accused in our criminal legal system, effectively negating the parchment protections in the Bill of Rights, including the right to trial. Normalized across the country, this legalized coercion has generated guilty plea rates in the range of 95 to 98 percent across state and federal systems, virtually erasing criminal jury trials from our legal landscape despite the myth of trials celebrated in high school civics classes and on the silver screen.

In fact, if you spend any time in any courthouse in any part of the land from sea to shining sea, you know that our courtrooms resemble "efficient" assembly lines of guilty pleas rather than arenas of evidentiary combat to determine

guilt. In virtually every criminal court in the United States, our sisters, brothers, friends, relatives, and neighbors face the brutal "logic" of the trial penalty which drives the vast majority of our brothers and sisters to plead guilty, effectively transforming the Framers' democratic vision of a system of public jury trials into a dystopian assembly line of guilty pleas.

Not only does the right to trial wither in the brave new world of modern coercive plea bargaining, modern plea agreements also routinely require the waiver of every right, liberty, and freedom that the Framers established in the Bill of Rights, undermining the letter and spirit of the Fourth, Fifth, Sixth, and Eight Amendments. Challenging police misconduct, requesting bail consistent with the presumption of innocence, challenging prosecutorial misconduct, reviewing the evidence, investigating a defense — each of these constitutionally necessary and just practices are routinely waived in the face of prosecutorial threats. Collectively, these abusive practices drive the assembly line of pleas without the "inconvenience" and "delays" associated with evidentiary hearings, investigation of facts, and trial.

This "efficiency" comes at a heavy price. The Framers intended jury trials to exercise public oversight over police and prosecutors and to give voice to the community in decisions affecting individual freedom and liberty. Indeed, John Adams described jury trials as "the heart and lungs of liberty" because citizens could observe first-hand, and thereby limit, the potential abuse of state power by police or prosecutors. In the same spirit, Alexis de Tocqueville praised juries as "little schools of democracy" because jury service prepared jurors to be better, more active citizens.

Contrary to this noble and democratic vision, however, we have replaced the collective wisdom of juries – the conscience of the community — with prosecutorial efficiency, thereby facilitating more and more guilty pleas to higher and higher sentences. Tragically, we have purchased this efficiency at the cost of mass incarceration measured in lives lost, families divided, and fraying of the fabric that once held our communities together. Without trials, we suffocate under the weight of an "efficiency" that not only generates mass incarceration but also aggravates racial injustice (by subjecting people of color to plea "bargaining" without the constitutional tools necessary to defend against it)[1] and conceals police misconduct (by eliminating the hearings and trials which would otherwise compel officers to justify their actions on the streets).

In light of the relationship between the trial penalty, mass incarceration, and disappearance of trials, I committed my presidency of NACDL to bringing the trial penalty into sharp focus. To realize this mission, NACDL undertook to study the trial penalty and, after publishing our report on the trial penalty in the federal system in 2018,[2] NACDL and numerous partner organizations organized an NACDL Presidential Summit entitled "The Constitutional Right to Trial: Organizing a National Movement to End the Trial Penalty." The Summit, held in December 2021, convened an ideologically, professionally, and experientially diverse array of legal opinion leaders, advocates, and legal reformers who have championed numerous successful legal reform efforts over the last two decades. We convened these leaders, advocates, and reformers not to bemoan the status quo but to explore the transformational strategies available to restore the system of trials not only envisioned by the Framers but also consistent with, and supportive of, democratic justice. This Report conveys their insights, strategies, and analyses.

Most importantly, the Summit called these leaders to action. Since the two-day event, we have poured blood, sweat, and tears into building a national coalition which we have creatively called the End the Trial Penalty Coalition (ETP) and which officially launched on May 3, 2023. ETP now includes dozens of legal opinion leaders and legal reform organizations who share the Mission of "eliminat[ing] the coercive elements of plea bargaining to restore our fundamental constitutional rights, including the right to jury trial." I am proud of our Coalition's ideological, professional, and experiential diversity (including impacted individuals who have directly or indirectly borne the brunt of the trial penalty), and I am confident that we will restore the Framers' vision of a system of jury trials designed to protect liberty rather than prosecutorial efficiency.

Martín Antonio Sabelli,
NACDL President, 2021-2022, San Francisco, California

Acknowledgments

NACDL would like to thank the Howard S. and Deborah Jonas Foundation for its support of the Summit. The Howard S. and Deborah Jonas Foundation, along with the Stand Together Trust, also supports NACDL's policy work on the trial penalty, including its work with the End the Trial Penalty Coalition and research and education at the state level through state trial penalty projects and reports.

NACDL would also like to thank the NACDL Foundation for Criminal Justice.

The core group of NACDL staff that planned this Summit were Martín Antonio Sabelli, Norman L. Reimer, Ivan Dominguez, Nathan Pysno, and Kate Holden. NACDL is also grateful to the founding organizations and individuals of the coalition who assisted in Summit planning, including Somil Trivedi, then of the ACLU; Professor Lucian Dervan of Belmont University College of Law; Clark Neily of the Cato Institute; Rebecca Shaeffer, then of Fair Trials International; Kevin Ring, then of FAMM; Brett Tolman of Right on Crime; Vikrant Reddy of Stand Together Trust; and William Rapfogel, of the Howard S. and Deborah Jonas Foundation.

The Summit was also ably supported, publicized, and planned by media and communications strategists Stu Loeser & Co. Our terrific team was Stu Loeser, William Chabot, Robert Familiar, Madeleine Saunders, and Drisana Hughes.

We want to thank our esteemed Summit panelists, identified throughout the report.

We would like to thank Norman L. Reimer, Kyle O'Dowd, Nathan Pysno, Kate Holden, and Shuli Carroll for their careful editing and helpful suggestions, as well as Thea Johnson for her thoughtful and comprehensive notes. We are grateful for the contributions of NACDL staff including Lisa Monet Wayne, Executive Director, and Kyle O'Dowd, Deputy Director. We would like to thank Cathy Zlomek, NACDL Art Director, and Jennifer R. Waters of Ben Print-Media Design for the design and production of the report. NACDL's Programs Department of Gerald Lippert, Akvile Athanason, and Koichi Take ensured, as always, a smooth presentation during the Summit itself.

Agenda

The Constitutional Right to Trial:
Organizing a National Movement to End the Trial Penalty

(December 8 & 9, 2021)

Wednesday, December 8

9:00 a.m. – 9:30 a.m.	Check-in and Coffee
9:30 a.m. – 10:45 a.m.	**Martín Sabelli Introductory Remarks** Opening Remarks on the Trial Penalty; **Clark Neily (Cato), Brett Tolman (Right on Crime), Vikrant Reddy (CKI)**, and **Cynthia Roseberry (ACLU)**
10:45 a.m. – 12:15 p.m.	**Panel One on Launching and Sustaining a National Campaign** • **Cornell Brooks,** Harvard Kennedy School – Moderator • **James Esseks**, ACLU HIV/LGBT Project • **Lisa Foster**, Fees & Fines Justice Center • **David Safavian,** American Conservative Union • **Laura Porter**, 8th Amendment Project
12:15 p.m. – 1:15 p.m.	*Lunch, with Video Presentation from Fair Trials*
1:15 p.m. – 2:15 p.m.	**Panel Two on Launching and Sustaining a National Campaign** • **Norman L. Reimer** – Moderator • **Stu Loeser**, Stu Loeser & Co. • **Michael Steel,** Hamilton Place Strategies • **Gisel Aceves**, Democratic Congressional Campaign Committee (DCCC)
2:15 – 2:30 p.m.	**How Advocates, Elected Officials & Philanthropists can Join Together to End the Trial Penalty – Howard S. Jonas, President, Howard S. and Deborah Jonas Foundation**
2:30 p.m. – 3:45 p.m.	**Solutions Panel** • **Lucian Dervan,** Belmont University College of Law; ABA Plea Bargaining Task Force – Moderator • **Kevin Ring,** FAMM • **Somil Trivedi**, ACLU • **Lars Trautman,** Right on Crime • **Diane Goldstein,** Law Enforcement Action Partnership
3:45 p.m. – 4:00 p.m.	*Break*

4:00 p.m. – 5:15 p.m.

Race and the Trial Penalty Panel

- **Rick Jones,** Neighborhood Defender Service – Moderator
- **Cornell Brooks,** Harvard Kennedy School
- **Cynthia Roseberry**, ACLU
- **Robert Rose,** Advocate

5:15 p.m. – 6:15 p.m.

Judicial Conversation about Judicial Complicity and the Trial Penalty

- **Vikrant Reddy,** Stand Together — Moderator
- **Judge John Gleeson,** U.S. District Court, E.D.N.Y. (former) (remote)
- **Judge Kimberly Esmond Adams,** Superior Courts of Georgia
- **Judge Kevin Sharp,** U.S. District Court, M.D. Tenn. (former)

Thursday, December 9

8:30 a.m. – 9:00 a.m. *Coffee*

9:00 a.m. – 10:15 a.m.

Trial Penalty Research and Report Efforts Panel

- **Nate Pysno**, NACDL – Moderator
- **Susan Walsh,** Chair of NYSACDL Trial Penalty Task Force
- **Jacquie Goodman,** CACJ Trial Penalty Task Force
- **Lucian Dervan,** Belmont University College of Law
- **Brandon Garrett,** Duke Law

10:15 a.m. – 11:30 p.m.

Media Panel: "Reporting on the Trial Penalty"

- **Martín Sabelli** – Moderator
- **Carrie Johnson,** NPR (remote)
- **C.J. Ciaramella,** Reason
- **Josie Duffy Rice**, freelance; former President of The Appeal (remote)

11:30 p.m. – 12:45 p.m.

Keynote Discussion

- **Andrew Crespo,** Premal Dharia, and Brittany White, Institute to End Mass Incarceration
- **Robert Rose**, Advocate

12:45 p.m. to 1:45 p.m. *Lunch*

1:45 p.m. – 3:00 p.m.

Panel on Comparative Legal Systems and the Trial Penalty

- **Rebecca Shaeffer,** Fair Trials Americas — Moderator
- **Jenia Turner,** SMU (remote)
- **Stephen Andersson**, U.S. State Department
- **Laure Baudrihaye-Gérard**, Legal Director, Fair Trials (Europe) (remote)
- **Máximo Langer**, UCLA School of Law (remote)

3:00 p.m. – 5:00 p.m.

NEXT STEPS: Engaged/Guided Discussion — Opportunity for all to weigh in and participate to inform core groups subsequent preparation of the platform for the movement.

Opening Remarks

Martín Sabelli Past President, NACDL[3]

Brett Tolman Executive Director, Right on Crime

Clark Neily Senior Vice President for Legal Studies, Cato Institute

Vikrant Reddy Senior Fellow, Stand Together / Charles Koch Institute

Cynthia Roseberry Acting Director, ACLU Justice Division

Martín Sabelli, the convenor of this Summit who was then serving as President of NACDL, welcomed attendees to the conference. After an extensive period of greeting time for attendees, many for whom this was the first in-person meeting after over a year of mostly virtual meetings, Sabelli began his substantive remarks.

Sabelli noted that there is an assumption that change is always gradual, but that this "gradualist assumption" is not necessarily true. Major change often happens quickly. He recalled that in 1989, he would not have imagined Nelson Mandela being released from prison. In 2007, he thought it would be 50 years before the United States had an African American president. But, both of those things quickly came to pass. Our goal here is to start a movement to end the trial penalty. We have already put together a very strong coalition. It seems daunting, but major change can often happen more quickly than we expect. Sabelli then thanked people who worked on putting the Summit together.

Brett Tolman, Executive Director of Right on Crime and former U.S. Attorney for the District of Utah, said that when he describes the trial penalty to people who are unfamiliar with the criminal justice system they are often amazed and say, "That can't be true, that sounds unconstitutional," to which Tolman replies, "It gets worse. Prosecutors have abdicated their responsibility to seek justice." Justice has been redefined so that the only benchmark in their own minds for what justice is and has become is the length of sentence. And if that's the only reward for a prosecution or for a "job well done," then extending the length of that sentence becomes very important. Tolman has seen prosecutors say, "'If he wants to roll the dice and go to trial, we're going to make him pay.'" This was said with no serious thought or afterthought and did not resonate with the prosecutor in any capacity. It was essentially rote or automatic. That's why the system does not change.

But, Tolman continued, there are prosecutors who do want to see change. Tolman thanked David Leavitt, the elected prosecutor of Utah County, Utah, for attending the Summit because Leavitt believes that one of the most egregious failings of the criminal justice system is its failure to bring cases to trial. Leavitt has noted the vast leverage prosecutors exert to force someone not to go to trial so that prosecutors never need to actually prove the charge with evidence. Tolman recalled a case where a prosecutor threatened that if the client went to trial, he would seek an enhancement for obstruction of justice. Tolman was skeptical and told the prosecutor he would never get the enhancement applied, but ultimately the prosecutor did.

In our system, the prosecutor's position is elevated and respected. The prosecutor represents the state, which is given deference, and the defense lawyer is seen as a less reputable attorney who represents bad guys. The problem is that prosecutors are so accustomed to the power they have that they don't observe their surroundings in an objective way to contribute to reforming the system to promote fairness. Tolman said he believes that prosecutors need to come back to the table and be part of that solution. The trial penalty is a problem because there should not be a punishment for exercising our constitutional rights. Tolman concluded, "I have wielded that power and I know that it needs to be reined in."

Clark Neily, Senior Vice President for Legal Studies at the Cato Institute, said that as a career constitutional litigator who just started doing criminal work four or five years ago, he feels like an

American surgeon who went to work in a developing country where they don't wash their hands between procedures and don't clean the instruments. As a constitutional litigator, he observed the criminal legal system and thought, "Oh no! Oh my God! You can't do that!" He said he has never seen anything so broken as our criminal justice system. But at the same time, Neily said he has never seen a public policy problem with as many low-hanging fruit solutions that are ready to be implemented. Other problems like the national debt, health care, and immigration — those are much harder policy problems. The challenges in this area are much more a problem of political will than they are conceptual. It is not difficult to understand what is so messed up about the system, in particular that coercion and coerced pleas have become the lifeblood of a system that was meant to be adversarial and not transactional. Neily agreed with Sabelli's opening remark that the problem is "daunting and beyond the reach of many, or perceived to be that way, but change comes quickly when we grab it."

Neily said he was one of three lawyers that brought the *Heller* case. Similarly, while working at Institute for Justice, the firm started working on civil forfeiture cases. Some people believed civil forfeiture was too entrenched to be successfully challenged, but, Neily said, they never lost a forfeiture case while he was there. Neily said they got every dollar back for every client they represented and by the time he left, 14 states had eliminated civil asset forfeiture or at least required a criminal conviction before it could be used. Change can happen fast, and this applies to the trial penalty and coercive plea bargaining as well. Neily is astonished and dismayed by the judiciary's tolerance for coercion in the plea process. "This is not the system that the Framers of our Constitution envisioned, and more importantly, it is not the system they described." The Constitution spends more words talking about jury trials than on any other topic and that is not an accident. The right to trial is the only right mentioned both in the body of the Constitution and in the Bill of Rights. Half the Bill of Rights is about criminal procedure.

"This is not the system that the Framers of our Constitution envisioned, and more importantly, it is not the system they described."

Neily continued by saying that advocates should let themselves consider reforms that seem too radical. It is also important to focus on reforms that can be imposed on the system against its will, because he lacks faith in policymakers when it comes to the criminal justice system. One is bail funds, to ensure that people who can't afford it can still make bail. There are about a dozen of them around the country. "Cash bail has become a way that judges and prosecutors have of keeping people locked up to make them more amenable to a plea offer. That's not how the system should work." Another idea is asking what percentage of cases would not have been brought if the defendant had access to counsel from the first point of contact with law enforcement? Why isn't that provided? Neily says he is working on this and calls it "pocket lawyer." Most people carry a smartphone. The idea is that it will provide free, live legal representation to make sure people stop making uninformed decisions like consenting to searches. Finally, when jurors are instructed about jury service, the first thing they are told is a lie: the judge tells them their only role is to be a factfinder. This is false. It contradicts more than 800 years of Anglo-American history. Jurors should be encouraged to ask questions like, "what's going to happen to this guy if we convict him? Is there a trial penalty in play? What were the pleas he was offered?" In the current system, they're generally not going to get answers, but that is because there is someone in the courtroom who does not want the jurors to have that information. Jurors should act accordingly. Neily closed by saying that there is a vast orchard of low-hanging fruit solutions to solve the trial penalty. He said he looks forward to working with everyone attending the Summit to get it done.

Vikrant Reddy, Senior Fellow at Stand Together and the Charles Koch Institute, began by relating a story he had read about a group of pioneers making

their way across the American West in the mid-19th century when a member of their party is murdered. The person accused is one of a notorious group of brothers who is on the trip. And the traveling party, who are not attorneys, stop right there on the trail and hold a trial. They gather all the witnesses and the accused. And rather than appointing one of their own as the judge, they wait for another wagon to come across them on this well-traveled trail so they can have someone who is totally independent to act as the judge. Other travelers who were not part of their traveling party are then recruited as jurors. Reddy said that this story goes to show the centrality of trials to the American character and experience. Reddy imagines the judge in the case, whose identity is not actually known, as a regular person with overalls and a corncob pipe who suddenly feels empowered but also deeply responsible in their new role and realizes that they cannot be a passive participant in the trial to come.

The Declaration of Independence says there are certain inalienable rights, "inalienable" meaning they can't be given or traded or bartered away. But during the plea process, inalienable rights are bartered away all the time.

Brilliantly segueing from his yarn about the old American West, Reddy said that, unlike the judge and participants in this impromptu trial, judges today too often are passive participants in the system. Something has been lost in the way people think about how deeply engaged a judge ought to be in the trial process and in the pre-trial process. There are so many things a judge could do if they characterized their role a little bit differently. A judge could insist, when a plea came before them, that certain rights are just not going to be waived. The Declaration of Independence says there are certain inalienable rights, "inalienable" meaning they can't be given or traded or bartered away. But during the plea process, inalienable rights are bartered away all the time. What if a judge insisted that all the evidence, even if the prosecutor thought it was immaterial, had to be shown to the judge first during the plea process, not just during trial? The whole theory behind plea bargaining is that the defendant has all the information and is making a calculation, but if certain evidence isn't presented, the defendant doesn't have all the information. This is where a judge can be engaged. What if a judge just rejected a plea for being too harsh or coercive? Judges have great authority and responsibility and should not be passive actors in this process. Reddy said, "I don't think we will see trial penalty reform until judges, both state and federal, get engaged."

Cynthia Roseberry, Acting Director of the ACLU Justice Division, said she was coming at this from the perspective of a criminal defense lawyer for most of her 20 plus years practicing law. Many of us scoff when the police say there are just "a few bad apples," because that is actually the system. But criminal defense lawyers are a part of this system too. Roseberry said "we, defense lawyers, have to look at ourselves within the system." In looking at the Model Code of Professional Conduct, there is language about respect for the system and upholding the legal process and seeking to improve the law and furthering public confidence in the law. Roseberry said she comes from a community where many people in the criminal justice system come from, a community that inspired her to become a lawyer. My challenge to you is to examine who we are in this process. Have we decided that this plea offer is good enough for *this* person?

Roseberry said, "I have admitted, as if I was in Alcoholic Anonymous, my name is Cynthia and I've convinced a defendant to take a 20-year plea deal. We are giving up their 4th, 5th, and 6th Amendment rights and the right to appeal. I once had a judge say, 'If your client goes to trial, they're going to get more time.'" They immediately made a motion to recuse the judge, but the point is the judge felt

empowered to say that within this system. Defense lawyers have to be willing to push back against the system. Roseberry said she remembered the shame she felt when the judge asked her client, "Is this a voluntary plea? Has anyone promised you anything?" and the client looked at her and she shook her head and said, "No no no." She said, "There's sickness you feel in the system being a part of that process. I know in that moment that we are case lawyers. But we should be cause lawyers, too." There are places to push back. In the Middle District of Georgia, she and other public defenders refused to agree to plea deals where the client waived an ineffective assistance of counsel claim because it was a conflict of interest. They received a Bar opinion confirming that it was a conflict of interest.

If a person needs to be punished, then that need is the same whether there is a plea or a trial. The sentence should be the same. There's nothing magic that happens between the plea and the trial.

She said she was privileged to be a member of the Colson Task Force on Federal Corrections and recalled in one of the hearings asking the head of the medical department, "Do you measure the impact of imprisonment on people who are imprisoned?" and the answer was "no." And she thought, "Then why are we doing this? If a person is not safe, if a person needs to be punished, then that need is the same whether there is a plea or a trial. The sentence should be the same. There's nothing magic that happens between the plea and the trial."

Sabelli then spoke about the particularly severe impact of the trial penalty on people of color and the poor. He relayed that Rick Jones, who leads Neighborhood Defender Services and is also a Past President of NACDL, says that plea bargaining is essentially a myth. People are held in pre-trial detention, and discovery is tied to trials which never happen, so they never get the discovery needed to adequately counsel their clients. There are under-resourced public defender systems and there are inherent biases in the system. All of these combine to undermine justice and fairness for every single person facing prosecution. But it is particularly severe for people of color and the poor.

Justice Kennedy said we don't have a system of trials, we have a system of pleas.[4] But as Rick Jones says, it is really a system of ultimatums. People of color and the poor have a gun held to their head day in and day out, even more so than the rest of the criminally accused because they face systemic racism, implicit bias, and all sorts of structural problems in the system. For people of color and the poor, this system of ultimatums has resulted in mass incarceration. And because, as Cynthia Roseberry said, plea bargains force the waiver of constitutional rights and in doing so cover up police and prosecutorial misconduct. Even those with every resource like Senator Ted Stevens are up against it in this system, but it is people of color and the poor that really get hammered.

Sabelli thanked his fellow introductory speakers and the first substantive panel began. ■

PANEL ONE
Launching and Sustaining a National Campaign

Moderator: Cornell Brooks Hauser Professor of the Practice of Nonprofit Organizations; Professor of the Practice of Public Leadership and Social Justice, Harvard Kennedy School

James Esseks Director, ACLU HIV/LBGT Project

Lisa Foster Co-Director, Fees & Fines Justice Center; former Director of the Office for Access to Justice at the U.S. Department of Justice; former California Superior Court Judge

Laura Porter Executive Director, 8th Amendment Project

David Safavian Director, American Conservative Union Foundation's Nolan Center for Justice

The trial penalty is a problem that pervades our criminal legal system. Because it touches so many aspects and is so entrenched in numerous ways, reforming it is not easy. This Summit was convened with the hope that it will launch a national movement to end the trial penalty. The Summit's first panel brought together speakers who have had success in building — and sustaining — successful national campaigns and movements, specifically those focused on legal issues other than the trial penalty.

Cornell Brooks, the panel's moderator, began by asking the speakers to share lessons from building their own campaigns and national movements. James Esseks, who ran a successful decades-long campaign advancing the right to gay marriage and is currently working on transgender justice, said he could provide four lessons: first, don't worry if the campaign seems unwinnable right now. Hearkening back to Sabelli's opening remarks that change can happen very quickly, Esseks said that campaigns "go from being completely impossible to inevitable overnight." He said from his outsider perspective, there is a good deal of energy and attention on criminal legal system reform right now. He said the road would be hard, but it was hard for gay rights in the 1970s as well.

The second lesson was that public opinion is hugely important. In 1996, 70% of Americans opposed gay marriage. But today, 70% support it. Esseks noted that something like gay marriage, which is now law, was widely opposed even recently. In 2004, 13 states had ballot initiatives on amending their state constitutions to exclude same sex marriage and "we lost all thirteen." In 2006, however, there were 11 ballot initiatives in 11 different states, and it looked like they would lose them all. In Arizona, the language was so broad that the proposed law could have taken domestic partner benefits away from straight people. Polling showed that this was the strongest argument, so the campaign focused on that, and they won. It was successful damage control or harm reduction, but it did nothing for the underlying campaign.

Third: don't be afraid of losing. Esseks said, "We lost a lot; we lost over 30 state constitutional amendment ballot" questions. And fourth, it's crucial to have a rough consensus amongst the advocates in the space about the global plan; what does success look like; and what is the rough path

to get there. Of course, each organization in the space should do what they are good at, but the coalition should have a plan that they agree on.

Lisa Foster, Co-Director of the Fines & Fees Justice Center, spoke from her experience trying to reform fines and fees nationwide. In 2018, 44 states and D.C. would suspend drivers' licenses for failure to pay fines and fees imposed in criminal cases, beginning a "cycle of punishment and poverty" from which very few could escape. Today, however, 28 of those states and D.C. have ended these suspensions. This is part of a larger campaign to eliminate fines and fees, or at least ensure that they are proportionate to the offense and the individual.

The importance of listening to impacted people and communities when developing priorities and devising strategies and legislative solutions. This is particularly true when considering whether to accept a legislative compromise. Without that engagement, there is a risk of both unintended consequences and solutions that are not durable.

While Foster was gratified by the success of the movement within a very short time period, she acknowledged that her group did not start the movement. Rather, the national movement to reform or eliminate fines and fees began organically with the Black community of Ferguson, Missouri. She acknowledged previous policy work led by non-profit organizations that documented the harm to communities, particularly communities of color, caused by fines and fees, including reports by the ACLU and the Brennan Center for Justice from 2010, but said that these reports garnered little attention and "sat on the shelf." While this was a known issue, there was no policy movement or reforms on it until 2014, when Michael Brown was killed by a Ferguson police officer. This illustrates the importance of listening to impacted people and communities when developing priorities and devising strategies and legislative solutions. This is particularly true when considering whether to accept a legislative compromise. Without that engagement, there is a risk of both unintended consequences and solutions that are not durable. Outside organizations will move on to the next issue or campaign, but the impacted communities are still there. It is important to make sure that impacted communities have the resources to have a seat at the table.

Foster continued by saying that media is critical; advocates need authentic voices. Almost all media includes a narrative, some person's story. Part of what advocates should do is help people tell their stories. These efforts should be bipartisan. She noted that the 10 states that enacted drivers' license suspension reform in 2021 were all over the map politically.[5] The first two states to end drivers' license suspensions were California and Mississippi. The fact that they've had success in both deep blue and deep red states indicates the broad bipartisan support of their movement.

David Safavian of the American Conservative Union echoed Foster's call for bipartisanship and said that criminal justice reform is a rare area of "true bipartisan cooperation." He argued that conservatives cannot be brought to the table on this issue as mere "window dressing," but also said that the passage of the First Step Act, which he called the first meaningful justice reform in a decade, did send a signal to conservatives that policy change in the area was acceptable. Safavian said that the biggest danger to success is if it becomes a litmus test for the left and right. If the assumption becomes that the left supports reform and the right does not, it is not likely to be successful. He also recommended that conservatives be the face of the movement in red states.

He stressed the importance of including prosecutors as partners in reform where possible and said that public safety has to be a part of the campaign. Ultimately, Safavian said a successful campaign on this issue would have two aspects: (1) convincing the public and stakeholders, including prosecutors, that there is a problem, and (2) a more policy-oriented face that uses hard data and ensures policymakers that their decisions are based on "hard data," and they will not be penalized for doing the right thing on this issue. Like others, Safavian emphasized that media attention is hugely important. He observed there is rarely anything on TV about the trial penalty.

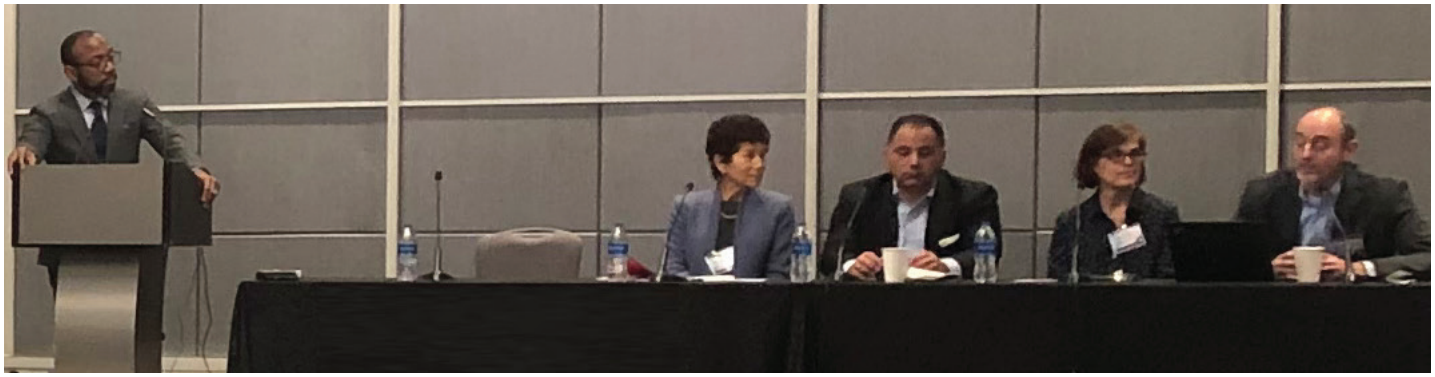
Laura Porter of the 8th Amendment Project, which seeks to abolish the death penalty, agreed with Esseks that her movement lost a lot of times before it started winning. She said public opinion polls show that a majority of Americans still support the death penalty but those numbers are declining. Like Foster and Safavian, she emphasized that reform is possible even in right-leaning states, noting that her current campaigns focused on ending the death penalty in Ohio and Utah. Different strategies are needed depending on where the state or jurisdiction is on the issue. Although local strategy was important, Porter said a key overarching national strategy was on "damaging the brand of the death penalty." These efforts have been successful: recent Gallup polling showed that despite a trend or perception of increasing crime, support for the death penalty has not increased.

Porter also said that state legislative strategy was important, but that it was not the only avenue for success. Her movement has had success by helping local attorneys to avoid the death penalty in the first place by educating local county populations about local practices and what's really happening in their prosecutors' offices. Porter advised identifying local partners, developing strong community relationships, and considering unusual allies, such as conservatives or law enforcement, when beginning any locally focused campaign. But, of course, some things are beyond control, such as a governor who is extremely pro-death penalty, but doing the good work can still help move people regardless of political alignment. Therefore, it is essential to prepare the atmosphere with communication. Even if a state has very entrenched policies, there will be lots of egregious stories to share, and it is imperative to share those stories.

Porter was struck by recent Ohio polling which showed that respondents wanted to reinvest money saved on the death penalty on violence prevention strategies. She said that her movement is working to add something to their messaging. It is acceptable if the messaging focuses on getting rid of something bad, but it is more powerful if it includes something good.

Brooks recalled the story of Adam and Eve whose first job in the Garden of Eden was to give names to everything. He asked the speakers about the power and importance of language. Esseks conceded that the term "trial penalty" may not be "decipherable to folks on the street," but, he added, the same was once true for the phrase "marriage equality." People didn't know what it meant; they learned what it meant. Now it is the term that is used and is widely understood by the public. People can also learn what "trial penalty" means.

Esseks emphasized that the language a campaign uses will evolve with time. It was a challenge to



Pictured left to right: *Cornell Brooks, Harvard Kennedy School – Moderator; Lisa Foster, Fees & Fines Justice Center; David Safavian, American Conservative Union; Laura Porter, 8th Amendment Project; James Esseks, ACLU HIV/LGBT Project.*

Photographer: *Kate Holden*

explain to straight people why gay people cared about having the right to marry. The campaign initially focused on the rights and benefits of marriage, such as immigration benefits, tax benefits, and workers' comp benefits. They talked about the harms gay people suffered by not having those rights, and that was a successful early strategy that influenced people. But, eventually, that had to change. Focus groups showed that, when asked why they wanted to marry, straight people often answered that they wanted to express their love and commitment in front of friends and family. When straight people were asked why they thought gay people wanted to marry, they answered, "For the rights and benefits." They thought gay marriage advocates misunderstood or even debased marriage by focusing on the rights and benefits. Esseks said this might have initially been a disheartening message to hear from the focus groups, but it actually meant that their arguments had been heard. It also signaled a need for new messaging, focused on love. If an earlier campaign had focused on love, it would likely have led to straight people thinking about gay people having sex, and it would have been a difficult place to start a conversation. But later in the life of the movement, it was the right time. He thinks the shift in message was probably essential to the eventual success of the movement. Esseks cautioned that the lesson is not: find the right message and the movement will win. Rather, the lesson is that the messaging can and should change over time as the movement gains ground.

The lesson is not: find the right message and the movement will win. Rather, the lesson is that the messaging can and should change over time as the movement gains ground.

Safavian stressed the need to understand the current mentality of the people a movement is trying to convince. He believes deep opinion research is valuable and that this foundational work is necessary for long-term success. He also warned against focusing the message on concepts such as "fairness" which have no clear definition and are often glossed over by skeptical audiences. Americans see "fairness" as a Rorschach test. It can set off the "BS detector," especially with policymakers.

Foster said their campaign regarding drivers' license suspensions was called "Free to Drive." She said this slogan was not tested, but they chose it consciously. They chose this slogan because it was an affirmative value, but they also wanted to appeal to traditionally conservative values. She acknowledged that freedom and liberty were buzzwords but could still have value in campaign messaging. Foster said that the slogan does not, of course, fully explain the goal of the movement, which was ending debt-based driver's license suspensions.

Brooks asked Porter to expand on what she said previously about unlikely allies. He said that the flipside of that is unheard victims. He asked her to discuss who is being hurt who might not even be aware that they are being hurt, particularly in the light of racial disparities and economic circumstances.

Porter agreed that there are a lot of unintended consequences throughout the criminal legal system, including with respect to both the death penalty and the trial penalty. Many are harmed by this "broken and messy and ineffective system." One is the families of the people sentenced to death who experience severe trauma throughout, including decades of media attention. The drawn-out process in these cases is harmful to many people, including the family of the accused as well as the family of the victim. It's important to think of how to frame the consequences for all of these people who are affected.

Expanding on this point about less obvious victims, Foster produced and displayed a camera ticket she recently received. It said she could pay $75 now, or if she exercised her right to trial, then she may be charged $100 and be assessed court costs. That's a trial penalty. In New Jersey, even if the prosecutor dismissed the case the defendant was assessed court costs. There are about 35 million traffic tickets in the U.S. every year. That's a lot of people who

are being subjected to the trial penalty. There are more impacted people than one might think, so think about how to convey the message that everyone's rights are being violated by this system.

Safavian agreed that this was a great advocacy tool. He said that prosecutors should be involved even though it may feel counterintuitive. David Leavitt, the prosecutor of Provo County, Utah (who was in attendance), said that trial lawyers are forgetting how to conduct trials because of how few cases are tried. Change will not happen without the input of prosecutors. Former prosecutors are almost as strong a voice that need to be "platformed." Even one allied prosecutor in a state who can help to counteract pro-trial penalty talking points would be a powerful voice.

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Brooks mentioned that the panel had touched on empirical storytelling and narrative storytelling. Brooks asked about the importance of moral voices and morally-focused storytelling in campaigns.

Foster said that Nevada is one of the few states that still treats traffic violations as misdemeanors. When the Clark County Justice Court shut down because of Covid-19, there were 270,000 outstanding misdemeanor warrants for traffic violations (which does not even include the City of Las Vegas). They did a study with UNLV graduate students on 200 of these warrants, randomly selected, and found that all of them were due to unpaid court debt from a traffic offense. The vast majority were for non-moving violations such as broken equipment, no insurance, and driving on a suspended license, basically offenses of poverty. The overwhelming majority were in Black and Brown communities. They did a media event with single moms who had traffic tickets being hauled to jail with kids in the car for unpaid fees they could not afford to pay. She said the Bible is full of admonitions about debt and forgiving debt. Engaging religious communities is helpful. She tried to use these arguments to get states to agree that after a certain amount of time, debts should be forgiven.

Porter agreed but said that it was important to marry powerful stories with empirical data. She said that religious and faith leaders could be influential messengers.

Safavian said, perhaps only half-joking, that morality would never be a consideration of legislators. In other words, he disagreed to an extent, adding he is wary of "policymaking by anecdote." For every poor old woman who is handcuffed for a traffic ticket, there's probably a story about a child rapist-murderer. It's possible the pro-reform side would not win the battle of anecdotes. He thinks focusing on hard data is a better way to reach the policymaker audience that advocates seek to influence, and data can help to counteract any powerful stories brought up by opponents.

Brooks brought up the Ban the Box campaign, which was based on a study by criminologists Alfred Blumstein and Kiminori Nakamura, called the "redemption study" showing that if a person goes a certain period without committing a crime, they are no likelier to commit a crime than any other person.[6] Sometimes the empirical study validates the moral lesson.

In response to an attendee question about judicial discretion, Safavian said the key was to have the right judges. Foster, who was formerly a state court judge in California, thought judges were "institutionally part of the problem." That said, some judges could be powerful allies in the quest for moral storytelling. She advised recruiting judges who want to see more criminal trials in the system. She also recommended bringing retired judges into our fold who are already sympathetic and thought it would be wise to seek to educate the current bench about the trial penalty.

Brooks fielded a question about costs and externalities, such as prison sentences also removing people from the workforce. Safavian said there has to be data to prove costs or externalities. If done right, this would force

prosecutors to better select cases for prosecution, which is a healthy thing. There are systemic costs assessed to the people choosing which cases to prosecute.

David Leavitt, the elected prosecutor from Provo County, said that no one can solve this problem better than an elected prosecutor. He said, "We took an oath to protect the constitution. Should the government prove the allegations the government makes? Of course, the answer is yes. One option is to have more prosecutors, but a better approach is to file fewer charges." He said that by the first quarter of next year he plans to eliminate plea bargains in his county.

Foster provided the example of Shelby County, Tennessee, where the conservative prosecutor decided to stop prosecuting driving with a suspended license, if the underlying suspension was due to unpaid court debt. In response to an uptick in violent crime, she thought this was a bad use of prosecutorial resources. No one in a meeting ever said, "I'm really worried about people out there driving on suspended licenses." People get cited, but not charged. In the first year she dismissed 26,000 cases.

She also agreed with Leavitt that they need to lift up and make positive examples of those who are doing things well. Prosecutors and judges need to be a part of this conversation. It is also important to look at the whole ecosystem broadly. It is good to advocate for individual things but also valuable to assess the system as a whole.

Professor Mark Osler of University of St. Thomas Law School said he thought the trial penalty was much more difficult to understand than marriage equality or the death penalty. Oftentimes, decisionmakers and the public do not understand the mechanism advocates are talking about.

Esseks said a key challenge was to get people talking about the issue in the first place. It's progress to get people to talk about the issue, even if they're talking about it the wrong way. "You have to find some way to pick a fight." This movement should embrace prosecutors talking about the trial penalty because it gets the issue on the agenda and gives advocates an opportunity to get their message out.

The panelists then suggested under-the-radar ways to garner media attention. Foster talked about John Jay College of Criminal Justice's media bootcamp where they invited journalists to hear about the issue. Brooks suggested that documentary filmmaking, which is relatively inexpensive, could be valuable.

Somil Trivedi, then of the ACLU, said that in the criminal legal system reform space, we are "in a boom-and-bust cycle and the trial penalty is just one issue within that system." He asked what we can do to keep momentum on this single issue?

Safavian said that social media like Twitter and Facebook contribute to the boom/bust cycle. He said NACDL and other criminal defense lawyers have the front row seat to what was offered versus what sentence was imposed. These attorneys can use social media: every time a defense attorney sees a trial penalty, they should post it on social media to get it out there into the ether.

Brooks fielded a question on what makes a successful brand. Safavian said a brand should ideally be "lowest common denominator." Folks may disagree 95% of the time but agree 5% of the time. It is important to have separate messaging to separate targets by separate entities. Messaging for the right likely will not work for the left and vice versa.

Foster agreed and said that tailoring messages to audiences is crucial. In Florida, they had a billboard with Grover Norquist on it. They would never do that in New York. When there is a coalition, it should lead with the partners that will be well received in that specific jurisdiction.

Porter closed by flipping a famed Marshall McLuhan quote on its head,[7] saying that the messenger may be more important than the message. Having a messenger that is trusted locally is essential if that message is to be well taken in the area. ■

PANEL TWO

The Constitutional Right to a Jury Trial: Organizing a National Movement to End the Trial Penalty

Moderator: Norman L. Reimer
Global CEO, Fair Trials International (former)

Gisel Aceves Political Director, Redistricting, Democratic Campaign Committee

Stu Loeser Founder and Principal, Stu Loeser & Co.

Michael Steel Partner, Hamilton Place Strategies (former)

After the initial panel, which featured lessons learned from subject matter experts who guided successful national reform campaigns that focused on such sensitive topics as marriage equality, capital punishment, and the national obsession with the imposition of fees and fines, the second panel keyed in on the more universal aspects of a national campaign. The objective was to tap into the expertise of expert political strategists to see how their perspectives could inform a national campaign to rein in the trial penalty, specifically identifying opportunities, challenges, and strategies to successfully elevate the issue and effectuate change.

Norman L. Reimer, then-Global CEO of Fair Trials, an international criminal justice watchdog and a co-planner of the Summit, moderated the panel. During his 15 years as Executive Director of NACDL, he led the efforts to elevate the trial penalty as a core reform issue. In his introduction of the panel, he noted that the trial penalty, and the coercive waivers it induces, is central to the tyranny of the U.S. criminal legal system. It is an accelerator if not the direct cause of all the ills that afflict the system, including racial and ethnic disparities, mass incarceration, overcriminalization, and the nearly universal overburdening of public defense systems.

The panelists included three experienced political strategists reflecting a broad ideological range. Gisel Aceves, who described herself as the most progressive activist among the group, served as Political Director of Redistricting for the Democratic Campaign Committee at the time of the Summit. She formerly served as Executive Director of the

Pictured left to right: *Gisel Aceves, Democratic Congressional Campaign Committee (DCCC); Norman L. Reimer – Moderator; Stu Loeser, Stu Loeser & Co.; Michael Steel, Hamilton Place Strategies.*

Photographer: *Kate Holden*

Committee for Hispanic Causes and Director of Latino Outreach for the Bloomberg for President campaign in 2016. She is a veteran of numerous campaigns.

At the time of the Summit, Michael Steel was a partner at Hamilton Place Strategies. He has had a distinguished career in media and political campaigns. He served as Senior Policy and Campaign Advisor for the presidential campaign of former Florida Governor Jeb Bush during his 2015-2016 campaign for the Republican presidential nomination. Prior to that he served as Press Secretary to former Speaker of the House John Boehner and before that as Press Secretary for the House Ways and Means Committee, as well as for Paul Ryan during his campaign for Vice President.

Stu Loeser is the founder and principal of Stu Loeser & Co. He served as Senior Advisor to the Michael Bloomberg for President campaign in 2016. Prior to that he served as Press Secretary to Mayor Michael Bloomberg for more than six years, the longest tenure in that position in New York City history. Loeser was also instrumental in raising Mr. Bloomberg's national profile on such cutting-edge issues as the need for reforms related to the environment, guns, and immigration.

The first and most important issue a reform coalition must address is identifying the outcomes sought by the movement. National campaigns often flounder for lack of a precise vision of the desired outcome.

Reimer began the conversation by asking the panelists to identify the most important things to consider in launching a national reform campaign.

Aceves noted that the most important questions to address are "why you?" and "why now?" Reformers must identify how a particular movement can uniquely speak to the concerns of the public in this moment. It is essential that a national campaign tap into hopes and dreams. To do that it needs both quantitative and qualitative data to confirm or dispel the theory of the case for change. Aceves also stressed the importance of identifying the core base and coalition support for the effort and working to expand it, refine it, and invest in it. The capacity to expand support is the greatest strategic challenge and often requires that a coalition be prepared to evolve to meet constituents where they are, something that the coalition can accomplish by remaining prepared to answer the why questions she first posited.

Steel offered a different approach to the general question of what is most important to launch a coalition. Whereas Aceves focused on the immediately-pressing questions of "why you and why now?," Steel encouraged focus on long-term goals. He said the first and most important issue a reform coalition must address is identifying the outcomes sought by the movement. National campaigns often flounder for lack of a precise vision of the desired outcome. Second, it is essential to identify what audience is necessary to reach the desired outcome. As a corollary to that it is important to identify what part of the audience agrees with the reform goal, and can serve as the motivator for change, and what part of the audience is ignorant about the issue or opposed, and therefore needs to be persuaded.

Steel noted that the trial penalty problem poses unique challenges because older and more affluent individuals are more likely to vote, but those demographics tend to be less likely to see the need for change. An additional reason why this issue poses heightened challenges is that it is generally easier to educate people on issues about which they know little or nothing (such as how cryptocurrency functions) than it is about something like the criminal process, which many people think they understand and believe that it works, even though those perceptions may be based upon fictionalized accounts that have created a distorted and romanticized depiction of the system.

While Loeser agreed with the points made by his co-panelists, he added an additional wrinkle. Apart from presidential campaigns, there is rarely a

significant press pool routinely covering most issues. This reflects changes in journalism with fewer news outlets available to provide sustained coverage. Thus, for an issue like the trial penalty it is critical to find ongoing story lines, co-opt them, take advantage of them, infiltrate them, and serve as validators for them. As an example, he referenced the presentation in the prior panel by Lisa Foster, who demonstrated how video summonses from a traffic camera galvanized change in Maryland. This is an example of how to garner attention for an abstract issue that allows reformers to counter the narrative that the criminal justice system is working fine. The average person sees red light or traffic cameras as unjust. Their use suggests a presumption of guilt and the failure to identify the driver seems unfair. And it is an issue that resonates with all people because it impacts nearly everyone regardless of income level, race, or other characteristics. With this issue it is possible to connect with media that covers cars, driving, and racing, as well as with 24-hour talk radio.

There is a better chance of breaking through in this ideologically polarized time when there is cross-ideological support.

Loeser's key point is that to connect with people where they are, it is helpful to find a story to engage people who are not naturally drawn to the issue so that the reform movement can reach people who do not even realize there is a problem that needs reform.

The next questions presented to the panel focused on how to determine who the people are that a movement must influence and what building blocks are necessary to identify the stories that will resonate.

Loeser said that it may not be a question of looking for the right people as much as it is looking to get the issue heard. With something like the trial penalty, individuals may not get the true nature of the problem when they first hear about it, but if they continuously hear that it is a problem the issue will resonate. Simply put, Loeser's view is that in the beginning it may be less important to focus on whom to target than it is getting the issue noticed. This is similar to James Esseks' point in the previous panel that advocates on this issue need to "pick a fight" in order to get more attention onto this issue.

Reimer asked whether starting a campaign with a diverse ideological array of support provides an advantage and bolsters Stu Loeser's view that coverage for the issue transcends the importance of audience focus.

Michael Steel agreed that there is a better chance of breaking through in this ideologically polarized time when there is cross-ideological support. If the movement remains disciplined about the desired outcome and message consistency, there is an opportunity for people to hear the same message from different messengers. That truly clicks. That breaks through. For example, hearing the same message from Koch Industries and the ACLU pops in people's minds. That is new. That is different. That resonates.

Steel cautioned, however, that the importance of picking a disciplined message cannot be overestimated. He recalled in stark terms that House Speaker John Boehner would say that "you need to get to the point where you say the same message until you think you will vomit if you say it one more time." It is at that point when strangers will approach someone and want to talk about the issue. The point is that it is incredibly important to bring this alliance together around a single message toward a shared goal.

Aceves underscored that message discipline is the biggest challenge for any campaign, especially issue advocacy. The breadth of perspectives that share the objective is a definite opportunity.

Panelists were then asked to address the question of how to get to that point where the message has been conveyed so that it resonates with the public in a way that grabs people.

Aceves pointed out that no one else is thinking about the issue as deeply as the Summit attendees.

Thus, a national movement must synchronize the messaging across whatever platforms it uses. If it feels repetitive that is good. Irrespective of the platform, whether it is print media, social media, or broadcast, the messaging must be consistent. That is key to getting people to understand the goal and grasp the underlying mantra of the reform effort.

Steel identified four keys to a successful message: it must be believable; it must be credible; it must resonate; and it cannot be detail oriented. As Gisel Aceves suggested, the participants in this program know what they are talking about and grasp the complexities of the issue in ways that others will not. Effective messages must not be complicated, such as "Coke is It." Or, as an example in the realm of political messaging, he explained that when the Republican party was trying to win the midterm elections in 2010 as the country was emerging from the Great Recession, the message, which became a mantra, was "Where are the jobs?" It was not complicated discussions about tax policy, overregulation, nor difficulties in implementation of the Affordable Care Act. Rather, it was a simple resonant message about jobs. The trial penalty reform effort needs to find something to encapsulate this complicated, multi-faceted issue that speaks to sentiment in a clear and resonant way.

> **"You need to get to the point where you say the same message until you think you will vomit if you say it one more time."**

Reimer then shifted the conversation to ask the panelists to assume that at the end of the conference, a broad array of groups agrees to proceed to build a campaign to rein in the trial penalty. Given the complexity of the issue, what is the "to do list?"

As an initial response, Steel posited the assumption that the desired policy outcomes will require a combination of executive, legislative, and judicial actions. It is necessary to segment out those decisionmakers because there will be different avenues for communicating with each — although the message must be consistent. He suggested that one approach might be to identify a state that is leading in this area that can be a laboratory and serve as an example and a first mover. Or there may be a public official who is leading in the area. The crux is that to get to the desired outcome, it is essential to determine what kinds of levers are available to impact the various branches of government to effectuate change.

On the question of finding a useful laboratory, given that the trial penalty must be addressed on the federal, state, and county levels of government, Reimer asked the panelists to comment on the importance of identifying a laboratory to launch the campaign.

Loeser responded that while that approach can be helpful, it must focus on a jurisdiction that is useful for the campaign. He pointed out that there might be a good venue in the sense that positive reforms are in progress, but no media in that venue to cover it. His view is that any laboratory upon which policymakers or advocates rely, must be a place where the issue can garner exposure. Aceves added that as important as finding the right venue is having the right messenger to communicate the message

Panelists were then asked to comment on the importance of surveys, polling, and focus groups.

Steel asserted that it is imperative to know where the public is before launching a campaign like this. What are the pre-existing public perceptions? Two things are necessary right off the bat. First, it is important to create a baseline survey. Ideally, this should include a combination of traditional and digital surveys, recognizing that even the oldest generation is now active on social media. Additionally, it is important to use experts that can dive deeply to understand people's attitudes and why they have them.

Second, it is essential to do regular online checks to see if perceptions are changing to assess whether the campaign is moving the needle. For example, the changes in attitudes on criminal justice reform between the

summer of 2020 and the time of this summit (December 2021) are profound. Extraordinary opportunities for change in 2020 were lost due to the perception of higher crime rates. A reform movement must recognize the environment in which it is operating at any given time.

The specter of the profound change in attitudes between the summer of 2020, when there was broad support for fundamental reform, until now prompted Reimer to ask the panel to address the extent to which one bad high-visibility case can undermine progress and whether it is possible to inoculate against overreaction.

Steel was firmly of the view that there is nothing that can prevent that kind of a reaction. Even when there has been discernible progress, one bad case can alter perceptions. Referencing the infamous situation in the 1980s when the candidacy of Democratic presidential nominee Michael Dukakis was undermined by the depiction of one individual who was granted a furlough and then committed a violent crime, Steel pointed out that despite 50,000 successful furloughs, the one bad case colored public perception. The only response is to learn to roll with the punches and seek new opportunities to convey the reform message. For example, the movement could recruit a celebrity that can bring new audiences to the issue. But the movement cannot protect itself against a bad high visibility case.

Loeser partially disagreed by noting that because this movement is still a year or two from getting off the ground it is possible to plan for the challenges and anticipate how things might evolve as the issue gains attention.

Aceves stressed that research is critical because understanding people's baseline is key to understanding what will resonate with them and it enables the movement to track progress. While there will be setbacks, it is essential to be ready for the obstacles that will inevitably arise.

Loeser further observed that the use of focus groups to inform research is vital. Traditional polling can be misleading. As an example, he noted that it was focus groups that provided invaluable insight for the marriage equality movement. The prior panel discussed how insights from that in-depth research into attitudes helped shift the discussion from one that was about equal marriage rights into one that focused on love, which proved transformational.

On the question of whether the outcome of polls or focus groups may be predetermined by how the questions are posed, Steel suggested that the true value of that research is not for the snapshot they reveal, but instead for their ability to track change and movement. Aceves added that it is vital to use multiple platforms to get the broadest input and that online platforms are far more accessible and minimize the risk of not capturing the views of certain groups.

The discussion then shifted to whether a reform movement may have to deal with impenetrable barriers to change and how to deal with that problem.

Steel observed that such barriers do exist, and it is imperative to identify them as early as possible. As an example, he referred to his experience with the Jeb Bush campaign and the challenge presented by Donald Trump. He pointed out that there was ample basis to attack Trump as a failure in business. He had inherited a fortune and suffered numerous business failures that resulted in multiple bankruptcies. But irrespective of those facts, the message that he was a business failure did not resonate because no one will believe that he's a failure after 40 years with his name on Trump Tower in New York, the New York media's celebration of him as successful, and the aura of business acumen that was transmitted nationwide by *The Apprentice* television program. Steel said it is essential for a movement to recognize that it cannot change certain perceptions.

Loeser agreed that there are impenetrable barriers, but those can be identified through focus groups. Aceves also cautioned about the dangers of the converse of the Trump example: the risk that proponents of reform are simply incapable of identifying impenetrable barriers. For example, referencing the Trump example, Aceves noted that many Democrats simply could not accept that someone as apparently unqualified as Trump had a real chance. This created an echo chamber effect where that shared perception led to the misconception that there was nothing to worry about. But when campaign representatives conducted research with more ideological diverse

groups, they learned that there were those who may have opposed Trump but warned that his candidacy should not be taken lightly. The Trump emergence underscores the necessity of in-depth preliminary research as a prelude to a successful campaign.

Reimer then relayed a question raised by NACDL President Martín Sabelli, specifically, whether the trial penalty reform movement can effectively take on the notions that more punishment equals more safety, that the criminal legal system is there to punish, and that these factors establish the racial implications of the trial penalty.

The right to a trial is a whole part of the constitution that is not being honored. That approach can resonate without having to break through those solid walls about the virtue of punishment and the role of the criminal process.

Steel stated flatly that he did not think either of those are winning fights. Those perceptions are as old as the Old Testament. Effective action on this issue cannot run head-first into that wall.

Loeser agreed but noted that the campaign can still be effective by approaching the issue from a different angle, such as making the point that the right to a trial is a whole part of the constitution that is not being honored. That approach can resonate without having to break through those solid walls about the virtue of punishment and the role of the criminal process.

Aceves viewed this challenge through the prism stressed earlier that it is essential to identify and understand the audience. For example, with respect to the racial disparity aspect, if someone tries to persuade a conservative, affluent person who is not aware of the nature of the problem that they should get behind eliminating the trial penalty because it is racist, that message will not resonate because it tends to make the person feel they are being labeled racist for thinking the system works.

But with other groups, such as minorities, they will understand the racial impact element to this. The message that the trial penalty is a problem and that change is necessary can be the same, but the delivery and the messengers may differ.

Steel added that the effort to address the trial penalty is essentially a rebellion and rebellions thrive on hope. He observed that emphasizing hope was the greatest strategy of the civil rights movement because it honored the American ideal and showed how society was falling short. Similarly, the trial penalty reform movement should celebrate the American criminal legal system as an ideal while showing how badly it is falling short of that shining ideal that many people imagine it to be.

Aceves concluded by noting that it is essential to recognize that progress is incremental. One must always confront the very real choice of taking the ball home or moving it forward. It's hard to move the ball with an all-or-nothing approach. As the movement connects with folks and moves the issue forward, it is important to focus on a goal or goals that are achievable. Try to get a small victory and then build on it. ■

How Advocates, Elected Officials & Philanthropists can Join Together to End the Trial Penalty

Howard S. Jonas President, Howard S. and Deborah Jonas Foundation

Howard Jonas, President of the Howard S. and Deborah Jonas Foundation, whose philanthropic support made the Presidential Summit possible, began by saying he thought advocates were perhaps expressing themselves wrong on this issue. Jonas recalled an example from the previous panel, wherein advocates are often afraid of something bad happening even after a policy success. For example, bail reform is passed and then a person out on bail kills somebody. Jonas stressed that mistakes are part of the ordinary criminal process, and these rare counterexamples should not dissuade us. From Andy Griffith and Perry Mason to John Peter Zenger, Americans have great respect for trials, even if having them is not a reality today, and in trials, as elsewhere, mistakes can still be made. It's possible that a guilty person may be found innocent, but people still have a fundamental belief in the system.

People also have a fundamental belief that everyone has a right to trial. If it is framed as "criminal justice reform" or "inequality," then maybe it is difficult to start a conversation. But, Jonas said, "If we frame it as: people deserve the right to a trial, and they shouldn't be tried by torture or by coercion, then I think we are likelier to prevail."

In business, Jonas said he considers himself a disruptor. He said he is happy to support the organizations that study the trial penalty. But, he said, "I don't think we should only study it; I think we should change it." Jonas is currently working on getting a simple law passed in Congress that would ensure judges take into account plea offers when sentencing individuals who exercise their right to trial. Jonas said he tends to be more Republican and is working with a Republican lobbying firm to get 50 Republicans in Congress to back this, which is hopefully a critical mass of sufficient bipartisan support.

Jonas says that if his initiative isn't successful in Congress, he plans to bring it to friendly states, like Colorado, and fund it as a voter initiative. Whatever the other side brings up, whether it be, "sentences won't be enough" or "it will break the system," Jonas says he wants to bring it back to a very simple issue: Do people get a trial in America or not? He said, "I believe there are swing states where we can prevail. And then those swing states become a laboratory. I believe you'll have less crime and less recidivism. I believe society will be better in those states." Jonas said that a lot of society coming apart now is a result of injustice in society. And, he added, the place where injustice starts is in our *in*justice system, in the fact that anybody who is accused is treated as if they are guilty and coerced into waiving their right to a trial. A lot of those people happen to be from a minority group, and it further disenfranchises those groups. This injustice shakes people's faith that the system is fair. Jonas said he will not rest until this is changed. ■

A lot of society coming apart now is a result of injustice in society. And, he added, the place where injustice starts is in our injustice system, in the fact that anybody who is accused is treated as if they are guilty and coerced into waiving their right to a trial.

PANEL THREE
Solutions

Moderator: Lucian Dervan Professor of Law and Director of Criminal Justice Studies at Belmont University College of Law

Diane Goldstein Executive Director, Law Enforcement Action Partnership

Kevin Ring President, FAMM (former)

Lars Trautman National Director, Right on Crime (former)

Somil Trivedi Senior Staff Attorney, Criminal Law Reform Project, ACLU (former)

Leading off, moderator Lucian Dervan, a law professor at Belmont who studies both the history of plea bargaining in the U.S. and the psychology of why innocent defendants plead guilty, noted that plea bargaining evolved as a form of corruption in the early 1900s. Diane Goldstein, a retired police lieutenant from Redondo Beach, California, described her own experience based on high-volume drug and gang prosecutions that churned people through the system. While her training was rooted in the idea that police should be neutral investigators, the role evolved into victim advocacy as tough-on-crime views gained steam. Goldstein observed that the trial penalty manifests early in the process, at the time of arrest, with police stacking charges to ensure the defendant is denied pre-trial release. This is exacerbated by the close relationship between police and prosecutors. It follows that any solutions to the trial penalty must address charge-stacking by law enforcement and prosecutors. There must be additional oversight and regulation with respect to the charging authority that both stakeholders wield.

Kevin Ring noted that the plea process is stacked against the accused because of mandatory minimum sentences. Incremental reforms are helpful, but true remediation of the trial penalty requires the elimination of coercive sentencing

Pictured left to right: *Lucian Dervan, Belmont University College of Law — Moderator; Diane Goldstein, Law Enforcement Action Partnership (LEAP); Somil Trivedi, ACLU (former); Kevin Ring, FAMM (former); Lars Trautman, Right on Crime (former).*

Photographer: *Kate Holden*

tools. Without judicial discretion, the balance inexorably tips towards the prosecution. Ring added that, beyond mandatory sentences and sentencing enhancements, the effects of the Sentencing Guidelines cannot be overlooked. His own criminal case involved sentencing guidelines that were easily manipulated by the prosecutor to greatly enhance the prescribed sentence. For comparison, Ring's co-defendant received a four-year sentence, while the prosecutor maintained that Ring's sentence should be up to 25 years. The difference between sentences offered through a plea deal and those imposed after trial have nothing to do with public safety. For those who fall through the cracks, judges must have authority to ameliorate severe trial penalties through second look laws. The system cannot be based on trust — it must be based on checks.

Lars Trautman focused on procedural, as opposed to "proscriptive," changes to address the trial penalty. He observed that most accused persons who plead guilty will enter "protected" plea agreements, which have a special legal status. Under these agreements, the defendant has no right to withdraw his plea agreement. Trautman suggested vesting the defendant with the right to withdraw the plea depending on the prospective sentence, which would remove the structural coercion inherent in the prevailing procedure. A model for such a process exists in Massachusetts for less serious offenses; the defendant and prosecutor both record their recommended sentences, and if the judge exceeds the defendant's recommendation, the defendant may withdraw his plea and proceed to trial. This record also provides benchmarks for any sentence imposed after trial. Trautman acknowledged that Massachusetts offenses eligible for this procedure generally did not trigger mandatory sentences, which is a factor that would need to be addressed before adopting this practice.

Somil Trivedi emphasized the need for greater transparency with respect to the plea process. He noted his own experience as a prosecutor, and the lack of data gathering with respect to pleas. Prosecutors should maintain a written record of plea offers, counteroffers, the timing of any offers, the rationale for plea offer modifications, and other details surrounding the plea process. Transparency must be paired with accountability, and this requires a different approach to the plea colloquy. Instead of focusing exclusively on the defendant — specifically, whether they felt coerced — the prosecutor should be required to establish that the defendant was not coerced to plead guilty. The twin goals of transparency and accountability could also be furthered through independent oversight of the plea process. Jurors provide oversight of the trial process, and the plea process requires a similar mechanism. In this regard, Trivedi commended the idea of adopting of Plea Integrity Units, which would be akin to the Conviction Integrity Units that exist within prosecutors' offices to identify wrongful convictions. Trivedi attributed this idea to Clark Neily. Trivedi concluded by stressing the need to correct the unfavorable law around plea bargaining, referring to an ACLU federal class action lawsuit challenging coercive plea bargaining.

The difference between sentences offered through a plea deal and those imposed after trial have nothing to do with public safety.

As pointed out by Lucian Dervan, the American Bar Association is taking steps to promulgate policies that address the trial penalty through its Criminal Justice Section's Plea Bargain Task Force. The task force recently issued its report and recommendations, which emphasize the need for trials and pre-trial litigation to ensure transparency, accountability, justice, and legal system legitimacy.[8] Broadly, the report explores solutions that (1) increase regulation and oversight, (2) enhance judicial sentencing discretion, and (3) transform procedural norms. Echoing Trivedi's comments, Dervan highlighted the importance of a robust and meaningful plea colloquy, as well as the need to undo guilty pleas under certain circumstances. The tools that enable prosecutors to coerce guilty pleas — such as threatening additional charges and pre-trial detention — also warrant scrutiny. Prosecutors must be required to provide pre-plea discovery, which is crucial to ensuring knowing

and voluntary waiver of the right to trial. Above all, Dervan views education — that is, the need to educate the public about how the system really works — to be of paramount importance. Reformers must seize the opportunity to open a dialogue with system stakeholders and challenge misguided perceptions that impede reform. For example, there is considerable evidence that innocent persons do in fact plead guilty, and this has helped advance the discussion into the realm of potential solutions.

Referring to her years in law enforcement, Diane Goldstein recalled her shock the first time an alleged victim lied to her. She lamented the cultural change that resulted in law enforcement acting as victim advocates instead of fact seekers. To address the complicity between law enforcement and prosecutors, especially regarding plea negotiations, Trivedi stated that *Brady* lists and do-not-call lists, which would track and disqualify law enforcement officers with credibility problems as witnesses, should be mandated.

There is considerable evidence that innocent persons do in fact plead guilty.

Dervan asked the panelists about elevating the role of jurors as one solution. South Carolina defense attorney Christopher Wellborn, from the audience, noted the possible ameliorative impact of (1) informing jurors of applicable sentencing laws, including mandatory minimums sentences, to provide impetus for nullification; and (2) allowing defendants who go to trial to opt for juror sentencing. From the audience, Clark Neily reiterated the need to fully inform jurors of their role in ensuring that prosecutions are legally and morally justified.

Dervan then asked what might motivate an individual to go to trial when every credible messenger is telling them to plead guilty. Diane Goldstein suggested that the system must be re-balanced, allocating more resources for public defenders and curbing overcriminalization, over-policing, and wasteful prosecutions. Dervan added that the defendant's decision-making process needs to be slowed down through more client-centered representation.

Kevin Ring suggested that the focus needs to be on individual actors, specifically lawyers. System actors need to demonstrate more courage in taking steps to address injustices. He specifically noted the need for lawyers to report unethical behavior to the state bar. Ring cited the example of Judge Kevin Sharp, who resigned from the federal bench because he did not want to impose unjust sentences.[9] Individual actors must follow this example, taking steps that call attention to the problem rather than waiting for policymakers to fix the system. He also emphasized the importance of including impacted people in the conversation.

The discussion then shifted to the earliest stages of the process, with Dervan noting the importance of increased opportunities for diversion out of the system. Also at the front end, Trivedi proposed community screening of charging decisions and community oversight at the plea phase.

Lars Trautman expressed concern that proposals to impose restrictions on the plea process might backfire. That is, removing plea bargaining incentives might lead to the unintended consequence of longer sentences. The question is where to focus reforms. Plea bargaining masks other system deficiencies, which must also be addressed.

From the audience, Martín Sabelli put forward the need for defense attorneys to examine their own responsibility for the trial penalty. For clients to have the courage to go to trial, they must be able to trust their attorney. This requires that defense attorneys examine their own implicit bias, and that they possess essential trial skills, like how to effectively select a jury. Dervan circled back to the theme that every part of the system is responsible for the trial penalty and must be examined.

Dervan then asked if we should just eliminate plea bargaining entirely. Trautman rejected this approach, stating that there is nothing wrong with a gap between the plea and trial sentence, which legitimately reflects acceptance of responsibility and the systemic benefit of efficiency. Given the

legal system's limited resources, avoiding trials for defendants without any colorable defense is an appropriate objective. The problem is that the current gap between plea offers and post-trial sentences is so large as to be coercive.

The need for efficiency is the result of a system that is clogged with unnecessary cases; 80% of cases are misdemeanors and 60-70% of those are nonviolent.

Trivedi noted that the need for efficiency is the result of a system that is clogged with unnecessary cases; 80% of cases are misdemeanors and 60-70% of those are nonviolent. Dervan added that the right to trial is a constitutional right and expressed the view that the system should not diminish individual rights for the larger goal of efficiency.

From the audience, Chris Young stressed the importance of transforming a system that, through its sole emphasis on punishment, treats human beings as disposable. Asserting their innocence, this individual turned down a plea agreement, went to trial, and received two life sentences. The case was before Judge Sharp, who later stepped down from the federal bench because of the draconian sentence he was forced to impose in this case. Based on his experience, Young noted the importance of improving attorney-client relationships, echoing statements made earlier. In regard to some incremental reforms, he stated, "We can't sweep the dirt under the carpet; that's not cleaning the house."

Following on that plea, Dervan asked the panelists what success would look like to them. Goldstein suggested that system actors should be judged based on sending fewer people to prison and upholding the Constitution. There should be greater community involvement and more front-end programs to address criminal behavior and its causes. Trivedi asserted that reforms must ensure that criminal prosecutions are as constitutionally expensive as intended. Ring's view of success was a return to proportionate sentencing, where punishment is based on the defendant's role and responsibility, not the exercise of a fundamental constitutional right. Trautman emphasized the need to consider and develop consensus on what constitutes an acceptable gap between plea-based sentences and post-trial sentences.

Offering some concluding thoughts, Dervan summarized the campaign's objective as giving people a meaningful choice to go to trial. At its most extreme, the trial penalty means that innocent people are too scared to go to trial. The solution is complex and multifaceted, calling for different types of transformation, some focused on plea bargaining and others focused on overcriminalization. ■

PANEL FOUR
Race and the Trial Penalty

Moderator: Rick Jones Executive Director, Neighborhood Defender Service

Cornell Brooks Hauser Professor of the Practice of Nonprofit Organizations; Professor of the Practice of Public Leadership and Social Justice, Harvard Kennedy School

Robert Rose Advocate & Researcher

Cynthia Roseberry Deputy Director, ACLU Justice Division

While the trial penalty is a system-wide problem that pervades many aspects of the criminal legal system, there is overwhelming evidence that the trial penalty most negatively impacts Black and Brown communities and defendants, exacerbating inequities in the system and society at large. This panel focused on race and the trial penalty and was moderated by Rick Jones, the Executive Director of Neighborhood Defender Services in Harlem. He began by asking how the trial penalty disparately impacts people of color and the poor.

Robert Rose, an advocate and researcher, began. He said he was convicted in 1995 after a trial in Queens County, New York. He refused a plea offer of three to nine years, went to trial, and was sentenced to 25 years to life. He ended up serving 24 and a half years. His judge had the reputation as one of the worst judges in Queens County. Even though it was a homicide-related offense, he was out on bail for three years prior to the trial, which was not the typical experience. Normally, homicide defendants are not out on bail. During that time, he went to court appearances, generally on his own with no counsel. The process felt "loosey goosey." Rose said he did not think much about pleading guilty versus going to trial, he just went to trial without a lot of studied deliberation.

Rose said he chose to go to trial because his lawyer advocated for him, and during trial his lawyer "really put up a big fight." The trial lasted a month and a half. On top of that, there was a *Batson* hearing that lasted two weeks. Rose said the judge was angry about his case taking a large amount of time. There were numerous hearings, including a *Mastrangelo*[10] hearing because a witness said they couldn't

Pictured left to right: *Rick Jones, Neighborhood Defender Service — Moderator; Robert Rose, Advocate; Cornell Brooks, Harvard Kennedy School; Cynthia Roseberry, ACLU.*

Photographer: *Kate Holden*

come testify, and Rose thought the judge seemed increasingly annoyed that Rose wanted to go to trial. Before he was offered three to nine years, which was offered at the completion of the State's case, the prosecutor's previous offer had been five to 15 years.

Rose said that most people don't have money and they don't get out on bail. Rose's situation was different; he was able to get out on bail. He met a lot of guys who had "cop-out" lawyers. This is when lawyers are paid a certain fee to "cop out," that is, go before the judge that they see every other day and make a plea deal directly with the judge. Rose believes there is a lack of integrity among lawyers, and lawyers should be accountable. In any given neighborhood there will be lawyers that say, for example, "Hey, I know Judge so-and-so, give me $20,000, and you'll be out in two days," and then they get five years or whatever. People who can't afford lawyers are the ones who end up with these bad "cop out" lawyers.

After serving 24 years, he now thinks he should have taken the plea offer of three to nine years.

Jones asked Rose if, knowing what he knows now, he would do the same thing. Rose was 19 when he was arrested. It was his first time being involved in the criminal system. He said he did not have the benefit of having a peer to ask for advice or find out what a good outcome would be. He also didn't have the benefit of hearing the truth about his judge. If they're back in the bullpen, a defendant can hear things like, "Hey, that lawyer is really good" or "Hey, that judge is going to give you a thousand years." Rose ruefully said that after serving 24 years, he now thinks he should have taken the plea offer of three to nine years.

Jones asked Cynthia Roseberry how the trial penalty disproportionately impacts people of color. Roseberry responded that, in this system, we need to either admit that Black people are more prone to criminality or that there is systemic racism in this system.

Jones asked how Roseberry prepares clients to navigate this system. She responded that many of her clients know more about the system than she does. They know how the system really works. Roseberry added, "I come as a privileged person, not, in their eyes, understanding the powerless position from which they want me to advocate for them. The thing that I can do is bring my heart there. We need to bring our hearts to this place. It can't just be good enough for 'those people over there' — it is all of us."

The trial penalty along with mandatory minimums and overcriminalization has delegitimized the message that the system works as whole.

Jones posed the same question, how does a defense lawyer or other advocate prepare clients or impacted people for entry into this unfair system, to Cornell Brooks. He said his first thought was not from his current position as a professor at the Harvard Kennedy School or in his previous position as President and CEO of the NAACP, but from a past position at the New Jersey Institute for Social Justice. He had never spent a day in a juvenile lockup and had never visited a prison, except as a law clerk. He led this organization which had advocates, lawyers, policy professionals, and "on the other side of the house" people providing direct services to folks

in jails and prisons in New Jersey. It struck him that they were providing them suits and dresses and telling them they could reenter society when they had "never entered society at the outset."

The trial penalty along with mandatory minimums and overcriminalization has delegitimized the message that the system works as whole. As far as the disparate impact on Black and Brown communities, Brooks said his organization served hundreds and hundreds of people in Newark, and during his years there they served "maybe a handful" of white people. But it's not merely racial disparities in terms of the defendants alone, it's the effect of those racial disparities on their children, their families, and on the jobs that they have. It's what happens when there are so many people subject to these disparities living in the same communities and neighborhoods. The disparities are more than just a collection of individuals that manage to "crawl out of the carceral state."

Jones noted that all three panelists, to varying degrees, seem to have some sense of hopelessness. He said he thought there was no doubt and no need to convince the people in the room that the system is racist, but, he asked them what the strategies should be for addressing these disparities.

All manner of incrementalist reform can add up to transformation. A movement will not succeed unless it can convince people that the movement can win.

Brooks said that preaching a sense of hopelessness may be descriptively true, but it can never be aspirationally true. Advocates must preach a sense of hopefulness. Even when there does not seem to be a basis for it, making the case that people seeking change have agency, have power, can organize, and can take a multivalent approach from the grassroots to the grass tops. It is important to include the business community, the faith community, and communities of affected people, and make it clear that people seeking change do have hope.

Brooks relayed the story of Harriet Tubman, who escaped from slavery on the Eastern Shore of Maryland, but then went back into slavery to free 70 people. She then went to the Carolina Lowcountry, became the first woman to command an American military unit, and then freed 700 more people. He said that hope could not be empirically demonstrated, rather, it had to be morally chosen. Advocates have to go into battle with the hope and faith that they can deliver, even if there's no empirical basis for that belief. There have been major changes on the death penalty, bail reform, and other things that at one time seemed hopeless. All manner of incrementalist reform can add up to transformation. A movement will not succeed unless it can convince people that the movement can win.

Roseberry agreed that having hope is an examination of ourselves and whether we as advocates can take up that mantle. Roseberry said that Brooks's story of Harriet Tubman rescuing people from slavery is not ancient history; Tubman died the year Roseberry's father was born. Advocates should seek a radical change of the system, for the check on power and the brokers of power in the system, from the police on the street to the prosecutors bringing charges, to the judges who sentence. It is not enough to just sit back and hope people do the right thing. Roseberry said, "We should get rid of the 5K1.1 snitch,[11] mandatory minimums, and limits on clemency. We should eliminate incentives for overcharging and change what success looks like in the system. Success is not always prosecution. We should fund and educate public defenders and appointed lawyers to prepare them to fight the giant, the government, in these cases. We should educate jurors to get them to lean into the system and not seek to escape it. It is a part of our democracy."

Jones then drew a distinction between systemic

change, things relating to prosecutors and judges, and things that happen as a person or case "march[es] through the system," and structural change, which would involve asking "is this the way it has to be? Can we envision another way (another structure) of doing justice?"

In certain communities, there is a feeling that people don't have a future, and they end up living a life that is based on that assumption.

Roseberry said that we must do exactly that. She said that the criminal justice system is where numerous other systems, such as health and economics, filter into. That's who ends up in the criminal system. We have to understand that all these systems are racist. We can't just look at one little piece and fix it. That's a Band-Aid on a gaping hole.

Jones asked Rose, from his personal experience of being arrested at the age of 19 and serving 24 years in prison, for his vision of a new system. Rose said that for him, the key would be "knowing there are people who believe in your future." He said in certain communities, there is a feeling that people don't have a future, and they end up living a life that is based on that assumption. But having mentors or friends who believe in them, in their "positive potential," is a great thing.

Rose said he got dragged into his situation. He was a college student at Fordham. He came home to visit his mother and saw her former boyfriend there with a weapon. Rose tried to get the gun away from him and did. Rose thought he had another weapon and shot him. Rose said the DA knew this and said, "'We know you didn't have a weapon; we know he came to your house; we know all of that." But the DA still prosecuted the case because he argued that Rose could have run away.

Jones asked Rose: "At that moment, when the prosecutor was in front of you saying, 'I know you didn't start this, I know it wasn't your gun, I know you were a kid, I know he was abusive to your mother, but you should have run,' what could the prosecutor have done differently that would have changed your entire life?"

Rose said the prosecutor didn't believe in his future. He said the police in his community knew the people who were a problem, but that kind of thing doesn't get addressed. They need social programs and someone who cares. Rose said he works with nonprofits on development and it's all about raising money, but people and organizations have to be careful who they take money from because the whole narrative can change if they take money from the wrong person. Rose says he tries to reach back into his community to people that are close to trouble so he can get involved and tell them about his experience.

Rose said his lawyer failed to explain mandatory minimums to him. He thought that by turning down the DA offer of three-to-nine years the worst he would get at trial is nine years. Instead, he got 25. But, he says, his family also got 25 years. It was a tragic thing for the whole neighborhood. Rose now lives in Harlem, and there are still people in the community who don't believe in their futures.

Roseberry agreed with Rose's point about the impact on communities. She said that when people show up in the criminal legal system, there's no acknowledgement or accounting for people without certain advantages, like being educated, healthy, loved and cared for. Jones asked about strategies to bring that kind of care, commitment, and concern to the system. Roseberry said these things should be considered in the policing, in the charging, in the sentencing. She said judges are rewarded for not using their hearts in this process because it's not efficient.

Jones asked Brooks how advocates can change the paradigm. He said that one of the central

challenges is that advocates have discrete policy objectives, but they are hard to remember for people who are not criminal defense lawyers.

Judges are rewarded for not using their hearts in this process because it's not efficient.

What is critically important in movement building is having a theme. One of the ways to respond to that is to interpret history in a different way. For example, the book *The New Jim Crow* by Michelle Alexander, describes mass incarceration as the new Jim Crow, with the old Jim Crow having formally ended with *Brown v. Board of Education*. The book suggested that people can end the new Jim Crow, just like they ended the old Jim Crow. It's important to tell the story in a different way; tie the story to a history. Advocates can point to this as a victory. They can tie the movement to a history that empowers people. Back in the 1860s, 80% of Black men voted. That history can be used in modern campaigns, such as the effort to restore enfranchisement to persons with prior felony convictions in Florida. "We valued the franchise back then; we value it again today." Tell the history differently if you need to. Bring the past into the present in a way that allows people to envision a future.

Jones asked what resources are needed to bring this new world order, this vision, to pass. Jones asked Rose to answer first, focusing on community and resources in the community that would be uplifting and empowering.

There is talk about the cost of action but not the cost of inaction.

Rose said he thought that people who enter the criminal legal system, who have just been arrested, should have a peer to speak frankly with them and tell them what's going on. The person isn't a lawyer and isn't involved in the court but can have a knowledgeable conversation with an accused person. People are frustrated in central booking and stressed out, so having that peer can help. Even before becoming involved in the system, people in the community need education, they need jobs.

Rose said we need more than studies and reports. It would be better to put our money and resources into action right away. He said he was recently paid by Columbia University to work on a report and was happy to be paid for it, but thought the money would be better utilized going straight to the community. He said all these universities and institutions do that, when instead they could use that same money and just do the work rather than study it.

Roseberry said it is obvious there needs to be more investment in public defenders, but beyond that, the public deserves transparency. The public needs to understand why people are being sent to prison and what's going on in the prisons. Another resource Roseberry believes we need is will: political will and moral will. Advocates have to have the will to change the system and invest in the change they want to see. They should start from a place where they can agree and build relationships with others so that the circle can grow.

Brooks said that a lot of discussion on the trial penalty is about the cost, especially the cost of trials. There is talk about the cost of action but not the cost of inaction. There is a lack of focus on the cost to children, to families, to communities. It's important to put a price tag on things that are less visible. For example: when the media talks about the cost of the bill, advocates should be talking about how it's going to improve the system and its legitimacy, which has an impact on law-abiding behavior. They should put numbers on their bill and back up those numbers with stories. Statistics and stories together are powerful.

Jones noted that a lot of these things are the intangibles that people know, but asked, in this data-driven, metrics-focused world we live in, how do advocates quantify those things? Brooks cited the scholarship of economist Desmond Ang (also from the Kennedy School), who looked at the impact of policing homicides on children, looking at things like school absences, grades, college attendance, and put a number on that.[12] In other words, he studies quantifying psychic harm. Brooks said, "We have to be more imaginative."

Coalitions need both people who are sympathetic, like Rosa Parks, but also radicals, like Claudette Colvin, whose radicalism we can respect.

Roseberry said these things are already done in wealthy neighborhoods. When there is a school shooting in a wealthy school, counselors are sent to that school. Society knows how to react to these things in an appropriate and productive way. But when a child on the South Side of Chicago shows up at school where there has been a shooting, the treatment is not the same. That child is punished for their reaction to trauma. It is part of the systematic differential treatment of different children.

I got seven or eight times what the minimum (in the plea offer) was. Rose explained that protecting the community could not be the rationale for his long sentence because he had been out on bail during a lengthy pre-trial period.

Jones then asked about coalition building, partners, and organizing. He asked, "Who are the folks we need to bring to the table to move this movement forward?" Brooks answered that making the ask is important. This includes asking prosecutors and judges to be a part of this fight. The Fraternal Order of Police are not likely to be allies but maybe others will, like the National Latino Peace Officers Association. It's important to look for ways to bring unexpected allies to the table. Brooks brought up perfect and imperfect coalitions. Coalitions need both people who are sympathetic, like Rosa Parks, but also radicals, like Claudette Colvin, whose radicalism we can respect. Clergy and religious leaders can be powerful moral allies. Alliances of religious organizations like the Jewish Federation or Baptist Church have worked together in the past and can work together now.

Roseberry said directly impacted people should be leading this process. She said it isn't right for advocates to be in a room talking about them. They need to be in the room and be at the forefront of this process.

Rose expressed concern about the new mayor of New York City, Eric Adams, possibly reinstituting harmful policies like the stop-and-frisk policy. He discussed coalitions being used to stop these things. Jones agreed that hyperlocal coalition building is very important.

Brad Haywood, a public defender in Fairfax, Virginia, and head of Justice Forward Virginia, asked Rose what his lawyer could have done to get him a better outcome in his case or at least

made him feel better about the outcome. Rose said that of course he feels differently about it in retrospect. He said he felt he could have been better educated by his lawyer about possible sentences and the consequences of turning down the plea offer. The Second Circuit has reversed cases for this very thing, where the lawyer didn't explain to the client what they faced.

Rose said, "Knowing what I know now, I would have pled guilty." He said he would caution people against going to trial because "judges are evil; they will lay you out. I got seven or eight times what the minimum (in the plea offer) was." Rose explained that protecting the community could not be the rationale for his long sentence because he had been out on bail during a lengthy pre-trial period. There's also no mandate for rehabilitation in New York state prisons. If a person goes to prison and has good conduct and trains for a job, it doesn't matter, the prison gets no credit for rehabilitating people, so they have no incentive. The state prison's job is just to hold that person in a cage for the term of their sentence. ■

PANEL FIVE
Judicial Conversation about Judicial Complicity and the Trial Penalty

Moderator: Vikrant Reddy Senior Fellow, Charles Koch Institute

Judge Kimberly Esmond Adams Superior Courts of Georgia, Fulton County

Judge John Gleeson (ret.) Partner, Debevoise & Plimpton LLP; former U.S. District Judge, Eastern District of New York

Judge Kevin Sharp (ret.) Partner, Sanford Heisler Sharp, LLP; former U.S. District Judge, Middle District of Tennessee

This discussion focused on judicial involvement and judicial complicity in the trial penalty and featured two former federal judges and a sitting state trial-level court judge. The panel's moderator, Vikrant Reddy, Senior Fellow at the Charles Koch Institute and Stand Together, began by stating that this entire conference is premised on the idea that trials are valuable — politically and morally in particular. He asked the panelists about the intrinsic value of trials.

Judge Kimberly Esmond Adams, the panel's only currently sitting judge, began her career as a state prosecutor and then was a defense attorney before joining the bench. She believes strongly in trials, and in her first year on the bench, tried approximately 30 jury trials. She inherited a substantial backlog including defendants who had been in custody for up to four years. She had to work to change the culture because many attorneys, both prosecutors and defense attorneys, were not interested in trying cases. They simply wanted to run this plea machine. Over the past 13 years, she has averaged 18-20 criminal trials a year (with the two pandemic years being the exception). "It is very demanding as a jurist," she said, "but I don't know another way to do it. The stress weighs on me. I am a staunch proponent of jury trials. In many ways, it's the only way we're able to hold judges, prosecutors, and law enforcement accountable."

Judge Kevin Sharp, a former federal judge in Nashville, Tennessee, said he only stayed on the bench for six years despite having jumped through all the hoops to show the other two branches of government that he had the judgment and temperament to sit on the federal bench, "and then" he said, "I promptly learned that they really don't want you to exercise that judgment." Instead, Congress tells judges what to do through mandatory sentencing laws. It was when he had to sentence Chris Young[13] (who attended the Summit) to mandatory life in prison for a nonviolent drug offense that he finally said enough is enough. Young eventually received clemency. Sharp said, "He ran face-first into the trial penalty. He could have taken a plea."

Sharp continued by saying that trials are incredibly important. It's the only way to get close to the truth. A system that encourages but, really, forces, a plea bargain is a meat grinder. The Constitution is clear about the right to trial, but it is taken away directly and indirectly. Sharp said, "There were times when things didn't feel right while presiding over cases, but I didn't have anything concrete." During one plea colloquy, though, it became clear to Sharp that the defendant didn't do what the government said she did. The defendant started going off script and Sharp began asking his own questions and the

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prosecutor eventually admitted they were prosecuting the sister-in-law of the actual target. Ultimately, he said he told the prosecutor he wasn't taking this plea and was going to dismiss the charges." On the other hand, trials take time; does the defendant want to sit in jail or lockup for two or three years? The speedy trial right doesn't really exist. Fixing that is critical.

Judge John Gleeson, a former federal judge in Brooklyn, New York, said it was important not to burden a right guaranteed by the Sixth Amendment by years or decades of additional time in prison. It's not much of a right if it costs the defendant 3 times or 2 times or even 1.5 times the amount of time in prison for exercising it. But even putting that aside for a moment, it's important to understand that the

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criminal legal system convicts people by either trial or plea bargain, but many other parts of the system depend on trials, specifically, for their legitimacy and their efficacy. One case he teaches is *Calandra*, which holds that the defendant can't make a motion to suppress in the grand jury.[14] One reason is to avoid slowing down the grand jury process by having Fourth Amendment rights litigated there. Another rationale is that you don't need to litigate those issues at the grand jury stage because they will be litigated through the trial process. In 1992, the *Williams* case declared that there is no duty to present substantial exculpatory evidence to the grand jury,[15] for the same reason: that the exculpatory evidence will be presented at the trial. The grand jury process also lacks the ordinary rules of evidence, such as the rule against hearsay. There is also the absence of confrontation. It is a system deliberately set up to permit ill-advised charges to come through because of the belief that they'll be exposed and properly litigated at trial. But because trials have dried up, other aspects of the system need to be questioned. We shouldn't have a system like ours that allows unsupported charges to be leveled in federal court under the assumption that they'll be fixed during a trial — which will guarantee Fourth Amendment rights, *Brady* rights, and that the evidence is otherwise admissible — because there are increasingly few trials in our system that guarantee these rights. The trials are an essential part of the criminal ecosystem. The other parts of it are called into question when there aren't trials.

Reddy relayed an anecdote about ecologists' concern about declining global honeybee populations. A decline in honeybees leads to a number of negative ripple effects on entire ecosystems. He wondered if this domino effect was similarly seen in our criminal legal system due to the reduction in trials. He asked to what extent judges are culpable for the reduction in the

number of trials. Specifically, is it unfair to ask if judges are too passive about plea bargaining?

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Judge Adams said she did not think that characterization was unfair and that it probably does describe many courtrooms across the country. There are some judges who are too passive and there are some who delve more deeply into facts and circumstances. For her the fact that a plea has been negotiated between the State and the defense is significant, but it is not dispositive. Even at the plea stage, the court should ask questions. She said, "If I'm asking questions about the person's life, and employment history, and family life, and it's the first time the defense attorney is hearing about this, that's a problem. That happens more than it should. If in the same plea, she asks the prosecutor if they've had contact with the alleged victim and they haven't, that's also a problem." Judge Adams doesn't believe it's the court's province to be involved in pre-trial negotiations. However, she said, "I do think the court has a responsibility to ensure we are not just rubber stamping these kinds of deals. We have to be, as jurists, more intentional. Mandatory minimums that remove from us the discretion to fashion appropriate sentences make this job really difficult." Too many jurisdictions have removed that discretion from courts in an effort to be tough on crime. They don't trust judges. Sometimes during a plea a person will say, "Judge, I didn't do it, but I want to go home."

Reddy then asked Judge Sharp the same question: are judges passive about plea bargaining? Sharp immediately said, "Yes, but . . . you don't know what's happening in the back. Because in the federal system, a lot of folks are shocked at what the possible sentence is. The number of times where someone came in and said, 'I've done this before and it's always been probation in the state system, and now I'm looking at 25 years,' and I would say, 'Yeah, welcome to the federal system.'" The judge has to trust the federal public defenders, who in his experience in the Middle District of Tennessee, were very good. If someone like Chris [Young] comes in and is facing life and the plea is 14 years, a judge has to decide, "Well, I trust they knew what they were doing in there."

> We shouldn't have a system like ours that allows unsupported charges to be leveled in federal court under the assumption that they'll be fixed during a trial — which will guarantee Fourth Amendment rights, Brady rights, and that the evidence is otherwise admissible — because there are increasingly few trials in our system that guarantee these rights.

Sharp said a judge can make up for that on the sentencing side.. He agreed with Judge Adams that a big part of that is taking the time to realize there is a human being in front of the judge. If there is no mandatory minimum, there are factors Congress set up that the judge is going to look

at to make sure it's an appropriate sentence. Sharp said he has been off the bench for about four years now and thinks about some of those cases: "Did I mete out the appropriate sentence?" He said, "There are still a few that I think about where I think I may have been too harsh, but for 99.9% I still look back on those and think I did the right thing. You can't be passive." Sentencing is the most important thing judges do.

Sentencing is the most important thing judges do.

Reddy then asked Judge Gleeson whether he thought there was a principled reason for some judges' passivity. Gleeson said, "I think judges are complicit in having created the trial penalty." He said he didn't think it was a matter of being passive or not passive. Rule 11 [of the Federal Rules of Criminal Procedure] says judges cannot be involved in plea negotiations. That's the rule. The main culprit of the trial penalty is the shift 30-40 years ago that took discretion away from judges. The shift took discretion away from judges and it went to prosecutors who now have more discretion, which had the effect of increasing the delta between plea sentences and trial sentences. It led to charge bargaining, and sentence bargaining, and bargaining over the factors that go into the guideline computation — drug weight and fraud loss. Prosecutors have enormous power. Only the risk assumers can go to trial. All the risk adverse ones can see the delta between the sentence if they plead guilty and the sentence if they don't and those are the 97% of defendants who plead guilty.

Gleeson continued by saying that a lot of what is said on this topic is local. Everyone knows their own area of the country. He said that one aspect of judicial complicity is that "if someone has the temerity to put the government to its proof and to put the court to its deployment of judicial resources necessary to try a case as compared to taking a plea, I think it's built into the DNA that they just pay a higher price." One piece of data he wishes the Sentencing Commission would gather is to disaggregate sentences imposed after a trial versus after a guilty plea to see if the bottom end of the range and the sentence imposed is smaller when a defendant has gone to trial. There's conventional wisdom on this: which is that when someone goes to trial, the judge sees all the evidence in 3D and there are some cases where that matters. But in most, a drug deal is a drug deal, a fraud is a fraud and Gleeson thinks it's built into the DNA of all the players in the system, including judges, that a person pays a higher price when they go to trial. And, he said, it's not just the two or three levels that the Guidelines contemplate as a reward for pleading guilty. As a general matter, the system dictates that defendants who go to trial need to pay a higher price.

Gleeson said when he was on the bench, prosecutors who were ordinarily not that aggressive about sentencing when people pled guilty would seek a sentence of 20 to 25 years after trial. And he would ask what their last plea offer was, and they'd invariably say, well, 10-12 years. And he would ask, "What did you learn during the trial that

Pictured left to right: *Judge John Gleeson, U.S. District Court, E.D.N.Y. (former) (remote); Vikrant Reddy, Stand Together — Moderator; Judge Kimberly Esmond Adams, Superior Courts of Georgia; Judge Kevin Sharp, U.S. District Court, M.D. Tenn. (former).*

Photographer: *Kate Holden*

warrants a ten-year difference between the sentence you would have been fine with if the defendant had pled guilty and the sentence you're telling me is the only just sentence to be imposed?" There was never really a good answer. He hesitated to do that because he was afraid prosecutors would not make the ordinary plea offers they made to defendants if they knew the judge would be asking that question at sentencing. In that sense, Gleeson does think judges are part of the problem.

The main culprit of the trial penalty is the shift 30-40 years ago that took discretion away from judges. The shift took discretion away from judges and it went to prosecutors who now have more discretion, which had the effect of increasing the delta between plea sentences and trial sentences.

Judge Adams recalled a colleague, now retired, who would make clear to defendants that if they chose to go to trial, the sentence would be higher after the trial. So not only did this conversation not allow for the possibility that the defendant would be acquitted, but that was obviously his way to strong-arm pleas. But there is some merit in sentences that may be higher post-trial that do not equate to a trial penalty. "But for me," she said, "it's not because I'm angry that the defendant has chosen to exercise his constitutional right to go to trial." Conversely, there have been cases before me that have been tried to verdict and resulted in conviction, and the sentence she imposed was less than was recommended during the plea negotiation process. Judge Adams said she doesn't want to give short shrift to the fact that the trial evidence may change the way a judge sees a case. She can generally put defendants who go to trial in two groups: one is people who believe they are innocent and the second is people who will face a mandatory minimum of 25 years via plea versus life if convicted at trial and feel like they don't have anything to lose by going to trial.

Judge Sharp said that one of the things that can't be discounted is vindictive prosecutors who say, "Here's the deal, but if you force me to go to trial we're going to start stacking. And I can turn this into a mandatory life if you make me go to trial," which is what happened in Young's case. Judge Sharp agreed with Judge Adams's point about the trial evidence swaying the judge. He recalled a specific case where a defendant got on the stand and testified. Sharp said he would have been better off not saying anything and it did result in Sharp sentencing him to more time. He said taking away discretion from the judge just shifted the discretion to prosecutors because of their control of charging. When Jeff Sessions was Attorney General, his policy was to charge people with everything the Department possibly could. Sharp said, "I thought this was a Department of *Justice*. The justice part fell off and that's disturbing."

Reddy then asked about specific actions judges could take to limit the negative effects of the trial penalty. He said he had four proposals and wanted to go through them one by one. The first is: judges could say that certain waivers of rights are not going to be permitted, such as waiving the right to appeal.

Judge Sharp said he thought that was a great idea. He said these are bad deals, particularly ones where the defendant waives the future right to petition for compassionate release. Those should be absolutely forbidden. Judge Adams agreed.[16]

Reddy's second proposal, adopted by Judge Emmett Sullivan of the U.S. District Court for the District of Columbia, is tis to require disclosure of favorable or exculpatory evidence not just at the trial stage but at the plea stage. On that idea, Judge Adams said there is some merit, but there may be scenarios where

defense attorneys are hesitant to share facts because they may be more nuanced. There are occasions where she has requested to see certain evidence, particularly where there are no mandatory minimums. But it's also true that prosecutors might not have all the evidence until they get closer to trial. So, she thinks this idea is good in theory, but not always practical.

Judge Sharp agreed with Judge Adams and thought it could work but on a case-by-case basis. A judge would have to rely on defense counsel. There are things they might not want the judge to see and things that the judge doesn't need to see. Sharp thought that doing it every case would be a burden that wouldn't move the ball along, but there could be cases where it is necessary. Getting *Brady* evidence at the trial stage is often difficult, so he was skeptical that prosecutors are going to be turning it over at the plea stage.

> **"What did you learn during the trial that warrants a ten-year difference between the sentence you would have been fine with if the defendant had pled guilty and the sentence you're telling me is the only just sentence to be imposed?"**

Reddy introduced the third proposal by invoking the phrase "the process is the punishment,"[17] referring to the fact that the legal system often requires numerous appearances, time off work, time away from family, and other expenses and sacrifices just to come to court, such that the process itself is punitive. Does the process itself push defendants toward pleas so they can avoid much of that process? And if so, are there things judges can do to make court procedures less grueling? For example, Professor Carissa Byrne Hessick at the University of North Carolina Law School wonders if it's necessary for the defendant to show up in person to hearings. On the civil side, lawyers frequently attend without the client.

Judge Sharp said he thought that this particular proposal was not doable because the defendant really does need to be there for 99% of court appearances. Maybe they could skip some minor procedural things, although the Constitution would require the defendant to be there for nearly all of it. He pointed out that many defendants may be distrustful of their lawyers and could be even more distrustful of them and the process as a whole if they ended up only hearing about certain proceedings after they occurred. Judge Sharp said he doesn't think excusing the defendant from appearing would be feasible or would help.

Judge Adams was also skeptical. For cases that involve someone's liberty, the defendant needs to be present at every stage. It's also important for the defendant and judge to see each other multiple times, so a defendant can determine whether they think they will be treated fairly and use that as a factor regarding whether to go to trial. Judge Adams said she explains the process to the defendant directly in open court because she doesn't know what conversations are going on between the defendant and defense counsel. Judge Adams added that doing these things in court also provides solemnity to the process, which is welcome.

Reddy asked about doing court proceedings using virtual meeting software such as Zoom. Judge Adams said she has not been in the courthouse since the pandemic began. While there have been no trials (during 2021), all hearings, from arraignments to substantive motions, have been on Zoom. It has worked relatively well for her. There has been a low no-show rate and it provides flexibility without disrupting the lives of people. However, Judge Sharp and Judge Adams agreed that a jury trial could not be done over Zoom and would have to be in person.

A Summit attendee said that especially in federal court, he likes to file a lot of motions and a big part of the motivation is to educate the judge about the case, which is effective even if he loses

the motion. He said he sometimes felt stymied in filing motions. Judge Sharp said he hoped he never made anyone feel that way. He found motions helpful for that exact reason, to help to educate the judge. "Otherwise, the judge is in the dark." After arraignment, Sharp said, "I may not see a person again until there's a plea. I appreciated motions."

Judge Adams asked if the motions lacked a legal basis, and the attendee said he's never filed a motion he didn't believe in. He said that the federal system discourages motions practice. Judge Sharp agreed, saying that he heard some judges grumble about that, but his response would be, "then what the hell are we doing here?" It's part of the job. If a judge doesn't want to rule on a motion, then they should get another job. Judge Adams agreed that part of a judge's job is to rule on motions and doing so never bothered her, unless it was frivolous.

Reddy then relayed a question posed by NACDL's then-President Martín Sabelli. He said NACDL is building a national coalition here to fight against the trial penalty. Can judges be a part of that coalition, formally or informally? Reddy pointed out that there are judges that care a lot about this issue, including the judges on this panel, but there are some judges who are indifferent. What can the judges who care about the trial penalty do to educate their colleagues?

Judge Adams said it's often hard for judges to take positions on things, but this is something that is so fundamental to our legal system that there is an opportunity for judges to play some role. It's important for activists and thinkers, like the Summit attendees, to think about the impact judges have and to find ways to incorporate them. It's important for judges to be educated. Judge Adams said judges don't like to think of themselves as political, but can be swayed by politics, especially judges who are elected to short terms. While judges should be educated and included, she said that it would not be appropriate for judges to be involved in supporting or opposing any legislative efforts.

Judge Sharp agreed that judges should be involved in ameliorating the trial penalty. It's a big problem and it can't be solved just with defense lawyers or even just with prosecutors. ■

PANEL SIX
Trial Penalty Research and Report Efforts

Moderator: Nathan Pysno Director of Economic Crime & Procedural Justice, NACDL

Lucian Dervan Professor of Law and Director of Criminal Justice Studies at Belmont University College of Law; Co-Chair ABA Criminal Justice Section Task Force on Plea Bargaining

Brandon Garrett L. Neill Williams, Jr. Professor of Law, Duke Law; Director, Wilson Center for Science and Justice

Jacqueline Goodman Law Office of Jacquie Goodman; Chair of CACJ Trial Penalty Task Force

Susan Walsh Partner, Vladeck, Raskin & Clark P.C.; Chair of NYSACDL Trial Penalty Task Force

Nathan Pysno of NACDL began by recalling David Safavian's remarks from the previous morning's panel, that any trial penalty policy arguments should be backed by hard data. Pysno noted that this panel featured the practitioners and academics who are gathering that data. He began by asking each to describe their research.

Brandon Garrett of Duke Law has worked with prosecutors in three geographically diverse counties (Provo County, Utah; Berkshire County, Massachusetts; and Durham County, North Carolina) on tracking and documenting plea offers. But he said the onus is on defense lawyers to step up and document trial penalty abuses, document what works, and document their cases. Defense lawyers care about the issue and are in the best position to gather data.

He said that recordkeeping on cases prior to trial is often "totally unstructured." Typical defense office training policies often consist of a defense lawyer using their judgment to "get a good offer," but how is defense counsel to know what a "good offer" is? They don't ask, "Are you effective as public defenders? Are there racial disparities in the offers? Can you show that people are being penalized for exercising their right to trial? Can you prove it?" The way to provide all these answers is to be documenting plea offers and related data.

Garrett said public defenders are often initially resistant to doing the extra work to track and document plea offers, but after the first couple times defenders use the tracker Garrett and his team developed, it takes just four minutes. Some defenders have also said they are concerned that prosecutors will punish their clients if they track this data. But many of the lessons have been valuable to the current work of public defenders. In some jurisdictions, there is more power for judges to intervene. Judges have been far more active than the lawyers realized. The tracking has shown real differences among cases about the degree to which the strength of the evidence matters in the plea process. They have also seen differences in mitigation during the plea process.

Except for voting, jury service is the most important thing citizens do. This is the citizen's role in "ferreting out the bad actors in the system."

Part of the virtue of tracking is that it helps to structure the process and helps to establish a best practices checklist. For example, a defense

lawyer could have a checklist before accepting a plea for a client that verified whether they at least considered a number of things, including mitigation, discovery, and collateral consequences like fines and fees, housing, and driver's license issues. This can also provide feedback to supervisors who can observe, for example, "Hey, we're not thinking enough about collateral consequences and should do more training on that particular issue."

He concluded by arguing that plea tracking is essential to the role of any defense lawyer and that defense lawyers can help their clients by being data collectors.

Susan Walsh, an experienced criminal defense lawyer in private practice in New York City, led the New York State Association of Criminal Defense Lawyers Task Force that published the hugely successful New York trial penalty report.[18] She began by thanking members of the Task Force who attended the Summit, namely Rebecca Brown of the Innocence Project and Don Salzman of Skadden.

She said the goal of the project was to gather data from across the state, authenticate the problem, depict it, and analyze it. The data included case law, literature, and a survey of the New York defense bar. The Task Force and multiple bar associations circulated the survey, which was completed by roughly 400 lawyers. One of the most interesting survey findings was the varying practices, even from courthouse to courthouse, that have a major impact on the trial penalty. Some prosecutors would refuse to offer a plea if a case was sent to a trial division. Some would say "no plea post-indictment."

Walsh said that, except for voting, jury service is the most important thing citizens do. This is the citizen's role in "ferreting out the bad actors in the system." The reform efforts stemming from the report included a change to the state judicial ethics rules that a judge may not say 10 years when the jury is out and then 40 years after conviction. Another recommended ethics change is that judges may not enhance sentences based on whether a defendant exercises their right to trial. A third was getting candidates running for district attorney to formally state their positions on the trial penalty.

Jacqueline Goodman, a criminal defense lawyer in Orange County, California, who is currently leading a trial penalty report project on behalf of California Attorneys for Criminal Justice, described the process. The California project, much like New York, has a committee and then smaller working groups or subcommittees within that. Although there is county-level data, there are often huge disparities even between courthouses. The federal NACDL report and the New York report are serving as a framework.

She said that the other side of the "trial penalty" coin is that there is fear among defenders of eliminating or discouraging "great deals." There is a feeling some defense lawyers have that they don't want to disincentivize prosecutors from offering a great deal. Goodman agreed with Garrett that the antidote to this attitude is data, so that people can see the broader problem of how the trial penalty is hurting defendants on a wide scale, as opposed to the experience in one individual case. Perhaps most compelling are stories of innocent people pleading guilty due to fear of the trial penalty.

Lucian Dervan, Professor of Law and Director of Criminal Justice Studies at Belmont University College of Law and Co-Chair of the ABA's Task Force on Plea Bargaining, focuses his academic

Pictured left to right: *Nate Pysno, NACDL — Moderator; Brandon Garrett, Duke Law; Susan Walsh, Chair of NYSACDL Trial Penalty Task Force; Jacquie Goodman, CACJ Trial Penalty Task Force; Lucian Dervan, Belmont University College of Law.*

Photographer: *Kate Holden*

research on two areas: the history of plea bargaining, and the psychology of why innocent people plead guilty. He began with the former by retelling the history of plea bargaining. He noted that our current system of plea bargaining doesn't have any deep constitutional roots and wasn't even intentionally created. It just kind of happened. The 1970 Supreme Court decision *United States v. Brady*[19] essentially blessed plea bargaining but did not embrace anything close to the frequency of plea bargaining in the system today.

Our current system of plea bargaining doesn't have any deep constitutional roots and wasn't even intentionally created.

Dervan also does empirical research regarding the incentives and psychology of innocent defendants who plead guilty. He conducted a study in 2013 which was the first psychological deception study to test this issue.[20] The study involved an accusation of cheating against college students where guilt or innocence was known to the researchers (due to some students acting as confederates). In that study, 56% of the innocent people pled guilty to cheating rather than going forward with trial.

Concerningly, Dervan said that the United States is exporting the system of plea bargaining to other parts of the world and researchers are noticing false pleas in other countries, just as there are in the United States. For example, when Japan instituted plea bargaining for the first time, they wouldn't permit an individual to merely plead guilty, they wanted something more, such as the defendant agreeing to testify against someone else. Unsurprisingly, this created significant perverse incentives that encouraged false accusations and false testimony. In Japan, research showed that 65% of people would plead guilty to something they hadn't done, while over 80% were willing to testify against someone else who hadn't done anything at all. There is a cascading effect when people are willing to falsely plead guilty and also falsely accuse others because the trial penalty is such a dangerous threat.

Pysno then recalled Lisa Foster's discussion the previous day about scholarly or policy reports that don't garner much attention and just "sit on the shelf." He asked how researchers and scholars can make sure that these reports and research garner attention and help to support actual policy change rather than sit on the shelf.

Goodman said it is important to get outside of our legal "bubbles" and seek media attention for our work.

Dervan added that he would like to see a conduit for these types of discussions, specifically between researchers on one hand and policymakers and practitioners on the other. He acknowledged that the data is often hard to get to. Many journals are not easily accessible. The average person has no access to it and neither does the media. Summit participants and others who care about this issue should work together to create better communication between academics, practitioners, and policymakers. It's not just providing academic research to policymakers though, it's also counsel and legislators saying, "Here's the data that we need that would support us in this work to get this passed or to win this case." The conduit should go both ways.

As an example, Dervan noted interesting research showing that the presence of counsel increased the rate of false pleas, except in cases where the lawyer explicitly and forcefully encouraged the defendant to go to trial. This is the exact opposite of what the Supreme Court expected.

Garrett thought that challenging existing harmful laws and practices, particularly on the local level, was important.

Walsh underscored that jails and prisons are full of people who are afraid to go to trial. The corrosive part of the system is people pleading to avoid that trial penalty. In talking to public defender offices during the New York Trial Penalty Project, there was a misconception that there was no trial penalty in some offices because "we get such great offers." The reports should be starting points to move the policy conversation. ■

PANEL SEVEN

Media Panel: Reporting on the Trial Penalty

Moderator: Martín A. Sabelli, Past President, NACDL; Law Offices of Martín A. Sabelli

C.J. Ciaramella, Criminal Justice Reporter, *Reason*

Josie Duffy Rice, freelance journalist; former President, *The Appeal*

Carrie Johnson, National Justice Correspondent, National Public Radio (NPR)

Nothing has the power to shape a national conversation and the opinions of the public more than the media. Journalists play a hugely important role in the criminal legal system and how individuals and advocates understand the issues and how to respond. With an issue as complex as the trial penalty, a journalist must meet a reader where they are and show them how the issue affects their life. The trial penalty problem is not a random outlier in a system that works well. The trial penalty persists because of how easy it is to inflict and then ignore. Reporting needs to shed light on how that happens and what our role is in upholding it.

This panel featured a discussion about reporting on the trial penalty and how journalists can raise the issue to a national level. The speakers were Martín Sabelli, then President of NACDL, as moderator; C.J. Ciaramella of *Reason;* Carrie Johnson of *NPR;* and Josie Duffy Rice, a freelance journalist and former President of *The Appeal*.

Sabelli kicked off the discussion by introducing the nuances of reporting on an issue as complex as the trial penalty. He noted that the trial penalty has numerous causes, numerous dimensions, and numerous implications, and therefore to effectively present the issue, report on it, and launch a national movement, advocates must establish ethical relationships with correspondents and promote the message and mission of their organizations within those relationships. When establishing

Pictured: *Martín Sabelli — Moderator; C.J. Ciaramella, Reason; Carrie Johnson, NPR (remote); Josie Duffy Rice, freelance; former President of The Appeal (remote).*

Photographer: *Kate Holden*

these relationships with reporters, it is important to have a shared goal or purpose for the reporting. In this instance, the goal of reporting is to explain this nuanced issue to readers and then convince them to take action to change the system — i.e., joining a coalition to address the problem. As

This reduced number of trials deprives everyone of a window into law enforcement and government misconduct.

Sabelli noted, the trial penalty is a complex issue, and there are numerous facets that a journalist can choose to explain to a reader. When reading a story, the reader hopes the person who wrote it is clear with their intentions, has experience with the issue, and is diligent in their reporting.

The three journalists on the panel have a long history of reporting on the criminal legal system for different publications and from different angles. C.J. Ciaramella writes for the libertarian-leaning news outlet *Reason*. Ciaramella believes the criminal legal system to be one of the most powerful arms of the state, which is why he writes extensively on these complex issues. He believes it his job as a

There's a public interest in learning more about the way prosecutors work and it's hard to do that without a free and fair adversarial trial proceeding.

reporter to take readers through the issues piece by piece, in an understandable and engaging way.

Carrie Johnson is a journalist at National Public Radio. For Johnson, the best parts of her career have been spent in the courthouse. An issue that led her to focus on the trial penalty is that during these years in the courthouse, she noticed there have been fewer and fewer trials. This reduced number of trials deprives everyone of a window into law enforcement and government misconduct. Johnson noticed that despite this crisis of the rapid reduction in trials, there seems to be little coverage of it in mainstream media. Johnson feels "there's a public interest in learning more about the way prosecutors work and it's hard to do that without a free and fair adversarial trial proceeding."

Josie Duffy Rice is a freelance journalist and former President of *The Appeal*, a nonprofit news organization that seeks to expose the harms and systemic racism inflicted by the criminal legal system. Duffy Rice began her journalism career at the same time the progressive prosecutor movement began to expand. To her, one of the difficulties in covering the system is that it is opaque and seems impenetrable, and because of this a lot of journalists will take things at face value. One way of addressing this as a journalist is to hear from people in the system. Since the trial penalty facilitates so many injustices, she interviews those who work in the system and are impacted by it and looks for trends that allow her to paint a bigger picture for the reader.

As Johnson alluded to, the trial penalty is not only built into the criminal legal system but is built into the reporting as well. The panelists all noted that they have been writing about these issues for a long time. Just because there is a broken system does not mean the national conversation will focus on it. Therefore, the actors in the system (journalists included) must continuously call attention to the problems. In raising the trial penalty to national visibility, each panelist agreed that it is important to have the groundwork in place. As an example, Ciaramella discussed qualified immunity and the murder of George Floyd[21] in 2020. For journalists to

be effective in their reporting in cases like this, they must have the foundation in place for readers. Like the other panelists, Ciaramella has spent his career reporting on the injustices of the system so when a specific event like the murder of George Floyd catapults the discussion of accountability and justice to a national level, their years of reporting on these types of injustices are the foundation for readers to learn the background, how something like this could happen, and why they need to care. Duffy Rice echoed this notion of credibility and consistency. She explained that it took a long time to get people to be outraged by the injustices of the system — it is not always one story that will change people: "You are not just shifting their perceptions of a system but shifting their perceptions of mercy and justice. Getting people to question their role in a system of injustice will never be easy." One hope is that a story will force people to think about and question their personal and political notions, their assumptions, their moral implications, and how those beliefs may reinforce or uphold certain injustices.

Just because there is a broken system does not mean the national conversation will focus on it.

Perhaps the most persuasive aspect of journalism, especially when the aim is to shed light on injustices and elevate the issue nationally, is storytelling. Johnson explained that when laying the groundwork to examine the trial penalty, it is important that reporters convey it is the system that is on trial and that should be playing defense, not the individual. To build that groundwork, journalists must tell the stories of those impacted by the system. She notes that stories take a long time, but they are essential for garnering public interest and government accountability. As Duffy Rice mentioned, the goal is to shift people's entire perceptions of a system, and the best way to do that is to make it personal and sympathetic using stories.

The goal is to create a system where there is an expectation that people's rights should be respected.

Duffy Rice explained, perhaps counterintuitively, that she is uninterested in innocence cases, especially when reporting on the trial penalty. Instead, she is interested in people who are guilty but are still subject to injustice. The goal is to create a system where there is an expectation that people's rights should be respected, and that can be achieved by showing humanity in the system — that it's not just random occurrences. She reiterated that it is a writer's job to challenge people's moral implications on whether something is "deserved." The question for her then becomes, "If they are guilty, what are we willing to allow?"

Building on the importance of storytelling, Sabelli asked whether there is a way to both meet people where they are with their knowledge and sense of injustice, and to tell stories that might not immediately resonate as the most egregious injustices in order to redefine what justice is. For Ciaramella, the power of storytelling is that the writer does not have to explicitly state that it is unfair. For example, he wrote a story in 2021 on the case of Richard "Dickie" Lynn being subjected to the trial penalty.[22] His co-defendants got off with about four to six-year sentences on average. Dickie chose to go to trial rather than accept the plea offer and "of the 21 co-defendants in the drug conspiracy, Lynn was the only one who was sentenced to life — seven concurrent life sentences." With the story of Dickie Lynn, Ciaramella used his writing to show the reader the same thing that Duffy Rice mentioned: while this man was not innocent, he was punished for going to trial and was himself a victim of an unjust system.

For effective storytelling, it is incredibly important to

hear from the people impacted by the system. Duffy Rice agreed that it's vital for journalists to facilitate these discussions and give impacted people and their families the platform to share their stories, but journalists and advocates should not expect impacted people to explain and fix the systems they've been forced into. Rather, that should come from the perspectives of people facilitating these injustices, such as prosecutors, judges, and defense lawyers.

When telling the story of a defendant who is the victim of the trial penalty, journalists will have to talk about the people facilitating the injustice, that is, the "villain" in the story. Often in these cases, that is the prosecutor. Duffy Rice explained that in her work she questions the role of villains when writing about the criminal legal system and tries to stay away from the notion of "good people vs. bad people" because that does not leave room for redemption. She is less interested in villainizing any individuals in the system, but rather hopes to show how these injustices happen and will keep happening until there are efforts to stop it. It is more about the endless villainy of power in the system and holding it accountable rather than any one individual. Johnson agreed, giving the example of the capital punishment movement. The push for abolition of the death penalty needs the voices of the people who worked on death row. Journalists do not need to write about them as villains, but rather show the reader what their experiences were while participating in these systems and why that correlates with the call for change.

While this man was not innocent, he was punished for going to trial and was himself a victim of an unjust system.

Johnson shared that a few years ago, she wrote a series on mandatory minimums focusing on relatively low-level, non-violent drug offenders. In one case, she illustrated the nature of injustice and the problem with proportionality by interviewing a sentencing judge about a case of his from 25 years earlier in which he gave a woman an extreme sentence because of mandatory minimums. He began crying on tape and this humanity and reaction to an injustice (that he played a part in) captivated readers. Today, Johnson tends to focus her stories on violent crimes. She noted that if the goal is to lower the prison population and address the injustices of our system, journalists and advocates must address and focus on violent crime as well, not just non-violent drug offenders. To further explain this, Johnson referred to a report[23] by the Square One Project and the need to "move beyond the easiest cases" and create new narratives for criminal justice reform. If journalists want people to be outraged by the injustices of a system, they must continuously challenge people to question the social norms of punishment and what they see as acceptable, and they need to report on how frequently these injustices are happening.

Pivoting to the topic of reporting itself, Sabelli asked about the shift in narratives, storytelling, and reporting since the murder of George Floyd by an officer of the Minneapolis Police Department. Duffy Rice mentioned phrases like "defund the police" or "abolition" were not frames of reference in much reporting until recent years. This is an example of how the field has changed recently and how our understanding of the system has expanded. There is much more skepticism of the system today than there was ten years ago (which is a journalist's job: to be skeptical and to question). Duffy Rice pointed out that the level of skepticism does depend on

A lot of good reporting on our system came about because of the protests in Ferguson, Missouri.

the type of media outlet and its intended scope and audience. Local media reporting can differ significantly from national media reporting — so while the breadth of coverage has expanded with

There is currently a shift in local and national media coverage that is more skeptical and takes a hyper-critical look at the systems.

events like the killing of George Floyd, those changes might not be as widespread on the local level. Ciaramella echoed this sentiment saying that a lot of good reporting on our system came about because of the protests in Ferguson, Missouri, following the 2014 police killing of Michael Brown. Ciaramella believes there is currently a shift in local and national media coverage that is more skeptical and takes a hyper-critical look at the systems and system actors. Johnson added to this example of the reporting shift that came out of Ferguson, saying there were young reporters like Wesley Lowery and Ryan Reilly who were on the front lines and came to national prominence because of their skepticism of the police and government. This was reporting that went against the status quo and questioned the role of law enforcement and how to hold those actors accountable in a system that historically has not. ■

KEYNOTE DISCUSSION

Andrew Crespo Morris Wasserstein Public Interest Professor of Law, Harvard Law School; Executive Faculty Director, Institute to End Mass Incarceration

Premal Dharia Executive Director, Institute to End Mass Incarceration

Robert Rose Advocate & Researcher

Brittany White Organizing Fellow, Institute to End Mass Incarceration

The Summit's Keynote Discussion featured two academics from the Institute to End Mass Incarceration, Andrew Crespo and Premal Dharia, as well as two impacted people, Brittany White, who also works at the Institute to End Mass Incarceration, and Robert Rose, a researcher and advocate. The discussion focused on sources of power in a reimagined criminal legal system.

Premal Dharia, Executive Director of the Institute to End Mass Incarceration, introduced herself and briefly described the Institute. Brittany White, an Organizing Fellow at the Institute to End Mass Incarceration, previously worked as a Live Free decarceration manager doing faith-based advocacy work. She went to trial and lost and got a 20-year sentence, split 5.[24] She returned home in 2014 with a deep sense that she had to do something to help others in the system.

Robert Rose, who spent 24 years in New York State prison, has been working as a researcher with numerous organizations focused on dismantling the prison industrial complex. He has worked on reports with Worth Rises, Sing Sing Quaker Worship group, TEDxSingSing, the Center for Justice at Columbia University, and with NACDL and FAMM on promoting the documentary film "The Vanishing Trial."[25]

Andrew Crespo, the Morris Wasserstein Public Interest Professor of Law at Harvard Law School and Executive Faculty Director of the Institute to End Mass Incarceration, said it is important to keep the goal in mind, think about what success would look like, and how we would know that we've achieved success.

Crespo said that the trial penalty is at the heart of plea bargaining. The system cannot have plea bargaining without a trial penalty. This ties to the question of efficiency. "Efficiency" often has a positive connotation, but it's important to realize the word is not inherently good or bad. It's inherently contingent: the value of something being efficient

Pictured left to right: *Robert Rose, Advocate; Brittany White, Andrew Crespo, and Premal Dharia, the Institute to End Mass Incarceration.*

Photographer: *Kate Holden*

is tied to the thing being described or the outcome that is desired. For example, an AK-47 and a Toyota Prius are both efficient, in terms of what each is designed to do and what it is being used to do.

The trial penalty is at the heart of plea bargaining. The system cannot have plea bargaining without a trial penalty.

Crespo continued, saying that he thought it was important to look at the prison system today through this lens of efficiency. The prison system as it is designed today is being used to inflict harm. Plea bargaining is what is making the system efficient. It's making a system designed to inflict harm more efficient. The question for a campaign trying to end the trial penalty, the launching of which is the goal of this Summit, is how should advocates and policymakers change the efficiency at the heart of the system?

Crespo said that plea bargaining is fundamentally about power. It's the tool by which the power to control case outcomes is used. To change this, there needs to be a change to the power structure. There needs to be a countervailing power. But where is that power going to come from? It has to come from somewhere that is aligned with the movement's goals. He suggested that legislators could potentially be a source of that power, checking the power of prosecutors. They could overrule *Bordenkircher v. Hayes*,[26] and place some due process limits on the plea process. But history suggests legislators will not do that. The institutional logic of the system also suggests they will not. These are system actors that have a vested interest in the system.

The prison system as it is designed today is being used to inflict harm. Plea bargaining is what is making the system efficient. It's making a system designed to inflict harm more efficient.

So, asked Crespo, where do we look for power? He said the first place to look is not to defense lawyers. Rather, the community should be the driver of the new vision of justice and power. Who is the community? The community is those feeling the weight of that oppression. They can collectively say "not guilty" at the early phases when asked how they plead. This idea has been floated before, by Henry Loomis in 1937 and by Michelle Alexander in her *New York Times* op-ed about "crashing the system."[27]

Crespo said that collective community power is fundamental to challenging mass incarceration. Can there be a sort of practice that marries organizing and lawyering? Plea bargaining is at the root of mass incarceration and the trial penalty is at the root of plea bargaining. It raises a lot of questions about the role of defense lawyers.

Dharia posed the question: "what's the role of defense lawyers?" She wants to diminish the idea that a defense lawyer's client is simply an individual who is not deeply connected to other people. What if being client-centered wasn't about honoring one person's wishes — what if that person was part of a collective? What if being "client-centered" meant that a client is part of a community, a client who comes to their defense lawyer to say, "I want solidarity with my neighbors." It would help to change the framework away from individualization. What if there was a collective that lawyers were responding to and supporting? This would de-center defense lawyers within the system or process. Lawyers would be

seen as supportive of a movement to end mass incarceration and a movement to end the trial penalty, being a part of Crespo's third option for the source of power for reform: communities.

Brittany White said that when she was convicted her mom was the only person there for her. She said, "I had a deep feeling of powerlessness." She was 23 years old. She came to court to say she wasn't going to plead guilty and the judge set a trial for the next day. After a one-day trial, she was found guilty by a jury. The judge waited months to sentence her.

White said that her experience told her she could not trust anyone, especially not her lawyer. "Organizing is about feeling powerful in a world that tells you that you should not have power — that your dignity is not a priority, and that society needs to be protected from you." She said her life has been about feeling shameful and powerless. She said, "I didn't have a community that told me my experiences were not isolated." Organizing is about imagining a different outcome that does not yet exist. Lawyers and movement builders can be allies. "Formerly incarcerated people have a sophisticated analysis of the problems we're facing. We know the reputations of the judges, lawyers, how we're being policed. I've never heard the trial penalty talked about in this way. Many of my formerly incarcerated associates will not understand what you're talking about with the phrase 'trial penalty.'" White said that everyone told her: "Take the plea." Impacted people understand: "You cannot beat the government. And you will be oversentenced." She wondered, "Who could my 23-year-old self have been if I had a community to support me when I went to trial in Pell City, Alabama?" White added that women in particular have an experience in the criminal system that is not typically discussed. Prisons don't have air conditioning. She recalled bathing with the same soap for many years. She said she gave many of her childbearing years to the system. These experiences are what is at stake if a person loses at trial.

Rose agreed that people in prison won't know what the trial penalty is either, but they know *Frye* or *Lafler*.[28] They are knowledgeable about the law, but it's a different language. Inside, people are trying to get out. When they hear about a case in the Supreme Court that might help them, they understand that. Courts understand that the trial penalty exists. The community on the inside needs to understand what's going on out here.

Returning to the topic of organizing, White added that organizing is all about relationships. A person in attendance followed up by asking how we can activate lawyers in a broader movement. Dharia said this is the framework, one centered on the community as a counterweight to the power wielded by prosecutors in the legal system, that they have landed on. Lawyers could think about their roles very differently, taking a page from organizing and advocacy work. ■

Plea bargaining is at the root of mass incarceration and the trial penalty is at the root of plea bargaining.

PANEL EIGHT
Comparative Legal Systems and the Trial Penalty

Moderator: Rebecca Shaeffer
Legal Director (Americas), Fair Trials (former)

Steven Andersson Senior Justice Consultant, United States Department of State

Laure Baudrihaye-Gérard
Legal Director (Europe), Fair Trials

Máximo Langer David G. Price and Dallas P. Price Professor of Law, UCLA Law; Director, UCLA Transnational Program on Criminal Justice

Jenia Turner Amy Abboud Ware Centennial Professor in Criminal Law, Southern Methodist University, Dedman School of Law

European countries are increasingly using plea bargaining or similar processes that undercut the implementation of the newly enacted procedural rights.

The final panel of the Summit presented an international perspective on plea bargaining practices, including a glimpse at why the United States propagates this uniquely American phenomenon globally. The panel also addressed safeguards established in various countries to prevent the emergence of the kind of extreme trial penalties that have become prevalent in the United States.

Rebecca Shaeffer moderated the panel. Shaeffer is the Legal Director for the American office of Fair Trials International. Shaeffer was instrumental in compiling the 2017 Fair Trials report *The Disappearing Trial – Towards a rights-based approach to trial waiver systems*.[29] To set the scene for this panel, Shaeffer explained how in recent years, the European Parliament and the European Court of Human Rights have moved to enact an array of fundamental rights to provide procedural safeguards for accused persons, a trend which, from her perspective as a U.S.-trained attorney, seemed to have peaked in the United States during the Warren Court era and has been backsliding ever since. As Fair Trials tracked and assessed the implementation of these rights, Shaeffer noted that European countries are increasingly using plea bargaining or similar processes that undercut the implementation of the newly enacted procedural rights. That phenomenon prompted Fair Trials to track plea bargaining practices around the world, which led to the publication of *The Disappearing Trial*, a comprehensive report that analyzed where plea bargaining exists, what it looks like, why waiver practices gain traction, and what safeguards exist related to their use.

As of the publication of that report in April 2017, 65 countries were using some form of plea bargaining. Since then, more have adopted trial waiver practices. The report established that the United States was often the inspiration for the adoption of the practices, sometimes with the support of U.S. executive departments such as the Departments of State, Defense, and Justice. The

Even where plea bargaining occurs without the most coercive features prevalent in the U.S., it remains a threat to the rule of law, judicial oversight, and the balance of power among the branches of government.

report found that plea bargaining remains most prevalent in the United States, where it occurs more frequently, with fewer safeguards, and with more coercive practices than in any other country's system. Many features of the trial penalty that have been explored at the Summit, such as the huge differential in sentences imposed after trial, charge stacking, charge bargaining, the threats of increased sentences for assertion of rights, and pressures caused by cash bail are unique to the U.S. system and, from a global perspective, are clearly outlier practices.

One key objective of this panel is to demonstrate how plea bargaining can operate without these onerous features. Shaeffer suggested that to the extent that the goal of the conference is to promote new thinking, there are enormous opportunities for imaginative approaches that can implement meaningful reforms within the U.S. constitutional context. There is much to learn from nations that have taken a fresh approach to criminal justice with new constitutions and new codification of procedural rights as a response to their experience with authoritarian governments at home. At the same time, Shaeffer noted that many of the U.S. practices have inhibited the fair trial rights envisioned by the U.S. Constitution, which remain, in large part, aspirational. She said, "It still takes an active imagination to picture what it would look like if the Sixth Amendment was applied to everyone without discrimination." Learning about other systems can help to achieve that goal in practical, realistic, and grounded ways. At the same time, it is important to note that even where plea bargaining occurs without the most coercive features prevalent in the U.S., it remains a threat to the rule of law, judicial oversight, and the balance of power among the branches of government.

Professor Jenia Turner focused on plea bargaining in Germany. The German system provides a sentence benefit, but plea bargaining is much more regulated than in the U.S. Informal bargaining in felony cases developed in the 1980s in response to rising caseloads. Eventually, German courts recognized the informal practice and placed broad limits on it. In 2009, the German legislature formally authorized and regulated the practice. As noted by Rebecca Shaeffer in her opening remarks, plea agreements in Germany are much less frequent and have declined in recent years.

There are noteworthy features of plea practices in Germany including explicit judicial involvement in the process (to the extent that judges can prescribe the sentence if there is an agreement versus a sentence after trial). There cannot, however, be so great a differential because that would be considered coercive and could lead to an involuntary confession. Additionally, the parties have access to all the evidence prior to the negotiation and judges must independently establish a sufficient basis for the judgment. And, quite significantly, parties may not bargain about the charges, the facts, or the right to appeal.

In practice, plea discounts of more than one-third of the anticipated post-trial sentence are disfavored and rarely occur. As evidence of that, a 2013 survey found that the average discount is between 25 and 33 percent of the anticipated post-trial sentence. Furthermore, German appellate courts review negotiated sentences as well as post-trial sentences to ensure that they are proportionate to the defendant's blameworthiness. Professor Turner noted that regulation reduces the risk that a plea discount can induce an innocent accused person to plead guilty, ensures that the sentence whether after a plea or trial remains proportionate, and promotes equal treatment of similarly situated defendants. She specifically discussed German high court holdings that recognize that extreme sentencing differentials can result in intolerable pressure on the accused to confess guilt, thereby undermining the voluntariness of the admission of guilt, while at

the same time noting that too extreme a discount can be disproportionate to a defendant's guilt.

Notwithstanding these safeguards, a 2013 survey of defense counsel showed that 55 percent of those polled reported that they had at least one case in which the plea discount induced clients to confess guilt even though the attorneys were not convinced the confession was accurate, with 35 percent reporting that this occurred "sometimes" or "frequently." Professor Turner explained that this pointed to the limits of the existing safeguards. This is particularly true in jurisdictions like Germany, and many U.S. venues, where there is an indeterminate sentencing regime which makes it difficult to calibrate the likely post-trial sentence. Further, German scholars have observed that judges may ratchet up the predicted post-trial sentence to induce a guilty plea.[30]

One extremely important feature of the German system is that it does not permit charge bargaining in felony cases and there is judicial supervision of charging decisions, thus avoiding the charge bargaining practices rampant in the U.S. system, in which prosecutors have exclusive control over charging and can exercise that broad discretion to manipulate sentencing outcomes.

One extremely important feature of the German system is that it does not permit charge bargaining in felony cases and there is judicial supervision of charging decisions, thus avoiding the charge bargaining practices rampant in the U.S. system, in which prosecutors have exclusive control over charging and can exercise that broad discretion to manipulate sentencing outcomes. Specifically, German prosecutors may not threaten to bring more serious charges if the defendant does not admit guilt. Additionally, the German system is not afflicted by the problem of baseline penalty harshness. In the United States, where the permissible sentences are extremely harsh, the differential between pre-trial and post-trial sentences can be so long as to be inherently coercive. German sentences are not only lower overall, but imprisonment of any length is far less prevalent in Germany.

Professor Turner also discussed the problem of uncertainty about trial outcome, which is far less of a problem in Germany because of the uniform mandatory disclosure of evidence prior to plea negotiation. Judicial involvement also tends to mitigate the coercive aspect of plea bargaining, but with the caveat that judicial coercion can still be a problem. Germany is considering adopting a practice of referring a case to a different judge if plea discussions do not result in a guilty plea, a practice which Professor Turner noted Connecticut has adopted.

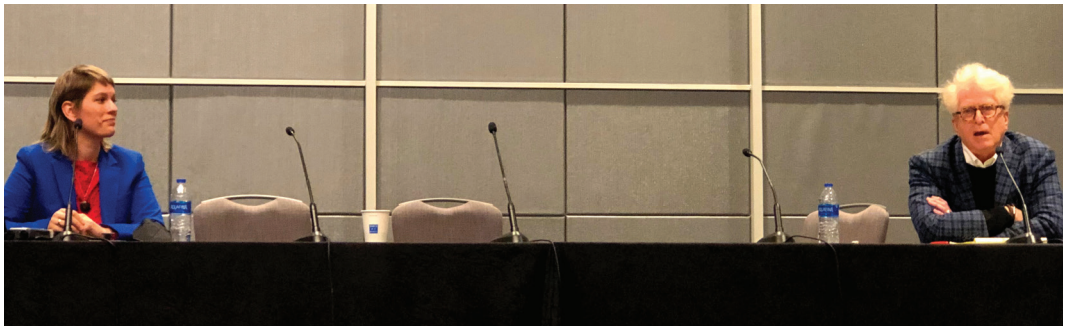
Finally, Professor Turner discussed the importance of transparency and accountability in plea bargaining. Germany addresses these problems through the requirement that courts must announce in open court and officially document any negotiations that have taken place. Indeed, they must also document the absence of any negotiation. Professor Turner, who has written on this subject, is a strong advocate for the adoption of transparency requirements in the U.S., including plea and sentence databases and a documentation requirement for all plea offers.

Laure Baudrihaye-Gérard began her presentation by noting that Europe has seen a significant increase in the percentage of cases resolved through trial waivers, with about 50 percent of cases resolved without a trial. Although this is far below U.S. levels, it is still a huge proportion of cases, which

The most senior Belgium judge observed that "plea bargaining made Belgium a rogue state."

poses such a serious challenge to the right to a fair trial and the concept of justice itself that the most senior Belgium judge observed that "plea bargaining made Belgium a rogue state." Fair Trials recently completed a study in five European countries, all of which are smaller and feature practices that are far less exemplary than in Germany: Albania, Cyprus, Hungary, Italy, and Slovenia. These countries represent both civil and common law traditions and have varied histories with plea bargaining. Italy was the first to introduce it in the late 1980s and Albania brought in plea bargaining as a legal transplant from the U.S. as part of post-reconstruction reforms after it emerged from the Soviet bloc. Hungary, like Belgium, was a late adopter of trial waivers.

The studied countries represent a diversity of waiver systems, but Fair Trials focused broadly on two practices: sentencing bargaining, which is a formal negotiation between the prosecution and the defense, and guilty pleas at pre-trial hearings, where the accused waive their right to trial in exchange for a more lenient sentence. In parallel, various countries employ other processes, including fast track proceedings. The research focused on the systemic pressures that prompt people to waive their trial rights, such as pre-trial detention, which is vastly overused in Europe, and extremely poor and overcrowded prison conditions. Approximately one-quarter of Europe's prison population are people in pre-trial detention. In addition to the coercive aspect of detention and the deplorable conditions of that detention, low acquittal rates, difficulties in accessing defense counsel, and the increasing imposition of prison sentences are all factors that drive people to give up their right to a trial.



Pictured: *Rebecca Shaeffer, Fair Trials Americas — Moderator; Stephen Andersson, U.S. State Department; Laure Baudrihaye-Gérard, Legal Director, Fair Trials (Europe) (remote); Jenia Turner, SMU (remote); Máximo Langer, UCLA School of Law (remote).*

Photographer: *Kate Holden*

Aside from these factors, an overriding contributor to the rise of waivers in Europe is growing prosecutorial power. Trial waiver processes were introduced for efficiency purposes as a caseload management tool for prosecutors to cope with rising numbers of cases and inadequate resources. They are now so integral to the functioning of the criminal process that one prosecutor observed that if the trial waiver system required a complete investigation to establish a person's guilt there would be no value in it and there might as well be a trial. The system places a premium on processing the maximum number of cases at the most minimal cost, which minimizes the judicial role, often to the great dismay of judges, and dehumanizes justice.

Another problem in relying upon procedural safeguards is the low remuneration for public defense counsel. For example, in Spain a lawyer receives the equivalent of $220 dollars per case — and that is for the entire case.

Baudrihaye-Gérard opined that one must query the efficacy of the efficiency goal itself because there is nothing to suggest that the burgeoning use of waivers is clearing capacity to facilitate a focus on more complex cases. Instead, the overall impact is net-widening, that is, an ever-increasing number of cases are sucked into the system. And typically, these are less serious cases that focus on vulnerable populations who cannot or will not fight back, such as people in poverty, foreigners, undocumented people who fear expulsion from the country, and communities that are already over-policed. Although statistics are scarce, where they exist, such as in France, they show that trial waiver systems are creating artificial legal recidivism with more cases and harsher punishments. Thus, rather than clearing cases, waiver systems simply increase the number of cases leaving the system at a breaking point as government officials continue to over-rely on law enforcement to address underlying social issues.

With this sobering view as context, Baudrihaye-Gérard discussed safeguards that can restore balance to the system and infuse a measure of equality of arms. First among these is providing the defense with early access to discovery, including the full case file. While some countries do not provide this access until after the closure of the investigation, others, such as France and Belgium, have adopted a rule that access must be provided as soon as a prosecutor offers a sentence agreement. Another key procedural safeguard prevalent in the European Union is early access to counsel, including as early as police custody before police questioning. While in some countries counsel is often not provided, in others, counsel is mandatory in the context of sentence bargaining agreements. Even so, there are enormous challenges in countries with inquisitorial systems that circumscribe the defense lawyer's role and where prosecutors dominate the investigative process. To illustrate this, Baudrihaye-Gérard referenced a case in Sweden where a court disbarred a defense lawyer for attempting to contact a witness to get information in support of a detained client.

Another problem in relying upon procedural safeguards is the low remuneration for public defense counsel. For example, in Spain a lawyer receives the equivalent of $220 dollars per case — and that is for the entire case, from the initial police investigative phase all the way through trial. This underscores how policymakers devalue the defense function and create a system that incentivizes waivers because of the pressures on defense counsel to resolve cases.

An alternative to procedural safeguards to ensure balance in a waiver system is to bring judges into the bargaining process. Throughout Europe there is a requirement that a judge must ensure that the

Research also shows that, in comparing systems across countries, there seems to be a correlation between the percentage of cases resolved without trial and the overall severity of punishment.

procedural safeguards for a trial waiver bargain are met. These safeguards include advice of rights, access to a lawyer, written formalization of the agreement, and ensuring that the person voluntarily consented to the waiver. In some countries, such as Hungary, the judge must also verify that the confession matches the evidence in the file and the judge has the authority to test the reliability of the confession.

Professor Máximo Langer is an expert in comparative plea bargaining who brought a Latin American perspective to the discussion. He noted that over the past 25 years the same trends that emerged in Europe have now arisen in Latin America in numerous countries with the introduction of one or more ways of resolving cases without trials. Ironically, these processes arose during an era when there was a trend to provide greater procedural rights as part of the implementation of public adversarial (as opposed to inquisitorial) systems designed to make justice more transparent and afford greater due process to defendants. Langer also noted that while there is a wide variation among Latin American countries in the regulation of trial waiver systems, there is a tendency to include the kinds of limitations described by the previous speakers. There are limits on prosecutorial discretion, there is access to the case file, and there is judicial involvement prior to the entry of a guilty plea. Additionally, as Professor Turner noted to be the case in Germany, in many Latin American countries penalties are less harsh than in the U.S. In contrast to other systems, however, Latin American countries only permit plea bargains in certain cases. For example, in Argentina if the maximum penalty is imprisonment for more than six years, the case must proceed to trial.

Langer then shared statistics from his research that showed a wide variation among Latin American countries in terms of the percentage of cases resolved without a trial, but none of them approach the 96 to 98 percent found in the U.S.[31] His research also shows that, in comparing systems across countries, there seems to be a correlation between the percentage of cases resolved without trial and the overall severity of punishment. Thus, the U.S., which is the most punitive country, is also the one with the highest plea bargain rate. Countries that tend to be less punitive tend to also have lower waiver rates. Additionally, there seems to be a similar correlation between the number of cases and the waiver rate. Langer cautioned however that it is unclear whether waivers make it possible to bring more cases or the fact that more cases are brought leads to a higher waiver rate.

Finally, Professor Langer suggested while there are variations in how trial waiver systems operate, the one common factor in their adoption all over the world is that they represent a transfer of power from judges and juries to prosecutors and police. Waiver systems tend to empower law enforcement to decide who gets prosecuted and convicted and gives law enforcement more influence over the severity of punishment. Additionally, these waiver systems incentivize all system actors, including defense lawyers, to rely upon them. Professor Langer ended with a plea for greater transparency and self-evaluation to assess the extent to which prosecutors and defense lawyers are fulfilling their proper obligations.

Stephen Andersson is a Senior Justice Consultant with the United States Department of State, and a former state and federal prosecutor, who provides technical support to countries looking to change and improve their justice systems, specifically working with them to adopt plea bargaining. Mr. Andersson began by observing that he felt a bit like Daniel in the lion's den because he has a completely different perspective on plea bargaining than other Summit participants. Andersson

strongly believes in the virtue of plea bargaining as a valuable law enforcement tool, especially as a mechanism to extract cooperation. He thinks it is a misnomer to refer to the practices under discussion as a trial penalty, rather it is a "plea benefit." There is a fundamental benefit to people pleading guilty and accepting responsibility. Confessions of guilt are important to victims and their families. Further, Andersson questions the premise that there is an inalienable right to a jury trial. The right to a jury trial may be negotiated away and that ability is one of the greatest tools available to a defendant when they are prosecuted for a crime of which they are guilty.

Mr. Andersson, however, characterizes himself as an uneasy supporter of plea bargaining because he does recognize its weaknesses. But institutions, like the criminal legal system, are flawed and they are run by humans who are also flawed. Flaws permeate the system at all phases, from policing through trial, sentencing and punishment, thus suggesting that plea bargaining is just another vital aspect of the process that is no more nor less flawed than any other aspects of the system. For that reason, Mr. Andersson expressed his gratitude for this conference because there is a need to make plea bargaining better. Plea bargaining is never going away, but as other speakers noted, there are ways to make it better. And in his work for the State Department, that is what he tries to do.

Mr. Andersson's work is mostly in post-colonial countries in Africa that have either the common law or civil law heritage, but in civil law systems, the inquisitorial model predominates. And in those systems, the prosecutor and defense lawyer have circumscribed roles and there is no tradition of a guilty plea. At the same time, there is limited prison capacity and prison conditions are dreadful, with people languishing for years before their cases get to court. Thus, the United States responds to this by trying to build capacity and by trying to implement processes by which those who wish to admit their guilt can secure their freedom. In these systems, the problem is not that there is a trial penalty but rather that the trial, or rather, the pre-trial process including waiting for the trial, is itself the penalty. In African countries with a common law tradition, such as Kenya, plea bargaining has taken hold, but it has been implemented with many of the procedural safeguards previously discussed: the right to counsel; the right to full disclosure of the evidence; the requirement that all plea agreements must be in writing; and there must be approval of the agreement in court by a judge who ensures that there is knowing consent.

In sum, Andersson said that plea bargaining is going to exist throughout the world not because the United States is an evangelist for it but rather because of substantial overcrowding of prisons. Plea bargaining is not the answer, but it can be a tool if used with effective guardrails. ■

Conclusion

The trial penalty pervades the U.S. criminal legal system. It has eviscerated the right to trial and other constitutional rights, worsened racial injustice, and paved the way for mass incarceration. Some of the policy solutions to correct the course of the decline in criminal trials are well known. Creative solutions are also needed. Beyond that, culture and attitude changes are needed. It is unfortunate that the expectation that few criminal cases are tried has seeped into prosecutorial, defense, judicial, and popular culture.

Since this Summit, the End the Trial Penalty coalition was formed, comprising individuals and groups from diverse ideological and experiential backgrounds who have jointly agreed to fight against the trial penalty. The speakers at this Summit provided hugely valuable insights on forming a national movement that this coalition will use in the fight ahead. ■

Speakers

Appendix – Speaker Biographies
Note: Speaker biographies and related professional affiliations may have changed since the drafting of this report.

GISEL ACEVES

A California native, Aceves began her political career a decade ago working on campaigns in Southern California. Her on-the-ground experience spans U.S. House and Senate races where she has served in multiple senior capacities. In the 2018 cycle, Aceves was tapped by EMILY's List and later the DSCC to advise campaigns. There she helped lay the groundwork to take back the House and protect hard-fought statewide races across the country. ■

THE HONORABLE JUDGE KIMBERLY ESMOND ADAMS

The Honorable Judge Kimberly Esmond Adams is serving her fourth term on the Superior Court of Fulton County in the Atlanta Judicial Circuit. She has been re-elected to three successive terms without opposition. Over the course of nearly 15 years on the trial bench, Judge Adams has presided over voluminous cases that include high profile criminal prosecutions and complex civil litigation involving multi-million-dollar land and contract disputes and personal injury claims. She also has handed down opinions in significant case of legal import involving state constitutional issues from qualified immunity to school choice. Judge Adams began her public service career after practicing as an employment attorney with a national labor and employment boutique.

A past president of the Georgia Association of Black Women Attorneys (GABWA) and currently Chair of the Judicial Council of the National Bar Association, Judge Adams is a well-respected bar leader and community servant. She has led a number of organizations and served in various capacities, including as a Past Chair of the National Advisory Board for *Foreverfamily*, a non-profit organization committed to mitigating the collateral effects on children of incarcerated parents. Judge Adams was invited to the White House in 2012 to participate in a workshop on parental incarceration.

Recognized both for her commitment to the legal profession and the community, Judge Adams has been the recipient of numerous, prestigious honors and awards. She possesses a deep commitment to the development of young people and frequently serves as a mentor, lecturer, speaker, moderator and panelist on topics ranging from the law and professionalism to education and the family.

Judge Adams earned her Bachelor of Arts Degree from Howard University in Washington, D.C. and her Juris Doctor Degree from the Notre Dame Law School. She resides in Atlanta with her husband, Michael, and they are the proud parents of an adult son, Michael (Ashley). ■

STEPHEN ANDERSSON

Stephen Andersson is a Senior Justice Advisor with the U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs. A graduate of the University of Chicago Law School, he previously served as an Assistant District Attorney for King's County (Brooklyn), New York; an Assistant United States Attorney for the U.S. Districts of Nebraska and the Northern District of Illinois; and as Director of Criminal Justice Operations for the Civilian Response Corps operated by the U.S. Departments of Justice and States. He has served overseas as a justice advisor for the United Nations Office on Drugs and Crime and the U.S. Departments of Justice and State. ■

LAURE BAUDRIHAYE-GÉRARD

Laure leads Fair Trials' legal and policy work in Europe and the organization's engagement with European regional authorities. She also leads on strategic litigation in regional and domestic courts. Laure is a qualified criminologist and participates in monitoring activities in a Brussels prison, reviewing complaints from detainees.

Laure studied English and French Law (King's College London and Universite de Paris I, Pantheon-Sorbonne) and EU law (College of Europe) and previously worked as a lawyer, representing and advising clients on government investigations and in EU law-related disputes. ■

CORNELL BROOKS

Cornell William Brooks is Hauser Professor of the Practice of Nonprofit Organizations and Professor of the Practice of Public Leadership and Social Justice at the Harvard Kennedy School. He is also Director of The William Monroe Trotter Collaborative for Social Justice at the School's Center for Public Leadership, and Visiting Professor of the Practice of Prophetic Religion and Public Leadership at Harvard Divinity School. Brooks is the former president and CEO of the National Association for the Advancement of Colored People (NAACP), a civil rights attorney, and an ordained minister.

Brooks was most recently visiting professor of social ethics, law, and justice movements at Boston University's School of Law and School of Theology. He was a visiting fellow and director of the Campaign and Advocacy Program at the Kennedy School's Institute of Politics in 2017. Brooks served as the 18th president of the NAACP from 2014 to 2017. Under his leadership, the NAACP secured 12 significant legal victories, including laying the groundwork for the first statewide legal challenge to prison-based gerrymandering. He also reinvigorated the activist social justice heritage of the NAACP, dramatically increasing membership, particularly online and among millennials. Among the many demonstrations from Ferguson to Flint during his tenure, he conceived and led "America's Journey for Justice" march from Selma, Alabama to Washington, D.C., over 40 days and 1000 miles.

Prior to leading the NAACP, Brooks was president and CEO of the New Jersey Institute for Social Justice, where he led the passage of pioneering criminal justice reform and housing legislation, six bills in less than five years. He also served as senior counsel and acting director of the Office of Communications Business Opportunities at the Federal Communications Commission, executive director of the Fair Housing Council of Greater Washington, and a trial attorney at both the Lawyers' Committee for Civil Rights Under Law and the U.S. Department of Justice. Brooks served as judicial clerk for the Chief Judge Sam J. Ervin, III, on the U.S. Court of Appeals for the Fourth Circuit.

Brooks holds a J.D. from Yale Law School, where he was a senior editor of the Yale Law Journal and member of the Yale Law and Policy Review, and a Master of Divinity from Boston University's School of Theology, where he was a Martin Luther King, Jr. Scholar. Brooks has a B.A. from Jackson State University. He is the recipient of several honorary doctorates including: Boston University, Drexel University, Saint Peter's University and Payne Theological Seminary as well as the highest alumni awards from Boston University and Boston University School of Theology. Brooks is a fourth-generation ordained minister in the African Methodist Episcopal Church. ■

C.J. CIARAMELLA

C.J. Ciaramella is a reporter at Reason. He was previously a politics editor at BuzzFeed, and a reporter for the Washington Free Beacon. His writing has also appeared in Vanity Fair, Vice, The Weekly Standard, High Times, Salon, The Federalist, Pacific Standard, The Washington Post, The Daily Beast, the San Diego Union-Tribune, and Street Sense. ■

ANDREW MANUEL CRESPO

Andrew Manuel Crespo is the Morris Wasserstein Public Interest Professor of Law at Harvard Law School, where he teaches criminal law and procedure and serves as the Executive Faculty Director of the **Institute to End Mass Incarceration**. Professor Crespo's research and scholarly expertise center on the institutional design, legal frameworks, and power structures of the American penal system. His scholarship has been honored by the Association of American Law Schools and profiled in **The New York Times**, with his leading articles appearing in the **Harvard Law Review**, the **Columbia Law Review**, and the **Yale Law Journal**. Together with John Rappaport, he is the author of Criminal Law and the American Penal System, an innovative forthcoming casebook that recasts the traditionally required criminal law course as a class about the role law and lawyers have played in building and sustaining the pathologies of the modern American penal system.

Nationally recognized for his expertise on a range of legal issues, Professor Crespo's public commentary can be found in **The New York Times**, **The Washington Post**, **The Boston Globe**, the **Journal of the American Medical Association,** and online at **Lawfare**, **Just Security**, **Take Care**, and **Inquest**, where he is a founding editor. Professor Crespo is an elected member of the American Law Institute, a member of the Academic Advisory Board of the American Constitution Society, and serves on the Standing Advisory Committee on

the Rules of Criminal Procedure for the state of Massachusetts. At the appointment of President Biden, he served in 2021 on the Presidential Commission on the Supreme Court of the United States. Prior to beginning his academic career, Professor Crespo served as a Staff Attorney with the Public Defender Service for the District of Columbia, where he represented over one hundred adults and juveniles charged with serious felonies, ranging from armed robberies, to burglaries, to homicides. As a member of the Harvard Law School faculty he continues to be active in litigation, authoring merits stage and amicus briefs on various issues, often in close collaboration with his students.

Professor Crespo graduated magna cum laude from Harvard Law School in 2008, where he served as president of the Harvard Law Review, the first Latino to hold that position. Following law school, Professor Crespo served for three years as a law clerk, initially to Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, then to Associate Justice Stephen Breyer of the U.S. Supreme Court, and finally to Associate Justice Elena Kagan during her inaugural term on the Court. Following his time as a public defender, Professor Crespo returned to Harvard as an assistant professor of law in 2015. In 2019, he became the first Latino promoted to a tenured position on the law school's faculty. ■

LUCIAN E. DERVAN

Lucian E. Dervan is a Professor of Law and Director of Criminal Justice Studies at Belmont University College of Law in Nashville, Tennessee. He is also the Founding Director of the Plea Bargaining Institute, a groundbreaking project that will provide a global intellectual home for academics, policymakers, advocacy organizations, and practitioners working in the plea bargaining space to share knowledge and collaborate. His teaching and research focus on domestic and international criminal law, and his writings have appeared in dozens of law reviews, psychology journals, and books. Professor Dervan is the author of four books and the founder and author of **The Plea Bargaining Blog**. In addition to his scholarly pursuits, Professor Dervan currently serves on the American Bar Association Board of Governors and Chairs the ABA Criminal Justice Section Plea Bargain Task Force. He was previously Chair of the ABA Commission on the American Jury and the ABA Criminal Justice Section. Prior to joining the academy, Professor Dervan served as a law clerk to the Honorable Phyllis A. Kravitch of the U.S. Court of Appeals for the Eleventh Circuit and practiced law with King & Spalding LLP and Ford & Harrison LLP. ■

PREMAL DHARIA

Premal Dharia is the Executive Director of the Institute to End Mass Incarceration at Harvard Law School, where she is also a Lecturer on Law. She is a founding editor of *Inquest*. Previously, Ms. Dharia spent nearly 15 years as a public defender in three different places: the Public Defender Service in Washington, D.C., the Office of the Federal Public Defender in Baltimore, Maryland, and the military commission at Guantanamo Bay, Cuba. She has represented hundreds of people, tried dozens of cases and supervised lawyers at various levels of practice. After years in the field of public defense, she brought her years of direct service and substantial expertise to systemic work at Civil Rights Corps, where she was the Director of Litigation. In 2019, Ms. Dharia started building a new organization to incorporate public defender advocacy into the broader push for systemic change to the criminal legal system. She was a Criminal Justice Fellow at the Reflective Democracy Campaign, a project of the Women Donors Network, which supported the launch of that organization, the Defender Impact Initiative (DII), and Dharia's investigation into the intersection of reflective democracy and the criminal system. Through DII, Ms. Dharia worked to reimagine the role of public defenders as systemic change agents, engaging community organizers, advocates and attorneys in the process. The work and ideas of DII have been incorporated into the Institute to End Mass Incarceration. Ms. Dharia serves on the Boards of the Free Minds Book Club & Writing Workshop and the Second Look Project, is on the Fellows Advisory Council of the International Legal Foundation and is on the Academic Advisory Board of the Family Justice Law Center. Ms. Dharia graduated from Brown University with a degree in History and African-American Studies, with a focus on comparative postcolonial studies, and from the University of Pennsylvania Law School. ■

JAMES ESSEKS

James D. Esseks is Director of the ACLU Lesbian Gay Bisexual Transgender Queer & HIV Project. Through litigation, legislative lobbying, policy advocacy, organizing, and public education, the ACLU seeks to ensure equality and justice for LGBTQ people and people living with HIV.

James was counsel in **Bostock v. Clayton County**, which established that LGBTQ people are protected from discrimination under federal law; in **Obergefell v. Hodges,** the case that won the freedom to marry nationwide; in **United States v. Windsor**, which struck down the federal Defense of Marriage Act; in **Gavin Grimm v. Gloucester County School Board**, about whether a Virginia school board can bar a boy from the common restrooms because he is transgender; in **Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission**, about whether a business open to the public can turn away LGBTQ customers based on its religious or artistic objections; and in successful challenges to bans on adoption and foster parenting by lesbians and gay men in Arkansas, Florida, and Missouri.

James and the ACLU have also worked extensively to fight anti-LGBTQ and specifically anti-transgender bills in the states and to fight the use of religion to justify discrimination against LGBTQ people.

The National LGBTQ Bar Association awarded James the **Dan Bradley Award** in 2013, the organization's "highest honor," recognizing individuals whose work "has led the way in our struggle for equality under the law."

James graduated from Yale College and Harvard Law School, where he was editor-in-chief of the Harvard Civil Rights-Civil Liberties Law Review. Prior to joining the ACLU in 2001, he was a partner at Vladeck, Waldman, Elias & Engelhard, PC. James clerked for the Honorable Robert L. Carter, United States District Judge for the Southern District of New York, and the Honorable James R. Browning, United States Circuit Judge for the Ninth Circuit. ■

LISA FOSTER

Lisa Foster is the Co-Director of the Fines & Fees Justice Center, a national nonprofit dedicated to ending the unjust and harmful imposition of fines and fees in the criminal legal system. A retired judge, Lisa is also the former Director of the Office for Access to Justice at the United States Department of Justice where she led the Department's efforts on fines, fees and bail reform, as well as access to counsel and legal assistance in civil, criminal and tribal courts. Prior to joining the Justice Department, Lisa served for ten years as a California Superior Court Judge in San Diego where she presided over criminal, civil and family law departments. Lisa was the Presiding Judge of the San Diego Court's Appellate Division, the Assistant Supervising Judge of the Family Division, and served as a member of the state Judicial Council Appellate Advisory Committee. Lisa graduated from Stanford University with a B.A. in American Studies and received her J.D., *magna cum laude*, from Harvard Law School. ■

BRANDON L. GARRETT

Brandon L. Garrett is the L. Neil Williams Professor of Law at Duke University School of Law, where he has taught since 2018. Garrett is the founder and faculty director of the Wilson Center for Science and Justice at Duke. He was previously the Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law. His research and teaching interests include criminal procedure, wrongful convictions, habeas corpus, corporate crime, scientific evidence, civil rights, and constitutional law. Garrett's work, including six books, has been widely cited by courts, including the U.S. Supreme Court, lower federal courts, state supreme courts, and courts in other countries. Garrett also frequently speaks about criminal justice matters before legislative and policymaking bodies, groups of practicing lawyers, law enforcement, and to local and national media. Garrett attended Columbia Law School, where he was an articles editor of the Columbia Law Review and a Kent Scholar. After graduating, he clerked for the Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit. He then worked as an associate at Neufeld, Scheck & Brustin LLP in New York City. Garrett is on the leadership team of the Center for Statistics and Applications in Forensic Science (CSAFE). Beginning in 2020, Garrett serves as the court-appointed monitor for the federal misdemeanor bail reform consent decree in Harris County, Texas. ■

THE HONORABLE JUDGE JOHN GLEESON (RET.)

Judge John Gleeson is a trial and appellate lawyer and company advisor who was a federal judge for 22 years before joining Debevoise & Plimpton. He is a litigation partner in the White Collar & Regulatory Defense and Commercial Litigation Groups.

Judge Gleeson is a Commissioner on the United States Sentencing Commission. A fellow of the American College of Trial Lawyers, Judge Gleeson's

practice focuses on white collar defense, complex civil litigation, internal investigations, and dispute resolution. Since joining Debevoise, Judge Gleeson has argued cases in numerous federal and state courts of appeals, conducted trial proceedings in federal and state courts, appeared in multiple bankruptcy proceedings, acted as both a mediator and arbitrator in commercial and employment disputes, conducted independent investigations, advised boards of directors on corporate governance matters, and provided expert testimony on United States law in multiple foreign tribunals. Judge Gleeson has also been appointed as amicus curiae on three occasions in separate federal courts to argue important issues of federal criminal law and procedure, including to make the argument against the government's motion to dismiss the prosecution of former National Security Advisor Michael Flynn.

Judge Gleeson is ranked as a leading lawyer in White Collar-Crime and Government Investigations by *Chambers USA* (2022), where clients have described him as "a thought leader" and "a skillful trial lawyer with great judgment." He is also recommended by *The Legal 500 US* (2021) for International Litigation.

Prior to joining the firm, Judge Gleeson was a United States District Judge in the Eastern District of New York, sitting in Brooklyn. While a judge, Judge Gleeson authored more than 1,500 published opinions (including 14 opinions for the United States Court of Appeals for the Second Circuit, sitting by designation). He also presided over more than 200 civil and criminal jury trials. He was assigned numerous Multidistrict Litigations, including two antitrust class actions against Visa and MasterCard and the Air Cargo antitrust cases. Judge Gleeson served on the Judicial Conference Committee on Defender Services for nine years (including three years as Chair). The Defender Services Committee is responsible for the approximately $1 billion per year program that provides effective defense counsel to the 80% of federal defendants who cannot afford to retain counsel.

Before his appointment to the bench in 1994, Judge Gleeson was a federal prosecutor in the same courthouse for 10 years. He served as Chief of Appeals, Chief of Special Prosecutions, Chief of Organized Crime and Chief of the Criminal Division. He personally tried 20 cases to verdict, argued 25 appeals in the United States Courts of Appeals for the Second Circuit, and also argued appeals in Third and Sixth Circuits. Among the numerous high-profile cases he tried, Judge Gleeson was the lead prosecutor in the murder and racketeering convictions of John Gotti and Victor Orena, the bosses of the Gambino and Colombo Families of La Cosa Nostra, respectively. Judge Gleeson received the Attorney General's Distinguished Service Award for his service in the *Gotti* case.

Judge Gleeson's decade-long efforts to convict John Gotti and dismantle the Mafia in New York are depicted in his book *The Gotti Wars: Taking Down America's Most Notorious Mobster* (Scribner 2022).

Prior to becoming a federal prosecutor, Judge Gleeson was a litigation associate at Cravath, Swaine & Moore for four years and a law clerk for the Hon. Boyce F. Martin, Jr. on the United States Court of Appeals for the Sixth Circuit.

Judge Gleeson has taught law for more than 30 years. He has taught Complex Federal Investigations at Harvard Law School and Sentencing at New York University School of Law and Yale Law School. He was the John A. Ewald, Jr. Distinguished Visiting Professor of Law at the University of Virginia School of Law. He has guest lectured at Yale Law School, Columbia Law School, Stanford Law School, Cornell Law School, University of Michigan Law School, Fordham Law School, Brooklyn Law School, and Cardozo School of Law. He is a co-author of the widely used treatise *Federal Criminal Practice: A Second Circuit Handbook (LexisNexis)*, which is now in its 20th edition. ■

DIANE GOLDSTEIN

Diane Goldstein is a 21-year veteran of law enforcement who served as the first female lieutenant for the Redondo Beach (CA, USA) Police Department. She is the Executive Director of the Law Enforcement Action Partnership, a group of criminal justice professionals that work advancing justice and public safety solutions. She is a guest **columnist** for many media organizations and recognized as a subject matter expert on criminal justice and drug policy. ■

JACQUELINE GOODMAN

Jacqueline Goodman is the chair of the NACDL-California Trial Penalty Task Force, and the founding

chair of the National Association of Criminal Defense Lawyers (NACDL's) Decarceration Committee. She is a Certified Criminal Law Specialist and a member of the bar of both California and Massachusetts. The former president of the California Attorneys for Criminal Justice (CACJ), she is now a Board member of the NACDL and co-chair of two of NACDL's annual programs: the Sex Crimes Defense Program and the Forensics Program. Her practice focuses on sex crimes and complex criminal cases. ■

CARRIE JOHNSON

Carrie Johnson is NPR's National Justice Correspondent. Since 2000, Carrie Johnson has covered a wide variety of stories about justice issues, law enforcement, and legal affairs for NPR's flagship programs *Morning Edition* and *All Things Considered*. Earlier in her career, she worked at The Washington Post and Legal Times.

Her work has been honored with awards from the Robert F. Kennedy Center for Justice and Human Rights, the Society for Professional Journalists, SABEW, and the National Juvenile Defender Center. She has been a finalist for the Loeb Award for financial journalism and for the Pulitzer Prize in breaking news for team coverage of the massacre at Fort Hood, Texas. Johnson served as a fellow at the Nieman Foundation for Journalism at Harvard University in 2019-2020. ■

RICK JONES

Rick Jones is the chief executive officer and a founding member of the Neighborhood Defender Service (NDS), a client-centered, community-based, holistic public defense organization with offices in New York, Michigan, and Texas. As a nationally and internationally recognized leader and expert in public defense, Rick has spent the last three decades working to promote racial justice, equity, and legal system transformation. Under his leadership, NDS has grown to become one of the foremost public interest law firms in the world, and is championing the fight to change the landscape of public defense throughout the United States and abroad. Rick is committed to helping shape the future of public defense and has trained and advised defenders in Afghanistan, Argentina, Brazil, India, Liberia, Nepal, and throughout the United States. He has written extensively on criminal legal system transformation for publications like The Champion, and has appeared on CNN, C-SPAN, NPR, PBS, in The New York Times and in the Black press. He has given testimony and made presentations before both houses of Congress, the United Nations, and numerous state and local legislative bodies. He was a lecturer in law at Columbia Law School, a faculty member of the National Criminal Defense College, and has been a guest lecturer at NYU, Yale, and Harvard law schools, among others. Rick served as the 59th President of the National Association of Criminal Defense Lawyers (NACDL) and as an inaugural member of the steering committee of the National Association for Public Defense (NAPD). He is the vice-chair of the board of The International Legal Foundation (ILF), a commissioner on the New York State Council on Community Re-Entry and Restoration, and a trustee of Fair Trials America (FTA). ■

MÁXIMO LANGER

Máximo Langer is David G. Price and Dallas P. Price Professor of Law at the School of Law of the University of California, Los Angeles, United States, where he teaches Criminal Law, Comparative Criminal Procedure and International and Transnational Criminal Law since 2003. He is also President of the American Society of Comparative Law. Besides teaching at UCLA, Professor Langer has taught at, among other institutions, the University Torcuato DiTella School of Law in Argentina and Harvard Law School (where he was Louis D. Brandeis Visiting Professor of Law). Professor Langer is also the Director of the Transnational Program on Criminal Justice at UCLA School of Law and is a Member of the American Law Institute. He was also the Founding Faculty Director of the Criminal Justice Program at UCLA School of Law. He obtained his *abogado* degree at the University of Buenos Aires School of Law and his Doctor of Juridical Science degree at Harvard Law School. He has authored many publications on criminal law and criminal procedure, including on plea bargaining in the United States and around the world, and his work has been translated to and published in multiple languages and has received awards from several professional associations. He is currently editing two volumes on plea bargaining. ■

STU LOESER

Stu Loeser is the Founding Principal of Stu Loeser & Co. The longest serving mayoral spokesperson

in New York City history, Stu Loeser has amassed more than two decades of communications, strategy and opposition research experience. After serving as U.S. Senate Majority Leader Charles Schumer's communications director, Stu became Mayor Michael Bloomberg's press secretary. He designed and led long-term strategic plans that made Mike Bloomberg a national leader on environmental sustainability, illegal guns and immigration while also managing all communications from City Hall and more than 40 city agencies.

Since 2012, Stu Loeser & Co. has helped some of the most prominent technology companies, Fortune 100 corporations, thriving start-ups and high net-worth individuals in the world set and exceed their goals. The firm's **"bare-knuckles approach, political instincts and deep connections"** has earned high praise. The company's 2017 addition of a corporate intelligence team returns Stu to his roots as **"New York City's foremost practitioner of the dark art known as opposition research."**

Earlier in his career, Stu worked on the Clinton/Gore and Gore/Lieberman presidential campaigns, as well as mayoral, gubernatorial and senatorial campaigns around the country. ■

CLARK NEILY

Clark Neily is senior vice president for legal studies at the Cato Institute. His areas of interest include constitutional law, judicial engagement, coercive plea bargaining, police accountability, and gun rights. Neily served as co-counsel in *District of Columbia v. Heller*, in which the Supreme Court held that the Second Amendment protects an individual right to own a gun. Neily received his undergraduate and law degrees from the University of Texas at Austin, and he is the author of *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government*. ■

LAURA PORTER

Laura Porter is Executive Director of the 8th Amendment Project and joined the organization after serving as Director of Campaigns for the Fair Punishment Project and nearly a decade as Director of Campaigns and Strategy with Equal Justice USA (EJUSA). Over the last 10 years Laura was a chief strategist in the death penalty repeal campaigns in Connecticut, Maryland, and Nebraska and gave strategic advice to policy advocates across the country. She specialized in building relationships with victims, law enforcement, and conservatives and led the groundbreaking national project Conservatives Concerned About the Death Penalty. Currently, she serves as the lead advisor to the Responsible Business Initiative engaging trade and business voices in criminal justice reform advocacy. Prior to campaign work, Laura was a public defender for 12 years in New York and a legal analyst on television. ■

NATHAN PYSNO

Nathan Pysno is Director of Economic Crime & Procedural Justice at NACDL. He leads NACDL's policy work on a wide variety of issues including, the trial penalty, plea bargaining, discovery, white collar crime, overcriminalization, and *mens rea*. He is a frequent writer, speaker, and lobbyist on criminal legal system reform issues. He was a member of the task force that published *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack*, a groundbreaking research report on the trial penalty in New York State.

Prior to joining NACDL, he was a white-collar criminal defense lawyer and litigator at a law firm in Washington, D.C., and served as a law clerk to Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit. He is a graduate of Carleton College and Vanderbilt Law School, where he was Senior Managing Editor of the Vanderbilt Law Review. He is an award-winning author. ■

VIKRANT P. REDDY

Vikrant P. Reddy is a Senior Fellow at the Stand Together Trust. In 2010, Reddy managed the launch of Right on Crime initiative at the Texas Public Policy Foundation. He serves on the board of the Wilson Center for Science and Justice at Duke Law School and on the Executive Committee of the Criminal Law Practice Group of the Federalist Society. He is a member of the Council on Criminal Justice and a Salzburg Global Fellow. He has previously worked as a researcher at the Cato Institute, a judicial clerk, and an attorney in private practice. Reddy is a graduate of the University of Texas at Austin and the Southern Methodist University School of Law in Dallas. ■

NORMAN L. REIMER

Norman L. Reimer has been a bar leader and criminal defense attorney throughout his career. For more than a decade a central focus of his work has been to expose and reform the trial penalty and the coercive plea practices that enable it. Norman L. Reimer served as the Global CEO of Fair Trials from 2021 - 2022. Fair Trials is a global criminal justice watchdog, fighting for fairness, equality, and justice, that works to expose, challenge and remedy system injustice in criminal processes. Before joining Fair Trials, Norman Reimer served as the Executive Director of the National Association of Criminal Defense Lawyers (NACDL) from 2006 – 2021. NACDL is the preeminent organization in the US dedicated to enhancing the capacity of the criminal defense bar to safeguard fundamental rights and promote reforms in further of a fair, rational, humane, and non-discriminatory criminal legal system.

Prior to his time at NACDL, Norman Reimer was a criminal defense lawyer based in New York City for over 20 years, practicing in state and federal court at both the trial and appellate levels and promoting systemic reform through both his service as a leader of the organized bar and the chair of numerous task forces and committees. He is a passionate advocate for the rights of the accused and the need to limit governmental overreach in the enforcement of its criminal laws. ■

JOSIE DUFFY RICE

Josie Duffy Rice is a journalist, writer, law school graduate, and podcast host whose work is primarily focused on prosecutors, prisons, and other criminal justice issues.

She is the host of the podcast UnReformed: The Story of the Alabama Industrial School for Negro Children, released in January 2023, which she also co-wrote. In addition, she co-hosts *What a Day*, Crooked Media's daily news podcast, two days a week. She is also the creator and co-host of the podcast *Justice in America*. Until May 2021, she was President of *The Appeal*, a news publication that publishes original journalism about the criminal justice system.

Her writing has been featured in *The New York Times*, *Vanity Fair, The New Yorker, The Atlantic,* and *Slate*, among others. She was a writer on the FX show *The Premise.* Josie was also a consulting producer for Campside Media's #1 podcast *Suspect*.

Josie has appeared on *The Daily Show* with Trevor Noah, *Late Night* with Seth Meyers, *All In with Chris Hayes*, and others. She's also been a guest on podcasts such as *You're Wrong About*, *5-4*, *Call Your Girlfriend, The Dig*, *92Y*, *Why Is This Happening?*, *Citations Needed,* and many more. She's also been a regular guest host of *Political Gabfest.*

Josie's a graduate of Harvard Law School and received her bachelor's degree from Columbia University. She is currently a Type Media Fellow, and was previously a 2020 New America Fellow and a Civic Media Fellow at University of Southern California's Annenberg Innovation Lab. She is writing a book and lives in Atlanta with her husband and two children. ■

KEVIN RING

Kevin Ring became president of FAMM in January 2017, succeeding founder Julie Stewart. Ring previously served as the group's vice president and director of strategic initiatives.

Ring has testified before Congress and state legislatures across the country regarding sentencing and prison reform. He has been profiled in various national publications, including the *Wall Street Journal, National Journal,* and *The Hill* newspaper. He has appeared as a justice reform expert on FOX News, CBS News, MSNBC, Headline News, National Public Radio, Al Jazeera, and many other television and radio outlets. He has spoken at major conferences and events, including TribFest, Congressional Black Caucus Foundation Conference, Conservative Political Action Conference, and the Variety / Rolling Stone Criminal Justice Summit. His writings have been published in numerous outlets, including *USA Today, The Washington Post, The Washington Times, The Hill,* and *Washington Examiner.*

Prior to joining FAMM in 2008, Ring was a lobbyist in Washington, DC. He was twice named one of K Street's Top Rainmakers by *The Hilll* newspaper. Ring was indicted in September 2008 on public corruption charges as part of the Jack Abramoff lobbyist scandal. After two trials and appeals, Ring ultimately served 20 months in federal prison.

Ring began his career in Washington, DC as a legislative aide on Capitol Hill. During his tenure, he served as counsel to the Senate Judiciary's Constitution, Federalism, and Property Rights Subcommittee under the leadership of future US Attorney General John Ashcroft. He also served as executive director for the Republican Study Committee, the largest member organization in the U.S. House of Representatives.

In 2004, Ring's first book, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice*, was published by Regnery. In 2016, Ring updated and revised the book, which was published as *Scalia's Court: A Legacy of Landmark Opinions and Dissents*.

Kevin is a graduate of Syracuse University and The Columbus School of Law at Catholic University of America in Washington, D.C. He lives in Maryland with his two daughters. ■

ROBERT ROSE III

Robert Rose is an activist and researcher with a focus on dismantling the prison industrial complex and working towards improving the lives of people currently incarcerated. Currently, he serves as a Digital Media Fellow at Second Chance Studios and appeared at the Summit prior to his fellowship. His work aims to expose the commercialization of the criminal legal system and advocate to protect and return the economic resources extracted from directly-impacted communities.

Robert organizes and leads campaigns that help equip consumers, investors, elected officials, celebrities, litigators, advocates, and the public with the tools needed to challenge those who profit from our nation's carceral crisis. At the Sing Sing Prison Museum, Robert is utilizing oral histories and historical analysis to tell the story of the history of incarceration in New York over the past 50 years. Previously, he worked as a Research Fellow with Columbia University's Center for Justice and as the Production Manager for TEDxSing Sing.

Robert has contributed to a multitude of reports with organizations, including Worth Rises, the Sing Sing Quaker Worship Group, and the National Association of Criminal Defense Lawyers (NACDL). Reports include "The Prison Industry: Mapping Private Sector Players," "Reducing Violence from Within," and a new study criticizing courts for "penalizing" those who refuse to plead guilty.

Robert earned his Bachelor of Science in Behavioral Science from Mercy College and a Master of Professional Studies from New York Theological Seminary. ■

CYNTHIA W. ROSEBERRY

Cynthia W. Roseberry is Acting Director, ACLU Justice Division. Ms. Roseberry works at the ACLU to reform the criminal legal system. She manages reform in federal and state systems through ACLU affiliates across the nation. She also co-convenes the **Justice Roundtable** and co-chairs the Criminal Justice Working Group at **Leadership Conference on Civil and Human Rights**. Additionally, she serves on the board of the **Deason Criminal Justice Center**.

During the Obama administration, she served as Executive Director of the historic Clemency Project 2014. Often referred to as the nation's largest law firm of nearly 4,000 lawyers, she provided pro bono support to obtain release for nearly 2000 people.

Ms. Roseberry also served on the Charles Colson Task Force on Federal Corrections, a nine-member, bipartisan, Congressional blue-ribbon panel charged with examining the federal corrections system. The task force released its groundbreaking report *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* in January of 2016.

Previously, Ms. Roseberry was the executive director of the Federal Defenders of the Middle District of Georgia, Inc. and taught at DePaul University College of Law in Chicago. For more than 10 years prior to teaching, she practiced federal and state criminal defense in Georgia.

A founding board member of the Georgia Innocence Project, she was the first African-American female president of the Georgia Association of Criminal Defense Lawyers. She received the 2016 COS Humanitarian Award, the 2017 annual service award from the Alpha Alpha Chapter of Phi Beta Sigma Fraternity, Incorporated and the 2017 Champion of Justice Award from the National Association of Criminal Defense Lawyers. Ms. Roseberry is also a member of the Council on Criminal Justice.

Ms. Roseberry earned her Bachelor of Science from Wilberforce University in Ohio. She earned her Juris Doctor from Georgia State University College of Law. She currently serves on the Reebok Human Rights Awards Board.

A national and international speaker, Ms. Roseberry has presented in nearly every U.S. state in Europe and the former Soviet Union and to a delegation of judges from China. Her TEDx talk, *My Father, My Hero*, delivered from inside a prison, has been critically acclaimed. See her TEDx talk at **http://bit.ly/myfather-myhero**. ■

MARTÍN ANTONIO SABELLI

Martín Sabelli received his degrees from Harvard College (1985), the London School of Economics and Political Science (1987), and Yale Law School (1990). He currently has his own firm and has served, in the past, as a Federal Public Defender, a partner of a national firm (Winston & Strawn), the Director of Training of the Office of the San Francisco Public Defender, and as a law clerk to the late Honorable Robert F. Peckham, United States District Judge.

He has represented individuals in state and federal courts since 1993 in a wide range of civil and criminal matters including complex federal white collar criminal prosecutions, multi-defendant federal conspiracy cases, federal and state gang-related prosecutions, and federal and state death-penalty matters. These matters have included corporate internal investigations in civil and criminal matters as well as matters pending before the Securities and Exchange Commission, matters investigated and prosecuted by the Federal Deposit Insurance Corporation, matters prosecuted under the Racketeering and Corrupt Organization Act, and legal malpractice matters.

He has taught for the National Criminal Defense College since 2001 and for the Trial Advocacy Workshop of Harvard Law School, the National Institute for Trial Advocacy, and the National Association of Criminal Defense Lawyers (NACDL) as well as numerous other criminal defense and public defense programs around the country and abroad. He received NACDL's Champion of Justice Award in 2018 and has served as Chair of its Ninth Circuit Lawyer's Assistance Strike Force and of numerous committees including the Trial Penalty (Coercive Plea Bargaining) Task Force. He is also a Member of the Board of Regents of the National Criminal Defense College (NCDC) and has been a faculty member there since 2000. He has authored law review articles and practice guides on gang expert issues, the dangers of self representation, expert witnesses, prosecutorial discretion, and comparative law issues.

He has also served as the Director of the Mexico Program for the National Institute of Trial Advocacy. He regularly lectures on comparative criminal justice issues and trains public defenders, judges, prosecutors, and lawyers in Argentina, Bolivia, Brazil, Chile, Colombia, Mexico, Peru, Uruguay, and numerous other countries. In 2013, he established an annual college, based in Argentina, for defenders in Latin America and has been deeply involved in establishing a jury trial system in criminal cases in Argentina. ■

DAVID SAFAVIAN

David Safavian is the general counsel and senior vice president of the American Conservative Union and the American Conservative Union Foundation. In this role, he leads a team of researcher, writers, and advocates who engage in criminal justice work at the federal and state levels.

Prior to joining ACU, Safavian was the chief of staff of a Member of Congress on the House Judiciary Committee. He was also the chief of staff and chief operating officer of a large Executive Branch agency and was subsequently appointed by George W. Bush to a Senate confirmed position in the Office of Management and Budget. David has taught ethics at Georgetown University and is a regular lecturer on criminal justice and ethics in a number of major university graduate business schools. He sits on the board of directors of the Clean Slate Initiative and the Veterans Advocacy Alliance.

David Safavian has a BA from Saint Louis University, a JD (magna cum laude) from Michigan State University, an LLM from the Georgetown University Law Center and an MBA from Loyola University Maryland. He and his wife live in Alexandria, Virginia with their two daughters. ■

REBECCA SHAEFFER

As Interim Global Legal Director at Fair Trials, Rebecca synthesizes and translates learning from European and global justice movements to support reform efforts in the USA and Latin America, and leads advocacy in the USA. She is the lead author of recent reports on comparative practice in pre-trial detention decision making, global plea bargaining, and access to a lawyer in police custody. She sits on the Steering Committee for an International Protocol on Non-Coercive Investigative Interviewing, led by former UN Special Rapporteur Juan Mendez,

and on the American Bar Association Criminal Justice Section's Plea Bargain Task Force. ■

THE HONORABLE JUDGE KEVIN H. SHARP (RET.)

Kevin Sharp is Co-Vice Chairman of Sanford Heisler Sharp and Co-Chair of the firm's Public Interest Litigation Group. Prior to joining the firm, Judge Sharp was nominated to the federal bench by President Barack Obama, confirmed unanimously by the Senate, and received his commission as a federal district court judge on May 3, 2011. Judge Sharp served on the U.S. District Court for the Middle District of Tennessee from May 2011 to April 2017, including service from 2014 to 2017 as the court's Chief Judge. Since serving on the federal bench, Judge Sharp has been involved in several projects related to criminal justice reform. In 2021, he helped secure Executive Clemency for Chris Young, a young man who Judge Sharp was required to sentence to life in prison due to draconian mandatory minimum sentencing laws. Judge Sharp is currently representing Leonard Peltier and seeking Executive Clemency. Peltier is a 78-year-old Native American civil rights activist who was convicted of killing two FBI agents at Pine Ridge Reservation in 1975.

In 2019 and 2020, Kevin also represented Tennessee death row inmate Nick Sutton's request to the Governor to commute his death sentence to life in prison without parole. He is an Advisory Board member to the Tennessee Innocence Project and the Nashville, Tennessee Chapter of the American Constitution Society.

When Kevin is not lawyering, he enjoys spending time with his family, reading, and studying Native American history. ■

MICHAEL STEEL

Michael Steel serves as Senior Vice President for Communications at Business Roundtable. In this role, he provides strategic guidance and management of BRT's efforts to advocate for better public policy solutions. At the time of the Summit, he was a partner at Hamilton Place Strategies, a Washington-based public affairs consultancy, and appeared at the Summit in that capacity.

Prior to that, he worked on Capitol Hill for a dozen years, serving as spokesman to then-Speaker John Boehner, the House Ways and Means Committee and the House Republican Policy Committee.

He also has extensive political experience, serving as a senior advisor to former Florida Governor Jeb Bush's presidential effort in 2016, and as spokesman for then-Vice Presidential nominee Paul Ryan in 2012, in addition to roles on Senator Mitt Romney's 2008 presidential campaign, at the National Republican Congressional Committee and statewide races in Oklahoma and North Carolina.

He began his career as a reporter at National Journal, and graduated from the University of North Carolina and Columbia University's Graduate School of Journalism.

Steel serves on the board of the Elizabeth Dole Foundation, which supports wounded warriors' caregivers, the Board of Advisors at UNC's Hussman School of Journalism, and has been inducted into the North Carolina Journalism and Media Hall of Fame. ■

BRETT TOLMAN

Brett Tolman is a shareholder and Chair of the Tolman Group's White Collar, Corporate Compliance, and Government Investigations Section. Mr. Tolman is the former United States Attorney for the District of Utah, and his practice involves assisting large and small companies and individuals in complying with state and federal criminal and civil laws. These matters include investigations alleging simple and complex financial fraud, corporate immigration violations, and other administrative and regulatory compliance issues. Mr. Tolman also serves as outside general counsel to numerous clients by providing guidance on legal issues confronting businesses and non-profit organizations ranging from contracts and agreements to the structuring of corporate transactions and business formations.

Prior to serving as US Attorney, Mr. Tolman served as Legal Counsel to the United States Senate Judiciary Committee in Washington, DC. Mr. Tolman has extensive experience navigating complex issues from drafting to enactment into law through Congress. Mr. Tolman is uniquely qualified having worked at the highest levels in both the Executive and Legislative branches of government to assist clients with government relation and lobbying issues at both the state and federal level.

Mr. Tolman maintains an AV Preeminent (4.7) rating with Martindale-Hubbell, which is the highest rating awarded to attorneys for professional competence and ethics. He has also been included on the list of The Best Lawyers in America in Commercial Litigation. He has also been selected for inclusion in Mountain States Super Lawyers (2014-2016) in the category of Criminal Defense: White Collar and has been voted by his peers throughout the state as one of Utah's "Legal Elite," as published in Utah Business Magazine (2011, 2014-2017). ■

LARS TRAUTMAN

Lars Trautman is the National Director of Right on Crime where he works to shape and advance policies that improve the criminal justice system. Previously, Lars served as a resident senior fellow of criminal justice and civil liberties policy at the R Street Institute as well as counsel for the Homeland Security Committee in the U.S. House of Representatives. Lars began his legal career as an assistant district attorney in Essex County, Massachusetts. ■

SOMIL TRIVEDI

Somil Trivedi is the Chief Legal & Advocacy Director at Maryland Legal Aid and formerly, including at the time of the Summit, a Senior Staff Attorney at the National ACLU. At the ACLU, Somil focused on prosecutorial reform efforts, including filing the only federal court class action in the country challenging coercive plea bargaining practices. He is also a former federal prosecutor and current board member at the Innocence Project of Texas. ■

JENIA IONTCHEVA TURNER

Jenia Iontcheva Turner is the Amy Abboud Ware Centennial Professor in Criminal Law at SMU Dedman School of Law, where she teaches criminal procedure, comparative criminal procedure, international criminal law, and international law. Her scholarship interests include U.S., comparative, and international criminal law and procedure, and she has written numerous articles and book chapters on these topics. In 2009, she wrote Plea Bargaining Across Borders, exploring plea bargaining in several national and international jurisdictions. She is also the co-editor of The Oxford Handbook of Criminal Process (with Darryl K. Brown and Bettina Weisser, 2019) and Criminal Procedures: Cases, Statutes, and Executive Materials (with Marc L. Miller, Ronald F. Wright, and Kay L. Levine, 7th ed. 2023). She is an Associate Member of the International Academy of Comparative Law, an Editorial Board Member of the Criminal Law Forum, and a member of the North Texas Federal Criminal Law Inn of Court. ■

SUSAN WALSH

Susan J. Walsh is a partner at Vladeck Raskin & Clark, PC in New York City. She has decades of trial and appellate experience in her criminal practice defending clients ensnared in the criminal justice system in matters that range from complex white collar business crimes, including fraud and embezzlement, to murder and narcotics conspiracies. Susan was the Chair of the New York State Criminal Defense Lawyers (NYSACDL) Task Force on the Trial Penalty which published the first state report on the penalty in 2021.

In addition to numerous day-to-day successes that have been unreported, Susan had the unprecedented success of securing commutations for seven of eight clemency petitions she filed under the Obama administration. The NYSACDL recognized her for this work in 2018. In 2020, Susan won a reversal of three eyewitness Hobbs Act robbery conviction by the Second Circuit Court of Appeals in the matter of the *United States v. Nolan*, — F3d . — , 2020 WL 1870140 (2d Cir. April 15, 2020) by convincing the Court that the trial lawyer was ineffective for, among other things, failing to employ the use of an expert on the issue of eyewitness testimony. Susan has been named a Super Lawyer many times and serves as the defense liaison to the ABA's Sentencing Standards Committee. Susan currently serves as the Second Circuit Representative to the Practitioners Advisory Group of the United States Sentencing Commission having been appointed in 2109. A Tufts University graduate with honors, Susan graduated from George Washington University Law School *cum laude* after working abroad in Vienna, Austria.

Since joining Vladeck Raskin & Clark, P.C. Susan has parlayed her courtroom advocacy as a criminal defense lawyer into representing employees; the victims of unfair employment practices and discrimination. Her civil practice in the employment arena includes age, gender and disability discrimination cases, among others, in state and federal arenas. Susan also is an advocate for resolution short of litigation on some matters and advises clients on separation, severance and non-competes. Susan is proud to teach all of these

advocacy skills to lawyers of the future as an Adjunct Professor at New York Law School since 2005. ■

BRITTANY WHITE

Brittany White is a voice for formerly incarcerated Black Women. As an organizer, strategist, and trainer, she centers her work on ensuring that women and their unique experiences in the American penal system are not erased from conversations or solutions related to gun violence and mass incarceration. Ms. White believes that cultivating a life of dignity for those most marginalized in our society is the key ingredient to developing justice-impacted leadership and is one of the highest callings of her life. This is accomplished by shifting people from shame to solution and is a process best led by those who have maneuvered through their own journeys with incarceration.

Brittany herself served five years within the Alabama Department of Corrections from 2009-2014. This eye-opening journey and loss of freedom gave her firsthand knowledge of the phenomenon of mass incarceration: an amassed system of people that society does not know how to help. During the course of her incarceration, she developed a strong desire to address the corruption and despair she witnessed on a day-to-day basis and, once released, and with the help of her church, found her purpose and a platform to articulate and act upon her experience. Subsequently, she went from being a volunteer faith leader, to a professional organizer, to the LIVE FREE Manager for Faith in Texas. As a part of this work, she raised funds and bailed out people of color from the local county jail to bring awareness to the harm of money bail policies, and worked to educate political leaders and candidates about ways to reduce incarceration. Ms. White serves as the decarceration director for Live Free and, as a visiting practitioner in residence, will spend the year developing a new project to strengthen opportunities and skills for formerly incarcerated communities.

Brittany has participated in panels, trainings, and conferences across the country and spoke with numerous presidential candidates during the 2020 campaign about their criminal justice platforms. Most recently she has engaged with the Biden administration on initiatives for formerly incarcerated persons. She has organized countless panels of formerly incarcerated persons and is currently spearheading an initiative to cultivate the leadership of "system survivors" across Faith in Action's national network. Her work and expertise has been featured in national and local media, including *The New York Times*, MSNBC, T*he Hill*, and NBC LX. ■

Members

Appendix: List of Members of the End the Trial Penalty Coalition

- ACLU
- The Bail Project
- Brennan Center for Justice
- Center for Justice Innovation
- Center on Wrongful Conviction
- Lucian Dervan, Professor of Law and Director of Criminal Justice Studies, Belmont University College of Law
- Drug Policy Alliance
- FAMM
- Fair Trials
- Fair and Just Prosecution
- Federal Public & Community Defenders
- Howard S. and Deborah Jonas Foundation
- Innocence Project
- International Legal Foundation
- Last Prisoner Project
- Marc Levin, Chief Policy Counsel, Council on Criminal Justice
- NAACP Legal Defense Fund
- National Association of Criminal Defense Lawyers (NACDL)
- Clark Neily, Senior Vice President for Legal Studies, Cato Institute
- Norman L. Reimer, Esq., former Executive Director, NACDL, former CEO, Fair Trials
- Right On Crime
- Robert Rose III
- The Sentencing Project
- Stand Together
- Somil Trivedi, Chief Legal & Advocacy Director, Maryland Legal Aid & Board Member, Innocence Project of Texas
- Tzedek Association

Endnotes

1 All accused face profound asymmetries of power in plea "negotiations," but people of color must also face the harsh realities of structural racism, conscious prejudice, and implicit bias.

2 NACDL, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018), https://nacdl.org/TrialPenaltyReport.

3 All professional affiliations listed herein are accurate as of the time of the Summit but may have changed since.

4 *Lafler v. Cooper*, 566 U.S. 156 (2012).

5 They were: Arkansas, Arizona, Colorado, Illinois, Indiana, Michigan, Minnesota, Nevada, Utah, and Washington.

6 Alfred Blumstein & Kiminori Nakamura, 'Redemption' in an Era of Widespread Criminal Background Checks, 263 NIJ Journal 10 (2009), available at https://www.ojp.gov/pdffiles1/nij/226872.pdf.

7 Marshall McLuhan, Understanding Media: The Extensions of Man 8 (1964) ("[T]he medium is the message.").

8 ABA Crim. Justice Section, Plea Bargain Task Force Report (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

9 Judge Sharp attended and spoke at the Summit on the Judicial Complicity panel.

10 *See United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982) (discussing Confrontation Clause and evidentiary rules issues when a witness is unable to testify at trial).

11 U.S. Sentencing Guidelines Manual §5K1.1 (Substantial Assistance to Authorities) (U.S. Sentencing Comm'n).

12 Desmond Ang, *The Effects of Police Violence on Inner-City Students*, 136.1 Quarterly Journal of Economics, 115-168 (Feb. 2021).

13 For more background on Young's story, see FAMM, Chris Young: "Barely on the Totem Pole" and Life in Prison, https://famm.org/stories/chris-young-barely-totem-pole-life-prison/.

14 *United States v. Calandra*, 414 U.S. 338 (1974).

15 *United States v. Williams*, 504 U.S. 36 (1992).

16 Judge Gleeson, who was appearing remotely, was having technical difficulties and could not participate in this part of the discussion.

17 *See* Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1979) (coining the phrase specifically with reference to misdemeanors).

18 NACDL & NYSACDL, The New York State Trial Penalty: The Constitutional Right to Trial Under Attack (2021), https://www.nacdl.org/NYSTrialPenaltyReport.

19 397 U.S. 742 (1970).

20 Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. Law & Criminology 1 (2013).

21 *See* Sarah D. Wire, *What is qualified immunity, the court creation that keeps cops from being sued over civil rights abuses?*, Los Angeles Times (May 25, 2021), https://www.latimes.com/politics/story/2021-05-25/what-is-qualified-immunity-how-is-george-floyd-connected.

22 C.J. Ciaramella, *This Florida Drug Smuggler Escaped 7 Life Sentences—Twice*, Reason (Apr. 2021),

23 Matthew Desmond & Greisa Martinez Rosas, The Square One Project, *Beyond the Easiest Cases: Creating New Narratives for Criminal Justice and Immigration Reform* (Dec. 2021), **https://squareonejustice.org/paper/beyondtheeasiestcases/**.

24 *See* Ala. Code § 15-18-8 (describing the "split" sentencing regime in Alabama law, which is essentially a partially suspended sentence).

25 **https://famm.org/vanishingtrial**/

26 434 U.S. 357 (1978) (holding that a prosecutor's threat to re-indict the defendant on more serious charges if he did not plead guilty did not violate the Due Process Clause of the Fourteenth Amendment).

27 Michelle Alexander, Go to Trial: Crash the Justice System, N.Y. Times, Mar. 10, 2012, **https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html**.

28 *Missouri v. Frye*, 566 U.S. 134 (2012) (ineffective assistance of counsel case holding that defense counsel has a duty to communicate plea offers to the defendant); *Lafler v. Cooper*, 566 U.S. 156 (2012) (holding that ineffective assistance of counsel during plea negotiations may constitute grounds for relief if there is a fair probability that counsel's ineffective assistance resulted in conviction or in a worse sentence).

29 Fair Trials International, *The Disappearing Trial – Towards a rights-based approach to trial waiver systems* (Apr. 2017), **https://www.fairtrials.org/articles/publications/the-disappearing-trial/**.

30 Of course, this also happens in the U.S. system. See, e.g., NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 18 (2018), **https://nacdl.org/trialpenaltyreport** [hereinafter "NACDL Trial Penalty Report"].

31 *See* NACDL Trial Penalty Report, at 14 (97% of convictions in federal criminal cases are the result of guilty pleas); NACDL & N.Y. State Ass'n of Criminal Defense Lawyers, The New York State Trial Penalty: The Constitutional Right to Trial Under Attack, at 15 (2021) (finding that 96% of felony convictions and 99% of misdemeanor convictions in New York State cases are guilty pleas); U.S. Sentencing Comm'n, 2021 Annual Report and Sourcebook of Federal Sentencing Statistics, at 56 table 11 (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

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