The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End

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Every day, in virtually every criminal court throughout the nation, people plead guilty solely as a consequence of a prosecutor's threat that they will receive an exponentially greater post-trial sentence compared to the pre-trial offer. The process is simple and the logic inexorable: the prosecutor conveys a settlement offer to the defense attorney–very often at the outset of the case before the defense has investigated or received discovery–threatening a post-trial sentence much greater than the pre-trial offer. The defense attorney–often before having had an opportunity to establish a relationship with the client–conveys that offer to her client who must choose between the opportunity and right to defend and the risk of adding years to the sentence if not decades after trial. That differential is known as the trial penalty, and this scene unfolds routinely in courtrooms across the country as if the Framers had intended this legalized coercion to be the fulcrum of the criminal justice system.

The Framers did *not* so intend. The Framers, surprisingly for a modern reader, considered jury trials to be every bit as important as the right to cast votes for our representatives. In fact, John Adams declared that "[r]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."[1] President Adams' colorful language reflects the strength of his view—a view shared by his contemporaries and the Framers—that the right to trial by jury protects the liberties of all individuals, not just the accused. The Framers imagined a process in which the accused, assisted by counsel, evaluated the charges, received the evidence, and elected to exercise or not exercise the right to compel the government to prove guilt beyond a reasonable doubt.

Nevertheless—the Constitution be damned—judges, defenders, and prosecutors today fulfill their functions acquiescent to the cynical logic of the trial penalty. Judges still decide questions of evidence and constitutional norms, and nominally possess the authority to decide criminal justice sentences. In reality, however, the trial penalty has effectively transferred the historic and constitutional sentencing authority of judges to prosecutors who—owing to mandatory minimum sentencing—essentially decide the order of magnitude of criminal justice sentences by deciding which statute or enhancement to charge, while a judge's role is at the margins of these sentences. This conversion of judicial authority to prosecutorial power has, in fact, fundamentally altered the inherent nature of the adversarial system. Prosecutors—playing out their role in this brave new world—harness this overwhelming power at every stage of a criminal prosecution to incentivize the accused to capitulate and forego fundamental rights. Society pays a price when, inevitably, guilty pleas operate to foreclose litigation that would have exposed unlawful government actions or practices and police misconduct.

The trial penalty affects all accused persons, rich or poor and of all backgrounds. The trial penalty, however, falls most harshly upon the most vulnerable, especially racial and ethnic minorities and the poor, thanks to the effects of systemic racism (including implicit biases) and other bargaining inequalities. This differential impact results from the operation of implicit bias as well as well-known disparate policing practices and the woeful underfunding of the public defense function. Whereas those with substantial economic resources have the means to avoid some of the most abusive aspects of the

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trial penalty, such as the use of bail as ransom, minorities and the poor are easy pickings for an assembly-line system of justice that has seen the criminal courts of this nation turned into guilty-plea conveyor belts. In many places, where lawyers are scarce and defenders shoulder crushing caseloads, accused persons can languish for weeks or months without access to counsel. But that does not stop the system from extracting guilty pleas from unrepresented accused persons, notwithstanding the enormous and life-altering collateral consequences of a criminal adjudication.

The trial penalty is not limited by case type. It could be a street crime, where the sole question is identification—whether the client is the perpetrator or not. It could be an alleged business crime, where the only issue is knowledge of a reportable condition. Or it could be an alleged economic crime, where the sole question is whether the client acted with a criminal intent. In each case the accused has an absolute constitutional right to trial before one's peers—a fundamental right to require that the prosecuting authority prove guilt beyond a reasonable doubt. But to assert that right, and all the ancillary rights that precede the trial itself—such as the right to discovery and inspection of the evidence, the right to procure witnesses, or the right to challenge unlawfully-seized evidence—the accused must be willing to pay a price that is often measured in years of imprisonment.

Further, despite all those rights, when a plea offer is made, the defense lawyer has an absolute obligation not only to convey the offer, but also to accurately and analytically advise as to the potential penalty if the offer is declined and the client is ultimately convicted. In fact, professional ethics require the lawyer to counsel the client as to the advisability of accepting the offer. From the standpoint of the defense lawyer, the prospect of seeing an innocent client convicted is the most dreaded aspect of criminal defense practice. But the duty to advise even an innocent client that it is in their best interests to give up solely because the price of asserting fundamental rights may be the destruction of their livelihood and their family is the most agonizing aspect of practice.

There is something fundamentally abhorrent about being a cog in a system that has seen the virtual elimination of trials. Yet with data showing less than three percent of criminal prosecutions resolved by a trial, and no stakeholder willing to break the tyrannical cycle of institutional coercion that is the hallmark of the trial penalty, the nation's criminal defense bar decided that silence is no longer an option.

In an effort to expose and confront the tyranny of the trial penalty, the National Association of Criminal Defense Lawyers (NACDL) published a major report to document the pervasive nature of the trial penalty in the federal system. *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* provides empirical support for the pervasive presence of the trial penalty, offers a litany of case studies to show its perverse impact on justice, and proposes various reforms to revitalize fundamental structural safeguards to provide a check on governmental power. The report includes ten fundamental principles designed to propel reform and which are universally applicable to all criminal justice systems, whether state or federal. Separately, the report includes ten recommendations that are specifically designed to curtail the most abusive aspects of the trial penalty on the federal level.

As a national criminal bar association in a country in which most criminal prosecutions are brought in the states, NACDL always intended that its efforts to expose and limit the trial penalty would focus on the states. Thus, when the report was published, NACDL hoped to shine a light on the problem by scheduling a launch event that might attract interest from outside the federal criminal defense community. It became apparent at that point that the frustration, sometimes bordering on outright disgust, at how the trial penalty has eroded fundamental rights is a broadly-held view embraced by the full spectrum of ideological orientation. As planning for the event took shape, it was soon obvious that the challenge was not going to be attracting sufficient interest, but rather determining whether participation had to be limited due to constraints of time and space.

On July 10, 2018, at a luncheon at the National Press Club, NACDL formally released the report.[2] The following major organizations participated in person or through endorsing statements: American Civil Liberties Union (ACLU); Cato Institute; Families Against Mandatory Minimums (FAMM); Fair Trials; Human Rights Watch; Charles Koch Institute; Innocence Project; Texas Public Policy Foundation and Right on Crime. Additionally, several prominent practitioners, and former United States District Judge John Gleeson, who authored the foreword to the NACDL report, also participated in the event. Their participation and their comments make it clear that the trial penalty is not some trivial matter of marginal concern; rather it is a central defect in the nation's criminal justice system, one which has triggered a broad-based outpouring of condemnation.

Jeffery Robinson, Deputy Legal Director and Director of the Trone Center for Justice and Equality at the ACLU, observed, "The NACDL report tells a not-so-hidden secret about the criminal legal system. Specifically, that innocent people plead guilty because they are faced with a 'trial penalty'. . . ." Jordan Richardson, Senior Policy Analyst at the Charles Koch Institute, asked, "What brings the right and the

left together? It's not much. But in criminal justice reform, this is one of the issues we've discovered we all actually agree that something needs to happen, something needs to change . . . The diminished power of the jury and the rise of plea bargaining is a danger to liberty." Kevin Ring, President of FAMM, noted, "The slow disappearance of our constitutional right to trial gets far too little attention. This report should serve as a wake-up call for lawmakers and lay people alike." Marc Levin, Vice President of Criminal Justice Policy at the Texas Public Policy Foundation and Right on Crime, asserted, "From a conservative perspective, for those of us who believe in limited government and individual liberty this is a really important issue. The trial process and juries represent a crucial check on the otherwise unlimited power of government . . . The trial penalty also violates the principles of proportionality and consistency in sentences. . . . "

These and other voices confirmed NACDL's belief that as onerous and distasteful as the trial penalty is for defense lawyers, who are the systemic participants who most closely and regularly see the devastating impact of the trial penalty, its corrosive impact on the public and society at large is appreciated by virtually all thoughtful observers of the modern criminal justice system. This support has reaffirmed NACDL's intention to engage its members, affiliates, and other interested groups in a national effort to expose the full extent of the trial penalty on the state level and promote reform. Thus, as those efforts began, it was indeed a welcome development when we were invited to consider the possibility of serving as guest editors for a special edition of the *Federal Sentencing Reporter* dedicated to an exploration of the trial penalty. This was an invitation we simply had to accept, as the prospect of bringing increased attention to this issue is a true gift.

To our great pleasure, but not unexpectedly, given the breadth of support when the NACDL report was published, we found tremendous interest in the subject—so much interest that we are extremely pleased that the project evolved into a double issue focused on the trial penalty. The authors of these articles bring a wide perspective to the subject. They explore the causation, impact, and potential cures of the problem. They demonstrate how the injustice of the trial penalty disproportionately crushes minorities and the poor. They provide historical perspective, which underscores the importance of the rights that have eroded under the corrosive impact of the trial penalty. Finally, one article provides an international perspective and catalogues myriad safeguards that show how other countries that have plea bargaining or trial waivers avoid the trial penalty phenomenon.

A Preview of the Articles

The right to a jury trial united vastly divergent perspectives when the founders crafted the Constitution and the Bill of Rights. In *Why the Founders Cherished the Jury*, Vikrant P. Reddy and Jordan Richardson of the Charles Koch Institute provide historical context for this cherished right. From this perspective, they present a compelling argument that the demise of the trial as a result coercive plea tactics, and the concomitant rise of what they describe as "an assembly line of guilty pleas," poses an overarching threat to liberty. Mr. Reddy and Mr. Richardson identify two core problems in a system dominated by coercive plea practices. First, effectively empowering those who bring the charges to also determine punishment undermines trust and objectivity. Second, the virtual elimination of jury trials ousts the citizenry from its ordained role as part of the structural system of checks and balances designed to prevent government oppression. They conclude with a cautionary note that a system that punishes the exercise of fundamental rights undermines the integrity of the criminal justice process.

Perhaps the single most powerful driving force behind the trial penalty is the mandatory minimum sentence. The availability of a mandatory minimum sentence, combined with the unfettered discretion of prosecutors to control the charging process, creates an insuperable weapon that so burdens the exercise of the rights afforded to an accused person as to render them a nullity. In *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, FAMM's General Counsel Mary Price describes the trial penalty as "one of the most lethal tools in the prosecutor's kit." The article dissects precisely how federal mandatory minimum sentences are manipulated by prosecutors to coerce guilty pleas. Through the prism of the case of Mr. Evans Ray, Ms. Price shows how federal prosecutors use their charging power to deploy mandatory minimums without regard for their own internal standards and for the sole purpose of punishing those who insist upon a trial. Mr. Ray's life sentence, which fortunately was eventually commuted by President Barack Obama, stands as a classic example of a punishment that fits neither the crime nor the purposes of punishment. It is also Exhibit A in proving the tyranny of the trial penalty.

A second driving force behind the trial penalty, perhaps a close second to mandatory minimums, is the Sentencing Reform Act of 1984 (SRA) which established sentencing guidelines for federal criminal cases. In *1980s Sentencing Reform and Its Impact on Federal Plea Bargaining and the Trial Penalty*,

Marjorie Peerce and Brad Gershel focus on the "constitutionally worrisome" trial tax imposed by the SRA, which had ostensibly been intended to reduce sentencing disparities. The authors demonstrate that the SRA effectively mandates "labyrinthine, severe, and inconsistent Guidelines" that endow prosecutors with effectively unfettered charging discretion and novel forms of sentencing power, which are chiefly to blame for the extraordinary price defendants pay to test the government's case at trial. Ms. Peerce and Mr. Gershel argue that the fact-driven guideline system *ipso facto* bestows prosecutors with tremendous power to determine sentencing outcomes inasmuch as they are "masters of the facts" that trigger application of Guideline rules. They suggest that trial rates are at historic lows because the administration of justice is designed to make the decision to put the government to its proof far too costly for the vast majority of accused. In their view, as long as prosecutors have the dominant and, indeed, overwhelming voice in the federal sentencing system, trials will become more and more rare and punishments emerging from trials will rarely comport with fundamental principles of fair and just sentencing.

To fully grasp the coercive impact of the trial penalty, and how it can be used by the state to extract a guilty plea from the innocent, it is useful to see how it is deployed when the prosecution brings charges under a flawed criminal statute. In *Not for Human Consumption: Vague Laws, Uninformed Plea Bargains, and the Trial Penalty*, Assistant Federal Public Defender Branden A. Bell provides a case study of how prosecutors can use charge bargaining and asymmetrical access to information to extract a guilty plea from an arguably innocent accused person. The Federal Analogue Act (21 U.S.C. Sec. 802 (A) (C)) treats substances that are "substantially similar" to schedule I or II controlled substances as if they are controlled substances. To be considered an analogue, the substance must be "substantially similar in chemical structure" to a schedule I or II controlled substance, and it must have, or be represented or intended to have, an effect on the central nervous system that is substantially similar to that of a schedule I or II controlled substance. But, as Mr. Bell describes, the question of substantial similarity is a question of fact for the jury that is not determined by the weight of opinion in the scientific community and thus may vary from jury to jury. One might assume that when dealing with this patent ambiguity, a person accused of a violation of the Analogue Act would almost certainly assert the right to a trial. Surely that would be the case in a properly functioning justice system. Why would anyone whose guilt can *only* be determined by a jury, plead guilty? The answer: the trial penalty. Mr. Bell describes a case in which two accused persons took the risk and prevailed. But 11 of the 13 charged defendants pleaded guilty to a charge that a jury determined was not a crime.

Indeed, the "innocence problem" is perhaps the most tragic and compelling reason why the trial penalty must be purged from the U.S. justice system. DNA and other exonerations provide irrefutable proof that actually innocent people are coerced into pleading guilty. Two of the articles address this problem from two very different vantage points. *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases* presents a deep analysis of what lies behind guilty pleas by innocent accused persons, written by three members of the Innocence Project staff, Director of Science and Research Glinda S. Cooper, Research Analyst Vanessa Meterko, and Research Associate Prahelika Gadtaula. Of the 360 people exonerated by DNA evidence (as of the date the article was drafted), 11 percent—40 of them—pleaded guilty. The authors analyzed demographic factors, crime details, type of evidence, and sentencing variables, and then compared those variables with those who had pleaded not guilty. Among the important findings were the role of false confessions and the coercive impact of the threat of the death penalty or a life sentence.

Data is important. It can show patterns and it can drive reform. But nothing is more persuasive than a first-hand account. *How the Threat of the Trial Penalty Coerces the Innocent to Plead Guilty: A First-Hand Account of an Exoneree* is Chris Ochoa's personal, heart-wrenching story of how and why he pleaded guilty to a rape and murder he not commit and spent 12 long years in prison before he was exonerated by DNA. His story shows how the trial penalty exerts its influence on everyone connected to a criminal prosecution, including an accused person's own lawyer and family. Mr. Ochoa, who subsequently graduated from the law school that helped secure his exoneration, provides an eyewitness account to the trial penalty in operation, vividly illustrating how this legally-sanctioned coercion is a one-way ticket to fundamental injustice.

Professor Lucian E. Dervan comes at the innocence problem from an entirely different perspective. *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty* traces the rise of plea bargaining and the jurisprudence that sustains it. In the final analysis, the case law that has enabled plea bargaining to become the rule rather than the exception rests on the assumption that irrespective of any inducements with promises of leniency, innocent people will not falsely condemn themselves. But that premise has now been discredited. Professor Dervan discusses the psychology of plea bargaining and

describes numerous studies that provide overwhelming proof that sufficient inducements will routinely compel defendants to plead guilty for reasons other than guilt. He then suggests that, armed with the new data gleaned from the studies he describes and confirmed exoneration of actually innocent individuals who pleaded guilty, it may be time for a fresh look at the jurisprudence that blithely blessed unbridled plea bargaining.

And that raises the question of whether there are concerns beyond the innocence problem. What about the effect of the trial penalty on participants other than the accused? Is there cause for concern if most cases are resolved without a trial? Frederick P. Hafetz answers these questions from the perspective of a long-time defense attorney and former prosecutor. In so doing, he addresses not only the problem of the actual innocent, but also of the arguably innocent. What are the consequences if courts never hear the evidence in support of a prosecutor's theory? In *The "Virtual Extinction" of Criminal Trials: A Lawyer's View from the Well of the Court*, Mr. Hafetz argues that effective transference of the sentencing power from the judge to the prosecutor, and the concomitant decline in trials, has resulted in fundamental degradation of the defense and prosecution functions. The sheer lack of trials itself is contributing to injustice. Prosecutors who are seldom required to try their cases pursue increasingly weak and questionable cases, secure in the knowledge that they most likely will never see their witnesses exposed to the rigors of cross-examination. Similarly, defense lawyers who rarely try cases will lack the skill set to accurately assess the strength of the case against their clients.

Worse, because the trial penalty operates to coerce the arguably innocent to capitulate, judges are ousted from their vital role in preventing government abuse. If cases are not tried, the court has no ability to assess the bona fides of the prosecution's theory. Mr. Hafetz provides a compelling example when he discusses a case in which the right to a trial was asserted notwithstanding the prospect of a significant trial penalty. There was a guilty verdict, but the court found that there had been no criminal wrongdoing and entered a judgment of acquittal, which was later upheld by the appellate court. It seems like the system was working as it should—except that similarly situated co-defendants had already entered guilty pleas. Fortunately, the government agreed to vacate the convictions against those defendants who had pleaded guilty. But if none of the accused defendants had the fortitude to face the risk of a significantly enhanced penalty, the government would have successfully prevailed in securing multiple unjust convictions. This is the trial penalty at work from the perspective of a practitioner.

Of equal, if not even more pervasive, concern is the degree to which the trial penalty perpetuates racial disparity in the criminal justice system. Rick Jones and Cornelius Cornelssen take this issue head on in *Coerced Consent: Plea Bargaining, the Trial Penalty, and American Racism*. They map the intersection of profound systemic biases in the criminal justice system and plea bargaining in order to question the notion of "bargaining" in a context of profound asymmetries of information and power. They conclude that for the accused, and especially for people of color, the term "ultimatum" better describes the reality of criminal justice in modern America than does the notion of "bargaining," which implies choice. Based on ample research, Mr. Jones and Mr. Cornelssen argue that systemic racism subjects people of color to disproportionate and unjustifiable penalties. They analyze specific aspects of the criminal justice system—prosecutorial discretion, conspiracy laws, fact and charge bargaining, and others—which, infected by systemic racism, generate and conceal this disparate impact. They conclude that reform requires sensitivity to societal issues related to criminal justice—including poverty, mental health, addiction, and racism—and that, instead of devoting more resources to an overworked legal apparatus, policymakers should focus on the factors driving so many people into contact with the law in order to redirect some of these contacts away from the criminal justice system. Finally, and specifically with respect to plea bargaining, they suggest that mandatory minimums be reconsidered and that a balance be imposed on the plea process and the legal system itself.

Disparate impact upon people of color and the poor is also the central theme of the submission by Emma Andersson and Jeffery Robinson of the ACLU. *The Insidious Injustice of the Trial Penalty: "It is not the injustice by the duration of pain that breaks the will to resist"* demonstrates how much more abusive the trial penalty is for accused who lack financial resources. It is in this article that we see the most vivid picture of how fundamental rights are held hostage by an institutional assembly-line approach that exalts case disposition over justice. Ms. Andersson and Mr. Robinson reference court observations in a study conducted by the ACLU and NACDL that demonstrate that it is not only the Sixth Amendment right to a trial that is eviscerated by the trial penalty, but also the right to counsel itself. They paint a vivid picture of the cruel scenario in which the accused must choose between fundamental rights and freedom, often without the guiding hand of counsel. Ms. Andersson and Mr. Robinson offer a multifaceted solution, focusing keenly upon all the key players in the system: the defense, the prosecution, the courts, and the political branches. The defense function needs more resources; the prosecution must exercise self-

imposed restraint; the political branches must limit the tyranny of mandatory minimums; and the courts must stop their complicity in the universal degradation of Sixth Amendment rights.

Brian Johnson identifies several concerns with plea-trial differences in federal sentencing. *Plea-Trial Differences in Federal Punishment: Research and Policy Implications* reviews relevant empirical research that confirms the large trial penalty in federal court: defendants convicted at trial are roughly twice as likely to go to prison and receive average sentences that are about 50 percent longer. Although estimates of the federal trial tax vary across years and across studies, evidence remains remarkably consistent. Moreover, common analytical research challenges likely contribute to systematic underestimates of plea-trial sentence differentials.

According to Professor Johnson, federal trial penalties also raise significant collateral concerns including the potential for overcharging, false guilty pleas, and racial disparities in punishment. This raises important questions about the voluntariness of guilty pleas and the fairness and proportionality in federal sentencing. Indeed, Professor Johnson cites several studies that support the conclusion that "the federal trial tax has grown so enormous that it leads to systematic coercion in guilty pleas and blurs the line between the guilty and the innocent." The article proposes several bold reforms designed to improve the balance of power in plea negotiations, increase transparency and accountability in prosecution, and limit the coercive pressure of trial penalties in the federal punishment process. Professor Johnson suggests restricting mandatory minimums laws, requiring public disclosure and procedural review of plea agreements, and codifying prosecution charging guidelines.

While Professor Johnson focuses on the trial penalty in federal cases, Marc A. Levin looks more expansively at the trial penalty in the states. *A Plea for Reviving the Right to a Jury Trial and a Remedy for Assembly-Line Justice* looks at all the systemic contributors to the trial penalty and presents a litany of potential reforms. In addition to the well-documented role of unbridled prosecutorial charging discretion, amped up by mandatory minimums and duplicative sentencing laws, Mr. Levin also looks at the role of an under-resourced defense function, the failure to provide prompt access to counsel, and the role of pretrial detention, often tied to lack of financial resources, as major contributors the problems. Accordingly, the panoply of solutions he proposes embraces nothing short of total systemic overhaul of the criminal justice system. Mr. Levin compellingly makes the case that while restrictions on mandatory minimums and various prosecutorial practices must be addressed, true reform will require a strengthening of the defense function, overhaul of the nation's approach to pretrial justice, vastly increased data collection, limitations on waivers, and reform of discovery practices.

Jury Empowerment as an Antidote to Coercive Plea Bargaining suggests a kind of self-help approach to the trial penalty. Clark Neily of the Cato Institute provides an overview of the rise of plea bargaining and catalogues the array of coercive tools in the prosecutor's tool kit: the use of pretrial release conditions to extract trial waivers; pre-adjudication seizure of assets; the inadequately resourced defense function; prosecutorial abuse of the charging function; mandatory minimums; and prosecutorial threats to those near and dear to an accused person. Then, after looking at the litany of harmful effects inflicted not only on the accused but on society itself, Mr. Neily summarizes various reform proposals and then adds one that is sure to provoke controversy. He proposes a First Amendment solution to the attack on the Sixth Amendment: let the jury reassert its history injustice-preventing role by giving them all the information concerning punishment and prosecutorial tactics, including coercive efforts to extract a guilty plea. Whether or not a resort to so-called jury nullification is a reliable solution to the trial penalty is debatable, but Mr. Neily provocatively challenges the advisability of present practice, which in most jurisdictions precludes jurors from knowing the length of a prison sentence that will result from their verdict. Most certainly, the road to reform of the trial penalty will require society to revisit the wisdom of both mandatory minimums and overall prescribed length of prison sentences. But everyone conversant with the interplay between criminal justice and the political process understands that this will be a long and winding road, strewn with extremely challenging obstacles.

JaneAnne Murray proposes an alternative route to reform. *Ameliorating the Federal Trial Penalty through a Systematic Judicial "Second Look" Procedure* makes the case for statutory authority to afford an opportunity for re-sentencing after the passage of a minimum number of years of imprisonment. Such a process would afford a court an opportunity to adjust for sentencing disparity, and it would apply emerging science related to brain development and risk assessment. Anticipating the usual complaints about a drain on resources, the same refrain that has been used to justify coercive plea bargaining, Professor Murray provides a cogent analysis that suggests that such a "second look" program could be cost-effective as well as consistent with fundamental notions of justice.

Finally, how does plea bargaining and the rise of the trial penalty in the United States compare to criminal justice processes in other democracies? The trial penalty has its roots in the ascendancy of plea

bargaining. Sadly, the U.S. embrace of plea bargaining is no longer a uniquely American phenomenon. In *The Trial Penalty: An International Perspective*, Rebecca Shaeffer, Senior Lawyer at Fair Trials (Americas), notes that the use of guilty pleas, abbreviated proceedings, and other trial waivers have spread around the globe—often with technical support and direction from U.S. officials. The article describes the findings from a Fair Trials project to study international use of trial waiver systems. Although the global rise of trial waivers portends the same problematic challenges for the rule of law by exalting expeditious disposition over adherence to constitutional principle and transparent application of judicially-controlled open justice systems, there are positive and hopeful developments that may energize a trial penalty reform movement in the United States. Ms. Shaeffer notes that the Fair Trials research shows that the "the so-called trial penalty is one aspect of trial waiver systems that appears to be almost wholly unique to the United States." In nearly every other country that employs trial waivers, there are effective safeguards that prevent the abuses that are so prevalent in the U.S. system. Through the explication of these safeguards, Ms. Shaeffer identifies a panoply of potential reforms that can ameliorate the coercive impact of the trial penalty and arm reformers with meaningful options to minimize the use of waivers to unnecessarily penalize the exercise of fundamental rights.

Conclusion

The articles included in this special issue underscore one hopeful reality: the breadth of concern with the trial penalty's central role in perverting the U.S. system of justice reflects unprecedented consensus. Critics of the decline of the jury trial and the institutional coercion that is the trial penalty in action span the ideological perspective. This is not the system of justice that the architects of this democracy envisioned, nor is it the system that people deserve, especially as the nation has evolved. The country may still have a long way to go purge racism and all forms of irrational disparity from its criminal justice system. But it has come far enough that it is long past time to tolerate a system that extracts years of a person's freedom as the price to access fundamental rights.

NACDL is determined to promote study and seek reform on the federal level and throughout the various states to minimize the tyranny of the trial penalty. This edition of the *Federal Sentencing Reporter* is an important step in that process.

Notes

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1 The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000).

2 *See* Norman Reimer, *NACDL's Efforts to Expose and Limit the Trial Penalty Garners Broad Support with the Launch of a National Reform Effort*, The Champion (July 2018), *print and video available at* https://www.nacdl.org/Champion.aspx?id=53148&terms=july+2018 (including participants' observations [Robinson, Richardson, Ring, and Levin] quoted in the following paragraph).