End the Trial Penalty Coalition

Policy Overview

Members of End the Trial Penalty support the Coalition's mission to end coercive plea bargaining, but membership does not mean support or endorsement for any particular policy. Please check with members themselves regarding whether they support specific policies or proposals.

INTRODUCTION

The trial penalty – the substantial and coercive difference between the sentence contained in a pre-trial plea offer compared to a post-trial sentence – is one of the most significant and problematic characteristics of the modern American legal system. The trial penalty harms people and undermines our adversarial system by threatening severe punishment for exercising the Sixth Amendment right to trial. People accused of crimes are coerced to plead guilty in an effort to avoid the greater of two evils even where a legal or factual defense may exist and even in cases of innocence. To illustrate, coalition member Rodney Roberts, a wrongfully convicted man who himself took a plea deal to avoid a life sentence and was later exonerated through DNA evidence, explains the trial penalty both as "choosing between Satan and the devil" and "sabotaging and saving myself at the same time." Across the criminal legal system, the trial penalty harms individuals, families, and communities.

This legalized and routine coercion has, on a systemic level, resulted in the almost complete disappearance of trials from our legal landscape, thereby undermining the integrity of our adversarial system of justice, reinforcing racial and economic disparities, and driving routine waivers of every criminal legal right in the Bill of Rights. Unfortunately, this distortion has largely escaped scrutiny and is not widely known beyond the criminal legal community. To that end, it's imperative to educate the public, future generations, policymakers, and the legal profession more broadly about the myriad harms of the trial penalty and what solutions exist to eliminate or mitigate them.

To engage the broader public, it is crucial to highlight the fundamental unfairness of the egregious and coercive nature of many plea negotiations. Examples include prosecutors telling people accused of crimes they have less than 15 minutes to accept an offer that "explodes," demanding a decision before the defense has the opportunity to investigate key evidence, and requiring waivers of other rights in the Bill of Rights, including rights to discovery, investigation and appeal.

The End the Trial Penalty Coalition's Policy Committee, which consists of a broad array of national organizations and individuals dedicated to criminal legal reform, has identified a series of prescriptions to eliminate or reduce the force of the trial penalty, along with various mechanisms to implement them. We grouped these policy recommendations into three major areas: Addressing Coercive Plea Bargaining; Data Collection & Transparency; and Post-Conviction Accountability.

In each section of this document, the Committee provides policymakers with a set of possible mechanisms for reform, training or education that correlate with the policy recommendations, including:

+ Federal legislation;
+ State-based legislation, and where feasible, State constitutional amendments;
+ Model policies, which are policies that could be voluntarily adopted by a prosecutor's office at the county level;
+ Voluntary data collection vehicles for defender or prosecutors' offices;
+ Opportunities for the development of training modules for defender or prosecutors' offices;
+ Incentivizing reforms through federal to state/local funding opportunities;
+ Opportunities for strategic litigation;
+ Opportunities for court action, either through the development of court or ethical rules, e.g. Standing Brady Order; or through model court record-keeping;
+ Agency action, including action by federal or state sentencing commissions (e.g., recommendation prohibiting the use of acquitted conduct to enhance a sentence);
+ Executive action, through the issuance of executive orders, or through the creation of task forces/commissions; and
+ Public education and advocacy.

To the extent policymakers are interested in pursuing any of these avenues for reform, this document provides guidance with respect to the various aspects of reform that should be considered.

I. ELIMINATING OR REDUCING COERCIVE PLEA BARGAINING

Last year, 98.3% of all federal criminal convictions came from guilty pleas. In a system where the vast majority of people accused of crimes decide to forego their constitutional right to a trial and plead guilty instead, the question naturally arises whether those decisions are truly free and voluntary as required by the Constitution, law, and ethics. Unfortunately, given the number of false guilty pleas that have been conclusively established through DNA testing and other highly reliable means, we know that not all guilty pleas are truly voluntary and that at least some—and perhaps many—are the product of coercion that results from a profound and routine imbalance between prosecutors and people accused of crimes. This imbalance is rooted in law (e.g., mandatory minimum sentencing), discretionary policies (e.g., charge stacking, forcing people to choose between discovery and an offer, and waiver of rights required by plea agreements); practices (e.g., underfunding of public defense delivery systems); and culture (e.g., the assumption that a person accused of a crime is guilty, the expectation that cases will result in guilty pleas, and the tendency to measure the success of a prosecution by the length of the sentence imposed).

Coercive Practices in Plea Bargaining

Judges and prosecutors wield a number of tools that might coerce people to forego their constitutional right to a trial. A non-exhaustive list of some of the most common—and effective—methods for inducing guilty pleas include:

- Extreme sentences, including those triggered by mandatory minimums;
- The risk of, length of, and conditions of pretrial detention;
- "Overcharging," which includes charge-stacking, punitive enhancements, adding charges to superseding indictments, and various other techniques designed to increase the exposure of the accused to punishment beyond what a neutral observer would consider the most natural charge/punishment for the conduct at issue;
- Exploding plea offers designed to prevent the defense team from adequately conferring with their client about the alleged offense, or fully investigating and properly assessing the strength of the government's case;
- Judicial threats to impose a punitive sentence if the person accused of a crime refuses to plead guilty and is convicted at trial;
- Coercive discovery practices such as withholding discovery, or forcing defendants to choose between their right to discovery and their right to trial;
- The threat of federal prosecution for state offenses, which brings determinate sentences and higher penalties for certain state offenses (and over-federalization of criminal law more broadly, which exacerbates the coercive "background dynamics" listed below);
- Threatening to manipulate sentencing guidelines (and exploit their inherent subjectivity) against the accused;
- The ability to run sentences consecutively; and

- Threatening to seek a sentence based on uncharged or acquitted conduct.

Background Dynamics That Facilitate or Enhance Coercive Practices in Plea Bargaining

The government's ability to exert plea leverage is enhanced by a number of policies and practices that have become endemic in modern times. These include but are not limited to:

- Judges failing to ensure that guilty pleas are truly voluntary, including indifference to coercion in the plea process and excessive faith in police and prosecutors;
- Underfunded public defense delivery systems that create an atmosphere where defense counsel are often overburdened with too many cases on their docket at any given time;
- Practical and legal restrictions on defense counsel's ability to investigate cases;
- Policies and practices that exclude potential jurors on the basis of race and/or personal beliefs, including opposition to capital punishment, distrust of law enforcement, support for so-called jury nullification, and disagreement about the proposition that jurors have a duty to apply the law as it is explained to them by the trial judge;
- The effects of a persistently racially disparate system in discouraging people of color from exercising their trial rights, including due to skepticism about the fairness of white jurors (and the ability of prosecutors to manipulate jury composition through strategic venue/forum choices);
- The effects of the over-policing of Black communities and other communities of color resulting in higher rates of prior convictions that can be used to enhance future sentences;
- A system of laws and rules that facilitates and approves coercive plea bargaining practices; and
- Lack of public awareness around the criminal legal system and the stigmatization of people accused of crimes.

Consequences of Coercive Plea Bargaining

Unsurprisingly, the use of coercion to induce trial waivers and guilty pleas has a variety of adverse consequences, including:

- Wrongful convictions;
- Grossly elongated sentences, even for those who may be factually guilty;
    - Degradation of the Constitution and rule of law;
    - Racial and ethnic disparities – disproportionate impacts on Black people and other people of color;
- Economic disparities – Disproportionate impacts on the economically disadvantaged, including the inability to pay cash bail, thereby perpetuating economic inequalities;

- Because of the leverage exerted by the trial penalty, increased overcriminalization, including the application of criminal laws where there may not be sufficient evidence beyond a reasonable doubt as well as the use of the expansion of the scope of criminal law(s) beyond their original intent by lawmakers; and
- Lack of Transparency – Concealing from public view government errors, overreach, and misconduct

Proposed Reforms

Enable and empower individualized justice in sentencing by judges, including reforming mandatory minimum sentences.

Judges should have the power to look at the facts and circumstances in a particular case without always being obligated to impose lengthy prison terms required by mandatory minimum sentences. Prosecutors should establish office-wide policies addressing charging offenses that carry mandatory minimum sentences and indicate that it is improper to add charges that carry a mandatory minimum sentence in response to the rejection of a plea offer on a non-mandatory-minimum charge. Prosecutors should also be required to decide before offering a plea at the outset of a case whether to include charges that carry a mandatory minimum sentence and show good cause for including such charges. In order to add such charges later, prosecutors should require supervisory approval and be required to show good cause so as to discourage use of mandatory minimums as a punishment to exert plea leverage.

Mechanisms: Legislation; voluntary prosecutor model policies; training; court action (court or ethical rules); executive action; and public education.

Enable open-file discovery practices to ensure the accused can make an intelligent,voluntary and informed decision, consistent with the requirements of the Constitution. The accused should have access to evidence in the government's possession, including exculpatory evidence and other relevant information before being required to respond to plea offers and on a continuous basis thereafter for later-discovered evidence. No plea should be accepted without a certification from the prosecution that all relevant information has been produced.

Mechanisms: Legislation; prosecutor model policies; training; court action (court or ethical rules), including standing Brady orders; executive action; public education.

Ethical charging policies. Prosecutorial charging powers should be regulated and consistent across the office. Policies should describe how prosecutors should decide which charges to bring, when it is (and is not) appropriate to bring additional charges, and what sorts of charging practices are improper. Prosecutors should bring charges that are proportional to the gravity of the offense (and never to strengthen their position in plea negotiations), and they should only charge offenses they believe—*at the time the charge is brought*—they can actually prove at trial. Prosecutors

should not file the maximum possible charge as a matter of course and should adopt office-wide policies to make it clear that charges should reflect the facts and circumstances of each case and be designed to achieve a just result.

Mechanisms: Legislation; prosecutor model policies; training; court action (court or ethical rules); executive action; public education.

Protect settled rights established by the Bill of Rights by eliminating the use of certain waivers of both statutory rights and constitutional rights from plea agreements. The End the Trial Penalty Coalition recommends adhering to the recommendations put forward by the American Bar Association Criminal Justice Section's Plea Bargaining Task Force: "[The ABA] Task Force concludes that the following rights should never be waived as part of a guilty plea: ineffective assistance of counsel, *Brady* compliance, innocence claims, Freedom of Information Act (FOIA) claims, compassionate release, the right to challenge sentencing errors, challenges to the constitutionality of the statute of conviction, and the right to appeal or seek post-conviction review related to the above." As further recommended by the ABA Plea Bargaining Task Force Report, "defendants should not be required to waive the right to challenge government misconduct to receive the benefit of a plea." The End the Trial Penalty Coalition further recommends extending these prohibitions to any future statutory rights not yet created or recognized. Alternatively, if such prohibitions are not adopted, jurisdictions should ensure that waivers are minimized and closely related to a legitimate government interest, as required by the unconstitutional conditions doctrine[1].

Mechanisms: Legislation; prosecutor model policies; training; court action (court or ethical rules); executive action; public education.

Increase the transparency of the plea process. The plea process should be more transparent (e.g., written plea offers) and more thoroughly documented, and system actors should collect data on plea practices.

Mechanisms: Legislation; prosecutor model policies; training; strategic litigation; court action (court or ethical rules); executive action; public education.

Reform pre-trial detention practices. Release practices must ensure that pretrial detention is never leveraged to coerce a plea and used only in extraordinary circumstances. Further, this should be put into practice by ensuring that people have multiple opportunities throughout the life of a case to request that someone be released on their own recognizance, that bail be reduced, or that an alternative form of bail be set.

[1] The unconstitutional conditions doctrine relates to the Constitution's prohibition on penalizing an individual for exercising a Constitutional right and indicates that the government cannot condition a government benefit on a person's agreement to forego the exercise of a Constitutional right.

Mechanisms: Legislation; prosecutor model policies; training; strategic litigation; court action (court or ethical rules); executive action; public education.

II. DATA COLLECTION & TRANSPARENCY

Data collection and transparency are essential to eliminating the trial penalty, as one cannot adequately address what one cannot measure. Court systems, sentencing commissions and prosecutor offices should collect and share with the public complete data about the plea process and each plea, including the history of plea offers in each case. Data should be used to assess and monitor racial and other biases in the plea process. Using this data, researchers, practitioners, and elected officials can ask informed questions about practices that contribute to the trial penalty, hold legal system actors accountable for their behavior, and partner in developing best practices to eliminate the coercive nature of plea bargaining.

Data collection should include demographic data for each charged person, i.e., race, ethnicity, and gender identity. It should also include the timing of a plea offer, its parameters, if it is taken off the table (by who, when, and why), and the sentence rendered as a result of the plea offer, or the sentence rendered following a guilty verdict, if the case goes to trial.

Data collection and analysis are irregular and sporadic across the country. Much of the information on the plea process, for example, is only accessible through prosecutors and defense practitioners, whose data collection and publication practices may require significant development. Below is an ambitious and also non-exhaustive list of specific, objective data that ideally would be collected, organized by the different phases of a criminal case. Where temporal considerations are relevant to the individual data points, efforts should be made to include that information as well. Further, all data collected should be publicly available and aggregated across all the data points.

- **Demographics**
    - Race
    - Ethnicity
    - Gender
    - Zip code
    - Indigency status
    - Whether the case involved a single defendant or co-defendants (cases with co-defendants should be linked for aggregation of data)
- **Charging**
    - Initial charges

- Category of each charge (citation, misdemeanor, felony, etc.)
- Sentencing range associated with each charge
- Whether any charges carry mandatory minimum sentences
- Any recidivist or conduct-based sentencing enhancements sought
- Whether charged by police or prosecutors
- Decision to transfer a case from state to federal authorities
- Any additional post-indictment or information charges, or changes to charges initially filed, and the dates on which those new or altered charges were added
- Final charges at disposition

- **Counsel**

  - Whether legal representation was present at the initial appearance.
  - Whether legal representation was present when the plea was entered
  - Whether counsel was appointed or privately retained

- **Pretrial Detention**

  - Prosecutorial recommendations as to pretrial release and the court's decision on pretrial release, including the amount of bail set, the form of bail set, and whether bail was paid (pretrial release outcome)
  - Length of pretrial detention in each case
  - Whether a plea was entered during pretrial detention or after release from pretrial detention
  - Whether the individual was ever detained pre-trial, including pre-arraignment or initial detention hearing
  - Conditions of release, as used by local jurisdictions

- **Pretrial Practice**

  - Whether open file discovery was available
  - If open file discovery is not the policy or practice of a jurisdiction, did the defense get discovery prior to a plea decision
  - Whether the person accused of a crime was provided access to *Brady* material prior to a plea decision
  - Whether pretrial motions were filed (including general information regarding topic of such motions, e.g. suppression of evidence, police misconduct, prosecutorial misconduct)
  - Whether plea negotiations or plea offers were linked to the ability to file pretrial motions

- Whether plea negotiations or plea offers included a "wired plea," *i.e.*, an offer to one person linked to the acceptance or rejection of a plea offer by another person charged with an offense
- Whether offers changed after the ruling on a pretrial motion
- The total length of time for which the case was pending

- **Plea Offers and Processes**

  - Documentation of each formal and informal plea offer
    - Include documentation of the sentence or sentencing range offered, any offer(s) regarding sentencing recommendations, and the charge(s) offered.
  - Whether there was a request for waivers of rights in each plea offer, and, if so, what waivers were sought.
  - Whether a conditional plea was allowed
  - Waivers of rights included in any final plea (if accepted)

- **Sentencing Outcomes**

  - Conviction at trial versus conviction by plea
  - Sentence imposed for those who plead guilty versus those who are convicted at trial, disaggregated by offense charged
  - Type of plea – Alford, Binding, Non-Binding
  - Identification of pleas to "time served"

- **Post Conviction**

  - Percentage of cases appealed after plea and number of those resulting in reversal of conviction
  - Number of innocence claims asserted after trial versus after plea
  - Number of exonerations after trial versus after plea
  - Number of "second look" cases brought after trial, e.g., clemency, compassionate release, and other resentencing mechanisms

Mechanisms: Legislation; prosecutor model policies; voluntary collection by defender offices; training; funding; strategic litigation; court action (court or ethical rules; or through model court record-keeping); executive action; or via task forces.

III. POST-TRIAL REFORM & ACCOUNTABILITY

There are too few tools to help people serving excessively long prison sentences because they exercised their constitutional right to trial. And too often, there is no accountability for the systems

that drive unjust outcomes through coercive and abusive practices. To rectify these issues, here are some proposed mechanisms for reform for consideration:

Judicial "Second Looks": Judges, people convicted of crimes, and others must be equipped with legal mechanisms to review and reduce excessive sentences on the "back end." There must also be meaningful efforts to change the culture on the bench and other key stakeholders—like sentencing commissions—through education, diversification, including robust defender representation, and even changes to ethical and procedural rules governing plea bargains and sentencing.

Mechanisms: Legislation; court rules, training, judicial appointments

Prosecutor-initiated resentencing: Lawmakers should equip prosecutors with the tools to meaningfully review prior sentences and recommend reduced sentences. California and other states have led efforts to enable prosecutors to revisit past sentences and to permit the courts to re-sentence regardless of other existing statutes, such as mandatory minimums. These statutes should be considered in consultation with participatory defense practitioners, along with other stakeholders to ensure they do not undercut broader re-sentencing efforts underway.

***Mechanism*:** Legislation

Executive Clemency: The President of the United States and state governors should be encouraged to grant executive clemency to people serving excessive sentences.

Mechanism: Executive Action

Post-conviction Justice: People serving unjust sentences should be able to seek relief in the courts, whether they pleaded guilty or went to trial. Policy and lawmakers should protect judicial discretion to grant compassionate release in a broad range of circumstances. In addition, state laws that bar people who plead guilty from seeking post-conviction relief should be repealed. Finally, public defenders must be equipped with the resources to represent people seeking post-conviction relief.

Mechanisms: Legislation; training; funding

Conviction Integrity Units: Greater use should be made of specialized units in prosecutors' offices that revisit past convictions. They should adhere to best practices, including for joint reinvestigations, be independent from the office's other post-conviction departments and shielded from political influence, and led by a person with significant defense experience.

Mechanisms: Legislation; training; model policies

Legal Reforms that Address Accountability: Too often, system actors who act abusively elude oversight or accountability. This must change. One example of a step to help remediate this problem would be enactment of the bipartisan *Inspector General Access Act*. The Act would empower DOJ's Inspector General to investigate allegations of prosecutorial misconduct against DOJ lawyers. In addition, the development of independent commissions on prosecutor conduct would promote accountability and transparency.

***Mechanisms*:** Legislation; court rules; model policies

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

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

Tzedek Association