



LEGISLATOR'S GUIDE TO THE ISSUES 2021-2022

The Trial Penalty

The Issue

"I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." – Thomas Jefferson

Beyond its intended function as an instrument for truth seeking and achieving fairness, the jury trial is an important check that citizens exercise against the potential for government overreach in the criminal justice system. The right to jury trial is so important, in fact, that the Framers explicitly codified it into the Sixth Amendment.

In the fullness of time, however, the citizenry has almost entirely divested itself of its ability to carefully scrutinize government's power at trial. Between the vast proliferation of criminal laws over the last hundred years and the sheer volume of cases passing through our courts on an annual basis, fewer and fewer criminal defendants avail themselves of their right to insist that governments prove them guilty of a crime—beyond a reasonable doubt and before a jury of their peers. Instead, widespread plea bargaining has become *de rigueur*. For example, 97.2% of defendants in the federal system chose to plead guilty in 2017.

The jury trial has largely become an anachronism.

The reasons for this are not necessarily driven by actual guilt of the defendant, to which he or she is merely acceding, but judicial efficiency. It comes down to simple math: given the millions of criminal cases that are opened every year, subjecting each to full trial would require many multiples of the current number of defense attorneys—which, in felony cases, are a constitutionally protected right themselves—prosecutors, judges, and court facilities necessary to handle them. The courts would all but grind to a standstill. However, greasing the skids of efficiency in this way has required tradeoffs that go beyond receiving a jury trial. Pleading guilty forecloses the opportunity to discover exculpatory evidence, confront and cross-examine witnesses, and appeal a conviction.

Furthermore, evidence suggests that defendants commonly waive their right to jury trial to avoid receiving a harsher penalty after facing a jury than they would receive during plea negotiations.

Enter the so-called "trial penalty."

Prosecutors can have extraordinary influence over a defendant's ultimate punishment. They have almost unrestricted discretion over which charges to bring, and because many criminal statutes can apply to specific conduct, prosecutors have broad authority to add or drop charges to entice a guilty plea. At the federal level, proliferation of mandatory sentences has increased

their leverage while also limiting judicial discretion over the final sentence. But even with discretionary sentencing guidelines, judges are often reticent to depart from their recommendations, and any available departures are only possible when defendants enter a guilty plea.

The trial penalty problem dovetails with growing pretrial detention. Because many criminal defendants are unable to pay a bond and therefore face prolonged detention prior to trial, especially those bonds tied to rigid county schedules, some simply accept a guilty plea on lesser charges and are "sentenced" to time served. It is not uncommon for this to happen to those who are factually innocent of an alleged crime. In 2016, an audit of drug cases in Harris County found that at least 298 people had accepted felony and misdemeanor plea deals well before lab tests later found no controlled substances for which they were initially charged.

This signals that the trial penalty is not a single, free-floating deficiency but rather represents one link among an interconnected chain of deficiencies that play off of and feed into each other—all of which frustrate the equitable administration of justice.

The Facts

- A National Association of Criminal Defense Lawyers' study of federal Sentencing Commission data examined the putative discrepancy between post-trial sentences versus those imposed following a guilty plea. On average, post-trial sentences were over three times longer.
- The differences varied widely depending on the specific offense but were most notable in drug, arson, auto theft, and firearms offenses.

Recommendation

Ensure that punishment assessed following a trial is not based, in whole or in part, upon the accused asserting their Sixth Amendment right to a jury trial.

Resources

[*The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save it*](#), National Association for Criminal Defense Lawyers (2018).

[*"298 Wrongful Drug Convictions Identified in Ongoing Audit"*](#) by Lise Olsen and Anita Hassan, *Houston Chronicle* (July 16, 2016).