

The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It

NACDL

18th Annual State Criminal Justice Network Conference

Website: <http://www.nacdl.org/trialpenaltyreport>

Norman L. Reimer, NACDL Exec Dir

THE TRIAL PENALTY:

The Sixth Amendment Right to Trial
on the Verge of Extinction and
How to Save It



Who cares?

Report Release

NACDL releases the report with a launch event at the National Press Club on July 10, 2018



Cato Institute



Human Rights Watch



Right on Crime



Texas Public Policy Foundation



Families Against Mandatory Minimums



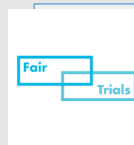
ACLU



Charles Koch Institute



Innocence Project



Fair Trials International

What is the Trial Penalty?



The Cost of Exercising a Fundamental Right to Have a Jury Decide Guilt or Innocence

**i.e. Requiring the state to do what the
constitution says it must: prove guilt to the
satisfaction of a jury.**

What are the REAL COSTS of the trial penalty?




- Vastly increased sentences
- Waiver of all manner of rights
 - Right to discovery
 - Ability to thoroughly investigate before entering guilty plea
 - Right to challenge unlawfully obtained evidence
 - Right to appeal
- Incentivizes government overreaching – Cases that could not convince a jury
- Evisceration of trial skills
- Curb judicial oversight and impairs supervisory role
- Enables assembly line justice and perpetuates mass incarceration
- Excludes citizenry from criminal justice process – Eliminates a core check on government excess
- Innocent plead guilty
- Incentivizes cooperation/risk of false cooperation

Is the Trial Penalty an Illusion?

Superseding Indictments



 U.S. Department of Justice
United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Place
New York, New York 10007

September 10, 2018

BY ECF & EMAIL

The Honorable Paul A. Engelmayer
United States District Judge
United States Courthouse
40 Foley Square
New York, NY 10007
engelmayer@nysd.uscourts.gov

Re: *United States v. [REDACTED]*, et al., 18 Cr. [REDACTED] (PAE)

Dear Judge Engelmayer:

The Government respectfully submits this letter to notify the Court and the defendants that the Government presently intends to seek a superseding indictment charging defendant [REDACTED] with firearms charges. The Government does not presently intend to bring additional charges in this case against any of the other charged defendants. The Government may, however, return to the grand jury to seek a superseding indictment refining the charges, including by adding substantive narcotics distribution charges, with respect to any defendant who proceeds to trial.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney

By: [REDACTED]
Assistant United States Attorneys
(212) 637-1066/2279/2616

cc: All Counsel of Record (by ECF & email)

Superseding Indictments



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97 percent

Some courts: 100 percent



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- Embezzlement: 4.7 – 0.6 years - *Eight times!*

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- Avg. differential in 2015: 10.8 – 3.3 years - *MORE THAN TRIPLE*
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- Food and drug offenses: 4.0 – 0.4 years - *TEN TIMES!!!!*
- Embezzlement: 4.7 – 0.6 years - *EIGHT TIMES!*
- Burglary/Breaking and Entering: 12.5 – 1.6 - *EIGHT TIMES!*

Substantial Assistance Departures

TOTAL

Overall Median percentage decrease:

50 percent

MANY KINDS OF CASES MUCH HIGHER

Case Kind	Percentage Departure
Embezzlement	67.5%
Fraud	73.5%
Bribery	83.1%
Civil Rights	86.5%
Food & Drug	100%
Environmental	100%
Admin of Justice	100%
Tax	100%

Ten Principles

Ten Principles



1. The trial penalty — the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial — **undermines the integrity of the criminal justice system.**
2. Trials protect the presumption of innocence and **encourage the government to charge cases based only on sufficient, legally-obtained evidence** to satisfy the reasonable doubt standard.
3. The decline in the frequency of **trials impacts the quality of prosecutorial decision-making, defense advocacy, and judicial supervision.**
4. The decline in the frequency of trials tends to encourage longer sentences thereby **contributing to mass incarceration**, including mass incarceration of people of color and the poor.
5. The decline in the frequency of trials **erodes the oversight function of the jury thereby** muting the voice of lay people in the criminal justice system and also **undercuts the role of appellate courts** in supervising the work of trial courts.
6. The trial penalty creates a **coercive effect** which profoundly undermines the integrity of the plea bargaining process.

Ten Principles

7. **A reduction for accepting responsibility** through a guilty plea is appropriate. The same or similar reduction **should be available after trial** if an individual convicted at trial sincerely accepts responsibility after trial regardless of whether the accused testified at trial or not.
8. **No one should be punished for exercising her or his rights**, including seeking pre-trial release and discovery, investigating a case, and filing and litigation of pre-trial statutory and constitutional motions.
9. **Mandatory minimum sentences undermine the integrity of plea bargaining** (by creating a coercive effect) **and the integrity of the sentencing process** (by imposing categorical minimums rather than case-by-case evaluation). At the very least, **safety valve provisions should be enacted** to permit a judge to sentence below mandatory minimum sentences if justice dictates.
10. If mandatory minimums are not abolished, the government should not be permitted to use mandatory minimum sentences to retaliate against an accused person's decision to exercise her or his constitutional or statutory rights. That is, **the state should not be allowed to file charges carrying mandatory minimum sentences in response to a defendant rejecting a plea offer or invoking her or his rights including the right to trial or to challenge unconstitutional government action.**

Ten Recommendations

Ten Recommendations to Curtail Federal Trial Penalty

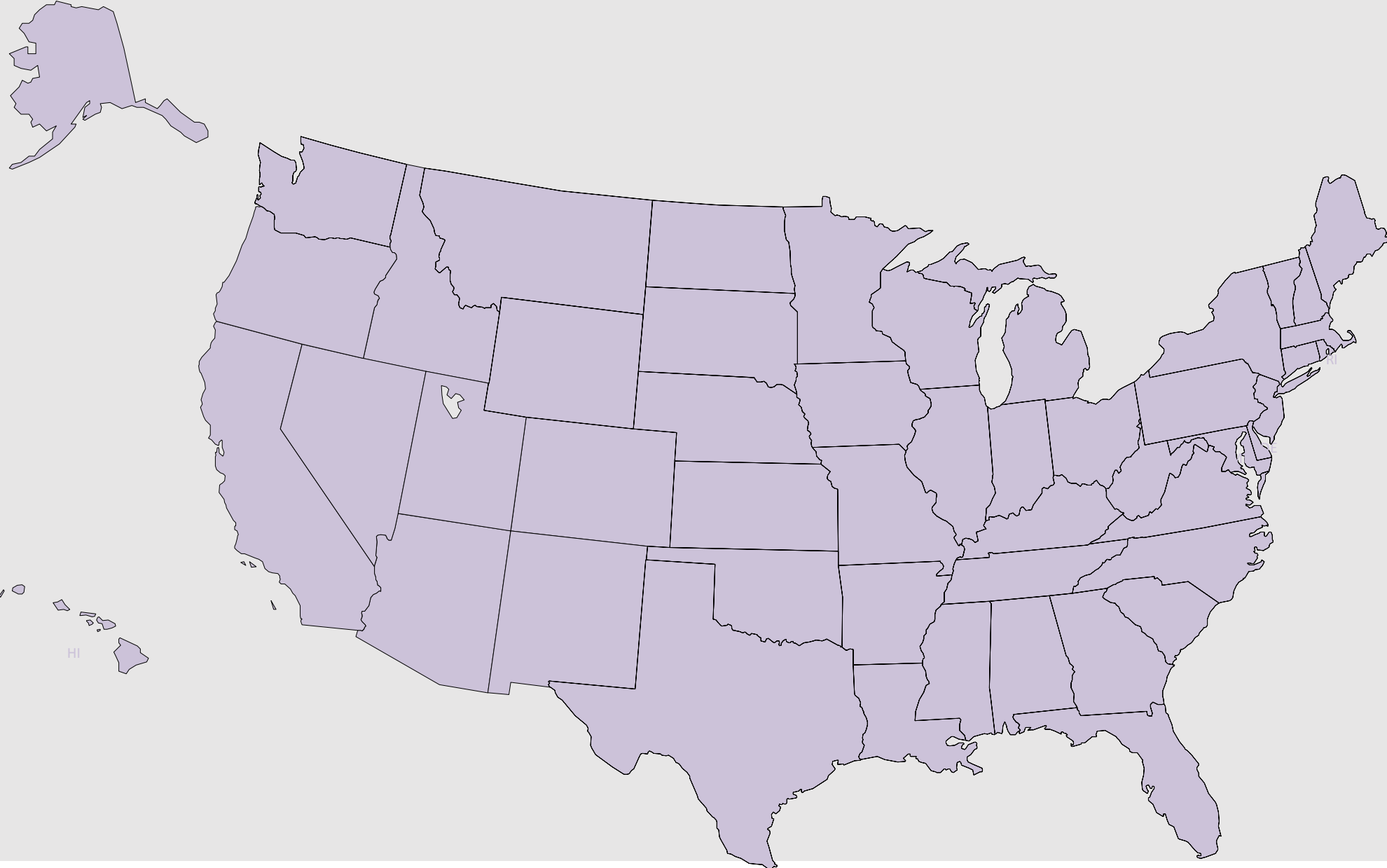
1. **Relevant Conduct:** USSG §1B1.3 should be amended to prohibit the use of evidence from acquitted conduct as relevant conduct.
2. **Acceptance of Responsibility:** USSG §3E1.1(b) should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.
3. **Obstruction of Justice:** USSG §3C1.1 should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Application Note 2 should also be clarified in this respect.
4. **Mandatory Minimum Sentencing:** Mandatory minimum sentencing statutes should be repealed or subject to a judicial “safety valve” in cases where the court determines that individual circumstances justify a sentence below the mandatory minimum.
5. **Full Discovery:** Defendants should have full access to all relevant evidence, including any exculpatory information, prior to entry of any guilty plea.
6. **Remove the Litigation Penalty:** The government should not be permitted to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty. This includes an accused person’s decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions.



Ten Recommendations

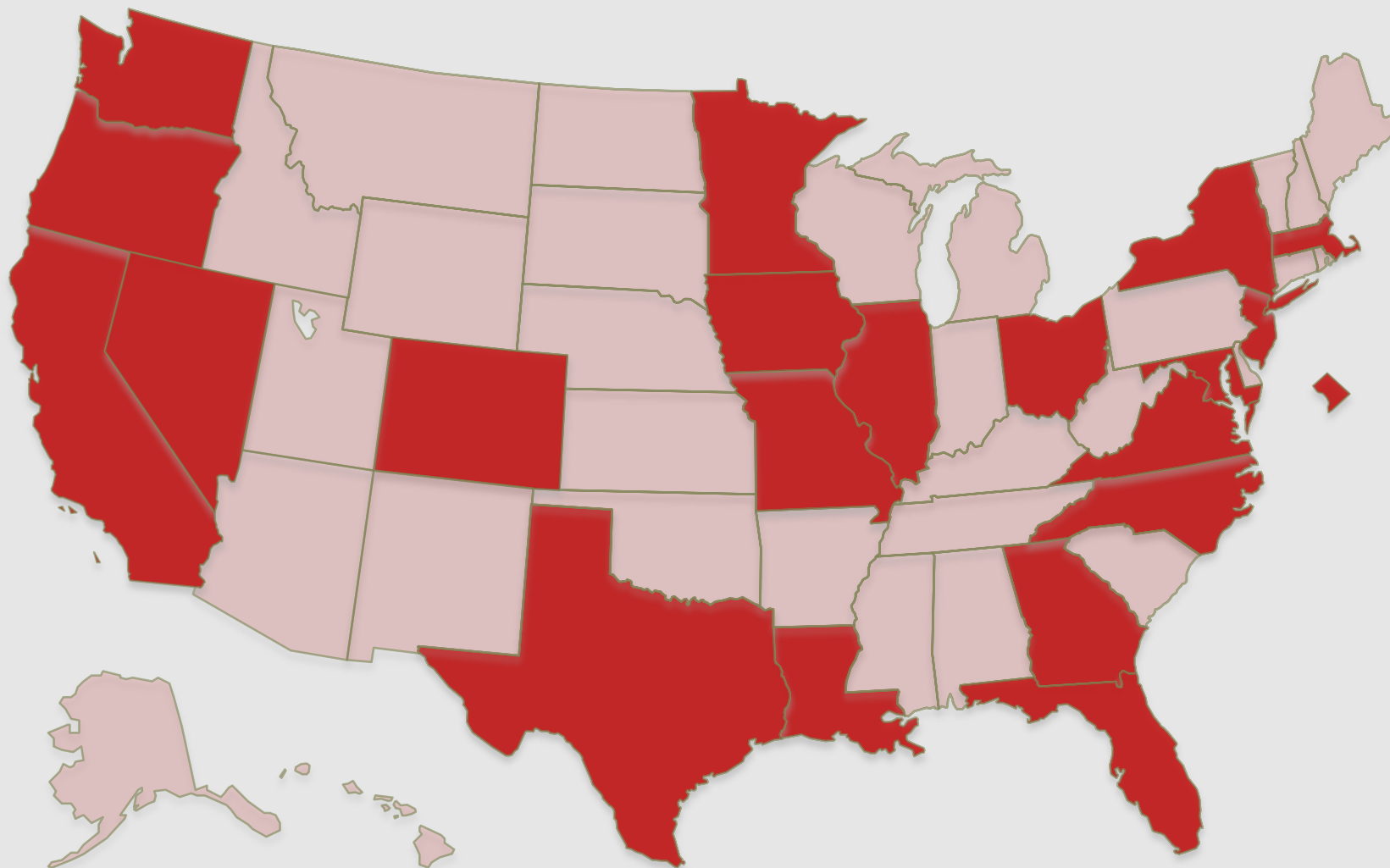
7. **Limited Judicial Oversight of Plea-Bargaining:** There should be mandatory plea-bargaining conferences in every criminal case supervised by a judicial officer who is not presiding over the case unless the defendant, fully informed, waives the opportunity. These conferences would require the participation of the parties but could not require either party to make or accept an offer. In some cases, one or more parties might elect not to participate beyond attendance.
8. **Judicial “Second Looks”:** After substantial service of a sentence, courts should review lengthy sentences to ensure that sentences are proportionate over time.
9. **Proportionality Between Pre-Trial and Post-Trial Sentencing:** Procedures should be adopted to ensure that the accused are not punished with substantially longer sentences for exercising their right to trial, or its related rights. Concretely, post-trial sentences should not increase by more than the following: denial of acceptance of responsibility (if appropriate); obstruction of justice (if proved); and the development of facts unknown before trial.
10. **Amendment to 18 U.S.C. § 3553(a)(6):** In assessing whether a post-trial sentencing disparity is unwarranted, the sentencing court shall consider the sentence imposed for similarly situated defendants (including, if available, a defendant who pled guilty in the same matter) and the defendant who was convicted after trial. The sentencing court shall consider whether any differential between similarly situated defendants would undermine the Sixth Amendment right to trial.

NACDL Reform Plan



Examples & Survey Responses

Q1: In what state do you practice? (47 total responses; 21 states)

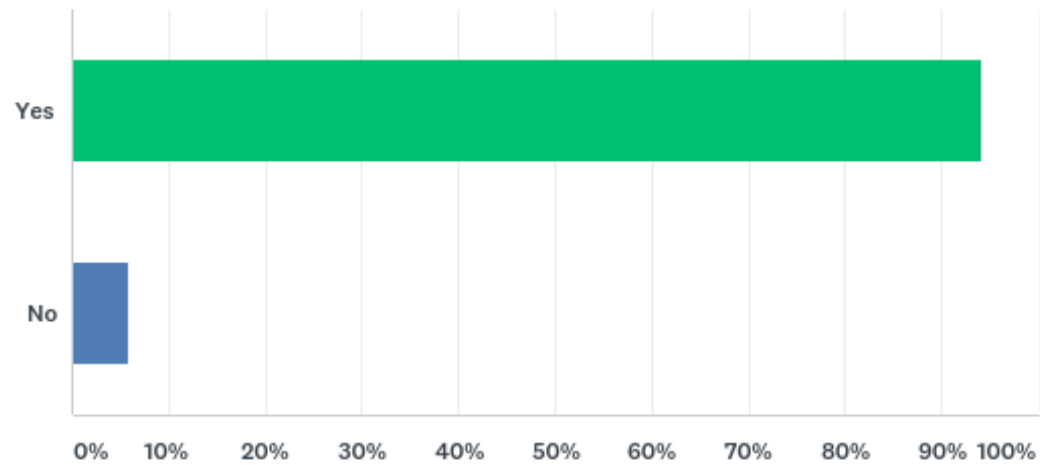


* Highlighted states reflect respondents from combined surveys (October and January)

Do You Believe the Trial Penalty is a Factor in Your State?



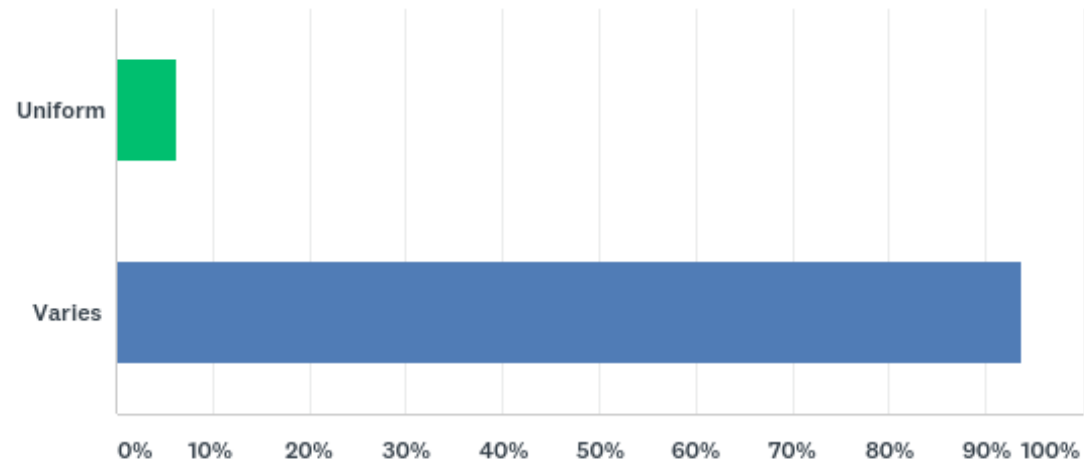
Q2 Do you believe the trial penalty is a factor in your state?



The Trial Penalty Varies Locally



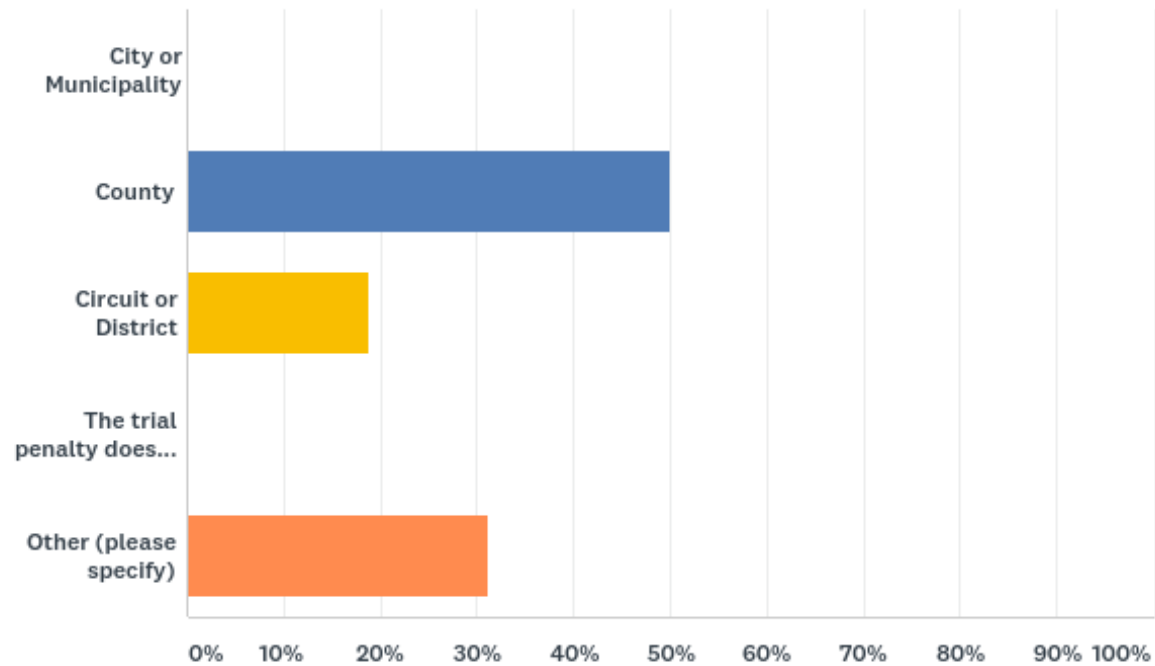
Q3 If the trial penalty is a factor in your state, is the trial penalty uniform throughout the state, or does it vary by locality?



The Trial Penalty Varies Locally



Q4 If the trial penalty varies in your state, on what local level(s) does it vary?



The Trial Penalty Varies Locally (“Other” Responses)

- Both in State and Federal trial courts
- All of above
- I’m mostly federal
- Varies by judge, not level of court
- Depends what judge, county, court, and the other factors.

Some Venues are More Severe than Others

“EDVA, juries sentence in state court and cannot suspend any portion of the sentence as the judge can. This is particularly coercive where statutes include minimum penalty ranges.”

“not venues but crime - drug sentences.”

“Rural counties.”

=====

“Federal court”

“Federal”

“Federal court;”

“EDVA”

“In what ways does the trial penalty manifest itself?”



ANSWER CHOICES	RESPONSES	
Significantly increased penalty if convicted after trial	100.00%	16
Waiver of pretrial suppression motions	68.75%	11
Waive of appeal	50.00%	8
The use of bail as ransom to induce a guilty plea (In other words, in your jurisdiction, is an accused person told that if they do not plead guilty at their first appearance, bail will be set)	31.25%	5
Other (please specify)	31.25%	5
Waiver of time to conduct a meaningful investigation	18.75%	3
Waiver of discovery	18.75%	3

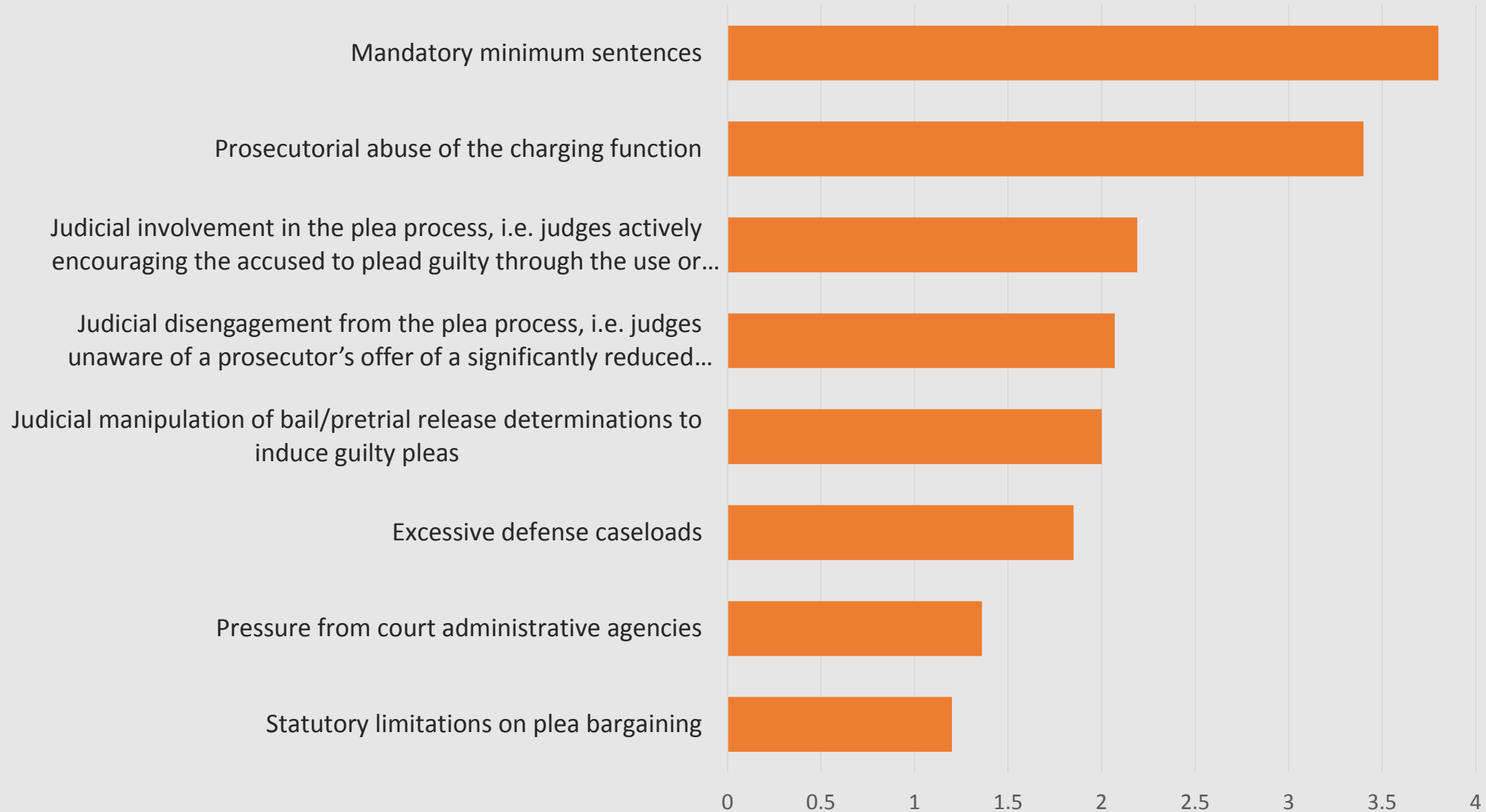
“In What Ways...” Other Responses

- “Escalating plea offers at each stage until no offer once trial date is set”
- “If we plead, we give up appeal, motions, FOIA etc. The guidelines are higher if go to trial.”
- “Different attitude from court and prosecutor upon conviction in setting bond/detaining pending sentencing.”

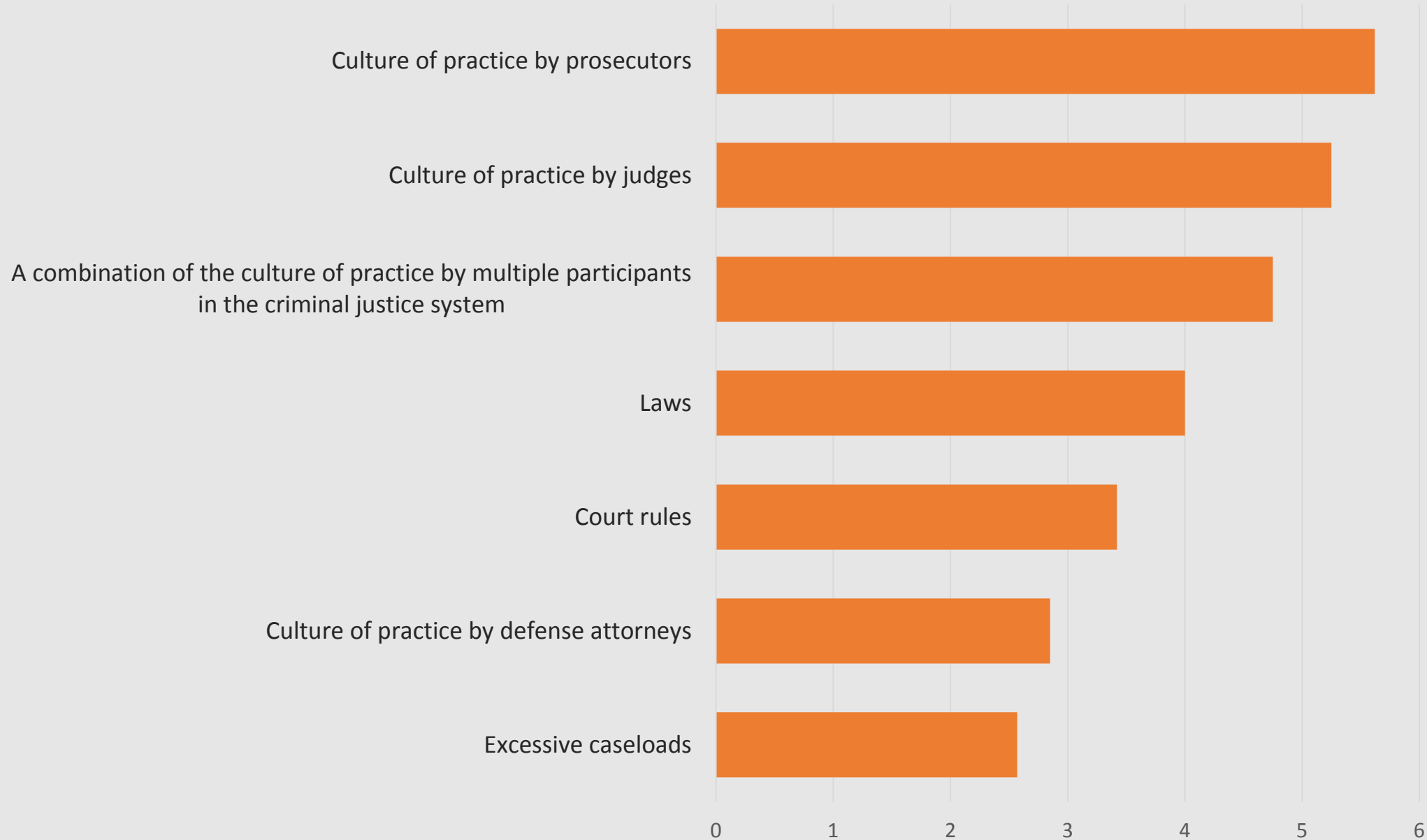
Contributing Factors (Sorted from Most to Least Significant)



What factors contribute to the trial penalty in your state



Primary Causes, Ranked



Discussion and Reaction

What you can do

Give us the stories:

nreimer@nacdl.org

trialpenalty@nacdl.org

Write: Op Eds/The Champion/FSR

