



**NACDL 20th Annual
State Criminal Justice Network
Conference**

**The Trial Penalty: The Scourge of the American
Criminal Legal System**

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Panelists:

Vikrant Reddy, Charles Koch Institute

Jeffery Robinson, The Who We Are Project

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What is the Trial Penalty?

- **The Cost of Exercising a Fundamental Right to Have a Jury Decide Guilt or Innocence or Other Fundamental Rights**

The Real Tyranny is how the Trial Penalty is Used:

The Threat

- Vastly enhanced sentences for the exercise of basic rights
- Extraction of waivers that eviscerate rights:
 - Right to counsel/pleas at first appearance
 - Discovery
 - Investigation
 - Challenges to unlawfully seized evidence
 - Right to appeal
 - Right to FOIA

Who Suffers from the Trial Penalty?

❖ Clients

❖ Society

❖ Criminal Defense Lawyers

• **Reform will benefit clients, society, and defense lawyers.**

What Makes it Possible

- Prosecutorial Control of Charging Function
- Mandatory Minimums
- Sentencing Guidelines
- Manipulation of Relevant Conduct
- Bail as Ransom
- Judicial Involvement or Judicial Disengagement
- Manipulation of “Substantial Assistance” – It is an Inducement for False Cooperation
- Plea Bargaining: A Constitution Free Zone Lack of Transparency

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

- And all these manifestations of the trial penalty:

- Enable and Exacerbate Disparate Impact and Systemic Racism

- Is the Trial Penalty an Illusion?
- . . . Or an established fact that permeates the U.S. criminal justice system?

The Trial Penalty is Real

- **Federal System:**
- 97 percent do not get a trial
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- **New York data**
 - 96 percent of all cases
 - 99+ percent of misdemeanors