The Insidious Injustice of the Trial Penalty: "*It is not the intensity but the duration of pain that breaks the will to resist.*"

EMMA ANDERSSON*

Senior Staff Attorney, National ACLU's Criminal Law Reform Project

JEFFERY ROBINSON

Deputy Legal Director, National ACLU

None of our constitutional rights are absolute—there are limits on them all. But the exercise of a constitutional right within its established boundaries should not subject you to government-imposed punishment. What's the point otherwise?

The Sixth Amendment rights to a lawyer and a trial by a jury of your peers are under attack. If you try to exercise these rights the government can and will punish you. Every day the government threatens to take away peoples' freedom and money just for trying to exercise these rights. And the threats work. Welcome to a criminal "justice" system ruled by the Trial Penalty and the Lawyer Penalty.

The trial penalty is easy to understand. Plead guilty and get less time; go to trial and get much more time if you are convicted.[1] The simplicity is one of the reasons it works so well. A common scenario is that, when the accused person meets with her lawyer, she is told something like this:

> *You are currently charged with ____. If you plead guilty the prosecutor will agree to a sentence of X. If you want a trial and you're convicted, the prosecutor will ask for a sentence much longer than X (often 2 or 3X, or occasionally even more).*

Sometimes the threat is even more punitive:

> *You are currently charged with ____. If you plead guilty the prosecutor will dismiss some of those charges and will agree to a sentence of X. If you want a trial, the prosecutor will ask to amend the charges and add new charges, which will increase the sentence. If you lose at trial you will serve a sentence much longer than X (often 2 or 3X, or occasionally even more). The offer expires in Y days and is withdrawn if you seek pretrial release, file any motion, or interview witnesses.*

The trial penalty has transformed the Sixth Amendment right to trial by jury into a fiction for the vast majority of people accused of crimes. Trial has become a seldom seen and seldom utilized part of the criminal legal system, and justice has suffered as a result.[2] We pay a high price for this decline. The very concept of justice is perverted when prosecutors punish people for making them do the work of going to trial and proving their case beyond a reasonable doubt. Moreover, as trials have disappeared, the number of wrongful convictions being exposed continues to climb. These two statistics are not unrelated: one important benefit of trials is that they are robust vehicles for revealing mistakes, biases, prejudices, and sometimes innocence. When you take away trials, more mistakes are inevitable.

Like most abusive practices in the criminal legal system, the trial penalty has a greater impact on people of color and the poor than it does on others. Although wealthy clients cannot buy their way out of a trial penalty, they can mitigate its impact by paying higher fines or penalties in exchange for shorter sentences. Bail pending resolution of the case can also impact the ultimate sentence—people who are out of custody at the time of sentencing tend to get shorter sentences that those who are in custody. Money and race play out in the bail system like they do in every other part of the criminal legal system. In addition to shorter sentences, the conditions of confinement faced by wealthy people (who can hire consultants to try to improve placement in a prison system) can be extraordinarily better than those generally faced by people of color and the poor.

Despite these advantages, even wealthy people who hire lawyers at the first hint of a criminal investigation cannot avoid the trial penalty. One of the authors has been involved in numerous multi-defendant white collar cases in which individuals who were ethical and honestly believed they could defend their behavior made a "business decision" to plead guilty to avoid exposing themselves to the possibility of much longer sentences after trial. Wealthy or not, four years in prison is a lot different than 12 years in prison. When people come face to face with the trial penalty, they cannot buy their way out of it with cash. If you want a trial, the only acceptable currency is your freedom, paid in days, weeks, months, or years.

One of our clients, a young man in his 20s, faced mandatory minimum charges that would have required the judge to impose a life sentence if he was convicted at trial. The prosecutors offered to dismiss the charges that would have led to a life sentence and to ask the judge for a seven-year sentence instead. While still devastating, seven years would allow this client time after his release to build and live a life instead of dying in prison. The catch? The

Federal Sentencing Reporter, Vol. 31, No. 4-5, pp. 222–225, ISSN 1053-9867, electronic ISSN 1533-8363.
© 2019 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Reprints and Permissions web page, https://www.ucpress.edu/journals/reprints-permissions. DOI: https://doi.org/10.1525/fsr.2019.31.4-5.222.

Downloaded from http://online.ucpress.edu/fsr/article-pdf/31/4-5/222/395148/fsr_2019_31_4-5_222.pdf by guest on 20 May 2024

prosecutors would only dismiss these charges if the client gave up his right to a jury trial. Thus, the punishment for exercising his constitutional right—for having the gall to hold the government to its burden and make the prosecutors do the work of proving their case in court—would literally be decades of this young man's life. He took the deal and pled guilty.

In some cases, the trial penalty threatens to exact a punishment even worse than the loss of your own freedom. One of our clients faced the following choice: plead guilty, waive your right to trial, and serve the rest of your life in prison; or, if you want a trial, the prosecutor will charge your wife too, and if you're both convicted your seven-year-old daughter will be left without either of you to raise her. He pled guilty and was sentenced to life without parole.

Many marginalized people also face a variant on the trial penalty—the lawyer penalty. All too often the Sixth Amendment right to a lawyer comes with the heavy cost of more time in jail or more case delays and life disruptions. The lawyer penalty is imposed when people who are arrested and held in custody make their first appearance in court after spending a night, a week, or sometimes even a month in jail.

The ACLU's Criminal Law Reform Project (CLRP) uncovered a textbook example of the lawyer penalty in a typical "court calendar" in Ohio. Prior to the start of court, a prosecutor spoke to the in-custody defendants to give them their "offers"—the sentences that the prosecutor would recommend if the person pled guilty *that day*. There were no defense lawyers present, and the precalendar discussions were not on the record. One in-custody defendant told the prosecutor that he had asked for a public defender 10 days earlier. The prosecutor said she didn't know anything about that request, reminded him that his trial was scheduled for that day, and informed him that her offer was credit for time served. In other words, don't ask for a lawyer to help you fight your case, and you can go home today instead of going back to jail. Our lawyers watched the defendant's initial resolve deflate into hopeless defeat as he accepted the offer that would allow him to regain his freedom as quickly as possible. When the judge took the bench, the prosecutor advised the court that the case would be resolved by a guilty plea. The record did not reflect that the defendant had wanted to fight his case with the help of a lawyer but never got one. And it did not reflect that he pled guilty to the charges because he was forced to choose between going home that day and enjoying the procedural protections of a lawyer and a jury trial after some unknown additional time in jail.

The ACLU's Criminal Law Reform Project does work in several areas of the criminal legal system. We regularly see both the lawyer penalty and the trial penalty at work: people face punishments simply for trying to cloak themselves in the alleged protections of our Constitution. Some of our current cases and investigations show how judges and prosecutors across America coerce defendants into pleading guilty and waiving their constitutionally guaranteed procedural protections.

In partnership with our colleagues at the National Association of Criminal Defense Lawyers (NACDL), we investigated trial and lawyer penalties in South Carolina. In the reports *Summary Injustice*[3] and *Rush to Judgment*,[4] we documented the failure of municipal and magistrate courts to ensure that defendants in these misdemeanor proceedings are provided with counsel. Through extensive court observation, we saw both the trial and lawyer penalties at work, squeezing people into impossible choices. With our NACDL colleagues, we observed judges tell defendants—both in and out of custody—that if they wanted either a lawyer or a jury trial, their case would be delayed for some unknown period of time. Over and over again, we watched people make the coerced choice to give up their Sixth Amendment rights so they could get out of jail or avoid taking another unpaid day off work to come back to court.

This investigation with NACDL grew into a case CLRP is currently litigating: *Bairefoot v. City of Beaufort, South Carolina* (9:17-2759-RMG), U.S. District Court, D. South Carolina, Beaufort Division. The three named plaintiffs in this case never received adequate advisements of their right to a lawyer and never got help from a lawyer. They all spent time in jail. The outcomes of their cases would have been radically different had they been represented by good lawyers. This type of system—marked by egregious unfairness and unconstrained by the Sixth Amendment's illusive guarantees—is at work across the country.

We see variations on the same theme in CLRP's case *Mock* et al. *v. Glynn County, Georgia, et al.* (2:18-CV-00025-RSB-BWC), U.S. District Court, Southern District of Georgia. The two named plaintiffs had been detained pretrial because they could not afford to pay their bail amount, which was set according to a predetermined schedule instead of their individual circumstances and ability to pay. Our investigation of this case revealed that when the judge advised defendants in this Georgia County of their right to a lawyer, he strongly encouraged them to proceed without one. The judge told defendants that to proceed unrepresented is "easier," and that they should just "take care of the case right now." For defendants who got this advice from the judge and who were in-custody on bail amounts they could not afford to pay, this meant there was only one way to get out of jail quickly: withdraw your request for a lawyer to work on your case, and plead guilty on the spot. In other words, fold immediately and give up your rights. If you want basic procedural justice, you have to pay with your physical freedom. Our Glynn County case demonstrates how the trial and lawyer penalties can show up in the earliest stages of a criminal case, and the importance of bail reform, which we are pursuing in legislatures and courts around the country.

The use of the trial and lawyer penalties to coerce guilty pleas is very effective because of the nature of the human psyche. In his book *Naked Lunch*, William Burroughs noted

Downloaded from http://online.ucpress.edu/fsr/article-pdf/31/4-5/222/395148/fsr_2019_31_4-5_222.pdf by guest on 20 May 2024

several things about human nature that relate to the effectiveness of these penalties. First, he noted: "*It is not the intensity but the duration of pain that breaks the will to resist.*" Get out today with credit for time served, or wait days, weeks, months, or years to get a lawyer and go to trial. And, if you are a person of color and/or poor, expect to wait in jail. Even if you are in a "nice facility," you can never get the time back.

It takes extraordinary and unusual resolve to maintain your will to resist in the face of this kind of pressure. Kalief Browder tried. He refused to plead guilty; he stood up to the threat of the trial penalty. He said "no" to plea offers that would have sent him home more than once. He was innocent and wanted to show that—and the price was three years of his freedom and ultimately his life.

Burroughs also understood the relationship between the person who can give comfort or pain (the prosecutor) and the person trying to survive (person accused). Burroughs wrote: "*The threat of torture* [*a longer prison term*] *is useful to induce in the subject* [*person accused*] *the appropriate feeling of helplessness and gratitude to the interrogator for withholding it.*" The tactic is simple. Prosecutors can threaten a person with an overwhelming prison term and then show kindness by offering a lower sentence. If you are in your 20s, an offer of seven years in prison sounds fantastic when compared to life without parole.

One of the most insidious features of the trial penalty is that it induces innocent people to plead guilty. Many who have never had to face the actual decision say they would never plead guilty to a crime they did not commit. Burroughs would tell you that people who say this have never been confronted with *extreme need*: the need to preserve a job, to keep an apartment, to care for your child, to make it to Veterans Affairs for drug treatment. You can't meet these needs locked up in a cage for an unknown period of time. Not many people will pay for the privilege of maintaining their innocence by giving up three years of freedom at Riker's Island. Burroughs wrote, "*Beyond a certain frequency need knows absolutely no limit or control. In the words of total need: 'Wouldn't you?' Yes you would. You would lie, cheat, inform on your friends, steal, do anything to satisfy total need.*" Would you plead guilty to a crime you did not commit to avoid what Mr. Browder went through? Yes you would.

What can be done to break the system's addiction to coerced guilty pleas? How can we move toward a criminal *justice* system where demanding your Sixth Amendment rights doesn't subject you to punishment? First, we have to ensure that we have enough good public defenders and that they are readily accessible to people as soon as their cases begin. In addition, prosecutors could exercise some self-restraint. A person charged with a crime should have their conduct assessed, and a prosecutor should ask for the minimum sentence necessary for a just result whether there is a trial or not. For example, if a prosecutor believes that seven years is a long enough sentence to protect the public from a particular defendant and rehabilitate him, the prosecutor should seek no more than that—even if the defendant goes to trial. There is precedent for this. Attorney General Eric Holder issued a series of memoranda to Department of Justice Attorneys directing them not to punish defendants with extra charges or longer sentences simply for going to trial. For example, in 2014, Holder instructed federal prosecutors that "[a] practice of routinely premising the decision to file [extra charges] solely on whether a defendant is entering a guilty plea . . . is inappropriate."[5] Unfortunately, this kind of self-restraint is subject to unilateral reversal. In 2017, Attorney General Jeff Sessions rescinded Holder's policy against the trial penalty.[6] We know, then, that so-called progressive prosecutors cannot alone stop these assaults on the Sixth Amendment.

Prosecutorial discretion has to be constrained by external forces. We must not give up on arguing that our state and federal constitutions place greater limits on prosecutorial discretion than courts currently recognize. But legislatures can check prosecutors, too. Legislatures can repeal mandatory minimum sentences that prosecutors so often wield against defendants to coerce them into waiving their rights. Legislatures can prevent prosecutors from seeking longer sentences after trial than they offered pretrial. And legislatures can repeal criminal laws that do not contribute to public safety, needlessly clog our courts, and disproportionately ensnare poor people and people of color in the criminal legal system. Loitering, drug possession, and panhandling, for example, all fit this description. With fewer crimes on the books, prosecutors and judges would have more time, and they would feel less pressure to keep an impossibly bloated system moving along by punishing defendants who want to exercise their rights.

One of the biggest challenges to ending the trial penalty in particular is the fact that lawyers and judges are accustomed to it and many know no other way. It is deeply entrenched. Criminal defense lawyers must not sit by while this crisis, hiding in plain sight, becomes permanent. We have a huge responsibility to speak out against this penalty—in public and in the courtroom. We need to call out prosecutors and judges on the record and clearly state exactly how the trial penalty is being used to force guilty pleas. We need to constantly tell judges that their decisions are causing people to lose children, jobs, apartments, food, and medicine.

It is never easy to break a long-standing habit. We have to get started now, before the right to a lawyer is seen as a meaningless technicality and jury trials are relegated to history books.

Notes

* Emma Andersson can be reached at eandersson@aclu.org. Jeff Robinson can be reached at jrobinson@aclu.org. The authors would like to thank the staff and lawyers of the ACLU's Criminal Law Reform Project and the members of NACDL who work on these issues every day.

1 Threats of higher fines are also part of this dynamic.

Downloaded from http://online.ucpress.edu/fsr/article-pdf/31/4-5/222/395148/fsr_2019_31_4-5_222.pdf by guest on 20 May 2024

[2] An estimated 97% of federal criminal cases resolve by plea instead of trial—and the statistics are similar in state courts all over America.

[3] National Association of Criminal Defense Lawyers & Foundation for Criminal Justice, Summary Injustice: A Look at Constitutional Deficiencies in South Carolina's Summary Courts (April 2016), *available at* https://www.nacdl.org/summaryinjustice/.

[4] National Association of Criminal Defense Lawyers & Foundation for Criminal Justice, Rush to Judgment: How South Carolina's Summary Courts Fail to Protect Constitutional Rights (January 2017), *available at* https://www.nacdl.org/summaryinjustice/.

[5] Memorandum from Eric Holder, U.S. Attorney General, to Department of Justice Attorneys, *Guidance Regarding §851 Enhancements in Plea Negotiations* (Sept. 24, 2014), *available at* https://www.justice.gov/oip/foia-library/ag_guidance_on_section_851_enhancements_in_plea_negotiations/download.

[6] Memorandum from Jeff Sessions, U.S. Attorney General, to All Federal Prosecutors, *Department Charging and Sentencing Policy* (May 10, 2017), *available at* https://www.justice.gov/opa/press-release/file/965896/download.

Downloaded from http://online.ucpress.edu/fsr/article-pdf/31/4-5/222/395148/fsr_2019_31_4-5_222.pdf by guest on 20 May 2024