

Plea-Trial Differences in Federal Punishment: Research and Policy Implications



BRIAN D. JOHNSON*

Professor of
Criminology and
Criminal Justice,
University of
Maryland

I. Introduction

Two empirical facts underlie ongoing policy debates over plea-trial differences in federal punishment: defendants who are convicted at trial receive significantly harsher sentences, and the overwhelming majority of federal defendants forego their constitutional right to jury trial and enter into plea agreements. A passel of studies finds large plea-trial differences in federal sentencing. Across jurisdictions, offense types, and time periods, research convincingly demonstrates that defendants convicted at trial receive more severe punishments than similar defendants who plead guilty. This “trial tax” or “plea discount” is among the most robust findings in the empirical sentencing literature (Johnson 2019). At the same time, guilty plea rates in both state and federal courts have ballooned. In federal court, more than 97 percent of convicted defendants plead guilty (Motivans 2019), lending credence to Justice Anthony Kennedy’s observation that “plea bargaining is not some adjunct to the criminal justice system; it is the criminal justice system” (*Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012)).

Many argue that falling trial rates are a direct consequence of increasing trial penalties. In part, this reflects the impact of federal sentencing reforms that have shifted increasing power to federal prosecutors. Unlike sentencing decisions, charge determinations are largely immune from public scrutiny and legal review. The proliferation of federal mandatory minimums and other sentencing enhancements, combined with the strict, formulaic calculus of the federal sentencing guidelines, provides for high punishment ceilings at trial that produce powerful incentives to plea-bargain. Although plea discounts are nothing new, the scope and magnitude of contemporary trial penalties are unprecedented. As numerous commentators have observed, “the gap between post-trial and post-plea sentences” is often “so wide” that “it becomes an overwhelming influence” in the defendant’s decision to plead guilty (NACDL 2018, 6). The combined forces of federal sentencing reform, “tough on crime” legislation, and limited prosecutorial oversight and accountability have contributed to a system in which prosecutors are able to threaten exorbitant sentences at trial, reducing the defendant’s plea decision to a Hobson’s choice—either take the plea deal that is proffered, or risk significantly harsher punishment at trial.

Comprehensive data on federal plea offers remain elusive, and numerous challenges exist for quantifying plea-trial disparities. Still, the overwhelming evidence suggests disproportionately severe sentences typify trial convictions. This is concerning for several reasons. The Supreme Court instructs that guilty pleas must be voluntary, knowing, and intelligent. Yet excessive trial penalties can generate coercive pressure to plead guilty regardless of legal culpability or factual guilt. A growing body of scholarship indicates that when plea-trial differentials are large, innocent defendants sometimes plead guilty (Bushway et al. 2014; Dervan and Edkins 2013; NACDL 2018). This raises important questions about the voluntariness of guilty pleas and the fairness and proportionality of federal sentences. The eclipse of the modern jury trial also has deleterious consequences on the legal process. Without a reasonable threat of taking a case to trial, defense counsel has limited recourse, and the potential for governmental abuse looms large (NACDL 2018).

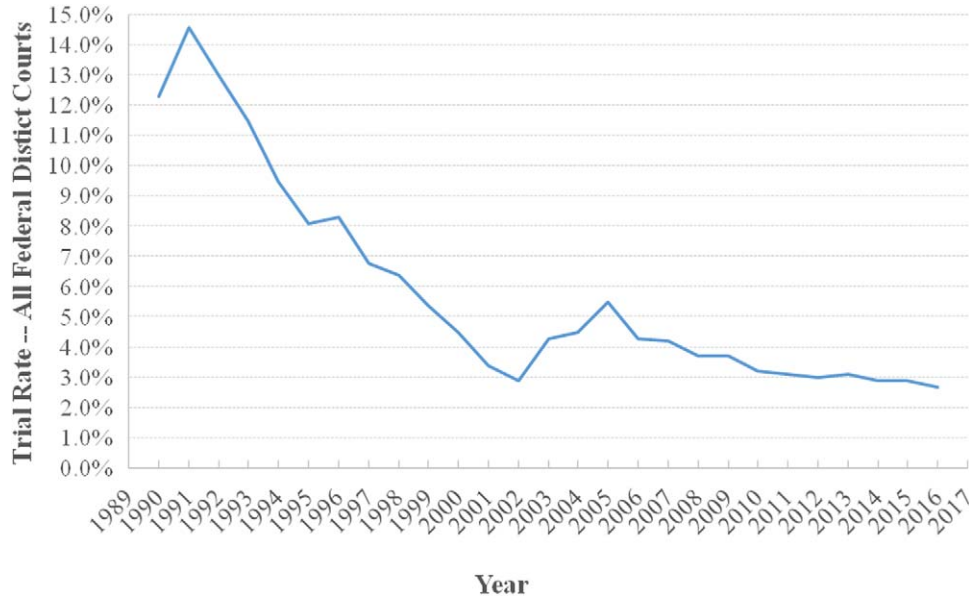
This essay reviews the empirical evidence on the presence of a federal trial penalty. It examines empirical challenges in documenting and quantifying plea-trial punishment differentials, and it identifies analytical advances that can improve our understanding of the trial tax. Ultimately, it suggests a large and consistent plea-trial disparity exists in federal court, which contributes to a range of significant policy concerns. The essay concludes by considering the policy implications of the trial tax and offers preliminary suggestions for addressing coercion in the guilty plea process and enhancing fairness and transparency in federal sentencing.

II. Plea-Trial Disparity in Federal Punishment

The constitutional right to jury trial is embedded in the democratic ethos of America; it plays an essential role in ensuring public representation and legitimacy of the justice system. Yet very few defendants go to trial. Although trial rates have been gradually declining for decades, they have fallen off precipitously in recent years, especially in federal court, continuing an unsettling trend in which the proportion of trials has decreased notably over the past three decades (see Figure 1). The modern decline in the jury trial has sundry causes. It likely reflects historical factors like increasing caseloads, growing trial complexity, and shifts in political motivation and case quality (Smith 2005; Johnson et al. 2016), but it is also the result of failed legal challenges

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Figure 1
Federal Trial Rate over Time in U.S. District Courts



Source: U.S. Sentencing Commission Annual Reports, 1990–1995, <https://www.ussc.gov/about/annual-report/archive>; and U.S. Sentencing Commission Sourcebooks of Federal Sentencing Statistics, 1996–2016, <https://www.ussc.gov/research/sourcebook/archive>.

that have served to institutionalize plea bargaining in American courts.¹ Federal sentencing reforms have concentrated plea bargaining power in the hands of prosecutors and further incentivized guilty pleas (Johnson 2019). The complexity of the federal guidelines, coupled with the broad availability of sentencing enhancements, affords liberal opportunity to threaten disproportionately punitive sentences at trial. With limited procedural oversight in plea bargaining, the result has been a widening lacuna between sentences meted out to trial defendants and those willing to exchange explicit concessions for the act of self-conviction (Alschuler 1979).

Recent reviews of trial penalty research report variations in effects sizes across studies and jurisdictions, but overwhelmingly demonstrate consistent patterns of disparity disadvantaging trial defendants. On average, trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that are 20 to 60 percent longer (Johnson 2019). Studies of the federal system report similar plea-trial disparity. Federal defendants are typically two to three times more likely to go to prison (Johnson and Betsinger 2009; Johnson 2019; USSC 2004) and receive incarceration terms from one-sixth to two-thirds longer, even after adjusting for other relevant sentencing criteria (Johnson 2019; Ulmer et al. 2010; Kim 2015). Statistical reports issued by the U.S. Sentencing Commission corroborate these findings. They show that trial cases are twice as likely to result in imprisonment, with average sentences that are more than 50 percent longer (USSC 2004; 2010; 2017a). Studies that focus on federal drug offenders find that trial defendants

receive two to five additional years of imprisonment (Kautt 2002; Steffensmeier and Demuth 2000).²

Estimating the magnitude of plea-trial differences in punishment is complicated by several factors. In the federal justice system, defendants who plead guilty routinely receive sentence reductions for “acceptance of responsibility.”³ In principle, these reductions reflect reduced culpability, but in practice they are closely aligned with plea discounts.⁴ Most studies do not include acceptance of responsibility in estimates of the federal trial penalty. Ulmer et al. (2010) demonstrate how trial penalty estimates are sensitive to the inclusion of these and other case processing discounts, such as downward departures for “substantial assistance” to the government.⁵ A guilty plea is a virtual prerequisite for a substantial assistance departure in federal court (Ulmer et al. 2010), and other downward departures are also much less likely in trial cases (Johnson et al. 2008). All of these factors can contribute indirectly to added sentence severity for defendants who go to trial.

The decision to plead guilty also impacts whether a prosecutor will file various sentencing enhancements. According to the U.S. Sentencing Commission, “Department policies allow prosecutors to invoke statutory minimum penalties and statutory enhancements as further incentives for guilty pleas” (2004, 30). Among others, these include mandatory minimums for drugs, firearms, and other specific offense categories (USSC 2011; 2017b), career offender and criminal history enhancements (USSC 2018a), and provisions that double mandatory minimums for drug offenders (USSC 2018b). In addition to aggregate

plea-trial differences at sentencing, then, federal trial penalties also operate indirectly through other mechanisms that are seldom fully captured by empirical studies. The result is that empirical studies tend to underestimate the full magnitude of plea-trial differences in federal punishment. Kim (2015), for example, illustrates how ignoring intermediate processes like acceptance of responsibility reduces trial disparity estimates and concludes that federal sentence lengths are two-thirds longer for trial defendants once they are considered.

It is important to acknowledge that there may be legitimate reasons for plea-trial differences in sentencing. In addition to offender remorse and rehabilitative potential, some scholars point to concerns with making victims testify or with the putative value of expediting criminal cases. These can be valid considerations, but they alone cannot account for the massive differentials in plea and trial sentences (Johnson 2019). In many ways, the existence of a federal trial tax is less important than its sheer magnitude. In other countries, like England and Wales, for example, there are express sentencing caps to limit the impact of plea discounts in sentencing. Notably, estimates from federal court suggest plea-trial disparity has increased over time in line with concomitant declines in federal trial rates (USSC 2010). This suggests large and growing trial penalties play an important role in the modern eclipse of the jury trial, and it also raises corollary concerns related to the potential for overcharging, false guilty pleas, and broader patterns of racial disparity in federal punishment.

III. Broader Consequences of the Federal Trial Tax

Prosecutors have always enjoyed wide latitude in charging decisions. The nebulous nature of the complex federal statutory code allows for and requires substantial prosecutorial discretion. Unlike sentencing decisions, though, charge determinations are principally immune from formal procedures of legal review. Because prosecutors are incentivized to obtain high conviction rates (Alschuler 1968), and guilty pleas guarantee conviction, perverse incentives can emerge that encourage overcharging (Caldwell 2011).⁶ Filing additional charges or excess counts provides leverage in plea negotiations, even when there is little intent of seeking convictions on all charges. The trial penalty plays a key role in this process. Inflating initial charges elevates the punishment ceiling at trial and makes plea offers more attractive. Research demonstrates that the larger the perceived plea discount, the higher the odds of a guilty plea (Bushway et al. 2014). Overcharging is inherently difficult to identify because it involves hidden intentions and because plea offers are rarely reliably recorded or empirically investigated (Johnson et al. 2016). The fact that initial charges are often substantially reduced provides prima facie evidence of the practice, however, and anecdotal accounts suggests it is commonplace, at least in some jurisdictions (Alschuler 1968; Johnson 2018; Graham 2014).

In addition to raising concerns about fairness and transparency in plea bargaining, overcharging can also have

other deleterious consequences. It represents a form of institutionalized coercion that may contribute to false guilty pleas. Lynch's (2016) in-depth analysis of federal drug defendants demonstrates how prosecutors often manipulate sentencing laws to coerce defendants to plead guilty by threatening "huge hammers" for those who insist on trial. As Justice Antony Scalia opined, the "grave risks of prosecutorial overcharging" are significant because they can also contribute to "an innocent defendant . . . pleading guilty to a lesser offense" to avoid the "massive risk" of a trial penalty (*Lafler v. Cooper*, 132 S.Ct. 1376, 1397 [2012]). Scholars generally agree that excessive plea-trial disparities contribute to false guilty pleas. High sentencing exposure at trial can place undue pressure on defendants to accept a plea offer, regardless of their guilt or innocence (Blume and Helm 2014; McCoy 2005; Lynch 2016).

This is especially concerning in the federal justice system where recommended guidelines sentences are often severe and myriad sentencing enhancements are available (Stith and Cabranes 1998). Empirical research demonstrates an inverse relationship between the size of the trial penalty and the likelihood of a false confession (Dervan and Edkins 2013; Bushway et al. 2014), suggesting large plea-trial differentials produce coercive pressure to plead guilty. It also shows that the risk of false guilty pleas is exacerbated in cases involving long terms of incarceration, capital punishment, and pretrial detention (Gross et al. 2005; Wright 2005; Blume and Helm 2014). As one example, Dervan and Edkins (2013) report that more than half of innocent defendants in an experimental setting were willing to plead guilty when faced with the risk of extreme trial penalties. Qualitative research with convicted offenders also indicates some defendants claim to be innocent and report that they pleaded guilty only to secure a sizeable plea discount (Zottoli et al. 2016). Moreover, using data from the National Registry of Exonerations, Blume and Helm (2014) show that 18 percent of exonerated defendants entered guilty pleas for crimes of which they were factually innocent. As Roberts and Bradford recognized, as the magnitude of the trial penalty increases, "so too, does the likelihood that innocent defendants will enter a guilty plea" (2015, 188). This is important because larger plea discounts are more likely to be offered in weaker cases (Bushway et al. 2014), which raises essential questions about coercion in plea bargaining when it occurs in the shadow of large trial penalties.

Excessive trial penalties can also contribute to broader patterns of racial inequality in the federal justice system. A number of studies find that mandatory minimums and other sentencing enhancements are disproportionately applied to defendants of color (Ulmer et al. 2007; Crawford et al. 1998; USSC 2017b). The U.S. Sentencing Commission reports that "Black offenders" are "more likely than any other race to have been convicted of an offense carrying a mandatory minimum penalty" (2017b, 53). In part, this may reflect the fact that black defendants are the most likely to go to trial, even after accounting for other considerations

like offense seriousness and criminal history (Albonetti 1990; Metcalfe and Chiricos 2018; Testa and Johnson 2019). It is unclear whether this reflects less favorable plea offers (Kutateladze et al. 2014), racial differences in perceived legitimacy and trust in the justice system (Hurwitz and Peffley 2005), structural deficits in plea bargaining power (Savitsky 2012), or other factors like differential treatment at earlier stages of the process (Kurlychek and Johnson 2019). Whatever the underlying causes, though, the empirical reality is that minority defendants more often go to trial and therefore are more likely to pay the trial tax. As such, large and systematic plea-trial differences in punishment have the capacity to further exacerbate existing patterns of racial inequality in the federal criminal justice system.

IV. Understanding and Improving Trial Penalty Estimates

Although research on the trial tax is expansive, and empirical findings are remarkably consistent, estimating plea-trial disparities in sentencing involves a number of key methodological challenges. Guilty plea and trial cases by definition are different. Although statistical analyses are designed to adjust for these differences, studies of plea-trial disparity still risk comparing apples to oranges. The relative size of the trial tax is also closely related to how intermediate case processing decisions are handled. Few studies capture the full breadth of outcomes impacted by the decision to go to trial. Moreover, some trial defendants will be acquitted, and the handling of these cases is highly consequential. Despite these issues, there are compelling reasons to believe estimates of plea-trial differences are robust. Research studies overwhelmingly find large trial penalties, qualitative and anecdotal evidence largely confirm them, and common limitations in statistical analyses tend to underestimate rather than overestimate this disparity. Nonetheless, addressing key analytic concerns can help to better quantify the magnitude of the trial tax and provide sounder recommendations for how to effectively address it in policy reforms.

First, there are inherent differences in cases that end in a plea or go to trial. Trial cases are more likely to involve serious, repeat offenders, male and minority defendants, and violent or weapons charges (Albonetti 1990; Metcalfe and Chiricos 2018; Testa and Johnson 2019). They may also involve greater uncertainty about defendant guilt. Research studies include a wealth of indicators to capture and adjust for these types of factors, but it is never fully possible to know the counterfactual outcome for an alternative mode of conviction. Better data provides more reliable estimates, though, so it is important to collect more detailed information on federal charging and sentencing decisions. For example, many studies have limited measures for quality of evidence; weaker cases tend to receive larger plea discounts and have greater odds of acquittal at trial (Johnson et al. 2016). Improved data collection efforts can help to begin to address concerns about omitted variable bias in current studies. Innovative new research approaches can also

improve our understanding of plea-trial disparity. For example, recent work employs experimental methods using survey data from court actors to generate more equivalent comparisons of plea and trial cases. Notably, this work continues to find strong evidence of a trial penalty. When court actors are asked how they would sentence a typical robbery case, they sentence the same hypothetical defendant to ten years following a trial and to only six years after a plea (Bushway et al. 2014). Other innovative approaches have also been implemented to correct for selection bias in who goes to trial and who pleads guilty, and this work also finds consistent plea-trial disparities (Abrams 2011; Bushway and Redlich 2012; Johnson and Larroulet 2019), suggesting concerns about imperfect comparisons do not explain the trial tax in punishment.

Second, estimates of the trial penalty depend fundamentally on how other related decisions are assessed, including charge reductions, guidelines departures, acceptance of responsibility, and trial acquittals. Defendants who plead guilty often have their charges reduced, though research studies tend to focus only on the most serious conviction offense. Reductions in the number, type, and severity of charges routinely occur during plea bargaining (Spohn et al. 2001; Shermer and Johnson 2010; Kutateladze 2018), which means the final conviction charge may differ substantially from the underlying offense behavior. Without explicitly accounting for this, the average plea defendant will tend to be a relatively more serious offender, resulting in a systematic underestimate of plea-trial disparities in sentencing.⁷ Similarly, estimates of the trial tax also depend on other case-processing decisions. Trial defendants are less likely to benefit from alternatives to incarceration (Engen et al. 2003) or favorable guidelines departures (Johnson 2005), and they are more likely to be subject to mandatory minimums and other sentencing enhancements (USSC 2017a). In the federal system, defendants who go to trial are virtually excluded from acceptance of responsibility and substantial assistance discounts (Johnson et al. 2008; Ulmer et al. 2010). Studies that include separate measures to capture these types of intermediary decisions effectively parse the total trial penalty into pieces, and very few studies consider these cumulative impacts (Kim 2015). To better understand the scale of the trial penalty, then, research needs to explicitly measure both the direct and indirect effects of going to trial across decision points in the federal justice system. In all likelihood, doing so would reveal a compound trial tax that further exacerbates sentencing differences between plea and trial defendants.

Third, although existing estimates tend to represent lower bounds of the trial penalty, the inclusion of acquittals largely offsets plea-trial disparities. Because acquitted defendants receive no additional punishment, their cases substantially mitigate average trial sentences, resulting in mean plea sentences that are similar to trials once acquittals are included (Smith 1986; Abrams 2011). Whether or not acquittals should be included in estimates of plea-trial

disparity, however, depends fundamentally on the question at hand. In studies that set out to test whether or not it is rational for a defendant to opt for trial, it is logical to include acquittals. However, for studies measuring the trial penalty—which is principally concerned with sentencing disparities among convicted offenders—this makes little sense. It is important for researchers and practitioners to be clear about this distinction. Any claims that the trial tax is illusory or negligible based on samples including acquitted defendants are arguably misguided (Abrams 2011). Additional research is needed to explain the factors that impact acquittals at trial, but this should not detract from the empirical fact that convicted trial defendants continue to receive significantly harsher sentences.

Future research can also improve upon our understanding of plea-trial differences in punishment by addressing a number of unresolved issues. A small body of work shows trial penalties vary across offense types and jurisdictions (Rhodes 1979; King et al. 2005; Ulmer et al. 2010), and other scholarship suggests they are inversely related to trial rates, though relatively few studies investigate these relationships in depth (Johnson 2019). Some scholars emphasize the importance of timing, noting increased benefits accrue for defendants who plead guilty early. In some jurisdictions, explicit policies exist that reward early pleas; in others, “exploding plea offers” are employed in which the plea deal is retracted if not accepted expeditiously. Little empirical work also exists on these topics, though many scholars question their wisdom on philosophical grounds, arguing that they represent another form of coercion in plea bargaining (Turner 2017; Zottoli et al. 2016). Additional studies are also needed to better test legal perspectives that emphasize the importance of evidentiary problems, victim considerations, and Fourth Amendment issues (Alschuler 1968; Spears and Spohn 1997; Bibas 2004), which are often absent from empirical plea research. For example, little is known about how the strength of the evidence impacts sentencing, especially in trial cases, though some recent work implicates it (Nir and Griffiths 2018). These and other considerations, such as differences among types of pleas and trials (Testa and Johnson 2019; Johnson 2003; King et al. 2005), should also be the explicit focus of future research, along with innovative studies that address potential policy solutions for limiting the trial penalty in federal punishment.

V. Policy Implications and Recommendations

The available evidence on the federal trial penalty suggests significant policy interventions are needed. Large trial penalties raise fundamental questions about the voluntariness of guilty pleas, the constitutional right to trial, and the presumption of innocence as founding principles of the American justice system. A prominent concern is that the federal trial tax has grown so enormous that it leads to systematic coercion in guilty pleas and blurs the line between the guilty and the innocent (McCoy 2005; Lynch 2016; Dervan 2015). Even for guilty defendants, though,

stark trial penalties threaten transparency, legitimacy, and proportionality in punishment (Turner 2017). Lengthy trial sentences are often disingenuous. Plea negotiations are hidden from public view and driven by expediency rather than desert and culpability. Defendants of similar blameworthiness can receive very different punishments based solely on exercising the constitutional right to trial. For all these reasons, the public expresses low levels of support for plea bargaining, which also suggests limited backing for the trial tax (Herzog 2004).

For defendants to earn a plea discount, they are typically required to waive many of their constitutionally guaranteed due process rights. In addition to the right to trial, they relinquish the right to self-incrimination, to confront witnesses, and to appeal plea agreements or challenge ineffective counsel (King and O’neill 2005). Federal defendants are also generally required to forfeit the right to detention hearings, to contest guidelines calculations, to file suppression motions, to request downward departures, and to challenge guidelines calculations (Hofer 2011). All of these waivers are motivated by administrative efficiency concerns rather than principled purposes of punishment. Stark trial penalties can also contribute to insufficient fact finding by requiring plea agreements to be entered into before full discovery of evidence is possible (Turner 2017).

A number of promising approaches are available for addressing these and related concerns. First, policy reforms are needed to help restore the balance of power in federal plea negotiations. Sentencing reforms over the past several decades have increasingly empowered prosecutors, providing them with a multitude of tools for ratcheting up trial penalties. At the vanguard are mandatory minimum sentencing laws, which have been shown to have little deterrent effect on crime while contributing to gross inequities in punishment (Tonry 2014; Ulmer et al. 2007; Lynch 2016). The penchant to threaten the filing of additional charges or added enhancements can be at least partially curbed by restricting mandatory minimum laws, and making them presumptive and/or subject to judicial approval. Doing so would not only curb the trial penalty but would also help to create greater transparency around federal charging. As Lynch observes, “The law equips prosecutors with a stockpile of enhancements,” making it “impossible to significantly reform the justice system without first constraining and reorienting the prosecutorial power that has accumulated” in federal court (2016, 9–10).

Second, guilty plea agreements need to be formally stated and publicly reported; they should include written reasons for charge alterations that are subject to review. Burgeoning concerns over limited accountability in prosecution can be addressed by requiring greater transparency in plea bargaining (Bibas 2009). Not only would this help to increase fairness and equality in charging practices, but it could also serve to limit overcharging and restrict the scope and magnitude of plea-trial disparity. Stronger systems of judicial review are needed to ensure consistency and uniformity in plea offers and to prevent disingenuous charging

practices from being used to over-incentivize guilty pleas. This may require additional steps, such as statutory limits on the magnitude of plea discounts, or punishment ceilings that preclude trial sentences from exceeding standard plea deals by more than a modest amount (Covey 2008). Other countries have implemented such practices (Brook et al. 2014). For example, in England and Wales, plea discounts are capped at a maximum of a one-third reduction from the trial sentence (Roberts and Bradford 2015). Although this further codifies plea-trial differences in sentencing, it expressly limits the magnitude of the trial penalty, restricting the scope of potential coercion in plea bargaining.

For the aforementioned approaches to be effective, sister reforms will be necessary to prevent widespread circumvention through charge manipulations. One possibility is to develop prosecutorial charging guidelines akin to sentencing guidelines for judges (Pfaff 2017). Many prosecutors' offices already have internal, informal charging guidelines. By codifying and subjecting them to more systematic scrutiny, greater consistency and fairness can be achieved. Guidelines of this sort would provide valuable benchmarks for acceptable charge reductions in typical cases; they would offer additional guidance on how, when, and why charging manipulations are appropriate; and they would provide a concrete foundation for implementing more formal systems of legal review. Guidelines could also help to balance the negotiating capital of prosecutors and defense counsel, while increasing transparency in charging and limiting the coercive pressure of trial penalties in plea bargaining.

VI. Conclusion

The existence of large plea-trial disparities in punishment is among the most robust empirical findings in contemporary research on the federal courts. Studies consistently reveal large sentencing differentials that disadvantage trial defendants (Johnson 2019; NACDL 2018). Although empirical estimates are vulnerable to a number of significant analytical challenges, the sheer magnitude and regularity of plea-trial differences leaves little doubt about their ubiquity or significance in federal court. Quantitative studies, qualitative reports, and anecdotal evidence all intimate hefty inequalities for defendants who go to trial. As federal trial penalties have grown in recent years, trial rates have declined precipitously, threatening the total eclipse of the federal jury trial (Smith 2005).

Plea discounts are often justified on grounds of administrative and organizational efficiency; prosecutors and other court actors are incentivized to seek speedy convictions. The guidelines themselves provide for explicit discounts for defendants who enter timely pleas. The trial tax reflects contemporary sentencing reforms that afford federal prosecutors with myriad tools to enhance trial sentences. It is further exacerbated by the federal sentencing guidelines, which provide for strict and mechanical guidelines calculations that often result in lengthy prison terms that are out of line with defendant culpability and harm.

And it is supported by the widespread acceptance of covert plea-bargaining practices that are not held to the same standards of accountability and legal review as downstream sentencing decisions.

Combined, these social forces create coercive pressure for federal defendants to plead guilty. Excessive trial penalties arguably violate the constitutional rights of defendants. Research shows that even innocent defendants will accept plea deals when plea-trial disparities are pronounced (Blume and Helm 2014; Dervan 2015). Large plea-trial disparities also contribute indirectly to broader patterns of social inequality in the criminal justice system, and they threaten the deterrent effects of punishment, violate principles of proportionality and fairness in sentencing, and ultimately reduce the perceived legitimacy of the justice system. The trial penalty may also contribute to insufficient fact finding by hindering adequate discovery when plea deals are proffered under strict time constraints (Turner 2017).

To address these concerns, significant policy reforms are required. Explicit steps must be taken to restore the balance of power in plea negotiations and to limit the discretionary capacity of prosecutors to threaten exorbitant sentences for trial defendants. Trial penalties are often tied to sentence enhancements, such as mandatory minimums and career offender statutes. By limiting the scope and applicability of these laws, significant strides can be made toward equalizing trial punishments. Greater transparency and accountability in federal plea bargaining is also needed. Written plea offers with stated reasons for charge alterations should be required in all cases. This would make the plea process more scrutable and transparent and would help to prevent overcharging. Prosecutors' offices should also implement internal policies that preclude the filing of additional enhancements when a defendant opts for trial. Finally, policymakers might consider promulgating charging guidelines to provide greater structure to federal plea bargaining. In line with this, statutory caps could be instituted to limit the magnitude of plea-trial sentencing disparities, as has been done in other countries (Roberts and Bradford 2015).

Overall, it is difficult to defend a punishment structure that systematically penalizes defendants for exercising their constitutionally guaranteed right to trial. There is a delicate balance between the organizational realities of federal courts, striving to ensure convictions and expedite criminal cases, and the broader moral and philosophical issues related to fairness, proportionality, deservedness of punishment, and the due process rights of criminal defendants. Ultimately, trial penalties are only defensible on utilitarian grounds related to organizational efficiency—they are fundamentally designed to compel guilty pleas—and few practitioners or policy pundits would be so bold as to suggest that this is one of the primary purposes of punishment. As Darbyshire opined, the trial tax when cast in this light represents a “stunning hypocrisy” in a legal system that “trumpets the right to trial” (2000, 901).

Notes

* Brian Johnson can be reached at bjohnso2@umd.edu.

- ¹ Although plea bargaining was repeatedly challenged on legal grounds, and early rulings were highly critical of the practice (see e.g., *Sheldon v. United States*, 242 F. 2d 101 [5th Cir.] [1958]); *Scott v. United States*, 349 F. 2d 641, 643 [6th Cir.] [1965]), the Supreme Court ultimately ruled it was an essential part of the criminal justice system (*Santobello v. New York*, 404 U.S. 257, 260 [1971]), and that it was not unconstitutional for prosecutors to enhance criminal penalties for defendants who refuse to plead guilty (*Bordenkircher v. Hayes*, 434 U.S. 357 [1978]; see also *Missouri v. Frye*, 132 S. Ct. 1399 [2012]).
- ² The lone exception in the federal trial tax literature is for military courts, where research suggests trial cases are punished less severely than guilty pleas (Breen and Johnson 2018). However, the unique structure of the military justice system, which includes frequent use of jury trials, jury sentencing, and sentencing caps in plea bargains, makes comparisons to other federal court contexts inherently difficult.
- ³ Sentence discounts for acceptance of responsibility provide for a decrease of two or three offense levels, which amounts to about a 35 percent sentence discount (Bibas 2001). Federal plea agreements typically include a stipulation that the government will support an acceptance of responsibility sentence reduction.
- ⁴ Kim (2015) reports that 97 percent of defendants who plead guilty received the acceptance of responsibility discount.
- ⁵ Federal prosecutors can file a motion requesting a substantial assistance departure, which allows the judge to go below the recommended guidelines range and below applicable mandatory minimums when a defendant provides assistance in the investigation or prosecution of another federal case (Johnson et al. 2008; Spohn and Fornango 2009; USSC 1998).
- ⁶ Alschuler (1968) identifies two types of overcharging that are employed to facilitate guilty pleas. Horizontal overcharging involves multiplying the number of charges filed against a defendant, and vertical overcharging entails charging a higher offense than warranted by case circumstances. Graham (2014) identifies three types of overcharging: 1) charges filed that do not meet the standards of legal proof, 2) charges filed that are proportionally out of line with the nature of the defendant's behavior, and 3) charges filed with the implicit intention of dismissing or reducing some or all of them during plea bargain. The current discussion is concerned with this final category in which the number or type of charges are filed in part with an eye toward facilitating subsequent guilty pleas.
- ⁷ To illustrate, consider two otherwise similar defendants, one charged with robbery who pleads to burglary, and one initially charged with and convicted at trial of burglary. Even though both defendants are convicted of the same offense, the plea defendant is a relatively more serious offender having initially been charged with robbery. To the extent that this impacts their punishment, sentence comparisons based on offense at conviction are likely to underestimate plea-trial disparities that would occur for identical defendants.

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