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CRUSHING THE SOUL OF FEDERAL PUBLIC DEFENDERS: THE PLEA BARGAINING MACHINE'S OPERATION AND WHAT TO DO ABOUT IT

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[*] Third Level Supervisory Assistant Federal Public Defender, District of Arizona. For their continued support, thank you Jon M. Sands, Leticia Marquez, Vicki Brambl, and Eric Rau. Thank you also to all the editors of the *Fordham Urban Law Journal*, including Shazell Archer, Erica Chan, and Kevin Winnie.

INTRODUCTION

The federal criminal trial rate in the United States was 14% in 1990 and 5% in the year 2000.[1] In 2019, it was 2.4%[2] nationally and 0.7% in the District of Arizona, where this Author practices.[3] These numbers mean assistant federal public defenders (AFPDs) are not in trial yearly. I know recently retired AFPDs who tried only one or two cases during their last decade of work.[4] AFPDs in the 1970s and early 1980s tried approximately one case per month.[5] Before becoming an AFPD, I was fortunate to have averaged three trials per year from 2005 to 2015 as an assistant Pima County Public Defender. The trial rate back then, in that jurisdiction, was higher.[6]

The dearth of trials is problematic for defendants.[7] In a system with high-frequency plea bargaining, many realize they have little to no chance of fighting their case.[8] For the falsely accused, trials are a vehicle for

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1. *See* William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1066 (2019) (citing Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1414 (2002)).

2. *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2019, DISTRICT OF ARIZONA 4 tbl.2 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2019/az19.pdf [https://perma.cc/3WJG-E63U].

3. *See id.* at 6.

4. Grant Bashore tried one case in his last decade of work as supervisory AFPD. *See* Email from Grant Bashore, former supervisory AFPD, Dist. of Arizona, to author (Oct. 30, 2021, 7:58 AM) (on file with author). Deirdre Mokos only went to trial twice in 20 years of practice as AFPD. *See* Email from Deidre Mokos, former AFPD, Dist. of Arizona, to author (Nov. 1, 2021, 8:35 AM) (on file with author). Vicki Brambl, an active supervisory AFPD, has tried 19 cases in 27 years. *See* Email from Vicki Brambl, Level II Supervisory AFPD, Dist. of Arizona, to author (Oct. 29, 2021, 9:57 AM) (on file with author). She is an outlier and had a smaller caseload after becoming a supervisor in 2004. *See id.*

5. *See* Interview with Fredric Kay, Former Fed. Pub. Def. for the Dist. of Arizona (1984 to 2004) (Sept. 22, 2021) (on file with author).

6. *See* Rosalind R. Greene & Jan Mills Spaeth, *The Vanishing Jury Trial Phenomenon & Trial Preparation*, ARIZ. ATT'Y, Apr. 2010, at 22, 28 (2010) (stating Robert J. Hirsh, former Pima County Public Defender, reported a trial rate of 8.5% to 9% in 2005 in Pima County, dropping to 7.5% in 2010).

7. Federal District Judge William G. Young wrote that jury trials are important because "the jury achieves symbolically what cannot be achieved practically — the presence of the entire populace at every trial." William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006) (quoting PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 21 (1984)). He proclaimed: "Through the jury, we place the decisions of justice where they rightly belong in a democratic society: in the hands of the governed." *Id.* at 69–70. Juries provide a democratic "counterbalance" to a largely unelected judiciary. *See id.* at 70 (quoting AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 236 (2005)).

8. I base this on six and a half years' experience representing federal criminal defendants.

vindication.[9] But with almost no trials, they have difficulty finding live proceedings to observe — fewer opportunities for understanding its mechanics.[10] In custody, defendants have a tough time talking to each other about trials because they rarely reject plea agreements.[11] Because lawyers seldom try cases, they cannot give much information to clients about its dynamics. Although most jurors convict, trials provide more meaningful finality to defendants compared to trials where they plead guilty because the defense lawyer confronted incriminating evidence through cross examination and the jury made a final decision based on the evidence.[12]

For lawyers, trials hone litigations skills such as thinking on one's feet, assessing and giving opinions about plea offers, articulating an opinion strongly and persuasively, and maintaining a professional demeanor when disagreeing with opposing counsel or the judge.[13] Trying cases also gives young lawyers the confidence to walk away from an undesirable plea offer, skills to carefully read disclosure, produce successful ideas for motions, and realize, ahead of trial, which witnesses to call.[14] Trials are usually the last resort if one loses a motion to suppress evidence or dismiss charges, but low trial rates also mean lawyers are rarely in evidentiary hearings, where they hone cross-examination skills.[15] Trials are a break from the

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9. The wrongful conviction rate for violent crimes is "around" 0.016%–0.062%. *See* Paul G. Cassell, *Overstating America's Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 851 (2018). Figures for non-violent crimes are unknown but an estimate is that they account for 18% of all exonerations. *See* Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 757 (2017).

10. This observation comes from interviews I have conducted of criminal defendants in pre-trial federal custody, at the Central Arizona Federal Detention Center, operated by CoreCivic.

11. *See supra* text accompanying note 10.

12. Most of my convicted clients thank me for my work during trial. During trial, they saw my confrontation of witnesses and argument about the strength of evidence, which they have expressed gratitude for when the process ended.

13. *See* Emily Lonergan, *The Value of Trial Experience to a Young Lawyer*, MARQ. UNIV. L. SCH. FAC. BLOG (June 18, 2013), https://law.marquette.edu/facultyblog/2013/06/the-value-of-trial-experience-to-a-young-lawyer/ [https://perma.cc/WC3H-XLVY]. This blog post addresses civil trials, but I find its points apply equally to criminal trials. *See generally id.*

14. *See id.*

15. Although the trial rate is low on a national level, AFPDs litigate motions to suppress more often than they are in trial. From my experience, AFPDs still file pre-trial motions to suppress and to dismiss at low rates — at most two to three times a year.

norm and supply something different from the routine of negotiating pleas, preparing for sentencing, meeting with clients, and researching the law.[16]

Federal public defender offices (FPDOs) with lawyers who try cases have better reputations and thus can attract higher-quality applicants.[17] A culture of complacency can overtake offices when lawyers go years without seeing a jury: mentors disappear, confidence fades away, and lawyers forget the Federal Rules of Evidence.[18] FPDOs with minuscule trial rates more easily fail to zealously represent the majority of clients because they foster a culture of pushing pleas.[19]

But how did the federal criminal justice system get to this point? And what are the implications for public defender practice? This Article examines three factors that helped create the plea bargaining machine: the United States Sentencing Guidelines,[20] mandatory minimum sentencing laws for drug cases, and fast-track programs. It explains the machine's real-life impact through AFPD work in the Tucson sector of the District of Arizona. Because people of color disproportionately make up the criminally accused, this Article argues that the exploitation of African Americans, Latinxs, and American Indians[21] helped facilitate plea bargaining hegemony. Because trials are rare, AFPDs spend most of their

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16. This observation comes from the Author's professional experience as public defender for over 16 years. Trials usually last several days, sometimes more. Spending an entire week devoted to a trial is a welcome deviation from visiting multiple clients per week in custody, preparing for sentencing hearings, negotiating, and even writing pre-trial motions.

17. Three questions Harvard Law School encourage applicants to consider when applying to public defender offices include: (1) "Are the lawyers highly regarded by the criminal defense bar in the areas?", (2) "Does the program have a reputation for zealous advocacy?", and (3) "What is the ratio of trials to pleas?" *See* LISA D. WILLIAMS, HARVARD L. SCH., CAREERS IN INDIGENT DEFENSE 9 (2012), https://hls.harvard.edu/content/uploads/2008/07/2012pdguide.pdf [https://perma.cc/Z53V-LNB9]. Undoubtedly having trials is desirable from a hiring standpoint. *See* NAT'L ASS'N FOR L. PLACEMENT, CLASS OF 2019 NATIONAL SUMMARY REPORT, https://www.nalp.org/uploads/Classof2019NationalSummaryReport_.pdf [https://perma.cc/BWB2-5L3S] (last visited Feb. 24, 2022).

18. *See* Email from Grant Bashore, *supra* note 4.

19. *See* Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1497 (2016) ("Many other public defender offices have an unfortunate culture of pushing guilty pleas, probably due to high workloads.").

20. Also known as "federal sentencing guidelines," "sentencing guidelines," "guidelines," or "U.S.S.G."

21. The term "American Indian," the more inclusive term, is used in this Article instead of "Indigenous People." *See Native American and Indigenous Peoples FAQs*, UCLA EQUITY, DIVERSITY & INCLUSION, https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/#term [https://perma.cc/CN5N-57LL] (last visited Jan. 18, 2022). Federal Indian Law and the U.S. Office of Management and Budget, through the U.S. Census Bureau use "American Indian." *See About the Topic of Race*, U.S. Census Bureau (Mar. 1, 2022), https://www.census.gov/topics/population/race/about.html [https://perma.cc/3AUL-V592].

time advising clients to waive trial rights and on sentencing advocacy.[22] This has implications for FPDO morale, training, and recruiting. Although high plea rates may never go away, the Article supplies advice for FPDOs and AFPDs to maximize the number of cases that should go to trial and improve indigent representation.

The Article continues as follows: Part I reviews literature on the reasons for low trial rates, current federal public defense practice, and what happens when public defender offices force lawyers to go to trial. Part II surveys the history of mandatory minimums, sentencing guidelines, and fast-track programs and explains how each suppresses the trial rate in the District of Arizona through drug cases. Part III explains how the historical exploitation of African Americans, Latinxs, and American Indians relates to the racial disparity the plea bargaining machine created. Part IV delves into a brief history of FPDOs, contrasts federal to state practice, and explains how representation before the plea bargaining machine differs from practice today. Part V examines efforts to abolish mandatory minimums and how FPDOs can improve training and practice to get the most from the plea bargaining machine.

I. LAY OF THE LAND

There is vast literature on low trial rates.[23] Scholars have found various causes responsible for the vanishing trial: mandatory minimums, sentencing guidelines, Department of Justice (DOJ) charging policy, the expense and complexity of trials, and improvements in technology.[24] But their work has failed to address how these factors negatively affect federal criminal defendants of color. While praising trials as desirable, scholars also pass over how training can lower plea rates and enhance client

22. This observation is based on the Author's experience as an AFPD for over six years and a supervisory AFPD for just under one year.

23. This Part does not address every scholarly work on low federal trial rates. Instead, it focuses on several law review articles closest to the topic of federal criminal defense practice and race as they relate to low trial rates.

24. *See* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 93 (2009) (explaining that external factors such as attorney hourly rates and related expenses have decreased the trial rate); *see also* MICHAEL TONRY, SENTENCING MATTERS 148–50 (1996) (finding that federal sentencing guidelines led more offenders to plead guilty); Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 144, 149 (2018) (explaining DOJ charging policy and improved technology have increased plea bargaining and decreased the trial rate); Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 121 (2020) (finding defense attorneys and judges see mandatory minimums as major source for decrease in trial rate).

representation.[25] Although attorneys David Patton and Joseph Hall have described the plea bargaining machine's impact on federal indigent defense practice, they have failed to address the specific effects on drug and illegal entry prosecutions.[26]

A. Explanations for the Decline of Jury Trials

Professors Sheri Seidman Diamond and Jessica Salerno published the results of a national survey on civil and criminal jury trials.[27] The study found that lawyers perceived mandatory minimums, the bail system, and sentencing guidelines as the source of reduced criminal jury trials.[28] The vast majority of defense attorneys viewed mandatory minimums as having a medium or large effect on trial rate reduction.[29] Diamond and Salerno explain that an important reason for increasing plea rates after sentencing guideline implementation is downward departures for defendants who accept responsibility for the offense after pleading guilty.[30] Many characterize sentences without reductions for acceptance of responsibility after trial as the "trial penalty."[31] The National Association of Criminal Defense Lawyers (NACDL) published a report after two years of investigation into the trial penalty's causes and viable solutions.[32] It reached similar conclusions as Seidman Diamond's and Salerno's survey. The report found the causes for the decline in trial rates to include:

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25. Clara Garcia and Carole J. Powell stress the importance of training on plea bargaining but do not discuss the specifics of trial practice. *See* M. Clara Garcia Hernandez & Carole J. Powell, *Valuing* Gideon*'s Gold: How Much Justice Can We Afford?*, 122 YALE L.J. 2358 (2013).

26. *See* Joseph S. Hall, Note, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331 (1999); *see also* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578 (2013).

27. *See* Seidman Diamond & Salerno, *supra* note 24, at 119.

28. In 2016, over one-fifth of all federal offenders were convicted of an offense carrying a mandatory minimum penalty. *See id.* at 126 (citing U.S. SENT'G COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 29 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [https://perma.cc/N86A-BQHR]).

29. *See id.* at 147.

30. *See id.* at 126.

31. *See id.* (citing *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead [https://perma.cc/PZ27-S8D5]).

32. *See* Nat'l Ass'n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Jury Trial on the Verge of Extinction and How to Save It*, 31 FED. SENT'G REP. 331 (2019).

(1) Mandatory minimum sentencing provisions that have reduced the trial rate from over 20% 30 years ago to 3% today.[33] Instead of mandatory minimums leading to harsher punishments on a select group of the most culpable defendants, the DOJ uses them to strong-arm guilty pleas and punish those who exercise their right to a jury trial.[34]

(2) The sentencing guidelines, which supply excessively harsh sentencing ranges for plea bargaining when mandatory sentences do not.[35]

(3) Federal judges, who are complicit in assuring low trial rates.[36] They believe defendants who go to trial "roll the dice" and either "win big or lose big."[37] Judges accept plea bargains that compromise a severe guidelines range but rarely vary downward far from the sentencing range after trial.[38]

Lastly, Professor Ronald F. Wright, a highly cited criminal law scholar, wrote that guilty plea rates increased after the sentencing guidelines took effect.[39]

B. Plea Bargaining Machine's Impact on Federal Public Defenders and Their Clients

i. Today's Practice Versus Practice During Gideon v. Wainright

David Patton, Executive Director for the Federal Defenders of New York, compares today's federal criminal justice system to the one during the time of *Gideon v. Wainright*.[40] He argues that the contemporary accused are poorer, "disproportionately more [B]lack and Hispanic," and subject to a system with fewer trials but more frequent and lengthier pre-trial detention.[41] Today's system is "inquisitorial" because a single government investigates, finds facts, and makes crucial decisions.[42] The existing sentencing framework, with lengthy mandatory minimums, shifts

33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *Id.*
38. *See id.*
39. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129–30 (2005).
40. *See* Patton, *supra* note 26, at 2583–86.
41. *Id.* at 2587 ("[I]n the fifty years since *Gideon* was decided and the Allen Report was published, defendants in federal court have become poorer, disproportionately more [B]lack and Hispanic, and subject to a system that affords them fewer trials and imposes more frequent, lengthier pretrial detention.").
42. *See id.* at 2590.

discretion away from judges and juries to prosecutors.[43] These mandatory minimums do not provide a reasonable way to constrain discretion and unwarranted disparities. Instead of leading to more uniform or tougher sentences, they result in less transparency and fewer challenges to government conduct.[44]

Criminal defendants in federal court during *Gideon* benefited from great trial lawyers. Today, however, an accused person needs a lawyer who negotiates, counsels, and investigates to prepare for sentencing.[45] Most defense work includes gathering mitigation evidence, asking prosecutors for less prison time and reduced charges, and counseling clients about plea bargains.[46] Although 97.3% of federal defendants plead guilty, Patton contends that the few number of trials are important and require courtroom skills.[47] Patton proposes the repeal of mandatory minimum sentences, less reliance on sentencing guidelines, less draconian sentences, more pre-trial release, and fuller and more timely disclosure.[48]

ii. Trial Rate's Decline and Public Defender Offices

Unhappy with low trial rates in their office, Clara Garcia Hernandez, Chief Public Defender for the County of El Paso, and Carole J. Powell, Deputy Chief in the same office, took radical measures.[49] They developed a quota system where every lawyer had to go to trial twice a year.[50] They also created a chart with every lawyer's name, displayed on a wall, that tallied all trials.[51] They sent office-wide emails congratulating lawyers on trials, acquittals, and other favorable verdicts and gave lawyers compensatory time or administrative leave when a trial ended.[52] Supervisory file reviews included trial and plea considerations.[53]

These tactics led to complaints among staff and no meaningful results.[54] The chart misled clients and family members that high trial rates mean better lawyers.[55] It devalued pre-trial work such as obtaining release,

43. *See id.* at 2598.
44. *See id.*
45. *See id.* at 2599.
46. *See id.*
47. *See id.*
48. *See id.* at 2601.
49. *See generally* Garcia Hernandez & Powell, *supra* note 25.
50. *See id.* at 2368.
51. *See id.* at 2367.
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*

investigating defense theories and evidence, negotiating favorable outcomes, and preparation that led to favorable results before trial.[56] It overlooked lawyers who are skilled negotiators.[57] Garcia Hernandez and Powell realized that trial rates are mostly controlled by factors outside the lawyer's power.[58]

Ultimately, they developed a survey to discover what services, communication, and outcomes clients want and value from the system.[59] Out of 558 clients, 8% wanted a trial, 39% a negotiated plea, and 51% were unsure.[60] Garcia Hernandez and Powell concluded that no public defender office should operate a "plea mill" where line public defenders quickly and without preparation advise and press clients to waive the constitutional right to trial.[61] Competent pre-trial and plea practice need investigation, research, and preparation.[62] Careful trial planning can lead to favorable plea bargains.[63] Competent plea bargaining requires "imagination, resourcefulness, and acute negotiation skills" — valued in civil practice but overlooked in criminal defense.[64] Public defenders must conduct more training and education in these areas.[65]

The following are Garcia Hernandez's and Powell's main points:

(1) Public defender offices should not punish line attorneys for not going to trial.[66]

(2) Office goals should be to ensure that clients decide with lawyers' effective advice and assistance.[67]

(3) A lawyer's goals should not be driven by the expectations of a supervisor, court, or prosecutor.[68] Instead, goals should be defined by standards to keep the office from becoming a plea-mill.[69]

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56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.* at 2370.
60. *See id.*
61. *See id.* at 2366.
62. *See id.*
63. Defense attorney's case preparation can result in more lenient pleas because such preparation may convince the prosecution that the case is weak or has become weak. *See* Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 450–51 (1971) ("When a New York or Philadelphia assistant prosecutor has a case which he believes is weak, he will frequently offer large concessions to induce a guilty plea.").
64. *See* Garcia Hernandez & Powell, *supra* note 25, at 2366.
65. *See id.*
66. *See id.* at 2370.
67. *See id.* at 2365–66.
68. *See id.* at 2370.
69. *See id.*

(4) The amount and quality of work performed by lawyers on cases does not correlate with the number of trials.[70]

(5) Public defender offices should look for ways to increase trial numbers without sacrificing more favorable outcomes such as dismissals.[71]

While the El Paso County Public Defender's Office trial rate remained low after Garcia Hernandez's and Powell's experiment, close to half of the trials resulted in acquittals.[72] Eighty-two percent of all adult cases resolved favorably relative to the prosecutor's initial plea-bargain offer.[73] In fiscal years 2011 and 2012, the Office obtained dismissals on almost a quarter of felonies, more than a third of misdemeanors, and a third of juvenile cases.[74] The El Paso office has become more client-centered in process and client-driven in outcomes.[75]

iii. Low Trial Rate's Impact on Assistant Federal Public Defenders

Attorney Joseph Hall authored an article on the impact of the sentencing guidelines on AFPDs and their clients.[76] Although overworked for years before the creation and application of the guidelines, AFPDs became busier after their implementation because sentencing practice became more time consuming and complicated.[77] AFPD clients also got worse sentencing outcomes.[78] Prosecutors exploited this reality by threatening harsher penalties if defendants did not accept a plea offer.[79] The sentencing guidelines also increased the difference between trial and plea outcomes. This contributed to innocent clients pleading guilty at higher rates.[80]

Hall argues that because the guidelines made sentencing practice more laborious, AFPDs are now more prone to curtailing sentencing litigation.[81] Before the guidelines, AFPDs entered into agreements in cases in exchange for agreements in other cases to preserve a working relationship with the prosecution.[82] This extends to practice after guideline implementation; at

70. *See id.*
71. *See id.*
72. *See id.* at 2369.
73. *See id.*
74. *See id.* at 2368.
75. *See id.* at 2370.
76. *See* Hall, *supra* note 26.
77. *See id.* at 1334.
78. *See id.* at 1370.
79. *See id.* at 1334.
80. *See id.* at 1347 (citing William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 39 n.129 (1997)).
81. *See id.* at 1344.
82. *See id.* at 1345.

sentencing, new extended work makes AFPDs reluctant to raise all possible issues "for fear of upsetting the prosecutor and the judge."[83]

C. New Ways to Understand the Decline in Federal Trials

i. The Booker *Decision, Charging Policy, and Trial Complexity and Expense*

Judge Robert J. Conrad and Attorney Katy Clements authored an article on the decline of criminal jury trials, focusing on the ten-year span from 2006 to 2016.[84] During this period, the number of criminal defendants who went to trial nationwide decreased by 47%.[85] Conrad's and Clements's thesis is that mandatory minimum penalties, the sentencing guidelines, and cooperation are the old trial-reducing factors that scholars have attributed as responsible for causing the trial decline but are no longer applicable.[86] Instead, the *United States v. Booker*[87] decision, DOJ charging policy, and external factors such as the expense of trials and stronger evidence decreased trial rates and increased plea bargaining.[88]

1. The Booker *Decision*

These reasons explain how the *Booker* decision decreased the trial rate[89]:

(1) Courts now view the guidelines range as the highest number of months to impose at sentencing.[90] Only 2.4% of the 66,961 cases in the United States Sentencing Commission's sentencing data for fiscal year 2016 received above-guidelines-range sentences.[91] Approximately 48.6% of cases that year received within-guidelines-range sentences and 49.0% received below-guidelines-range sentences.[92] Downward variances

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83. *Id.* (first citing Robinson O. Everett, *Toward a More Effective Right to Assistance of Counsel*, 58 LAW & CONTEMP. PROBS. 1, 1–3 (1995); then citing MILTON HEUMANN, PLEA BARGAINING 131–38 (1978)).

84. *See* Conrad & Clements, *supra* note 24.

85. *See id.* at 105 ("From 2006 to 2016, the overall number of criminal jury trials declined by 47%, and the jury trial rate declined by almost 40%.").

86. *See id.* at 127.

87. 543 U.S. 220 (2005) (finding the sentencing guidelines are advisory).

88. *See* Conrad & Clements, *supra* note 24, at 115.

89. *See id.* at 133–36.

90. *See id.* at 133.

91. *See id.* at 133 n.185 (citing U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/TableN.pdf [https://perma.cc/YB4E-TM2V]).

92. *See id.*

increased from 28.4% of cases before *Booker* to 49.0% of cases in 2016.[93] Because plea offers post-*Booker* more easily reduce the applicable sentencing range compared to trial, defense lawyers view plea bargaining as lower risk for clients.[94]

(2) *Booker* elevated the importance of sentencing hearings.[95] It now makes sense to avoid jury trials because they provide a greater opportunity to present incriminating evidence, which has only gotten stronger over the twentieth century.[96] If the prosecution must present a broad range of incriminating facts to a jury, they would have an easier time presenting it to a judge at sentencing if the case went to trial. Defense lawyers choose the narrower scope at sentencings after plea agreements.[97]

2. DOJ Charging Policy

DOJ charging policy under former United States Attorney Generals John Ashcroft and Eric Holder has not stopped the decrease in trials.[98] Despite ideological differences, both have helped lower the trial rate.[99] Notably, Eric Holder emphasized charging more immigration crimes compared to drug crimes.[100] Holder also encouraged fast-track charging to resolve cases quickly.[101] Thus, the Honorable Robert J. Conrad and Katy Clements indicate this helped increase the plea rate by a couple of percentage points more compared to Ashcroft.[102]

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93. *See id.* at 133.

94. *See id.* at 133–34.

95. *See id.* at 134.

96. *See id.*

97. *See id.*

98. *See id.* at 146 ("[T]the number of jury trials continues to decline.").

99. *See generally id.* at 144–49.

100. *See id.* at 142 (citing *Statistical Tables for the Federal Judiciary: Table D-2*, ADMIN. OFF. U.S. CTS. (Dec. 2015), https://www.uscourts.gov/data-table-numbers/d-2 [https://perma.cc/QE5V-NVXE] ("Holder invested more prosecutorial resources in filing immigration charges as illegal immigration became a growing national problem.")).

101. *See id.*

102. *See id.* at 147 (first citing U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf [https://perma.cc/NV6E-8DSV]; then citing U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureC.pdf [https://perma.cc/WG3D-CH9W]; and then citing U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2005), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2005/fig-C-post_0.pdf [https://perma.cc/RQ63-8VMT]) ("In 2014 and 2015, after Holder's memoranda, plea agreements resolved almost 97% of convicted defendants' cases compared to the 94.5% under Ashcroft in 2005.").

3. External Factors

Several external factors have made trials less appealing and helped decrease the trial rate in the last two decades. First, technology has improved the ability of cell phones and other devices to store more incriminating evidence, which the government can access and present at trial.[103] Technology has also improved the ability to present evidence in a more compelling way in the courtroom: larger screens today can display computer animations to jurors.[104] Second, trial preparation is more time consuming because of the increased use of experts, expenses for experts and other witnesses, and higher hourly rates for attorneys.[105] These factors pressure the government and the defense to settle.[106] Third, plea bargain expectations for prosecutors, judges, and defense lawyers are different.[107] As opposed to 30 years ago, all see trial as failure.[108] Prosecutors find that a case must be flawless to go to trial and believe it is worse for one's career to lose a case at trial compared to not taking cases to trial.[109] Conrad and Clements say this pressures more prosecutors to plea bargain.[110] Judges also find that trials leave more room for reversible error, so they also want more plea bargaining.[111]

a. Improved Technology and Investigations

Professor Darryl Brown argues that trial rates in criminal cases decreased from roughly 20% in the 1990s to 3% today not because of broad discovery regimes that led to the same decrease in civil cases but because law enforcement is more adept at gathering more and stronger evidence against criminal defendants.[112] Technology and investigative tactics have made criminal cases stronger for the government.[113] Today, with witnesses, audio and video recordings, currency recovered after arrest, and "buy money" used in stings, prosecutors with sufficient resources can more

103. *See id.* at 150–51.
104. *See id.*
105. *See id.* at 152.
106. *See id.* at 152–53.
107. *See id.* at 154.
108. *See id.* at 155.
109. *See id.*
110. *See id.*
111. *See id.* at 154–55.
112. *See* Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 192–93 (2018).
113. *See id.* at 174–76.

easily evaluate and charge crimes.[114] With stronger evidence, prosecutors today can also offer incentives for codefendants in gang or conspiracy cases to cooperate.[115]

Brown also makes the case that federal plea rates are high because of mandatory minimums, sentencing guidelines, and U.S. Supreme Court precedent that permits prosecutors to hard bargain with defendants.[116] For instance, it is legally permissible for prosecutors to charge offense A, offer a plea agreement with range of sentence Y, but, if the defendant declines, supersede the formal accusation with charge B, which could double or triple sentence Y.[117] This is easier today because the government has stronger evidence.[118] Stronger evidence makes it difficult for defense attorneys to bargain for a deviation from standard plea agreements.[119]

Literature on the vanishing trial is expansive. Traditional explanations have been updated with newer evidence post-*Booker*. The impact of technology and stronger evidence have contributed to plea bargaining hegemony.[120] Although scholars have discussed the impact on public defense practice, they have neglected training alternatives.[121] Race has also not been closely analyzed in the conversation of trial reduction.[122]

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114. *See id.* at 185 (quoting Besiki L. Kutateladze, Victoria Z. Lawson & Nancy R. Andiloro, *Does Evidence Really Matter? An Exploratory Analysis of the Role of Evidence in Plea Bargaining in Felony Drug Cases*, 39 LAW & HUM. BEHAV. 431, 431, 433 (2015)).

115. *See id.* at 186.

116. *See id.* at 193, 198–99.

117. *See id.* at 193 (first citing Bordenkircher v. Hayes, 434 U.S. 357, 363–64 (1978) (affirming prosecutor's decision to add charge carrying life sentence after defendant declined a plea offer carrying a five-year sentence); then citing Mabry v. Johnson, 467 U.S. 504, 507–09 (1984) (finding a prosecutor is not required to abide by original plea bargain offer after defendant accepts it but before court accepts it); and then citing United States v. Goodwin, 457 U.S. 368 (1982) (finding a prosecutor's decision to add felony charge after defendant declines to plead guilty to a misdemeanor not constitutionally vindictive)).

118. *See id.* at 184.

119. *See* Adam Robison, *Waiver of Plea Agreement Statements: A Glimmer of Hope to Limit Plea Statement Usage to Impeachment*, 46 S. TEX. L. REV. 661, 691 (2005) (noting that a "prosecutor would benefit more when she has a strong case against the accused, because she is in a better position to obtain what she wants under the terms of the plea agreement").

120. *See* Brown, *supra* note 112, at 174–76, 187.

121. David Patton and Joseph Hall explain the impact of low trial rates on AFPDs but do not propose any training possibilities for improvement. *See* Patton, *supra* note 26; *see also* Hall, *supra* note 26.

122. David Patton explains that defendants of color are more prevalent in today's federal system, but his article stops there. *See* Patton, *supra* note 26, at 2600–01.

II. MANDATORY MINIMUMS, SENTENCING GUIDELINES, AND FAST-TRACK PROGRAMS

This Part provides a brief history of mandatory minimum punishments for drug offenses, federal sentencing guidelines, and fast-track programs. It applies each to federal defense in the Tucson sector of the District of Arizona. Contemporary practice in drug cases shows the plea bargaining machine at work.

A. How the Plea Bargaining Machine Reduced Trial Rates[123]

i. Mandatory Minimums for Drug Offenses

The mandatory minimum sentencing laws in effect today for drug crimes were not the first.[124] In 1956, Congress enacted the Narcotics Control Act, which established a regime of compulsory punishments for the most serious drug importation and distribution offenses.[125] It provided statutory minimums based on the controlled substance and the number of a defendant's prior drug convictions.[126] In 1970, Congress implemented the Comprehensive Drug Abuse Prevention and Control Act.[127] It included the repeal of statutory mandatory sentencing provisions for drug offenses except those applicable to a special category of professional criminals.[128]

Today's statutory penalty scheme for drug offenses originated in the 1980s when events and public opinion gave impetus to sweeping criminal

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123. Technology has contributed to declining trial rates. The advent of smart phones and heavier reliance on digital communication makes prosecution easier because evidence remains on a phone. *See* Brown, *supra* note 112, at 180 (finding that technology has helped the government obtain more incriminating evidence, which, if shared with the defense, leads to more guilty pleas). Although the Supreme Court held that people have an expectation of privacy in cell phones, authorities may conduct a cursory search under the border search authority. *See* Riley v. California, 573 U.S. 373, 387 (2014) (finding an interest in preventing destruction of evidence did not justify dispensing with warrant requirement for searches of cell phone data). *But see, e.g.*, United States v. Cano, 934 F.3d 1002, 1018 (9th Cir. 2019) (border search exception to the Fourth Amendment's warrant requirement authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband; a broader search cannot be justified by the particular purposes served by the exception).

124. *See* Molly Gil, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT'G REP. 55, 55 (2008) ("It is not the first time in American history that they have been used and failed.").

125. *See id.* at 57 ("Sentences for drug traffickers were increased to a five-year minimum for a first offense and a ten-year minimum for all subsequent violations.").

126. Narcotics Control Act of 1956, Pub. L. No. 84-728, § 103, 70 Stat. 567, 568. The penalty provisions also prohibited probation and parole. *See id.*

127. *See* William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 318 (1993).

128. *See id.*

law reform.[129] Popular tragedies such as the death from cocaine overdose of University of Maryland's basketball star and first draft pick of the Boston Celtics, Len Bias, convinced many that the United States faced a drug crisis.[130] Drug abuse became the most important public concern, surpassing economic problems.[131] Congress believed authorities processed major drug traffickers quickly through the system, only to see them return to criminal activities because of lenient sentencing practices.[132] U.S. society believed rehabilitation of offenders failed and harsh punishments were necessary.[133]

Congress looked for ways to decrease the supply and demand for drugs through statutorily mandated sentencing provisions such as the Anti-Drug Abuse Act of 1986.[134] This Act imposes severe mandatory minimum penalties for drug trafficking.[135] It requires five-year mandatory minimum penalties to "'serious' traffickers and . . . ten-year mandatory minimum penalties to 'major' traffickers."[136] Drug quantity identifies the offender.[137] For example, possession for distribution of one kilogram or more of a mixture or substance containing a detectable amount of heroin triggers a mandatory minimum sentence of ten years' imprisonment without parole.[138] Possession for distribution of five kilograms or more of a mixture or substance containing a detectable amount of cocaine also triggers a ten-year sentence.[139] Congress provided five-year mandatory minimum penalties for those involved in trafficking smaller quantities.[140] Trafficking in 100 grams or more of a mixture or substance containing a detectable amount of heroin, or 500 grams or more of a mixture or

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129. *See* Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 3 (2015); *see also* 132 CONG. REC. 26,436 (1986) (statement of Sen. Hawkins) ("Drugs pose a clear and present danger to America's national security. If for no other reason we should be addressing this on an emergency basis.").

130. *See* Saris, *supra* note 129.

131. *See* Wilkins et al., *supra* note 127, at 315.

132. *See id.*

133. *See* Saris, *supra* note 129, at 4; *see also* U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIME JUSTICE SYSTEM 7 (1991) (discussing a shift away from a rehabilitative model toward controlling crime using "more certain, less disparate, and more appropriately punitive" sentences).

134. *See* Wilkins et al., *supra* note 127, at 315; *see also* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -5 (amending 28 U.S.C. § 841(b)(1)).

135. *See* Saris, *supra* note 129, at 3.

136. *Id.* at 3–4 (quoting U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6 (2002)).

137. *See id.*

138. *See* Wilkins et al., *supra* note 127, at 316 (citing 21 U.S.C. § 841(b)(1)(A)(i) (1988 & Supp. III 1991)).

139. *See id.*

140. *See* 21 U.S.C. § 841(b)(1)(B).

substance containing a detectable amount of cocaine triggered the five-year mandatory minimum.[141]

The Anti-Drug Abuse Act of 1986 also harshly punishes defendants with prior convictions for offenses that resulted in death or serious injury, or if distribution was to a vulnerable person.[142] If a defendant has a prior conviction for a felony drug offense, the Act sets the mandatory minimum at twice the otherwise applicable number of years.[143] If death or serious bodily injury resulted from a controlled substance, a mandatory minimum of 20 years would apply.[144] The 1986 Act also requires a mandatory minimum punishment if the drug distribution was to a person under age 21, to a pregnant female, or involved a minor in the distribution process.[145]

The Anti-Drug Abuse Act of 1988, a similarly harsh law, includes a provision that makes mandatory minimum sentences for drug distribution and importation offenses applicable to convictions for attempts and conspiracies to commit those offenses.[146] It also amended 21 U.S.C. § 844 to make crack cocaine the only drug with a mandatory minimum penalty for a first offense of simple possession.[147]

ii. Federal Sentencing Guidelines

Criticism of regularity and severity in criminal punishment dates back centuries, to as early as the 1700s.[148] Back then, detractors voiced concerns about rising crime rates to illustrate that the justice system did not appropriately sanction individuals convicted of criminal offenses.[149] These

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141. *See id.* The legislative history suggests that the five-year mandatory minimum would apply to mid-level drug dealers (called "serious traffickers"). *See* H.R. REP. NO. 99-845, at 17 (1986).

142. *See* 21 U.S.C. § 841(b)(2).

143. *Id.*

144. *Id.* § 841(b)(1)(A)–(B).

145. *Id.* §§ 859, 860, 861.

146. Pub. L. No. 100-690, § 6470(a), 102 Stat. 4181, 4377.

147. *See* Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 358 (2010) (citing AM. BAR ASS'N, JUSTICE KENNEDY COMM'N, REPORT WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (2004)). The Act also made possession of more than five grams of a mixture or substance containing cocaine base punishable by at least five years in prison. The five-year minimum penalty also applies to possession of more than three grams of cocaine base if the defendant has a prior conviction for crack cocaine possession and to possession of more than one gram of crack if the defendant has two or more prior crack possession convictions. *See* Anti-Drug Abuse Act of 1988 § 6371.

148. *See* Wilkins et al., *supra* note 127, at 307.

149. *See id.* (first citing DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 52–53, 61–62 (1971); then citing MICHEL

observers argued deterrence was ineffective in reducing crime.[150] They saw capital punishment as the sanction of choice, but juries seldom imposed it.[151]

Reforms moved sentencing policy toward fixed terms of imprisonment.[152] By the early 1800s, most states adopted criminal statutes with fixed sentence terms.[153] This marked change to potential rehabilitation; lengthy imprisonment periods would serve deterrence and rehabilitation purposes.[154] Congress ratified an indeterminate sentencing system in 1910 with a parole board deciding release dates.[155] This system existed until the 1970s, "when reformers denounced the rehabilitative model as ineffective, capricious, and discriminatory."[156]

From the 1910s until the enactment of the sentencing guidelines in 1984, no system provided consistency.[157] Judges had substantial discretion in deciding the sentence for any person accused of a crime.[158] Outside of statutory maximums and constitutional limits, judges applied their own sense of justice.[159] Even the United States Supreme Court tried to ameliorate this problem in 1949 when the Court ruled judges should "consider 'the fullest information possible concerning the defendant's life and characteristics.'"[160] This directive supplied no uniformity. Judges continued to differ on the length of punishment for any person's crime.[161] Sentencing for similar crimes led to different results.[162] For instance,

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FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 7–23 (Alan Sheridan, trans. 1977)).

150. *See id.* (citing FOUCAULT, *supra* note 149, at 7–23).

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.* at 308 (citing Act of June 25, 1910, ch. 387, 36 Stat. 819).

156. *Id.* (first citing Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974); then citing DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 1 (1975)).

157. *See* Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1051–55 (2001).

158. *See* Jane A. Dall, *"A Question for Another Day": The Constitutionality of the U.S. Sentencing Guidelines Under* Apprendi v. New Jersey, 78 NOTRE DAME L. REV. 1617, 1620 (2003).

159. *See id.* (citing THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 10.1, at 1685 (2002)).

160. *See id.* at 1619–20 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

161. *See id.* at 1620.

162. *See id.*

judges imposed longer sentences on people of color compared to whites for the same crime, even when both had similar backgrounds.[163]

The changes that led to the present system originated when Senator Edward M. Kennedy, propelled by critics of the rehabilitative model, introduced a bill in 1975 calling for a judicial commission to promote guidelines for federal courts to address sentencing disparities.[164] The Senate, driven by similar concerns, tried to revise the criminal code but failed.[165] They instead took the sentencing reform legislation from this effort and inserted it into a "criminal law-strengthening package."[166] The Senate eventually passed the Comprehensive Crime Control Act of 1984,[167] which included the Sentencing Reform Act of 1984 (SRA), early that year.[168] The House of Representatives ratified it, and President Reagan signed it into law on October 12.[169]

The SRA included the sentencing guidelines,[170] which "provide[d] for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[171] The guidelines' basic purpose is to provide consistency and predictability to the federal sentencing system.[172] To achieve this goal, the district judge determines the appropriate sentencing guidelines range by: "(1) [F]inding the applicable offense level and offender category and then (2) consulting a table that lists proportionate sentencing ranges . . . at the intersections of rows (marking offense levels) and columns (marking offender categories)."[173] The intersection of criminal history and offense level determines the sentencing range for the criminal defendant.[174] This mechanical process should lead to uniformity across all federal districts,

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163. *See id.*

164. *See* Wilkins et al., *supra* note 127, at 309–10 (citing 21 CONG. REC. 37,562 (1975)).

165. *See id.* at 310.

166. *Id.* (citing S. Res. 1762, 98th Cong. 2d Sess, 130 CONG. REC. 1649 (1984)).

167. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 209–210, 98 Stat. 1837, 1986–87 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C).

168. *See* William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1053 n.13 (1992) (stating that the Sentencing Reform Act of 1984 (SRA) is found in Title II of the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3553).

169. *See* Wilkins et al., *supra* note 127, at 310.

170. *See* 28 U.S.C. § 994.

171. *See* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A.1.2 (U.S. SENT'G COMM'N 2021).

172. *See* Memorandum from Attorney General John Ashcroft on Setting Forth Justice Department's Sentencing Policies to All Fed. Prosecutors (July 28, 2003), 15 FED. SENT'G REP. 375, 375, 2003 WL 22208857.

173. *See* Dorsey v. United States, 567 U.S. 260, 265 (2012).

174. *See* Quincy H. Ferrill, *Enhancement Without a Cause:* United States v. Serfass *and Its Erasure of the Scienter Requirement*, 53 TEX. TECH L. REV. 311, 315 (2021).

but that has not been the case.[175] In the Author's experience, judges, even in the same courthouse, disagree, sometimes substantially, over appropriate sentencing decisions.

The SRA required judges to impose a sentence within the guidelines range absent circumstances that justify a departure.[176] This changed after the Supreme Court, in *United States v. Booker*, held that the guidelines violated the Sixth Amendment and made them advisory.[177] After *Booker*, opinions empowered judges to ignore the mechanical method of finding the appropriate guideline range when imposing sentences.[178] Despite this new freedom, judges still impose within guidelines sentences in approximately 80% of decisions.[179]

Research into trial rates after the Supreme Court held the guidelines constitutional in 1989[180] shows trial rates decreased.[181] Plea bargaining rates remained between 84% and 85% from 1984 to 1989.[182] They climbed soon after, reaching 94% by 2001.[183] In 2019, the plea rate in federal court was 90%.[184] The significance of these increases shows the guidelines were

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175. *See* Emily W. Andersen, Note, *"Not Ordinarily Relevant": Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1506–07 (2015) (citing AM. COLL. OF TRIAL LAWS., UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 190 (2004), http://www.prisonpolicy.org/scans/Sentencing Guidelines_3.pdf [http://perma.cc/FN82-FSEB]).

176. *See* 18 U.S.C. § 3553(b)(1).

177. 543 U.S. 220, 226–27 (2005).

178. *See, e.g.*, Rita v. United States, 551 U.S. 338, 346 (2007) (finding a sentence within a properly calculated guideline may be presumptively reasonable); Kimbrough v. United States, 552 U.S. 85, 91 (2007) (finding a district court can justify a sentence outside a properly calculated guideline range based on the disagreement with the policy judgments of the Sentencing Commission undergirding a particular guideline); Gall v. United States, 552 U.S. 38, 4547 (2007) (stating appellate courts may not presume that a sentence outside the Guidelines range is unreasonable).

179. *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1682 n.274 (2012) (citing U.S. SENT'G COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2011)) ("The precise rate is 82.6%, including 54.5% within the range, 26.3% below the range based on a government motion, and 1.8% above the range.").

180. Mistretta v. United States, 488 U.S. 361, 412 (1989) (finding the United States Sentencing Commission constitutional and that Sentencing Guidelines represented a constitutional delegation of powers).

181. *See* John B. Meixner & Shari Seidman Diamond, *Does Criminal Diversion Contribute to the Vanishing Civil Trial?*, 62 DEPAUL L. REV. 443, 453 (2013).

182. *See id.*

183. *See id.* (citing GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 223 tbl.9.1 (2003)).

184. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://pewrsr.ch/2F1Qxn7 [https://perma.cc/3WRL-NQP8]. And for those defendants who choose to go to trial, the conviction rate is greater than 80%. *See id.*

a factor in persuading lawyers in more cases to advise clients to accept plea agreements instead of going to trial.

iii. Fast-Track Programs

Fast-track programs give prosecutors the power to offer defendants a reduced sentence in exchange for a pre-indictment guilty plea.[185] The purpose of these programs is to "facilitate prompt and easy disposition of cases to reduce the burdens they impose" on districts.[186] These burdens included growing numbers of defendants leading to problems of physical space and staff.[187] There was insufficient space to house detained defendants and not enough prosecutors to handle all cases brought to them in districts along the southwestern border.[188] Prosecutors used fast-track, a more formalized version of the flip-flop program used in the Southern District of California since the 1970s, to ameliorate the problem.[189] The United States Attorney's Office (USAO) for the Southern District of California implemented the first fast-track program in 1993.[190] It applied to immigration defendants charged with violating 8 U.S.C § 1326(b).[191] This law carried a maximum penalty of five or 15 years, depending on whether the court convicted the defendant of an aggravated felony.[192] Under this first fast-track policy, defendants could enter a pre-indictment plea to violating § 1326(a), which carries a maximum two-year sentence.[193] To take advantage of the favorable plea, the accused had to waive

185. *See generally* Erin T. Middleton, *Fast-Track to Disparity: How Federal Sentencing Policies Along the Southwest Border Are Undermining the Sentencing Guidelines and Violating Equal Protection*, 2004 UTAH L. REV. 827.

186. United States v. Medrano-Duran, 386 F. Supp. 2d 943, 944 (N.D. Ill. 2005).

187. *See id.*

188. *See id.*

189. *See* Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 90–91 (2012) (citing *Hearing Before the Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary on S. 1064*, 93d Cong. 751 (1973)). In the flip-flop program undocumented crossers who had been previously excluded would be charged with a two-count complaint for misdemeanor illegal entry (which has a six-month statutory-maximum penalty) and felony illegal re-entry (two-year statutory-maximum penalty). If the person agreed to plead guilty to the misdemeanor count of illegal entry before formal accusation the prosecutor dropped the felony illegal re-entry charge. *See id.* The agreement benefitted the defendant and the government. The defendant avoided a felony conviction and received a lower statutory-maximum penalty. *See id.* The program efficiently processed cases by avoiding the district court dockets and grand jury proceedings. *See id.*

190. *See* United States v. Estrada-Plata, 57 F.3d 757, 759 (9th Cir. 1995).

191. *See id.*

192. *See id.*

193. *See id.*

indictment,[194] enter the plea at the first hearing before the court,[195] waive sentencing appeal,[196] stipulate that the guideline range exceeds the two-year maximum,[197] and agree not to argue for departures or downward adjustments.[198]

It was not long before fast-track programs grew. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act mandated the United States Attorney General to set standards for fast-track programs nationally within six months.[199] Attorney General John Ashcroft sent memos to all federal prosecutors.[200] The memos authorized them to agree to downward departures when a fast-track program and details for implementation are in place.[201] The memos explained that fast-track programs are reserved only for rare situations, including when a district's resources are limited by a larger than normal volume of particular types of cases.[202]

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194. FED. R. CRIM. P. 7(b) (stating that a person may waive an indictment to a felony offense "by information if the defendant — in open court and after being advised of the nature of the defendant's rights — waives prosecution by indictment.").

195. *See Estrada-Plata*, 57 F.3d at 759.

196. The Supreme Court has held that a criminal defendant can elect to waive important constitutional and statutory rights during the plea-bargaining process. *See* United States v. Mezzanatto, 513 U.S. 196, 201 (1995). This includes the waiver of a sentencing appeal in a plea agreement. *See* United States v. Allison, 59 F.3d 43, 46 (6th Cir. 1995); *see also* United States v. Schmidt, 47 F.3d 188, 192 (7th Cir. 1995); United States v. Attar, 38 F.3d 727, 731 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1957 (1995); United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 652 (1994); United States v. DeSantiago-Martinez, 980 F.2d 582, 583 (9th Cir. 1992), *amended*, 38 F.3d 394 (1994), *cert. denied*, 115 S. Ct. 939 (1995); United States v. Melancon, 972 F.2d 566, 567–68 (5th Cir. 1992); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992); United States v. Rutan, 956 F.2d 827, 829–30 (8th Cir. 1992).

197. *See Estrada-Plata*, 57 F.3d at 759.

198. *See id.*

199. Pub. L. No. 108-21, § 401(m), 117 Stat. 650, 675 (2003) ("Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall — . . . (2) promulgate, pursuant to section 994 of title 28, United States Code — . . . (B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney . . . .").

200. *See* Rebecca Schendel Norris, *Fast-Track Disparities in the Post*-Booker *World: Re-Examining Illegal Reentry Sentencing Policies*, 84 WASH. U. L. REV. 747, 756 (2006); *see also* Memorandum from John Ashcroft, Att'y Gen., Dep't of Just., on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing to all Fed. Prosecutors (Sept. 22, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm [https://perma.cc/6GX6-C78M]; Memorandum from John Ashcroft, Att'y Gen., Dep't of Just., on Setting Forth Justice Department's "Fast Track" Policies to all Fed. Prosecutors (Sept. 22, 2003) [hereinafter Aschroft Memorandum, Setting Forth], *reprinted in* 16 FED. SENT'G REP. 134 (2003).

201. *See* Norris, *supra* note 200, at 756–57.

202. *See* Aschroft Memorandum, Setting Forth, *supra* note 200.

Fast-track programs permit prosecutors to "offer lower sentences in exchange for guilty pleas" to promote efficiency.[203] In the District of Arizona, fast-track programs are available for reactive drug cases, immigration violations of 8 U.S.C. § 1326, and alien smuggling under 8 U.S.C. § 1324.[204] Absent unusual circumstances, plea agreements for drug cases in Arizona are "fast-track."[205] Prosecutors offer four points off for government savings (the "fast-track" reduction), three points off for acceptance of responsibility, and two points off for safety valve.[206] A standard plea offer in a drug case also permits the defendant to argue for variances and minimal or minor role adjustments, but no other departures.[207]

B. How Mandatory Minimums, Sentencing Guidelines, and Fast-Track Programs Fuel the Plea Bargaining Machine in Arizona Drug Cases

i. National Charging Policy and Impact of Defense Attorney Advice

On January 29, 2021, Acting Attorney General Monty Wilkinson reinstated Attorney General Eric Holder's 2010 criminal charging policy.[208] The policy requires prosecutors to make individualized assessments for charging, plea bargaining, and sentencing in each case.[209]

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203. *See* Joy Anne Boyd, Commentary, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 598 (2004).

204. This is based on my trial practice in the Evo DeConcini U.S. Courthouse in Tucson, Arizona.

205. *See* Norris, *supra* note 200, at 748, 757 (citing Government's Memorandum of Law in Opposition to the Defendant's Motion for a Non-Guideline Sentence Based on the Existence of Fast-Track Programs at 46, United States v. Krukowski, No. 04 Cr. 1308 (S.D.N.Y. filed June 10, 2005)).

206. *See* U.S. SENT'G GUIDELINES MANUEL § 5K3.1 (U.S. SENT'G COMM'N 2022) (fast-track savings); *see also id.* § 3E1.1 (acceptance of responsibility); *id.* § 5C1.2 (safety valve).

207. *Id.* § 3B1.2.

208. *See* Memorandum from the Acting Att'y Gen., Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing to all Fed. Prosecutors (Jan. 29, 2021), https://www.justice.gov/ag/page/file/1362411/download [https://perma.cc/6H7Y-F5CR]. The Acting Attorney General was Monty Wilkinson. *See* Sheena Foye & James R. Wyrsch, *DOJ Issues Interim Policy Allowing for Prosecutorial Discretion in Criminal Prosecutions*, AM. BAR ASS'N (Mar. 22, 2021), https://www.americanbar.org/groups/litigation/committees/criminal/practice/2021/doj-issues-interim-policy-allowing-for-prosecutorial-discretion-in-criminal-prosecutions/ [https://perma.cc/8UEP-F9QC].

209. Memorandum from Eric H. Holder, Jr., Att'y Gen., on Department Policy on Charging and Sentencing to all Fed. Prosecutors (May 19, 2010), http://lawprofessors.typepad.com/files/holdermemo.pdf [https://perma.cc/D7M8-5R9A]. Specifically:

> [C]harging, plea agreements, and advocacy at sentencing must be made on the merits of each case, taking into account an individualized assessment of the defendant's conduct and criminal history and the circumstances relating to

Wilkinson's directive is less severe compared to previous orders under former Attorney General Jeff Sessions but has not changed drug courier treatment.[210] Under the new policy, the government continues to prosecute low-level couriers under mandatory minimum sentencing laws.[211] Following national policy, federal prosecutors in Arizona file charges capturing the full weight of drugs seized by agents. These charges, more often than not, trigger mandatory minimum punishments.[212]

As of this writing, Attorney General Merrick Garland, Wilkinson's permanent replacement, can reinstate Eric Holder's 2013 directive, which forbade prosecutors to pursue charges carrying mandatory minimums absent specific circumstances.[213] Such change is not expected to increase trial rates.[214] This is illustrated during this Author's experience as an AFPD. This Author's first two years of federal practice, 2015 to early 2017, coincided with the application of the 2013 Holder Memo. Clients accused of drug trafficking during that period did not reject plea agreements at higher rates compared to clients charged under Attorney Generals Jeff Sessions or William Barr.[215] The bulk of my cases during that period consisted of drug cases positively affected by the Holder Memo.

Prosecutorial and judicial practice impact attorney recommendations to clients. Defense lawyers correctly advise clients that if they go to trial, judges are less likely to take two points off for acceptance of responsibility,

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> commission of the offense (including the impact of the crime on victims), the needs of the communities we serve, and federal resources and priorities.

See id.

210. Session's policy required prosecutors to pursue the most serious, readily provable offense. Memorandum from Att'y Gen., Department Charging and Sentencing Policy to all Fed. Prosecutors (May 10, 2017), https://www.justice.gov/opa/press-release/file/965896/download [https://perma.cc/R874-3UMK] ("[P]rosecutors should charge and pursue the most serious, readily provable offense.").

211. Absent explicit reversal of the May 10, 2017, directive, prosecutors continue to indict defendants under charges requiring mandatory minimum sentences.

212. The quantity of drugs required to trigger mandatory minimum amounts are the following: heroin (100 grams (5 years), 1 kilogram (10 years)); cocaine (500 grams (5 years), 5 kilograms (10 years)); methamphetamine mixture (50 grams (5 years), 500 grams (10 years)); pure methamphetamine (5 grams (5 years), 50 grams (10 years)); and marijuana (100 kilograms or 100 plants (5 years), 1,000 kilograms or 1,000 plants (10 years)). 21 U.S.C. § 841(b)(1)(A)–(B).

213. *See* Memorandum from Eric H. Holder, *supra* note 209.

214. *See* Conrad & Clements, *supra* note 24, at 139 ("During Holder's tenure as Attorney General, jury trials of drug prosecutions decreased by forty-nine percent from 932 jury trials in 2009 to 473 trials in 2015.").

215. For example, the trial rate in Arizona in 2016, in which 44.2% of cases were drug related, was only 0.7%. *see* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2016, DISTRICT OF ARIZONA fig.A, tbls.1, 5 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2016/az16.pdf [https://perma.cc/QJ6D-FF9L].

not give safety-valve relief, and add two points for obstruction of justice if they testify and are found guilty by a jury.[216] Defense lawyers also advise what prosecutors may do if a client exercises her right to trial: supersede the formal accusation with more charges or allege a sentencing enhancement such as prior convictions.[217] These recommendations are correct: prosecutors make good on their promises to supersede indictments or allege sentencing enhancements. They also heavily influence clients to waive their rights to a jury trial and accept a plea agreement.

If the accused signs a plea agreement and is contrite about the crime during the pre-sentence interview, the guidelines guarantee two points off for acceptance of responsibility and almost always three points if the offense level is 16 or higher.[218] The third point for acceptance of responsibility, controlled by the government, is guaranteed in plea agreements for routine drug cases in Arizona. Plea agreements also guarantee four points off for the fast-track program.[219] These incentives, even in cases that do not require mandatory minimums, make it difficult for defendants to reject plea agreements because the potential prison time reduced is substantial.[220]

ii. Drug Cases in Arizona

In 2019, drugs constituted 28% of all criminal filings in federal courts.[221] In the same year, drug cases constituted 16.3% of all federal criminal

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216. *See* U.S. SENT'G GUIDELINES MANUEL § 3E1.1 (U.S. SENT'G COMM'N 2022) (acceptance of responsibility); *see also id.* § 5C1.2 (safety valve); *id.* § 3C1.1 (obstruction of justice); 18 U.S.C. § 3553.

217. The U.S. Supreme Court has ruled that prosecutors have wide discretion to decide whom and when to prosecute. *See* Wayte v. United States, 470 U.S. 598, 607–08 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982))). The Court has long held that, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

218. *See* U.S. SENT'G GUIDELINES MANUEL § 3E1.1 (U.S. SENT'G COMM'N 2022).

219. *See id.* § 5K3.1.

220. *See* Innocence Staff, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/ [https://perma.cc/RM7R-CRL9] (noting that "a defendant is more likely to receive a lesser sentence if they choose a plea deal rather than a trial").

221. *See Federal Judicial Caseload Statistics 2019*, U.S. CTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 [https://perma.cc/8GWR-7XRT] (last visited Mar. 20, 2022).

filings in Arizona.[222] The rate was almost identical in the Tucson sector, at 16.1%.[223] Immigration crimes constituted 65.5% of all cases that year in Arizona.[224] As of the writing of this Article, drug cases constitute 54% of the Author's caseload. All but one client charged with drugs face mandatory minimum punishments if convicted.

Because of the land border with Mexico, most federal drug cases in Arizona involve arrest at ports of entry, where people routinely smuggle drugs to the United States in cars, their clothing, or bodies, as they enter through pedestrian lanes.[225] People caught smuggling drugs are also arrested by federal officers at immigration checkpoints,[226] in areas near the border, and on American Indian reservations.[227] Occasionally, DEA agents arrest people in Phoenix or Tucson after undercover investigations, but these make up a minority of drug cases.[228] Seizures of methamphetamine, heroin, cocaine, fentanyl, and marijuana are the most prevalent in drug arrests.[229]

Based on this Author's professional experience, most in-custody defendants accused of drug trafficking in the District of Arizona are foreign nationals with little to no community ties to the United States.[230] In-custody defendants accused of drug trafficking also include large numbers

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222. *See* OFF. OF THE CLERK OF THE CT., DIST. OF ARIZ., DISTRICT OF ARIZONA ANNUAL STATISTICAL REPORT FISCAL YEAR 2019 14–18 (2019), https://www.azd.uscourts.gov/sites/default/files/documents/FY19%20Annual%20Report.pdf [https://perma.cc/4TFY-Q6GL].

223. *See id.* at 19.

224. *See id.* at 18.

225. In most cases, agents find drugs concealed in natural voids in a car or non-factory compartments. They also find drugs inside tires, car seats, and trunks of cars. Pedestrians hide drugs in clothing and even in private body cavities.

226. *See Immigration Checkpoints Catching More Drugs than People*, SANTANVALLEY.COM (Nov. 7, 2014), https://www.santanvalley.com/san-tan-valley-area-information/arizona-news/immigration-checkpoints-catching-more-drugs-than-people [http://perma.cc/P2JT-3PUZ].

227. *See Cartel Operators Used Indian Reservation as Smuggling Pass-Through*, POLICE MAG. (May 19, 2011), https://www.policemag.com/347866/cartel-operators-used-indian-reservation-as-smuggling-pass-through [https://perma.cc/6TUX-42NN].

228. *See* Rafael Carranza, *Arizona Border with Mexico Sees Most Drug-Trafficking Arrests, Report Says*, ARIZ. CENTRAL (June 21, 2017, 8:24 AM), https://www.azcentral.com/story/news/politics/border-issues/2017/06/20/arizona-border-mexico-drug-smuggling-arrests/382553001/ [https://perma.cc/LFA6-JSLN].

229. *See* DRUG ENF'T ADMIN., DEA-DCT-DIR-008-21, 2020 NATIONAL DRUG THREAT ASSESSMENT 2 (2021), https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf [https://perma.cc/DY8S-AW6R].

230. This Author has not found any studies documenting the citizenship of in-custody pre-trial detainees in the District of Arizona. On a broader scale, 83.5% of all Bureau of Prisons inmate are U.S. citizens. *Inmate Citizenship*, FED. BUREAU PRISONS (Mar. 12, 2022), https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp [https://perma.cc/R795-FA49].

of legal permanent residents and citizens whom judges believe will not appear for future court proceedings.[231]

Because most drug couriers do not have prior convictions, only a small minority fail to qualify for the safety-valve law.[232] For the unfortunate minority who do not qualify, prosecutors sometimes offer a plea requiring a five-year mandatory minimum term in prison.[233] To obtain comparable benefits, in rare cases, prosecutors require a proffer session for defendants

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231. Non-U.S. citizen clients who entered the country with a visa typically have few ties to the United States. Even though most live near the border in Northern Mexico, judges rarely release them from custody. Judges do not believe they will return to court. Mexico does not permit U.S. Marshals, who execute failure to appear warrants for federal judges, to travel to Mexico to execute warrants. *See* Roberto J. Ramos, *An Update on the Pursuit of Fugitives Who Flee into Mexico*, TEX. PROSECUTOR (Oct. 2012), https://www.tdcaa.com/journal/an-update-on-the-pursuit-of-fugitives-who-flee-into-mexico/ [https://perma.cc/C2UF-Z6YQ]. Mexican authorities can, however, pursue people facing American arrest warrants for drug cases. *See id*. Clients with permanent U.S. residency mostly have strong ties to the United States. The majority live, work, and raise families in U.S. cities. Consequently, most judges in Arizona release them from custody pending trial.

232. The safety valve allows a court to sentence a person below a mandatory minimum sentence and to reduce the person's offense level under the Federal Sentencing Guidelines by two points. *See* 18 U.S.C. § 3553(f); *see also* U.S. SENT'G GUIDELINES MANUEL § 5C1.2 (U.S. SENT'G COMM'N 2022). The law, as originally passed, required a person to meet the following criteria: (1) Not have more than one point in criminal history; (2) Any prior conviction cannot have involved a firearm, violence, or a credible threat of violence; (3) Any prior conviction cannot have resulted in death or serious bodily injury; (4) The person cannot have been an organizer, leader, manager, or supervisor of the drug activity; and (5) Before sentencing, the person must have truthfully told law enforcement about his or her involvement in the crime. The First Step Act increased the availability of the safety valve by making it easier to meet the first requirement of little prior criminal history. Before the First Step Act, a person could have no more than one criminal history point. This generally means no more than one prior conviction in the last ten years for which the person received either probation or less than 60 days of prison. The First Step Act permitted eligibility if, in addition to meeting requirements (2) to (5) above, the defendant does not have: (A) more than four criminal history points, excluding any criminal history points resulting from a one point offense, as determined under the Sentencing Guidelines; (B) a prior three point offense, as determined under the Sentencing Guidelines; and (C) a prior two point violent offense, as determined under the Sentencing Guidelines. *See* Pub. L. No. 115-391, 132 Stat. 5194 (2018). Recently, the Ninth Circuit Court of Appeals decided *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021), which greatly expanded the safety valve. The court held:

> As a matter of first impression, we must interpret the "and" joining subsections (A), (B), and (C) under § 3553(f)(1). If § 3553(f)(1)'s "and" carries its ordinary conjunctive meaning, a criminal defendant must have (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense, cumulatively, before he or she is barred from safety-valve relief under § 3553(f)(1).

Id.

233. This is not an uncommon practice. *See* United States v. Tran, No. 10-00269 HG-01, 2015 WL 4911457, at *1 (D. Haw. Aug. 14, 2015) (explaining the government filed information requiring a mandatory minimum of ten years on drug case based on prior a prior conviction, subjecting defendant to a ten-year mandatory minimum. Defendant pled to an offense requiring no less than the five-year mandatory minimum).

to describe co-conspirator involvement as a pre-condition for negotiating a favorable plea agreement.[234] This is a problem for couriers because most do not know of others involved in drug trafficking.[235] Drug trafficking organizations (DTOs) recruit people to drive drug-laden cars across the border who are not involved in cartel operations.[236] This way, recruits cannot provide information if agents arrest them and offer opportunities to inculpate others in exchange for favorable treatment such as dismissed charges, lenient sentencing recommendations, or no filing of charges.[237] It is not in the interest of DTOs to use their own members to cross narcotics into the United States.[238]

Due to required five- or ten-year mandatory minimum punishments with scant prospect of qualifying for the safety valve after trial conviction, people facing mandatory minimums in drug cases rarely exercise their rights to a jury trial.[239] Instead, most sign a plea agreement and hope for a time-served sentence after being told by their lawyers they should perform well under pre-trial services supervision, demonstrate family and community support, and contrition.

In the Tucson sector of the District of Arizona, judges typically impose sentences ranging from 24 to 40 months in prison for couriers who smuggle drugs in cars, sign plea agreements, are in-custody, and are safety-valve

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234. *See* United States v. Kent, 649 F.3d 906, 914 (9th Cir. 2011) (finding the prosecutor was permitted not only to require cooperation as a condition of the guilty plea but also to file an additional sentencing enhancement if defendant did not sign plea agreement).

235. *See* Timothy P. Tobin, Note, *Drug Couriers: A Call for Action by the U.S. Sentencing Commission*, 7 GEO. MASON L. REV. 1055, 1066 (1999) (citing Ralph Kistner, *Commentary*, 3 FED SENT'G REP. 231, 231 (1991) ("[C]ouriers most likely lack knowledge of the scope and structure of the overall drug scheme or the activities of others within the scheme.")).

236. *See* Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 FORDHAM L. REV. 1749, 1749 (2019) ("Drug couriers often lack substantial ties to drug-trafficking organizations, which generally recruit vulnerable individuals to act as couriers and mules.").

237. *See* Walter I. Gonçalves, Jr., *Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 COLUM. J. RACE & L. 1, 57 n.338 (2020) (citing John S. Austin, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review* — United States v. Wade, 15 CAMPBELL L. REV. 263, 274 (1993) (noting that drug couriers have little knowledge of operations)) (explaining trusted people in drug organizations do not tell couriers details about drug trafficking). Low level couriers are "unable to supply 'substantial assistance' and must serve mandatory minimum sentences if convicted." *See* Austin, *supra*.

238. *See* Weber, *supra* note 236, at 1765 ("These low-level drug couriers have little to no involvement in the larger drug-trafficking operation and, as a result, possess limited information of value to law enforcement in the event that they are apprehended.").

239. It is extremely difficult to qualify for the safety valve after trial. One example of a success story is described in *United States v. Sherpa*. 110 F.3d 656, 662 (9th Cir. 1996) (holding a court may reconsider facts necessary to the jury verdict in determining whether to apply the "safety valve").

eligible.[240] Sentences are rarely over four years.[241] Couriers who choose trial and are convicted have minuscule chances of qualifying for the safety valve and thus face much higher sentences.[242]

The high percentage of drug cases, nationally and in Arizona, helps explain minuscule trial rates across the board.[243] The other contributing factor is an increasing rate of criminal filings for another category of case that rarely results in trial: illegal entry and re-entry.[244] In 2019, illegal entry and re-entry filings constituted 65.5% of all filings in Arizona, a 46.3% increase compared to 2018.[245]

To summarize, mandatory minimums and the sentencing guidelines were instituted almost 40 years ago in response to public opinion and the lack of regularity from sentencing judges. Fast-track programs helped reduce court time and space in detention centers. All have had the effect of drastically reducing federal trials, especially in drug and illegal re-entry cases.

III. STIGMATIZATIONS OF AFRICAN AMERICANS, LATINXS, AND AMERICAN INDIANS HELPED FACILITATE THE PLEA BARGAINING MACHINE

Racial minorities constitute the majority of federal criminal defendants.[246] This Part briefly describes the historical exploitation of African Americans, Latinxs, and American Indians in the United States. It then explains how the plea bargaining machine generates racial disparities.

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240. *See* Curt Prendergast, *Drug-Smuggling Sentencing Vary Wildly Along Mexico Border*, TUSCON.COM (Nov. 9, 2018), https://tucson.com/news/local/drug-smuggling-sentences-vary-wildly-along-mexico-border/article_a45fca2d-b468-5a92-8072-55f6d073f2b1.html [https://perma.cc/4NY4-9UAP] (finding judges in other southwest border districts impose harsher sentences for drug crimes).

241. The average sentence for drug trafficking in the District of Arizona in 2020 was 28 months. *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2020, DISTRICT OF ARIZONA 11, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/az20.pdf [https://perma.cc/6WD6-WRGM] (last visited Jan. 19, 2022).

242. *See Sherpa*, 110 F.3d at 660.

243. Government plea policies impact trial rates and workload. *See* M. Elaine Nugent & Mark L. Miller, *Basic Factors in Determining Prosecutor Workload*, PROSECUTOR, Aug. 2002, at 32, 33 ("Policies regarding plea negotiations, such as 'no plea' policies, further impact caseload and trial rates.").

244. *See infra* Section IV.D.

245. *See* OFF. OF THE CLERK OF THE CT., *supra* note 222, at 18.

246. In 2017, 53.2% of all persons convicted of a federal offense were Latinx, while 21.5% were white, and 21.1% were Black. U.S. SENT'G COMM'N, FISCAL YEAR 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf [https://perma.cc/W9VG-8LQ6].

Conscious racism paved the way for unconscious racism prevalent in today's criminal justice system.

A. Exploitation of Racial Minorities and Resulting Stereotypes[247]

i. African Americans

Slavery was foundational to the United States's economic ascension.[248] During the Atlantic slave trade, from approximately 1526 to 1867, whites shipped 12.5 million slaves from Africa to the Americas.[249] Nearly 2 million did not make the voyage, but 10.7 million arrived.[250] Slavery endured for almost 250 years.[251] Just before the American Civil War ended the practice, almost 4 million individuals were enslaved.[252]

Slavery was a violent, degrading institution. Whites whipped slaves routinely.[253] Women slaves were exploited by their white masters in chattel slavery.[254] Patriarchal culture permitted women to be treated as property.[255] As early as the adoption of *partus sequitur ventrem* into Virginia law in 1662,[256] society classified the children born of sexual

247. Fortunately, there is literature on how criminal defense lawyers can educate themselves about implicit racial bias and practice in a way that mitigate its affects. *See* Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. FOR SOC. JUST. 333, 335–36 n.12 (2020).

248. *See generally* EDWARD BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM (2014) (noting that U.S. commerce and economic success came from the slave trade economy).

249. *See* Steven Mintz, *Historical Context: Facts About the Slave Trade and Slavery*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/content/historical-context-facts-about-slave-trade-and-slavery [https://perma.cc/FFW7-ZBET] (last visited Mar. 20, 2022).

250. *See id.*

251. *See* Laurel E. Fletcher, *What Can International Transitional Justice Offer U.S. Social Justice Movements?*, 46 N. KY. L. REV. 132, 133 (2019).

252. *See* Henry Louis Gates, Jr., *Slavery by the Numbers*, ROOT (Feb. 10, 2014, 12:01 AM), https://www.theroot.com/slavery-by-the-numbers-1790874492 [https://perma.cc/7RXL-EY23].

253. *See* Lea VanderVelde, *The Last* Legally *Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727, 769–70 (2016). *See generally* ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1995).

254. *See* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 218 (1992).

255. *See* Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 241–42 (1997) (citing Emily R. Brown, *Changing the Marital Rape Exemption: I Am Chattel(?!); Hear Me Roar*, 18 AM. J. TRIAL ADVOC. 657, 658 (1995)).

256. Under the doctrine of *partus sequitur ventrem*, a slave takes "the status of his or her mother, regardless of the amount of white, [B]lack, or Indian ancestry." *See* Paul Spruhan, *A*

relations between a Black woman and any man as slaves regardless of the father's race or status.[257] Concurrently, southern communities made it criminal for white people to marry Black persons.[258]

Slavery is largely responsible for modern-day inequalities, which help perpetuate and justify implicit biases.[259] For example, social scientists Keith Payne, Heidi A. Vultich, and Jazmin Brown-Ianuzzi found links between modern day geographic areas where people held slaves and implicit racial bias.[260] They compared proportions of the enslaved population according to the 1860 census with county-level implicit race bias in over 1,400 counties from the Project Implicit database.[261] The empirical study found higher levels of implicit bias in whites in states where slavery and racial apartheid were more central to their economy and culture.[262] This means the degree of implicit bias is stronger in these areas of the country compared to all others. Implicit bias is ubiquitous in criminal justice, including plea bargaining.[263]

ii. Latinxs

Between 1848 and 1879, whites lynched Mexicans at a rate of 473 per 100,000 of the U.S. population.[264] By comparison, whites lynched African

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Legal History of Blood Quantum in Federal Indian Law to 1935, 51 S.D. L. REV. 1, 6 (2006).

257. *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 604–05 (2007).

258. *See* Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place; Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 26–27 (1989).

259. *See* Heidi A. Vuletich & B. Keith Payne, *Stability and Change in Implicit Bias*, 30 PSYCH. SCI. 854, 855 (2019) ("[E]conomic dependence on slavery motivated a range of cultural, legal, economic, and ideological reactions aimed at justifying slavery and, later, maintaining the racial hierarchy.").

260. *See* B. Keith Payne, Heidi A. Vuletich & Jazmin L. Brown-Iannuzzi, *Historical Roots of Implicit Bias in Slavery*, 116 PROC. NAT'L ACAD. SCIS. 11693, 11697 (2019).

261. *See id.*

262. *See* Eli Jones, *The Inherent Implicit Racism in Capital Crime Jury Deliberation*, 9 VA. J. CRIM. L. 109, 118 (2020) (citing Payne et al., *supra* note 260) ("[E]xperts have found a direct correlation tracing back to slavery with higher levels of implicit bias, with white people in states which made slavery and racial apartheid more central to their economy and culture displaying higher levels of implicit bias.").

263. *See* Besiki Luka Kutateladze, Nancy R. Andiloro & Brian D. Johnson, *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398, 399 (2016) (describing how Black defendants are less likely to receive reduced plea offers and that both Black and Latinxs are more likely to receive plea offers that include jail time).

264. *See* Peter Yoxall, Comment, *The Minuteman Project, Gone in A Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIA. INTER-AM. L. REV. 517, 522 (2006) (citing William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. SOC. HIST. 411, 413 (2003)) (arguing that historians often overlook violence

Americans at 52.8 victims per 100,000 of the population in Mississippi between 1880 and 1930, the period and region in which African American lynchings were at their highest level.[265] After 1880, the lynchings of Mexicans declined.[266] Nonetheless, whites lynched Mexicans at 27.4 victims per 100,000 people, higher than the number of African Americans lynched in some southern states.[267] Amazingly, the last recorded lynching of a Mexican in the United States took place on November 16, 1928.[268] A conservative estimate posits 597 lynchings of Mexicans in the United States, or slightly more.[269]

Whites lynched Mexicans for myriad reasons. Examples included "acting 'uppity,' taking away jobs, making advances toward . . . white [women], cheating at cards, practicing 'witchcraft,' and refusing to leave land that Anglos coveted."[270] Whites also justified lynching Mexicans for acting "too Mexican," which included "speaking Spanish too loudly or reminding Anglos too defiantly of their Mexicanness."[271]

During the Jim Crow years, or the period after the Civil War era until 1968, whites subjected Latinxs in many jurisdictions to forms of exclusion, segregation, and disenfranchisement similar to those inflicted on African Americans.[272] In jurisdictions where the criminal justice system excluded Latinxs from juries, they were, ironically, "legally characterized as white, but socially treated as non-white."[273] Courts justified their exclusion from juries based less on ethnicity but on subordinate social status to whites.[274] Latinxs in the United States have also been prejudiced and systemically discriminated against in housing, employment, and education.[275] For example, Mexican Americans before World War II were the victims of

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against persons of Mexican descent that occurred in the United States in the nineteenth and early twentieth centuries).

265. *See id.* at 522–23.

266. *See id.* at 523.

267. *See id.*

268. *See id.*

269. *See id.* at 523 n.37.

270. *See* Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 299 (2009) (citing Carrigan & Webb, *supra* note 264, at 418–22).

271. *See id.*

272. *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 60 (2012).

273. *See* Christopher F. Bagnato, Comment, *Change Is Needed: How Latinos Are Affected by the Process of Jury Selection*, 29 CHICANA/O-LATINA/O L. REV. 59, 60 (2010).

274. *See id.*

275. *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 888 (1995) (citing PETER SKERRY, MEXICAN AMERICANS: THE AMBIVALENT MINORITY 26 (1993)).

school and residential segregation and were denied the right to vote in many parts of Texas.[276]

Today, largely due to historical exploitations, people hold negative stereotypes of Latinxs. They perceive them as lazy, lacking in initiative, unproductive, and on the dole.[277] Stereotypes for Latinx criminal defendants are even worse. Research shows they have been associated with "innate criminality,"[278] typified as "treacherous,"[279] drug traffickers,[280] violence-prone,[281] "predatory," and "disposed to chronic criminal offending."[282] Undoubtedly, these stigmas carry over to criminal justice.[283]

iii. American Indians

Before Europeans arrived in the region they called the "New World," approximately 15 million American Indian people lived in what is today the mainland United States.[284] U.S. society nearly exterminated American

276. *See id.* (citing SKERRY, *supra* note 275, at 39, 44–45).

277. *See id.* (citing RODOLFO O. DE LA GARZA ET AL., LATINO VOICES: MEXICAN, PUERTO RICAN & CUBAN PERSPECTIVES ON AMERICAN POLITICS 2 (1992)).

278. *See* Malcolm D. Holmes et al., *Minority Threat, Crime Control, and Police Resource Allocation the Southwestern United States*, 54 CRIME & DELINQUENCY 128, 129 (2008).

279. *See* CORAMAE RICHEY MANN & MARJORIE S. ZATZ, IMAGES OF COLOR, IMAGES OF CRIME: READINGS (2d ed., 2002).

280. *See* Theodore Curry & Guadalupe Corral-Camacho, *Sentencing Young Minority Males for Drug Offenses*, 10 PUNISHMENT & SOC'Y 253, 259 (2008).

281. *See* KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (2003).

282. *See* Cassia Spohn & Dawn Beichner, *Is Preferential Treatment of Female Offenders a Thing of the Past? A Multisite Study of Gender, Race, and Imprisonment*, 11 CRIM. JUST. POL'Y REV. 149, 179 (2000).

283. *See generally* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (reviewing several of these studies and exploring how memory biases may function in legal decision making).

284. *See* Anthony Peirson Xavier Bothwell, *We Live in Their Land: Implications of Long-Ago Takings of Native American Indian Property*, 6 ANN. SURV. INT'L & COMP. L. 175, 176 (2000) (citing JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 23 (1993).

Indians in the wake of the Civil War.[285] By 1910, only about 200,000 of the American Indian population still lived.[286]

Generations of American Indians have been exploited.[287] Government actions such as extermination, religious persecution, forced migration to Indian reservations, and systematic removal of American Indian children to boarding schools caused repeated exposure to trauma.[288] The founding fathers advanced cultural racism toward American Indians.[289] In 1779, George Washington called American Indians "beasts of prey" and told his subordinates to "attack the Iroquois and lay waste all the settlements around."[290] He also ordered subordinates "not to consider any overture of peace before the total ruin of their settlement is effected [sic]."[291] Although today politicians do not use overtly racist rhetoric, American Indians are at the bottom of the socioeconomic ladder compared to all other racial and ethnic groups.[292]

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285. *See* Victor Suthammanont, Note, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y.L. SCH. L. REV. 1173, 1179 (2005) (first citing JOHN SELBY, THE CONQUEST OF THE WEST 199-240 (Rowman & Littlefield 1976); then citing DEE BROWN, BURY MY HEART AT WOUNDED KNEE (Henry Holt 2001); and then citing William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 24–25 (2002)).

286. *See* Louise Erdrich, *Where I Ought to Be: A Writer's Sense of Place*, N.Y. TIMES, July 18, 1985, at 6.

287. *See* Gabrielle Mandeville, Note, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 193 (2015) (citing Andrea L. Johnson, Note, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 631 (2012)).

288. *See id.* (citing Alexandra (Sandi) Pierce, *Shattered Hearts: The Commercial Sexual Exploitation of American Indian Women and Girls in Minnesota*, MINN. INDIAN WOMEN'S RESOURCE CTR., 4 (2009), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1027&context=humtraffconf [https://perma.cc/PKQ7-9XD3]).

289. *See* Andrea Wallace, *Patriotic Racism: An Investigation into Judicial Rhetoric and the Continued Legal Divestiture of Native American Rights*, 8 DEPAUL J. FOR SOC. JUST. 91, 99 (2014).

290. *See id.* (quoting DAVID E. STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD 119 (1992)).

291. *Id.* (quoting STANNARD, *supra* note 290, at 119).

292. *See generally* Valerie Wilson & Zane Mokhiber, *2016 ACS Shows Stubbornly High Native American Poverty and Different Degrees of Economic Well-Being for Asian Ethnic Groups*, ECON. POL'Y INST. (Sept. 15, 2017, 3:06 PM), https://www.epi.org/blog/2016-acs-shows-stubbornly-high-native-american-poverty-and-different-degrees-of-economic-well-being-for-asian-ethnic-groups/ [https://perma.cc/4KKB-3ALM].

B. Plea Bargaining Machine's Racist Outcomes

i. Impact of Mandatory Minimums on Racial Minorities

The crisis of the 1980s that paved the way for mandatory minimum laws on the books today took place, largely, because of the War on Drugs.[293] This actually became a war on African Americans,[294] Latinxs, and American Indians.[295] The Anti-Drug Abuse Act may not have been enacted directly to negatively affect African Americans,[296] but this inquiry is not as important as how minority communities have been affected by the law's implementation.[297] The effects of this law and others like it have been destructive.[298] The harshness of punishments under them has lessened the credibility of our contemporary criminal justice system.[299]

In federal court, African American defendants are more likely to face mandatory minimum sentences than white or Latinx defendants.[300] A study from 2011 shows that while 39.5% of white defendants and 46.3% of Latinx defendants received "safety valve" relief from mandatory minimum sentences that year, only 14.4% of African American defendants obtained it.[301]

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293. *See* Abigail A. McNelis, *Habitually Offending the Constitution: The Cruel and Unusual Consequences of Habitual Offender Laws and Mandatory Minimums*, 28 GEO. MASON U. C.R. L.J. 97, 99 (2017) (discussing mandatory minimums emerging from the War on Drugs).

294. *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER, RACE & JUST. 381, 384 (2002) ("[T]he drug war's focus on the African American community was neither an accident nor a conspiracy. Rather, the drug war is simply a prominent example of the central role both race and the definition of crime play in the maintenance and legitimization of white supremacy.").

295. *See* United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); *see also* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 757 (1993); Randolph N. Stone, *Crisis in the Criminal Justice System*, 8 HARV. BLACKLETTER J. 33 (1991) (the "war on drugs" has resulted in a war against young Black males).

296. *See* Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 23 (2013).

297. *See id.*

298. *See id.*

299. *See id.*

300. *See* Nathaniel W. Reisinger, Note, *Redrawing the Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle Between Justice and Finality*, 54 HARV. C.R.-C.L. L. REV. 299, 318 (2019) (citing U.S. SENT'G COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 159 (2011)).

301. *See id.* (citing Patti B. Saris, *Sentencing Reform*, 59 BOS. BAR J. xli, xlii (2015)).

One provision of the Anti-Drug Abuse Act of 1986[302] was the "100-1" rule, so named because it required a five-year mandatory minimum sentence for trafficking in 500 grams of powder cocaine or five grams of crack.[303] This provision of the law had a disproportional impact on African Americans.[304] In Fiscal Year 2016, over three-quarters of crack cocaine trafficking offenders were Black (82.6%), followed by Latinxs (11.3%), whites (5.6%), and other races (0.5%).[305] This led to disproportionately higher sentences for Black drug defendants.[306] The average number of Blacks sentenced by federal judges for crack cocaine offenses in each year from 2009 to 2014 approximated the total lynched in the United States from 1895 to 1968.[307]

Like other drugs, crack-cocaine sentences depended on quantity, resulting in minor players in large conspiracies exposed to potentially long sentences.[308] They were also statutorily mandated, so criminal history makes no difference to sentencing decisions.[309] Although the Fair Sentencing Act of 2010 reduced this disparity, crack is still punished at an 18-to-1 ratio, and even this change came too late for those convicted and

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302. Pub. L. No. 99–570, 100 Stat. 3207.

303. *See U.S. Supreme Court Weights 100-to-1 Disparity in Crack/Powder Cocaine Sentencing*, ACLU (Oct. 2, 2007), https://www.aclu.org/press-releases/us-supreme-court-weighs-100-1-disparity-crackpowder-cocaine-sentencing [https://perma.cc/U5GP-4WRW].

304. *See Quick Facts on Crack Cocaine Trafficking Offenses*, U.S. SENT'G COMM'N (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY16.pdf [https://perma.cc/NM4G-7XQ6]. Some argued that high mandatory minimum sentences for crack were attributable to racism. S*ee, e.g.*, Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1268–69 (1994) (arguing that because "[B]lacks as a class are disproportionately *victimized*" by traffic in crack cocaine, "[B]lacks as a class may be *helped* by measures reasonably thought to discourage such conduct"); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995) ("[C]rack cocaine penalties are the product of unconscious racism.").

305. *See Quick Facts on Crack Cocaine Trafficking Offenses*, *supra* note 304.

306. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing; No End to Disparity*, 28 AM. CRIM. L. REV. 161, 205–06 (1991) (finding higher sentences for Black offenders was caused in part by the 100-to-1 crack and powder cocaine ratio).

307. *See* Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 876 (2014) (first citing *Quick Facts on Crack Cocaine Trafficking Offenses*, U.S. SENT'G COMM'N (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Crack_Cocaine.pdf [https://perma.cc/6J76-7EPW]; then citing *Lynchings: By State and Race, 1882–1968*, UNIV. MO.-KAN. CITY SCH. L., http://law2.umkc.edu/faculty/projects/ftrials/shipp/lynchingsstate.html [https://perma.cc/KXU6-D3LE] (last visited Feb. 26, 2022)).

308. *See* Smita Ghosh, *Congressional Administration During the Crack Wars: A Study of the Sentencing Commission*, 23 U. PA. J.L. & SOC. CHANGE 119, 139 (2020).

309. *See id.*

sentenced under the 100-to-1 ratio.[310] Many Black and minority defendants served unduly long and disproportionate sentences compared to whites.[311]

ii. Race and the Sentencing Guidelines

The application of the federal sentencing guidelines in 1987 led to a radical shift in the racial balance of those sentenced for a crime. Before the guidelines, whites comprised 66.3% of those sentenced, African Americans 22.3%, and Latinxs 8.5%.[312] After the guidelines took effect, the percentage of whites sentenced dropped to 44.5%, while African-Americans and Latinxs increased to 26.2% and 26.3%, respectively.[313] The figures are more alarming for those aged 18 to 25: white males sentenced in this group dropped from 56% immediately before the implementation of the guidelines to 39.2% after; African Americans increased from 27.6% to 29.2%; and Latinxs sentenced more than doubled, from 12.4% before to 31.6% after guideline implementation.[314]

The sentencing guidelines also contributed to the increase in the incarceration rate in the United States.[315] They have tripled the length of prison terms and resulted in the wildly disproportionate imprisonment of African Americans.[316] African Americans make up a large share of the prison population and face racial disparities in federal sentencing under the guidelines.[317] For example, compared to whites, African American males are more likely to be incarcerated, receive longer sentences, and have higher rates of obtaining a no-prison option when it is available.[318]

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310. *See* Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.); *see also* Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 453 n.302 (2017).

311. *See* Heaney, *supra* note 306, at 205–06 (stating the 100-to-1 ratio between crack and powder cocaine disproportionately caused higher sentences for Black offenders).

312. *See* Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE. W. RES. L. REV. 727, 766 (1998) (citing Heaney, *supra* note 306, at 204, 204 tbl.5).

313. *See id.*

314. *See* Heaney, *supra* note 306, at 205 tbl.6.

315. *See* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 523 (2007).

316. *See id.* at 523–24 (citing MARC MAUER, RACE TO INCARCERATE 124 (1999)) (stating that in 1989 nearly one in four Black males between ages 20 and 29 were under some form of criminal justice supervision on any given day and in 1995 the figure increased to one in three).

317. *See* TUSHAR KANSAL, THE SENT'G PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 4, 7 (Marc Mauer ed., 2005) ("Blacks are more likely to be disadvantaged in terms of sentence length at the federal level . . . .").

318. *See id.* at 2.

A summary of 85 empirical studies of sentencing disparity concludes that African Americans and Latinxs were generally sentenced more harshly than whites.[319] This summary included sentencing data before and after applying the guidelines and incorporated some state data.[320] It notes that although sentencing guidelines "were associated with smaller unwarranted sentencing disparities," those disparities still existed.[321] The report found that: (1) young Black and Latinx males face harsher sentencing compared to other populations; (2) Black defendants convicted of harming white victims receive harsher sentences than defendants convicted of an intraracial crime; and (3) Blacks and Latinxs convicted of drug and property crimes face more time in prison.[322]

The landmark Supreme Court decision that made the guidelines advisory, *United States v. Booker*, did not alter racial disparities at sentencing.[323] In 2006, the year after the Court decided *Booker*, 23% of federal inmates incarcerated for drug offenses were African American, while only 15% were Caucasian.[324] *Booker* did not solve the problem of sentencing racial disparity.[325] Judges who follow *Booker* and impose sentences that deviate from the guidelines still implicitly sentence African Americans more severely compared to whites.[326]

American Indians have also been negatively affected by guideline sentencing. The United States Sentencing Commission created a Native American Advisory Group in 2002 to understand racism and disparate effects on American Indians in federal sentencing.[327] The group found disparities: American Indians serve longer sentences in federal custody

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319. *See* OJMARRH MITCHELL & DORIS L. MACKENZIE, THE RELATIONSHIP BETWEEN RACE, ETHNICITY, AND SENTENCING OUTCOMES: A META-ANALYSIS OF SENTENCING RESEARCH 8–9 (2004), https://www.ncjrs.gov/pdffiles1/nij/grants/208129.pdf [https://perma.cc/6K3K-JPK2].

320. *See id.* at 7.

321. *Id.*

322. *Id.* at 20–21, 74.

323. *See* Jennifer M. Cox, *Frequent Arrests, Harsh Sentencing, and the Disproportionate Impact They Have on African Americans and Their Community*, 3 S. REGION BLACK L. STUDENTS ASS'N L.J. 17, 25 (2009) (discussing the disproportionate and extreme negative impact of harsh Sentencing Guidelines on African Americans and their communities).

324. *See id.* at 25–26 (citing BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., BULLETIN: PRISONERS IN 2006 25 (2007)).

325. *See id.* at 25.

326. *See id.* at 26.

327. *See* Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 73–74 (2011) (citing U.S. SENT'G COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON NATIVE AMERICAN SENTENCING ISSUES 10–11 (2003), http://www.ussc.gov/Research/Research_Projects/Miscellaneous/20031104_Native_American_Advisory_Group_Report.pdf [https://perma.cc/9K3S-PN8Q]).

under the guidelines.[328] Specifically, American Indians prosecuted for crimes under the Major Crimes Act face longer imprisonment compared to whites who commit similar crimes in the same areas but do not face federal prosecution.[329]

iii. Fast-Track Programs Disproportionately Affect Latinxs

Fast-track programs are rooted in aversion towards foreigners from developing nations.[330] Fast-track's advent coincides with the sharp increase in criminal prosecutions of migrants under 8 U.S.C. §§ 1325 and 1326.[331] It also coincides with Operation Gatekeeper, a plan to militarize the U.S.-Mexico border that led to more migrant deaths in the desert and failed deterrence to decrease migration from Mexico and Central America.[332]

Fast-track programs impact Latinxs more than other racial or ethnic groups due to their prevalence in border districts with higher caseloads.[333] Federal prosecutors have focused time and resources on the prosecution of criminal immigration violations such as illegal entry and re-entry from drug enforcement.[334] Due to skyrocketing numbers of people with prior removal

328. *See id.* at 74.

329. *See* Gregory D. Smith, Note, *Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the* Erie Railroad *into the Major Crimes Act*, 27 HAMLINE L. REV. 483, 486–87 (2004).

330. *See* Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 440 (2008) (noting that impassioned Americans focus efforts on proposed legislation supporting not only the construction of a U.S.-Mexico border fence but also the criminalization of unlawful presence).

331. Illegal entry prosecutions increased from 15,392 cases in Fiscal Year 1997 to 90,067 in 2013, a 500% increase. *See The Immigration Prosecution Factory*, KINO BORDER INITIATIVE (Nov. 14, 2017), https://www.kinoborderinitiative.org/immigration-prosecution-factory/ [https://perma.cc/79JV-SEK7]. The total number of people apprehended for illegally crossing the Southern United States border has been steadily falling since the year 2000. *See* Rebecca Hersher & Vanessa Qian, *3 Charts that Show What's Actually Happening Along the Southern Border*, NPR (June 22, 2018, 5:15 PM), https://www.npr.org/2018/06/22/622246815/unauthorized-immigration-in-three-graphs [https://perma.cc/Q8TE-2AK3].

332. *See* Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 279 (2018) ("The Clinton Administration implemented Operation Gatekeeper in 1994 as a method to stop the flow of undocumented migration across the southern border."). The first fast-track program began in 1993. *See* United States v. Estrada-Plata, 57 F.3d 757, 759 (9th Cir. 1995).

333. *See Estrada-Plata*, 57 F.3d at 761 ("The fast-track policy undoubtedly affects Hispanics more than other races, because the Southern District of California includes a portion of the United States/Mexico border.").

334. *See* Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 728 (2016) (citing Michael T. Light, Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal*

orders, the government now prosecutes many caught reentering the United States for illegal re-entry. For example, in 2006, "almost 26% of all federal prosecutions were related to illegal reentry and other types of immigration violations."[335] That number rose to 49.9% by 2012.[336] In 2016, criminalization of immigration violations such as unlawful entry comprised 52% of all federal prosecutions.[337] In fiscal year 2017, there were 300,000 apprehensions along the U.S.-Mexico border.[338] Without question, fast-track programs have had a negative, disproportionate impact on Latinxs.

The historical exploitation of people of color helped justify the plea bargaining machine. Violent, conscious racism led to implicit racial biases present in today's criminal justice system that facilitate the machine's operation.

IV. FEDERAL PUBLIC DEFENDERS AND THE PLEA BARGAINING MACHINE

The plea bargaining machine altered federal public defender (FPD) practice. This Part provides a brief history of the FPD program and contrasts it with state and county systems. It then describes federal public defending before the sentencing guidelines. Despite fewer trials, federal defenders today positively influence outcomes for clients who plead guilty under fast-track programs.

A. Brief History of the Federal Public Defender Program

Although the right to appointed counsel in capital cases came in 1932,[339] the federal defender program did not arrive until 1970.[340] Several events

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Immigration Crimes: Unlawful Reentry Drives Growth, PEW RCSH. CTR. (Mar. 18, 2014), http://pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/ [https://perma.cc/69BR-VCC9]).

335. *See id.*

336. *See id.* (first citing MARK MOTIVANS, U.S. DEP'T OF JUST., NCJ 248470, FEDERAL JUSTICE STATISTICS, 2012 4 (2015), http://www.bjs.gov/content/pub/pdf/fjs12st.pdf [https://perma.cc/7TSD-QEAE]; then citing U.S. SENT'G COMM'N, ILLEGAL REENTRY OFFENSES 1 (2015), http://ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf [https://perma.cc/3UUV-JNHF]).

337. *See* TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, IMMIGRATION NOW 52 PERCENT OF ALL FEDERAL CRIMINAL PROSECUTIONS (2016), http://trac.syr.edu/tracreports/crim/446/ [https://perma.cc/DRS2-6TD3].

338. *See* Sean McMinn & Renee Klahr, *Where Does Illegal Immigration Mostly Occur? Here's What The Data Tell Us*, NPR (Jan. 10, 2019, 4:58 PM), https://www.npr.org/2019/01/10/683662691/where-does-illegal-immigration-mostly-occur-heres-what-the-data-tell-us [https://perma.cc/6LMK-924D].

339. *See* Powell v. Alabama, 287 U.S. 45, 73 (1932).

340. *See Defender Services*, U.S. CTS., https://www.uscourts.gov/services-forms/defender-services [https://perma.cc/JN2N-BMXQ] (last visited Mar. 21, 2022).

took place to form the program during this period. The Judicial Conference of the United States first proposed creating a federal defender in 1937,[341] but Congress failed to pass the bill in 1939.[342] In 1938, the Supreme Court of the United States ruled that federal defendants have a right to appointed counsel in felony trials.[343] Twenty-three years later, in 1961, Attorney General Robert F. Kennedy's Committee on Poverty and the Administration of Justice published the Allen Report, which proposed a professional federal defender program.[344] The Allen Report became the centerpiece for the Criminal Justice Act of 1964 (CJA),[345] but "[this] final law only instituted a system to recompense appointed counsel."[346]

The DOJ and the Judicial Conference's Committee to Implement the CJA commissioned the Oaks Report, a study that in 1967 proposed improvements to the CJA.[347] This report concluded that large urban districts had difficulty meeting the need for experienced lawyers from lists of panel members.[348] It recommended supplying those districts with full-time, salaried defenders.[349] This recommendation led to the 1970 amendment to the CJA, which authorized the formation of defender organizations in districts in which "at least two hundred persons annually require the services of appointed counsel."[350] The change called for federal public defender organizations (FPDOs) and community defender organizations (CDOs).[351] FPDOs are federal employees governed by the U.S. District Court, and CDOs constitute nonprofit defense counsel service organizations, staffed by non-federal government employees and governed by a board of directors.[352]

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341. *See* Paul D. Hazlehurst, *A Federal Public Defender's Perspective*, FED. LAW., Mar. 2015, at 50, 52 (citing John J. Haugh, *The Federal Criminal Justice Act of 1964: Catalyst in the Continuing Foundation of the Rights of the Criminal Defendant*, 41 NOTRE DAME L. REV. 996, 997 (1966)).

342. *See id.*; *see also* Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A).

343. *See* Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).

344. *See* Hazlehurst, *supra* note 341, at 52.

345. *See id.*

346. *See id.*

347. *See* David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 347 (2017) (citing DALLIN H. OAKS, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS (1969)).

348. *See* Hazlehurst, *supra* note 341, at 52 (citing Dallin H. Oaks, *Improving the Criminal Justice Act*, 55 ABA J. 217, 221 (1969)).

349. *See id.*

350. *See id.* (quoting 18 U.S.C. § 3006A(g)(1)).

351. *See id.*

352. *See* Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense*, *1996–2011: An Exploratory Study,* 8 FED. CTS. L. REV. 81, 92 n.49 (2015) (citing 18 U.S.C. § 3006A(g)(1), (2)).

In 1976, there were 22 FPDOs and nine CDOs.[353] In 1995, there were 48 FPDOs in 58 federal districts and 11 CDOs in 13 districts.[354] FPDOs represented approximately one half of 89,000 indigent defendants.[355] CJA panel lawyers represented the other half.[356] Today, there are 81 federal defender organizations that employ over 3,700 lawyers, investigators, paralegals, and support staff.[357] Nationally, these organizations represent approximately 60% of indigent defendants.[358] CJA panel appointments represent the remaining 40%.[359] These statistics illustrate the percentages of federal public defender representation and provide the reader with a context to understand how many defendants are affected by AFPD work.

B. Differences Between Federal[360] and Local[361] Defender Systems

Although there are many variations between districts and offices in federal and state systems, several important characteristics differentiate the two. For example, unlike many state systems, federal public defender programs are well-funded[362] and provide clients with good representation.[363] Some describe the federal public defender the "gold

353. *See* Hazlehurst, *supra* note 341, at 52 (citing Dudley B. Bonsai, *The Criminal Justice Act, 1964 to 1976*, 52 IND. L.J. 135, 136 n.9 (1976)).

354. *See id.* (citing John J. Cleary, *Federal Defender Services, Serving the System or the Client*, 58 LAW & CONTEMP. PROBS. 68 (1995)).

355. *See id.*

356. *See id.*

357. *See Defender Services*, *supra* note 340.

358. *See id.*

359. *See id.*

360. To understand the size of the federal criminal justice system compared to states, federal prison inmates account for only 13% of the total prison population in the United States. *See* Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 192 (2013).

361. In 2007, there were at least 1,046 public defender offices. This does not include FPDOs, offices that provided primarily contract or assigned counsel services with private attorneys, or public defender offices that were principally funded by a tribal government. Offices that provided primarily appellate or juvenile services were excluded from the data collection. *See* Inter-Univ. Consortium for Pol. & Soc. Rsch., Bureau of Just. Stat., *Census of Public Defender Offices: County-Based and Local Offices, 2007 (ICPSR 29502)*, NACJD (May 13, 2011), http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/29502/documentation [https://perma.cc/MM4M-6K8N].

362. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 197 (2021) ("[S]tate defenders' caseloads are often significantly higher than their federal counterparts, which may mean that in the federal system, there is less ineffective assistance of counsel." (citing Inga L. Parsons, *"Making It a Federal Case": A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 857–66 (1997) (comparing the caseloads and institutional resources available to state versus federal public defenders))).

363. *See* Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 685 n.11 (2010); *see also* Wesley M. Oliver, *Choice*

standard" of indigent defense representation.[364] Federal defenders are paid higher salaries[365] and, with few exceptions, have lower caseloads compared to state or county defenders.[366]

Federal cases are more serious because the vast majority of federal crimes are felonies.[367] Further, federal prosecutors, except those handling fast-track programs like flip-flops[368] and Operation Streamline (OSL),[369] rarely charge or plea bargain offenses to misdemeanors.[370] Federal defendants charged with felonies serve more time in prison compared to state defendants because sentences of probation are rare in the federal system.[371] Finally, federal practice involves crimes that cross state and

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of Counsel and the Appearance of Equal Justice Under Law, 109 NW. U. L. REV. ONLINE 1117, 1126 (2014) (citing Zachary Cloud, Note, *The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America*, 22 B.U. PUB. INT. L.J. 403, 420 (2013)).

364. *See* J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1127 (2014) (citing Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 325–26 (2011)) (noting that in one recent survey federal judges rated the performance of federal public defenders slightly better than that of their prosecutorial counterparts).

365. I worked in as a Pima County Assistant Public Defender for ten years. When hired by the federal public defender in 2015, my annual salary increased by 25%. As of the writing of this Article my salary is higher than the vast majority of lawyers working in the Pima County indigent defense system.

366. *See* Julian A. Cook III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C. L. REV. 1073, 1115 (2019) ("Though public defender caseloads are comparatively more burdensome at the state level, many federal public defender offices experience similar hardships." (first citing Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1075–76 (2016)); then citing Luis v. United States, 136 S. Ct. 1083, 1095 (2016))); *see also* Norman Lefstein, *Time to Update the 'ABA Ten Principles' for the 21st Century*, CHAMPION, Mar. 2016, at 44 (noting that the problem of overwhelming caseloads is one that afflicts state public defense systems but not federal public defenders).

367. *See* Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 258 (2015) (noting that federal misdemeanors are "few in number").

368. Lawyers in federal court in Arizona also refer to flip flops as "mixed complaints." In a flip-flop, the government charges a defendant with a felony and a misdemeanor. If he/she rejects the plea, the government prosecutes the misdemeanor. If the defendant pleads guilty to the misdemeanor, the government dismisses felony, and the magistrate judge sentences the defendant without a presentence report either at the initial appearance or the detention/change of plea/sentencing hearing. *See* David Martin & James F. Metcalf, *Pretrial Services Along the Border: A District of Arizona Perspective*, 76 FED. PROBATION (2012).

369. *See* Keller, *supra* note 189, at 121 (explaining that OSL is an early disposition program designed to quickly process as many illegal entrants and re-entrants as possible).

370. *See* Natapoff, *supra* note 367, at 292 ("Federal misdemeanors are relatively few in number, but — with the notable exception of immigration cases — they tend to get appointed counsel and individuated adversarial treatment.").

371. *See* Timothy Baldwin & Olin Thompson, *More Horse-Hair for the Sword of Damocles? The Rhode Island Probation System and Comparisons to Federal Law*, 21 ROGER WILLIAMS U. L. REV. 244, 258 n.79 (2016) ("Probation sentences are relatively rare

national borders, such as drug importation, sex trafficking, immigration, and extraditions.[372] The federal government also has authority to charge crimes committed in Indian Country because of the Major Crimes Act.[373]

State practice consists mostly of crimes within one jurisdiction and includes mixtures of misdemeanors and felonies.[374] State and county offices typically have misdemeanor and felony units in which lawyers exclusively handle one caseload type.[375] State units also include appeals and juvenile units.[376] Units in federal offices are based on appellate versus trial lawyers.[377] Some federal offices also have capital habeas units (CHUs) that exclusively handle death penalty appeals.[378]

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in the federal system, mainly because the government tends to prosecute only more serious crimes that generally warrant incarceration.").

372. State criminal authority requires only that criminal conduct take place within the state's territorial limits. *See* WHARTON'S CRIMINAL LAW § 14 (15th ed., 1993). Federal criminal authority usually requires the involvement of a federal interest. Some bases for federal jurisdiction include (1) property belonging to the United States; (2) assaulting or killing specified federal officers or employees while engaged in performing their official duties; (3) protection of foreign officials or official guests; (4) use of the mails; and (5) stamp forgery. *See* 2 WHARTON'S CRIMINAL LAW § 19:4 (16th ed., 2021). The commission of an offense within the "special maritime and territorial jurisdiction of the United States" is also a common basis. *See* 18 U.S.C. § 7. Some federal authority is designed to supplement and assist local authorities in tasks of law enforcement, such as crimes that rest on interstate travel or transportation. *See, e.g.*, 18 U.S.C. §§ 1951, 1952.

373. 18 U.S.C. § 1153 (creating federal authority over serious crimes when committed by American Indians).

374. *See Federal Versus State Work*, UNIV. MICH. L. SCH., https://www.law.umich.edu/mdefenders/students/Different-Types-of-Indigent-Defense/Pages/Federal-versus-State-Work.aspx [https://perma.cc/26JS-7AHB] (last visited Mar. 22, 2022) ("State defenders will handle everything from public urination to petty theft to serious homicide cases over the course of their careers. There will be public order offenses, theft offenses, drug offenses, weapon offenses, and violent offenses in state systems. There is a lot of variety in state systems.").

375. *See* Richard A. Chappell, *Looking Back at Federal Probation*, 66 FED. PROBATION 3, 9 (2002) ("Only a small percentage of juvenile offenders appears before federal courts but the number of cases against juveniles are considerable.").

376. *See* Gabriel J. Chin & Hannah Bogen, *Warren Court Incrementalism and Indigent Criminal Appellants' Right to Trial Transcripts*, 51 U. PAC. L. REV. 667, 689 (2020) (noting that the "vast majority of states now have appeals specialists as part of their indigent defense program, whether as appellate units in general public defenders offices, freestanding appellate public defenders, separate trial and appeals panels for appointed private counsel, or some combination").

377. Most federal defender offices have a traditional trial unit (TRAD) which includes appeals unit and a capital habeas unit (CHU).

378. In total, there are 17 CHU units among 91 federal public defender offices. *See* Stephen B. Bright, *Independence of Counsel: An Essential Requirement for Competent Counsel and A Working Adversary System*, 55 HOUS. L. REV. 853, 881 (2018).

Federal charges depend on USAO policies that vary among districts.[379] The most prevalent charges along the southwest border include immigration crimes such as illegal entry and re-entry,[380] drug importation, alien smuggling,[381] bulk cash smuggling,[382] and firearm smuggling.[383] AFPDs along the southwest also handle cases from Indian reservations and charges common to most districts, such as unlawful possession of a firearm, wire fraud, and bank robbery.[384]

C. The Plea Bargaining Machine's Impact on Federal Public Defender Practice

i. Federal Defense Practice in Tucson Before the Sentencing Guidelines

The purpose of federal public defenders, to provide high-quality representation to the indigent accused facing federal charges,[385] has not changed, but the practice has. Federal defenders used to be in trial more often compared to today.[386] Beginning in 1970, when the federal public defender program started in Arizona, AFPDs were in trial about once a month.[387] The caseload for AFPDs was about 50 cases per lawyer.[388] Trial lawyers handled their own appeals and traveled to the Ninth Circuit Court of Appeals to argue cases.[389] The caseload consisted of drug-related crimes

379. *See* BRIAN D. JOHNSON, THE MISSING LINK: EXAMINING PROSECUTORIAL DECISION-MAKING ACROSS FEDERAL DISTRICT COURTS 109 (2014), https://www.ncjrs.gov/pdffiles1/nij/grants/245351.pdf [https://perma.cc/MD9J-K66K] (finding significant variation in charging decisions across federal districts — disparate outcomes are the result of different charging strategies based on each district's prosecutorial goals and caseloads); *see also* TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, U.S. PROSECUTION OF CORPORATE CRIME VARIES WIDELY BY LOCATION, PROGRAM AND AGENCY (2016), https://trac.syr.edu/tracreports/crim/411/ [https://perma.cc/G3UH-GLYG].

380. 8 U.S.C. § 1325 makes it a crime to unlawfully enter the United States. 8 U.S.C. § 1326 makes it a crime to unlawfully reenter, attempt to unlawfully reenter, or to be found in the United States after having been deported, ordered removed, or denied admission.

381. 8 U.S.C. § 1324 makes it illegal to aid, sell, encourage, or induce illegal entry of an undocumented person into the United States.

382. *See* 31 U.S.C. § 5332.

383. *See* 18 U.S.C. § 922.

384. *See id.* § 922(g)(1) criminalizes the shipping, transportation, or possession of any firearm or ammunition distributed in interstate or foreign commerce by a convicted felon.

385. *See* Bonnie Hoffman, Gideon*'s Champions*, NAT'L ASS'N CRIM. DEF. LAWS. (May 2013), https://www.nacdl.org/Article/May2013-GideonsChampions [https://perma.cc/BS7D-Q3PR].

386. *See* Ortman, *supra* note 1 (stating that the federal trial rate accounted for 14% of convictions in 1990 and 5% in 2002. The plea rate in 1938 was 80% and 86% in 1940).

387. *See* Interview with Fredric Kay, *supra* note 5.

388. *See id.*

389. *See id.* Mr. Kay also stated that his caseload at the Pima County Public Defender, where he practiced for just under two years, was double, with about 100 cases. *See id.*

as well as crimes committed on American Indian Reservations such as sexual assaults, aggravated assaults, and homicides.[390] The USAO charged only a few illegal re-entry cases per year.[391]

There were no guidelines, so sentencing was "wide open."[392] Judges imposed sentences of varying length depending on the case and defendant.[393] Cases would also go to trial quicker compared to today.[394] Trials, with some exceptions, would take place within three months of arrest.[395] Today, the average federal criminal trial can take months, sometimes years, to reach a jury.[396] Fortunately, Assistant United States Attorneys (AUSAs) promptly sent disclosure to AFPDs and continued to send it as it became available before trial.[397] Unlike today, agents did not audio- or video-record interviews. The DEA and FBI assigned one agent to author reports who adopted the reports of others.[398] A higher percentage of clients were in custody during the 1970s compared to today.[399]

ii. Contemporary Federal Public Defender Practice in Tucson

Today, unlike pre-sentencing guideline practice, federal public defenders have few opportunities to cross-examine witnesses, present evidence, and argue before juries.[400] Newly hired AFPDs with little to no trial experience

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390. *See id.*

391. *See id.*

392. *See id.*

393. *See id.*

394. *See* Christopher Slobogin, *The Case for A Federal Criminal Court System (and Sentencing Reform)*, 108 CALIF. L. REV. 941, 946 (2020) (noting that in federal court "the median time from initiation of a traditional criminal case to its termination at the district court level has skyrocketed by more than 200 percent in the past forty-five years, from around three months to over seven months").

395. *See* Interview with Frederic Kay, *supra* note 5.

396. *See Felony Offenses*, OFF. FED. PUB. DEF. FOR N.D. CAL., https://www.ndcalfpd.org/felony-offense [https://perma.cc/3J6X-9GQE] (last visited Nov. 24, 2011) ("Most felony cases, however, take much longer. The average felony case in the Northern District takes one year from the arraignment to sentencing. Complicated conspiracy cases or fraud cases can often take much longer. Delays can come from the need to review discovery, interview witnesses, bring and argue motions, negotiate plea agreements, and prepare for trial.").

397. *See* Email from Frederic Kay, Former Fed. Pub. Def. for the Dist. of Arizona (1984 to 2004), to author (Sept. 24, 2021) (on file with author).

398. *See id.*

399. *See* Interview with Frederic Kay, *supra* note 5.

400. *See* Patton, *supra* note 26, at 2581 (noting that in 1963, nearly 15% of all federal defendants went to trial; in 2010, the figure was 2.7%); *see also* Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html [https://perma.cc/T7FQ-CPDL].

have a tough time getting this experience because there are not enough trials to go around.[401]

The best opportunity for new lawyers to attain cross-examination practice are in evidentiary motion hearings. Evidentiary motion hearings also allow for direct examination and oral argument before judges.[402] Examinations of witnesses sometimes take place at sentencing, but busy judges mostly deny such requests by defense lawyers.[403] Judges, in this Author's experience, do not want to hear mitigation evidence directly from witnesses in routine cases because of crowded calendars.

Another opportunity to cross-examine government witnesses and present evidence is preliminary hearings.[404] But today, at least in Tucson, the vast majority of defense lawyers waive this right on behalf of clients.[405] To indict, prosecutors instead take cases to the grand jury.[406] A few prosecutors who have no choice but to take a case to preliminary hearing retaliate by not offering a disclosure agreement.[407] As of the writing of this

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401. Supervisors in the Tucson office of the Federal Public Defender in Arizona have had a tough time getting newly hired AFPDs to join a case going to trial because of the lack of trials. The COVID-19 pandemic has not helped.

402. FED. R. EVID. 611 (defining the scope of direct and cross examinations); *see also* Goodwyn v. Simons, 90 F. App'x 680, 682 (4th Cir. 2004) (per curium) (applying Rule 611(a)'s standard to evidentiary hearings).

403. There is no constitutional right nor rule requiring judges to permit testimony of defense witnesses at sentencing. *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §26.4(g) (4th ed. 2020) ("[E]videntiary hearings are common, but not required, for federal sentencing. Federal Rule 32(i) provides for a sentencing hearing at which the court 'may permit the parties to introduce evidence on objections' to the presentence report." (quoting FED. R. CRIM. P. 32(i))); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1846 (2003) ("The Supreme Court has similarly left unclear whether the defendant's due process and/or compulsory process rights provide any constitutionally protected interest in rebutting the state's evidence or calling witnesses in a noncapital sentencing proceeding." (citing McGautha v. California, 402 U.S. 183, 218 (1971))). Victims in federal cases, however, have the right to be present at sentencing. *See* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended at 18 U.S.C. § 3771).

404. *See* California v. Green, 399 U.S. 149, 165 (1970) (holding that cross-examination of accuser at preliminary hearing was sufficient to meet constitutional requirements).

405. *See* FED. R. CRIM. P. 5.1(a); *see also* 18 U.S.C. § 3060(a). The term "preliminary hearing" refers to the proceeding formerly called a "preliminary examination," described in Rule 5.1(a) of the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 5.1(a).

406. A preliminary hearing must be held within 14 days for in-custody defendants and 21 days for those out of custody. *See* FED. R. CRIM. P. 5.1. Prosecutors often elect to take the case to a grand jury before the preliminary hearing. *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1282 (2006) (pointing out that federal prosecutors "routinely time grand jury indictments so as to bypass the adversary preliminary hearing, even though some courts have frowned upon this practice" (citations omitted)).

407. The Tucson office of the Federal Public Defender negotiated a disclosure agreement with the USAO. If the defendant insists on a preliminary hearing the prosecutor does not offer the disclosure agreement.

Article, most AFPDs in Tucson sign such agreements because they require prosecutors to provide disclosure promptly instead of on the eve of trial or during trial after a witness testifies. These disclosures during trial are legal under the Jencks Act.[408]

AFPDs who seldom or never file motions that require evidentiary hearings, insist on preliminary hearings, or go to trial, will never attain the experience level required to provide adequate advice for clients.[409] It is difficult to know what will happen if a client rejects a plea agreement if the lawyer has not been in trial for years.[410] Having a comfortable presence in front of a jury, being quick on one's feet to make objections, and the competence to modify a defense theory during trial — these are abilities honed only by confronting witnesses before judges and juries.[411]

Contemporary federal criminal practice in Tucson has opened criticism of federal public defenders. State practitioners say federal defenders never go to trial and mostly represent illegal re-entry cases. For state lawyers, federal practice is more lucrative but boring.[412] Lawyers "plead everyone out" and "never fight cases."[413] While there are fewer trials in federal court[414] and many cases are immigration related, the "boring" criticism is unfounded. While Tucson AFPDs handle a fair number of drug cases, they also handle complex white collar and violent American Indian reservation

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408. The Jencks Act, which controls pre-trial discovery, does not require the disclosure of reports by government witnesses until after the officer testifies on direct examination at trial or a pre-trial hearing. *See* 18 U.S.C. § 3500. In reality, if the government insists on the terms of the Jencks Act, trial judges urge them to disclose reports a reasonable period before trial to avoid delay during trial.

409. It is generally known that younger lawyers need to learn from more experienced practitioners. *See, e.g.*, Willie Peacock, *Advice for New Lawyers: How to Survive and Thrive*, CLIO BLOG (July 20, 2021), https://www.clio.com/blog/advice-for-new-lawyers/ [https://perma.cc/YK98-J9SR] (advising younger lawyers that their clients are likely to get better results if they find an experienced mentor with decades of experience).

410. *See* Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 158, 200 (2010) (stating a civil lawyer's failure to disclose his or her lack of trial experience to a prospective client may be a misrepresentation). This applies to the criminal defense lawyer as well.

411. *See* Ruth A. Bahe-Jachna, *Finding Your Way to First-Chairing a Trial*, 44 LITIG. 18, 21 (2017) (stating the best way to hone trial skills is to practice before a jury and judge — for young lawyers this can be accomplished through mock trials).

412. This is based on this Author's experiences talking with county and state public defenders in Pima County.

413. *Id.*

414. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004) (explaining that the number of trials "[o]ver the past generation or more" has "undergone a sharp decline").

prosecutions charged under the Major Crimes Act.[415] Supervisory AFPDs decide what cases to panel to CJA lawyers and, absent a conflict of interest, intentionally keep more interesting cases in-house.[416]

Today's practice of few trials means few acquittals. This leads AFPDs to celebrate other types of victories. Celebratory emails are mostly about judges imposing time-served sentences in drug sentencings or favorable outcomes from pre-trial motions.[417] This Author's "victories" in federal cases include plea agreements to time served because prosecutors sometimes agree on the strength of pre-trial motions to suppress evidence or dismiss charges. Another type of victory includes dismissed charges when Immigration and Customs Enforcement violates the Bail Reform Act by incarcerating clients without papers who magistrate judges release from pre-trial detention.[418]

D. Federal Public Defenders and Fast-Track Cases at the U.S-Mexico Border

OSL and flip-flop cases assumed approximately 10% of this Author's time as AFPD before the USAO suspended the programs due to the COVID-19 pandemic.[419] As of the writing of this Article, OSL is suspended.[420] Flip-flops returned, but in a varied format: the turnaround time is approximately 30 days between arrest and the sentencing hearing. Before the COVID-19 pandemic, the turnaround time was one week.[421] Most supervisors speculate flip-flops will return to the shorter timeframe when the COVID-19 pandemic subsides.[422]

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415. This information is not publicly available but is based on this Author's experience as supervisory AFPD.

416. With rare exception, the Federal Public Defender in Tucson panels most illegal re-entry and alien smuggling cases and keeps the majority of violent and white-collar cases.

417. In the Pima County Public Defender's Office, where this Author practiced from 2005 to 2015, celebratory emails about trials were a frequent occurrence.

418. *See* United States v. Santos-Flores, 794 F.3d 1088, 1091 (9th Cir. 2015) ("[T]he risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition." (citing United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1176–78 (D. Or. 2012))).

419. As of the writing of this Article, OSL in Tucson is suspended and flip-flops resumed after an absence of one and a half years.

420. Email from Jon M. Sands, Fed. Pub. Def., Arizona, to author (July 9, 2021) (on file with author).

421. *See* Mona Lynch, *Backpacking the Border: The Intersection of Drug and Immigration Prosecutions in a High Volume U.S. Court*, 57 BRIT. J. CRIMINOLOGY 112, 120 (2015) ("The subsequent hearing for those heading to flip-flop court will happen within a week, by which time the defendant will have spoken to an attorney and been informed of the offer in exchange for pleading guilty.").

422. The current general order from the District Court of Arizona forbids the presence of in-custody defendants in court absent trial or other compelling circumstance. Once the Court lifts the order flip-flops will return to the normal format and schedule.

Work for OSL and flip-flop cases includes explaining complaints, plea bargains, and providing legal advice to clients about pleading guilty. As most people charged under these programs are foreign-born, they require a layperson's explanation of the U.S. justice system.[423] AFPDs also explain to clients the panoply of constitutional rights[424] and help them complete forms for the nonprofit group No More Deaths[425] to assist with recovering property seized by U.S. Border Patrol agents.[426] After the first meeting, AFPDs call clients' family members to explain the legal process and sentence.

Our impact on cases sometimes includes convincing prosecutors to lower the number of days in an OSL or flip-flop plea agreement if we detect mistakes in sentencing calculations. Prosecutors determine the sentence on these early disposition plea agreements from the number and timing of a client's removals, criminal history, and, for alien smuggling cases, the number of undocumented people in a car.[427] As an example, if the defense lawyer suspects an incorrect number of days for sentencing based on the client's criminal history and number of removals and the AUSA agrees, a sentence could be lowered from 120 to 90 days.

During OSL proceedings, defense lawyers often convince prosecutors to dismiss cases if clients show symptoms of mental illness or incompetency.[428] OSL clients who do not speak English or Spanish and had no crossing history also see their cases dismissed because of the unavailability of indigenous language interpreters for same-day court hearings.[429] If an OSL client has a family member in the same OSL group,

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423. *See* Lynch, *supra* note 421, at 118 (noting that flip-flop cases "include[] illegal entry/re-entry cases, drug cases and a smattering of illegal identity cases that typically involve a defendant accused of using fraudulent documents at the port of entry on the border"). Operation Streamline is "limited to those accused of illegally entering or re-entering the United States." *See id*. at 118 n.4.

424. This includes the rights to trial, an attorney, privilege against self-incrimination, among others. U.S. CONST. amends. V, VI.

425. No More Deaths/No Mas Muertes is a humanitarian organization formed in 2004 dedicated to "stepping up efforts to stop the deaths of migrants in the desert and to achieving the enactment of a set of Faith-Based Principles for Immigration Reform." *See About No More Deaths*, NO MORE DEATHS, https://nomoredeaths.org/about-no-more-deaths/ [https://perma.cc/M6SS-RRGY] (last visited Dec. 12, 2021). It became affiliated with the Unitarian Universalist Church of Tucson as an official church ministry in the summer of 2008. *See id.*

426. *See id.* ("We minister to incarcerated migrants and their families by helping them recover their personal effects from the US Border Patrol, belongings that would otherwise be lost. We pick them up, safeguard them, and mail them home.").

427. This is based on this Author's experience representing clients at OSL from 2015 to 2020.

428. *See id.*

429. *See id.*

lawyers ask judges to order detention facilities to house them together.[430] If a client in OSL expresses a fear of returning to Mexico or his or her native country because of threats from gangs or cartels, lawyers request the United States Marshals to permit them to take a form letter requesting asylum or refugee protection to the detention facility, so he or she gains placement in an asylum track in immigration court.[431]

Lawyers sometimes convince judges to release clients charged under the flip-flop program at the initial appearance. As flip-flop plea agreements require time in custody, lawyers occasionally persuade prosecutors to permit clients to self-surrender at a later time because of work or school obligations. Defendants charged under the flip-flop program who magistrate judges release at the initial appearance sometimes reject misdemeanor plea agreements because of required incarceration.[432] These clients instead wait for indictment and felony pleas.[433] District court judges in these cases frequently impose time-served sentences because of the low guideline ranges for these charges and clients' minimal criminal history.[434]

Federal public defense in 2022 consists of fewer trials compared to the pre-guideline era. In Arizona, the fast-track program in illegal re-entry cases created a system of massive plea bargaining.[435] In these quick resolution cases, AFPDs spend most of their time on non-litigation type efforts such as explaining plea agreements, advising clients to waive trial rights, and calling family members.[436]

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430. *See id.*

431. The intent of the form letter, drafted by the lawyer, is to alert prison and immigration officials that the accused wants to appear before an immigration judge in order to begin an asylum or refugee application program so as to avoid return to his/her home country and face death. *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 15, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/S3D5-UMTT].

432. This is based on this Author's professional experience as AFPD representing clients in flip-flop proceedings from 2015 to 2022.

433. *See supra* note 432.

434. To qualify for flip-flop charging a person must have minimal criminal history and be accused of charges encompassed by the program: illegal entry, presentation of false documents, or drug possession. *See* Lynch, *supra* note 421, at 118.

435. *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 147 (2009).

436. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1351 n.405 (2010) (quoting interview with defense attorney in OSL describing role as "'not really practicing law' but rather 'sort of like doing administrative detail'").

V. WHAT CAN BE DONE?

This Part explains efforts to abolish mandatory minimum sentencing laws.[437] It then advises FPDO supervisors and line AFPDs on how to deal with the reality of the plea bargaining machine. FPDOs can maximize the number of cases that should go to trial by offering better training. Indirectly, FPDOs can promote deep work for lawyers and staff to increase productivity and work satisfaction. In the right cases, they can encourage AFPDs to discuss matters with trusted journalists to increase public awareness of the perils of mandatory minimums.

A. Efforts to Eliminate Federal Mandatory Minimums

Federal mandatory minimum laws such as the Anti-Drug Abuse Act have been in effect for nearly 40 years.[438] Ten-year sentences for low-level drug offenders have inspired people to become vocal about repealing these laws.[439] Retired United States Supreme Court Justice Anthony Kennedy is one example. In 1994, he told Congress he agreed with most federal judges that "mandatory minimums are an imprudent, unwise and often unjust mechanism for sentencing."[440] In August of 2003, he gave a well-publicized speech to congressional lawmakers at the American Bar Association's Annual Meeting.[441] During the speech, he pleaded for lawmakers to change federal law to not require five or ten years for drug traffickers but to give judges discretion to impose appropriate sentences.[442]

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437. Judges have expressed deep concern with the sentencing guidelines. *See, e.g.*, *Influential Judges' Group Urges Repeal of Tough Sentencing Guidelines*, L.A. TIMES (Sept. 24, 2003, 12:00 AM), https://www.latimes.com/archives/la-xpm-2003-sep-24-na-judges24-story.html [https://perma.cc/H678-AZ35]. I have found no organizations dedicated to repealing the sentencing guidelines nor fast-track programs.

438. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986).

439. *See* George Copeland, Jr., *Rally Calls for End to Mandatory Minimum Sentences*, RICHMOND FREE PRESS (Apr. 8, 2021, 6:00 PM), http://richmondfreepress.com/news/2021/apr/08/rally-calls-end-mandatory-minimum-sentences [https://perma.cc/3PJZ-LCC8].

440. *See Mandatory Sentencing Is Criticized by Justice*, N.Y. TIMES (Mar. 10, 1994), https://www.nytimes.com/1994/03/10/us/mandatory-sentencing-is-criticized-by-justice.html [https://perma.cc/4TX4-2CE4] (quoting testimony of Justice Kennedy).

441. *See* Brad Wright, *Justice Kennedy Criticizes Mandatory Minimum Sentences*, CNN (Apr. 9, 2003, 5:29 PM), http://www.cnn.com/2003/LAW/04/09/kennedy.congress/index.html [https://perma.cc/C2KZ-X8RZ].

442. *See* Michael D. Wysocki, Comment, *Beyond A Reasonable Doubt: The Effects of* Blakely v. Washington*,* United States v. Booker*, and the Future of the Federal Sentencing Guidelines*, 38 TEX. TECH L. REV. 495, 508 (2006) (citing Anthony M. Kennedy, J., U.S. Sup. Ct., Address at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html [https://perma.cc/T5ZL-A6DZ]).

Justice Kennedy is one of many people who oppose mandatory minimums. Families Against Mandatory Minimums (FAMM) is an organization that aims to repeal all such laws.[443] Part of their work includes lobbying in Washington, D.C. for the repeal of these statutes. Julie Stewart, its founder, wrote that she started FAMM to bring attention to the fact that mandatory sentences are draconian and remove discretion from judges.[444] Judges are closer to defendants compared to members of Congress who know nothing about drug cases.[445]

Since its founding in 1991, FAMM has helped enact federal legislation to reform sentencing and prison policies such as the 1994 safety valve, the Fair Sentencing Act, and the First Step Act of 2018.[446] At the state level, FAMM has helped repeal mandatory minimums in Michigan, Massachusetts, Florida, Pennsylvania, Maryland, Missouri, Tennessee, Georgia, and Iowa.[447] The organization has also served as a founding member of the Clemency Project 2014, one of the biggest pro bono mobilizations in history; resulting in over 1,700 people receiving sentencing communications from President Barack Obama; among other accomplishments.[448]

Other efforts to eliminate or amend federal mandatory minimum sentencing have come from Congress. On January 27, 2021, United States Senators Cory Booker and Dick Durbin announced the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act to eliminate the eighteen to one crack to powder cocaine disparity.[449] On September 28,

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443. *See* Erik S. Siebert, Comment, *The Process Is the Problem: Lessons Learned from United States Drug Sentencing Reform*, 44 U. RICH. L. REV. 867, 898–900 (2010).

444. *See* Julie Stewart, *The Effects of Mandatory Minimums on Families and Society*, 16 T.M. COOLEY L. REV. 37, 38 (1999) ("In 1991, I started Families Against Mandatory Minimums (FAMM) and tried to bring attention to the fact that mandatory sentences exist, that they are draconian in many cases, and that they remove discretion from the judge, who is, in fact, closest to the defendant. He has been involved. He knows about the plea bargain. He has read the presentence report. He should be the one doing the sentencing instead of members of Congress who have never laid eyes on the defendants and know nothing about their cases.").

445. *Id.*

446. *See FAMM's History and Accomplishments*, FAMM, https://famm.org/about-us/famms-history/ [https://perma.cc/BGD9-ULGN] (last visited Oct. 21, 2021).

447. *See id.*

448. *See id.*

449. *See It's Time to #EndTheDisparity Between Crack and Powder Cocaine*, FAMM, https://famm.org/endthedisparity/ [https://perma.cc/Q89P-EKXC] (last visited Oct. 21, 2021) ("On January 27, Sens. Cory Booker and Dick Durbin announced the EQUAL Act, which would end this sentencing disparity and apply the equal penalties retroactively. The EQUAL Act was introduced in the U.S. House on March 9 by the bipartisan group of Reps. Hakeem Jeffries, Kelly Armstrong, Bobby Scott, and Don Bacon. These bills will be considered in both chambers in the coming months. FAMM supports both bills.").

2021, the U.S. House of Representatives passed it, paving the way for a vote in the Senate.[450] In March of 2021, Mr. Durbin and Senator Mike Lee reintroduced the Smarter Sentencing Act of 2013.[451] This bipartisan criminal justice legislation proposes modifying 21 U.S.C. § 841(b)(1) to reduce all ten-year mandatory minimums to five years and reduce all five-year mandatory minimums to two years.[452] Following suit, many states, including New Jersey, Oregon, Virginia, and California, recently introduced bills to repeal mandatory minimums.[453]

Although the United States sees a trend towards ending mandatory minimums,[454] there are two reasons there has not been abolishment of all such laws over the last 30 years. First, a sizable portion of the U.S. public perceives politicians who propose to repeal mandatory minimum sentences for drugs as "soft on crime."[455] This makes it difficult for this legislation to gain wide support among elected officials. Second, the U.S. Senate has moved to a system where a supermajority is required to pass legislation.[456] According to Professor Ronald Wright, changes in mandatory minimum sentencing laws will take place incrementally.[457]

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450. *See* Sarah N. Lynch, *U.S. House Passes Bill to End Disparities in Crack Cocaine Sentences*, REUTERS (Sept. 28, 2021, 5:50 PM), https://www.reuters.com/world/us/us-house-passes-bill-end-disparities-crack-cocaine-sentences-2021-09-28/ [https://perma.cc/V2F2-FC6K].

451. *See* TROY K. STABENOW, 5B WEST'S FED. FORMS, DISTRICT COURTS — CRIMINAL § 91:50.20 (5th ed., 2021); *see also Durbin, Lee Introduce Smarter Sentencing Act*, COMM. ON JUDICIARY (Mar. 26, 2021), https://www.judiciary.senate.gov/press/dem/releases/durbin-lee-introduce-smarter-sentencing-act [https://perma.cc/9BDX-TMCJ].

452. *See* S. 1410, 113th Cong. § 4 (2013).

453. *See* Elizabeth Weill-Greenberg, *'It Tears Families Apart': Lawmakers Nationwide Are Moving to End Mandatory Sentencing*, APPEAL (Apr. 15, 2021), https://theappeal.org/it-tears-families-apart-lawmakers-nationwide-are-moving-to-end-mandatory-sentencing/ [https://perma.cc/HLP7-J52C].

454. *See* Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 409 (2017) ("Although the federal government has not moved as quickly as the states to repeal mandatory sentences, the trend in both the federal and state systems is clearly toward repeal.").

455. *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 30 (2010) ("While the passage of mandatory minimums can enhance a representative's prospects for reelection, efforts to reform such laws may be perceived as a political liability, allowing an opponent to assail the incumbent as being soft on crime.").

456. *See* Ronald F. Wright, *Portable Minimalism in Sentencing Politics*, 2011 CARDOZO L. REV. DE NOVO 9, 13, 18 ("[T]he institutional decision rules in the federal legislative process tell us that the vote count will have to approach unanimity before any change will occur.").

457. *See id.* at 18 ("One small reduction in sentences enacted every 24 years is a realistic — and underwhelming — prediction of what we might expect from the federal system.").

B. How to Battle the Plea Bargaining Machine

The primary mission of FPDOs is to provide zealous representation to indigent federal criminal defendants.[458] FPDOs cannot lobby.[459] Thus, these organizations only spend minimal resources on advocacy to eliminate or amend sentencing guidelines or mandatory minimum sentencing laws.[460] FPDOs' efforts to educate lawmakers about legislation include its Federal Public and Community Defenders Legislative Committee.[461] This group responds to questions from Congress related to legislation affecting federal offenses.[462] Some offices, at the invitation of the United States House Judiciary Committee, also send AFPDs to work in criminal justice policy and legislation for no more than two years.[463]

FPDOs spend the majority of their resources defending criminal defendants. To deal with the practical impact of minimal trial rates, FPDOs must provide effective training for line attorneys.[464] Besides a basic framework for defending federal criminal cases, the training must hone AFPDs' ability to screen cases that should go to trial and then improve trial skills.

i. The Importance of Training

Through training, AFPDs can better detect when a case should go to trial. Training can also improve trial practice. Besides in-house training, if

458. *See Mission — Defender Services*, U.S. CTS., https://www.uscourts.gov/services-forms/defender-services/mission-defender-services [https://perma.cc/MW2F-Y2NK] (last visited Feb. 17, 2022) ("The mission of the Defender Services program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (18 U.S.C. § 3006A), and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services.").

459. *See* Email from Jon M. Sands, Fed. Pub. Def., Dist. of Ariz., to author (Oct. 13, 2021) (on file with author).

460. As has been explained above, the purpose of FPDOs is to provide the highest quality representation possible to its clients, not legislative efforts. On the other hand, FPDOs offices have routinely sent AFPDs on details to work with senators such as Dick Durbin.

461. *See* Email from Jon M. Sands, *supra* note 420.

462. *See id.*

463. *See* FED. DEF. LEGIS. COMM, H. COMM. ON JUDICIARY, 2020: FEDERAL DEFENDER DETAILEE LEGISLATIVE COUNSEL, https://www.fd.org/sites/default/files/webform/vacancy_files/2020_hjc_detailee_announcement.pdf [https://perma.cc/4CHD-6F7S] (last visited Feb. 17, 2022).

464. *See* Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 524 (2010) (summarizing an interview with Jon Sands, Federal Public Defender for the District of Arizona, highlighting the importance of training in the context of OSL and preventing low morale among AFPDs).

available, FPDO supervisors should send newer AFPDs to trial colleges.[465] They should also require inexperienced AFPDs to pair up with experienced lawyers that have matters set for trial or evidentiary hearings so they can cross-examine witnesses and observe how skilled lawyers try cases.

The size of an FPDO often dictates how much in-house training supervisors can offer. Small offices have fewer lawyers and, therefore, fewer resources for in-house opportunities. In these offices, new AFPDs rely on trial colleges and national federal defender seminars.[466] Trial colleges include the National Criminal Defense College's (NCDC) Trial Practice Institute (TPI),[467] the National Institute for Trial Advocacy (NITA),[468] Gerry Spence's Trial Lawyer's College in Laramie, Wyoming,[469] or Ira Mickenberg's National Defender Training Project.[470]

Larger offices, such as the Federal Defenders of San Diego, have in-house training programs, including a training director.[471] In 2021, the Tucson office of the Arizona FPDO started a training program for lawyers new to federal trial practice.[472] Three supervisors, including this Author, teach weekly seminars on Mondays during lunch to lawyers on areas of federal criminal defense. AFPDs in the Phoenix office of the FPDO can participate during the sessions live via Zoom.

ii. Areas for Training to Improve Pre-Trial Representation

1. Advising Clients on the Benefits of a Plea Offer

FPDOs should train lawyers to advise clients to consider rejecting plea agreements where the offer has either the same result as trial or marginal

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465. A trial college is a training program where lawyers spend hours, sometimes days, in breakout groups learning and practicing trial skills for jury selection, direct and cross examination, and opening statements and closing arguments.

466. This proposition is not publicly available knowledge but is based on this Author's experience as AFPD, particularly the Author's experience in training and as a supervisor.

467. *Trial Practice Institute*, NAT'L CRIM. DEF. COLL., https://ncdc.net/trial-practice-institute/ [https://perma.cc/P5PW-J763] (last visited Feb. 17, 2022).

468. NAT'L INST. TRIAL ADVOC, https://www.nita.org/s/ [https://perma.cc/C2YY-9CJ9] (last visited Feb. 17, 2022).

469. TRIAL LAWS. COLL., https://www.triallawyerscollege.org/ [https://perma.cc/7ZQC-TJE6] (last visited Feb. 17, 2022).

470. *See* Kathryn T. Ng, *Tax Strategy Patents: Close Pandora's Box on Patenting Criminal Defense Strategies*, 34 U. DAYTON L. REV. 253, 269 (2009) (explaining that Ira Mickenberg is the director of the National Defender Training Project, organizes conferences designed to inform practicing attorneys of new defense strategies and techniques).

471. *See About FDSDI*, FED. DEFS. SAN DIEGO INC., https://fdsdi.com/about-fdsdi/ [https://perma.cc/5K9U-QNA8] (last visited Feb. 17, 2022).

472. This information is not publicly available and is based on this Author's professional experience as a supervisory AFPD.

benefit. This Author has seen plea agreements in which the only benefit is the one level off for acceptance of responsibility that the government controls under U.S.S.G. § 3E1.1(b).[473] Clients must know the value of one point off in terms of months of incarceration when considering a plea. Clients must also know that in the vast majority of cases, judges do not deduct two levels off for acceptance of responsibility after trial.[474] Depending on the offense level, the difference between a two-point reduction can be a few months to two years.[475] For example, the difference between levels 12 and 14 is four months, but the difference between levels 28 and 30 is 19 to 24 months.[476]

2. Advising Clients to Go to Trial

In Arizona, plea agreements on reactive drug cases include a four-level reduction for fast-track.[477] Therefore, it makes little sense to go to trial on factually difficult drug importation cases. These drug cases also mostly trigger the ten-year mandatory minimum.[478] But plea offers in cases involving the exportation of firearms or ammunition have no mandatory minimums, and plea offers frequently do not include meaningful reductions at sentencing.[479] Going to trial on these cases rarely leads to substantially worse results.

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473. The one level reduction is only available for offenses with a base level of 16 or higher. *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018).

474. *See* Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1231 (2015) (noting that only 3% of trial convictions result in acceptance of responsibility reductions).

475. *See* U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2021).

476. *See id.*

477. *See* Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 285 n.1 (1998) ("Reactive cases are those in which someone has been caught committing a crime and the office reacts to an arrestee being presented for prosecution. Investigation therefore follows, rather than precedes, arrest.").

478. This is because drug arrests at or near the U.S.-Mexico border typically involve large quantities of drugs. Most drugs consumed in the United States come from Mexico. *See More US Citizens Arrested for Smuggling Drugs over US-Mexico Border*, NBC L.A. (May 31, 2021, 8:52 AM), https://www.nbclosangeles.com/news/california-news/more-us-citizens-arrested-for-smuggling-drugs-over-us-mexico-border/2607088/ [https://perma.cc/PUW6-9XR7].

479. There are exceptions. In one of my recent cases the difference between a sentence at trial and a plea offer was five offense levels. The offense level after trial conviction was 26, with two points off for fast-track under U.S.S.G. § 5K2.0 and three points off for acceptance of responsibility under § 3E1.1. This means that if the client went to trial and lost, the offense level, because he was criminal category I, would be 63 to 78 months. If convicted with the plea agreement the guideline would be 37 to 46 months. At the low end, the

Plea agreements in the Tucson sector of the District of Arizona are mostly favorable. This has contributed to low trial rates in the District.[480] Illegal re-entry clients see beneficial plea offers, as do those charged under 18 U.S.C. § 1324 for alien smuggling and 31 U.S.C. § 5332 bulk cash smuggling prosecutions. Except for violent crimes or crimes against children, Arizona plea agreements favor pre-trial resolution in lieu of trial.[481] But even in these cases, reasonable prosecutors offer pleas with substantial savings compared to trial. Favorable plea policies are good for clients because of reduced imprisonment. But these policies make it difficult to proceed to trial.

3. The Ability to Screen Cases for Trial

AFPDs must be able to screen which cases should go to trial and then effectively try cases that make it that far.[482] FPDOs can provide training for line AFPDs to properly screen when to recommend rejection of the plea agreement and proceed to pre-trial motion practice. Successful motions can lead to dismissal.[483] Offices should also train lawyers to examine the facts and theory of defense.[484] They can pair experienced, successful lawyers with younger lawyers, so they review cases together. Most lawyers, including those less experienced, can spot issues such as Fourth Amendment and Miranda violations but may not always identify nuanced problems such as the need to file motions to suppress eyewitness identifications, motions to sever charges or defendants, or motions to

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difference is 26 months, at the high end 32 months. These amounts are significant, and the vast majority of clients would accept the plea offer.

480. Typically drug and illegal-entry cases are difficult to defend, prompting defense lawyers to strongly recommend plea agreements that are already favorable. *See* Kevin B. Ross, *Defense Techniques for Federal Drug Cases*, *in* DEFENSE STRATEGIES FOR DRUG CRIMES (2010) (noting that "[f]ederal drug cases are not easy to defend").

481. This proposition is based on this Author's experience.

482. *See* Conrad & Clements, *supra* note 24, at 165 ("Prosecutors and defense attorneys could boldly challenge the existing no-trial zeitgeist and hone their trial skills in cases that make sense to try.").

483. There are multiple grounds for filing a motion to dismiss a case. One example is a motion to dismiss for outrageous government conduct. *See, e.g.*, United States v. Garza-Juarez, 992 F.2d 896, 904 (9th Cir. 1993) ("The government's conduct may warrant a dismissal of the indictment if that conduct is so excessive, flagrant, scandalous, intolerable and offensive as to violate due process; the trial court may also dismiss the indictment in the exercise of general supervisory powers.").

484. *See* Laurie Shanks, *Child Sexual Abuse: Moving Toward A Balanced and Rational Approach to the Cases Everyone Abhors*, 34 AM. J. TRIAL ADVOC. 517, 540 (2011) ("Once the investigation is complete, the defense attorney must formulate a theory of defense."); *see also* Kinsey v. State, 798 P.2d 630, 632–33 (Okla. Crim. App. 1990) ("[A] defendant is entitled to an instruction on his theory of defense where there is evidence to support it, even if such evidence is discredited").

dismiss because of duplicitous or multiplicious indictments.[485] Offices should supply continuing legal education trainings to cover these areas.

To maximize the number of cases that should go to trial, FPDO supervisors and heads of offices must train lawyers to take the time to analyze all possible trial issues. To do this, supervisors must emphasize the importance of requesting full disclosure and combing through it and the defense investigation. As this takes time and AFPDs often have heavy caseloads, it is difficult to try cases within two or three months from arraignment.

4. Disclosing Trial Experience to Clients

Scholars have argued that lawyers should disclose their lack of trial experience to prospective clients.[486] This Author agrees with this approach. Younger lawyers with little to no trial background should tell clients that if their case proceeds to trial, he or she will try the case with another lawyer in the office with adequate experience. Supervisors should then pair new lawyers with more experienced ones if there is any indication a case may proceed beyond plea resolution. One problem with current federal practice is that it takes time for lawyers to acquire sufficient trial exposure. Offices must decide if they want to hire only lawyers with several years of experience or invest more resources into training newer lawyers.

5. The Importance of Deep Work for Public Defenders [487]

Although the practice of working deeply and instituting a sequential method at work does not lead to more trials, it ensures that AFPDs have more time to focus so they can produce higher quality, distraction-free work with more satisfaction. Inevitably, working deeply will produce more work. Because trials reduce the time that can be spent on other cases, these strategies are crucial for FPDOs with high caseloads.

It is common knowledge among lawyers that high-quality work on cases requires time and concentration. AFPDs need as much time as possible, without interruption, to read disclosure, take notes, listen to and watch recorded witness interviews, conduct legal research, assign investigators and paralegals to conduct casework, and discuss the issues they find with

485. This is based on this Author's experience as supervisory AFPD.

486. *See* McCormack & Bodnar, *supra* note 410, at 158, 200 (contending that a lawyer's failure to disclose his or her lack of trial experience to a prospective client may be a misrepresentation).

487. See CAL NEWPORT, DEEP WORK: RULES FOR FOCUSED SUCCESS IN A DISTRACTED WORLD (2016) for background on the concept of "deep work."

other lawyers, trial teams, and clients. FPDO staff should not criticize lawyers who close their doors, do not respond quickly to emails, and turn on do not disturb messages on telephones. These are ways to ensure the peace and quiet required to engage in deep work.[488] To ensure client communication, this Author spends the majority of one day per week visiting clients in person at detention facilities when not in trial, traveling for work, or on vacation.[489] But this Author also minimizes distractions through quarterly and weekly planning, time-blocking every workday, and practicing capture, configure, and control techniques.[490]

Lawyers must not ignore clients, but this does not mean lawyers should be available to clients during all work hours.[491] This Author's preference during a typical workday is to be available for phone calls from clients and client family members and friends when not engaged in deep work blocks — mostly at the end of a workday. On most days, I tell receptionists I may receive phone calls for a designated one-hour period.

6. Speaking to the Media

The media can educate the public on problems in criminal justice, such as mandatory minimum punishments.[492] There are many examples of shocking stories in the press. Take, for instance, the story of 47-year-old Gregory Taylor, who the California Supreme Court released after spending 13 years in prison.[493] A trial judge sentenced him to 25 years in prison for

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488. *See* Craig Jarrow, *Is an Open-Door Policy Killing Your Productivity?*, TIME MGMT. NINJA, http://timemanagementninja.com/2010/12/is-an-open-door-policy-killing-your-productivity [https://perma.cc/G3ZK-6GEN] (last visited Feb. 17, 2022).

489. Our office now has the ability for video visits with in-custody clients, but these are less personal compared to in-person meetings.

490. *See* Cal Newport, *Projects vs. Tasks: A Critical Distinction in Productive Scheduling*, STUDY HACKS BLOG (Jan. 2, 2021), https://www.calnewport.com/blog/2021/01/02/projects-vs-tasks-a-critical-distinction-in-productive-scheduling/ [https://perma.cc/V8LB-C3PC] (supplying an example of quarterly, weekly, and daily planning). For capture, configure, and control methods see generally DAVID ALLEN, GETTING THINGS DONE (2001).

491. *See* MODEL RULES OF PRO. CONDUCT r. 1.4(a)(3) & cmt. 3 (AM. BAR ASS'N 2019). "[A] lawyer shall . . . keep the client reasonably informed about the status of the matter . . . ." *See id.* r. 1.4(a)(3). Comment 3 adds that "paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation." *See id.* r. 1.4 cmt. 3.

492. *See* Alan S. Gerber, Dean Karlan & Daniel Bergan, *Does the Media Matter? A Field Experiment Measuring the Effect of Newspapers on Voting Behavior and Political Opinions*, 1 AM. ECON. J. 35, 35 (2009) (asserting "[c]itizens learn about politics and government from the [media]").

493. *See* Naimah Jabali-Nash, *Three Strikes and He's Out (of Prison)! Homeless Man Spent 13 Years Behind Bars After Trying to Break into Church Kitchen*, CBS NEWS (Aug. 17, 2010, 4:13 PM), https://www.cbsnews.com/news/three-strikes-and-hes-out-of-prison-

trying to break into St. Joseph's Church in Los Angeles to find food.[494] The judge's hands were tied due to California's three-strikes mandatory minimum law.[495] Another example is the story of Mark Weller from Sioux City, Iowa, a man who fell victim to federal mandatory drug sentencing laws.[496] Mr. Weller faced the ten-year mandatory minimum because informants revealed he dealt two and a half kilograms of methamphetamine across state lines to maintain an addiction.[497] *The Washington Post* published a story about Evans Ray, Jr., sentenced to life imprisonment for violating federal three strikes for drug offenses.[498] It was only because of President Barack Obama's pardon that Mr. Evans won his freedom after spending 12 years in prison.[499] These terrible stories can help foster change by educating the public and creating momentum for reform.

FPDOs should not discourage line attorneys from speaking with trusted journalists about cases in which mandatory minimums lead to unjust results, so long as clients consent beforehand.[500] Before speaking with journalists about a client's unjust length of imprisonment because of a mandatory minimum law, line AFPDs should consult with supervisors and heads of offices.

CONCLUSION

The plea bargaining machine has reduced options for the accused, increased disparities for racial minorities in all parts of the trial process, and crippled federal defender culture to one of armistice. Offense level reductions from fast-track (U.S.S.G. §5K3.1) and government-controlled

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homeless-man-spent-13-years-behind-bars-after-trying-to-break-into-church-kitchen/ [https://perma.cc/G7V7-U78W].

494. *See id.*

495. *See California Man Released From Prison After Serving 13 Years*, AFRO-AM. (Aug. 21, 2010), https://afro.com/california-man-released-from-prison-after-serving-13-years/ [https://perma.cc/B98K-U4P6].

496. *See* Eli Saslow, *Against His Better Judgment*, WASH. POST (June 6, 2015), http://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/ [https://perma.cc/VG5H-GUCK].

497. *See id.*

498. *See* Justin Wm. Moyer, *A Drug Dealer Got a Life Sentence and Was Devastated. So Was the Judge Who Sentenced Him.*, WASH. POST (May 6, 2017), https://www.washingtonpost.com/local/a-drug-dealer-got-a-life-sentence-and-was-devastated-so-was-the-judge-who-sentenced-him/2017/05/04/efb81020-2aa0-11e7-9b05-6c63a274fd4b_story.html [https://perma.cc/ZU9D-3XS4].

499. *See id.*

500. In speaking with the media, public defenders should adhere to ABA Standard 4-1.10, Relationship with the Media. This standard asks that lawyers secure client consent before divulging confidential information and not allow the client's representation to be adversely affected by media contacts or attention. *See* CRIMINAL JUSTICE STANDARDS, DEFENSE FUNCTION STANDARD 4-1.10 (AM. BAR ASS'N 2017).

acceptance of responsibility (U.S.S.G. §3E1.1(b)), both often present in pleas, help create heavy trial penalties. Mandatory minimums in drug cases make it almost impossible to advise any client to go to trial.

Today, lawyers, prosecutors, and judges realize the power of the machine and avoid trials over pleas in more than 97% of cases. This starkly contrasts with practice in the 1970s and 1980s before the guidelines, when lawyers tried cases monthly. It also contrasts with Pima County Superior Court's 8% trial rate in the mid-2000s, where this Author started as a public defender. Today, the tiny fraction of cases that proceed to trial does not faze most criminal justice professionals.

Scholarship has adequately addressed the effect of the guidelines and mandatory minimums on trial rates. But it has not supplied an analysis on how the plea bargaining machine operates in real cases along the United States-Mexico border. Notable offense level reductions in plea offers and a culture of plea-pushing among defenders make it rare for those charged with illegal re-entry to exercise trial rights.

The future is uncertain. Will trial rates deplete to less than 1% nationally? Will Congress eventually do away with mandatory minimums, mitigating the plea bargaining machine in drug prosecutions? FPDOs and AFPDs have no control over these matters. But they have the power to better analyze cases and sometimes push for trial, not pleas. This practice, along with improved courtroom lawyering, can make a small but significant dent in the criminal justice system by increasing the trial rate.