

The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges

*The Honorable Robert J. Conrad, Jr. & Katy L. Clements**

ABSTRACT

Federal criminal jury trials are dying. Surely, but not slowly. Within the ten-year span from 2006 to 2016, the absolute number of cases disposed of by jury trial declined by forty-seven percent. During the same ten-year span, the portion of defendants' cases disposed of by jury trial similarly declined by almost forty percent. Go to the movies, turn on the television, or open a book, and the vanishing trial is not the portrayal of the American criminal justice system you will see. The media depicts a thriving criminal adjudicatory system full of dramatic human interactions, complex fact patterns, and cathartic resolutions rendered at the hand of the twelve-person, hallowed pillar of American democracy: the jury.

*This Article debunks that fiction. The criminal jury trial decline has been occurring since the 1980s. Yet the primary factors scholars have attributed as responsible for igniting the trial decline no longer predominate. Prior scholarship has blamed mandatory minimum penalties and mandatory Federal Sentencing Guidelines as the principal agents of the trial decline. This Article examines the vanishing trial phenomenon in the post-mandatory Guidelines era and discovers startling results. Despite the Supreme Court making the Guidelines advisory in *United States v. Booker* in 2005 and a prosecutorial push during the Obama Administration to circumvent charging mandatory minimum penalties, trial numbers continue to rapidly decline.*

*By tracing trial statistics in the twenty-first century, this Article identifies new factors, largely unexamined in the vanishing trial literature, that have arguably driven trial numbers to even lower levels. Specifically, the authors contend that *Booker*, changes in Department of Justice policies, and other extrinsic factors outside the criminal justice system have further marginalized the existence of trials and juries. The authors lament that the sentencing hearing has replaced the trial as the paramount proceeding in most criminal cases and explore the consequences of plea agreements supplanting the public*

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square openness of trials. By doing so, the authors hope to embolden the players in the criminal justice system to not go gentle into a trial-less system, but rather, to rage against the dying of the trial light.

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*Do not go gentle into that good night, . . . Rage, rage against
the dying of the light.*

—Dylan Thomas¹

INTRODUCTION

A federal criminal jury trial is a marvel. Public perceptions influenced by cinematic and literary portrayals do not do it justice. Imagine the courtroom scene. The evidence has been presented subject to cross-examination. The victim and the defendant’s family sit upright, perched behind counsel, nervously respecting the formality of the proceedings. Their restlessness is palpable. “You may proceed,” booms the judge. The prosecutor rises to make the closing argument. The defense attorney is poised to rebut and defend. The trial judge formulates instructions soon to be given to the jury, knowing that an appellate court will scrutinize each word for legal error. The silent tension hangs thick in the air. The lawyers speak. The jury then retires to deliberate privately on the defendant’s fate. All await the verdict—from the Latin “verdictum,” meaning “a declaration of the truth.”² This spectacle is riveting, majestic, poetic—and disappearing.

Even a decade ago, attorneys tried more criminal cases. For example, in the United States Attorney’s Office (“USAO”) in the Western District of North Carolina (“WDNC”)—where one of the coauthors currently presides as a federal district judge—the U.S. pros-

¹ DYLAN THOMAS, *Do Not Go Gentle into That Good Night*, in THE POEMS OF DYLAN THOMAS 239 (Daniel Jones ed., 2003).

² *Verdictum*, BLACK’S LAW DICTIONARY (10th ed. 2014).

ecutor's office tried an average of forty-four cases per year from 1989 to 2004.³ In 2016, the same office tried only seventeen cases.⁴ From June 2005 through December 2007, that coauthor presided over forty-six criminal trials.⁵ During years 2015 and 2016, the same coauthor presided over a total of two criminal jury trials per year.⁶ In 2016, the six judges in the WDNC had a combined total of seventeen criminal trials, down from an annual high of more than sixty criminal trials a decade ago.⁷ Once viewed as "trial judges," federal district judges are increasingly seen as "sentencing judges."⁸

The same can be said for criminal attorneys, who can now more aptly be termed "sentencing advocates" than "trial lawyers." Currently, thirty-three attorneys are assigned to the criminal division of the USAO for the WDNC.⁹ In 2016, only sixteen of those attorneys appeared as counsel of record in a criminal trial.¹⁰ Yet during the same year, those same thirty-three attorneys advocated at more than 900 sentencing hearings and supervised release revocation hearings.¹¹ Federal Defender Office ("FDO") statistics reflect a similar trend. The Office of the Public Defender for the WDNC has thirteen trial attorneys.¹² In 2016, four Assistant Federal Defenders tried a total of five cases while court-appointed and private attorneys tried twelve cases.¹³ As Figure 1 portrays, the litigating offices in the criminal justice system are not trying many criminal cases in the WDNC.¹⁴

³ Internal Courthouse Records for the Western District of North Carolina (on file with the authors) [hereinafter Internal Courthouse Records].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; see *infra* Figure 1.

⁸ See MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 1 (1978) ("[T]he 'trial court' is really a 'plea bargaining court.'").

⁹ *Criminal Division of the United States Attorney's Office: Western District of North Carolina*, U.S. DEP'T JUSTICE, <https://www.justice.gov/usao-wdnc/criminal> [https://perma.cc/F756-UP7E] (last updated Oct. 13, 2015).

¹⁰ Internal Courthouse Records, *supra* note 3.

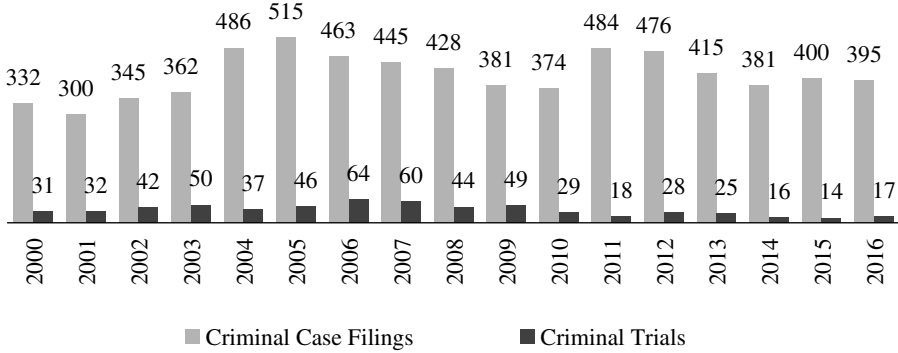
¹¹ *Id.*

¹² *Office Information*, FED. PUB. DEFENDER: W. DIST. N.C., <http://ncw.fd.org/content/office-information> [https://perma.cc/EX6T-RSHQ] (last visited Jan. 30, 2018).

¹³ See Internal Courthouse Records, *supra* note 3.

¹⁴ See *id.*

FIGURE 1. CRIMINAL CASE FILINGS & TRIALS IN THE WDNC
2000–2016¹⁵



National statistics mirror what has occurred in the WDNC. In its Statistical Tables for the Federal Judiciary, the U.S. Administrative Office of the Courts does not distinguish between the total number of criminal trials disposed of by jury versus those disposed of by bench. However, the Office does track the number of criminal defendants terminated by jury trials separately from the number of defendants whose cases are terminated by bench trials. In 2006, jury trials disposed of 3258 criminal defendants.¹⁶ Although trials and defendants are not equally distributed across districts,¹⁷ this number roughly averages to each USAO trying thirty-four defendants by jury per year.¹⁸ Compare that to the 1713 criminal defendants disposed of by jury trials in 2016,¹⁹ which roughly equates to each USAO trying about eighteen defendants by jury per year.²⁰ As indicated in Figure 2, from 2006 to 2016, the absolute number of criminal defendants disposed of by jury trials nationwide decreased by forty-seven percent.²¹ And when

¹⁵ Internal Courthouse Records, *supra* note 3. Trial numbers include both jury and bench trials.

¹⁶ *Statistical Tables for the Federal Judiciary: Table D-4*, ADMIN. OFF. U.S. CTS. (Dec. 2006), http://www.uscourts.gov/sites/default/files/statistics_import_dir/D04Dec06.pdf.

¹⁷ In 2015, the Southern District of New York had fifty criminal jury trials among forty-four Article III judges compared to the seven criminal jury trials that occurred in the WDNC in 2015. 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?_r=0; Internal Courthouse Records, *supra* note 3. Regardless, both districts have experienced over a 50% reduction of criminal jury trials in the span of ten years.

¹⁸ See *infra* Figure 2; see also U.S. Attorneys: About, U.S. DEP'T JUST., <https://www.justice.gov/usao/about-offices-united-states-attorneys> [<https://perma.cc/58YX-R463>] (last updated Apr. 6, 2017).

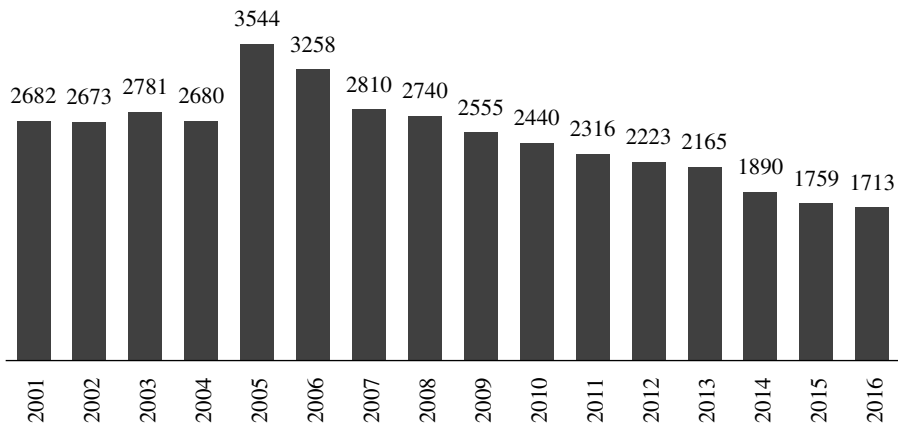
¹⁹ See *infra* Figure 2.

²⁰ *Id.*

²¹ *Id.*

one considers that the government tried some of these defendants in the same proceedings as codefendants, the actual number of jury trials is even less than the above numbers reflect. If this trend continues, jury trials may soon become a distant memory of the past, only preserved in iconic (and then archaic) films.²²

FIGURE 2. CRIMINAL DEFENDANTS DISPOSED OF BY JURY TRIALS IN U.S. DISTRICT COURTS 2001–2016²³



Much has been said about the vanishing civil jury trial;²⁴ less has been said about its cousin—the vanishing criminal jury trial. The disappearance is a phenomenon. While this Article narrows its focus to the reasons behind the federal criminal jury trial decline, the authors note that a similar diminution in criminal trials is occurring at the state

²² See, e.g., 12 ANGRY MEN (Orion-Nova Productions 1957); MY COUSIN VINNY (Palo Vista Productions 1992).

²³ *Statistical Tables for the Federal Judiciary: Table D-4*, ADMIN. OFF. U.S. CTS. (Dec. 2001–2016), <http://www.uscourts.gov/data-table-numbers/d-4?pt=all&pn=all&t=all&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D=> [hereinafter *Table D-4*].

²⁴ See, e.g., AM. COLL. OF TRIAL LAWYERS, THE “VANISHING TRIAL:” THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM 10–23 (2004); Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge’s Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 100–02 (2010); Mark W. Bennett, *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 306–09, 312 (2004); Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 U. KAN. L. REV. 893, 896–98 (2013); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1262–68 (2005) [hereinafter Galanter, *The Hundred-Year Decline*]; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–92 (2004) [hereinafter Galanter, *The Vanishing Trial*]; Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of Solution?*, 79 CONN. B.J. 1, 9–22 (2005); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 542–62 (2012).

level.²⁵ During a period when the number of federal criminal statutes, regulations, attorneys, and judges rose, actual numbers of jury trials fell to unprecedented levels. This Article examines the causes of this decline while recognizing the distinctiveness of criminal cases and the critical Sixth Amendment rights that come with them. The authors lament the disappearance of the criminal jury trial yet avoid criticism of choices attorneys make in the best interests of their clients.

In 2003, Professor Marc Galanter prepared a working paper for the American Bar Association (“ABA”) Litigation Section’s Symposium on the Vanishing Trial.²⁶ In his seminal work, Galanter traced the startling decline in federal civil cases disposed of by trials—from 11.5% in 1962 to 1.8% in 2002, and a 60% decline in the absolute number of trials since the mid-1980s.²⁷ Galanter’s article broadly examined the time period of 1962 to 2002, concentrating primarily on the declining civil trial.²⁸ This Article focuses on the criminal side in the years since Galanter’s study—devoting special attention to the ten-year span from 2006 to 2016—and discovers similar results. From 2006 to 2016, the overall number of criminal jury trials declined by 47%, and the jury trial rate declined by almost 40%.²⁹

25 The authors note the information asymmetry between gathering jury trial statistics in the states and gathering these same statistics in federal courts due to the lack of consistency among states in collecting and compiling empirical courthouse data. Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 755–56 (2004). However, Brian Ostrom, Shauna Strickland, and Paula Hannaford-Agor of the National Center for State Courts (“NCSC”) amassed a large data collection from a twenty-three-state sample from 1976 to 2002. *Id.* at 761. Their findings elucidated that despite a 127% increase in total criminal dispositions from 1976 to 2002, state criminal jury trials decreased by 15% over the almost three-decade period, from 42,049 criminal jury trials in 1976 to 35,664 in 2002. *Id.* at 761, 763–64. More recent data are almost unobtainable because the NCSC stopped tracking state statistics that distinguished between jury and bench trials, citing the administrative difficulties in these data collections. See T. Ward Frampton, Note, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 197 (2012).

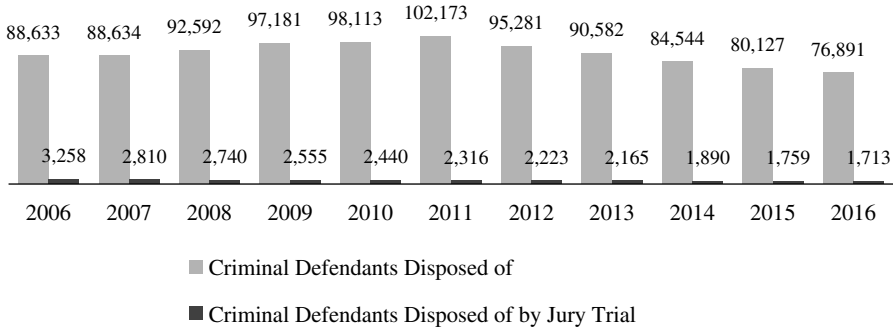
26 That paper became an article entitled, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*. Galanter, *The Vanishing Trial*, *supra* note 24.

27 *Id.* at 459.

28 See generally *id.* at 460–92 (tracing the civil trial decline over a forty-year period).

29 See *infra* Figure 3. The criminal jury trial rate was determined by dividing the total number of defendants disposed of by criminal jury trials each year by the total number of criminal defendants disposed of each year.

FIGURE 3. CRIMINAL JURY TRIAL RATES IN U.S. DISTRICT COURTS 2006–2016



This Article assesses the root causes of the federal criminal jury trial decline and posits that those causes have changed since the 2003 Galanter study. Most prior scholarship, including Galanter’s brief treatment of declining criminal trials, points to mandatory minimum penalties (“MMs”) and mandatory Federal Sentencing Guidelines³⁰ as the principal reasons for the criminal trial diminution.³¹ This Article expands the focus.

The authors contribute to the current vanishing-trial literature by demonstrating that despite the modification to the mandatory Sentencing Guidelines scheme and recent Department of Justice (“DOJ”) policy directives to resist charging MMs in certain cases, criminal jury trials continue to decline. This Article adds to prior scholarship by contending that changes in the criminal legal landscape since Galanter’s 2003 study have exacerbated the trial decline. Specifically, the

³⁰ Courts and scholars frequently characterize the pre-*Booker* Guidelines as “mandatory” although the Guidelines had a built-in departure scheme. See, e.g., *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1352 (2016) (noting that new judges appointed post-*Booker* are “less wedded” to the Guidelines than old judges who “spent decades applying *mandatory* Guidelines” (emphasis added)); see also *Pepper v. United States*, 562 U.S. 476, 489 (2011); *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring); *Rita v. United States*, 551 U.S. 338, 354, 364 (2007); *United States v. Booker*, 543 U.S. 220, 265–66 (2005); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (U.S. SENTENCING COMM’N 1989) (constructing a list of circumstances that might warrant courts departing from the Guidelines range). Therefore, pre-*Booker* Guidelines are more accurately characterized as “de facto mandatory.” With this crucial caveat in mind, the authors choose to adopt the same taxonomy.

³¹ See, e.g., Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226, 227–29 (2007); Galanter, *The Vanishing Trial*, *supra* note 24, at 493–95; Galanter, *The Hundred-Year Decline*, *supra* note 24, at 1263; Kravitz, *supra* note 24, at 9 (asserting that the Guidelines, MMs, and plea bargaining in general are “widely recognized to be the cause of the recent decline in criminal trials”); Ronald F. Wright, *Trial Distortion and The End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129–32 (2005).

authors argue that the 2005 Supreme Court decision in *United States v. Booker*,³² shifts in DOJ policy, and various extrinsic factors outside the criminal justice system have magnified the criminal jury trial diminution. While direct causation cannot be proven, strong correlation can be shown by examining factors that preceded, and likely precipitated, a greater decrease in the absolute number of criminal jury trials and the overall criminal-jury-trial rate.³³ This Article examines the “whos, whats, and whys” for the phenomenon of reduced federal criminal jury trials. Behind every set of statistics is a story. This Article attempts to uncover and synthesize that story.

The analysis proceeds in five parts. Part I identifies the players and their respective roles in the criminal justice system. Part II considers the potential causes of the reduction in criminal jury trials within the criminal justice system, moving in a chronological sequence. This Part examines internal factors previous scholars pinned as responsible for the trial decline—MMs, mandatory Guidelines, and cooperation—through the lens of the twenty-first century. Part II also identifies new internal factors that have emerged in the twenty-first century that have magnified the trial decline: *United States v. Booker* and changes in DOJ policy. Part III analyzes external factors, outside of the criminal justice system, that are “trial suppressors” and influence how the internal actors operate. Part IV asserts that the diminishing trial number has serious implications for individual litigants, our judicial system, the American public, and our democracy as a whole. Part V serves as a summary and supplication, encouraging all actors within the criminal justice system to fight for the preservation of the criminal jury trial.

Through this analysis, the authors hope to (1) illuminate the continued criminal jury trial decline in the post-mandatory Guidelines era and new anti-MM climate, (2) identify and expose the factors driving the trial decline, and (3) through this diagnosis, provide a new frame-

³² 543 U.S. 220 (2005).

³³ Comporting with Galanter’s classifications, this Article similarly traces the decline in the portion of criminal defendants disposed of by jury trial (referred to as the “criminal-jury-trial rate”) and the decline in the absolute number of criminal defendants disposed of by jury trials in federal courts. The terms “number of trials,” “absolute number of trials,” and “trial number” are used interchangeably throughout this Article. Additionally, these terms technically refer to the number of criminal *defendants* disposed of by jury trials because the U.S. Administrative Office of the Courts does not track the total number of jury trials each year. See *supra* text accompanying notes 15–22. Both measurements have declined from 2006 to 2016, with the absolute number of criminal defendants disposed of by jury trials declining by 47% and the criminal-jury-trial rate declining by almost 40% within the ten-year span. See *supra* Figures 2, 3; *supra* note 29 and accompanying text.

work to use in viewing the criminal justice system and instill a greater zeal within the players and the public to fight for the preservation of trials in criminal adjudication.

I. THE PLAYERS

As a preliminary matter, it is helpful to identify the agents of the criminal justice system and their roles within the system. The three branches of the federal government share responsibility for exercising criminal enforcement power and imposing a sentence upon an individual.³⁴ Part I of this Article establishes the branches' separate, yet interdependent, roles in the criminal justice system and identifies the jury as a fourth entity, intentionally designed to influence—but not belong to—the three branches of governmental power.

A. *The Legislative Branch: The Creators*

The task of criminalizing particular conduct begins with the legislative branch. Statutes created by Congress are the basis of charges brought by prosecutors.³⁵ Legislators determine which crimes are of national importance by designating specific crimes as needing urgent attention and heavy penalties. “Federalizing” a criminal offense is one such mechanism. Congress can codify a crime in the United States Code that was traditionally handled at the state level and thus classify the crime as a “federal offense.”³⁶ This effectively gives federal prosecutors concurrent or exclusive jurisdiction over certain crimes that historically have been matters of local concern (e.g., drug trafficking, use of firearms, and violent crimes) and enables federal prosecutors to remove these cases from crowded state court dockets.³⁷ Congress can also attach MMs for certain crimes.³⁸ These federal statutes require

³⁴ See Memorandum from James B. Comey, Deputy Attorney Gen., to All Federal Prosecutors (Jan. 28, 2005), http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf [hereinafter Comey Memorandum]; see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006).

³⁵ See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 198 (2014).

³⁶ See *Fowler v. United States*, 563 U.S. 668, 684–85 (2011) (Scalia, J., concurring) (discussing how Congress can federalize crimes traditionally handled at the state level).

³⁷ See Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 761–62 (1996) (“We are living in an age when Congress seems intent on ‘federalizing’ more and more criminal offenses that have been historically tried in state courts.”).

³⁸ For a complete list of federal statutes carrying mandatory minimum penalties still in force as of 2012, see FAMS. AGAINST MANDATORY MINIMUMS, FEDERAL MANDATORY MINIMUMS (2013), <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>.

the imposition of a specified minimum term of imprisonment upon conviction and satisfaction of certain criteria,³⁹ unless a safety valve applies.⁴⁰ Where MMs exist, a judge is not free to sentence below that minimum, absent a government motion for a substantial assistance departure.⁴¹

B. The Executive Branch: The Enforcers

The executive branch brings the charges and, in most cases, offers a negotiated plea. The DOJ works through Main Justice in Washington and the ninety-four federal districts across the country to set institutional policies regarding charging and plea agreements that it expects all prosecutors to follow.⁴² The ABA defines prosecutors as “administrator[s] of justice” whose “primary duty . . . is to seek justice within the bounds of the law, not merely to convict.”⁴³ The Supreme Court, in reversing a conviction based upon prosecutorial misconduct, described the role of the United States Attorney:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite

39 U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 10 (2017) [hereinafter USSC 2017 MM REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

40 A “safety valve” is an exception to MM sentencing laws that allows a judge to sentence below the statutorily prescribed minimum sentence if certain conditions are met. *See, e.g.*, 18 U.S.C. § 3553(f) (2012) (crafting a safety valve provision in which the court can impose a sentence below an MM in certain circumstances); *United States v. Dominguez Benitez*, 542 U.S. 74, 74, 77–78 (2004) (explaining how qualifying for a safety valve has important sentence-length reductions for defendants subject to MMs). In 1994, Congress enacted a safety valve at 18 U.S.C. § 3553(f) for certain drug-trafficking offenses. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 67 (2011) [hereinafter USSC 2011 MM REPORT]. In 2016, 13.7% of convicted drug offenders subject to MMs received a safety valve. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.44 (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table44.pdf>.

41 USSC 2011 MM REPORT, *supra* note 40, at 5.

42 Each of the ninety-four federal districts has one U.S. Attorney appointed by the President (except for the districts of Guam and the Northern Mariana Islands, which share one U.S. Attorney), with the advice and consent of the Senate, who can only be dismissed by the President. The U.S. Attorney, usually through respective Assistant U.S. Attorneys (“AUSAs”), represents the federal government in court and prosecutes all federal crimes.

43 CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTIONS § 3-1.2 (AM. BAR ASS’N 2015) [hereinafter ABA STDS.].

sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.⁴⁴

Prosecutors exercise immense power in deciding which charges to bring and what, if any, plea to offer.⁴⁵ Similar criminal conduct can lead to dramatically different sentencing ranges depending upon a variety of factors. These factors include the statute the prosecutor elects to use in charging, cooperation of individual defendants in the prosecution of other criminal activity, and policy priorities of the DOJ.⁴⁶ This prosecutorial discretion is largely shielded from judicial review.⁴⁷

⁴⁴ *Berger v. United States*, 295 U.S. 78, 88 (1935). Although Justice Sutherland's quote can be found in virtually every USAO office or website, few know the prosecutorial misconduct behind the quote. See, e.g., Bennett L. Gershman, "Hard Strikes and Foul Blows:" *Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177, 181–87 (2010); see also Robert H. Jackson, U.S. Attorney Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in NAT'L COLL. OF DIST. ATTORNEYS, ETHICAL CONSIDERATIONS IN PROSECUTION: ROLES AND FUNCTIONS OF THE PROSECUTOR 4 (John Jay Douglass ed., 1977) ("[T]he citizen's safety lies in the prosecutor who . . . seeks truth and not victims . . .").

⁴⁵ See *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996) (affording prosecutors a "presumption of regularity" when reviewing prosecutorial filing and charging decisions (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926))).

⁴⁶ See *id.* at 464 (noting the wide latitude the "Attorney General and United States Attorneys retain" to enforce criminal laws); *United States v. Goodwin*, 457 U.S. 368, 380 (1982) ("For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o 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."); ABA STDS., *supra* note 43, § 3-4.2.

⁴⁷ Subject to constitutional constraints, the Court has ordered the judiciary to give great deference to individual prosecutorial decisions so that prosecutors, as the "President's delegates," can faithfully carry out the execution of the law. *Armstrong*, 517 U.S. at 464; see *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (quoting *Goodwin*, 457 U.S. at 380 n.11)); *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

C. *The Judicial Branch: The Presiders*

1. *The United States Sentencing Commission and Judges*

The United States Sentencing Commission (“USSC”), judges, and federal defenders shape the judicial branch’s role in the criminal justice system. Created by Congress, the USSC is a bipartisan, independent agency located in the judicial branch of the government and is responsible for promulgating the Guidelines designed to accomplish the often-conflicting goals of uniformity, proportionality, transparency, and honesty in sentencing.⁴⁸

In the past, the Guidelines applicability was mandatory.⁴⁹ Now, as a result of the *Booker* decision in 2005, the Guidelines are merely advisory.⁵⁰ Article III judges must still correctly calculate the applicable Guidelines range and determine whether a sentence within that range serves the statutory sentencing purposes enunciated by Congress.⁵¹ But if judges conclude that the Guidelines range does not further those sentencing purposes, judges can then select a sentence within statutory limits that does serve those ends, explaining any departure or variance from the advisory Guidelines range.⁵² The decisions of sentencing judges are subject to appellate review for substantive and procedural “reasonableness.”⁵³

Prior to imposing a sentence, judges review plea agreements, previously agreed upon between the prosecution and defense, to ensure that the agreements are knowing, voluntary, and factually based.⁵⁴ Under Federal Rule of Criminal Procedure 11, the judiciary has broad discretion to reject pleas or not follow the recommendations in plea agreements.⁵⁵

2. *Defense Counsel*

Defense counsel ensures that the government’s process of depriving someone of liberty is just and fair. This task applies equally whether the deprivation occurs through trial or by plea.⁵⁶ The ABA

⁴⁸ See 28 U.S.C. § 991 (2012).

⁴⁹ See *supra* text accompanying note 30.

⁵⁰ *United States v. Booker*, 543 U.S. 220, 245 (2005).

⁵¹ *Gall v. United States*, 552 U.S. 38, 49–50 (2007).

⁵² *Id.*; see also *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013); *Pepper v. United States*, 562 U.S. 476, 490 (2011).

⁵³ *Booker*, 543 U.S. at 260–63.

⁵⁴ FED. R. CRIM. P. 11(b).

⁵⁵ See *id.*; see also Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 207–08 (2006).

⁵⁶ See *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027 (D. Neb. 2005);

asserts that “[d]efense counsel [for the accused] is essential to the administration of criminal justice.”⁵⁷ The Founders recognized the paramount importance of defense counsel by mandating that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.”⁵⁸ Sixth Amendment jurisprudence continually reaffirms this founding principle.⁵⁹ In fact, the landmark Supreme Court case *Gideon v. Wainwright*⁶⁰ extended the Sixth Amendment’s demands by holding that the Constitution necessitates state-appointed counsel for all indigent defendants charged with felonies or misdemeanors resulting in jail time.⁶¹

To implement *Gideon*’s holding, the Criminal Justice Act of 1964 (“CJA”)⁶² authorized districts to establish federal public defender organizations—FDOs—to represent indigent defendants.⁶³ These FDOs act as the USAOs’ counterpart, and the government compensates them for their services.⁶⁴ Today, there are eighty-one authorized FDOs in ninety-one federal judicial districts that are currently consid-

Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 59, 62 (1996).

⁵⁷ ABA STANDS., *supra* note 43, § 4-1.2(a).

⁵⁸ U.S. CONST. amend. VI.

⁵⁹ See, e.g., *Alabama v. Shelton*, 535 U.S. 654, 657–58 (2002); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black, J., concurring); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963).

⁶⁰ 372 U.S. 335 (1963).

⁶¹ *Id.* at 339–45; see also *Scott*, 440 U.S. at 373–74.

⁶² Congress enacted the Criminal Justice Act of 1964 to establish a comprehensive system for appointing and compensating attorneys to represent defendants who could not afford hiring counsel in federal criminal proceedings. See Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (2012)).

⁶³ 18 U.S.C. § 3006A(g)(2) (2012).

⁶⁴ Congress allocates funding, the Committee on Defender Services budgets and grants funding for each defender organization, and the Director of the Administrative Office of the Court supervises the payments made from the appropriations. *Id.* § 3006A(i); *Defender Services*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/7QGB-BGCM>].

ered part of the judicial branch.⁶⁵ In the four districts not served by an FDO, CJA panel attorneys⁶⁶ handle indigent defendants.⁶⁷

Although combatting in the same arena, defense counsel's role markedly differs from the prosecutor's role. While truth and justice should always guide prosecutorial decisions, defense counsel is under no similar obligation.⁶⁸ Rather, defense counsel's duty is to zealously and uncompromisingly defend his client while staying within the bounds of law.⁶⁹ While defense counsel should not intentionally misrepresent matters of fact or law to the court,⁷⁰ he is also expected to "know[] but one person in all the world," his client.⁷¹ Alan Dershowitz, a renowned criminal law scholar, has argued that "[w]hat a defense attorney 'may' do, he *must* do, if it is necessary to defend his client[,] . . . even if the attorney finds the step personally distasteful."⁷² One of the most difficult duties a defense attorney is tasked with is counseling his client about the decision to plead guilty or go to trial.⁷³

⁶⁵ *Defender Services*, *supra* note 64. It should be noted that there is a growing controversy for the FDO to achieve independence from the judiciary. *See generally* COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, CR-CJAREV-MAR 93, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 49 (1993), [https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Prado%20Committee%20Report%20\(Jan%201993\).pdf](https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Prado%20Committee%20Report%20(Jan%201993).pdf) (recommending the creation of a free-standing Center for Federal Indigent Defense Services independent from the Administrative Office of the United States Courts); NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE* (2015), <https://www.nacdl.org/indigentdefense/federalcrisis/> (follow "Read the Report (PDF)" hyperlink) [hereinafter *THE INDEPENDENCE IMPERATIVE*] (arguing that it is imperative that the FDO operate as an independent agency, outside of the judiciary, if indigent defendants are to receive adequate and effective assistance of counsel and illuminating the conflicts of interest and other problems latent within vesting exclusive oversight power of indigent defense in the judiciary).

⁶⁶ Panel attorneys are private attorneys who accept CJA indigent assignments, and whom the government compensates at a fixed rate. *See Defender Services*, *supra* note 64.

⁶⁷ CJA panel attorneys also serve in cases where a conflict of interest or some other factor precludes FDO representation. *Id.*

⁶⁸ *See* *United States v. Wade*, 388 U.S. 218, 256–57 (1967) (White, J., dissenting in part and concurring in part); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 933 (1996).

⁶⁹ Lefcourt, *supra* note 56, at 61; *see also* ABA STDS., *supra* note 43, § 4-1.2(b).

⁷⁰ *See* ABA STDS., *supra* note 43, § 4-1.3(c) (charging defense attorneys with "a duty of candor toward the court and others").

⁷¹ Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976) (quoting 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821)).

⁷² ALAN M. DERSHOWITZ, *REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM* 145 (1996).

⁷³ *See* *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.");

Defense counsel has an ethical obligation to seek the best deal—the lightest sentence—for his client.⁷⁴ Often, accepting a plea agreement and forgoing trial constitute the best deal.

D. *The Jury: The Outsiders*

The Framers established a unique, intricate, and tripartite system of checks and balances.⁷⁵ In recognizing that the three branches of government would be almost inextricably intertwined, the Framers decided that an additional check, apart from the government, was necessary to ensure the integrity of the American criminal justice system.⁷⁶ Transplanted from its Anglo origins, the jury system was swiftly implemented in all American colonies.⁷⁷ The colonists, jaded from past negative experiences with the English justice system, designed the jury to be a conduit for keeping power in the hands of the people.⁷⁸ The Framers intentionally required “all Crimes,⁷⁹ except in Cases of Impeachment,” to be tried by a jury and designated the jury as a vital pillar for reaching just results in the courtroom.⁸⁰ In colonial times, few legal disputes were resolved without a jury.⁸¹ Now, few disputes are resolved with a jury. This Article contends that this transfor-

see also ABA STDS., *supra* note 43, § 4-5.1; Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 946–47 (2000) (“[N]othing can prepare a criminal lawyer for the intensity of counseling clients about the decision to plead guilty or go to trial, especially where the stakes are high.”).

⁷⁴ See ABA STDS., *supra* note 43, § 4-5.1. Commentary for the most recent edition to the ABA Criminal Justice Standards for the Defense Function is currently “underway.” *Criminal Justice Standards for the Defense Function: Table of Contents*, A.B.A., https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-Table-ofContents.html (last visited Mar. 3, 2018). The commentary included in the third edition of the ABA Standards noted that once a lawyer concludes that accepting a plea is in the client’s best interest, the attorney should use “reasonable persuasion” to encourage the client to make a “sound decision.” STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.1 cmt. (AM. BAR ASS’N 1993), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf (Advice on the Plea).

⁷⁵ Barkow, *supra* note 34, at 990.

⁷⁶ Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 7 THE WRITINGS OF THOMAS JEFFERSON 404, 408 (Albert Ellery Bergh ed., 1905) (“I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”).

⁷⁷ NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 36, 47 (2007).

⁷⁸ *Id.* at 48.

⁷⁹ The Supreme Court has since held that the Constitution entitles all defendants charged with crimes resulting in more than six months of imprisonment to a jury trial. *See Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968).

⁸⁰ U.S. CONST. art. III, § 2; *id.* amend. VI.

⁸¹ VIDMAR & HANS, *supra* note 77, at 48. *But see generally* Lawrence M. Friedman, *The*

mation—the disappearance of criminal jury trials—has serious implications for democracy and justice.

II. INTERNAL FACTORS

After setting the backdrop for how these players interact in the criminal justice system, this Article now explores how each of these players has employed and has been affected by various trial-reducing mechanisms. Just as no one branch can exercise criminal power alone, no one variable can explain the demise of criminal jury trials. Whether by design or neglect, various factors have reduced the jury's power, circumvented its role, and marginalized its existence. This Part examines variables within the criminal justice system that have contributed to the trial abatement and traces how these factors have changed in the twenty-first century.

The analysis proceeds chronologically, examining trial suppressors in the order in which they emerged in the criminal legal landscape. This Part begins with decades-old factors that continue to exert their trial-suppressing force on the criminal justice system today, although in different ways than in the past. Section II.A recognizes MMs as the strongest statutory weapon that limits the trial rate. Section II.B identifies what many consider the initial spark of the noticeable criminal trial decline: the birth and application of the Federal Sentencing Guidelines. Section II.C explores two of the contours of the Guidelines that specifically contribute to the trial diminution and incentivize pleas—acceptance of responsibility and substantial assistance reductions. After exploring these old factors in their current state, this Article advances by arguing that other new factors must be in play to account for the forty-seven percent decline in the number of defendants disposed of by jury trials that has occurred from 2006 to 2016. This Part continues by identifying and exploring new trial-reducing variables that are products of the twenty-first century. Section II.D examines how *Booker* has transformed the use of the Guidelines today and argues that *Booker* has magnified the trial decline and cemented the prominence of pleas. Finally, Part II.E assesses how the actual forces of MMs, the Guidelines, and *Booker* converge and operate through the DOJ, and illustrates how changes in the DOJ's charging and plea policies have minimized the trial number.

Day Before Trials Vanished, 1 J. EMPIRICAL LEGAL STUD. 689, 689 (2004) (arguing that trials were never the routine dispositive mechanism for resolving legal issues).

A. *Impacting the Trial Rate: The Uptick in Mandatory Minimum Penalties*

When contemplating the sentencing calculus, two forces must be considered in tandem: mandatory minimum penalties and the Federal Sentencing Guidelines. MMs and the Guidelines exist in parallel, yet separate, universes, and factored together, they instruct judges' eventual sentencing determinations. In order to stay consistent with congressional intent and federal laws, the USSC has incorporated MMs into the Guidelines by enacting sentencing ranges near statutory penalties since the Guidelines' inception, and the USSC continues to account for newly enacted MMs through the Commission's annual Guideline amendments.⁸² Nevertheless, the MM analysis is distinct from the Guideline calculation,⁸³ and MMs apply to some, but not all, criminal violations. In contrast, the Guidelines account for all criminal offenses. Because MMs predated the Guidelines, their trial-suppressing effects merit analysis first.

1. *Expanding Mandatory Minimum Penalties' Range and Power*

At different times, especially in the modern era, Congress has supplemented the existing sentencing scheme with MMs. Historically, Congress has reserved MMs for those crimes which it deems the most serious and worthy of the greatest punishment: for example, treason, murder, rape, and slave trafficking.⁸⁴ In the late twentieth century, Congress began to increase the number and type of federal statutes carrying MMs, including drug offenses.⁸⁵ Legislators have continued

⁸² See USSC 2017 MM REPORT, *supra* note 39, at 16.

⁸³ *But see* Dean v. United States, 137 S. Ct. 1170 (2017). In this recent case, the Court held that when a court sentences a defendant for two offenses—one which carries an MM and one which does not—the sentencing court may consider that the defendant must already be sentenced for a lengthy MM when calculating the defendant's sentence for the non-MM conviction. *Id.* at 1178. Therefore, judges may allow the imposition of MMs on one conviction to influence their amount of Guidelines variances and ultimate sentencing determinations for other offenses. *Id.* at 1176–77. This comports with *Booker's* central sentencing tenet: courts should take a holistic approach to sentencing and consider all 18 U.S.C. § 3553(a) factors when calculating a defendant's sentence. See *infra* notes 161–69 and accompanying text.

⁸⁴ See USSC 2017 MM REPORT, *supra* note 39, at 62.

⁸⁵ This was partly in response to a push for waging a war on drugs. See President Richard Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), <http://www.presidency.ucsbl.edu/ws/?pid=3047> (“America’s public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.”). Nixon coined the war on drugs, and Reagan’s administration magnified this war, bringing about “drug hysteria.” See President Ronald Reagan, Radio Address to the Nation on Federal Drug Policy (Oct. 2, 1982), <http://www.presidency.ucsbl.edu/ws/?pid=43085> (characterizing drugs as “an especially vicious virus of crime”); *A Brief History of the Drug War*,

this trend by increasing the number of MMs from 98 in 1991 to 195 in 2011, including in the areas of firearm usage,⁸⁶ aggravated identity theft,⁸⁷ and sexual exploitation of children.⁸⁸

In its 2017 Report on MMs to Congress, the USSC reported that “[t]he percentage of offenders convicted of an offense carrying a mandatory minimum penalty” was relatively consistent from 1991 to 2014, “fluctuating between 26.0 percent and 31.9 percent from fiscal year 1991 through fiscal year 2013.”⁸⁹ However, the percentage has dropped over the last three years, and only 21.9% of convicted offenders were subject to an MM in 2016.⁹⁰ With new and proposed legislation aimed at avoiding the harsh effects of MMs, like the Fair Sentencing Act of 2010⁹¹ and the proposed Sentencing Reform and Corrections Act of 2015,⁹² one might expect to see this number continue to decrease.⁹³

2. *Magnifying Sentences, Minimizing Trials*

Mandatory minimum penalties circumscribe judicial discretion while increasing prosecutorial power. Once an MM is in play, a judge cannot impose a sentence below the statutorily prescribed minimum term of imprisonment unless one of the limited exceptions for departure applies.⁹⁴ Judges tend to resent this limitation on their discre-

DRUG POLICY ALL., <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> [https://perma.cc/VMJ9-AZSP].

⁸⁶ See An Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469 (1998) (codified as amended at 18 U.S.C. § 924(c)(1)(A) (2012)).

⁸⁷ See Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, § 2(a), 118 Stat. 831 (2004) (codified at 18 U.S.C. § 1028A(a)(1) (2012)).

⁸⁸ See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of the U.S. Code); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 206, 120 Stat. 587, 613 (codified at 18 U.S.C. § 2241(c) (2012)); USSC 2011 MM REPORT, *supra* note 40, at 71–72.

⁸⁹ USSC 2017 MM REPORT, *supra* note 39, at 29.

⁹⁰ *Id.*

⁹¹ In 2010, President Obama signed the Fair Sentencing Act into law, which reduces the disparity in sentencing between the amount of crack and powder cocaine needed to trigger a federal offense. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

⁹² If passed, this Act would allow previously convicted drug offenders to seek shorter sentences in line with the new penalties approved by Congress in 2010. It would reduce the mandatory minimum term of some drug and gun offenses and would expand the safety valve. However, the Act would also create two new MMs: ten years for interstate domestic violence resulting in a death and five years for providing weapons or aid to terrorists. Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015).

⁹³ But see *infra* note 250 and accompanying text.

⁹⁴ See 18 U.S.C. § 3553(e)–(f) (2012). Section 3553(e) encompasses perhaps the most fre-

tion—even former prosecutors who once used MMs effectively and fairly (one hopes)⁹⁵ in a previous professional lifetime.⁹⁶ Some judges lamented the increased frequency of MM charges in the early 2000s, noting that “[i]n too many cases[,] a sledge hammer is the only tool available to dispatch a fly.”⁹⁷ When faced with a long, mandatory term of imprisonment, defendants attempt to circumvent charges triggering MMs at all costs. This often involves avoiding trial by entering into a plea agreement that includes cooperation.⁹⁸

Until recently, DOJ policy changes initiated by Attorney General Eric Holder in 2010 and continuing through May 2017 encouraged prosecutors to refrain from charging MMs for certain offenses.⁹⁹ It is

quently employed method defendants use to sidestep MMs: substantial assistance reductions. The authors discuss substantial assistance reductions and their impact on the criminal trial rate below in Section II.C.

⁹⁵ This Article acknowledges that much of the plea agreement process occurs behind closed doors and that judges cannot participate in plea agreement conversations between the prosecutor and defense counsel. FED. R. CRIM. P. 11(c)(1); see Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in YALE KAMISAR ET AL., *CRIMINAL JUSTICE IN OUR TIME* 1, 19 (A.E. Dick Howard ed., 1965). Much has been written about the “veiled threats” prosecutors purportedly make in the plea-bargaining process. See, e.g., John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 124 (1992); William Pizzi, *The Effects of the “Vanishing Trial” on our Incarceration Rate*, 28 FED. SENT’G REP. 330, 335 (2016); Wright, *supra* note 31, at 83; William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 30, 31. Evaluating contentions such as these exceeds the scope of this paper.

⁹⁶ See, e.g., Robert J. Conrad, Jr., Chief Judge, W. Dist. N.C., U.S. Sentencing Commission Regional Hearings on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984: View from the Bench 4 (Feb. 11, 2009), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20090210-11/Judge%20Robert%20Conrad%2021109.pdf> (“Sentencing decisions are always difficult, but the required application of mandatory minimums in cases where they are not warranted is repugnant.”); see also *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 43 (2007), <https://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36343/html/CHRG-110hhrg36343.htm> (statement of Judge Paul G. Cassell on behalf of the Judicial Conference of the United States); JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16 (1990), http://www.uscourts.gov/sites/default/files/reports_of_the_proceedings_1990-03_0.pdf (urging Congress “to reconsider the wisdom” of MMs).

⁹⁷ E.g., Conrad, *supra* note 96, at 4.

⁹⁸ If defendants do not qualify for the statutory safety valve, they can still circumvent MMs by providing substantial assistance to the government in the investigation and prosecution of another. See 18 U.S.C. § 3553(e)–(f) (2012). Providing substantial assistance often presupposes resolving a case through plea. See *infra* Section II.C. This Article uses “cooperation” and “substantial assistance” interchangeably.

⁹⁹ See USSC 2017 REPORT, *supra* note 39, at 23; *infra* Section II.E. As discussed in Section II.E, Attorney General Sessions has reversed these DOJ policy amendments initiated by the Holder administration in a memorandum Sessions issued in May 2017. Memorandum from Jeff

difficult to predict how the trend of moving away from MMs has affected the number of trials. On one hand, if defendants do not face mandatory terms of imprisonment, they have less incentive to plead out to receive Guideline reductions and could be encouraged to push for a jury trial.¹⁰⁰ On the other hand, charging fewer MMs could result in prosecutors offering more attractive plea terms that seem too good to defendants to turn down.¹⁰¹ Therefore, eliminating MMs might actually lead to fewer trials.

Even if Congress does not reduce the number of MMs, other avenues exist to sidestep MMs' harsh effects. Indeed, these penalties lay dormant in the U.S. Code until a prosecutor chooses to charge a defendant with an MM.¹⁰² Only then are judges bound by the terms of the statute carrying the MM. Thus, the force behind MMs depends upon prosecutorial charging and plea policies. In Section II.E, the authors outline changes in Main Justice's policies regarding MMs that have occurred in the 2000s and explore how these policies shape the current trial climate. However, before discussing modern day DOJ policy changes, examination of the Federal Sentencing Guidelines is necessary.

B. Igniting the Trial Decline: The Implementation of the Guidelines

Prior to the Guidelines, sentencing was indeterminate.¹⁰³ Judges were free to fashion a defendant's sentence however they saw appropriate, tending to create disparate sentences for the same offense de-

Sessions, Attorney Gen., to All Federal Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [hereinafter Sessions Memorandum]. Instead, Sessions has encouraged prosecutors to "fully utilize[] the tools Congress has given" them, which include MMs. *Id.* at 1.

¹⁰⁰ See USSC 2011 MM REPORT, *supra* note 40, at 127 (demonstrating that defendants are less likely to plead guilty when they are not eligible for safety-valve relief).

¹⁰¹ See Bobby Allyn, *Plea Bargaining on the Rise as 'Sword of Mandatory Sentencing' Loses Edge in Pa.*, WHYY (Nov. 23, 2016), <https://whyy.org/articles/plea-bargaining-on-the-rise-as-pa-sword-of-mandatory-sentencing-loses-edge/> ("[W]ithout the threat of a guaranteed harsh punishment, offers to defendants have become more lenient . . . 'which defendants are taking at a greater rate'").

¹⁰² See 21 U.S.C. § 851(a)(1) (2012) ("No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.").

¹⁰³ S. REP. NO. 98-225, at 49, 65 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3232, 3248 [hereinafter S. REP. NO. 98-225] (characterizing the indeterminate sentencing scheme as producing "unwarranted disparity" and "uncertainty about the length of time offenders will serve in prison").

pending upon which judge presided.¹⁰⁴ No right of appeal existed as long as the sentence was within the statutory maximum.¹⁰⁵ With no absolute benchmarks or standards, the indeterminate sentencing structure fostered an (almost) “anything goes” environment in sentencing hearings.¹⁰⁶ Judges exercised nearly unfettered power.¹⁰⁷ While some judges enjoyed this freedom and power, others bemoaned the lack of guidance:

I found sentencing traumatic in the pre-Guidelines days. The sentencing range often spanned many years, sometimes all the way from probation to life in prison. Some judges may have the wisdom of Solomon in figuring out where in that range to select just the right sentence, but I certainly don't. . . . Somehow I felt it was wrong for one human being to have that much power over another. Imposing sentence was, for me, almost an act of sacrilege.¹⁰⁸

After nearly a decade of study,¹⁰⁹ Congress responded to the nationwide sentencing discrepancies by passing the Sentencing Reform Act of 1984 (“SRA”).¹¹⁰ The SRA created the USSC and charged the bipartisan agency with the task of establishing the Guidelines to eradicate “unwarranted sentencing disparities” by providing “certainty and fairness” in the sentencing process.¹¹¹ The USSC originally wrote the

¹⁰⁴ *United States v. Booker*, 543 U.S. 220, 255–56 (2005); *Burns v. United States*, 501 U.S. 129, 132–33 (1991); S. REP. NO. 98-225, *supra* note 103, at 44 (attributing part of the unwarranted sentencing disparities to the fact that “some judges tend to give generally tough or generally lenient sentences”).

¹⁰⁵ *See Dorszynski v. United States*, 418 U.S. 424, 431–32 (1974) (noting that once an appellate court determines that a lower court’s sentence determination was within statutory limits, “appellate review is at an end” (citing *Gore v. United States*, 357 U.S. 386, 393 (1958))).

¹⁰⁶ *See* S. REP. NO. 98-225, *supra* note 103, at 75 (critiquing the fact that judges were not required to state their reasons for imposing a sentence).

¹⁰⁷ *See id.* (acknowledging that “[e]ach judge [was] left to formulate his own ideas about the factors to be considered in imposing sentence” and the weight of each factor); *see also id.* at 38 (linking unwarranted disparities to “the unfettered discretion the law confers” on judges for imposing and implementing sentences).

¹⁰⁸ Alex Kozinski, *Carthage Must Be Destroyed*, 12 FED. SENT’G REP. 67, 67 (1999); *see also* Conrad, *supra* note 96, at 4 (“I have found that the most difficult task for me as a judge is to sentence another human being. Human tragedy is reflected in each hearing. . . . I would feel at a loss in those tough moments of decision if I only had my own idiosyncratic preferences or anecdotal experience to follow. Instead, for the past twenty-five years, judges have had a beneficial resource to consult which reflects, for the most part, the sentencing practices of colleagues across the country and across the years.”).

¹⁰⁹ *Booker*, 543 U.S. at 292 (Stevens, J., dissenting).

¹¹⁰ Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

¹¹¹ *Id.* at 2018.

Guidelines “without any particular defendant in mind”¹¹² to achieve greater uniformity, transparency, and certitude in sentencing.¹¹³ Attempting to bring order to the indeterminate chaos, the Guidelines rewrote the sentencing equation to a constrained calculation, primarily relying upon two variables: the level of offense and the defendant’s criminal history.¹¹⁴ However, the Guidelines did not completely confine judges to a sentencing straightjacket; the Guidelines only prescribed a general range of months. Judges still had to exercise discernment when determining the specific number of months to impose within the calculated range and when considering whether a Guideline departure should apply.¹¹⁵

As Galanter’s statistics illustrate, implementation of the Sentencing Guidelines in 1987 originally seemed to spike the number of trials.¹¹⁶ However, just as most regimes take time to adjust to major systemic overhauls, the number of federal criminal trials did not feel the full impact of the Guidelines until the early 1990s. As acknowledged, it is difficult to study the trial effects of one variable in isolation. Nevertheless, it is undeniable that the implementation of the Guidelines correlated with a striking trial decline and a plea agreement surge. In the next Section, the authors examine the principal trial-reducing mechanisms in the Guidelines and how they have changed criminal adjudication.

¹¹² Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1435 (2008).

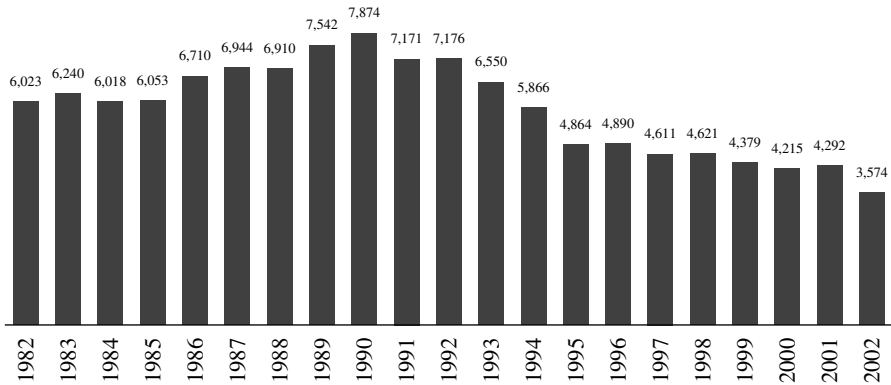
¹¹³ See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 3 (U.S. SENTENCING COMM’N 1987).

¹¹⁴ See *id.* § 1B1.1.

¹¹⁵ *Id.* ch. 5, introductory cmt.; *id.* § 5K2.0.

¹¹⁶ See *infra* Figure 4; see also Galanter, *The Vanishing Trial*, *supra* note 24, at 554.

FIGURE 4. CRIMINAL DEFENDANTS DISPOSED OF BY BENCH & JURY TRIALS IN U.S. DISTRICT COURTS 1982–2002¹¹⁷



C. *Incentivizing Plea Agreements: The Impact of the Guidelines*

The Guidelines contain multiple incentives for defendants to forgo trials. Acceptance of responsibility and substantial assistance reductions are the two most common ways defendants can mitigate their sentences. Prosecutors and judges' receptiveness to these departures has increased since 2000, which is discussed in greater detail in Section II.E. Qualifying for these reductions has one crucial caveat: acceptance of responsibility and substantial assistance normally entail admissions of guilt and thus usually follow guilty pleas. Defendants' ability to fully leverage the Guidelines in their favor often presupposes defendants' forfeiture of their chance to contest guilt at trial.

1. *Cooperation, Cronies, and Caveats*

If defendants "clearly demonstrate[] acceptance of responsibility," courts can then grant defendants two-level sentence reductions, even without prosecutors' consent.¹¹⁸ Defendants can receive three-level reductions if their cases are sufficiently serious, and the government files motions indicating the timeliness of such acceptance.¹¹⁹ Acceptance of responsibility can significantly reduce defendants' sentences, and qualifying for this exception can mean the difference between receiving a split sentence (partially served in home confinement without parole) instead of prison time, or receiving twenty years

¹¹⁷ Statistics include both jury and bench trials. Galanter, *The Vanishing Trial*, *supra* note 24, at 554 (reflecting numbers the Administrative Office of U.S. Courts submitted in its Annual Report of the Director in Tables D-4).

¹¹⁸ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (U.S. SENTENCING COMM'N 2016) [hereinafter USSG 2016].

¹¹⁹ *Id.* § 3E1.1(b).

instead of life imprisonment on the high end of the Sentencing Table.¹²⁰ There is, however, a limitation to receiving this reduction. If defendants opt to go to trial, they typically do not receive acceptance of responsibility credit.¹²¹ Moreover, the Guidelines permit the court to add two offense levels when defendants willfully commit or suborn perjury.¹²² Going to trial unsuccessfully sometimes results in defendants experiencing a “five-level swing” under the Guidelines.¹²³

In this scenario, defendants risk losing an opportunity to receive a sentence reduction and face a potentially much longer sentence after trial.¹²⁴ Defense attorneys know the consequences of the so-called “trial penalty”—“the differential between the sentence after plea and [the] sentence after trial”¹²⁵—all too well and must counsel their clients accordingly.¹²⁶ This creates a natural plea agreement incentive, and predictably, the number of defendants receiving acceptance of responsibility reductions has risen considerably since the mid-1990s.¹²⁷

Additionally, the Guidelines (and the sentencing statute) contain another provision that operates as a trial disincentive¹²⁸: the substan-

¹²⁰ See *id.* ch. 5, pt. A, sentencing tbl.

¹²¹ *Id.* § 3E1.1, cmt. n.2; see Galanter, *The Vanishing Trial*, *supra* note 24, at 494–95.

¹²² USSG 2016, *supra* note 118, § 3C1.1.

¹²³ The “five-level swing” refers to when a defendant would have received a three-level reduction for acceptance of responsibility but instead goes to trial and then upon conviction receives a two-level increase for obstruction of justice. *United States v. Wallace*, 597 F.3d 794, 802 (6th Cir. 2010); see also *United States v. Bailey*, 892 F. Supp. 997, 1016 (N.D. Ill. 1995).

¹²⁴ Young, *supra* note 95, at 31 (citing *Berthoff v. United States*, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001), *aff’d*, 308 F.3d 124 (1st Cir. 2002)) (claiming that the trial penalty can result in defendants receiving “sentences that are 500 percent longer” than defendants who committed the same offense but accepted plea agreements).

¹²⁵ Wright, *supra* note 31, at 86. Professor Ronald F. Wright has written extensively and persuasively on this topic. Scholars also include superseding indictments as a variable in the trial penalty calculation. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1231–32 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006) (discussing how a prosecutor claimed he would file a superseding indictment which would result in defendant facing an MM of 105 years in prison if defendant rejected the plea offer, which included a recommended prison sentence of fifteen years). Documenting the validity and frequency of these purported threats remains difficult and is outside the scope of this Article.

¹²⁶ See Turner, *supra* note 55, at 203, 206.

¹²⁷ In 2016, 95.8% of convicted offenders received either a three- or two-level reduction for acceptance of responsibility. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table18.pdf>. In comparison, only 86.8% of convicted offenders received acceptance of responsibility reductions in 1996. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (1996), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1996/TAB-18_0.pdf.

¹²⁸ Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator’s Dilemma*, 90 N.Y.U. L. REV. 1722, 1737 (2015).

tial assistance departure.¹²⁹ If defendants substantially assist the government in the investigation or prosecution of another offender, they can receive a Guideline departure upon motion by the government.¹³⁰ In essence, the government offers to “purchase” the defendant’s information, using sentence reductions as currency. The more valuable the information, the more the government is willing to pay. Although USAOs around the country vary on how they apply this provision, defendants can hope to receive a one-third to one-half reduction in their sentence recommendations.¹³¹

For example, suppose a USAO charges Defendant 1 with possession with intent to distribute more than five kilograms of cocaine, triggering a ten-year MM.¹³² Defendant 1 is known as the local neighborhood dealer but is not believed to be violent or a member of any illicit groups. Defendant 1, hoping to mitigate his ten-year MM sentence, offers to give the government ten names of his former customers whom he knows still frequently traffic narcotics. After the indictment of Defendant 1, the USAO decides to shift its prosecutorial focus and resources to combatting gang violence. Due to its limited resources and new prosecutorial priorities, the office has no intention of investigating Defendant 1’s customers. Therefore, the USAO views Defendant 1’s information as having minimal value and does not submit a USSG § 5K1.1 substantial assistance motion, leaving Defendant 1 still subject to at least a ten-year sentence. On the other hand, the same day of Defendant 1’s indictment, the USAO also indicts Defendant 2 with the same offense—possession with intent to distribute more than five kilograms of cocaine—also triggering the ten-year MM.¹³³ The office has long suspected Defendant 2 of being a peripheral member of the city’s largest and most violent gang. During negotiations, Defendant 2 agrees to provide the government with incriminating information on two of the gang’s most dangerous leaders in exchange for a sentence reduction. Because the USAO sees Defendant 2’s information as very valuable, the office asks the court to grant a sentence reduction that would reduce Defendant 2’s sentence by half (to five years). Upon giving “substantial weight” to the gov-

129 18 U.S.C. § 3553(e) (2012); USSG 2016, *supra* note 118, § 5K1.1.

130 18 U.S.C. § 3553(e); USSG 2016, *supra* note 118, § 5K1.1.

131 For defendants who qualify for substantial assistance, the median percent decrease from the Guidelines minimum was 50%. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.30 (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table30.pdf>.

132 See 21 U.S.C. § 841(b)(1)(A) (2012).

133 See *id.*

ernment's evaluation of Defendant 2's assistance,¹³⁴ the court views Defendant 2's information as more valuable than the value the government suggests and grants an even greater sentence reduction,¹³⁵ ultimately reducing Defendant 2's sentence length from ten to two years.¹³⁶ Although both Defendant 1 and Defendant 2 committed the same crime and gave all the information they could supply, Defendant 1's sentence is five times longer (ten years) than Defendant 2's sentence (two years).

Similar to the acceptance of responsibility reduction, efforts to cooperate in most cases presuppose a decision to forgo the right to contest guilt at trial. The foregoing hypothetical exemplifies why the possibility of receiving substantial assistance reductions is one of the strongest trial-reducing motivators.¹³⁷ Moreover, qualifying for acceptance of responsibility and substantial assistance are not mutually exclusive.¹³⁸ Therefore, a cooperating defendant could expect to receive a three-level reduction for acceptance of responsibility and a further reduction for substantial assistance at the request of the prosecution.¹³⁹ This presents a massive incentive for defendants to choose to plead guilty over going to trial. In addition, the existence of one or more cooperating witness defendants strengthens the government's case against other defendants, undoubtedly inducing more pleas as a

¹³⁴ USSG 2016, *supra* note 118, § 5K1.1 cmt. n.3.

¹³⁵ *Id.* cmt. background (affording latitude to the sentencing judge to make downward departures but also requiring the judge to state the reasons for reducing a defendant's sentence). These reasons must be consistent with the statutory purposes of sentencing as defined in § 3553(a). *Id.*

¹³⁶ See 18 U.S.C. § 3553(e) (2012) (allowing a court to sentence below a statutorily prescribed mandatory minimum term of imprisonment upon motion of the government that the defendant has substantially assisted in the investigation or prosecution of another offender); see also USSG 2016, *supra* note 118, § 5K1.1 cmt. 1.

¹³⁷ It is worth noting that since 2000, fewer defendants have qualified for substantial assistance reductions. In 2000, 17.9% of cases received substantial assistance reductions. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2000), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2000/Fig-G_0.pdf. In 2016, 11.1% of cases resulting in conviction still received substantial assistance reductions. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureG.pdf>. This could in part be due to noncooperation variances from the Guidelines becoming more frequent and acceptable after *Booker*. See *infra* Section II.D.

¹³⁸ See USSG 2016, *supra* note 118, § 5K1.1, cmt. 2.

¹³⁹ *Id.*

result. Unsurprisingly, these provisions have set off what some call “a plea-bargaining frenzy” and a trial famine.¹⁴⁰

2. *Clarifying the Stakes, Reducing Sentence Outcomes*

The Guidelines’ enactment of narrower and more specific sentencing ranges clarified the stakes for defense attorneys and prosecutors. While most plea agreements provide for nonbinding sentencing recommendations, which the court is free to accept or reject,¹⁴¹ they shift the playing field substantially in favor of defendants. As discussed in Section II.D.2, prosecutors are in much different positions advocating for the plea result than they are in advocating for a specific sentence after trial. The adjustment of the adversarial relationship, at least psychologically, is a strong motivator to resolve the case without trial. A plea deal that takes months, perhaps even years, off the sentence defendants might receive if convicted at trial can seem too appealing to refuse.¹⁴² Couple this with the reality that the federal conviction rate is currently around eighty-eight percent in criminal jury trials,¹⁴³ and even the most daring and adept litigators would pause before urging their clients to exercise their Sixth Amendment jury trial right.

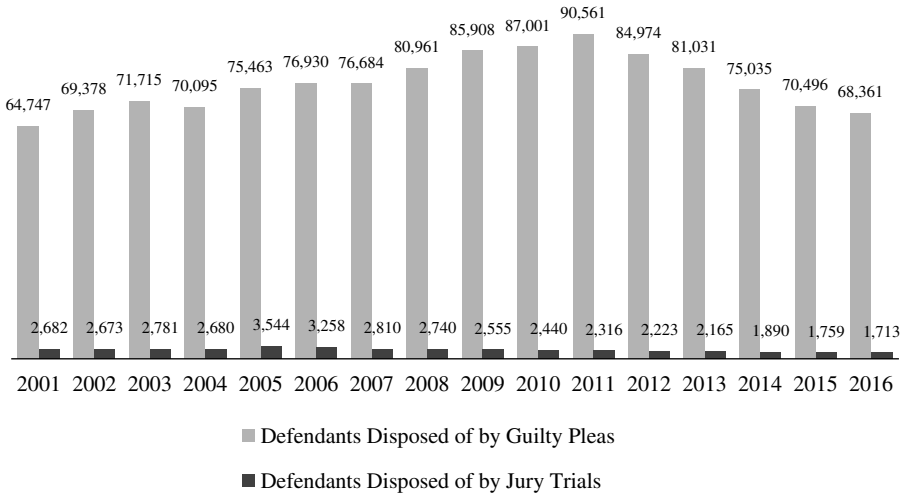
¹⁴⁰ GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 230 (2003).

¹⁴¹ *But see* FED. R. CRIM. P. 11(c)(1)(C) (providing for a binding agreement to a specified sentence).

¹⁴² Federal Rule 11 of Criminal Procedure outlines three types of plea agreements: (1) charge agreements, in which the government agrees to not bring or to move to dismiss other charges in exchange for the defendant’s plea of guilty to a given charge; (2) recommendation agreements, in which the prosecution recommends or does not oppose a particular sentence or sentencing range to the court; and (3) specific sentence agreements, in which the parties agree that a specific sentence, sentencing range, or Guidelines provision is applicable, and the agreement is binding upon the court if the court accepts the plea agreement. FED. R. CRIM. P. 11; DAVID DEBOLD, PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES § 8.02 (2017).

¹⁴³ *Statistical Tables for the Federal Judiciary: Table D-4*, ADMIN. OFF. U.S. CTS. (Dec. 2016), http://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2016.pdf.

FIGURE 5. DEFENDANTS DISPOSED OF BY GUILTY PLEAS & JURY TRIALS IN U.S. DISTRICT COURTS 2001–2016¹⁴⁴



Mandatory minimum penalties, the Guidelines, and cooperation are the old trial-reducing factors that scholars have attributed as responsible for causing the trial decline. Because these factors have existed since the late 1980s, one would eventually expect the trial decline to reach an equilibrium if these were the only factors in play.¹⁴⁵ Yet the trial rate continues to resist this osmotic urge.¹⁴⁶ Clearly, other forces are at work, nudging trials to continue their rapid reduction in the twenty-first century. In the next two Sections, the authors speculate on what continues to keep the trial decline in motion.

D. *Immortalizing Pleas: Booker and Beyond*

Some judges bemoaned the draconian effects of the mandatory¹⁴⁷ Guidelines that forced them to impose what they viewed as unjust and disproportionate sentences in some instances.¹⁴⁸ While this might have

¹⁴⁴ Table D-4, *supra* note 23.

¹⁴⁵ See Daniel Richman, *Judging Untried Cases*, 156 U. PA. L. REV. PENNUMBRA 219, 219 (2007).

¹⁴⁶ See *supra* notes 29, 33 and accompanying text.

¹⁴⁷ Although described as “mandatory,” the USSG structurally envisions a system of departures for factors “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” USSG 2016, *supra* note 118, § 5K2.0(a)(1); see also *supra* note 30 and accompanying text.

¹⁴⁸ Jack B. Weinstein, *A Trial Judge’s First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 30 (1987) (bemoaning the Guidelines vindictive standards that “callously mandate incarceration across the board no matter how costly or destructive the result”); Kristina Walter, Note, *Booker and Our Brave New World: The Tension Among The Federal Sentencing Guidelines, Judicial Discretion, and a Defendant’s Constitutional Right to Trial by Jury*, 53 CLEV.

been a common judicial complaint from 1987 through 2005, this argument no longer carries the weight it once did. Developments in the Supreme Court's Sixth Amendment jurisprudence during the twenty-first century have profoundly impacted sentencing procedures. A series of Supreme Court decisions raising concerns about the incompatibility of the Sixth Amendment with judges' fact-finding and application of the Guidelines without juror input¹⁴⁹ ultimately culminated in the 2005 case of *United States v. Booker*.¹⁵⁰

1. *A New Guidelines Regime: United States v. Booker*

Booker overhauled the sentencing system. In *Booker*, a jury serving in the Western District of Wisconsin found Freddie J. Booker guilty of possessing at least 50 grams of crack cocaine.¹⁵¹ These jury-found facts, proven beyond a reasonable doubt, allowed the sentencing judge to impose a twenty-one-year and ten-month sentence on Booker.¹⁵² At Booker's sentencing hearing, however, the judge found additional facts, by a preponderance of the evidence, that Booker possessed an additional 566 grams of crack cocaine and had obstructed justice.¹⁵³ The new, judge-found facts materially altered Booker's originally expected sentence, and the judge instead imposed a thirty-year sentence on Booker.¹⁵⁴ Booker appealed his sentence determination, and eventually his case reached the Supreme Court, where the Court vacated the district court's judgment and remanded the case.¹⁵⁵ Specifically, the Court held that the Sentencing Guidelines violated a defendant's Sixth Amendment right to trial by jury because they permitted the imposition of a sentence on the basis of facts found by a judge

ST. L. REV. 657, 658 (2006); J. Thomas Marten, U.S. Dist. Judge, Dist. of Kan., Written Statement to the United States Sentencing Commission 7 (Oct. 20, 2009), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20091020-21/Marten_testimony.pdf ("[S]entencing should be an art, not a science."). *But see* Kozinski, *supra* note 108, at 67; *see also* Conrad, *supra* note 96, at 3.

¹⁴⁹ *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004) (declaring that judicial fact-finding to enhance sentences within a mandatory Guidelines system violates a defendant's Sixth Amendment right to have all facts the law makes essential to punishment proven beyond a reasonable doubt to a jury); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (noting that facts which increase the penalty beyond the statutorily prescribed maximum penalty, except for facts of prior conviction, are elements of the offense that must be proven beyond a reasonable doubt to a jury).

¹⁵⁰ 543 U.S. 220 (2005).

¹⁵¹ *Id.* at 227.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 226–27.

using a lower standard of proof.¹⁵⁶ To avoid this constitutional infirmity, the *Booker* “remedial” majority found the Guidelines to be advisory, not mandatory.¹⁵⁷ The Court clarified that, subject to “reasonableness” review, sentencing courts must treat the Guidelines as a first step, but not the last, in fashioning a sentence.¹⁵⁸

While many still consider the Guidelines the “cornerstone” of sentencing, judges must balance factors in addition to the Guidelines to accomplish the statutory purposes of sentencing apart from the Guidelines.¹⁵⁹ Judges were previously supposed to consider these factors alongside the Guideline calculation, but in reality, the Guidelines held the greatest, if not exclusive, weight when formulating a sentence.¹⁶⁰ *Booker* simply re-elevated the factors and purposes of sentencing that were always intended to be present.

Booker reminded judges that they must consider all seven factors set forth in 18 U.S.C. § 3553(a), one of which is the Guideline calculation, when fashioning a sentence.¹⁶¹ These factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed to reflect the four primary purposes of sentencing, i.e., retribution, deterrence, incapacitation, and rehabilitation;
- (3) the kinds of sentences available (e.g., whether probation is prohibited or a mandatory minimum term of imprisonment is required by statute);
- (4) the sentencing range established through application of the sentencing guidelines and the types of sentences available under the guidelines;
- (5) any relevant “policy statements” promulgated by the Commission;
- (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 245.

¹⁵⁸ *Id.* at 259, 261, 264.

¹⁵⁹ *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) (noting that after *Booker*, “[a] district judge must include the Guidelines range in the array of factors warranting consideration”). See 18 U.S.C. § 3553(a) (2012) for the list of factors judges must consider when fashioning a sentence.

¹⁶⁰ See *Booker*, 543 U.S. 220, 259–60, 264 (characterizing the mandatory, imposing Guidelines as having the force of law that hampered judges’ consideration of other statutory purposes of sentencing).

¹⁶¹ *Id.* at 261.

(7) the need to provide restitution to any victims of the offense.¹⁶²

When considered together, these factors should advance the four well-established purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation.¹⁶³ While none of these sentencing considerations were new, *Booker* brought more of the policy-based and philosophical considerations of sentencing back into the spotlight. *Booker* attempted to augment the Guidelines weight with other § 3553(a) factors so that all seven factors could equally impact the judges' crafting of a sentence that is "sufficient, but not greater than necessary."¹⁶⁴ *Booker* essentially equipped judges with a tool belt of permissible sentencing justifiers.

Booker made it "pellucidly clear" that the deferential abuse-of-discretion standard of review now applies to appellate reasonableness review of sentencing decisions.¹⁶⁵ Although the Guidelines, along with their policy statements and commentary, still represent the "starting point and the initial benchmark" in sentencing,¹⁶⁶ courts are free to vary from Guidelines ranges so long as the Guidelines calculation is correct, and the court articulates a basis for sentencing that reasonably serves one of the § 3553(a) factors.¹⁶⁷ Accordingly, post-*Booker* appellate review of sentencing decisions reached in lower courts results in few sentencing reversals.¹⁶⁸ *Booker* discretion¹⁶⁹ loosened the so-called "shackles" of Guidelines oppression.

¹⁶² U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 2 (2015) (summarizing the 18 U.S.C. § 3553(a) factors for consideration at sentencing).

¹⁶³ See generally *United States v. Shortt*, 485 F.3d 243, 248–49 (4th Cir. 2007) (articulating how courts should calculate sentences using the § 3553(a) factors to further the four purposes of sentencing).

¹⁶⁴ *Id.* at 252 (quoting 18 U.S.C. § 3553(a)) (recognizing that the Guidelines recommended range is merely one factor courts must balance among other factors when formulating a sentence under § 3553(a)).

¹⁶⁵ *Gall v. United States*, 552 U.S. 38, 46 (2007); *Booker*, 543 U.S. at 261–62.

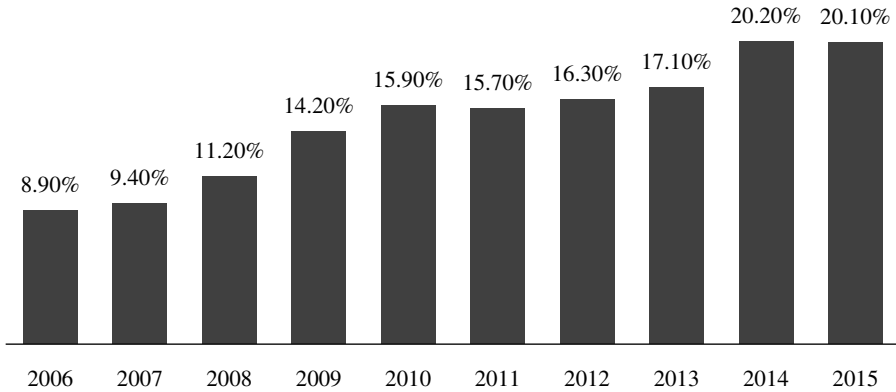
¹⁶⁶ *Gall*, 552 U.S. at 49.

¹⁶⁷ *Id.* at 40–41, 49–50 (affirming probation as defendant's penalty where the advisory Guidelines range was thirty to thirty-seven months and negating "proportionality" review as the proper appellate standard of review).

¹⁶⁸ Briana Lynn Rosenbaum, *Sentence Appeals in England: Promoting Consistent Sentencing Through Robust Appellate Review*, 14 J. APP. PRAC. & PROCESS 81, 82 (2013) (describing appellate courts very deferential approach to lower courts' sentencing decisions).

¹⁶⁹ Consistent with the USSC's nomenclature, the authors use the phrase "*Booker* discretion" as an umbrella term to include those cases in which judges have explicitly referenced "*United States v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system." U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N n.3 (2015), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/TableN.pdf>.

FIGURE 6. PERCENTAGE OF CASES SENTENCED OUTSIDE OF GUIDELINES RANGE CITING *BOOKER* DISCRETION¹⁷⁰



Initial data demonstrated that *Booker* did not significantly influence judicial discretion in sentencing. In 2006, a majority of sentences still fell within Guidelines ranges.¹⁷¹ As Justice Sotomayor noted, “It is simply not the case that the Sentencing Guidelines are merely a volume that the district court reads with academic interest in the course of sentencing.”¹⁷² However, judges have become more comfortable exercising their *Booker* discretion with each passing year. In 2016, only 48.6% of sentences conformed with Guidelines ranges.¹⁷³

In 2006, the year immediately following the *Booker* decision, judges made *Booker* variances in only 8.9% of cases.¹⁷⁴ In 2016, judges

¹⁷⁰ U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2006–2015) (combining percentages from categories (a) “Upward Departure With *Booker*/18 U.S.C. § 3553,” (b) “Above Guideline Range With *Booker*/18 U.S.C. § 3553,” (c) “Downward Departure With *Booker*/18 U.S.C. § 3553,” and (d) “Below Guideline Range With *Booker*/18 U.S.C. § 3553”).

¹⁷¹ See U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2006), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2006/tableN_0.pdf (indicating that 61.7% of sentences still fell within Guidelines ranges). Combining within-range sentences with government-sponsored below-range sentences makes this percentage even higher: 86.3% of sentences in 2006. *Id.* See generally Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 490 (2014) (arguing that judges “are subconsciously anchored by the calculated Guidelines range”).

¹⁷² *Peugh v. United States*, 133 S. Ct. 2072, 2087 (2013).

¹⁷³ See U.S. SENTENCING 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>.

¹⁷⁴ U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2006), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2006/tableN_0.pdf. The USSC distinguishes between cases in which (1) courts explicitly reference *Booker*, 18 U.S.C. § 3553, or related factors as reasons for sentencing outside of

made variances citing *Booker* discretion in 20.1% of cases.¹⁷⁵ This percentage growth is likely to continue as attorneys refine their sentencing advocacy on variances and as the last vestiges of Guidelines compulsion disappear. For some time, it was an academic question whether the *Booker* effect would be maximal or minimal.¹⁷⁶ That question is no longer subject to debate. *Booker* is arguably the most influential Supreme Court decision to impact the criminal justice system in the past fifteen years.¹⁷⁷

2. *Booker's Effect on the Trial Number: Plummeting to New Lows*

Booker turned the determinate sentencing scheme upside down. Many scholars predicted an uptick in the number of trials: If even making plea agreements would not ensure sentence length predictability or guarantee sentence reductions, why should defendants forgo exercising their trial right?¹⁷⁸ Going to trial would be a riskier gamble, but, if successful, trials could also provide more lucrative rewards—defendants could potentially walk away free. Because many scholars primarily pinned the trial decline on the enactment of a mandatory sentencing scheme, some prosecutors feared an overburdening of their trial dockets in a post-*Booker* world.¹⁷⁹ Moreover, the *Booker* decision itself sought to revitalize jury power and esteemed the inte-

the Guidelines range; (2) courts made departures and did not cite *Booker*, 18 U.S.C. § 3553, or related factors for sentencing outside of the Guidelines range; and (3) courts sentenced outside of the Guidelines range but did not indicate a departure or *Booker*, 18 U.S.C. § 3553, or related factors. *See id.*

¹⁷⁵ U.S. SENTENCING 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>.

¹⁷⁶ *See generally* Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 422–23 (2006); Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 666–67 (2006).

¹⁷⁷ One of *Booker's* salutary unintended consequences has been the return of passion in sentencing advocacy. In a Guideline world, the arguments over which subsection applies can be fairly abstract. In a post-*Booker* world, the advocacy has returned to where it began: arguing ultimate issues of deterrence, incapacitation, retribution, and rehabilitation. *See infra* Section II.D.2.

¹⁷⁸ *See* Wright, *supra* note 31, at 133.

¹⁷⁹ *See* Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 800–02 (2005); Douglas A. Berman, *Thinking About What DOJ Is Thinking About*, SENT'G L. & POL'Y (Jan. 30, 2005, 12:29 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/thinking_out_lo.html (noting that “the [*Booker*] ruling will make it difficult to convince defendants to plea bargain, because they may think they’ll get a better deal from a judge.” (alteration in original)).

gral purpose of the jury in the judicial system.¹⁸⁰ Accordingly, *Booker* gave trial enthusiasts hope that a jury trial resurgence might be on the horizon.

The initial post-*Booker* trial statistics comported with these prognoses.¹⁸¹ From 2004 to 2006, jury trials increased by over twenty-one percent.¹⁸² Despite what some saw as a potential for the resurrection of jury trials, the post-*Booker* spike did not last. In fact, from 2006 to 2016, the percentage of defendants disposed of by jury trials declined by forty-seven percent.¹⁸³ In the wake of *Booker*, trial numbers have plummeted to new lows,¹⁸⁴ and if the current rate of decline continues, criminal trials will become all but extinct within the next century.

Booker has led to a decrease, not increase, in trials for a number of reasons. Why did so many get it wrong?

First, the statistical reality is that many courts now view the Guidelines range as a de facto ceiling.¹⁸⁵ In theory, a court is free to vary upward to accomplish the statutory purposes of sentencing; in practice, few do. The Guidelines are no longer “presumed” to represent reasonable ranges, and *Booker* has increased Guidelines skepticism.¹⁸⁶ Accordingly, we have seen an uptick in downward variances from 28.4% in a pre-*Booker* world to 49.0% of cases in 2016, often premised upon plea agreement requests.¹⁸⁷ With so little to risk, and

¹⁸⁰ See *United States v. Booker*, 543 U.S. 220, 236–37 (2005).

¹⁸¹ See *supra* Figure 2.

¹⁸² In 2004, 2680 jury trials took place annually compared to the 3258 jury trials that occurred in 2006, the year immediately following the *Booker* decision. See *supra* Figure 2.

¹⁸³ See *supra* Figures 2, 5.

¹⁸⁴ See Douglas A. Berman, *Highlighting the Notable Absence of Criminal Trials in a High-Profile Federal District Court . . . Thanks to the Modern “Trial Penalty,”* SENT’G L. & POL’Y (Aug. 9, 2016, 9:39 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2016/08/highlighting-the-notable-absence-of-criminal-trials-in-a-high-profile-federal-district-court-thanks-.html [https://perma.cc/N8VA-KNE3].

¹⁸⁵ Only 2.4% of the 66,961 cases included in the USSC’s sentencing data for the fiscal year of 2016 received above-Guidelines-range sentences, compared to the 48.6% of cases that received within-Guidelines-range sentences and the 49.0% of cases that received below-Guidelines-range sentences. U.S. SENTENCING 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>.

¹⁸⁶ *Nelson v. United States*, 555 U.S. 350, 352 (2009) (Breyer, J., concurring in the judgment) (per curiam).

¹⁸⁷ U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G (2005), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2005/fig-g-pre_0.pdf (pre-*Booker*); U.S. SENTENCING 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>.

so much to gain, the plea resolution has increased in value and frequency.

Second, because *Booker* elevated the purposes of sentencing, it simultaneously illuminated the tactical advantages of sentencing hearings over trials. Trials result in a larger quantum of evidence being presented. As the quantity and quality of evidence has strengthened in the twenty-first century, much of the evidence presented at trial can negatively impact the defendant at sentencing.¹⁸⁸ At trial, the government has the burden of proving each element beyond a reasonable doubt to the unanimous satisfaction of the jury. The defendant has no burden, and frequently exercises his right to not testify or present any evidence. If the defense decides to put on a case, it often has laser-like focus on a singular deficiency in the government's proof. Thus, a typical trial produces disproportionate amounts of one-sided evidence adverse to the defendant. If there is a sentencing hearing after trial,¹⁸⁹ it is because the government already prevailed by meeting its higher burden of proof (beyond a reasonable doubt)¹⁹⁰ at trial than the burden needed to establish a Guidelines adjustment in a sentencing hearing (usually by a preponderance of the evidence).¹⁹¹ So, why put more harmful facts in front of the sentencing judge than necessary? While the prosecutor may attempt to prove the same damaging facts at sen-

¹⁸⁸ See *infra* Section III.A.

¹⁸⁹ The authors note that if the prosecution prevails at trial, a sentencing hearing will follow. However, a plea agreement abrogates the need for a trial and allows a defendant to proceed directly to the sentencing stage.

¹⁹⁰ Construed together, the Fourteenth Amendment and Sixth Amendment entitle a defendant to a jury determination that he is guilty of every element of the crime with which he is charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). The need to establish proof beyond a reasonable doubt that a defendant is guilty applies with equal force to plea agreements.

¹⁹¹ Almost every circuit has held that preponderance of the evidence is the appropriate burden of proof for all factual matters at sentencing, consistent with the USSC's position noted in the commentary. See, e.g., *United States v. Grier*, 475 F.3d 556, 568 (3d Cir. 2007) (en banc); *United States v. Barton*, 455 F.3d 649, 657–58 (6th Cir. 2006); *United States v. Dorcelly*, 454 F.3d 366, 371–72 (D.C. Cir. 2006); *United States v. Okai*, 454 F.3d 848, 852 (8th Cir. 2006); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005); *United States v. Magallanez*, 408 F.3d 672, 685 (10th Cir. 2005); *United States v. Gonzalez*, 407 F.3d 118, 125 (2d Cir. 2005); *Cirilo-Muñoz v. United States*, 404 F.3d 527, 532–33 (1st Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304–05 (11th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); USSG 2016, *supra* note 118, § 6A1.3, cmt. *But see* *United States v. Watts*, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting) (per curiam) (“The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [constitutional] jurisprudence.”). Proffers of evidence are usually sufficient during sentencing hearings.

tencing, these facts are often record proof and not live testimony, minimizing their impact.¹⁹²

Third, *Booker* altered the adversarial relationship between the prosecution and defense. In a plea-bargaining scenario, the sentencing hearing takes place after a series of negotiations between the prosecution and defense counsel, not after a hotly contested trial. Adversarial enmity has less time to inculcate in plea negotiations than it would have during the trial process. And adverse perceptions of the defendant's conduct developed through the lengthy trial process could potentially affect the prosecution's sentence recommendation. In contrast, the plea process allows prosecution and defense counsel to work together as collaborative parties to achieve a desirable outcome and dissipates the need to battle over ultimate questions of guilt and innocence. In a plea agreement, the prosecutor is the party to a mutually satisfactory deal, not the adversary fought at trial and again on appeal.

Fourth, *Booker*'s recalibration of the sentencing scales has opened the door for greater sentencing advocacy in the courtroom. Defendants know that defeat is likely if they proceed to trial because of the high federal conviction rate of jury trials (eighty-eight percent).¹⁹³ Therefore, the laws of probability indicate that defendants and defense counsel should refocus their efforts on the sentencing hearing. The fact that there is a sentencing hearing means that guilt has already been established. Sentencing hearings allow attorneys to move beyond disputing factual and legal determinations of guilt and to instead argue about big-picture policy issues: rehabilitation, proportionality, etc. In a trial, the government goes first and presents its evidence which may be rebutted, explained away, or otherwise called in to question. At sentencing, at least in the WDNC, the defense precedes the government and makes its case for why the court should not judge the defendant by the offense of conviction and criminal history. Instead, the sentencing pitch centers around the statutory purposes of sentencing. And lawyers may rationally redirect their efforts toward this focus. Instead of airing out dirty laundry at trial, defendants are opting for plea resolution where their lawyers have the best opportunity to divert the court's gaze from the offense conduct to arguments for variance.

¹⁹² Courts do not require that all sentencing proceedings occur on the record. See *United States v. Morace*, 594 F.3d 340, 344 n.1 (4th Cir. 2010).

¹⁹³ *Statistical Tables for the Federal Judiciary: Table D-4*, ADMIN. OFF. U.S. CTS. (Dec. 2016), http://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2016.pdf.

Mandatory minimum penalties, implementation of the Guidelines, cooperation reductions, and other aforementioned factors that drive plea resolution are valid and help explain why criminal jury trials are diminishing. But *Booker* is a new catalyst for greater decline. Noncooperation departure sentences were severely limited before 2005, but now judges show greater receptivity to variance arguments. *Booker* cannot be viewed in isolation as the sole cause of vanishing trials, but when considered in combination with other classical factors, *Booker* can explain a large part of the forty-seven percent decrease in the number of defendants disposed of jury trials since 2006. As discussed in the next Section, DOJ policy changes have joined forces with *Booker* to further limit trials' presence.

E. Imploding the Trial Rate: Changes in Main Justice Policies

Since 1980, U.S. Attorneys General, the nation's top prosecutors, have issued charging and plea policy directives through memoranda.¹⁹⁴ Main Justice publishes these directives with the intent that the policies embodied within the memoranda will steer the ninety-four federal districts and serve as guiding principles for all federal prosecutors to follow. This practice has remained consistent throughout the last fifteen years. However, the language used and the positions articulated regarding the Guidelines and MMs in the memoranda have experienced notable changes. Two principal approaches have largely governed DOJ policy throughout the twenty-first century: the "Ashcroft approach" and the "Holder approach," named after the Attorneys General who authorized the respective charging and plea policies.¹⁹⁵ This Section explores the differences between these two approaches and the effects each approach has had on trial numbers.

The Reno Memorandum, issued in 1993, still governed DOJ Policy when John Ashcroft assumed the role of Attorney General in 2001.¹⁹⁶ Although the Reno Memorandum encouraged adherence to the Sentencing Guidelines, it tempered this adherence by emphasizing the exercise of individualism in prosecutorial decisions.¹⁹⁷ Attorney General Reno instructed prosecutors to conduct "an individualized assessment of the extent to which particular charges fit the specific

¹⁹⁴ USAOs sometimes term these memoranda "Bluesheets."

¹⁹⁵ See *infra* Sections II.E.1, II.E.2.

¹⁹⁶ Memorandum from Janet Reno, Attorney Gen., to Holders of U.S. Attorneys' Manual, Title 9 (Oct. 12, 1993), reprinted in 6 FED. SENT'G REP. 352, 352 (1994) [hereinafter Reno Memorandum].

¹⁹⁷ See *id.*

circumstances of the case” when entering plea agreements.¹⁹⁸ Reno emphasized proportionality, requiring prosecutors to assess whether the Guidelines or potential MMs would be proportional to the seriousness of defendants’ conduct.¹⁹⁹ This approach changed in 2003 under Attorney General John Ashcroft and subsequently changed again in 2010 under Attorney General Eric Holder.

1. *Ashcroft v. Holder: Charging and Plea Policies*

Whereas Reno stressed the values of individualism and proportionality governing prosecutorial discretion, Ashcroft established “fundamental fairness” as the overarching prosecutorial goal.²⁰⁰ Ashcroft believed that the charges a defendant faced “should not depend upon the particular prosecutor” in the USAO assigned to handle the case.²⁰¹ In essence, prosecutors in the Western District of North Carolina should treat a Charlotte bank robbery in the same manner as prosecutors in the Southern District of California would treat a San Diego bank robbery.

Since the 1980s, DOJ policy has instructed prosecutors that they should ordinarily charge “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.”²⁰² However, Ashcroft removed the “*should*” language from Reno’s memorandum.²⁰³ Instead, Ashcroft directed prosecutors that they “*must* charge and pursue the most serious, readily provable offense.”²⁰⁴

Ashcroft defined the most serious offense as the charge that would yield the greatest sentence.²⁰⁵ Previous Attorneys General had stated that the most serious offense would *ordinarily* be the offense with the highest penalty, but Ashcroft required all prosecutors to pursue the most substantial sentence under the Guidelines and applicable

¹⁹⁸ *Id.*

¹⁹⁹ *See id.*

²⁰⁰ Memorandum from John Ashcroft, Attorney Gen., to All Federal Prosecutors (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm [hereinafter Ashcroft Memorandum].

²⁰¹ *Id.*

²⁰² U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.310 (1984), https://www.justice.gov/archive/usao/usam/1984/title9_part1.pdf.

²⁰³ Compare Reno Memorandum, *supra* note 196 (emphasis added), with Ashcroft Memorandum, *supra* note 200.

²⁰⁴ Ashcroft Memorandum, *supra* note 200 (emphasis added).

²⁰⁵ *Id.* (“The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.”).

statutes.²⁰⁶ He also encouraged prosecutors to charge any applicable statutory enhancements, like 21 U.S.C. § 851 or 18 U.S.C. § 924(c)²⁰⁷ and discouraged prosecutors from making downward departures absent substantial assistance.²⁰⁸

Two years later in 2005, Deputy Attorney General James Comey issued a general reiteration of Ashcroft's memorandum, still insisting that prosecutors charge and pursue the most serious readily provable offense and emphasizing strict adherence to the Guidelines, even in a post-*Booker* world.²⁰⁹ If prosecutors wanted to recommend or stipulate to a sentence outside of the Guidelines, they had to obtain supervisory approval first.²¹⁰ However, in 2010 under Attorney General Eric Holder, the DOJ reinserted the "individualized assessment" language that Ashcroft intentionally excised ("Holder Memorandum 1").²¹¹ Holder returned to the concept of individualism and attention to the specific facts and circumstances as guiding principles in prosecutorial decisionmaking.²¹²

Ashcroft perceived prosecutorial charging disparity as incompatible with justice.²¹³ Holder, on the other hand, thought justice required prosecutors to base their charging decisions on their own subjective judgment of the defendant and the defendant's relevant conduct.²¹⁴ As part of Holder's "Smart on Crime Initiative,"²¹⁵ Holder issued another

²⁰⁶ *Id.*

²⁰⁷ *Id.* The obligatory nature of the command was modified in cases involving multiple 18 U.S.C. § 924(c) charges. *Id.* For example, a bank robber pleading to four armed bank robberies could plead to four substantive armed robberies and only one § 924(c) charge (not four), thus avoiding the "stacking" of twenty-five-year consecutive gun counts. The incentive to plead guilty in this example is obvious.

²⁰⁸ Ashcroft Memorandum, *supra* note 200.

²⁰⁹ Comey Memorandum, *supra* note 34 (advising federal prosecutors on charging decisions two weeks after *Booker*).

²¹⁰ *Id.*

²¹¹ Memorandum from Eric H. Holder, Jr., Attorney Gen., to All Federal Prosecutors (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [hereinafter Holder Memorandum 1].

²¹² *Id.* ("[E]qual justice depends on individualized justice . . .").

²¹³ See Ashcroft Memorandum, *supra* note 200.

²¹⁴ See Holder Memorandum 1, *supra* note 211.

²¹⁵ Early in 2013, Holder instituted "a comprehensive review of the criminal justice system" to ensure that federal laws are enforced more fairly and efficiently. *The Attorney General's Smart on Crime Initiative*, U.S. DEP'T JUSTICE (Mar. 9, 2017), <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative>. The project included five main goals: "1. To ensure finite resources are devoted to the most important law enforcement priorities; 2. To promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system[;] 3. To ensure just punishments for low-level, nonviolent convictions[;] 4. To bolster prevention and reentry efforts to deter crime and reduce recidivism[; and] 5. To strengthen protections for vulnerable populations." *Id.*

memorandum in 2013 specifically addressing MMs and recidivist enhancements (“Holder Memorandum 2”).²¹⁶ Holder Memorandum 2 articulated a general policy that in the context of drug-related offenses, which are consistently the most prosecuted type of offense throughout the twenty-first century,²¹⁷ MMs and § 851 enhancements should be reserved for only serious, high-level crimes.²¹⁸ Holder criticized some MMs and recidivist enhancement statutes as resulting in “unduly harsh sentences” that did not reflect the seriousness of the crime, the culpability of the defendant, or the general principles of prosecution.²¹⁹ In response to Holder Memorandum 2, prosecutors often chose to omit listing quantities of illegal substances in indictments for drug cases in order to sidestep triggering an MM.²²⁰ Prosecutors also seemingly reduced the frequency with which they pressed for § 851 enhancements.²²¹ Figure 7 demonstrates that Holder’s greater leniency in drug prosecutions likely altered the composition of the federal criminal jury trial docket. 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 2015.²²² Clearly, two conflicting regimes have governed DOJ policies through-

²¹⁶ Memorandum from Eric H. Holder, Jr., Attorney Gen., to the U.S. Attorneys and Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [hereinafter Holder Memorandum 2].

²¹⁷ See generally *Statistical Tables for the Federal Judiciary: Table D-2*, ADMIN. OFF. U.S. CTS. (Dec. 2001–2016), <http://www.uscourts.gov/data-table-numbers/d-2?pt=all&pn=all&t=all&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D=>. From 2001 to 2016, the total number of defendants charged with drug offenses has been greater than the total number of defendants in any other offense category.

²¹⁸ Holder Memorandum 2, *supra* note 216.

²¹⁹ *Id.*

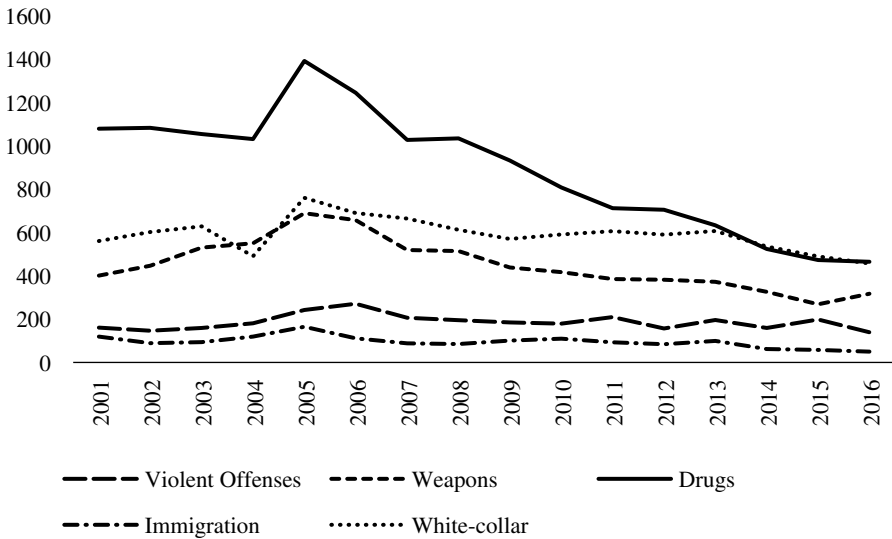
²²⁰ Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?_r=0.

²²¹ Surveying USSC statistics, the Office of the Inspector General reported an apparent decline in the DOJ’s use of recidivist enhancement statutes after Holder Memorandum 2. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE DEPARTMENT’S IMPLEMENTATION OF PROSECUTION AND SENTENCING REFORM PRINCIPLES UNDER THE SMART ON CRIME INITIATIVE 28–30 (2017) (“According to the USSC, in FY 2012, federal prosecutors filed recidivist enhancements in approximately 20.6 percent of eligible cases, but in only 17.6 percent of eligible cases in FY 2014. Also, this decline in the rate of recidivist enhancements occurred despite a rise in the percentage of eligible defendants.” (footnote omitted)). The report also chronicles that an increased percentage of § 851 enhancements were eventually withdrawn in 2014, consistent with Holder’s policies. *Id.*

²²² See *infra* Figure 7.

out the twenty-first century that have affected how, and which, crimes are charged.

FIGURE 7. CRIMINAL DEFENDANTS DISPOSED OF BY JURY TRIALS IN U.S. DISTRICT COURTS BY OFFENSE TYPE 2001–2016²²³



2. *Ashcroft v. Holder: Prosecutorial Priorities and Programs*

Ashcroft and Holder disagreed on actions as well as semantics. The types of crimes prosecuted and the programs implemented under each Attorney General differed, evincing the different philosophies on what represented the gravest risks of harms and how those harms should be managed and mitigated. Ashcroft implemented programs designed to “get tough” on crime,²²⁴ especially drug crimes, and his

²²³ Table D-4, *supra* note 23. In 2005, the Administrative Office of the U.S. Courts changed its taxonomy in classifying offenses in Tables D-2 and D-4. Therefore, the authors added slightly different sets of variables for the years 2001–2004 than used in calculating statistics for the years 2005–2015. Accordingly, this is a general comparison between types of offenses and should be construed as an approximation.

²²⁴ Ashcroft praised and sought to expand Operation Weed and Seed in 1991, and enacted Operation Pipe Dreams and Operation Headhunter in 2003 to get tough on drugs, Project Safe Neighborhood in 2001 to get tough on guns, and the HAZMAT Initiative in 2003 to get tough on terrorism. Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2327–28 (2014); John D. Ashcroft, Attorney Gen., Prepared Remarks of Attorney General John Ashcroft: HAZMAT Initiative Announcement (Sept. 30, 2003), <https://www.justice.gov/archive/ag/speeches/2003/093003hazmatremarks.htm>; John D. Ashcroft, Attorney Gen., Address for Weed and Seed Conference (Aug. 27, 2001), <https://www.justice.gov/archive/ag/speeches/2001/082701nationalweedandseedconfer.htm>; Press Release, Dep’t of Justice, Operation Pipe Dream Puts 55 Illegal Drug Paraphernalia Sellers Out of Business (Feb. 24, 2003), https://www.justice.gov/archive/opa/pr/2003/February/03_crm_106.htm.

case docket reflected this priority. During Ashcroft’s five-year tenure as Attorney General, drug filings constituted the bulk of charges filed—approximately thirty-six percent of the federal criminal docket. While not all of Aschroft’s programs assured prosecution as the end result, all relied on at least the threat of criminal prosecution as the key mechanism for “weeding out” criminals.²²⁵

TABLE 1. AVERAGE FILINGS BY OFFENSE TYPE²²⁶

Offense Type	Ashcroft	Holder
Violent Offenses	4%	3%
Weapons	11%	9%
Drugs	36%	31%
Immigration	18%	27%
White-collar	17%	15%
Other	14%	15%

In contrast, Holder sought to “seed”—implement community programs in high crime areas focused on prevention, intervention, treatment, and neighborhood revitalization—and then “weed” if seed-ing was unsuccessful.²²⁷ The changes Holder made to existing programs and the new programs he enacted revealed his philosophy that prosecution should not be the default answer for solving the crime

²²⁵ See sources cited *supra* note 224.

²²⁶ These averages, rounded to the nearest whole number, rely on statistics compiled from Table D-2 from the Administrative Office of the U.S. Courts. *Statistical Tables for the Federal Judiciary: Table D-2*, ADMIN. OFF. U.S. CTS. (Dec. 2001–2005; 2009–2015), <http://www.uscourts.gov/data-table-numbers/d-2?pt=all&pn=all&t=all&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D=>; see also *supra* note 222 and accompanying text. “Other” refers to offense categories which were excluded from the calculations of the Violent Offenses, Weapons, Drugs, Immigration, and White-Collar categories (e.g., sex offenses, regulatory offenses, etc.).

²²⁷ U.S. DEP’T OF JUSTICE, INDEPENDENT EVALUATION OF THE NATIONAL WEED AND SEED STRATEGY 1–7 (2010).

problem.²²⁸ During 2015, Holder's last year in office, criminal filings were the lowest they had been since 1998.²²⁹

The types of charges Holder encouraged prosecutors to file diverged as well. Holder denounced what he viewed as the excessive imposition of "draconian" sentences for low-level drug offenders and accordingly aimed to reduce heavy prosecutions of "low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels."²³⁰ Holder succeeded in this effort. In 2014 and 2015, drug filings were the lowest they had been since the 1990s.²³¹ Rather, Holder invested more prosecutorial resources in filing immigration charges as illegal immigration became a growing national problem.²³² Holder also modified fast-track programs to help process the voluminous immigration caseload. Fast-track programs began in the 1990s in southwestern border districts with an exceptionally high immigration caseload, but Holder expanded the use of these programs to other areas of the country.²³³ If a defendant participates in a fast-track program, the government can move for a downward departure of up to

²²⁸ Holder emphasized multidisciplinary, community-based initiatives that partnered with forces outside of the criminal justice system as the key to combatting crime. In 2010, Holder implemented Defending Childhood—a community-based initiative to combat childhood exposure to violence as victims or witnesses—the National Forum on Youth Violence Prevention—a multidisciplinary, community-based partnership that works together, shares information, and builds local capacity to prevent and reduce youth violence—and the Office for Access to Justice, an office created to address the access-to-justice crisis across the criminal and civil system, ensuring fair and efficient justice system outcomes, regardless of status or wealth. *Defending Childhood: About the Initiative*, U.S. DEP'T JUST., <https://www.justice.gov/defendingchildhood/about-initiative> [<https://perma.cc/4BTY-B6CT>]; *Access to Justice: About the Office*, U.S. DEP'T JUST., <https://www.justice.gov/atj/about-office> [<https://perma.cc/8L9E-GRXN>].

²²⁹ The DOJ brought charges against 79,285 criminal defendants in 2015. *Statistical Tables for the Federal Judiciary: Table D-2*, ADMIN. OFF. U.S. CTS. (Dec. 2015), http://www.uscourts.gov/sites/default/files/data_tables/stfj_d2_1231.2015.pdf.

²³⁰ Eric Holder, Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

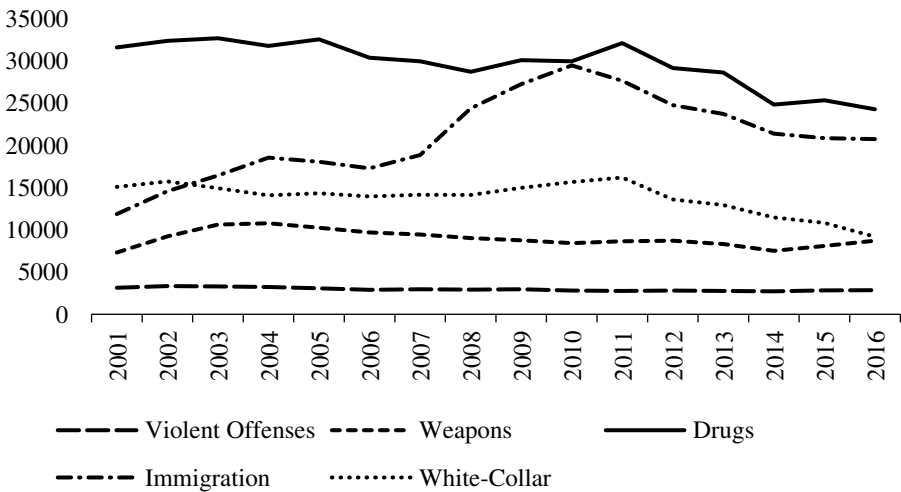
²³¹ The DOJ filed drug offense charges against 25,333 criminal defendants in 2015, compared to the 32,543 charges filed in 2005 during Ashcroft's last year in office. *Statistical Tables for the Federal Judiciary: Table D-2*, ADMIN. OFF. U.S. CTS. (Dec. 2005, 2015), <http://www.uscourts.gov/data-table-numbers/d-2?pt=all&pn=all&t=all&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D=>

²³² In 2015, the DOJ filed immigration offense charges against 20,858 criminal defendants in 2015, compared to the 11,863 defendants charged of committing an immigration offense in 2001. *Id.* (Dec. 2001, 2015).

²³³ Memorandum from James M. Cole, Deputy Attorney Gen., to All United States Attorneys (Jan. 31, 2012), <https://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf>.

four levels in exchange for the defendant promptly pleading guilty.²³⁴ Holder encouraged prosecutors to use these programs because they saved the government time and money. In 2015, fast-track programs—premised upon a plea agreement system—processed 16.9% of all federal criminal cases.²³⁵ Now, pleas resolve nearly all immigration offenses.²³⁶ Therefore, the uptick in immigration filings could also explain the dwindling trial numbers in the Holder administration. And due to the Trump Administration’s indicated focus on combatting illegal immigration, one can expect to see immigration filings rise, use of fast-track programs and pleas increase, and trial numbers implode.²³⁷

FIGURE 8. DEFENDANTS COMMENCED IN U.S. DISTRICT COURTS BY OFFENSE TYPE 2001–2016²³⁸



²³⁴ *Id.*

²³⁵ U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Fig.G (2015), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureG.pdf>. Figure G represents this statistic as the “EDP (§5K3.1)/Government Sponsored Below Range” value.

²³⁶ In 2016, 97% of immigration cases were disposed of by plea. *See Statistical Tables for the Federal Judiciary: Table D-4*, ADMIN. OFF. U.S. CTS. (Dec. 2016), http://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2016.pdf (rounded to nearest whole number).

²³⁷ Donald J. Trump, Address on Immigration (Aug. 31, 2016), <http://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> (“Under my Administration, anyone who illegally crosses the border will be detained until they are removed out of our country. . . . We will terminate the Obama Administration’s deadly non-enforcement policies that allow thousands of criminal aliens to freely roam our streets.”).

²³⁸ *See supra* notes 223, 226.

3. *Ashcroft v. Holder: A Case Study*

The divergence in approaches among Attorneys General is instructive in evaluating our central inquiry—the causes of the diminishing criminal jury trial. To see how the issue of DOJ policies has real implications for the number of trials, this Article examines the following hypothetical:

As a result of information provided by cooperating witnesses and law enforcement surveillance, police stop defendant's car. Police find numerous baggies on defendant's person containing a total of ten ounces of cocaine. Police also discover a loaded nine-millimeter pistol underneath the defendant's seat. The same cooperating witnesses provide statements that defendant has been a street-level dealer of cocaine for several years and that they have purchased more than five kilograms from him during that time period. In addition to the firearm possessed on the day of arrest, these witnesses allege defendant possessed a firearm on two other occasions while selling cocaine on the street. Defendant has one prior conviction for a felony drug offense and is on probation at the time he is alleged to have committed the instant offense.

Potential sentencing results depend on whether the Ashcroft approach or the Holder approach guides a prosecutor's charging decisions. The sentence could result in some variant of the following:

ASHCROFT:

The defendant is indicted for a multiyear conspiracy to possess with intent to distribute at least five kilograms of cocaine²³⁹ and a substantive possession with intent to distribute cocaine on the day of arrest. He is also charged with three counts of possession of a firearm in furtherance of a drug trafficking crime²⁴⁰ and one count of possession of a firearm by a felon. The government files an information alleging the defendant's prior drug conviction.²⁴¹

²³⁹ This charge carries an MM sentence of ten years. 21 U.S.C. § 841(b)(1)(A) (2012).

²⁴⁰ These charges carry MM sentences of five years for the first offense and twenty-five years for each subsequent offense. 18 U.S.C. § 924(c)(1)(A)(i), (C)(i) (2012). The sentence for each violation of this statute must be served consecutively to any other term of imprisonment. 18 U.S.C. § 924(c)(1)(D)(ii). Notably, the Supreme Court has recently held that a sentencing court may consider the imposition of these lengthy MMs when calculating a defendant's sentence for the underlying predicate offenses. *Dean v. United States*, 137 S. Ct. 1170, 1176–77 (2017). However, this 2017 decision would not have affected the above Ashcroft calculations.

²⁴¹ The filing of an information alleging a prior felony drug offense triggers an increased MM sentence of twenty years for the 21 U.S.C. § 841(b)(1)(A)(ii) offense. 21 U.S.C. §§ 841(b)(1)(A), 851(a)(1).

If found guilty on all counts after trial, the defendant's expected sentence would be a staggering seventy-five years just based on the applicable MMs.

If defendant agreed to plead guilty to the drug conspiracy and possessing a firearm in furtherance of a drug trafficking crime on the date of arrest, the government would likely dismiss the remaining charges, resulting in a twenty-five-year sentence, based on the applicable MMs. If the defendant provided substantial assistance, the government would likely withdraw the § 851 notice and move for reduction of one-third to one-half of the mandatory fifteen years, or a sentence of seven to ten years.

HOLDER:

The defendant is indicted for a multiyear conspiracy to possess with intent to distribute an unspecified quantity of cocaine, a substantive possession with intent to distribute cocaine,²⁴² possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a felon.

If found guilty of all charges after trial, the defendant's expected sentence would be seventeen and a half years.²⁴³

If instead, the defendant agreed to plead guilty, the government would likely hold him only responsible for the drugs possessed on the date of arrest and allow him to plead to the felon-in-possession-of-a-firearm charge, thereby avoiding any MM, which would result in a four-year sentence.²⁴⁴ If the defendant provided substantial assistance, the government would likely move for reduction of one-third to one-half of the low end of the Guidelines range, or a sentence of two to three years.

²⁴² These drug charges have maximum sentence of twenty years, with no MM. 21 U.S.C. § 841(b)(1)(C).

²⁴³ This calculation assumes the government proves that at least five kilograms of cocaine was reasonably foreseeable to the defendant during his participation in the conspiracy. USSG 2016, *supra* note 118, §§ 1B1.3(a)(1)(B), 2D1.1(c)(5) (offense level 30). It also assumes the defendant's criminal history category is III, § 4A1.1(a)–(d) (3 criminal history points for prior drug conviction, 2 additional points for being on probation at the time of the offense), resulting in an advisory Guidelines range of 151–188 months, plus 60 months for the firearm offense.

²⁴⁴ This calculation assumes a drug quantity of 280 grams of cocaine, USSG 2016, *supra* note 118, § 2D1.1(c)(11) (offense level 18), and that the gun was possessed during the drug offense, § 2D1.1(b)(1) (2 additional levels). The felon-in-possession-of-a-firearm offense has a higher offense level, § 2K2.1(a)(4)(A), (6)(B) (offense level 20 based on prior drug conviction plus 4 additional levels for possessing firearm in furtherance of another felony); § 3D1.3(a) (using highest offense level for grouped counts), which after a reduction for acceptance of responsibility, § 3E1.1 (3 offense levels), results in an advisory Guidelines range of 46–57 months.

TABLE 2. ASHCROFT V. HOLDER—CHARGE & SENTENCE COMPARISON

	Ashcroft Approach		Holder Approach	
	Charges	Years	Charges	Years
Trial	Drugs	20 years MM	Drugs	20 years max (no MM)
	Gun 1 + drug trafficking	5 years MM consecutive	Gun 1 + drug trafficking	5 years MM consecutive
	Gun 2 + drug trafficking	25 years MM consecutive	Felon + Gun	10 years max concurrent
	Gun 3 + drug trafficking	25 years MM consecutive	Total	17.5 years (5 year MM)
	Felon + Gun	10 years max concurrent		
	Total	75 years MM		
Plea	Drugs	20 years MM	Drugs	20 years max (no MM)
	Gun 1 + drug trafficking	5 years MM consecutive	Felon + Gun	10 years max concurrent
	Total	25 years MM	Total	4 years (no MM)
Plea + Cooperation	Drugs	10 years MM	Drugs	20 years max (no MM)
	Gun 1 + drug trafficking	5 years MM	Felon + Gun	10 years max (no MM)
	Reduction	1/3 to 1/2 off	Reduction	1/3 to 1/2 off
	Total	7–10 years	Total	2–3 years

4. *Ashcroft v. Holder: Different Policies, Different Sentence Lengths, Same Declining Trial Trend*

As Table 2 demonstrates, the Ashcroft and Holder approaches produce drastically different outcomes. This Article's intent is not to critique the policy wisdom of each. It is, however, relevant to the discussion to note that despite these ideological shifts, one constant has remained: the number of jury trials continues to decline. Under Ashcroft, a prosecutor could only bargain for an amount less than the most serious sentence available if (1) the case had an evidentiary deficiency; (2) the defendant agreed to cooperate; or (3) one of the other limited exceptions enumerated in the Ashcroft Memorandum applied.²⁴⁵ Prosecutors could not use plea agreements to avoid trial.²⁴⁶ As Ashcroft's policies subjected many defendants to lengthy MMs,

²⁴⁵ See Ashcroft Memorandum, *supra* note 200.

²⁴⁶ See *id.*

plea agreements rose because the risk of going to trial appeared too great. Often defendants made the calculation to plead and cooperate, hoping to receive a cooperation reduction below an MM.²⁴⁷

Holder's approach commanded prosecutors to evaluate situations where charging the highest penalty might not be necessary to achieve the goals of sentencing. Because cases could be charged to avoid MMs, as in drug cases charging an unspecified amount of controlled substances, MMs could disappear. This made the Guidelines computations more significant. The "five-level" theory²⁴⁸ becomes more compelling in the absence of MMs as the trial penalty becomes more severe under a pure Guidelines analysis. Conversely, in cases where MMs are higher than the Guidelines range, the offense-level reduction becomes inconsequential.

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 2005.²⁴⁹ Although this uptick is slight, it might indicate that plea agreements under Holder contained more attractive terms to defendants. Holder's emphasis on conducting an individualized assessment allowed defense attorneys more room to negotiate why their client was different and should receive a lighter sentence. Today, in a post-*Booker* world, prosecutors appear more receptive to these arguments. Where negotiating plea agreements for anything less than the most serious readily provable offenses under Ashcroft may have been seen as concessions due to busy dockets or

²⁴⁷ See *supra* Table 2.

²⁴⁸ See *supra* note 123 and accompanying text.

²⁴⁹ U.S. SENTENCING 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>; U.S. SENTENCING 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>; U.S. SENTENCING 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. Approximately eighty-eight percent of all defendants in 2014 and 2015 plead under Holder and approximately eighty-six percent of all defendants plead in 2005 under Ashcroft. See *Statistical Tables for the Federal Judiciary: Table D-4*, ADMIN. OFF. U.S. CTS. (Dec. 2005, 2014, 2015), <http://www.uscourts.gov/data-table-numbers/d-4?pt=all&pn=all&t=all&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D>.

case deficiencies,²⁵⁰ those same agreements post-Holder may be seen as ways to avoid overly severe sentencing results.²⁵¹

Notably, current Attorney General Jeff Sessions has reversed course and explicitly rescinded Holder's policies on refraining from charging MMs and seeking § 851 enhancements in cases involving low level, nonserious drug-related offenses.²⁵² Rather, Sessions has encouraged prosecutors to "fully utilize[] the tools Congress has given" them, including charging MMs and statutory enhancements.²⁵³ Sessions conceded that in some circumstances, prosecutors should not strictly adhere to charging "the most serious, readily provable offense" and should, on occasion, refrain from charging MMs.²⁵⁴ Nevertheless, he has articulated that in most cases, recommending Guidelines range sentences—which often have MMs built into their structure²⁵⁵—will be appropriate.²⁵⁶ Sessions has condemned and prohibited the practice of hiding relevant facts that affect Sentencing Guidelines and MMs, such as omitting the total quantity of illicit drugs at issue, from the sentencing court.²⁵⁷ Thus far, Sessions has

250 Ashcroft's Memorandum enumerated a limited list of exceptions when prosecutors could negotiate a plea agreement that would yield less than the most substantial sentence. Ashcroft Memorandum, *supra* note 200. Ashcroft based most of these limited exceptions on either resource or caseload reasons. *See id.* *See generally* Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, 243 N.Y. L.J. (2010) (noting the difference in Ashcroft's plea-bargaining policy from his predecessor's, Janet Reno).

251 *See* Holder, *supra* note 230 ("This is why I have today mandated a modification of the Justice Department's charging policies so that certain low-level, nonviolent drug offenders . . . will no longer be charged with offenses that impose draconian mandatory minimum sentences. They now will be charged with offenses for which the accompanying sentences are better suited to their individual conduct, rather than excessive prison terms more appropriate for violent criminals or drug kingpins."). Indeed, in 2015 criminal filings were at their lowest levels in seventeen years, yet nearly 88% of criminal cases were resolved by plea. *Statistical Tables for the Federal Judiciary: Table D-4*, ADMIN. OFF. U.S. CTS. (Dec. 2015), http://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2015.pdf.

252 Sessions Memorandum, *supra* note 99, at 1–2 (rescinding "[a]ny inconsistent previous policy of the Department of Justice relating to these matters" and footnoting Holder Memorandum 2 and Holder's Memorandum giving guidance regarding § 851 enhancements in plea negotiations as examples).

253 *Id.*

254 *Id.*

255 *See supra* note 82 and accompanying text.

256 Sessions Memorandum, *supra* note 99.

257 *Id.*; *see also supra* note 218 and accompanying text. Sessions previewed this stance during his Attorney General nomination hearing when he indicated that he disagreed with Eric Holder's policy allowing prosecutors to charge a lower quantity of drugs than the defendant possessed in order to sidestep MMs. *See Hearing on the Nomination of Sen. Jeff Sessions to Be Attorney Gen., Panel 1: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017) (Jan. 10, 2017), <https://www.judiciary.senate.gov/meetings/01/10/2017/attorney-general-nomination> (statement of Sen. Chris Coons, Member, S. Comm. on the Judiciary). Sessions stated it was

reinstated an Ashcroft approach in the DOJ. But as the Ashcroft and Holder comparison indicates, despite Main Justice's charging and plea policies, the trial rate implications seem to stay the same: drastic decline.

Thus far, this Article has outlined internal developments within the criminal justice system that have changed both the rules of the game and the roles of the players since Galanter's 2003 study. This Article has identified MMs as a trial suppressor that works independently, yet in tandem, with the Guidelines to reduce trial numbers. This Article has posited that all stages of the Guidelines—the birth, implementation, and eventual overhaul in *Booker*—have resulted in reduced trial numbers. Although scholars have frequently discussed how the implementation of the Guidelines diminished trials and increased pleas,²⁵⁸ this is the first article to contend that *Booker*'s overthrow of the mandatory nature of the Guidelines has amplified the trial decline. Finally, this Article has postulated that the power and force of MMs and the Guidelines culminate in the DOJ's hands. As demonstrated, the DOJ can impact the number of trials through its charging and plea policies.

In the next Part, the authors briefly explore extrinsic factors that do not fit neatly into one category yet still exert considerable influence on how the internal criminal adjudication system operates and disposes of cases. These outside factors, apart from the criminal justice arena, help define the rules and boundaries for how the inside actors play the game. Consequently, these external factors also play a large role in minimizing the number of trials.

III. EXTERNAL FACTORS

A. Evidence and Expense

Stronger evidence due to technological advances has powerfully contributed to the trial decline. Electronically stored information ("ESI"), electronic trace evidence, and other forms of digital evidence increase the quality and quantity of evidence available at trial.²⁵⁹ In-

"problematic and difficult to justify a prosecutor charging" five kilograms of drugs when the actual amount was ten in order to get a lower sentence. *Id.* He opined that there might be circumstances where charging a lesser amount of drugs than the facts seem to support might be appropriate, especially if there were proof and other evidentiary issues (similar to Ashcroft's policy), but he did not think that it was generally a sound principle. *Id.*

²⁵⁸ See, e.g., Bowman, *supra* note 31, at 227.

²⁵⁹ See Ronald J. Hedges, "Hot Topics" for ESI in Criminal Matters, CRIM. JUST., Fall 2016, at 43, 43.

creased use and prominence of DNA evidence has revolutionized criminal adjudication. Throughout the twenty-first century, the use, accuracy, and prevalence of DNA evidence has increased and become pervasive in the American criminal justice system.²⁶⁰ Over the past seventeen years, Congress has even enacted federal laws about the intersection of DNA evidence and criminal adjudication.²⁶¹ DNA evidence is now one of the strongest criminal adjudication tools.

Increased use of electronic surveillance through “Title III intercepts”²⁶² and cell tower locational tools have also led to stronger cases.²⁶³ Text messaging, emailing, internet posting, and communicating through social media platforms have strengthened motive and conspiracy evidence. In addition to electronically stored evidence, the ability to communicate this evidence to jurors by means of electronic courtroom presentation systems augments the government’s case.²⁶⁴ The use of computer-generated animations by the prosecution has also become common to recreate and depict a crime scene or event to

²⁶⁰ See *Williams v. Illinois*, 567 U.S. 50, 58 (2012); Dist. Attorney’s Office for the Third Judicial Dist. v. *Osborne*, 557 U.S. 52, 62 (2009) (“Modern DNA testing can provide powerful new evidence unlike anything known before.”); *Advancing Justice Through DNA Technology: Using DNA to Solve Crimes*, U.S. DEP’T JUST., <https://www.justice.gov/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes> [<https://perma.cc/FY3E-5HYQ>] (tracing the “great advances” in DNA, “a powerful criminal justice tool,” throughout the twenty-first century).

²⁶¹ See Innocence Protection Act of 2004, Pub. L. No. 108-405, tit. IV, 118 Stat. 2260, 2278 (codified as amended at 18 U.S.C. §§ 3600–3600A (2012)); DNA Identification Act of 1994, Pub. L. No. 103-322, § 210304, 108 Stat. 2065, 2069–70 (codified at 42 U.S.C. § 14132 (2012)). One of these laws authorizes the FBI to maintain a national DNA database of samples from some classes of offenders. See 42 U.S.C. § 14132. To see the power of DNA evidence in proving wrongful convictions and freeing hundreds of wrongfully imprisoned defendants, see *The Cases, INNOCENCE PROJECT*, <https://www.innocenceproject.org/all-cases/#exonerated-by-dna> [<https://perma.cc/3285-RJDE>].

²⁶² See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801–804, 82 Stat. 197, 211–25 (codified as amended at 42 U.S.C. §§ 3782–3784, 18 U.S.C. §§ 2510–2520). Also known as the “Wiretap Act,” this law establishes procedures for obtaining warrants to authorize wiretapping by government officials. See *id.* § 2516; see also U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL: CRIMINAL RESOURCE MANUAL § 28, <https://www.justice.gov/usam/criminal-resource-manual-28-electronic-surveillance-title-iii-applications> [<https://perma.cc/RKL5-DJCV>] (last updated Oct. 2012) (stipulating Title III application requirements).

²⁶³ See *Carpenter v. United States*, No. 16-402 (U.S. argued Nov. 29, 2017), a case currently pending before the U.S. Supreme Court, in which the Court will decide whether the warrantless search and seizure of cell phone records violates the Fourth Amendment.

²⁶⁴ In the WDNC and over half of the federal districts across the country, the jury has digital access to evidence in the deliberation room through a system known as JERS (Jury Evidence Recording System). See *Jury Evidence Recording System (JERS)*, U.S. DIST. CT., W. DIST. N.C., <http://www.ncwd.uscourts.gov/jury-evidence-recording-system-jers> [<https://perma.cc/B247-9PLX>] (last visited Feb. 3, 2018).

jurors.²⁶⁵ Cumulatively, the advances in technological evidence move more cases out of the ambit of potential reasonable doubt, which often leads ineluctably to more pleas.²⁶⁶

But evolutions in technology come at a cost. The overall expense of going to trial is another strong extrinsic factor quashing the total number of trials. Litigation costs have risen dramatically in the twenty-first century, partially due to these technological advances. Expensive discovery review is often cited as a trial suppressor.²⁶⁷ Years ago, discovery was produced in a single Redweld folder. Today, it is often produced electronically in gigabytes—sometimes even ter-

²⁶⁵ See generally BARBARA E. BERGMAN ET AL., 3 WHARTON'S CRIMINAL EVIDENCE § 16:30 (15th ed. 1999 & Supp. 2016); Saul M. Kassir & Meghan A. Dunn, *Computer-Animated Displays and the Jury: Facilitative and Prejudicial Effects*, 21 LAW & HUM. BEHAV. 269, 280 (1997); Betsy S. Fiedler, Note, *Are Your Eyes Deceiving You?: The Evidentiary Crisis Regarding the Admissibility of Computer Generated Evidence*, 48 N.Y.L. SCH. L. REV. 295, 303 (2003) (calling computer-generated evidence “the common medium for evidentiary displays” in the courtroom); Carolyn Smart, Case Note, *The Computer Must Be Right: Computer Generated Animations, Unfair Prejudice and Commonwealth v. Serge*, 26 TEMP. J. SCI. TECH. & ENVTL. L. 387, 388 (2007).

²⁶⁶ However, technological advancements have also proven the innocence of many defendants. Perhaps the best example of technological advancements improving the accuracy of criminal adjudication is a state case, commonly known as the “Duke Lacrosse” case. In historically what would have been a “he said, she said” case of sexual assault, defense attorneys were able to prove innocence by ingeniously capturing “digital alibis” for the relevant time period. See Office of the Attorney Gen. of N.C., Durham County Superior Court Case File Nos. 06 CRS 4332–4336, 5582–5583: Summary of Conclusions 3–4, 14, <http://www.ncDOJ.gov/getdoc/29748585-538e-43be-9de2-113628743d57/SummaryConclusions.aspx> [<https://perma.cc/DQ47-DDCZ>] (last visited Feb. 3, 2018). This evidence included cellphone calls and photographs, ATM deposit receipts, time-stamped bank surveillance photographs and film, taxi logs, dormitory card keys, and various other forms of digital evidence. See *id.* at 4–9. DNA evidence supported the innocence of the accused individuals as well. See *id.* at 12–13.

²⁶⁷ See, e.g., Patricia Lee Refo, *The Vanishing Trial*, LITIG. ONLINE, Winter 2004, at 1, 3, https://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_opening_statement.authcheckdam.pdf (claiming that discovery, which has become too broad, time-consuming, and costly, is partially to blame for the disappearing trial phenomenon); see also, e.g., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009), http://www.uscourts.gov/sites/default/files/final_report_on_the_joint_project_of_the_actl_task_force_on_discovery_and_the_iaals_1.pdf (evaluating the potentially astronomical costs of discovery and concluding that “[s]ome deserving [civil] cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them”). Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit has asserted that the excesses of discovery in civil cases “have made the formal trial process less attractive than almost any alternative.” Patrick E. Higginbotham, *RAND Review*, RAND CORP., <https://www.rand.org/pubs/periodicals/rand-review/issues/summer2004/28.html> (last visited Mar. 3, 2018).

abytes.²⁶⁸ ESI has transformed discovery into an onerous process and has caused the costs of discovery to skyrocket, especially in white-collar cases.²⁶⁹ Some law firms have even established their own discovery centers, staffed with attorneys dedicated solely to identifying, preserving, collecting, and reviewing electronic documents in an effort to deal with the crushing burden ESI imposes.²⁷⁰

And the cost of discovery is not the only litigation expense to raise its price tag. Other costs associated with trials have risen, including attorneys' hourly rates, expert witness rates, and the \$400 million jury-consultant industry.²⁷¹ The expense of preparing for trials is sometimes cost prohibitive for those defendants paying for counsel themselves.²⁷² Cost control is also a reality for public defenders, but in a more indirect manner. Courts have a constitutional mandate to provide indigents with an adequate defense, including the cost of hiring experts in some cases.²⁷³ Yet due to cuts in federal indigent defense funding as a result of a budget crisis in 2013, financial constraints limit the former "gold standard" model's ability to provide effective indigent assistance.²⁷⁴ As Judge William L. Dwyer once claimed, "Money

268 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting the gigabytes of business records that would be involved in discovery); *Janvey v. Romero*, 817 F.3d 184, 191 (5th Cir. 2016) (remarking on the sixty terabytes of electronic data—"the equivalent of 6 Libraries of Congress"—parsed through during the discovery process); *United States v. Schmutzler*, 602 F. App'x 871, 873 (3d Cir. 2015) (stating that the United States presented evidence that defendant possessed between two to four terabytes of child pornography).

269 Stephen Pate, *A Proposal to Rein in Runaway Discovery*, 4 BLOOMBERG L. REP. – FED. PRAC., no. 13, 2010, at 1–2.

270 See, e.g., *Practices: E-Discovery*, KING & SPALDING, <http://www.kslaw.com/practices/Discovery-Center> [<https://perma.cc/2CJ3-XXMC>].

271 See ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 93 (2009); James F. Henry, *The Courts at a Crossroads: A Consumer Perspective of the Judicial System*, 95 GEO. L.J. 945, 951 (2007).

272 See *supra* note 269. One vanishing-trial scholar suggested that "the risks attendant to litigation" might be "jacked up to so high a level that no litigant in his or her right mind would choose to take them." Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 980 (2004).

273 See *Ake v. Oklahoma*, 470 U.S. 68, 82–83 (1985) (holding that in cases where a defense "may be devastated" by the absence of an expert witness, the state must provide an expert for an indigent defendant); *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963) (recognizing that indigent defendants are constitutionally entitled to receive effective assistance); see also 18 U.S.C. § 3006A (2012) (mandating that courts furnish legal representation to indigent defendants); *Providing Defense Services*, A.B.A., https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#1.6 [<https://perma.cc/T6LT-39GP>] (Standard 5-1.6: Funding) ("[The] [g]overnment has the responsibility to fund the full cost of quality legal representation for all [indigent defendants]. It is the responsibility of the organized bar to be vigilant in supporting the provision of such funding.").

274 THE INDEPENDENCE IMPERATIVE, *supra* note 65, at 5. State indigent defense services

... is the defining element of our modern American criminal justice system.”²⁷⁵ Indeed, financial limitations necessarily guide many decisions made in the criminal landscape.

Finally, the cost of the trial itself must be considered. Plea scholar John Langbein noted that reforms in evidence procedures and the “lawyerization of the trial,” enacted to provide additional safeguards in the trial setting, have also ironically undermined the trial system.²⁷⁶ These reforms have sometimes rendered the jury trial almost “unworkable as the routine dispositive procedure” because jury trials are now so complicated and time consuming.²⁷⁷ And the longer the trial, the greater the expense.²⁷⁸ Therefore, litigation expenses, in the aggregate, can limit the players’ resources, stamina, sophistication, and even their ability to play the game.

B. *Expectations and Entrenchment*

Expectations are another extrinsic factor that impact the number of trials. While plea agreements have existed for centuries in America,²⁷⁹ the propriety, necessity, and legality of the practice continue to be a topic of national debate today.²⁸⁰ In 1971, the Supreme Court declared plea agreements constitutional and necessary for the survival of the criminal justice system.²⁸¹ In 1974, eighty percent of convictions came from plea agreements—today the number is approximately ninety-seven percent of federal criminal convictions.²⁸² As Jus-

have often referred to the FDO services as the “gold standard” in providing indigents with sufficient funding and competent defense. *Id.* For more information regarding the 2013 budget sequestration, see *Fiscal Year 2013: Budget Sequestration and the Judiciary—Annual Report 2013*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/statistics-reports/fiscal-year-2013-budget-sequestration-and-judiciary-annual-report-2013> (last visited Feb. 3, 2018).

²⁷⁵ WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY’S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY* 115 (2002).

²⁷⁶ John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 11 (1978).

²⁷⁷ *Id.*

²⁷⁸ Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 566–67 (1977).

²⁷⁹ See generally MARY E. VOGEL, *COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY* 3–5 (2007) (exploring the origins of plea bargaining from early nineteenth-century America in antebellum Boston and tracing plea bargaining’s historical development and gradual institutionalization in the American criminal justice system).

²⁸⁰ Robert Schehr, *The Emperor’s New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 385–87 (2015) (asserting that the practice of plea bargaining fundamentally violates the Constitution and erodes individual litigants’ rights despite case law and scholarly articles praising plea bargaining’s merits).

²⁸¹ *Santobello v. New York*, 404 U.S. 257, 261 (1971).

²⁸² See Pizzi, *supra* note 95, at 331; see also U.S. SENTENCING COMM’N, *SOURCEBOOK OF*

tice Kennedy cogently noted: “[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.”²⁸³

The overarching expectation within the criminal legal landscape is that trials are outliers and plea agreements are the norm. Plea agreements are so entrenched in our system that we do not notice the absence of trials because almost no one goes looking for them anymore.²⁸⁴ Moreover, society now often views the few criminal trials that do occur as “litigation failures.”²⁸⁵ Many attorneys see trials as breakdowns in the system, a signal that attorneys have failed. Vanishing civil trial literature holds alternative dispute resolution (“ADR”) and other settlement possibilities largely responsible for cultivating the “trial as failure” mantra.²⁸⁶ Yet the same expectation pervades the criminal system through plea bargaining—ADR’s criminal counterpart. There has been a shift from trying cases to brokering mutually beneficial deals, and trials no longer embody adjudicative resolution because plea agreements have supplanted that role.

The no-trial expectation permeates firm, USAO, and even courthouse culture, all of which sometimes view the career consequences of losing trials as much greater than the career consequences of not trying cases.²⁸⁷ Even judges have more career consequences at stake in trials: judges can only commit “trial errors” when a trial occurs in the first place.²⁸⁸ Therefore, judges can expect fewer reversals of their de-

FEDERAL SENTENCING STATISTICS fig.C (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureC.pdf>.

²⁸³ *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

²⁸⁴ FISHER, *supra* note 140, at 230 (“[P]lea bargaining grew so entrenched in the halls of power that today, though its patrons may divide its spoils in different ways, it can grow no more. For plea bargaining has won.”).

²⁸⁵ The “trial as failure” perception existed even in the 1990s, yet the pervasiveness of this perception has increased in the 2000s. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991); see Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1326 (2013) (noting that many pretrial procedures and disclosures are indeed designed to prevent parties from ever proceeding to trial); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925 (2000) (summarizing and critiquing the “trial as failure” perception that permeates the judiciary as well as attorneys).

²⁸⁶ See, e.g., Friedman, *supra* note 81, at 694; Galanter, *supra* note 24, at 514–15; Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 752–55 (2010).

²⁸⁷ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471–72 (2004) (“[Prosecutors] may further their careers by racking up good win-loss records, in which every plea bargain counts as a win but trials risk being losses. The statistic of conviction, in other words, matters much more than the sentence. . . . Losses at trial hurt prosecutors’ public images.” (footnote omitted)).

²⁸⁸ FISHER, *supra* note 140, at 176. Trials publicize judges’ actions and decisions, and as the

cisions by making those decisions through sentencing hearings, often as a result of plea agreements that provide, in part, for the waiver of appeal.²⁸⁹

This increases the pressure on attorneys who actually do try cases. By trying a case, an attorney brings his work into the limelight and implicitly requests that the judge spend more time processing his case than the rest of the cases comprising the judge's docket. Many attorneys believe that a case must be invincible before taking it to trial, making demands on the court and jury's time, and risking increased incarceration. All of these expectations can have crippling effects on attorneys trying cases and on judges presiding over them.

C. *Efficiency and Expediency*

Finally, efficiency is another extrinsic factor affecting the number of trials. Efficiency has become a guiding principle of our society and pervades our institutional priorities. Efficiency prompts us to achieve quick results while expending minimal effort and expense, and the criminal justice system has not escaped efficiency's grasp.

The legislature seeks to make and pass laws as quickly as possible, and the executive branch strives to do the same in processing cases. The more cases a federal district disposes of, the more successful that district is deemed to be. Main Justice even notes districts that are "underperforming."²⁹⁰ At their core, plea agreements are mechanisms of efficiency.²⁹¹ Plea agreements allow prosecutors to achieve the same result—conviction—by expending fewer resources and less time, effort, and risk than a trial demands. Public defenders and private attorneys are subject to efficiency constraints as well. Heavy

English philosopher, Jeremy Bentham, stated, "Publicity is the very soul of justice. . . . It keeps the judge himself, while trying, on trial." Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 831 n.234 (2004) (alteration in original) (citing NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM* 79–81 (2003)).

²⁸⁹ See generally Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2029–32 (2000); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 *HASTINGS CONST. L.Q.* 127, 128 (1995); *The Supreme Court—Leading Cases*, 109 *HARV. L. REV.* 111, 258–59 (1995) (criticizing plea negotiation statement waiver provisions as "further erod[ing] both the protections available to criminal defendants and the integrity of the criminal justice system"). See generally Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 *B.C. L. REV.* 871 (2010) (challenging the constitutionality of plea agreement waivers of appellate rights).

²⁹⁰ Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 *YALE L.J.* 1374, 1404 (2008).

²⁹¹ See FISHER, *supra* note 140, at 176 ("[T]he sheer efficiency of plea bargaining as a means of clearing cases . . . has frozen it in place.").

caseloads and limited resources incentivize public defenders to process cases at a more expeditious and cost-effective rate.²⁹² Private attorneys must also have a heavy caseload to maintain a steady income, and they often generate more money by disposing of cases more swiftly through plea agreements.²⁹³

Efficiency also guides the judiciary's work. Judges as docket managers have become the norm.²⁹⁴ A court may conduct several sentencing hearings in a day. In contrast, as of 2009, the average length of a criminal jury trial was five days.²⁹⁵ Trials require greater bench presence and participation than reviewing plea agreements in sentencing hearings requires.²⁹⁶ Naturally, efficiency's institutionalization also suppresses trial numbers.

This concludes our exploration of the factors contributing to the trial diminution. Certainly, the authors have not covered all of the factors that have brought us to the current trial number today. The reduction in trials is a multifaceted issue containing numerous moving parts. An article identifying and providing an in-depth analysis of every potential trial suppressor would not be possible. However, Parts II and III have highlighted what the authors view as the primary root causes behind the vanishing criminal jury trial in the twenty-first century. These encompass old factors—MMs, the Guidelines, and cooperation—that continue to exert their force, albeit in different forms and potency levels than in the past. But the authors also identify new factors, products of the twenty-first century, that have amplified the trial decline—*Booker* discretion, DOJ policy changes, and developments in various external factors. Thus far, the authors have speculated on why the criminal jury trial decline persists. This Article now pro-

²⁹² Judge Nancy Gertner has expressed her deep concern “about the state of the federal defenders. . . . [T]he differential between the resources available to the government and that of the public defender becomes more and more stark and the constitutional guarantee of effective counsel more and more at risk.” Letter from Nancy Gertner, U.S. Dist. Court Judge (Retired) & Senior Lecturer of Law at Harvard Law Sch., to Kathleen Cardone, Chair, Ad Hoc Comm. to Review the Criminal Justice Act Program (Apr. 7, 2016), <http://www.nancygertner.com/sites/default/files/Testimony%20April%202016.pdf>.

²⁹³ HEUMANN, *supra* note 8, at 25.

²⁹⁴ See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 627–28 (2009); Resnik, *supra* note 288, at 830.

²⁹⁵ D. Graham Burnett, *A Juror's Role*, EJOURNAL USA, July 2009, at 7, 10.

²⁹⁶ See Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. 243, 247 (2013) (“Bench presence measures the number of hours a federal district judge spends on the bench, presiding over the adjudication of issues in an open forum.”).

gresses to addressing the most important “why”: why we should care about the disappearance of jury trials from our criminal justice system.

IV. THE CONSEQUENCES

Jury trials are on the verge of extinction,²⁹⁷ but so what? Does the jury trial diminution truly represent an American tragedy? Or, is it a sign of national progress and improved productivity?²⁹⁸ Part IV explores the ramifications of a system dominated by plea agreements.

A. *The System’s Loss*

The absence of jury trials makes the judicial process more secretive and contravenes the “presumption of openness [that] inheres in the very nature of a criminal trial under [the American] system of justice.”²⁹⁹ Trials provide a public forum for the airing of grievances, yet the death of trials marks the end of doing justice where disputes are played out under the attentive eye of judge and jury.³⁰⁰ In an adversarial trial system, judges and lawyers welcome the presence of outsiders, both as witnesses and as active participants. The courtroom becomes a theater, where all actors and observers are welcome.³⁰¹ The courtroom record created in trials becomes a script, immortalizing the details of the case, the attorneys’ arguments, and the jury’s final decision. And trials attract media attention, expanding awareness to the general public.

These realities are not present in the plea process. Following the Rule 11 hearing,³⁰² United States Probation Officers prepare and distribute presentence reports to the parties under seal.³⁰³ Each side has an opportunity to contest the factual and legal conclusions.³⁰⁴ Parties

²⁹⁷ See Richman, *supra* note 145, at 219 (“Every time one thinks that the system has hit an equilibrium at some ‘natural’ distribution, the trial rate goes down a bit more.”).

²⁹⁸ In the “trial as failure” framework, the corollary of trials as failures is settlements as successes. Settlements epitomize successful and efficient lawyering through collaboration and compromise. See *supra* notes 285–86 and accompanying text. Through this vein, if a trial occurs, counsel has already lost the battle due to their incompetence during the negotiation process. See DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 381 (2016).

²⁹⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

³⁰⁰ See BURNS, *supra* note 271, at 121.

³⁰¹ See Friedman, *supra* note 81, at 699–701.

³⁰² Courts must conduct a Rule 11 hearing before accepting a defendant’s guilty plea. Rule 11 hearings are designed to ensure that defendants fully understand the nature of the offenses of which they are charged, the acts necessary to establish guilt, and the consequences of pleading guilty. See 2 MARK S. RHODES, *ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* § 11:30 (2d ed. 1985) (describing the purposes and requirements of a Rule 11 hearing).

³⁰³ FED. R. CRIM. P. 32(c)–(e).

³⁰⁴ See FED. R. CRIM. P. 32(f).

often file sentencing memoranda under seal as a result of citation to the sealed presentence reports. Much has already been agreed to on paper without adversarial testing. That which is to be litigated at the sentencing hearing frequently involves Babel-like intramural fights between attorneys, refereed by the judge, over cryptic terms. For example, the parties may litigate whether a defendant's mitigating role can be described as minimal (four-level reduction) or minor (two-level reduction), or if the court cannot choose between the two, then it can grant a three-level reduction.³⁰⁵ The determination of whether an enhancement should apply for possession of a firearm in connection with an offense—another recurring squabble at sentencing hearings—depends on whether it is “clearly improbable” that the weapon was connected to the offense.³⁰⁶ The ever-changing Guidelines contain over 600 pages of these relevant, yet non-self-defining, distinctions. Lawyers are directed to consult the Guidelines language and where there is ambiguity, glean from the commentary, to assist in the determination. Never-ending circuit court opinions construing both the Guidelines and commentary in question require a third level of scrutiny. The circuits often split and rarely does the Supreme Court enter the fray to resolve the issue.³⁰⁷

Suppose you are a courtroom spectator, a mother whose son has just been sentenced, or a victim whose life's savings have been swindled. You cannot understand a word that is being said. The lawyers speak in strange ways about unseen things, in foreign phrases and terms that do not seem connected to ultimate or tangible matters. Usually the first question asked of the lawyer at the end of the sentencing hearing is, “What happened?” This everyday occurrence is the antithesis of the catharsis and clarity that emerge from a well-trying jury case.³⁰⁸ Trials send a clear message that wrongdoing has consequences and innocence has rewards. There is third-party (jury) validation of the government's use of power. Or not. The current dominance of plea resolution eliminates all this and adds to the perception of an

³⁰⁵ See USSG 2016, *supra* note 118, § 3B1.2.

³⁰⁶ See *id.* § 2D1.1(b)(1) & cmt. n.11(A).

³⁰⁷ See, e.g., *Current Circuit Splits*, 12 SETON HALL CIR. REV. 250, 260–64 (2016) (summarizing a few of the more well-known circuit splits over interpretations of Guidelines provisions).

³⁰⁸ See VIDMAR & HANS, *supra* note 81, at 129 (“Trials have the additional goal of providing the parties and society as a whole with a sense that the procedure is fair and that justice has been done.”).

impersonalized justice system.³⁰⁹ Obscurity and secrecy supplant the public-square openness of trials.

B. *The Guild's Loss*

In addition to sparking a trial decline, settling criminal cases by plea agreements stunts the development of case law. Precedential rulings undergird the American judicial system.³¹⁰ A lawyer's ability to successfully analogize or distinguish his case to or from prior cases can determine the outcome of his client's case.³¹¹ Just as the mandatory Guidelines gave attorneys a barometer for predicting sentencing outcomes given similar offense conduct and criminal histories, jury verdicts inform lawyers' future advice on guilt and innocence questions.

New law develops when appellate judges review decisions reached by lower courts. In the criminal system, lower courts most frequently make those decisions through trials. In the civil system, new law can be formed through summary judgments and judgments on the pleadings.³¹² The criminal system does not contain analogs to these civil dispositions. In contrast, plea agreements often contain mandatory waiver provisions of the defendant's rights to trial and appeal.³¹³ These provisions could also be termed "precedent waivers" as they essentially ensure that no new case law will develop from these defendants' cases. Plea agreements eliminate the need for judges to decide difficult evidentiary questions. The vanishing trial trend could curtail the development of legal doctrine and perpetuate the gradual staling of case law.³¹⁴ Appellate courts are not given opportunities to develop or apply precedent to new facts. And lawyers are left on increasingly shaky ground when advising future clients in novel areas of law.

³⁰⁹ E.g., Wright, *supra* note 31, at 86 ("Federal sentencing should become more a servant of truth and less a slave to efficient case disposition.").

³¹⁰ Black's Law Dictionary defines precedent as "[a]n action or official decision that can be used as support for later actions or decisions; esp[ecially], a decided case that furnishes a basis for determining later cases involving similar facts or issues." *Precedent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

³¹¹ See *id.*

³¹² See FED. R. CIV. P. 12(c), 56.

³¹³ See DAVID TAYLOR SHANNON, MAKING YOUR DEAL WITH THE DEVIL: PLEA AGREEMENTS UNDER THE FEDERAL RULES, FEDERAL SENTENCING GUIDELINES, AND DEPARTMENT OF JUSTICE POLICIES 30–35 (2007) (enumerating a common list of waiver provisions in plea agreements).

³¹⁴ See Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 346 (2011).

Lost opportunity to apply precedent to new facts is not the only negative consequence to the legal guild. Trial skills are both art and science and are lost if not practiced.³¹⁵ Instructional programs in law schools and other trial advocacy settings have admirably attempted to fill the gap. But there is nothing like a jury trial with real-life consequences to equip lawyers to better handle real-life cases. The more time that passes between trials, the more time lost confidence has to set in.³¹⁶ With fewer trials come fewer opportunities to hone trial skills. More attorneys fear going to trial because of lack of experience and diminished confidence.³¹⁷ This presents a catch-22 dilemma: attorneys have more incentive to avoid trial because of their lack of experience, which in turn prevents them from ever gaining trial experience.³¹⁸ Less trial experience also weakens attorneys' abilities to accurately evaluate case outcomes, which results in less-informed plea negotiations.³¹⁹

What has been said about the atrophy of attorney trial skills applies with equal force to trial judges. Judges need regular opportunities to sharpen their presiding skills. One of the remarkable things learned when the undersigned switched seats in the courtroom from advocate to presider (or as one coauthor's friend suggested, from player to benchwarmer) is the different skill set necessary to excel. As an advocate, outcomes turn on preparation—interviews, strategy, examination outlines, and anticipation of evidentiary issues. As a judge, success often depends on reflexive ruling relying on past experience to resolve present trial objections. It takes practice and repetition to do this well. And judges are not getting it. This lack of trial experience over the long term will result in fewer skilled trial advocates being nominated to the bench.³²⁰ And once confirmed, those on the bench will have less opportunity to warm it. In today's trial-less climate, judges have fewer occasions to improve their trial skills. This bodes poorly for our justice system.

³¹⁵ See *id.* (echoing a federal judge's commentary on the growing disparity between lawyers' pretrial and trial skills).

³¹⁶ See Terry Carter, *The Endangered Trial Lawyer*, A.B.A. J. (Mar. 2, 2009, 5:30 AM), http://www.abajournal.com/magazine/article/the_endangered_trial_lawyer.

³¹⁷ See *id.*

³¹⁸ See AM. COLL. OF TRIAL LAWYERS, *supra* note 24, at 22. Catch-22 is a term coined by Joseph Heller in his 1961 novel *Catch-22* and refers to a situation from which an individual cannot escape because of contradictory rules.

³¹⁹ See Galanter, *supra* note 24, at 521–22.

³²⁰ Higginbotham, *supra* note 286, at 755.

C. *The Defendant's Loss*

The absence of the jury trial negatively impacts criminal defendants. By accepting a plea agreement, a defendant waives his constitutional right to present his story to a fresh set of eyes. Deciding the fate of a potential criminal is not a normal, everyday occurrence for the jury. Juries know that being selected to play this important role in the administration of justice is an honor and a duty, and the court instructs jurors not to take their job lightly. Juries understand that their decisions have great implications.³²¹

Most defendants recognize that the guilt determination will likely be the same regardless of whether they accept a plea agreement or proceed to trial. The high federal conviction rate solidifies this reality.³²² However, the United States has always ascribed value to processes, not merely outcomes. Indeed, one of *Gideon's* central tenets is that the Constitution entitles all defendants to have equal access to a right to fight.³²³ In a system where conviction is almost certain, the level of process received becomes a paramount concern of defense counsel and their clients. If the government is going to deprive defendants of their liberty, defendants at least want to be able to tell their side of the story. Brokering plea agreements, while faster and easier to process, necessarily involves less process than trials provide. Therefore, when defendants plead out, they forfeit their right to fight and minimize their opportunity to tell their stories.³²⁴

In the overwhelming majority of cases resolved by plea, the presumption of innocence has been overcome by the defendant's admission of guilt. In many cases, this is just and fair to both sides. In close or weak cases, the absence of the potential for independent fact-finding by a neutral jury has weightier justice implications.

D. *The Jury's Loss*

The forgotten player of the criminal justice system—the jury—perhaps represents the gravest concern to those considering the disappearing criminal jury trial. The right to jury trial in criminal cases and concomitant presumption of innocence is a constitutional right that

³²¹ See VIDMAR & HANS, *supra* note 81, at 241–49 (establishing the jury as the “lynchpin in the process of capital punishment”).

³²² See *supra* text accompanying note 143.

³²³ See *Gideon v. Wainwright*, 372 U.S. 335, 339–345 (1963).

³²⁴ See BURNS, *supra* note 271, at 113–15 (espousing trials as a public forum of power where defendants can effectively tell their stories).

the jury and our society cannot “disregard[] . . . at [their] pleasure.”³²⁵ The jury, “the spinal column of American democracy” and only entity that the Framers designed to exist as a truly independent check on the criminal adjudication system,³²⁶ risks becoming obsolete. Jurors enjoy autonomy and take their oath of service seriously. They are told at the end of the case that they have been on the court’s schedule throughout the trial, but now the court is on their schedule. They may stay late into the night or come back early the next week. On occasion, they choose to work over a weekend, and the court accommodates them. Rarely has the U.S. District Court for the WDNC interacted with a jury after a verdict without being left with a sense of wonder at the ability of a jury to get it right.³²⁷ Rarer still has been the occasion where the jurors do not leave with a sense of meaningful participation in the democratic process which jury service affords.

The paucity of trials deprives citizens of this meaningful opportunity to participate in democracy. Jury duty empowers the average citizen and elevates a citizen’s role from member to decisionmaker.³²⁸ Besides voting, jury service is one of the only ways citizens can directly engage in and affect our government. The U.S. Court Handbook aptly states that “[t]here is no more valuable work that the average citizen can perform in support of our Government than the

³²⁵ Standard Criminal Jury Instructions of Judge Robert J. Conrad, Jr., W.D.N.C. (on file with the authors) (“Every defendant in a criminal case is presumed to be innocent, and this presumption continues throughout the course of the trial. This presumption will end only if you reach the jury room and arrive unanimously at the conclusion, if you do, that the government has shown to your satisfaction that the defendant is guilty beyond a reasonable doubt. This burden on the government does not change at any time during the course of the trial. The presumption of innocence in favor of a defendant is not a mere formality to be disregarded by the jury at its pleasure. It is a substantive part of our criminal law.”).

³²⁶ *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part). John Adams circumscribed the role of the jury to operate as a “check” on the excess of government powers: “As the constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.” 2 THE WORKS OF JOHN ADAMS 253 (Charles Francis Adams ed., 1850).

³²⁷ See Jason Mazzone, *The Justice and The Jury*, 72 BROOK. L. REV. 35, 35 (2006) (“Judges who work with juries—trial judges—tend to think very highly of them.”); cf. Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 305 (2007) (documenting the frequency with which juries get it wrong in state courts). However, the study still concludes that juries’ verdicts are accurate in the majority of cases. *Id.* But see Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 190–97 (1990) (summarizing views of dissatisfaction with the jury system and speculating on reasons for incompetent juror decisionmaking).

³²⁸ See BURNS, *supra* note 271, at 117–19.

full and honest discharge of jury duty.”³²⁹ In the WDNC, it is the court’s practice to stand as the jury enters and leaves the courtroom. Jurors are the judges of the facts, and the judges of law acknowledge that in a small way by extending this courtesy.

Jurors often leave the jury-duty experience with a renewed sense of faith in the fairness and integrity of our government.³³⁰ However, as trials disappear, the risk of the public becoming increasingly disenchanted and distrustful of the American judicial system, and more importantly, of our democracy as a whole, becomes more real.³³¹

V. SUMMARY AND SUPPLICATION

This Article has primarily analyzed the factors driving the forty-seven percent reduction in the number of criminal defendants disposed of by jury trials from 2006 to 2016 and has explored how these factors alter, and in some sense limit, how the players in the criminal justice system, identified in Part I, execute justice. In Part II, the authors examined old factors that scholars identified as causing the trial decline—MMs, the Guidelines, and cooperation—in light of twenty-first-century changes inside and outside of the criminal legal landscape. New factors—*Booker*, changes in DOJ policies, and other extrinsic factors, including stronger evidence, increased trial expense, no-trial expectations, and an emphasis on efficiency—have served the same end: to diminish the number of jury trials.

These new factors—especially *Booker*—have transformed the way the criminal justice system operates by elevating the sentencing hearing as the desirable and dispositive criminal adjudicatory procedure. *Booker* has fundamentally altered the way that judges and attorneys view the Guidelines, clarified the tactical advantages of sentencing hearings over trials for both sides, altered the adversarial relationship between the prosecution and defense, and changed the substance and focus of criminal attorneys’ courtroom arguments. *Booker*’s combined effects have cemented the status of the sentencing

³²⁹ ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 15, <http://www.uscourts.gov/sites/default/files/trial-handbook.pdf> [<https://perma.cc/RZX9-DJXR>].

³³⁰ Some studies even show that people are more likely to vote after serving on a jury. John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 592–93 (2002); John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 351, 363–64 (2008).

³³¹ See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (“Democracies die behind closed doors.”); VIDMAR & HANS, *supra* note 81, at 129 (noting that jury trials engender a sense of procedural fairness, which “enhances the broader legitimacy of the justice system”).

hearing as the preeminent and preferred criminal adjudicatory procedure.

DOJ policy changes have joined forces with *Booker* to solidify plea agreements' prevalence and trials' paucity. Attorney General Ashcroft's insistence on charging and pleading to "the most serious, readily provable offense" incentivized defendants to provide substantial assistance as a vehicle for avoiding the draconian bite of MMs.³³² Attorney General Holder "fundamentally [rethought] the notion of mandatory minimum sentences for drug-related crimes" and encouraged prosecutors to move away from charging what he viewed as inflexible and inappropriate mandatory minimum charges and recidivist enhancements in some cases.³³³ Although prosecutors have been charging fewer MMs and asking for Guidelines variances more often, this might soon change under Attorney General Sessions, who has disavowed Holder's policies regarding MMs and statutory enhancements and has reinstituted an Ashcroft approach to charging, MMs, and statutory enhancements.³³⁴ Regardless, as discussed above,³³⁵ for different reasons, antithetical policies have led to similar results—declining trials.

Part III evinced that extrinsic factors also affect the number of trials. Technological advancements in the twenty-first century have resulted in stronger evidence that moves more cases out of the realm of reasonable doubt, thereby making plea agreements the most prudent choice for defendants. These technological innovations have also increased discovery and litigation costs, further incentivizing plea agreements over trials. Additionally, expectations limit trials, as plea agreements have become the primary mechanism for resolving disputes in our criminal justice system. Many of those well acquainted with the criminal justice system see trials as aberrations, do not expect attorneys to try cases, and view trials as breakdowns in the system. This no-trial expectation places more pressure on attorneys who decide to try cases because trials are a rare spectacle in today's legal landscape. Lastly, the high value placed on efficiency and expediency naturally reduces trial numbers. Together, all of these factors—stronger evidence, increased expense, a no-trial expectation, and an emphasis on efficiency—abate the trial number and conversely increase the number of plea agreements.

³³² Ashcroft Memorandum, *supra* note 200.

³³³ See Holder, *supra* note 230; Holder Memorandum 1, *supra* note 211.

³³⁴ See Sessions Memorandum, *supra* note 99.

³³⁵ See *supra* Section II.E.

In Part IV, the authors explored the ramifications a trial-less system has for the players and the criminal justice system. The adversarial system has transitioned from the public-square openness and catharsis of trials to the more secretive process of plea agreements, sealed presentence reports, and unattended sentencing hearings. As trials move closer to extinction, trial skills have become a dying art form, both for attorneys and judges. Attorneys may now fear going to trial due to underdeveloped trial skills.³³⁶ Defendants also minimize their voice in sentencing hearings by forfeiting their right to fight and their right to tell their side of the story to a jury. A plea-dominated system perhaps silences the public's voice the most by eliminating the need for a jury and thus denying ordinary citizens a meaningful opportunity to play a role in our democracy. As Part IV illustrates, the trial decline has negative implications for all players of the criminal justice system and for our democracy as a whole.

As demonstrated in this Article, there are many internal systemic factors suppressing trial numbers: MMs, the Guidelines, cooperation, *Booker* discretion, and DOJ policy directives. The intention of this Article is threefold: (1) to remind ourselves that the criminal jury trial persists in a post-Guidelines era; (2) to illuminate the factors driving the criminal jury trial decline; and (3) through this diagnosis, to encourage players and the public to reconceptualize how they view the system and how they play the game. While these factors are largely outside of any individual player's control, these players can still effectuate change in their respective fields that in the aggregate, could perhaps lead to systemic change.

All players could implement changes that would help reverse the declining trial rate. Legislators could reserve MMs for those crimes that truly constitute the gravest concerns to society. Efforts could be made to pass MMs that are considered proportional to the applicable crimes and accomplish the statutory purposes of sentencing. Prosecutors and defense attorneys could boldly challenge the existing no-trial zeitgeist and hone their trial skills in cases that make sense to try. Judges could remember their adjudicatory roles and balance office expectations and budget and efficiency constraints with the need to foster a trial culture. They could, for example, pause before accepting, or at times even reject, plea agreements that do not adequately correspond to defendants' offense conduct and the statutory purposes of sentencing, including the need to protect the public.

³³⁶ See AM. COLL. OF TRIAL LAWYERS, *supra* note 24, at 22–23.

In this Article, the authors lament the American trial decline. However, the authors do not suggest that all cases should be tried. The criminal adjudicatory system would be backlogged and bankrupt and simply could not survive without plea agreements.³³⁷ Moreover, the authors affirm that defense counsel acts properly and prudently in pursuing the lowest sentence possible for their clients. To fulfill the ethical demands of the profession, defense counsel *must* often advise their clients to accept plea agreements. The high federal conviction rate, trial penalty, strength of evidence, and other risks attendant to trials are realities that must be addressed and accounted for when deciding whether to accept a plea offer or proceed to trial. However, the authors make a supplication to attorneys to try the cases that need to be tried—those that truly exist in the realm of reasonable doubt. Finally, this Article hopes to inspire attorneys and judges to not abstain from trying cases due to lack of practice. Giving in to the reluctance of trying cases only solidifies the reality that attorneys and judges will never hone their trial skills. The best way attorneys and judges can develop trial skills is through trying and presiding over real-life cases. The authors intend to embolden attorneys (on both sides) and judges to have the courage to fight for the preservation of the trial system. The continued existence of the jury, the Sixth Amendment, innocence, and our democracy may depend on it.

CONCLUSION

This Article ends where it began—in the courtroom. The trial concludes. All players—the defendant, the victim, the attorneys, the judge, the jury—have traversed the adversarial process together. All have played their respective roles and contributed to the dialogue. The journey of the trial has forged an unlikely community.

The judge and the jury enter the courtroom to deliver the outcome. The deputy clerk reads the verdict: “Guilty on all counts.” The Assistant U.S. Attorney closes his trial notebook. The United States Marshals escort the defendant through the courtroom side door. The defense attorney packs her briefcase and walks toward the set of swinging doors marking the exit. She carries not only the weight of her U.S. Criminal Code and Guidelines books but also the weight of defeat.

³³⁷ See JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: INVESTIGATING CRIME* 40 (5th ed. 2013).

But only for a moment. As she leaves, she makes eye contact with the family of the just-convicted defendant. Gratitude is reflected in their eyes. She has fought for their loved one. Even the victim, still grieving, still experiencing loss, looks upon her with respect. The trial has fashioned a new lens through which the courtroom actors see one another. A space of humanity has been shared. The defense attorney departs the courthouse. She will battle another day matching wits with her worthy adversary, the Assistant U.S. Attorney, in tomorrow's courtroom drama. Or will she?