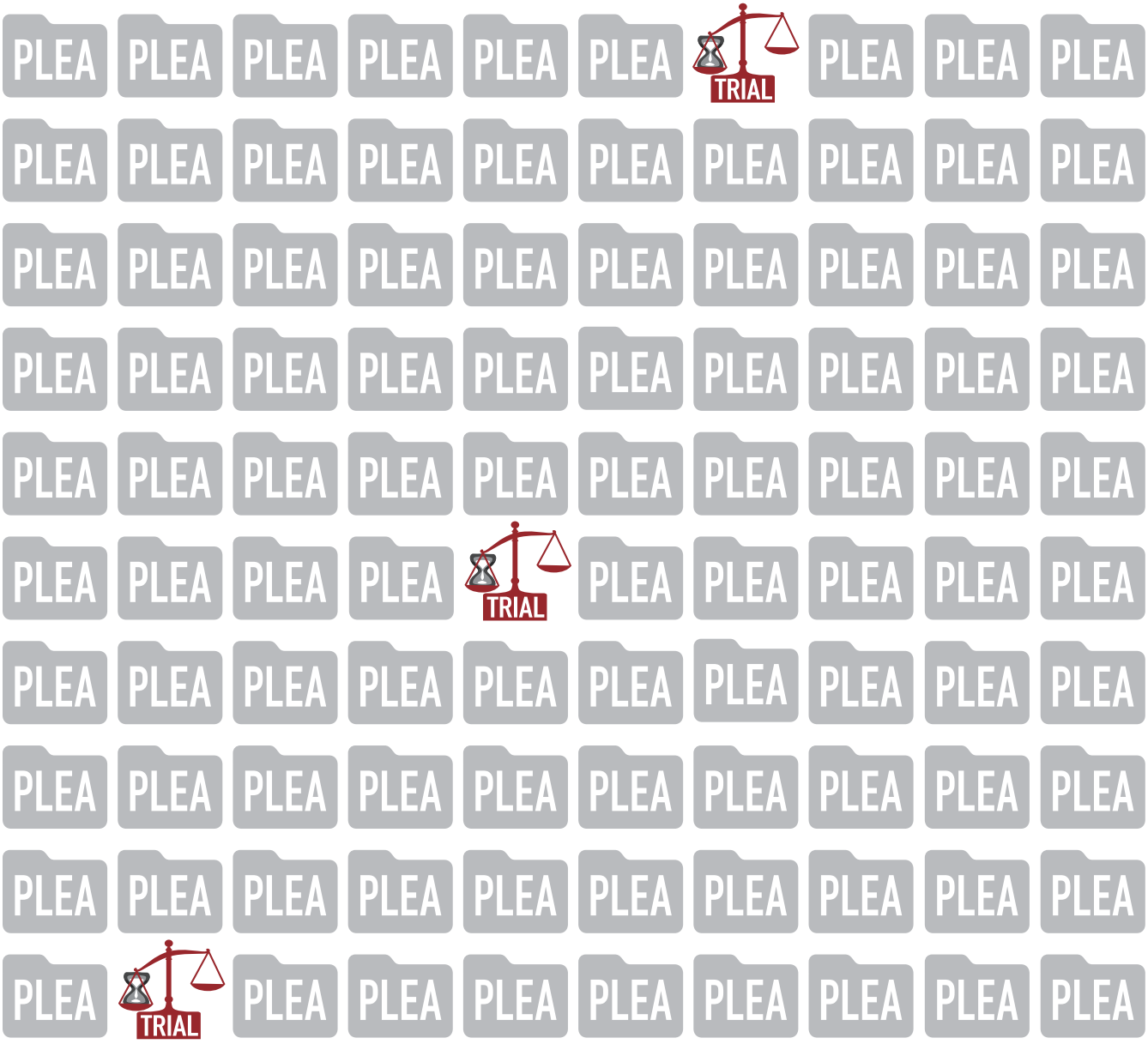
THE TRIAL PENALTY:

The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It



National Association of Criminal Defense Lawyers
NACDL
1958

FOUNDATION FOR CRIMINAL JUSTICE

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The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It

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National Association of Criminal Defense Lawyers NACDL 1958

Foundation for Criminal Justice

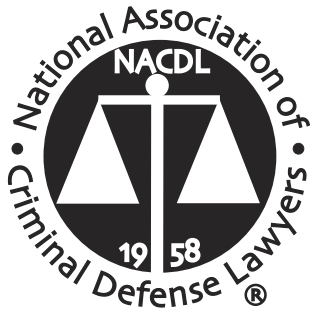
TABLE OF CONTENTS

About the National Association of Criminal Defense Lawyers 1
About the Foundation for Criminal Justice 2
Foreword 3
Acknowledgements 4
Executive Summary 5
The Scope of the Problem 5
The Impact of the Trial Penalty 9
Principles and Recommendations 11
Principles 11
Recommendations 12
Introduction 14
Measuring the Trial Penalty 17
A Brief History of Plea Bargaining and the Federal Sentencing Guidelines 19
Plea Bargaining and the Supreme Court: A Shift from Distrust to Dependency 19
The Sentencing Reform Act of 1984, United States v. Booker, and Judicial Discretion in Sentencing 22
Plea "Bargaining" and Coercive Prosecutorial Discretion. 24
An Imbalance of Negotiating Power 25
Specific Bargaining Tactics 25
Charge Bargaining 25
Fact Bargaining 26
Draconian Plea Agreements and "Rights Bargaining" 28
Prosecutorial Attitudes and Incentives to Coerce 30
Inadequate Constitutional Protections For Defendants During Plea Bargaining 30
Prosecutors Leverage Excessive Sentencing Guidelines To Force Pleas 32
Economic Crimes As an Example of the Guidelines' Overreach 32
Increased Penalties for Indeterminate Loss Amounts 33
Overlapping Enhancements Double-Count the Same Conduct 34
The Commission's 2015 Amendments: A Tepid Attempt at Reform 36
Departure Provisions In The Sentencing Guidelines Put Even More Power In the Hands of Prosecutors 39
Acceptance of Responsibility 39
Substantial Assistance 42
Statutory Mandatory Minimum Sentencing Enhancements Exacerbate Already Out-of-Control Guidelines Sentences 48
§ 924(c) — Stacked Penalties for Carrying a Gun 48
§ 3559 — Three Strikes And You're Out 49
Judicial Reticence to Mitigate Unwarranted Disparities 54
Principles and Recommendations 58
Principles 58
Recommendations 59
Conclusion 61
Endnotes 62

ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. *NACDL envisions a society where all individuals receive fair, rational, and humane treatment within the criminal justice system.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's many thousands of direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.



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ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

The Foundation for Criminal Justice (FCJ) is a 501(c)(3) charitable non-profit organized to preserve and promote the core values of America's criminal justice system guaranteed by the Constitution — among them access to effective counsel, due process, freedom from unreasonable search and seizure, and fair sentencing. The FCJ supports NACDL's charitable efforts to improve America's public defense system, and other efforts to preserve core criminal justice values through resources, education, training, and advocacy tools for the public and the nation's criminal defense bar.

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FOREWORD

A grand jury presentation can consist entirely of information that would be inadmissible at trial. A prosecutor may knowingly use illegally-obtained evidence to obtain an indictment, and if she has evidence in her possession that substantially exculpates the target, she may withhold it from the grand jury. The presentation need only establish probable cause to believe the target committed the crime. If 11 of the 23 grand jurors are unconvinced that even that low threshold has been met, an indictment can still be obtained. And of course it's all *ex parte*, so no one is even there to question the prosecutor's presentation.

What accounts for all this? Why do our Supreme Court decisions and federal rules establish a charging process that *guarantees* that imperfect, ill-advised criminal charges can make it through if the prosecutor presses them? The answer is simple: because of trials. Those imperfect, ill-advised charges will come out in the wash when they are subjected to the cleansing effects of a criminal trial in open court. Indeed, when prosecutors know that such charges will go to trial, where they must be proved beyond a reasonable doubt to the satisfaction of a unanimous jury based on admissible evidence that is subject to vigorous challenge by defense counsel to whom exculpatory evidence must be disclosed, they are not likely to bring them in the first place.

This report is a major contribution to the discussion of one of the most important issues in criminal justice today: the vanishing trial. Once the centerpiece of our criminal justice ecosystem, the trial is now spotted so infrequently that if we don't do something to bring it back, we will need to rethink many other features of our system that contribute to fair and just results only when trials occur in meaningful numbers.

The first task in solving a problem is identifying its causes, and this report nails that step. Mandatory minimum sentencing provisions have played an important role in reducing our trial rate from more than 20% thirty years ago to 3% today. Instead of using those blunt instruments for their intended purpose — to impose harsher punishments on a select group of the most culpable defendants — the Department of Justice got in the habit long ago of using them broadly to strong-arm guilty pleas, and to punish those who have the temerity to exercise their right to trial. The Sentencing Guidelines also play an important role, providing excessively harsh sentencing ranges that frame plea discussions when mandatory sentences do not. Finally, the report correctly finds that federal sentencing judges are complicit as well. In too many cases, excessive trial penalties are the result of judges having internalized a cultural norm that when defendants "roll the dice" by "demanding" a trial, they either win big or lose big. The same judges who will go along with a plea bargain that compromises a severe Guidelines range are too reticent to stray very far from the sentencing range after trial.

The report's principles and recommendations will stimulate some much-needed discussion. Today's excessive trial penalties, it concludes, undermine the integrity of our criminal justice system. Putting the government to its proof is a constitutional right, enshrined in the Sixth Amendment; no one should be required to gamble with years and often decades of their liberty to exercise it. The report properly raises the "innocence problem," that is, the fact that prosecutors have become so empowered to enlarge the delta between the sentencing outcome if the defendant pleads guilty and the outcome if he goes to trial and loses that even innocent defendants now plead guilty. But there's an even larger hypocrisy problem. Our Constitution claims to protect the guilty as well, affording them a presumption of innocence and protecting them from punishment unless the government can *prove them guilty* beyond a reasonable doubt. A system characterized by extravagant trial penalties produces guilty pleas in cases where the government cannot satisfy that burden, hollowing out those protections and producing effects no less pernicious than innocents pleading guilty.

The report's recommendations range from the sweeping (ban those mandatory minimums) to the technical (eliminate the motion requirement for the third "acceptance" point), and include suggested modifications to the "relevant conduct" principle at the heart of the Guidelines, pre-plea disclosure requirements, "second looks" at lengthy sentences, and judicial oversight of plea discussions. A particularly attractive recommendation would require judges sentencing a defendant who went to trial to pay greater attention to the sentences imposed on co-defendants who pled guilty; few things place today's excessive trial penalty in sharper relief.

There is no such thing as a perfect criminal justice system. But a healthy one is constantly introspective, never complacent, always searching for injustices within and determined to address them. The sentencing reform movement a generation ago disempowered judges and empowered prosecutors. Federal prosecutors have used that power to make the trial penalty too severe, and the dramatic diminution in the federal trial rate is the result. Our system is too opaque and too severe, and everyone in it – judges, prosecutors, and defense attorneys — is losing the edge that trials once gave them. Most important of all, a system without a critical mass of trials cannot deliver on our constitutional promises. Here's hoping that this report will help us correct this problem before it is too late.

John Gleeson

Partner, Debevoise & Plimpton

Former United States District Judge, Eastern District of New York

ACKNOWLEDGEMENTS

This report was truly a joint project, reflecting a remarkable collaboration among numerous entities, all determined to understand and redress the phenomenon of the trial penalty. NACDL's members and many clients contributed to this effort, as did various leaders, and a magnificent team of volunteers from a major law firm. They all deserve the appreciation of the legal profession and the society it serves.

NACDL thanks the Foundation for Criminal Justice and various other donors whose financial support helped make this project possible. NACDL also extends its deep appreciation to the team of attorneys at firm of Skadden Arps Slate Meagher & Flom LLP who worked diligently on the extensive research and drafting involved in this critical project. The Skadden team of attorneys, led by Esther Bloustein, Elisa Klein, and Pro Bono Counsel Donald P. Salzman, also included Justin Barrett, Alison Bloch, Warren Feldman, Mari Guttman, Lauren Haberman, Wallis Hampton, Maximillian Hirsch, Parker Justi, Brittany Libson, Daniel Mayerfeld, Sonya Mitchell, Shayla Parker, Stefania Rosca, Rachel Schiffman, Deepa Vanamali, Caroline Ferris White, and Michael Wiesner.

NACDL also extends its thanks to the members of the NACDL Trial Penalty Recommendation Task Force who dedicated their time and effort to this report and the development of its principles and recommendations: Co-Chairs Andrew Birrell, Ramon de la Cabada, and Martín A. Sabelli; and Members John Cline, James Felman, Daniella Gordon, JaneAnne Murray, David Patton, Marjorie Peerce, NACDL Immediate Past President Barry J. Pollack, and Todd Pugh. In addition, Barry Pollack's long-standing support for this project is deeply appreciated. NACDL also thanks the many lawyers and their clients who contributed their stories and insights to this project, some of whom saw or suffered the impact of the trial penalty first hand.

Thanks also to the following NACDL staff for the careful editing and helpful suggestions: Norman L. Reimer, Executive Director; Kyle O'Dowd, Associate Executive Director for Policy; Quintin Chatman, Editor of *The Champion*®; and Ivan J. Dominguez, Director of Public Affairs & Communications. NACDL would also like to thank Cathy Zlomek, NACDL Art Director and her department for the design of the report.

EXECUTIVE SUMMARY

The Scope of the Problem

In the words of John Adams, "[r]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."[1] President Adams' colorful language reflected the strength of his view — a view shared by his contemporaries — that the right to trial by jury protects our liberties every bit as much the right to cast votes for our representatives.

There is ample evidence that federal criminal defendants are being *coerced* to plead guilty because the penalty for exercising their constitutional rights is simply too high to risk.

To the modern ear, this view comes as a surprise. While Americans celebrate the notion of representative government just as much now as they did in the time of the Framers, few still think of trial by jury as a bulwark against the arbitrary and capricious use of government power. Why does this notion seem so surprising to the modern observer? What has become of the sense — so natural for Mr. Adams and his contemporaries — that trial by jury protects freedom?

The answer, is simple: over the last fifty years, trial by jury has declined at an ever-increasing rate to the point that this institution now occurs in less than 3% of state and federal criminal cases.[2] Trial by jury has been replaced by a "system of [guilty] pleas"[3] which diminishes, to the point of obscurity, the role that the Framers envisioned for jury trials as the primary protection for individual liberties and the principal mechanism for public participation in the criminal justice system.

The trial penalty cannot be attributed to any single cause. Rather, many shortcomings across the criminal justice system combine to perpetuate this injustice.

Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose. Faced with this choice, individuals almost uniformly surrender the right to trial rather than insist on proof beyond a reasonable doubt, defense lawyers spend most of their time negotiating guilty pleas rather than ensuring that police and the government respect the boundaries of the law including the proof beyond a reasonable doubt standard, and judges dedicate their time to administering plea allocutions rather than evaluating the constitutional and legal aspects of the government's case and police conduct. Equally important, the public rarely exercises the oversight function envisioned by the Framers and inherent in jury service. Further, the pressure to

plead guilty, and plead early, is often accompanied by a requirement that accused persons waive many valuable rights, including the right to challenge unlawfully procured evidence and the right to appeal issues which have an impact not only in their cases but also for society at large.

While scholars still debate the theoretical justifications for and against plea bargaining, neither the government nor the public have exhibited any significant resistance to its rise to dominance. This is not altogether surprising given the ostensible advantages of plea bargaining. Trials are lengthy, expensive processes that can leave victims waiting for years to obtain restitution and closure. Plea bargaining presents a seemingly reasonable alternative that promotes efficiency while providing defendants an opportunity for leniency and putting them on an early road to rehabilitation. Conventional wisdom understandably views this as a win/win solution, particularly because the Constitution affords defendants the right to choose to go to trial if they wish to do so.

For most, however, the right to a trial is a choice in name only. Empirical studies and exoneration data have revealed that the pressures defendants face in the plea bargaining process are so strong even innocent people can be convinced to plead guilty to crimes they did not commit.[4] This disturbing figure casts doubt on the assumption that defendants who plead guilty do so voluntarily.

The virtual elimination of the option of taking a case to trial has so thoroughly tipped the scales of justice against the accused that the danger of government overreach is ever-present. And on a human level, for the defense attorney there is no more heart-wrenching task that explaining to client who very likely may be innocent that they must seriously consider pleading guilty or risk the utter devastation of the remainder of their life with incalculable impacts on family.

As this Report illustrates, there is ample evidence that federal criminal defendants are being *coerced* to plead guilty because the penalty for exercising their constitutional rights is simply too high to risk. This "trial penalty" results from the discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial. If there were no discrepancy at all, there would be far less incentive for defendants to plead guilty. But the gap between post-trial and post-plea sentences can be so wide, it becomes an overwhelming influence in a defendant's consideration of a plea deal. When a prosecutor offers to reduce a multi-decade prison sentence to a number of years — from 30 years to 5 years, for example — any choice the defendant had in the matter is all but eliminated. Although comprehensive data regarding plea offers remains largely unavailable, anecdotal evidence suggests that offers of this nature are common. Prosecutors enjoy enormous discretion to force a defendant's hand. While some may view prosecutors' actions as generous, their willingness to reduce sentences so drastically raises serious doubt that the initial sentences were reasonable in the first place.

Indeed, the ability of prosecutors to threaten exorbitant sentences permeates the federal criminal justice system and has spurred a mounting wave of criticism in recent years. In 2013, Human Rights Watch published a

report detailing the ways federal prosecutors use the sentencing laws to coerce federal drug defendants to plead guilty. Building off of that work, NACDL has conducted its own study to examine the structures and mechanisms in the federal system that perpetuate the trial penalty in criminal cases across the board. In particular, NACDL canvassed previous scholarly research, judicial precedent and commentary, the history of and recent amendments to federal sentencing statutes and guidelines, and data and statistical studies published by the U.S. Sentencing Commission. NACDL also conducted a survey, interviewed defense counsel, and examined the case files of dozens of federal criminal defendants to identify real world instances of the trial penalty at play. The following report is the result of those efforts.

As explained in greater detail below, the trial penalty cannot be attributed to any single cause. Rather, many shortcomings across the criminal justice system combine to perpetuate this injustice. Prosecutors — who serve in an adversarial role and are personally incentivized to achieve speedy convictions — enjoy unbridled discretion and informational advantages at the preliminary stages of criminal proceedings that have a significant impact on the sentence that will ultimately be imposed. That influence is exacerbated by the federal Sentencing Guidelines, which call for formulaic calculations that are ripe for manipulation, that often result in sentences far out of proportion with a defendant's actual culpability, and that deliberately reward defendants who agree to plead guilty and do so quickly. Although judges nominally retain discretion to decide a defendant's ultimate sentence, that discretion is frequently hampered by mandatory minimum statutory penalties which are triggered solely by the prosecutor's charging decisions. In addition, many judges are reticent to meaningfully exert their discretion, preferring to cling to the tidy Guidelines calculations, which are virtually immune from reversal on appeal. As a result, when the rare defendant insists on his right to a trial, these forces converge to inflict excruciating penalties. Those penalties then serve as a warning to the next defendant who will know his only hope of obtaining a fair sentence is to forego the right to a trial.

Criminal defense lawyers have long known that trials are vanishing. This is an unacceptable development, and not just because the art of trying a case is atrophying. The virtual elimination of the option of taking a case to trial has so thoroughly tipped the scales of justice against the accused that the danger of government overreach is ever-present. And on a human level, for the defense attorney there is no more heart-wrenching task that explaining to client who very likely may be innocent that they must seriously consider pleading guilty or risk the utter devastation of the remainder of their life with incalculable impacts on family.

This Report documents the corrosive effect of the trial penalty on the system of criminal justice. It examines the relationship between the trial penalty and numerous characteristics of modern criminal justice including virtually unfettered prosecutorial charging discretion,[5] mandatory minimum sentencing statutes,[6] and the federal Sentencing Guidelines. The Report highlights specific cases to demonstrate that individuals are being punished simply for holding the government to its burden of proof and, in some cases, that the trial penalty has coerced innocent individuals, later exonerated, to plead guilty for fear of devastating long post-trial sentences.

In calling out these mechanisms that perpetuate the trial penalty, NACDL does not intend to censure any particular participants or constituencies. Nor is the goal of this report to denounce or abolish plea bargaining. Instead, in identifying the flaws in the plea bargaining and sentencing processes, NACDL seeks to provoke a larger conversation on how those processes can be reformed to reduce the prevalence of coercion. To that end, NACDL

offers a series of recommendations for specific reform in various areas of the criminal justice process in the hope that, by enacting these reforms, criminal defendants can be truly free to choose to exercise their constitutional rights.

As trials and hearings decline, so too does government accountability. Government mistakes and misconduct are rarely uncovered,[7] or are simply resolved in a more favorable plea bargain.[8] Moreover, the ease of conviction can encourage sloppiness, and a diminution of the government's obligation to fairness.

A system that insulates a prosecution from the searing light of a public trial invites the misuse and abuse of the criminal law. The notion that the exercise of a fundamental constitutional right should be so burdened contravenes a core value that is at the heart of a democracy founded upon the concept that the power of government should be limited. Accused persons should not have to gamble with years of their lives in order to have their day in court. No one should be subjected to geometrically increased punishment merely for putting the government to its proof. And no government should be able to wield the power to prosecute and condemn in a process that is rigged so that it virtually never has to show its hand. A system that has effectively consigned the right to a trial to the dustbin of history should not be tolerated.

Finally, while this report focuses on federal criminal practice, it is well-established that the trial penalty is just as prevalent in state and local criminal prosecutions, and that the virtual extinction of jury trials is just as prevalent in these jurisdictions. NACDL hopes to partner with its many affiliates and other criminal justice reform groups to tackle the roots causes of the trial penalty and restore the balance essential to a fair and just criminal justice system.

The Impact of the Trial Penalty

The trial penalty has profoundly altered a criminal justice system designed as an adversarial battle between the government and defense lawyers, presided over by a judge, with a jury as the final arbiter of guilt.

- The trial penalty has made the **government** the most powerful player in the criminal justice system. Although the defendant is cloaked in the presumption of innocence and the prosecutor theoretically has the burden of proof, as the Report makes clear, the mere decision to charge triggers a domino effect making a guilty plea the only rational choice in most cases. And as trials and hearings decline, so too does government accountability. Government mistakes and misconduct are rarely uncovered,[7] or are simply resolved in a more favorable plea bargain.[8] Moreover, the ease of conviction can encourage sloppiness, and a diminution of the government's obligation to fairness.

- Defense counsel, whose role is to ensure that "all other rights of the accused are protected,"[9] spend most of their time negotiating plea bargains and drafting sentencing memoranda. As a result of the trial penalty, not only are defense counsel trying fewer cases, they are frequently forced to settle cases before meaningful investigation and litigation of the government's case.[10]

- The prevalence of guilty pleas sidelines **judges** from their traditional supervisory role. Rather than scrutinizing the sufficiency and legality of the government's case, they are reduced to rubber-stamping plea bargains. If a mandatory minimum sentencing statute controls, judges do not even exercise their traditional sentencing role.

- The decline in the number of trials, and the litigation that precedes them, also causes **advocacy skills** to **atrophy** on both sides of the adversarial system. The federal courthouse in Manhattan, for example, held only 50 trials in 2015. Many defense lawyers and prosecutors have not tried cases in years, and many of the federal judges have similarly not presided over a trial in years.[11] As one judge summed up the impact of the vanishing trial: "The entire system loses an edge and . . . the quality of justice in our courthouses has suffered as a result."[12]

The pressure defendants face to plead guilty can even cause innocent people to plead guilty. Of the 354 individuals exonerated by DNA analysis, 11% had pled guilty to crimes they did not commit,[14] and the National Registry of Exonerations has identified 359 exonerees who pled guilty.[15] . . . besides a trial, the defendant gives up many protections designed to ensure that no innocent defendant faces punishment.

- The capacity of the government to process large caseloads without hearings or trials has resulted in an exponential increase in incarceration. Wreaking devastation in lives and communities, and selectively concentrated among the poor and people of color, the nation's **mass incarceration** has rightly been described as "the great unappreciated civil rights issue of our time."[13]

- Exoneration research has revealed one of the most tragic aspects of the criminal justice system: The pressure defendants face to plead guilty can even cause ***innocent* people** to plead guilty. Of the 354 individuals exonerated by DNA analysis, 11% had pled guilty to crimes they did not commit,[14] and the National Registry of Exonerations has identified 359 exonerees who pled guilty.[15] Additionally, the potential for such wrongful convictions is compounded in bargained-for-justice because, besides a trial, the defendant gives up many protections designed to ensure that no innocent defendant faces punishment.

- Finally, the decline in jury trials deprives society of an important community check on excesses of criminal justice system. **Juries** not only determine whether the prosecutors have met their high burden. They also apply their own sense of fair play — frequently convicting of lesser-included offenses or even acquitting entirely where the prosecution is perceived as over-reaching.[16] They are a reminder that the government is not omnipotent, but instead remains subject to the will of the people. As the U.S. criminal justice system churns some 11 million people through its courtroom doors every year,[17] trial by jury actively engage the public in this critical process of democracy.

PRINCIPLES AND RECOMMENDATIONS

Principles

1. The trial penalty — the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial — undermines the integrity of the criminal justice system.

2. Trials protect the presumption of innocence and encourage the government to charge cases based only on sufficient, legally-obtained evidence to satisfy the reasonable doubt standard.

3. The decline in the frequency of trials impacts the quality of prosecutorial decision-making, defense advocacy, and judicial supervision.

4. The decline in the frequency of trials tends to encourage longer sentences thereby contributing to mass incarceration, including mass incarceration of people of color and the poor.

5. The decline in the frequency of trials erodes the oversight function of the jury thereby muting the voice of lay people in the criminal justice system and also undercuts the role of appellate courts in supervising the work of trial courts.

6. The trial penalty creates a coercive effect which profoundly undermines the integrity of the plea bargaining process.

7. A reduction for accepting responsibility through a guilty plea is appropriate. The same or similar reduction should be available after trial if an individual convicted at trial sincerely accepts responsibility after trial regardless of whether the accused testified at trial or not.

8. No one should be punished for exercising her or his rights, including seeking pre-trial release and discovery, investigating a case, and filing and litigation of pre-trial statutory and constitutional motions.

9. Mandatory minimum sentences undermine the integrity of plea bargaining (by creating a coercive effect) and the integrity of the sentencing process (by imposing categorical minimums rather than case-by-case evaluation). At the very least, safety valve provisions should be enacted to permit a judge to sentence below mandatory minimum sentences if justice dictates.

10. If mandatory minimums are not abolished, the government should not be permitted to use mandatory minimum sentences to retaliate against an accused person's decision to exercise her or his constitutional or statutory rights. That is, the state should not be allowed to file charges carrying mandatory minimum sentences in response to a defendant rejecting a plea offer or invoking her or his rights including the right to trial or to challenge unconstitutional government action.

Recommendations

1. Relevant Conduct: USSG §1B1.3 should be amended to prohibit the use of evidence from acquitted conduct as relevant conduct.

2. Acceptance of Responsibility: USSG §3E1.1(b) should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

3. Obstruction of Justice: USSG §3C1.1 should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Application Note 2 should also be clarified in this respect.

4. Mandatory Minimum Sentencing: Mandatory minimum sentencing statutes should be repealed or subject to a judicial "safety valve" in cases where the court determines that individual circumstances justify a sentence below the mandatory minimum.

5. Full Discovery: Defendants should have full access to all relevant evidence, including any exculpatory information, prior to entry of any guilty plea.

6. Remove the Litigation Penalty: The government should not be permitted to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty. This includes an accused person's decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions.

7. Limited Judicial Oversight of Plea-Bargaining: There should be mandatory plea-bargaining conferences in every criminal case supervised by a judicial officer who is not presiding over the case unless the defendant, fully informed, waives the opportunity. These conferences would require the participation of the parties but could not require either party to make or accept an offer. In some cases, one or more parties might elect not to participate beyond attendance.

8. Judicial "Second Looks": After substantial service of a sentence, courts should review lengthy sentences to ensure that sentences are proportionate over time.

9. Proportionality Between Pre-Trial and Post-Trial Sentencing: Procedures should be adopted to ensure that the accused are not punished with substantially longer sentences for exercising their right to trial, or its related rights. Concretely, post-trial sentences should not increase by more than the following: denial of acceptance of responsibility (if appropriate); obstruction of justice (if proved); and the development of facts unknown before trial.

10. Amendment to 18 U.S.C. § 3553(a)(6): In assessing whether a post-trial sentencing disparity is unwarranted, the sentencing court shall consider the sentence imposed for similarly situated defendants (including, if available, a defendant who pled guilty in the same matter) and the defendant who was convicted after trial. The sentencing court shall consider whether any differential between similarly situated defendants would undermine the Sixth Amendment right to trial.

INTRODUCTION

For decades, criminal justice in this country has remained largely hidden from public scrutiny, relegated to backroom "negotiations" between prosecutors and defendants, where the defendant agrees to forego fundamental constitutional rights in exchange for the hope of leniency in sentencing. Year after year, the trend has seen the percentage of federal defendants pleading guilty continuing to rise. In 2016, 97.3% of defendants in the federal criminal justice system opted to concede their guilt. And in 2017, that number held steady at 97.2%. That means that in recent years *fewer than 3%* of federal criminal defendants chose to take advantage of one of the most crucial constitutional rights.[18]

In 2016, 97.3% of defendants in the federal criminal justice system opted to concede their guilt. And in 2017, that number held steady at 97.2%. That means that in recent years *fewer than 3%* of federal criminal defendants chose to take advantage of one of the most crucial constitutional rights.[18]

Plea bargaining has become so widely accepted that these statistics are unlikely to shock the average reader. But they should be deeply troubling. In a recent article in the *New York Times*, one federal judge highlighted the important role of the jury trial "not only as a truth-seeking mechanism and a means of achieving fairness, but also as a shield against tyranny. As Thomas Jefferson famously said, '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.'"[19]

Indeed, jury trials offer the average citizen an opportunity to directly participate in the criminal justice process to prevent the government from overstepping its authority. The public may still decry overcriminalization and the soaring prison population from afar. But the proliferation of plea bargaining has largely eliminated the public's traditional ability to nullify the government's overreach in individual cases. Despite the clear intentions of the country's founders, American society has willingly handed their authority back to the very institutions that juries were meant to keep in check.

What's more, they have done so not in the name of justice but of efficiency. The current public attitude echoes the same justification the Supreme Court gave when it jettisoned its historical skepticism of plea bargaining: "'If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.'"[20] However appealing the efficiency argument may be, it completely eviscerates the myriad protections secured by a jury trial. Defendants who go to trial enjoy the right:

- To be found guilty only by a jury of their peers, selected with the input of defendants' counsel and under restrictions to prevent discrimination that could cause the jury's decision to be unfairly biased;[21]
- To discover exculpatory and impeachment evidence that jurors would likely find material;[22]
- To confront and cross-examine witnesses to ensure live, adversarial testing of the prosecution's case;[23]

- To eliminate any adverse comments by the prosecution regarding the defendants' choice to remain silent;[24]
- To be found guilty only by a unanimous decision from the jury that they found evidence of guilt beyond a reasonable doubt after proper instructions to ensure that they understand the necessary level of proof and the burden on the prosecution to prove its case.[25]
- To raise constitutional and other legal challenges to the manner in which the government acquired evidence to support prosecution; and
- To appeal the conviction and any ancillary rulings underlying the conviction.

None of these protections is available to a defendant who pleads guilty.[26] Popular arguments about greater efficiency thus inevitably lead to an uncomfortable conclusion: however important these constitutional rights are, this country *cannot afford* to uphold them save in 3% of criminal cases.

There are undoubted advantages in allowing defendants to plead guilty — for the government, for society, and for defendants themselves. But do those advantages come at the expense of fairness and justice?

There are undoubted advantages in allowing defendants to plead guilty — for the government, for society, and for defendants themselves. But do those advantages come at the expense of fairness and justice? The astounding percentage of defendants who so willingly relinquish important Constitutional protections alone demands closer scrutiny of plea bargaining. Despite the nominal right of individual defendants to insist on a trial, recent studies have revealed that the plea bargaining process can be so coercive it can influence even innocent defendants to plead guilty. As this report details, there is ample evidence that many defendants are compelled to forego their right to a trial because the penalties they would otherwise face are too steep to risk.

This "Trial Penalty" — the discrepancy between the sentence offered during plea negotiations and the sentence a defendant will face after trial — has received much attention in recent years. In 2013, Human Rights Watch published a report detailing how prosecutors use the trial penalty to force federal drug defendants to plead guilty.[27] Joining that effort, NACDL has undertaken its own study to examine the mechanisms that contribute to the trial penalty in federal criminal cases across the board.

The United States Sentencing Commission's data on federal sentencing confirms the existence of a trial penalty. In 2015, in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence. In antitrust cases, it was more than eight times as high. (*See* Figure 1, below.) Although these averages do not represent the precise choice faced by any individual defendant, NACDL has also conducted a survey and identified numerous real-world instances of the trial penalty — where defendants who went to trial faced extreme penalties compared to the sentences they were offered during plea negotiations or the sentences

of their similarly-situated co-defendants. Because plea negotiations are off the record and because most cases plead out, data regarding plea offers is largely unavailable, so there is no way to accurately calculate the full extent of the trial penalty. Nevertheless, a combination of anecdotal evidence and an analysis of prosecutorial practices, sentencing laws, and judicial decisions strongly suggests that coercion plays a major role in the ever-increasing percentage of defendants who forego their right to a trial.

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Federal prosecutors, who are already personally incentivized to achieve speedy convictions, have virtually unbridled discretion over decisions that will dictate a defendant's ultimate sentence. They possess nearly exclusive authority in selecting what charges to bring, and in most cases, any number of criminal statutes could apply to a defendant's conduct, each carrying a different potential sentence. Prosecutors thus have wide discretion to choose to add or drop charges in an effort to achieve a guilty plea. On the other hand, defendants presented with plea offers are often at an informational disadvantage and are unable to adequately assess the likelihood that they could be acquitted of the charges the prosecutor has selected, even with the benefit of effective assistance of counsel.

The federal sentencing laws in turn provide prosecutors with an arsenal of tools that can be manipulated to convince defendants to plead guilty. The federal Sentencing Guidelines, which are the starting point for sentencing in all federal cases, can result in excruciatingly steep penalties that are frequently disproportionate to a defendant's actual culpability, and important reductions from those penalties are generally only available to defendants who plead guilty. Although judges retain ultimate authority over final sentences, mandatory minimum sentencing statutes — which are only triggered by a prosecutor's decision to charge under the statute — curb judges' discretion in many instances. Even when there is no mandatory penalty in play, many judges are reticent to meaningfully exercise their discretion and instead cling to the familiar Guidelines calculations which are unlikely to be overturned on appeal. In short, the system is stacked against a defendant who insists on his right to a trial because the only way to ensure a fair sentence is to plead guilty.

Fortunately, the mechanisms that contribute to the trial penalty are not cemented in stone. In this report, NACDL has highlighted some of the specific ways defendants are unfairly coerced to forego their right to a trial with the goal of making progress toward reducing the impact of the trial penalty. To that end, NACDL has proposed several specific recommendations for reform. NACDL is hopeful that this effort will spur a broader movement to eliminate the coercive forces at play in plea bargaining and restore true freedom of choice for criminal defendants.

MEASURING THE TRIAL PENALTY

Based on the data files published by the Sentencing Commission, NACDL has calculated the discrepancy between average sentences post-trial as opposed to those imposed following a guilty plea.* (*See* Figure 1, below) When compared within each primary offense category, the results tend to confirm the existence of a trial penalty. For instance, in 2015, the average sentence for fraud was three times as high for defendants who went to trial versus those who pled guilty. And for burglary/breaking and entering and embezzlement it was nearly eight times as high.[28] Although this analysis does not take into account every factor in each individual case that may have led to a higher sentence, the fact that post-trial sentences tend to be significantly higher in most primary offense categories suggests that defendants are in fact being penalized for going to trial.

It may be difficult to calculate how much higher a post-trial sentence would need to be in order to coerce a defendant to plead guilty. But there is strong evidence that these discrepancies can compel even an innocent person to plead guilty.[29]

It may be difficult to calculate how much higher a post-trial sentence would need to be in order to coerce a defendant to plead guilty. But there is strong evidence that these discrepancies can compel even an innocent person to plead guilty.[29] Numerous scholars have examined the innocence problem of plea bargaining and have estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent.[30] Even assuming only the lowest of these estimates to be accurate, such outcomes cannot be condoned. The National Registry of Exonerations has identified 359 specific instances where defendants were later determined to be innocent of the crimes they originally pled guilty to.[31] A few cases are particularly worthy of note:

- Marcellus Bradford pled guilty to aggravated kidnapping in a case involving the kidnapping, rape, and murder of a 23-year-old woman in Chicago in 1986. In exchange for his testimony against a co-defendant, the prosecution agreed to drop the murder and rape charges. Bradford agreed, pled guilty, and was sentenced to 12 years in prison. But, after testifying at trial, Bradford recanted his statements, saying police had coerced him into falsely confessing and that he did so only to avoid a life sentence. DNA testing later confirmed that Bradford had not been involved in the crime.[32]

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* *For the purposes of the more granular, offense-specific data analysis set forth in this report, the U.S. Sentencing Commission data files underlying the 2015 Sourcebook were studied in depth.*

- Michael Marshall, who pled guilty after being charged with aggravated assault, armed robbery, possession of a firearm during a felony, and possession of a firearm by a convicted felon, faced potentially decades in prison. He was sentenced to four years on a charge of theft by taking. Marshall later wrote a letter to the Georgia Innocence Project claiming, "I plead guilty out of being scared." Marshall was released after DNA testing showed his DNA did not match the evidence from the crime.[33]

- Viken Keuylian pled guilty to one count of wire fraud based on an alleged failure to repay a bank loan and false statements to the bank. After pleading guilty, his attorney obtained documents in a civil lawsuit with the bank showing that the bank was in fact aware that the money would not be immediately repaid and that the bank was part of an arrangement to support certain business efforts by Keuylian. Keuylian then filed a motion seeking to withdraw his guilty plea, explaining that he always believed the fraud allegation was false but could not prove it until he obtained crucial evidence from the civil lawsuit. He also alleged that he was told that if he did not plead guilty he would be charged with money laundering and would face a significantly larger sentence and that his sister would be charged with fraud as well. The court granted his motion to withdraw his guilty plea and his conviction was vacated. Ultimately, the court granted a motion to dismiss the charge.[34]

- James Ochoa pled guilty to carjacking and armed robbery against his attorney's advice after a judge threatened him with a sentence of 25 years to life if a jury found him guilty. Pre-trial testing eliminated Mr. Ochoa as a possible contributor to the DNA evidence in his case, and news media reported that a deputy district attorney had called the lab to ask a lab analyst to change this report before it was released to Mr. Ochoa's counsel (the analyst refused). Nonetheless, Mr. Ochoa pled guilty and was sentenced to two years in prison. He was later released and his conviction vacated after the DNA was matched to another man arrested in an unrelated crime who later confessed to this crime.[35]

These examples show that the threat of a substantially greater sentence following a conviction at trial is a powerful incentive for even an innocent person to forego his or her Constitutional rights. And, as Mr. Ochoa's case demonstrates, this is true even where the government's case is relatively weak. Although most of these examples involve state court convictions, the same incentives to plead guilty plague the federal criminal justice system. Moreover, in most federal cases, there is rarely biological evidence to look to for purposes of exoneration. Indeed, one of the key determinants of guilt or innocence in many criminal cases is intent — something that cannot be scientifically determined. Accordingly, these defendants are even less likely to risk a lengthy sentence — even if they know they did not intend to commit fraud.

As the discussion that follows will show, the influences that weigh on a defendant's decision to exercise the right to trial and the advantages that are skewed toward achieving guilty pleas leave little doubt that innocent defendants could be coerced to plead guilty.

A BRIEF HISTORY OF PLEA BARGAINING AND THE FEDERAL SENTENCING GUIDELINES

Plea Bargaining and the Supreme Court: A Shift from Distrust to Dependency

Even before the time of this country's founding, juries had traditionally served as a check on the various branches of government,[36] allowing citizens to interpret how and when the law should be applied and "'plac[ing] the real direction of society in the hands of the governed.'"[37] As one scholar has explained, the criminal jury enjoyed the privilege to "decid[e] not to enforce a law where they believe[d] it would be unjust or misguided to do so, allow[ing] average citizens, through deliberations, to limit the scope of the criminal sanction."[38] Today, the critical role that juries historically played has all but disappeared as plea bargaining has become the overwhelming norm for resolving criminal cases.

The practice of plea bargaining came into greater prominence in the early twentieth century, when crime was on the rise — arguably as a result of overcriminalization — and the criminal justice system was bending under its weight.[39]

Bargained-for justice — trading an admission of guilt for a lesser sentence — is assumed to be acceptable. But not too long ago, guilty pleas secured through promises of leniency or threats of higher sentences were actually deemed to be unconstitutional. The practice of plea bargaining came into greater prominence in the early twentieth century, when crime was on the rise — arguably as a result of overcriminalization — and the criminal justice system was bending under its weight.[39] Yet the practice was generally regarded by courts with deep suspicion, and the Supreme Court outright disapproved of it in a number of opinions.[40] In 1941, the Court ruled that a defendant's guilty plea induced by the prosecutor's threat to seek a higher sentence was unconstitutional. The Court determined that the defendant had been "deceived and coerced into pleading guilty."[41] These sentiments were echoed in several later opinions. Most notably, in *United States v. Jackson*, the Court held that the federal kidnapping statute imposed an "impermissible burden on the exercise of a constitutional right" because it called for the death penalty only for defendants convicted by a jury.[42] According to the Court, "the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them."[43] The Court readily acknowledged that the statute did not preclude defendants from acting voluntarily. Nevertheless, the *tendency* of the statute *to discourage* defendants from insisting on their innocence was enough to overturn it.[44] By 1968, the Supreme Court had rejected "every guilty plea induced by threats of punishment or promises of leniency that had arrived on its docket."[45]

Despite its prior distrust of plea bargaining, in 1970, the Supreme Court made an astonishing about-face and ruled that it was *not* unconstitutional for prosecutors to offer inducements to obtain a guilty plea — even if

Figure 1
Sentence (Years) x Primary Offense x Plea/Trial

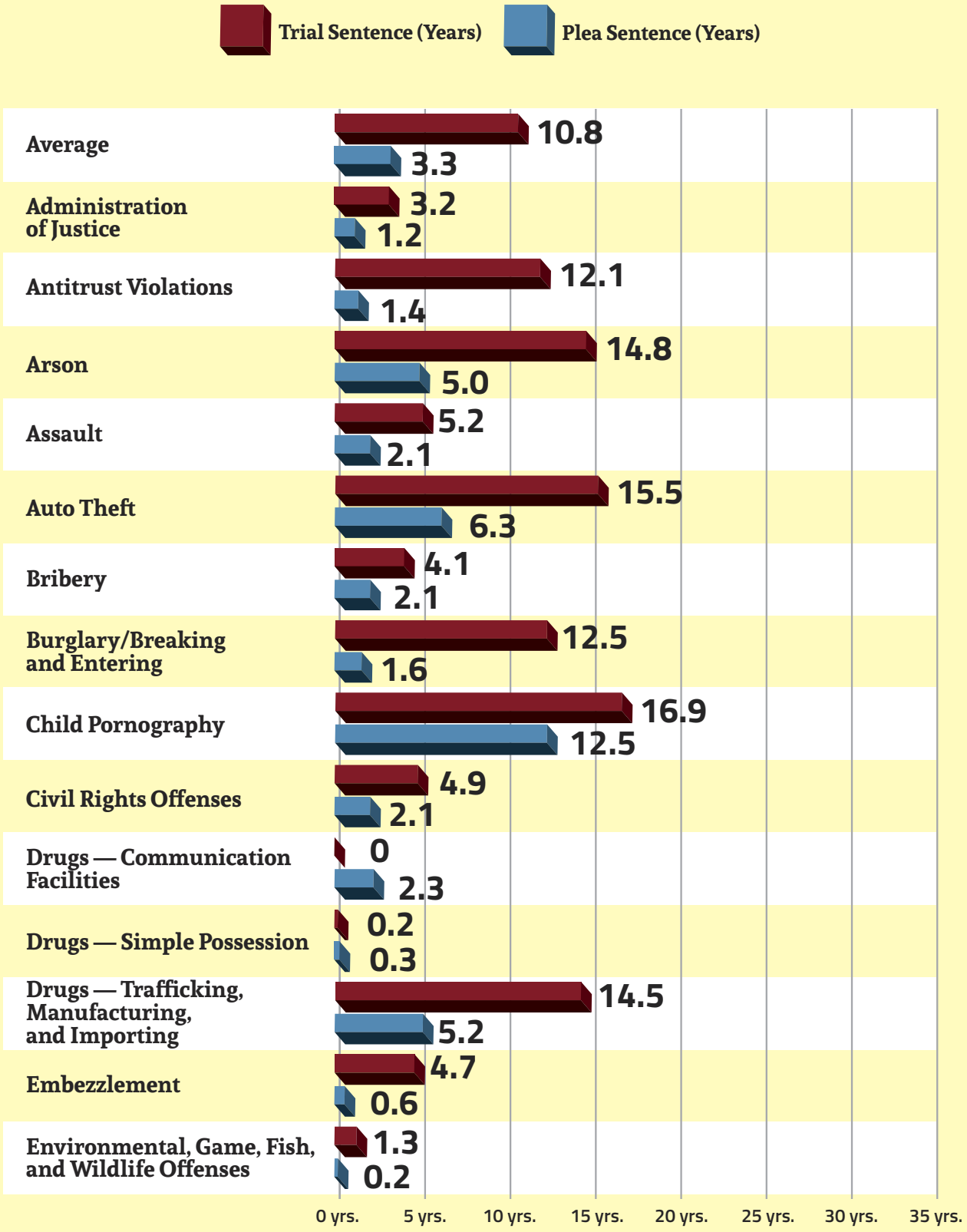

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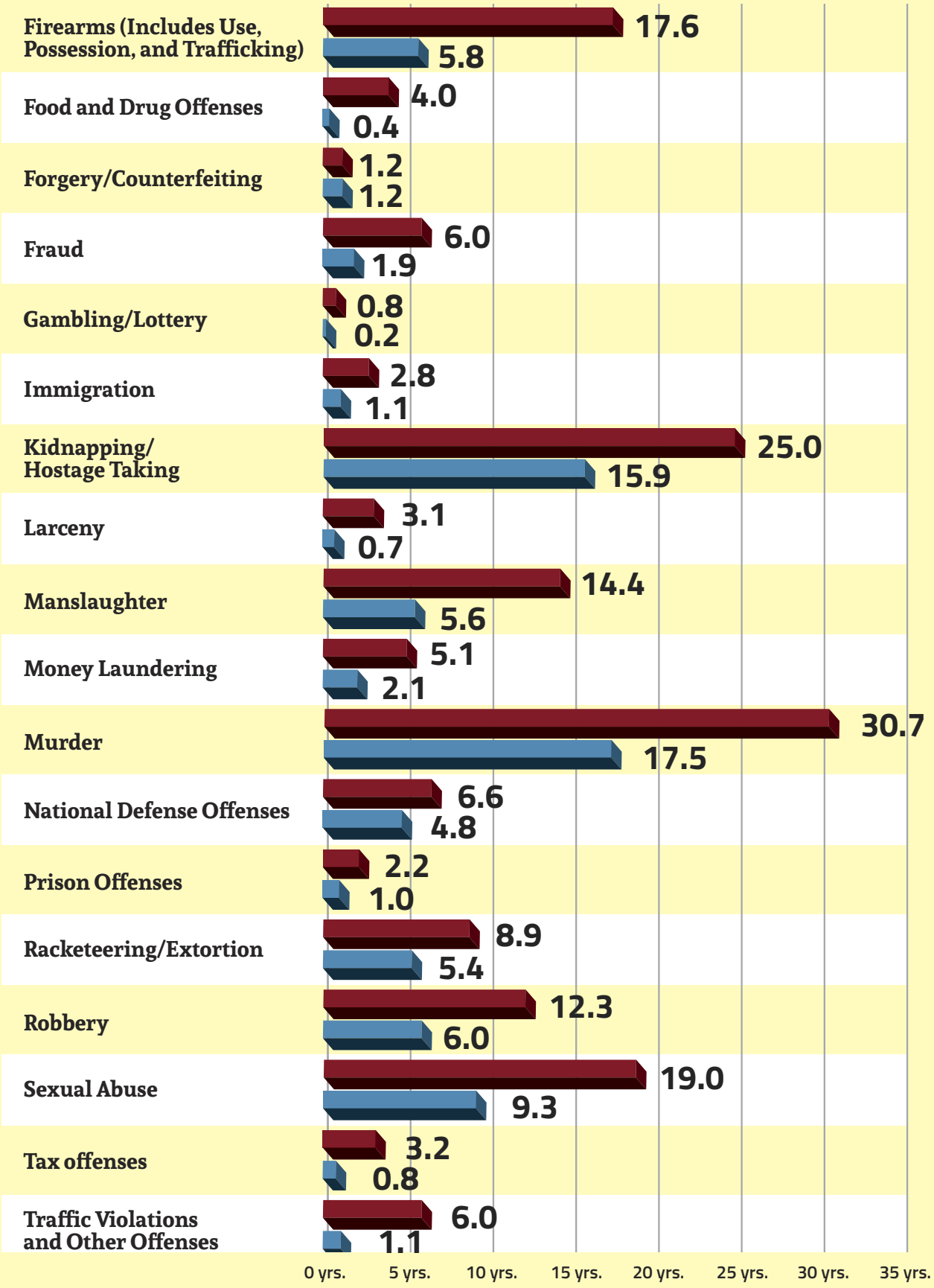
Figure 1: Sentence (Years) x Primary Offense x Plea/Trial



such inducements were in the form of threats to seek a higher sentence after trial. In *Brady v. United States*, the Supreme Court held that a guilty plea is not unconstitutionally coerced when "motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face ... a higher penalty authorized by law for the crime charged."[46] The Court came to the same conclusion in *Parker v. North Carolina*, stating that "an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial."[47] With these opinions, the Supreme Court reversed decades of skepticism and ushered in a regime of unrestrained plea bargaining.

Indeed, a mere eight years later, the Court was going out of its way to defend the practice; not even the threat of life in prison was enough to convince the Court that the defendant was being unconstitutionally coerced to give up his right to a trial.[48] Although such threats might discourage defendants from going to trial, "'the imposition of these difficult choices [is] an inevitable' — and permissible — 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'"[49] The Court was no longer asking whether the system *should* encourage the negotiation of pleas; it took this as a given. Many scholars have surmised the reason for this abrupt change of tune — plea bargaining had become critical to maintaining an efficient criminal justice system.[50]

The Sentencing Reform Act of 1984, United States v. Booker, and Judicial Discretion in Sentencing

Around the same time that the Supreme Court officially endorsed plea bargaining, significant reforms were underway in how criminal defendants were sentenced. Prior to 1984, federal district judges possessed discretion to impose any sentence on a defendant, constrained only by the Constitution and applicable statutory limitations. In response to concerns that this discretion produced wide disparities among similarly-situated defendants — depending largely on geography and the idiosyncrasies of individual judges — Congress passed the Sentencing Reform Act of 1984, instituting a commission to establish "guidelines ... for use of a sentencing court in determining the sentence to be imposed in a criminal case ...."[51] When the Guidelines were initially adopted, they were considered mandatory. Absent particular circumstances identified in the Guidelines themselves,[52] judges had no discretion to depart from the calculated sentencing range even if they believed the sentences they were imposing were unfair.

Prosecutors have maintained an inordinate amount of discretion over a defendant's ultimate sentence, in part, because the Guidelines are skewed in their favor.

Under these Guidelines, judges select a specific sentence from a range of sentences that is arrived at through a compilation of mathematical calculations. First, the judge calculates the defendant's offense level by: (1) identifying the applicable Guideline based on the statute of conviction; (2) determining the base offense level; (3) evaluating the relevant conduct of the defendant and any others involved in the offense to apply specific offense characteristics;[53] and (4) making any applicable adjustments based on, for example, particular characteristics of the victims, the defendant's role in the offense, whether the defendant accepted responsibility, and/or whether

the defendant obstructed justice. Then, the judge calculates the defendant's criminal history category based on any prior convictions. After determining these two variables — offense level and criminal history category — the judge then plots the point at which they intersect on the Sentencing Table.[54] That intersection yields a sentencing range from which the judge can select a specific sentence.

To aid judges in their selection of an appropriate sentence, a probation officer will conduct an investigation and prepare a Presentencing Report (PSR). In the PSR, the probation officer will include details of the underlying conduct of the offense and the defendant's criminal history, will perform the calculations under the Guidelines, and then make a recommendation to the judge as to an appropriate sentence within the applicable Guidelines range. Both the prosecution and the defense then have an opportunity to review the PSR and raise any objections to the probation officer's calculation. After reaching a conclusion as to the appropriate Guidelines calculation, the judge considers the probation officer's recommendation and the positions of the parties and determines the final sentence.

As discussed more fully in the sections that follow, prosecutors have maintained an inordinate amount of discretion over a defendant's ultimate sentence, in part, because the Guidelines are skewed in their favor. By way of example, the Guidelines offer substantial incentives to defendants to plead guilty quickly, before defense counsel has been able to meaningfully evaluate the merits of the prosecution's case. And the overly-broad definition of "relevant conduct" allows prosecutors to introduce evidence of conduct that was not previously charged or of which the defendant was actually acquitted. "No other common law in the world enables the prosecutor to seek a sentence based on criminal conduct never charged, never subject to adversary process, never vetted by a grand jury or a jury, or worse, charges for which the defendant was acquitted."[55]

In 2005, the Supreme Court finally struck down the provision of the Sentencing Reform Act that made the Guidelines mandatory. *United States v. Booker* is considered a landmark decision because, in theory, it returned sentencing discretion to the judiciary. However, it is widely acknowledged that the Guidelines continue to have a pervasive impact on sentences. Because the Supreme Court has held that the Guidelines are still the presumptive "starting point and the initial benchmark" for all sentences in the federal system, in every case, judges must still calculate the sentence called for by the Guidelines and consider that recommendation in imposing a sentence.[56] As Justice Sotomayor recently explained, "[i]n most cases, it is the range set by the Guidelines, not the minimum or maximum term of imprisonment set by statute, that specifies the number of years a defendant will spend in prison."[57]

Moreover, despite wishful thinking that *Booker* would encourage federal judges to assume a more active role in determining sentences, data show that over 80% of sentences are still within the Guidelines range.[58] The Supreme Court recently eliminated defendants' ability to challenge the Guidelines on grounds of vagueness, further entrenching their preeminence in a sentencing judge's calculations.[59] Because many sentencing judges have been reluctant to closely scrutinize the application of the Guidelines and because the Supreme Court has encouraged that reluctance, prosecutors may continue to rely on the Guidelines to threaten increasingly harsh sentences, pressuring defendants to plead guilty.

PLEA "BARGAINING" AND COERCIVE PROSECUTORIAL DISCRETION

Today, the Federal Rules of Criminal Procedure explicitly recognize and sanction plea bargaining. In exchange for a defendant's agreement to plead guilty, prosecutors may offer to not bring certain charges or to dismiss certain charges.[60] They may agree to recommend, or not to oppose, a particular sentence or sentencing range.[61] In addition, they may agree to argue for or against the application of particular sentencing factors.[62] The flip side of all of these options is that prosecutors may also threaten to add charges or to recommend increased sentences if defendants refuse to plead guilty.

As one federal judge has acknowledged, "most judges, happy for their own reasons to avoid a time-consuming trial, will barely question the defendant beyond the bare bones of his assertion of guilt, relying instead on the prosecutor's statement (untested by any cross-examination) of what the underlying facts are."[66]

Because plea negotiations take place outside the purview of the court, both the judiciary and the public are cut off from exercising any oversight. The result is that prosecutors possess nearly unchecked discretion in plea negotiations.

In one of its early opinions favoring plea bargaining, the Supreme Court expressed a concern that failing to constitutionally approve the practice would drive it "back into the shadows from which it ha[d] so recently emerged."[63] The problem is, since that time, plea bargaining has largely remained in the shadows. Judicial scrutiny of guilty pleas is extremely limited. Unlike in some states, judges at the federal level are prohibited from participating in the plea bargaining process.[64] Although they are required to determine that a guilty plea is voluntary before accepting it, voluntariness is all but presumed as long as the judge has reminded a defendant of his or her right to a trial and recited rote language listing the protections a trial affords.[65] As one federal judge has acknowledged, "most judges, happy for their own reasons to avoid a time-consuming trial, will barely question the defendant beyond the bare bones of his assertion of guilt, relying instead on the prosecutor's statement (untested by any cross-examination) of what the underlying facts are."[66]

Because plea negotiations take place outside the purview of the court, both the judiciary and the public are cut off from exercising any oversight. The result is that prosecutors possess nearly unchecked discretion in plea negotiations.

An Imbalance of Negotiating Power

In theory, plea bargaining is a negotiation between the government and the defendant. But the two sides do not come to the bargaining table as equal adversaries. The prosecutor is almost always at an informational advantage because he is not required to share information from his investigation with the defendant before offering and requiring the acceptance of a plea deal, leaving the defendant to guess what the prosecutor will be able to prove beyond a reasonable doubt. In addition (as discussed in greater depth in the following sections), many provisions built into the fabric of the sentencing system strengthen the prosecutor's bargaining leverage.[67] In fact, because certain key sentencing benefits are only available to defendants who plead quickly, there is even greater pressure to secure a plea agreement before the defendant or defense counsel have had any opportunity to evaluate the merits of the prosecution's case.

Specific Bargaining Tactics

Charge Bargaining

Sentences are highly influenced by the specific crimes that are charged — a decision that is entirely within the discretion of the prosecution.[68] Because any number of criminal statutes might apply to a defendant's conduct, there is usually a wide array of charges from which the prosecutor can choose. Thus, prosecutors may threaten to charge under the statute carrying the highest maximum penalty in order to obtain bargaining leverage.[69] They may also intimidate defendants by threatening charges that carry mandatory minimum penalties.[70] There is no legal basis for a defendant to challenge the sufficiency of a grand jury indictment in federal court, and a grand jury may indict on mere hearsay without ever hearing evidence favorable to the accused. So prosecutors retain the upper hand to threaten more serious charges, even if they are supported by evidence that would be inadmissible at trial, can be defeated by countervailing evidence, or are wholly unsupported by the law.[71] Because so few defendants are willing to risk going to trial, prosecutors' charging decisions are largely free from judicial scrutiny.

The consequences for those who insist on their right to trial are even more severe because, many prosecutors believe that, once they have made a threat, they cannot hesitate to follow through — no matter how outrageous the threat is. Otherwise, their threats will not be taken seriously in the future and they will undermine their bargaining leverage.

Charge bargaining strategies enable the prosecutor to exert considerable pressure over defendants to plead guilty.[72] Professor Lucian Dervan recently highlighted a case that starkly illustrates the power prosecutors have over sentences because of their unbridled discretion to select charges. Lea Fastow was the wife of Enron's former chief financial officer, Andrew Fastow. Initially, prosecutors charged her with six felony conspiracy and tax fraud counts, which, under the Sentencing Guidelines, carried a potential sentence of 8 to 10 years in prison.[73] Under a

plea agreement, the prosecution agreed to seek a sentence of only five months. When the presiding judge rejected the plea agreement given that probation officers had recommended a sentence of 10-16 months, Ms. Fastow changed her plea to not guilty.[74] To maintain her cooperation and the cooperation of her husband (who was also facing prosecution on separate charges), prosecutors then withdrew the original charges and reached an agreement with Ms. Fastow for her to plead guilty. The revised plea agreement involved a misdemeanor tax charge carrying a potential sentence of 10-16 months under the Guidelines. Both sides requested a sentence of ten months, and the court imposed a sentence of 12 months. At the second plea hearing, the court commented: "The Department of Justice's behavior might be seen as a blatant manipulation of the federal justice system and is of great concern to this court."[75]

Such manipulation is indeed troubling. But it is all too common. The consequences for those who insist on their right to trial are even more severe because, many prosecutors believe that, once they have made a threat, they cannot hesitate to follow through — no matter how outrageous the threat is. Otherwise, their threats will not be taken seriously in the future and they will undermine their bargaining leverage.

Fact Bargaining

Apart from selecting charges, prosecutors can also influence sentences by bargaining with defendants regarding what facts will be considered when determining their sentences.[76] In considering the facts relevant to sentencing, judges rely on the probation officer's presentence report (PSR).[77] The probation officer is supposed to conduct an independent investigation into the defendants' conduct and criminal background. But in reality, the description of the offense in the PSR is usually derived from information provided by the prosecutor in the indictment.[78]

With fewer and fewer defendants opting for trial, judicial scrutiny of the terms of plea agreements is increasingly limited, as is judicial scrutiny of police conduct because defendants are coerced into waiving the right to challenge misconduct before the trial court or on appeal.

When a defendant pleads guilty, he typically reaches an agreement with the prosecution regarding the relevant facts, and that stipulation is expressly set forth in the plea agreement.[79] Judges may also take such stipulations into account at sentencing. In fact, when the statement of facts included in the plea agreement differs from that included in the PSR, courts tend to defer to the plea agreement.[80] So the factual details that will be used to evaluate the defendant's sentence under the Guidelines is yet another item for the prosecutor to trade, and the incentive for a defendant to reach agreement with the prosecutor becomes even greater.[81]

Although the Department of Justice has consistently instructed prosecutors to only stipulate to facts they know to be true and to disclose to the court all facts relevant to Guidelines calculations,[82] fact bargaining persists.[83] When no defendants in a criminal conspiracy exercise their right to a trial — as is almost always the case — there is likely no way to know that fact bargaining has occurred. So by continuing to take advantage of their discretion to force pleas, prosecutors can prevent their own manipulation from being uncovered.

FedEx, UPS, and the Trial Penalty

In 2013, the federal government accused both FedEx and UPS of illegally conspiring to distribute controlled substances by delivering packages containing pharmaceuticals purchased from Internet pharmacies. Neither company was actually aware of what was in the packages. Despite the novel theory of the government's case, UPS quickly entered a non-prosecution agreement and succumbed to a fine of approximately $40 million and a slew of corporate governance reforms. By contrast, when FedEx opted to take its case to trial, the government sought fines of $1.6 billion — forty times the amount it was willing to accept from UPS in exchange for the non-prosecution agreement. FedEx ultimately prevailed after the presiding judge expressed skepticism of the case and the government dropped its charges. While the trial judge declared that FedEx was factually innocent of the charges, the only reason the judge even got involved was because FedEx insisted on challenging the charges at trial. UPS had engaged in the same conduct and was equally innocent, but incurred a $40 million fine because it gave up its right to a trial in exchange for leniency.

Many prosecutors will not hesitate to use the full extent of their bargaining power to secure guilty pleas.

Draconian Plea Agreements and "Rights Bargaining"

In addition to charge and fact bargaining, prosecutors also have wide discretion to dictate the terms and timing of plea agreements, and they can insist on objectionable terms knowing that those terms will likely never be scrutinized. For instance, in many districts, it is common practice to require defendants to waive the right to appeal their sentence or important legal rulings including, for example, the legality of the criminal statutes or police conduct, including the legality of a stop, search, or seizure, or the acquisition of other forms of evidence.[84] And where a defendant has already litigated such an issue, waiver of the right to appeal an adverse determination is frequently a condition of the guilty plea. Increasingly, prosecutors are requiring defendants to waive their right to receive exculpatory evidence in the possession of the government.[85] Very few defendants will refuse to accede to such terms because the only other choice is to take the case to trial and face a much higher sentence. So prosecutors can make plea offers on an all-or-nothing basis, confident that defendants will accept any terms to avoid an excessive sentence and that judges will rubberstamp the deal because they do not want to deny a defendant the benefit of a bargained-for lower sentence. With fewer and fewer defendants opting for trial, judicial scrutiny of the terms of plea agreements is increasingly limited, as is judicial scrutiny of police conduct because defendants are coerced into waiving the right to challenge misconduct before the trial court or on appeal. In the rare case where a defendant goes to trial and challenges the prosecutor's draconian terms, the prosecutor will likely object to the court invading its domain. For example, in one federal case, the defendant was offered a plea agreement that would preclude him from making arguments at sentencing comparing his culpability to one of his co-defendants — a comparison which the law requires of the sentencing judge.[86] The prosecutor was only willing to remove that term from the plea agreement if the defendant first agreed to plead to additional counts that would ultimately result in exposure to a lengthier maximum sentence.[87] When the defendant attempted to raise the unfair plea agreement terms to the court's attention, the prosecutor berated him, arguing that if he "wants to enter into a contract with the government, his choices are perforce constrained by what the government is prepared to agree to."[88]

The Department of Justice frequently pushes Congress and the Sentencing Commission for higher and higher penalties, further evidence of a strong desire to enhance their negotiating leverage.

Perhaps the most extreme example of draconian plea terms was only recently limited by action of former Attorney General Eric Holder. In many districts, prosecutors were seeking a waiver of a prospective claim of ineffectively assistance of counsel as a condition of a guilty plea. In other words, to avoid the trial penalty an accused would have to agree that she would never challenge the fact that the plea itself was the result of ineffective representation of the very counsel who assisted the defendant in understanding the strength of the case and, in

David Anthony Taylor and the Trial Penalty

David Anthony Taylor was a member of a gang in Southwest Virginia that was implicated in a string of 10 robberies in 2012. The gang targeted drug dealers because they would typically have drug proceeds in their homes and would be reluctant to report the crimes to the authorities for fear of arrest themselves. George Fitzgerald, the leader of the gang, conducted the surveillance of the victims, decided who would participate in each home invasion, and divided up the proceeds afterwards. He also took a cut of the proceeds from all 10 robberies.

Taylor, on the other hand, was a low-level member who participated in only 3 of the 10 break-ins. He was not involved in planning any of them. Fitzgerald described that Taylor's role was to act as a human shield; as the first member of the gang to enter the house, he was the one most likely to be shot if the victims were armed.

When the gang members were indicted, all of them except Taylor pled guilty. Fitzgerald, the ringleader, was sentenced to 22 years in jail, after receiving a reduction for cooperating with the government against the other gang members. The other low-level members received sentences between 7 and 14 years.

The prosecutor initially offered Taylor a plea deal — it would agree to indict him for only one count of robbery and one count of brandishing a gun. But if Taylor refused the deal, the prosecutor threatened to file additional charges. Taylor chose to exercise his right to a trial, and the prosecutor made good on his threat — he filed a superseding indictment adding two more counts, including an additional gun charge which stacked another mandatory 25 years onto Taylor's potential sentence.

Taylor's first trial resulted in a hung jury, but the second jury convicted him of three of the four counts in the superseding indictment. He was acquitted of one of the gun charges.

Although the prosecutor had moved at trial to exclude evidence regarding Taylor's potential sentence from being presented to the jury (because it might confuse them), after conviction, he sought a 42-year sentence — an upward variance from the Guidelines. In support of that onerous penalty, the prosecutor argued that he could have charged Taylor with participation in another, separate robbery, and that the Guidelines did not appropriately account for Taylor's failure to accept responsibility for his crimes.

Taylor was ultimately sentenced to 28 years in jail, longer than any of his co-defendants, even the ringleader.

the vast majority of cases, recommended the guilty plea. NACDL and various state entities determined that this practice was unethical, and after a challenge to a rule proscribing this kind of waiver was rejected by the Supreme Court of Kentucky, the Department of Justice barred the conduct.[89]

But the capacity of prosecutors to construct ever more onerous conditions for a guilty plea cannot be overstated. Indeed, federal prosecutors now seek even the waiver of rights under the Freedom of Information Act.[90]

Prosecutorial Attitudes and Incentives to Coerce

One criticism of constitutional jurisprudence on plea bargaining is that it fails to acknowledge that prosecutors, as officials of the state, have obligations beyond their own personal interests.[91] In our adversarial system, prosecutors face strong personal, professional, and institutional incentives to secure pleas. Prosecutors, however, are ethically obliged to do justice and not win at any cost. Prosecutors are required to act as an arm of justice and not merely as an adversary to the defendant. Unfortunately, many prosecutors will not hesitate to use the full extent of their bargaining power to secure guilty pleas.[92]

While most prosecutors will not acknowledge that defendants should be punished for going to trial, most adopt the attitude that leniency is only for those defendants who admit their guilt before trial which, of course, amounts to same thing. If a prosecutor finds himself in the difficult position of having to support a much harsher sentence than he was originally willing to accept in exchange for a guilty plea, the most common refrain is that he is merely applying the law. That is a hard argument to swallow, however, because prosecutors actively advocate for amendments to the law to increase their bargaining power. The Department of Justice frequently pushes Congress and the Sentencing Commission for higher and higher penalties, further evidence of a strong desire to enhance their negotiating leverage.

Inadequate Constitutional Protections For Defendants During Plea Bargaining

In 2012, the Supreme Court finally acknowledged that plea bargaining had replaced trials as the nearly universal means of resolving criminal cases: "'It is not some adjunct to the criminal justice system; it is the criminal justice system.'"[93] Because the ultimate fate of defendants is now almost always decided before trial, the Court's landmark decisions in *Missouri v. Frye* and *Lafler v. Cooper* recognized that defendants are entitled to effective assistance of counsel during plea negotiations. But, while this is certainly a welcome concession, it does not remedy the imbalance of power between prosecutors and defendants.[94] Defendants who are represented by effective counsel are still up against the prosecution's unrestrained charging discretion and informational advantages. And, as discussed in more detail below, the exorbitant Sentencing Guidelines and statutes skew the playing field even more in the prosecutor's favor.

Kevin Ring and the Trial Penalty

Kevin Ring was a lobbyist involved in the Jack Abramoff bribery scandal in the mid-2000s. Abramoff and several of his law firm colleagues were accused of providing bribes and gratuities to White House staffers, Congressional aides and other government officials in an attempt to, among other things, influence legislation permitting gambling on Indian reservations. Ring, who worked for Abramoff at the time, was indicted for conspiracy to commit honest services fraud and pay illegal gratuities.

Abramoff and his fellow mastermind in the scheme, Michael Scanlon, were also accused of orchestrating a kickback conspiracy where they actually lobbied against their clients' interests to extort higher fees from them. Ring was largely uninvolved in the kickback conspiracy.

Both Abramoff and Scanlon pled guilty and were sentenced to 4 years and 20 months, respectively. The other lobbyist defendants also pled guilty and the government recommended that they be sentenced either to home confinement or only a few months in prison. The court sentenced one to thirty days in prison and the others to probation.

Ring, however, chose to go trial. After an initial hung jury, the second jury found him guilty. At sentencing, the prosecution calculated Ring's Guidelines range to be between 17 to 21 years, far longer than either Abramoff or Scanlon had received.

In supporting that calculation, the prosecution urged the court to consider the benefits the lobbyists' clients had received in exchange for the bribes — even though it had not argued that those facts were relevant to sentencing any of Ring's co-defendants. The prosecution dismissed any suggestion of fact bargaining, claiming that it had only recently acquired evidence establishing the extent of the benefits.

In a presentencing opinion, the court explained that, although it was not clear that fact bargaining had occurred, courts have little ability to uncover or police such tactics when they are used:

> In criminal cases involving plea agreements, the Court and the probation office are frequently at the mercy of the parties to disclose and explain relevant facts [and] may not always get a full picture of the defendant's offense conduct, nor do[they] have the means to learn the information on [their] own.

The judge ultimately rejected the prosecution's argument and sentenced Ring to 20 months in jail:

> Employing a dramatically different methodology for calculating the Guidelines range of those who plead guilty would ... undermine the very purpose of the Guidelines, and give prosecutors even more power over sentencing than is already the case.

PROSECUTORS LEVERAGE EXCESSIVE SENTENCING GUIDELINES TO FORCE PLEAS

The enormous discretion that prosecutors wield to pressure defendants to plead guilty through traditional mechanisms like charge and fact bargaining is even greater in light of the Sentencing Guidelines. Although the Guidelines were adopted as a means of addressing unwarranted disparity in sentencing, they have been largely ineffectual in meeting that goal.[95] The Supreme Court has made clear that individual judges are best suited to weigh disparities on a case-by-case basis.[96] But the pipe dream of administering "uniform" justice has held sway, reinforcing the influence of the Guidelines which rely on mathematical calculations at the expense of fairness in individual cases.

As judges, scholars, and even former prosecutors have observed, overemphasis on the amount of loss often leads to sentences that are disproportionate to the seriousness of the offense.[115]

Indeed, although several federal judges are quite outspoken about their disagreement with the Guidelines — referring to them as arbitrary and having been "drawn from nowhere"[97] — many, many more remain reluctant to deviate from them. One federal judge recently admitted that she would not have imposed a 360-month sentence, but she felt compelled to do so because the Guidelines called for that sentence.[98] In fact, because judges are still required to begin their sentencing analysis by calculating the Guidelines range, there may be a psychological predisposition to sentence within that range.[99] It is also possible that the Guidelines have maintained their pervasive force because they represent the path of least resistance. Within-Guidelines sentences are virtually immune from review on appeal, so judges who do not like to be overturned can ensure a good record by sticking to the Guidelines.[100] Others may cling to the Guidelines because they are used to them. Most of the federal judiciary is made up of judges who began their tenure under a system in which the Guidelines were mandatory, and they may find it difficult to divorce themselves from such a familiar crutch. But whatever their reasons or motivations for doing so, the fact remains that many judges continue to adhere to the Guidelines, preventing any truly meaningful check on federal prosecutors who can use the increasingly harsh Guidelines sentences to coerce defendants to plead guilty.

Economic Crimes As an Example of the Guidelines' Overreach

One of the most flagrant examples of how the Guidelines call for the imposition of excessive sentences is Section 2B1.1, the Guideline that applies to economic crimes. Section 2B1.1 has long been criticized for resulting in sentences that are grossly disproportionate to a defendant's actual culpability. Judges have referred to sentences under this Guideline as "patently absurd on their face,"[101] "a black stain on common sense,"[102] and, "fundamentally flawed."[103] Because defendants' sentences are so inflated under the Guidelines, prosecutors have enormous leverage in economic crime cases to force guilty pleas.[104]

Increased Penalties for Indeterminate Loss Amounts

Although it is commonly referred to as the "fraud guideline," Section 2B1.1 covers a vast array of offenses and offenders, more than any other guideline. It determines the sentences for more than 300 federal criminal statutes and applies to offenses ranging from illegally downloading digital music to massive fraudulent investment schemes.[105] Individuals sentenced under this provision of the Guidelines made up 12.2% of all defendants sentenced in federal courts.[106] Despite the breadth of criminal conduct covered, sentences under Section 2B1.1 are principally driven by a single factor: the amount of loss that actually resulted, or was intended to result, from the offense.[107]

This factor has become increasingly significant in enhancing sentences for economic crimes.[108] The amount of loss is factored into a defendant's total offense level, which is one of the two variables for determining an ultimate sentencing range. When the Guidelines were first adopted, the amount of loss could result in, at most, a 13-level enhancement to a defendant's total offense level. Over the intervening years, the loss table was adjusted to add more categories of loss with higher and higher enhancements.[109] Under the current Guidelines, the amount of loss can result in an enhancement of as much as 30 levels.[110] This means that where a defendant's sentence falls in a range between 0-6 months and 15-20 years will be determined by a single factor.

In cases where losses are particularly difficult to calculate, prosecutors have even greater leverage to force pleas.[123]

This consistent, upward ratcheting of the loss table is out of sync with the Commission's initial purpose for economic crimes. Originally, the Commission sought to provide a short but definite period of confinement in cases that had traditionally resulted in sentences of probation.[111] Over the years, however, the amount of loss enhancements were inflated, not as the result of any empirical analysis suggesting sentences were too low, but rather, in response to directives from Congress who were facing political pressure in the wake of major financial crises.[112] The framers of the Guidelines settled on loss as the driving factor for economic crimes because they believed it to be a reasonable approximation of the seriousness of an offense, and it was common to all covered offenses.[113] But, while the amount of loss may have been an effective means of selecting a sentence somewhere between probation and a few years imprisonment, as the upper range of sentences has risen, it has become far harder to justify basing sentences so heavily on this single factor.[114]

As judges, scholars, and even former prosecutors have observed, overemphasis on the amount of loss often leads to sentences that are disproportionate to the seriousness of the offense.[115] Defendants are plugged into specific slots along the broad spectrum of the loss table without any consideration for other factors that are arguably more significant when measuring a defendant's relative culpability, for instance, the scope and duration of the offense, how much the defendant gained from it, or the defendant's motivation.[116] In addition, individual defendants are frequently held accountable for all losses caused by participants in the same scheme, even if the defendant was not involved in his co-defendants' conduct, did not intend for the losses to occur, and did not personally profit from them.[117] A defendant's subjective intent with respect to loss will only be considered under the Guidelines if he or she intended more loss than what actually occurred, meaning intended loss can only increase a defendant's sentence, not lower it.[118]

What's more, in the situation of an unsuccessful fraud — where no loss occurs — intended losses can still increase a defendant's sentence even if the fraudulent scheme is so outlandish that it never could have succeeded in the first place. For instance, one federal district judge imposed a 20-year sentence on defendants who used AOL email accounts to impersonate Buryatian nationals and Yamasee tribesmen seeking a five billion dollar loan to rebuild a pipeline across Siberia.[119] Unsurprisingly, the only person who was "defrauded" by the scheme was a government informant. Even though the defendants had no chance of succeeding in the scheme and no loss could possibly have occurred, the judge imposed a 20-year sentence largely based on an *intended loss* of $3 billion. The Second Circuit reversed, finding that no legitimate investor would have fallen prey to such an outlandish scheme. The concurring judge noted that "[e]ven if it were perfect, the loss guideline would prove valueless in this case, because the conduct underlying these convictions is more farcical than dangerous."[120] Despite cases like this, the Guidelines permit sentencing judges to rely entirely on intended loss.

Even when actual loss has occurred, loss calculations need not be precise or certain. The sentencing judge is only required to make a "reasonable estimation" of loss.[121] Nor is the prosecution required to prove losses beyond a reasonable doubt; the significantly lower preponderance of the evidence standard applies at sentencing.[122] In other words, a defendant considering whether to exercise his right to trial knows that, even if he decides to put the prosecution to its proof and is acquitted of certain charged conduct, he may still face an enhancement for that conduct at sentencing. In cases where losses are particularly difficult to calculate, prosecutors have even greater leverage to force pleas.[123] They may even use novel theories for calculating losses during plea negotiations to overstate the severity of a defendant's likely sentence.[124] Lower-level members of a fraudulent scheme are more susceptible to these threats because they rarely know the full extent of the loss. Unless contrary information is presented at sentencing, a sentencing judge is permitted to rely solely on the loss amount that the parties stipulate to in a plea agreement.[125] Thus, few defendants will risk going to trial if they can secure the prosecution's agreement to a low loss amount by pleading guilty.

In addition to these tactics, the government may also engage in sentencing entrapment. In such cases, the government uses an undercover agent to investigate criminal conduct but then exacerbates the magnitude of the defendant's conduct to boost the Guidelines calculation and create a sentence that will be high enough to coerce a guilty plea. The government may do this by prolonging its investigation even after it has sufficient evidence to obtain an indictment. This practice is entirely permissible in many federal Circuits because judges are unwilling to invade the government's discretion to investigate crimes.[126] In other cases involving crimes like those subject to Section 2B1.1 — where sentences depend so heavily on quantities involved in the crime — the government may also instruct its agents to deliberately increase those quantities to in turn increase the applicable Guidelines ranges that will apply.

Overlapping Enhancements Double-Count the Same Conduct

On top of the enhancement for amount of loss, Section 2B1.1 contains 29 specific offense characteristics ("SOCs") that call for additional enhancements to a defendant's total offense level.[127] At first glance, the SOCs could be viewed as an attempt to more accurately distinguish between the seriousness of different types of economic crimes. But the SOCs almost always aggravate sentences rather than reduce them. So more offense levels are piled on to sentences that are already bloated and out of proportion with culpability because of the onerous loss

enhancement. The SOCs are thus serving no distinct purpose other than to give prosecutors more leverage to threaten higher sentences.[128] Additionally, many of the SOCs involve factors that are already taken into account in the loss calculation itself. Frank Bowman — one of the drafters of the modern version of the fraud Guideline (and now an outspoken critic of it)[129] — has explained that the loss calculation was originally intended to serve as a proxy for multiple factors relevant to the seriousness of an offense.[130] Over time, however, the Commission added more and more SOCs to the Guideline but failed simultaneously to decrease the enhancements under the loss table.[131] So factors that were already incorporated into a defendant's sentence through the loss enhancement are now frequently double-counted.[132]

By way of example, the Guidelines stack additional offense levels on top of the loss enhancement when the offense involves a certain number of victims.[133] But higher loss crimes are already much more likely to include a large number of victims because they involve high losses.[134] The same could be said for the "sophisticated means" enhancement, which adds two levels where the defendant "intentionally engaged in or caused [] conduct constituting sophisticated means."[135] As losses are higher, it becomes far more likely that the defendant will have needed to use "sophisticated means" to achieve them.[136] The definition of "sophisticated means" does not provide much guidance on when the enhancement should apply: "especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense."[137] The application notes provide only two specific examples, one of which is now included in the text of the Guideline itself.[138] This makes it ripe for use by the prosecution as leverage during plea negotiations.[139]

The SOCs can also overlap with each other and other Guideline provisions. For example, Section 3B1.3 calls for a 2-level increase to the offense level if the defendant used a special skill.[140] "Special skill" is not defined, so in many cases, both the sophisticated means SOC and the special skill SOC could apply to the very same conduct. The Commission has generally acknowledged this phenomenon of "factor creep," explaining that "as more and more adjustments are added to the sentencing rules, it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[141] However, because the Guidelines do not counsel against applying multiple SOCs even when they overlap, prosecutors can rely on them to threaten higher sentences if defendants refuse to plead guilty.[142]

Because the Guidelines are untethered from determinations of actual culpability, prosecutors have the power to threaten sentences for economic offenders that are generally reserved for the most heinous of violent criminals.

A most egregious instance of double-counting occurs in securities fraud cases involving public companies. A small impact on a large public company can easily result in losses exceeding $20 million, and securities fraud will involve a large number of victims by its very nature.[143] So even before considering any SOCs, defendants in these cases are almost always facing offense levels in the high-20s.[144] But because so many SOCs potentially apply in these cases, sentences can easily reach life imprisonment, even where the loss amount is relatively low.[145] For instance, under the current Guideline, an officer or director of a public company convicted of securities fraud could receive:

Base offense level, §2B1.1(a)(1)	7
More than $3.5 million loss, §2B1.1(b)(1)	+18
Substantial financial hardship	
to 25 or more victims, §2B1.1(b)(2)	+6
Sophisticated means, §2B1.1(b)(10)	+2
More than $1 million in gross receipts, §2B1.1(b)(16)	+2
Violation of securities laws	
by officer of public company, §2B1.1(b)(19)(A)	+4
Aggravating role in offense, §3B1.1(a)[146]	+4
TOTAL OFFENSE LEVEL:	**43 (life)**

As the above calculation illustrates, Section 2B1.1 can result in harsher sentences than those typically imposed in cases of murder, kidnapping, and sexual abuse.[147] Even if one were to argue that a multi-decade sentence is truly appropriate in a particular case, the Guidelines are so onerous that the sentencing judge may be required to *depart downward* from the Guidelines range to reach that sentence.[148] Because the Guidelines are untethered from determinations of actual culpability, prosecutors have the power to threaten sentences for economic offenders that are generally reserved for the most heinous of violent criminals.[149] Although they may be lenient when a defendant agrees to plead guilty, they exhibit no restraint in seeking the highest sentence possible when defendants dare to exercise their right to trial.[150]

The Commission's 2015 Amendments: A Tepid Attempt at Reform

In a series of well-publicized cases following *Booker*, a few federal judges flexed their newly-acquired discretion and spoke out against the absurdly lengthy sentences produced by the fraud Guideline. In 2006, Judge Rakoff of the Southern District of New York rejected a Guidelines sentence of life imprisonment for a first-time non-violent offender accused of securities fraud and instead imposed a sentence of 42 months.[151] In explanation, he noted "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."[152]

In 2012, the Commission announced that it was beginning a multi-year effort to study sentences for economic crimes and that it intended to make reform to Section 2B1.1 a priority.[153] Those efforts culminated in a series of amendments to Section 2B1.1 that took effect in November 2015. The loss table was tweaked to account for inflation, the victims table was amended to focus less on quantity and more on victim impact, and the definition of intended loss was rewritten to clarify that it is a subjective standard.[154] Although these changes were welcome, most commentators agree that the Commission's reforms did not go far enough, and many predict that the amendments will have little real-world significance.[155] By way of example, the Commission revised the victims table so that higher-level enhancements are applied only if the relevant offense conduct caused "substantial financial hardship."[156] But, as one commentator has pointed out, focusing on victim impact will still favor prosecutors since most of the evidence will likely be in the form of hearsay, and defendants will have no access

Bradley Stinn, Friedman's Jewelers, and the Trial Penalty

As CEO of Friedman's Jewelers, Bradley Stinn had led his company from a failing regional business with $40 million in debt to a thriving, national chain with over 700 stores throughout the country. Stinn was one of Friedman's largest shareholders and was unswervingly devoted to its success during his eleven years with the company.

Unbeknownst to Stinn, Friedman's CFO, Vic Suglia, and its controller, John Mauro, had been aiding one of Friedman's vendors in a fraudulent loan scheme. When the SEC and DOJ began investigating Friedman's involvement in the scheme, they also uncovered questionable accounting practices that had allowed Friedman's to overstate its earnings. The government brought criminal charges against Suglia and Mauro related to the loan fraud and five accounting violations. Both admitted the charges and pled guilty.

Although the government agreed that Stinn knew nothing of the loan fraud, it indicted him for securities fraud because Suglia and Mauro's accounting manipulations had allegedly resulted in misleading statements in Friedman's public filings. The government offered Stinn a 5-year maximum sentence if he pled guilty, but Stinn did not take the deal because he'd had no personal involvement in preparing the financial statements and said he would not be able to truthfully admit that he knew they were false. Suglia and Mauro both testified against him at trial, and Stinn was convicted.

Members of the jury explained after the trial that they had convicted Stinn because they believed he knew about one of the alleged accounting violations and should have disclosed it. But they explained that they understood Stinn's role in the offense to be minimal. The presentence report ignored this evidence and based its analysis on the facts alleged in the indictment, even though members of the jury had admitted to having rejected most of those allegations. The presentence report calculated $100 million in losses and applied a host of specific offense characteristics to reach an offense level of 48. The recommended sentence was 70 years.

As a first-time offender who had already suffered significant losses from his own large investment in Friedman's — and who faced a restitution penalty on top of that — Stinn argued for leniency. Former colleagues, one of the jurors, and even a long-time Friedman's investor who had lost money in the fraud wrote in support of Stinn's request. But the prosecution vehemently defended the Guidelines calculation and urged the court to impose a lengthy sentence. The judge ultimately sentenced Stinn to 12 years in prison.

Suglia and Mauro — who had actually manipulated Friedman's accounting records and participated in the separate fraudulent loan scheme — were sentenced after Stinn. In stark contrast, the prosecution recommended no jail time, and they were sentenced to probation.

to that information before sentencing and no meaningful way to challenge it.[157] Another commentator explained that virtually all high-loss defendants will still get at least the 2-level enhancement for 10 or more victims, and many will still get a 4 to 6-level enhancements because it is likely that at least a few of their victims suffered substantial financial hardship.[158] Ultimately, loss continues to overwhelm other sentencing considerations, and the amendments did nothing to address the increasing number of overlapping SOC enhancements.[159]

The full impact of the Guidelines — absent negotiated reductions — can only truly be tested if defendants go to trial. Thus, fewer trials masks the need for reform, keeping onerous Guidelines in place, which perpetuates prosecutors' leverage to force pleas, in turn decreasing the number of trials, and the cycle endlessly repeats.

In rejecting more sweeping change, the Commission maintained that the fraud Guideline was not fundamentally "broken," as some had argued.[160] But it reached that conclusion based on sentencing data that was overwhelmingly the result of plea bargaining. In other words, the Commission failed to consider how the Guidelines operate in the abstract, absent the prosecution's willingness to bargain away otherwise applicable enhancements.[161] Because of that, the fraud Guideline remains a daunting tool in the hands of prosecutors.

The Department of Justice and U.S. Attorney's Office, for their part, opposed many of the changes the Commission did make to Section 2B1.1, revealing a deep-seated unwillingness to relinquish the power to coerce pleas.[162] While they admitted that the fraud Guideline was imprecise, they simultaneously maintained their position that sentences for economic crimes were not harsh enough. For instance, in 2011, then U.S. Attorney for the Southern District of New York Preet Bharara acknowledged that the Guidelines do not offer "meaningful guidance for differentiating among financial criminals and accurately gauging their relative culpability," but as a solution he proposed two new aggravating SOCs for insider trading offenses and a floor for mortgage fraud cases that would set a default loss amount even in cases where the victim banks did not actually suffer any loss.[163] In recent years, the Department of Justice has pushed for more and more SOC enhancements with the specific purpose of further increasing sentences for economic offenders.[164]

The result of efforts to amend Section 2B1.1 reveals a flaw in the Commission's procedures for internal reform. Although the Commission collects a vast amount of data each year on the application of the Guidelines and conducts an annual process to amend them, those efforts rarely, if ever, look at how the Guidelines can be manipulated by prosecutors to force guilty pleas. The full impact of the Guidelines — absent negotiated reductions — can only truly be tested if defendants go to trial. Thus, fewer trials masks the need for reform, keeping onerous Guidelines in place, which perpetuates prosecutors' leverage to force pleas, in turn decreasing the number of trials, and the cycle endlessly repeats.

DEPARTURE PROVISIONS IN THE SENTENCING GUIDELINES PUT EVEN MORE POWER IN THE HANDS OF PROSECUTORS

Because many judges are reticent to deviate from the Guidelines, qualifying for a reduction or departure that is expressly sanctioned by the Guidelines can be critical for defendants to obtain a fair sentence. Yet, two of the most important provisions of the Guidelines allowing for reductions/downward departures — acceptance of responsibility (§ 3E1.1) and substantial assistance (§ 5K1.1) — can be obtained only if a defendant pleads guilty. In many cases, the only way to secure leniency from the onerous penalties imposed under the Guidelines or statutory mandatory enhancements is to give up the constitutional right to a trial.

Acceptance of Responsibility

Section 3E1.1 of the Guidelines allows for a two-level reduction in a defendant's offense level if the defendant "clearly demonstrates acceptance of responsibility for his offense." Despite the title of this provision, in practice it has nothing to do with the level of remorse a defendant feels or expresses at sentencing. Instead, it is almost uniformly treated as a discount awarded to defendants who plead guilty.

In many cases, the only way to secure leniency from the onerous penalties imposed under the Guidelines or statutory mandatory enhancements is to give up the constitutional right to a trial.

When first formulating the Guidelines in 1987, the Commission considered a proposal for an automatic discount in guilty plea cases but rejected it because a fixed reduction "would not be in keeping with the public's perception of justice."[165] Under the earliest version of Section 3E1.1, a defendant was not automatically entitled to the two-level reduction merely because he pleaded guilty, nor was he necessarily disqualified from the reduction merely because he chose to go to trial.[166] Two years later, however, the Commission added an application note making clear that, except in rare circumstances, the "adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial," even if the judge later determines that the defendant has exhibited genuine remorse. That has remained the rule ever since. So, for all intents and purposes, "acceptance of responsibility" has become synonymous with pleading guilty.

Section 3E1.1 also allows for an additional one-level reduction when a defendant "timely" notifies authorities of his intention to plead guilty and assists the government in the investigation and prosecution of his own misconduct.[167] Colloquially referred to as "super acceptance of responsibility," this additional reduction exists for the express purpose of "permitting the government to avoid preparing for trial" and allowing the government and the court to "allocate their resources efficiently."[168] Although the reduction has been available to defendants since 1992, it was significantly restricted in 2003, with the passage of the Feeney Amendment. Now Section 3E1.1(b)

requires a motion by the government stating that the defendant's plea was timely and that it helped to conserve the costs of preparing for trial. Since then, most Circuits have interpreted the language "upon motion of the government" to vest prosecutors with the exclusive authority to decide who should receive the additional benefit under Section 3E1.1(b).[169] They will only overturn a prosecutor's decision to withhold a supporting motion if there is evidence of unconstitutional motive.[170] Thus, most defendants remain at the mercy of the prosecution and know they must plead quickly to benefit from the additional reduction. This, in turn, discourages transparency and tends to insulate the government from the consequences of failing to identify and disclose exculpatory evidence.

Both versions of the acceptance of responsibility reduction unfairly penalize defendants who go to trial. Even where defendants feel no genuine remorse, they can expect to receive the reduction as long as they are willing to save the government the time and expense of a trial. On the other hand, prosecutors may rely on the acceptance of responsibility provision to argue for disparately higher sentences for defendants who choose to exercise their right to a trial.

While a two- or three-level reduction may not seem significant enough to coerce someone to plead guilty, it can have a substantial impact on a defendant's ultimate sentence. For instance, a defendant with an offense level of 33 ordinarily would face a sentence between 11 and 14 years. But if he timely notifies authorities of his intention to plead guilty and secures a government motion in support of the full three-level reduction, he can reduce his sentence by almost 4 years. Even at the low end of the sentencing table, where only the two-level reduction is available, there is still a significant inducement to plead guilty because it may mean the difference between having to serve jail time or being permitted to serve the sentence in home detention or on probation.[171]

Particularly in cases where the question of guilt turns on a subjective assessment of a defendant's knowledge or intent, it is fundamentally unfair to punish a person for asserting the right to have a jury make that determination.

Although it may not be inherently objectionable to incentivize defendants to plead guilty by offering them a modest benefit, the reduction for acceptance of responsibility does not operate in the abstract. In most cases, some form of prosecutorial bargaining has already resulted in a reduced sentence because of dismissed charges or stipulated facts. Because prosecutors possess immense discretion to influence sentencing outcomes before the Guidelines are even applied, the reduction for guilty pleas that is built into the Guidelines only serves to compound their formidable power to extract guilty pleas.[172]

The other, perhaps unintended, consequence of providing an express sentencing discount for pleading guilty in the Guidelines themselves is that it predisposes prosecutors and judges to overlook instances where defendants are being unfairly punished for exercising their right to a trial. Indeed, the prosecutors in the Kevin Ring case were unashamed in their position that he deserved harsher punishment because "he is the only lobbyist who went to trial and chose not to plead guilty...."[173] Particularly in cases where the question of guilt turns on a subjective assessment of a defendant's knowledge or intent, it is fundamentally unfair to punish a person for asserting the right to have a jury make that determination. There is no reason why a person who genuinely believes he did not knowingly commit a crime cannot sincerely accept responsibility after a jury of his peers renders

James Fields and the Trial Penalty

In 2010, James Fields and Jon Latorella, the chief financial officer and chief executive officer of LocatePlus Holdings Corporation, were both charged with securities fraud, money laundering, and aggravated identity theft. The government offered the defendants the same deal — in exchange for their guilty pleas, it would recommend a sentence of 5 years. The defendants would be prohibited from arguing for a lower sentence. However, if they both pled guilty, the government would allow them to recommend a sentence of not less than 4 years.

Latorella took the deal. But Fields rejected it because he believed that the terms of the plea agreement violated his right to due process. Fields went to trial and was ultimately found guilty.

At sentencing, the prosecutor admitted that "[a]s to core culpability, there is nothing to distinguish Fields from Latorella." Despite that admission, he advocated for a nine-year sentence for Fields — nearly twice what Latorella got in his plea bargain.

In support of the lengthier sentence, the prosecutor protested Fields' vigorous defense of his case, arguing that the 390 docket entries and "scorched-earth litigation" tactics evidenced that Fields had not accepted responsibility for his crimes.

The sentencing judge disagreed, expressing discomfort with the prosecution's arguments because they suggested that the reason Fields should receive a higher sentence was not because he lacked remorse but because he chose to go to trial:

> [I]n my turn, do I say he went to trial, he consumed vast quantities of Canadian forest with his paper in this context, consequently he gets a higher sentence? ... [A]m I engaging in a pretext when I said it is not because he went to trial[,] it is because he lacked remorse...?

The judge ultimately sentenced Fields to the same 5 years as Latorella, rejecting the prosecutor's invitation to equate the choice to go to trial with a failure to accept responsibility:

> There is, of course, embedded in the Sentencing Guidelines a concept of acceptance of responsibility. It is, as I indicated from my perspective, a Faustian bargain made by the Sentencing Commission in recognition of practices that have developed, but frankly I am indifferent to it in making my own judgment about what the proper sentence should be.

judgment. But the Guidelines expressly discourage judges from individually assessing a defendant's level of remorse and instead impose an automatic penalty for not pleading guilty, condoning the notion that the assertion of the constitutional right to a trial imposes an unfair burden on the government.

Those judges who cling to the Guidelines have a ready-made defense when faced with the argument that a trial penalty is being imposed: a harsher sentence is fair because the defendant failed to "accept responsibility." Because the Guidelines sanction this way of thinking, judges can rely on this rote defense and may turn a blind eye to the unfairness of the sentences they are imposing.

Indeed, those judges who cling to the Guidelines have a ready-made defense when faced with the argument that a trial penalty is being imposed: a harsher sentence is fair because the defendant failed to "accept responsibility." Because the Guidelines sanction this way of thinking, judges can rely on this rote defense and may turn a blind eye to the unfairness of the sentences they are imposing.

Substantial Assistance

Another Guideline provision that has a significant impact on inducing guilty pleas is Section 5K1.1, which permits a downward departure from the applicable Guidelines range where a defendant has provided substantial assistance to the government in the investigation or prosecution of another offender.[174] To qualify for this departure, defendants must first admit their own guilt and then provide the prosecution with information about the criminal conduct of their co-conspirators or about other crimes.[175] At least one federal Circuit Court of Appeals has recognized that "obtaining a substantial assistance motion from the government represents a particularly critical point in [the criminal] process" because of the profound effect it can have on a defendant's sentence.[176]

Unlike acceptance of responsibility — which has a fixed benefit — Section 5K1.1 places no limit on how far a defendant's sentence can be reduced in exchange for providing substantial assistance. In 2015, the median departure in 5K1.1 cases was 50.4%. For cases involving certain specific types of crimes, it was much higher. For example, the median departure in fraud and money laundering cases was over 70%. In bribery and civil rights cases it was over 80%.

Prosecutors are incentivized to be extremely lenient with cooperators because the information cooperators provide allows the government to secure more convictions with fewer resources.[178] And, although prosecutors merely make recommendations at sentencing, judges are generally inclined to accept their recommendations because they believe the prosecutors are in the best position to quantify the significance of the cooperators' assistance.[179] Where prosecutors are authorized to cut defendants' sentences by half — or more — there is a powerful inducement for defendants to plead guilty. Prosecutors take full advantage of this incentive; in 2015, 12.4%, or one out of every eight, federal defendants received a departure for substantial assistance.[180]

Not every defendant has the chance to take advantage of the departure, however. Originally, Rule 35 of the Federal Rules of Criminal Procedure allowed defendants to appeal directly to the sentencing judge for leniency and

Annette Trujillo and the Trial Penalty

Annette Trujillo was a legal assistant at a law firm in Florida during the housing boom in the mid-2000s. Shortly after hiring her, Trujillo's employer delegated to her the task of conducting real estate closings. She soon became caught up in a mortgage fraud scheme perpetrated by a group of mortgage brokers, realtors and several straw buyers who used fraudulent loan applications to extract more money from banks than they would have otherwise been prepared to lend. To cover up the scheme, the co-conspirators included false information on the settlement documents regarding how the proceeds of the loans would be disbursed. As the closing agent, Trujillo signed off on the settlement documents.

When the scheme was eventually uncovered, Trujillo was indicted on charges of bank fraud and wire fraud in connection with the two properties for which she had acted as the closing agent. The government also indicted her on a charge of conspiracy, alleging that she had conspired with the other defendants to commit the fraud. Trujillo maintained that she had not intended to defraud anyone and she had not received any financial gain from the fraud. Because she believed she was innocent of conspiracy, she took her case to trial. The jury ultimately returned a guilty verdict on the bank and wire fraud counts but acquitted her of the conspiracy charge.

Trujillo's co-defendants — the masterminds who concocted the scheme, the mortgage brokers who provided false information on the loan applications, and the straw buyers who had allowed their names to be used on the applications — all pled guilty and all received reductions for acceptance of responsibility.

Trujillo was sentenced to 5 years, 5 months, more than double the sentences of the mortgage brokers and straw buyers, who had actually benefitted from the fraud.

Although she had been convicted in connection with only two properties, the prosecution sought to apply a loss amount arising out of five properties, based on evidence of a separate mortgage fraud scheme it had only recently discovered. Trujillo protested the injustice of being held responsible for conduct she had not even been charged with and which she had had no opportunity to contest at trial. But the judge remained unsympathetic. In supporting her ultimate sentence, the judge expressed the view that Trujillo deserved harsher punishment than her co-defendants because she had not accepted responsibility for her crimes.

the judge could give them credit for attempting to cooperate, even if the government chose not to acknowledge their efforts.[181] But, with the advent of the Guidelines, there was a shift in authority. Section 5K1.1 now requires the government to file a motion supporting the departure.[182] A prosecutor's decision to withhold a supporting motion is reviewable only if the defendant can demonstrate that the prosecutor had an unconstitutional motive for doing so.[183] Moreover, prosecutors are usually only willing to file supporting motions in exchange for information that can help them secure additional convictions.[184] Thus, a defendant who wants to receive a substantial assistance departure ordinarily must offer to disclose information that the government does not already have.[185]

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This creates additional pressure for defendants to plead quickly, before they have had much time to consider their options. If defendants wait too long to offer to cooperate, they run the risk that someone else will cooperate before them and the information they have to trade will no longer be of any value to the government.[186]

This creates additional pressure for defendants to plead quickly, before they have had much time to consider their options. If defendants wait too long to offer to cooperate, they run the risk that someone else will cooperate before them and the information they have to trade will no longer be of any value to the government.[186] It also entices defendants to embellish the facts, or even lie, in the hopes of providing new information that will earn them a substantial assistance motion.[187] There is an extensive body of scholarly work discussing the unreliability of cooperator testimony.[188] A study conducted in 1999 concluded that prosecutors are quick to believe cooperators when they offer testimony that will secure additional convictions, but they frequently lack sufficient evidence to corroborate that testimony.[189] Despite widespread concerns about reliability, there may be little opportunity to challenge cooperator testimony in individual cases. Even defendants who take their cases to trial are limited in their ability to impeach cooperating witnesses because they do not always have discovery into discussions between the prosecution and a cooperating witness.[190] For instance, prosecutors are not required to take notes of their meetings with cooperating witnesses, so there may be little available to defense attorneys in the way of written discovery. Moreover, the jury may not be able to assess the witness's motives because they will likely not know the extent of the sentencing reduction the witness is receiving since prosecutors often delay sentencing for cooperating witnesses until after they have testified.[191] Those defendants who are unwilling to risk the harsh consequences of losing at trial may be forced to plead guilty because of false cooperator testimony.[192]

§5K1.1 Substantial Assistance Departure Cases: Degree of Decrease for Offenders in Each Primary Offense Category[177]

PRIMARY OFFENSE	N	Median Sentence in Months	Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	8,084	31	30	50.4
Murder	10	92	194	60.6
Manslaughter	1	—	—	—
Kidnapping/Hostage Taking	3	120	47	40
Sexual Abuse	45	72	60	47.5
Assault	5	48	18	35.3
Robbery	74	42	20	30.7
Arson	21	38	36	53.9
Drugs — Trafficking	4,705	42	41	48.4
Drugs — Communication Facility	36	7	24	85.8
Drugs — Simple Possession	1	—	—	—
Firearms	723	48	36	44.4
Burglary/B&E	2	—	—	—
Auto Theft	11	2	29	80
Larceny	54	8	22	69
Fraud	1,288	12	21	73.5
Embezzlement	16	7	14	67.5
Forgery/Counterfeiting	46	10	11	57.8
Bribery	66	5	21	83.1
Tax	79	0	16	100
Money Laundering	155	12	24	72.2
Racketeering/Extortion	196	24	25	52.6
Gambling/Lottery	13	0	6	100
Civil Rights	6	11	56	86.5
Immigration	241	12	12	45.5
Child Pornography	59	120	72	40
Prison Offenses	9	8	8	33.7
Administration of Justice Offenses	68	0	12	100
Environmental/Wildlife	23	0	18	100
National Defense	24	23	33	58.9
Antitrust	6	15	16	52.3
Food & Drug	9	0	18	100
Other Miscellaneous Offenses	89	0	18	100

Gil Lopez and the Trial Penalty

Gil Lopez was the Chief Accounting Officer of Stanford Financial Group, a company that provided legal and accounting services to a group of entities owned and managed by Allen Stanford. For decades, Allen Stanford had been appropriating credit deposit investments in Stanford International Bank (SIB) for his own personal benefit, using the funds to support the rest of his companies and to bankroll his lavish lifestyle. While Stanford was the overall mastermind of the scheme, it was undisputed that his Chief Financial Officer, James Davis, was the next in line. Davis admitted that he orchestrated the cover-up efforts by falsifying revenue disclosures in SIB's annual reports and bribing government regulators and the company's external auditor.

As the government later conceded, Lopez was completely unaware that Davis had paid bribes to cover up Stanford's scheme. But, in his role as Chief Accounting Officer, he did review drafts of SIB's annual reports before they were made public. So when the fraud was eventually uncovered, Lopez was indicted along with Stanford and Davis.

Davis quickly pled guilty and agreed to testify against Stanford and Lopez in exchange for a 5K1.1 motion from the government. The only person who Lopez could have testified against was Davis himself. Lopez met with the Assistant U.S. Attorney to discuss a plea, but because Davis had gotten there first, he had no information to trade, and no formal plea offer was ever made. He decided instead to take his case to trial, and the jury convicted him, largely based on Davis's testimony.

Davis received a downward departure for his cooperation and was sentenced to five years. Lopez — who was indisputably less culpable than Davis and who gained nothing from the fraud other than his regular salary — was sentenced to 20 years in prison.

When he raised this gross disparity on appeal, the Fifth Circuit brushed it off. Although the panel readily admitted that plea bargaining "often does lead to more lenient sentences for more culpable defendants who choose to cooperate," it expressed no sympathy for defendants like Lopez, who are unwittingly punished in the process. According to the Court, "[t]his is simply the way that cases against multiple co-defendants are often prosecuted."

Lopez was 70 years old when he was sentenced and will likely die in prison.

Probably the most perverse aspect of the substantial assistance departure, however, is that it disproportionately favors the most culpable defendants. Those at the highest levels of a criminal conspiracy are usually the ones who know the most about it and are most valuable to prosecutors.

Probably the most perverse aspect of the substantial assistance departure, however, is that it disproportionately favors the most culpable defendants. Those at the highest levels of a criminal conspiracy are usually the ones who know the most about it and are most valuable to prosecutors. On the other hand, defendants who have had only minimal involvement are unlikely to have much information of value to trade.[193] The Guidelines allow prosecutors complete discretion to decide who qualifies for the departure, and many judges are unwilling to challenge that discretion at sentencing. So it is frequently the least culpable defendants who face the harshest penalties.[194]

STATUTORY MANDATORY MINIMUM SENTENCING ENHANCEMENTS EXACERBATE ALREADY OUT-OF-CONTROL GUIDELINES SENTENCES

Beyond the overreaching Sentencing Guidelines, there are other mechanisms in the federal criminal justice system that create significant barriers for exercising the right to a trial. In certain cases, federal statutes require mandatory enhancements to sentences that judges are required to tack on. But these apply only if the prosecution has first charged the defendant with conduct triggering the enhancement. Thus, prosecutors have yet another tool in many cases to persuade defendants to plead guilty.

§ 924(c) — Stacked Penalties for Carrying a Gun

Prosecutors can use the threat of 18 U.S.C. § 924(c) to prompt defendants to plead guilty. Under this statute, any person who "uses or carries a firearm" or possesses a firearm "in furtherance of" a drug trafficking crime or a crime of violence faces a mandatory additional term of 5 years in prison.[195] This additional term must be served on top of the sentence that applies under the Guidelines for the underlying offense. Judges do not have discretion to make the terms concurrent.[196] Where 924(c) applies, defendants are automatically disqualified from receiving probation.[197]

In addition, for every "second or subsequent" firearms offense, defendants face a 25-year enhancement.[198] Sentences for multiple 924(c) violations are "stacked," meaning that a defendant charged with two 924(c) violations in the same indictment will face 5 additional years for the first violation and then 25 more years on top of that for the second violation.

It is entirely up to prosecutors whether or not to charge an eligible defendant with a violation under 924(c).[199] What's more, if they opt to file the charge and the defendant is convicted, the additional penalty is obligatory and the judge must impose it.

There has been a barrage of criticism for applying the gun enhancement to drug trafficking crimes because it severely ratchets up sentences even for non-violent drug offenders.[200] But even in the context of crimes of violence, 924(c) poses a significant and unwarranted impairment on the free exercise of the right to a trial. The enhancement has the potential to apply in a wide variety of circumstances. "Crimes of violence" under 924(c) extend well beyond the traditional notion of violent crime, which includes offenses like murder, rape, and assault.[201] For a crime to be "violent" for purposes of imposing the gun enhancement, it is not necessary that any individual actually have been injured or even that the defendant threatened to injure someone.[202] There simply needs to be a *risk* that physical force will be used against the person *or property* of another. Under the broad definition of this so-called "residual clause," burglary of an unoccupied home and obstruction of justice may be deemed crimes of violence.[203] The Supreme Court recently overturned a similar definition of "violent felony" in the Armed Career Offender Act (18 U.S.C. § 924(e)) because it was unconstitutionally vague, but lower federal courts have continued to apply the residual clause in 924(c).[204]

Because of their vast discretion in charging, prosecutors can threaten 924(c) enhancements if defendants refuse to plead guilty. Defendants will know that they have no hope of leniency at sentencing because the enhancements are mandatory. Thus, exercising one's right to trial becomes a treacherous route, and the severity of the consequences can easily sway defendants to plead guilty.

The 924(c) enhancement is both vague and overbroad. It goes well beyond addressing the aim of reducing gun violence.[205] For 924(c) to apply, a defendant only has to carry or possess the gun; he need not ever fire or even brandish it. That means that the defendant will face a firearms enhancement even when the gun is unconnected to the violent nature of the crime. In fact, one commentator conducted a study in 2000 revealing that only a minority of cases involving 924(c) convictions were cases where the firearm was actually used.[206]

Despite the overbreadth of 924(c), there is little judges can do to regulate its use by prosecutors. Because of their vast discretion in charging, prosecutors can threaten 924(c) enhancements if defendants refuse to plead guilty. Defendants will know that they have no hope of leniency at sentencing because the enhancements are mandatory. Thus, exercising one's right to trial becomes a treacherous route, and the severity of the consequences can easily sway defendants to plead guilty.

The three strikes rule thus severely punishes defendants for their past conduct without any means to appeal to the sentencing judge for leniency.[209]

Usually, the only way to obtain relief from prosecutorial overreach is to go to trial in the hope that the weaknesses in the government's charges will eventually be revealed. But because the vast majority of defendants never take their cases to trial, there is no telling how many defendants have succumbed to the threats of prosecutors based on improper 924(c) charges.

§ 3559 — Three Strikes And You're Out

Another weapon prosecutors have to coerce guilty pleas is 18 U.S.C. § 3559(c), the "three strikes" rule, which mandates a sentence of life imprisonment *without parole* for any defendant convicted of a violent felony who has previously been convicted of two or more violent felonies or one violent felony and one serious drug offense. Similar to 924(c), a defendant's sentence under the three strikes rule is entirely dependent on the prosecutor, who must file an information notifying the court and the defendant of the prior offenses supporting the enhancement. The government is perfectly free in any case to choose not to seek the enhancement. On the other hand, if they do seek it, the life sentence is mandatory.[207] Judges have no avenue for mitigating the sentence even if they believe the circumstances do not call for such a harsh penalty.[208] The three strikes rule thus severely punishes defendants for their past conduct without any means to appeal to the sentencing judge for leniency.[209]

The federal three strikes rule was adopted in 1994 as part of the Violent Crime Control and Law

Francisco Feliciano and the Trial Penalty

In April 2011, an armed, masked man attempted to rob a bank in Florida, but he abandoned his plan shortly after entering the bank and was driven away from the scene by an accomplice. Ten days later, a similar robbery took place at a nearby bank, involving two-masked men and a third accomplice as the getaway driver. They managed to steal over $10,000 in cash. Although there was evidence that a gun had been used during the first attempted robbery, neither the bank's surveillance footage nor any eyewitnesses identified a gun at the second robbery.

Following an investigation, three men were indicted as the perpetrators of the two robberies: Steven Trubey and Francisco Feliciano were implicated in both robberies, and Christopher Quinn was identified as their accomplice in the second robbery. Quinn eventually pled guilty. Although he admitted he never saw a gun at the second robbery, he claimed that Feliciano had told him he had gun. Based on that scant evidence, the prosecution threatened Feliciano with stacked gun charges for both robberies and a 25-year enhancement under 924(c) unless he agreed to plead guilty. But Feliciano chose to go to trial, believing that medical evidence would exonerate him. As was well-documented (and as Trubey corroborated), Feliciano had been receiving medical treatment for herniated discs and would not have been able to easily vault the counters (twice) like the masked perpetrator at the second robbery had done.

At trial, the prosecution presented no fingerprints, DNA, or other physical evidence linking Feliciano to the crimes. Quinn was the government's key witness and testified that Feliciano told him he had a gun at the second robbery. Trubey, on the other hand, testified that he had helped Feliciano pawn his gun a week earlier, so they used a shoebox with blinking lights disguised as a bomb at the second robbery instead because they had no gun. Despite this evidence contradicting Quinn's testimony, the jury found Feliciano guilty on all charges, including both gun charges, and he was sentenced to 41 years in jail.

Trubey, who admitted to participating in the second robbery, should have faced a similar penalty. But he pled guilty, was indicted for only the first robbery, and was sentenced to 8 ½ years. Quinn was sentenced to 14 years.

When Feliciano appealed the 25-year enhancement, the government initially defended it, arguing that Quinn's testimony was sufficient to support the second gun charge. But a month later (and conspicuously right after the U.S. Attorney for that district retired) the government changed its tune and filed an amended brief conceding that it was obvious Quinn was lying about the gun and admitting there was not sufficient evidence to support the second gun charge.

In reversing Feliciano's sentence, the Eleventh Circuit expressed concerns that the prosecution had decided to file the second gun charge in the first place: "The government clearly knew there were problems with this charge before trial. ... While it is good that the government eventually reached an understanding of the inherent weakness in Count Four, they knew from interviews with Messrs. Trubey and Quinn long before trial that no one saw a gun .... We expect more from United States prosecutors."

Enforcement Act. It followed similar laws in Washington and California that were spurred by public outrage over several high-profile murders committed by convicted felons shortly after they had been released from prison.[210] Proponents of three-strikes laws claim they serve to protect the public from the most dangerous violent criminals by removing them permanently from society.[211] But, like 924(c), the three strikes rule broadly defines "violent felony"; it is not limited to crimes involving serious injury or death. Defendants can face a mandatory life sentence as long as each of their three strikes involves a mere *risk* that physical force will be used.[212] A group of current and former prosecutors who publicly opposed Washington's version of the three-strikes rule provided this hypothetical scenario to illustrate that law's overreach:

> An 18-year old high school senior pushes a classmate down to steal his Michael Jordan $150 sneakers — Strike One; he gets out of jail and shoplifts a jacket from the Bon Marche, pushing aside the clerk as he runs out of the store — Strike Two; he gets out of jail, straightens out, and nine years later gets in a fight in a bar and intentionally hits someone, breaking his nose — criminal behavior, to be sure, but hardly the crime of the century, yet it is Strike Three. He is sent to prison for the rest of his life.[213]

Although harsher penalties may be justified for certain habitual offenders, in most cases imprisonment for life with no opportunity for parole is extreme. The Sentencing Guidelines already contemplate higher sentences for those defendants with a history of criminal conduct.[214] Indeed, the Guidelines consider the defendant's criminal history before calculating the appropriate sentencing range in every case,[215] and they specifically provide for increased sentences for "career offenders" — including those defendants convicted of three or more violent crimes.[216] But at least the Guidelines attempt to tailor sentences for career offenders to their individual conduct and circumstances. The Sentencing Commission recently reported that defendants accused of three or more crimes of violence under the "career offender" Guideline received, on average, a sentence of about 15 years, which, for most defendants, is nowhere near a life sentence.[217] Moreover, the Sentencing Commission has now revised its definition of "crime of violence" to remove the residual clause for crimes that involve a mere risk of physical force.[218] But that vague and overbroad language remains applicable under the three strikes rule.[219] Also, under the career offender Guideline, the judge always retains the authority to depart upward or downward if the circumstances warrant a harsher or more lenient sentence. In contrast, the three strikes rule automatically imposes an arbitrary life sentence that cannot be adjusted under any circumstances.

Even when prosecutors do not believe a life sentence is truly warranted, there is nothing preventing them from threatening to apply the three strikes rule if the defendant insists on going to trial.

Because repeat offenders already face substantial penalties under the Guidelines and other statutory enhancements — likely keeping them in prison well into middle-age — there seems little added benefit to perpetual incarceration. Most violent crime is committed by young men, and recidivism rates in general drop

steadily and significantly after age 25.[220] On the other hand, the expense of incarceration rises precipitously as prisoners age.[221] The three strikes rule thus imposes significant costs on the government by keeping habitual offenders in prison long after they have ceased to be a threat to society.

Recent data published by the Sentencing Commission suggests that, in many cases, even prosecutors do not support the imposition of a life sentence.[222] Nonetheless, the three strikes rule can be a powerful tool for securing guilty pleas. Even when prosecutors do not believe a life sentence is truly warranted, there is nothing preventing them from threatening to apply the three strikes rule if the defendant insists on going to trial. For instance, in the case of Demetrius Derden, the prosecutor included a concession in the plea agreement stating that she would not seek a life sentence under 3559(c) if he pled guilty.[223] At Derden's plea colloquy, both the prosecutor and the presiding judge emphasized that concession. "MS. ALLYN: *You might not have qualified for that anyway*, but regardless the government is saying we're not even to look at that [sic], we're not going to seek that. ... THE COURT: You can't get a life sentence unless the government seeks it. ... So if the government is not seeking a life sentence, you are not going to get a life sentence."[224] The judge later admitted that "[t]hroughout these proceedings, it has never appeared likely that Derden would qualify for a life sentence under § 3559(c)(1)."[225] In fact, one of Derden's prior offenses *by definition* could not qualify as a violent felony under the statute because it was not one of the enumerated offenses and was not punishable by at least 10 years in prison.[226] But nothing prevented the prosecutor from emphasizing that the three strikes rule might apply in order to obtain Derden's guilty plea.

Even in cases where the three strikes rule might arguably apply, the prosecution still retains the upper hand in plea negotiations. All the prosecutor need do is establish that the elements of the previous offenses meet the definition of "violent felony"; the government has no obligation to evaluate the defendant's actual conduct. But if the defendant wants to rebut that argument, *he* must prove with *clear and convincing evidence* that there was no serious threat of harm to any person.[227] Indeed, establishing the absence of a physical injury is often an insurmountable burden because the official records of prior offenses may not contain any evidence regarding injury and the prior offenses may be so old that defendants cannot gather evidence anew.[228] Federal courts have held that placing the burden of proof on defendants in these instances does not violate due process, but at least one Court of Appeals judge disagreed, noting that, in a case involving a 25-year old robbery conviction, "[witnesses to such an ancient event are often gone; physical evidence has almost certainly disappeared."[229] Thus, defendants facing three-strikes charges are at a severe disadvantage in negotiating plea deals and have little hope of contesting the charges if they choose to go to trial.

Thus, defendants facing three-strikes charges are at a severe disadvantage in negotiating plea deals and have little hope of contesting the charges if they choose to go to trial.

Denandias Watson and the Trial Penalty

Denandias Watson grew up in an "environment of great deprivation and neglect." His father was killed by a police officer under the influence of alcohol; he subsequently watched his mother endure years of physical and verbal abuse at the hands of his step-father. As his defense counsel explained, he "hasn't been shown any human kindness by anybody" in his entire life. Dealing with depression, he dropped out of school, turned to alcohol and drugs, and embraced the streets.

On two separate occasions in 1997 and 1998, Watson was arrested for possession with the intent to distribute cocaine. He allegedly assaulted the arresting officers during the first offense. And he was accused of carrying a firearm during both offenses. In each instance, he pled guilty.

Several years later, he was arrested again in connection with an armed robbery at a restaurant. In their pursuit of the robbers, a few of the arresting officers sustained minor injuries.

During plea negotiations for the robbery, the prosecution offered to recommend a sentence of 15 years and a downward departure if Watson cooperated in the investigation of his co-defendants. But they threatened to seek the 3559(c) enhancement if he insisted on going to trial. Watson's two co-conspirators — who also had criminal records — pled guilty and were each sentenced to twenty-two years in prison.

When Watson ultimately chose to exercise his right to a trial, the prosecution followed through on their threat and filed an information seeking to impose a life sentence. Although Watson objected that one of his prior convictions had been obtained through an invalid guilty plea, the sentencing judge did not believe he had the authority to reconsider that conviction even for purposes of sentencing Watson's most recent offense.

Because the judge was bound by the prosecution's decision to seek the three-strikes enhancement, he had no choice but to sentence Watson to life in prison. The only way Watson could have avoided that sentence was to give up his constitutional right to a trial.

JUDICIAL RETICENCE TO MITIGATE UNWARRANTED DISPARITIES

Except where mandatory minimums apply, federal judges do retain a significant amount of discretion over sentencing in individual cases. Indeed, after *Booker* was decided, federal judges were afforded an important tool to aid in the exercise of their newly-granted discretion. Chapter 18, Section 3553(a) of the U.S. Code instructs judges to impose sentences that are "sufficient, but not greater than necessary," to achieve the recognized goals of sentencing. It then lists several factors the sentencing judge should consider, including:

- the nature and circumstances of the offense and the history and characteristics of the defendant;
- the kinds of sentences available;
- the Sentencing Guidelines;
- policy statements of the Sentencing Commission;
- the need to avoid unwarranted sentence disparities among similarly situated defendants; and
- the need to provide restitution to any victims of the offense.[230]

These requirements existed even when the Guidelines were mandatory, but the factors in 3553(a) had little independent significance because judges were compelled to sentence within the Guidelines range. Now that the Guidelines are advisory, one would expect the other 3553(a) factors to have a larger influence over sentences. That has not proved to be the case, however.

In two cases, *Gall* and *Nelson*, the Supreme Court made clear that sentencing judges must consider the 3553(a) factors independent of the Guidelines themselves; they cannot presume that a within-Guidelines sentence is reasonable.[231] But that mandate has little practical significance because appellate courts *are* permitted to affirm within-Guidelines sentences based on the presumption that they are reasonable.[232] As Justice Souter recognized in a dissenting opinion:

> Without a powerful reason to risk reversal on the sentence, a district judge faced with evidence supporting a high subrange Guidelines sentence will ... sentence within the high subrange. This prediction is weakened not a whit by the Court's description of within-Guidelines reasonableness as an "appellate" presumption .... What works on appeal determines what works at trial.[233]

Sentencing judges thus know that within-Guidelines sentences are unlikely to be overturned, and their consideration of the 3553(a) factors is usually a rote recitation without any meaningful explanation of how

the factors have been applied.[234] In addition, the Sentencing Commission's "Statement of Reasons" reporting form encourages judges to ignore their obligations under 3553(a) because, in the vast majority of cases, the form does not require judges to provide any written explanation of sentencing decisions that are within the Guidelines range.[235]

Except where mandatory minimums apply, federal judges do retain a significant amount of discretion over sentencing in individual cases. . . . Now that the Guidelines are advisory, one would expect the other 3553(a) factors to have a larger influence over sentences. That has not proved to be the case, however.

Circuit court decisions since *Gall* and *Nelson* have also watered down judges' discretion under 3553(a). This is particularly true for 3553(a)(6) — which addresses the need to avoid unwarranted disparities among similarly-situated defendants. Some Circuits have effectively written this paragraph out of the statute, reasoning that the Guidelines calculations already address this concern and that asking individual judges to make determinations about unwarranted disparities is impractical and imprecise.[236] Other Circuits have limited the scope of unwarranted disparity challenges by holding that 3553(a)(6) is only concerned with national disparities; judges need not compare the sentences of defendants involved in the same criminal scheme when considering unwarranted disparities.[237]

Courts have allowed outrageous sentencing disparities among co-defendants, even in cases where the nature and circumstances of their offenses is practically identical and the only significant difference is that one defendant insisted on a trial.

Even judges who are generally willing to consider disparity among co-defendants may decide it is irrelevant if one co-defendant goes to trial. According to some judges, the concern about unwarranted disparities does not even apply in this circumstance because a defendant who chooses to go to trial is necessarily differently-situated from his co-defendants who pled guilty.[238] Admittedly, if judges were *required* to impose identical sentences on co-defendants, that would virtually eliminate the incentive to plead guilty in every case. But even a judge who feels compelled to honor the bargained-for sentence in a plea agreement is not prevented from imposing an appropriately proportional sentence on a similarly-situated co-defendant who has gone to trial. A flat-out refusal to consider 3553(a)(6) at all if a defendant goes to trial effectively condones *any* disparity in sentencing among co-defendants, regardless of how extensive the disparity is. Courts have allowed outrageous sentencing disparities among co-defendants, even in cases where the nature and circumstances of their offenses is practically identical and the only significant difference is that one defendant insisted on a trial.

Allmendinger's case is a telling example of the pervasive and pernicious impact of the Guidelines. Although the judge applied a variance of *80 years*, that did Allmendinger little good. He was still going to end up spending

nearly the rest of his life in prison because the sentence under the Guidelines was astronomical. If, instead of using the Guidelines as a baseline, the judge had started with Oncale's sentence — which everyone agreed was sufficient — and moved upward, Allmendinger likely would have received a fairer sentence. In isolation of the Guidelines, it would have been hard for the judge to determine that 40 additional years in prison was "sufficient, but not greater than necessary" to account for the distinctions between Oncale and Allmendinger. But where the presumptive starting point for a sentence is in excess of the entire lifespan of most people, locating a sentence "sufficient, but not greater than necessary" can easily turn into an arbitrary task.[239] In many cases, the excessive pull of the Guidelines prevents judges from meaningfully exercising their discretion under 3553(a).

Allmendinger's case amounts to an endorsement of a 35-year penalty for exercising the right to a trial. But neither the sentencing judge nor the appellate court bothered to concern themselves with the effect that disparity could have on later defendants who are faced with the decision to relinquish their constitutional rights. With outcomes like this, it is little wonder that only 3 out of 100 defendants are willing to risk going to trial.

Christian Allmendinger and the Trial Penalty

In 2004, Christian Allmendinger and Brent Oncale founded a company called A&O to sell bonded life settlement investments — interests in life insurance policies protected by a reinsurance bond. Investors were guaranteed a pay-out based on the life insurance policies, which would remain in force as long as the premiums on the life insurance policies were current.

In marketing their products to investors, the partners made false statements about the size and staff of A&O and their record of earning returns. They also mispresented the use of invested funds. Instead of being segregated in a separate account and used solely to pay premiums, the funds were comingled with A&O's general operating account. The partners used that account to pay millions of dollars to themselves.

Following a series of regulatory inquiries, the partners agreed to sell A&O to another company "Blue Dymond." Unbeknownst to Allmendinger, Blue Dymond was actually a shell company created by Oncale, who intended to continue running the business after it was sold. In late 2007 — long after Allmendinger left the business — Oncale and another associate appropriated $11 million of investor funds from the company and ceased making premium payments, causing the life insurance policies to lapse and forcing the company into bankruptcy. A&O's investors lost over $100 million.

Allmendinger and Oncale were both indicted. Oncale pled guilty as part of a cooperation agreement and was sentenced to 10 years in prison (later reduced to 5 years after testifying against Allmendinger). Allmendinger chose to go to trial, was convicted, and faced a sentence of 125 years in prison under the Guidelines — a shocking disparity given the similarity between the two partners.

There were only two material differences between them. While Oncale stayed on and eventually participated in the decision to cease making premium payments, ultimately causing investors' losses, Allmendinger left the business at a time when premium payments were current on a sufficient number of policies to pay off A&O's investors. On the other hand, while Oncale immediately offered to cooperate with investigators, Allmendinger initially hid some of the proceeds of the fraud after he was indicted and initially contemplated flight but eventually appeared for trial. In all other respects, the two original partners were identically culpable.

The judge agreed to grant Allmendinger a variance of 80 years, that still left him with 45 years — 9 times higher than Oncale's sentence. In supporting that sentence, the judge referred to Allmendinger's crimes as "heinous." He did not explain why Allmendinger deserved such a harsh sentence compared to his partner.

On appeal, the Fourth Circuit rejected Allmendinger's argument of unwarranted disparity, finding that the sentencing judge's explanation was adequate to meet the requirements of 3553(a). Allmendinger was 39 when he was sentenced. His 45-year sentence will keep in him in prison for nearly the rest of his life.

PRINCIPLES AND RECOMMENDATIONS

Principles

1. The trial penalty — the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial — undermines the integrity of the criminal justice system.

2. Trials protect the presumption of innocence and encourage the government to charge cases based only on sufficient, legally-obtained evidence to satisfy the reasonable doubt standard.

3. The decline in the frequency of trials impacts the quality of prosecutorial decision-making, defense advocacy, and judicial supervision.

4. The decline in the frequency of trials tends to encourage longer sentences thereby contributing to mass incarceration, including mass incarceration of people of color and the poor.

5. The decline in the frequency of trials erodes the oversight function of the jury thereby muting the voice of lay people in the criminal justice system and also undercuts the role of appellate courts in supervising the work of trial courts.

6. The trial penalty creates a coercive effect which profoundly undermines the integrity of the plea bargaining process.

7. A reduction for accepting responsibility through a guilty plea is appropriate. The same or similar reduction should be available after trial if an individual convicted at trial sincerely accepts responsibility after trial regardless of whether the accused testified at trial or not.

8. No one should be punished for exercising her or his rights, including seeking pre-trial release and discovery, investigating a case, and filing and litigation of pre-trial statutory and constitutional motions.

9. Mandatory minimum sentences undermine the integrity of plea bargaining (by creating a coercive effect) and the integrity of the sentencing process (by imposing categorical minimums rather than case-by-case evaluation). At the very least, safety valve provisions should be enacted to permit a judge to sentence below mandatory minimum sentences if justice dictates.

10. If mandatory minimums are not abolished, the government should not be permitted to use mandatory minimum sentences to retaliate against an accused person's decision to exercise her or his constitutional or statutory rights. That is, the state should not be allowed to file charges carrying mandatory minimum sentences in response to a defendant rejecting a plea offer or invoking her or his rights including the right to trial or to challenge unconstitutional government action.

Recommendations

1. Relevant Conduct: USSG §1B1.3 should be amended to prohibit the use of evidence from acquitted conduct as relevant conduct.

2. Acceptance of Responsibility: USSG §3E1.1(b) should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial.

3. Obstruction of Justice: USSG §3C1.1 should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Application Note 2 should also be clarified in this respect.

4 Mandatory Minimum Sentencing: Mandatory minimum sentencing statutes should be repealed or subject to a judicial "safety valve" in cases where the court determines that individual circumstances justify a sentence below the mandatory minimum.

5. Full Discovery: Defendants should have full access to all relevant evidence, including any exculpatory information, prior to entry of any guilty plea.

6. Remove the Litigation Penalty: The government should not be permitted to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty. This includes an accused person's decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions.

7. Limited Judicial Oversight of Plea-Bargaining: There should be mandatory plea-bargaining conferences in every criminal case supervised by a judicial officer who is not presiding over the case unless the defendant, fully informed, waives the opportunity. These conferences would require the participation of the parties but could not require either party to make or accept an offer. In some cases, one or more parties might elect not to participate beyond attendance.

8. Judicial "Second Looks": After substantial service of a sentence, courts should review lengthy sentences to ensure that sentences are proportionate over time.

9. Proportionality Between Pre-Trial and Post-Trial Sentencing: Procedures should be adopted to ensure that the accused are not punished with substantially longer sentences for exercising their right to trial, or its related rights. Concretely, post-trial sentences should not increase by more than the following: denial of acceptance of responsibility (if appropriate); obstruction of justice (if proved); and the development of facts unknown before trial.

10. Amendment to 18 U.S.C. § 3553(a)(6): In assessing whether a post-trial sentencing disparity is unwarranted, the sentencing court shall consider the sentence imposed for similarly situated defendants (including, if available, a defendant who pled guilty in the same matter) and the defendant who was convicted after trial. The sentencing court shall consider whether any differential between similarly situated defendants would undermine the Sixth Amendment right to trial.

CONCLUSION

In closing, it is important to reiterate what is at stake if the trial penalty continues to hold sway over defendants' free exercise of their Constitutional rights. A system that coerces even one innocent person to plead guilty should not be condoned. Nor should the rights of the accused to hold the government to its burden of proof be impeded by fear of severe retribution. Unless the freedom of choice to exercise the right to a jury trial is fully restored, a great hypocrisy will endure — one that espouses lofty principles of criminal justice but insists that the system for administering criminal justice cannot afford to honor those principles except in an insignificant percentage of cases.

NACDL readily acknowledges the difficulty of fashioning a sentencing system that allows for individualized sentences tempered by concerns for national parity, and then administering that system in a just and efficient way. This study should not be viewed as a disparagement of the federal prosecutorial bar, the federal judiciary, or the Sentencing Commission as a whole. However, as an organization dedicated to promoting civil rights and liberties that are fundamental to democracy, NACDL is gravely concerned that the current system unfairly infringes on one of the most precious Constitutional rights.

As the years go on, fewer and fewer defendants are choosing to take advantage of the right to a trial. When the risks of exercising this crucial human right are too great for all but 3% of federal criminal defendants, the system is in need of repair.

ENDNOTES

1. *See* The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000).

2. In 1970, for example, 15 percent of federal cases went to trial. Hindelang Criminal Justice Research Ctr., Univ. at Albany, Sourcebook of Criminal Justice Statistics Online tbl.5.22.2010 (Kathleen Maguire ed.), *available at* **http://www.albany.edu/sourcebook/pdf/t5222010.pdf**. But this percentage started rapidly declining in the ensuing decades, to a low of 2.9 percent in 2015. U.S. Sentencing Commission, Overview of Federal Criminal Cases Fiscal Year 2015, at 4 (2016), *available at* **http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf**. The state statistics duplicate the federal pattern, and, indeed, indicate that less than two percent of state cases proceed to trial today. Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 Nw. U. L. Rev. 1429, 1432 (2017). At the same time, and hardly coincidentally, the number of prosecutions rose. In 1970, according the Hindelang Criminal Research Ctr. Sourcebook on Criminal Justice Statistics, federal prosecutors filed charges against 36,356 defendants. By 2011, this number had almost tripled to a peak of 102,617 filings. John Gramlich, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, Pew Research Center, Mar. 28, 2017, *available at* **http://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades/**. It has since declined to 77,152. *Id.*

3. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

4. *See, e.g., infra* notes 14, 15, 29 & 30.

5. The most important driver of pleas is the government's leverage in plea bargaining. *See* John Pfaff, Locked In: How Our Fractured Criminal Justice System Creates Mass Incarceration (2017) [hereinafter Locked In]; Jed. S. Rakoff, *Why Do Innocent People Plead Guilty*, N. Y. Rev. of Books, Nov. 20, 2014, *available at* **http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/**. Harsh new sentencing statutes and guidelines introduced in the 70s, 80s, and 90s permitted prosecutors to threaten greatly enhanced sentences if the defendant was convicted at trial. These sentences were "largely on the books for bargaining purposes," as the Supreme Court finally acknowledged in 2012. *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (*quoting* Barkow). *See also* Gary Fields & John Emschwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J., July 23, 2011, *available at* **https://www.wsj.com/articles/SB10001424052702304319804576389601079728920**.

6. The government can further up the ante by offering to withdraw, or threatening to file, charges carrying mandatory minimum penalties, or penalties that can be enhanced based on the defendant's prior criminal record. In fact, one judge notes that prosecutors' use of prior felony statements to enhance a defendant's sentence "have played a key role in helping to place the federal criminal trial on the endangered species list." *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (2013) (Gleeson, J.).

7. *See, e.g.*, Joel Rudin, *Disciplining Errant Prosecutors*, 80 Fordham L. Rev. 537 (2011); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 Wis. L. Rev. 291, 327-31 (2006).

8. *Id.*.

9. *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

10. *See* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 Yale L.J. 2578 (2013).

11. Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. Times, Aug. 7, 2016, *available at* **https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0**.

12. *Id.*

13. Walter Dellinger, *Supreme Court Breakfast Table*, Slate.com, June 25, 2014, *available at* **http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_roundup_does_today_s_cellphone_decision_mean_the_court_like.html**.

14. **https://www.innocenceproject.org/dna-exonerations-in-the-united-states/** (last visited Feb. 8, 2018).

15. **http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P** (last visited Feb. 8, 2017).

16. *See United States v. Polizzi*, 549 F. Supp. 2d 308, 404-32 (E.D.N.Y. 2008) (Weinstein, J.) (describing history of jury nullification), vacated sub nom., 564 F.3d 142 (2d Cir. 2009).

17. *See* **https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29** (last visited Feb. 8, 2018).

18. United States Sentencing Commission, 2016 Sourcebook of Federal Sentencing Statistics, Figure C, *available at* **https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/FigureC.pdf** & United States Sentencing Commission, 2017 Sourcebook of Federal Sentencing Statistics, Figure C, *available at* **https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/FigureC.pdf**. *See also* Statistical Tables for the Federal Judiciary — June 2016. Table D-4, Criminal Defendants Terminated by Type of Disposition & Offense, *available at* **http://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2016/06/30**. This figure includes defendants who were acquitted after trial. It does not include those whose charges were dismissed by means other than acquittal.

19. Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Times, Nov. 20, 2014.

20. Suja A. Thomas, The Missing American Jury 50 (2016) (quoting John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, Harv. J.L. & Pub. Pol'y, 119, 125 (1992)). *See also* Chief Justice Burger's majority opinion in *Santobello v. New York*, 404 U.S. 257, 260 (1970).

21. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

22. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

23. *Crawford v. Washington*, 541 U.S. 36 (2004).

24. *Griffin v. California*, 380 U.S. 609 (1965).

25. *Cage v. Louisiana*, 498 U.S. 39 (1990).

26. *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (holding that defendants who plead guilty do not have a constitutional right to obtain impeachment evidence from prosecution prior to entering plea: "[T]he Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor."); *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010) (explaining that right to access exculpatory evidence "is a *trial* right" not available to defendants who plead guilty). Almost invariably, federal prosecutors will require, as a condition of the plea agreement, that the defendant waive the right to file pre-trial motions to suppress and the right to appeal.

27. *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, Human Rights Watch (2013).

28. These calculations are based on data from the United States Sentencing Commission's datafiles for individual offenders, *available at* **http://www.ussc.gov/research/datafiles/commission-datafiles**. The calculations exclude death sentences (which are beyond the datafiles' scope), 144 sentences of life in prison, and 2 cases where an unspecified term of imprisonment was imposed. Those sentences are excluded from this analysis because they do not meaningfully lend themselves to a comparison of sentences on a scale of years. Because a life sentence is far more likely to be imposed post-trial than post-plea, the average discrepancy is in all likelihood greater than what has been calculated.

29. Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 Utah L. Rev. 51, 95 (2012) ("At some point, the sentencing differential becomes so large that it destroys the defendant's ability to act freely and decide in a rational manner whether to accept or reject the government's offer.").

30. Dervan, 2012 Utah L. Rev. at 85. *See also* Donald A. Dripps, *Guilt, Innocence,* & *Due Process of Plea Bargaining*, 57 Wm. & Mary L. Rev. 1343, 1360-63 (2016).

31. **http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P** (last visited Feb. 8, 2017).

32. **http://www.innocenceproject.org/cases/marcellius-bradford/** (last visited Feb. 8, 2017).

33. **http://www.innocenceproject.org/cases/michael-marshall/** (last visited Feb. 8, 2017).

34. **http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4471** (last visited Feb. 8, 2017).

35. **http://www.innocenceproject.org/cases/james-ochoa/** (last visited Feb. 8, 2017).

36. Thomas, *supra* note 20, at 43-48 (describing how the jury's original power was transferred "to the very parts of government that that jury was intended to check").

37. Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMP. L. STUDIES 973, 974 (2004) ("In its political aspect, the jury is a 'republican' body that 'places the real direction of society in the hands of the governed.' It is drawn from the community at large and speaks with a voice unmediated by either a political appointment process or a requirement of professional training. The jury is the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system.").

38. CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (2014).

39. *See also* Dervan, *supra* note 29, at 59-61 (describing meteoric rise in plea bargaining as means of settling criminal disputes which was in part in response to "drive to create new criminal laws, a phenomenon that only added to the courts' growing caseloads"). *See also* Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J. OF L., ECON. & PLCY. 645, 649 (2011) (noting that number of federal criminal cases concluding in guilty pleas rose sharply from 50% in the early 1900s to 90% in 1925).

40. *See generally* Dervan, *supra* note 29, at 65-76.

41. *Walker v. Johnston*, 312 U.S. 275, 279-86 (1941).

42. *United States v. Jackson*, 390 U.S. 570, 572 (1968).

43. *Id.* at 583.

44. *Id.* ("Thus the fact that the [statute] tends to discourage defendants from insisting on their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the [statute] does so involuntarily. The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate the constitutional infirmity in the capital punishment provision of the [statute].").

45. Dervan, *supra* note 29, at 58-76, 76 (2012) (citing *Machibroda v. United States*, 368 U.S. 487 (1962) (if defendant's allegations were true that prosecutor had threatened to bring additional charges if defendant did not cooperate, then defendant "is entitled to have his sentence vacated"); *Lynum v. Illinois*, 372 U.S. 528 (1963) (striking defendant's confession as a statement made after threats of punishment and promises of leniency)).

46. *Brady v. United States*, 397 U.S. 742, 751 (1970). This case should not be confused with the better-known case of *Brady v. Maryland*, 373 U.S. 83 (1963), where the Supreme Court held that the prosecution is required to turn over evidence to the defendant that could help prove his or her innocence.

47. *Parker v. North Carolina*, 397 U.S. 790, 795 (1970).

48. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). In *Bordenkircher*, the defendant was charged with uttering a single forged check in the amount of $88.30, an offense that carried a term of two to ten years in prison. The prosecutor offered to recommend a sentence of five years if the defendant pled guilty. But if the defendant did not plead guilty and "save the court the inconvenience and necessity of a trial," the prosecutor would return to the grand jury to seek an indictment under a Habitual Criminal Act that would subject the defendant to a mandatory sentence of life imprisonment. The defendant rejected the plea and the prosecutor obtained the indictment under the Habitual Criminal Act. After the defendant was found guilty at trial, he was sentenced to life in prison. The Court rejected the defendant's argument that, by making good on his threat to seek a more serious charge carrying a substantially greater sentence, the prosecutor had violated the Constitution's Due Process Clause. 434 U.S. at 365.

49. *Bordenkircher v. Hayes*, 434 U.S. at 364 (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

50. Dervan, *supra* note 29, at 56, 81-82 (describing *Brady* as a "great compromise" necessitated by strains on the criminal justice system resulting from additional rights afforded to defendants under due process jurisprudence in the 1960s and ever-increasing numbers of criminal cases).

51. 28 U.S.C. § 994(a)(1). The Sentencing Commission is an independent commission of the judicial branch of the federal government, and consists of seven voting members, appointed by the President with the advice and consent of the Senate. 28 U.S.C. § 991(a). At least three of the members must be federal judges, and no more than four may be members of the same political party. *Id.* The Attorney-General or his/her designee serves as an ex officio, non-voting member of the Commission. *Id.* Each Commissioner serves for a term of six years.

52. These circumstances include, among other things, the provision of "substantial assistance" to the government in the prosecution of other defendants or crimes (§ 5K1.1) and the fact that a defendant was operating under coercion or duress (§5K2.12). *See also generally* 2016 Guidelines Manual, Chapter 5, Part K.

53. "Relevant conduct" for purposes of calculating the offense level is not limited to conduct that the defendant actually engaged in himself. It can also include the conduct of others involved in the same criminal scheme, as long as the conduct was "reasonably foreseeable" in connection with "jointly undertaken criminal activity." Guidelines Section 1B1.3. This definition of "jointly undertaken criminal activity" was recently amended in 2015. But the Commission explained that it was "not intended as a substantive change in policy." *See* Amendments submitted to Congress April 30, 2015, at 15, *available at* **http://www.ussc.gov/guidelines/amendments/reader-friendly-version-amendments-submitted-congress-april-30-2015-effective-november-1-2015**.

54. The most recent version of the Sentencing Table is available at **http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.pdf**.

55. Nancy Gertner, Bruce Brower & Paul Shechtman, *'Why the Innocent Plead Guilty': An Exchange*, N.Y. Times, Jan. 8, 2015.

56. *Gall v. United States*, 128 S. Ct. 586, 596 (2007).

57. *Beckles v. United States*, 580 U.S. __ (Mar. 6, 2017) (Sotomayor, J., concurring).

58. *See id.*; United States Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Figure G, *available at* **https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureG.pdf**. The Sentencing Commission reports that nearly 50 percent of sentences are within the Guidelines range, but the "below-range" classification is misleading because more than 40 percent of those sentences are the result of downward departures expressly recognized by the Guidelines. So the percentage of cases where judges choose to exercise their discretion to depart from the Guidelines is actually much lower than 50 percent.

    See also Frank O. Bowman, III, '*Loss' Revisited: A Guarded Defense of the Centerpiece of the Federal Economic Crime Sentencing Guideline*, 82 Mo. L. Rev. 1, 3 (2017) ("Critical to any discussion of the post-*Booker* era is the understanding that the Guidelines, theoretically advisory though they may be, retain a powerful effect on the sentences defendants actually receive. Just under half of all sentences are still imposed within the judicially calculated guideline range, and most sentences imposed outside the applicable range remain fairly close to that range.") (citing Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 Houston L. Rev. 1227, 1244 -50) (2014)). *See also Rita v. United States*, 551 U.S. 338 (2007) (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continue to treat the Guidelines as virtually mandatory after our decision in *Booker*.").

59. *Beckles v. United States*, 580 U.S. __ (Mar. 6, 2017).

60. Fed. R. Crim. P. 11(c)(1)(a).

61. Fed. R. Crim. P. 11(c)(1)(b).

62. Fed. R. Crim. P. 11(c)(1)(c).

63. *Bordenkircher*, 434 U.S. at 365.

64. Multiple states have explicitly condoned participation by judges in the plea bargaining process, while others have allowed it without comment. *See* Risha Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 Ohio St. L.J. 566, 577-79 (2015).

65. *See* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 Wm. & Mary L. Rev. 1225, 1273 (2016) ("Judges should be concerned with little more than whether a defendant had competent legal assistance and had not '*misunderstood the choices* that were placed before him;' constitutional law has almost nothing to say about whether choices the state creates for defendants are fair or coercive."); Stephanos Bibas, *Designing Plea Bargaining from the Ground up: Accuracy and Fairness without Trials as Backstops*, 57 Wm. & Mary L. Rev. 1055, 1074 (2016) ("Rules of criminal procedure require judges to provide defendants with a laundry list of procedural rights at plea colloquies, resulting in a near-monologue interrupted only by the defendant's perfunctory 'Yes' to each question. This information comes too late in the process to make a difference; by the time of the plea colloquy, the plea is *a fait accompli*."). *See also id.* at 1059 (noting that judges "may require only bare-bones allocution of factual and legal guilt, and do not have to speculate about the odds of conviction or the collateral consequences.").

66. Rakoff, *supra* note 19.

67. *See* notes 93-239, *infra*, and accompanying text.

68. There is no judicial scrutiny of the prosecution's selection of charges. *See Bordenkircher v. Hayes*, 434 U.S. at 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). As one commentator has noted, "Assuming the prosecutor has a legal right of plenary discretion, it then subordinates the defendant's rights to the tactical exercise of that discretion." Dripps, *supra* note 30, at 1370.

69. H. Mitchell Caldwell, *Coercive Plea Bargaining*, 61 Catholic U. L. Rev. 63, 83 n.147 (2011). Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 Hastings Const. L.Q. 561, 587 (Apr. 10, 2014) ("A prosecutor can now routinely decide whether to charge the same act as a misdemeanor or a felony; whether to add an enhancement . . .; whether to add a prior conviction; or whether to allege the offense happened 'in a school zone' or another location that will increase the potential punishment. Adding charges, enhancements, or prior convictions can substantially increase the severity of a sentence."). Although the U.S. Attorneys' Manual instructs prosecutors not to file charges simply to exert leverage to induce a plea, it also instructs them to "seek a plea to the most serious offense that is consistent with the nature and full extent of the defendant's conduct and likely to result in a sustainable conviction." U.S. Attorneys' Manual § 9-27.000, *available at* **https://www.justice.gov/usam/united-states-attorneys-manual**. *See also* Mary Patrice Brown and Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1077 (2006) (DOJ policy, reflected in various memoranda issued by attorneys general from Richard Thornburgh to John Ashcroft providing guidance on plea bargaining, [is/has been] to require federal prosecutors to charge and pursue the most serious, readily provable offense(s)).

70. Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 Int'l Crim. Justice Rev. 1, 27 (2002) ("Apart from filing multiple charges, another powerful weapon available to prosecutors is charging defendants under penalty-enhancing statutes."). *See also United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004) (drug defendant charged with twenty counts, including five § 924(c) counts, after rejecting a plea offer to plead guilty to a drug distribution count and one § 924(c) count; "the government made clear to Mr. Angelos that if he rejected the offer, the government would obtain a new superseding indictment adding several § 924(c) counts").

71. Caldwell, *supra* note 69, at 85.

72. *Id.* at 77; Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, at 2 (Bureau of Justice Assistance, U.S. Dep't of Justice 2011) ("Overall, the majority of evidence illustrates that those who accept a plea are likely to receive a lighter sentence compared with those who opt for a trial. This disparity exists because prosecutors are granted wide discretion when reducing charges."), *available at* **https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf**.

73. Indictment, *U.S. v. Fastow*, Cr. No. H-03- (S.D. Tex. Apr. 30, 2003), *available at* **http://news.findlaw.com/wsj/docs/enron/usleafstw43003ind.pdf**; Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1, 16 n.91 (2013) ("Given an alleged loss amount of $17 million and more than fifty victims, Fastow, who had no prior criminal record, faced a sentencing range of 97-121 months.").

74. *Lea Fastow Plea Deal Scrapped*, CNNMoney (Apr. 7, 2004, 6:06 p.m.), *available at* **http://money.cnn.com/2004/04/07/news/midcaps/enron_fastow/**.

75. *Lea Fastow Pleads — Who's Next?* CNNMoney (May 6, 2004, 5:46 p.m.), *available at* **http://money.cnn.com/2004/05/06/news/midcaps/enron_lfastow/**.

76. Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 136 (1998) ("Plea bargaining that takes the form of 'fact bargaining' under a regime of mandatory sentencing guidelines is, for all intents and purposes, *sentence* bargaining.").

77. Fed. R. Crim. P. 11(c)(3)(A).

78. Probation Officers' Survey, 8 Fed'l Sent. Rep. 303, 303 (1996) ("[I]n most districts the Probation Officer prepares the Offense Conduct section of the presentence report with information supplied by the government."); Felicia Sarner, '*Fact Bargaining*' *Under the Sentencing Guidelines: The Role of The Probation Department*, 8 Fed. Sent'g Rep. 328, 329 (1996) (arguing that the Probation Office has a pervasive law enforcement bias; "The prosecutor's version [of the facts] tends to be adopted in its entirety, almost without exception."); Stith & Cabranes, *supra* note 76, at 138-39 ("The description of the offense in most presentence reports in most districts is prepared largely or exclusively on the basis of information provided by the prosecutor.").

79. Brown & Bunnell, *supra* note 69, at 1068-70.

80. Probation Officers' Survey, *supra* note 78, at 304 ("[W]hile courts do weigh both sides and often hold hearings, they almost universally defer to the plea agreement, especially when it is more favorable to the defendant than the presentence report.").

81. Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 Cardozo L. Rev. 2199, 2235-2236 (2014) ("With the guidelines, a plethora of facts are specifically relevant to increase and decrease sentencing recommendations. And these fact-based modifications reach much farther than statutory offense enhancements. In essence, fact bargaining here represents more a form of sentence bargaining than plea bargaining because the relevant facts are usually external to the elements of the specific offense(s) of conviction.").

82. *See, e.g.*, U.S. Attorneys' Manual § 9-27.430, *supra* note 69 ("[T]he Department's policy is only to stipulate to facts that accurately reflect the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue."); Memorandum from Attorney General Richard Thornburgh on Plea Policy for Federal Prosecutors: Plea Bargaining Under the Sentencing Reform Act (1989) ("The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue."), *available at* **https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/useful_reports/thornburgh_memos_3.13.89_and_6.16.89.pdf**; Memorandum from Attorney General John Ashcroft on Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals 2 (July 28, 2003) ("If readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office."), *available at* **https://www.justice.gov/sites/default/files/ag/legacy/2009/03/20/ag-072803a.pdf**.

83. Sonja B. Starr and M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 12 (2013) ("Plea agreements usually include factual stipulations, and, even though DOJ has long directed prosecutors not to bargain over these facts, many studies have documented the persistence of fact-bargaining."). A 1996 survey of probation officers suggested a widespread perception that fact bargaining occurred regularly and that the stipulated facts in a plea agreement often were not accurate or complete. Probation Officers' Survey, *supra* note 78, at 303.

84. Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. Rev. 871 (2010).

85. This waiver implicates defendants' due process rights as set forth in *Brady v. Maryland*, 373 U.S. 83. This practice effectively encourages prosecutors to withhold exculpatory evidence during the plea bargaining process. *See also Alvarez v. City of Brownsville*, 860 F.3d 799 (5th Cir. 2017), rehearing en banc docketed, No. 16-40772 (5th Cir. Nov. 2, 2017) (addressing the question, via a § 1983 action, of whether under the U.S. Constitution a prosecutor may withhold proof of innocence while a defendant pleads guilty).

86. *See* 18 U.S.C. § 3553.

87. *See* Memorandum in Support of Motion by Defendant James Fields for a Rule 11 Hearing, Notice of Acceptance of Terms of Plea Offer, and Limited Objection Based on 18 U.S.C. § 3553(a)(6) and the Due Process Clause in *United States v. Latorella and Fields*, No. 10-cv-10388-DPW (D. Mass. Mar. 21, 2012).

88. *See* Government's Memorandum in Response to Defendant James Fields's Motion for a Rule 11 Hearing in *United States v. Latorella and Fields*, No. 10-cv-10388-DPW (D. Mass. Mar. 21, 2012), at 4.

89. National Association of Criminal Defense Lawyers Ethics Advisory Committee Formal Op. No. 12-02 (2012), *available at* **https://www.nacdl.org/ethicsopinions/12-02/**; *United States v. Kentucky Bar Association*, 439 S.W.3d 136 (Ky. Aug. 21, 2014); Press Release, Department of Justice, Attorney General Holder Announces New Policy to Enhance Justice Department's Commitment to Support Defendants' Right to Counsel (Oct. 14, 2014), *available at* **http://www.justice.gov/opa/pr/attorney-general-holder-announces-new-policy-enhance-justice-departments-commitment-suppoet**.

90. *See Class v. United States,* 2018 WL 987347, *3, ___ S.Ct. __ (U.S. Feb. 21, 2018) ("...express waivers included...various rights to request or receive information concerning the investigation and prosecution of his criminal case."). *See also* Tim Cushing, *Court Tells Government Sticking FOIA Waivers in Plea Agreements Is Probably a Bad Idea*, techdirt, Aug. 11, 2017, *available at* **https://www.techdirt.com/articles/20170805/10120837932/court-tells-government-sticking-foia-waivers-plea-agreements-is-probably-bad-idea.shtml**.

91. *See* Darryl K. Brown, *supra* note 65, at 1274.

92. Jenn Rolnick Borchetta & Alice Fontier, *When Race Tips the Scales in Plea Bargaining: New Research Finds That Prosecutors Give White Defendants Better Deals Than Black Defendants*, Slate.com, Oct. 23, 2017.

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

94. *See* Darryl K. Brown, *supra* note 65, at 1275.

95. *See, e.g.*, *United States v. Diaz*, No. 11-CR-00821-2 (JG), 2013 U.S. Dist. LEXIS 11386, at *94 & n.164 (E.D.N.Y. 2013) (citing numerous studies disputing notion that adherence to Guidelines would create greater parity among sentences).

96. *See Kimbrough v. United States*, 552 U.S. 85, 107-108 (2007).

97. Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 Fed. Sent'g Rep. 6, 7 (2013).

98. *Beckles v. United States*, 580 U.S. __ (Mar. 6, 2017) (Sotomayor, J., concurring).

99. Jillian Hewitt, Note, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 Yale L.J. 1018, 1022 (2016) (noting that there is a "significant body of scholarship" suggesting judges are predisposed to anchor their sentences to the Guidelines range because they are required to begin their analysis with the Guidelines) (citing 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, 492-93 (2014); Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 Yale L.J. 426, 439-41 (2011)).

100. Rakoff, *supra* note 97, at 8. *See also Rita v. United States*, 551 U.S. 338 (2007) (holding that appellate courts may presume that within-Guidelines sentences are reasonable).

101. *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) (Rakoff, J.) (rejecting Guidelines sentence of life imprisonment and imposing sentence of three and half years).

102. *United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008) (Block, J.) (rejecting Guidelines sentence of 360 months to life and imposing sentence of 5 years).

103. *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (Underhill, J., concurring in ruling reversing life sentence).

104. *See* Todd K. Lester, Jeffrey B. Jenson & Matthew P. Diehr, *Federal Sentencing For Economic Crimes — Are We There Yet?*, 1 Investigations Q. 11 (2014) ("white collar criminal defendants are particularly incented to enter plea agreements because of the draconian penalties resulting from the overemphasis on loss as a component in sentencing.").

105. *See* Alan Ellis, John R. Steer, & Mark H. Allenbaugh, *At a 'Loss' for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 35 (2011) (noting that Section 2B1.1 applies to more than 300 federal criminal statutes, which is far more than any other guideline).

106. *See* United States Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Table 17, *available at* **http://www.ussc.gov/research/sourcebook-2015**. In 2015, only two other guidelines were applied more frequently: Section 2D1.1 (drug crimes) represented 29.1 percent and Section 2L1.2 (immigration) represented 21.7 percent. *Id.* Section 2B1.1 has consistently been one of the most frequently applied guidelines for over 15 years.

    Note that these figures reflect percentages of all *measured* cases. As the 2015 Sourcebook indicates, 6,381 cases were excluded from Table 17's calculations because there was incomplete information regarding which guidelines were applied in those cases.

107. *See* § 2B1.1(b)(1).

108. *See* Testimony of James E. Felman, on behalf of the American Bar Association, before the United States Sentencing Commission for the hearing on Proposed Amendments to the Federal Sentencing Guidelines regarding the Dodd-Frank Act and the Patient Protection and Affordable Care Act, Feb. 16, 2011, at 13 (arguing that reliance on loss to drive sentencing "is simply out of control" because amount of loss in 1987 could increase sentence only five-fold, and now it can increase it 40-fold), *available at* **http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110216/Testimony_ABA_%20Felman.pdf**.

109. *See* Ellis, Steer & Allenbaugh, *supra* note 105, at 36-37 (explaining that, because of adjustments to loss table, sentence for offense involving loss of over $20 million effectively tripled between 1987 and 2003); Frank O. Bowman, III, *Damp Squib: The Disappointing Denouement of the Sentencing Commission's Economic Crime Project (And What They Should Do Now)*, 27 Fed. Sent'g Rep. 270, 272 (2015) (describing historical adjustments to loss table and noting that "the sentencing effect of an $80 million loss in 1989 was more than doubled by the 2001 guidelines").

110. Section 2B1.1 begins with a base offense level of 6 or 7 (depending on the maximum sentence in the criminal statute the defendant is charged under) and adds an increasing number of offense levels depending on the amount of loss. There are 16 categories of loss, with the lowest category ($6,500 or less) requiring no increase in a defendant's offense level and with the highest category ($550,000,000 or greater) requiring an increase of 30 levels. For healthcare offenses involving a government healthcare program, the amount of loss could add as many as 34 levels. *See* § 2B1.1(b)(6).

111. *See* Mark H. Allenbaugh, '*Drawn From Nowhere': A Review of The U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data*, 26 Fed. Sent'g Rep. 19, 19 (2013) (describing Commission's process for drafting initial set of guidelines for economic crimes).

112. *See* Ellis, Steer & Allenbaugh, *supra* note 105, at 36 (initial adjustment was in response to savings and loan crisis of the late 1980s); Bowman, III, *supra* note 109, at 272 (explaining that "political furor" following Enron scandal and passage of Sarbanes-Oxley Act were impetus for even further adjustments even though Commission had just raised sentences to historic levels only months earlier, which "no one, outside of Congress, felt to be unduly lenient"); *see also United States v. Corsey*, 723 F.3d 366, 379 (2d Cir. 2013) (Underhill, J., concurring) (noting that "loss guideline ... was not developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices" and arguing that "history of bracket inflation directed by Congress renders the loss guideline fundamentally flawed, especially as loss amounts climb").

113. *See* Rakoff, *supra* note 97, at 7 (explaining that one of the primary goals of the framers of Section 2B1.1 was to eliminate the disparity in sentencing between white collar crimes and "street" crimes).

114. *See* Ellis, Steer & Allenbaugh, *supra* note 105, at 39-40 (illustrating that tranches in loss table are arbitrary by comparing loss amounts and sentences for various high-profile white collar defendants).

115. *See United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2014) (Lynch, J.) ("In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence."); Rakoff, *supra* note 97, at 7 ("[I]t should be obvious that in a great many, perhaps most, cases the weight of the drug or the amount of loss does not fairly convey the reality of the crime or the criminal."); Allenbaugh, *supra* note 111, at 25 ("Although the concept of loss has intuitive appeal as a measure of economic offense seriousness, it is far too abstract in its current form to serve as an appropriate sentencing factor for so many diverse types of offenses and offenders."); Letter from former U.S. Attorneys to the Honorable Linda R. Reade, in *United States v. Rubashkin*, 2:08-cr-01324-LRR (N.D. Iowa), dated April 26, 2010 (urging court to depart from guidelines sentence of life in prison).

116. *See* Ellis, Steer & Allenbaugh, *supra* note 105, at 37 ("While the fraud guideline focuses primarily on aggregating monetary loss and victimization, it fails to measure a host of other factors that may be important, and may be a basis for mitigating punishment...."); Hewitt, *supra* note 99, at 1033-34 (noting that loss enhancements overwhelm other, arguably more relevant factors, and comparing loss table — which contemplates up to a 30-level adjustment — to role in the offense calculations under Section 3B1.1-2 — which can result in, at most, a 4-level adjustment); Douglas A. Berman, *Fiddling with the Fraud Guidelines as* Booker *Burns*, 27 Fed. Sent'g Rep. 267, 268 (2015) (explaining how emphasis on loss is in tension with Congress's statutory sentencing instructions in 18 U.S.C. § 3553(a) because loss only captures the "nature and circumstances of the offense" but ignores other relevant factors, such as the need "to afford adequate deterrence to criminal conduct" or "to impose similar punishment on similar offenders").

    Gain is factored in only where loss cannot reasonably be determined or when it acts as an aggravating factor (on top of the loss enhancement) in cases involving more than $1 million in gross receipts obtained from a financial institution. § 2B1.1 (Application Note 3B); § 2B1.1(b)(16)(A). Because the "court need only make a reasonable estimate of loss," (§2B1.1 (Application Note 3C)) gain is rarely used as an alternative, even though, in cases involving multiple defendants, it is arguably a more accurate gauge for each co-defendant's culpability.

117. *See* § 2B1.1 (Application Note 3F(iv)). *See also United States v. Rodriguez*, 751 F.3d 1244, 1256-57 (11th Cir. 2014) (low-level member of mortgage fraud scheme held accountable for losses on loans even though her only connection to them was that the loan documents had been rerouted by other members of the scheme through P.O. boxes she had opened in her name). Enhancements for losses resulting from "jointly undertaken activity" can materially increase sentences. *See, e.g.*, *United States v. Sykes*, 774 F.3d 1145, 1148 (2014) (attributing losses of entire scheme under "reasonable foreseeability" standard resulted in 4 additional offense levels than if court had only considered losses directly caused by defendant).

118. *See* Section 2B1.1(b)(2). Coupled with the lower "reasonable foreseeability" standard of the relevant conduct Guideline (Section 1B1.3), this provision means that any defendant involved in a scheme that causes higher losses than he personally intended will be held accountable for the same amount of losses as his co-conspirators, even if they subjectively intended the losses and he did not. *See* Bowman, III, *supra* note 58, at 27-32 (acknowledging one of the downfalls of fraud guideline is how it weighs intended versus actual loss).

The Commission recently amended the definition of intended loss to clarify that intent is a subjective standard — "pecuniary harm the defendant purposely sought to inflict." §2B1.1 (Application Note 3A). But this may have little real-world impact. For one thing, judges are permitted to adopt an evidentiary presumption that a defendant subjectively intended losses if they were reasonably foreseeable. *See* Testimony of Michael Caruso on behalf of Federal Public and Community Defenders to the United States Sentencing Commission regarding the Public Hearing on Economic Crime and Inflation Adjustments, March 12, 2015, at 10-13 (arguing that clarification may not make that much difference because evidentiary standard allows judge to presume the defendant intended losses if they were reasonably foreseeable), *available at* **http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Caruso.pdf**. Second, many courts, when considering relevant conduct under Section 1B1.3, include all losses that anyone in the fraudulent scheme subjectively intended, as long as they were reasonably foreseeable to the defendant. *See id.* at 10 (citing *United States v. Otuya*, 720 F.3d 183, 191 (4th Cir. 2013) (attributing losses that defendant did not personally intend because co-conspirators intended them)). The result is that the objective "reasonably foreseeable" standard often trumps subjective intent.

119. *See United States v. Corsey*, 723 F.3d 366, 367-71, 377 (2d Cir. 2013).

120. *Id*. at 377 (Underhill, J., concurring).

121. Section 2B1.1 (Application Note 3C). *See also* Lawrence J. Zweifach et al., *Loss Causation and the Criminal Prosecution of Securities Law Violations*, *in* Securities Litigation and Enforcement Institute 2005, at 327 (PLI Corp. and Prac. Course, Handbook Series No. 6746, 2005).

122. *See, e.g.*, *United States v. Watts*, 519 U.S. 148, 157 (1997) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

123. *See, e.g.*, Hanni Fakhoury, *How the Sentencing Guidelines Work Against Defendants in CFAA Cases*, Electronic Frontier Foundation, April 9, 2013 (noting particular difficulty of calculating precise loss amount in computer fraud cases and describing case involving stolen articles from website JSTOR where prosecution threatened $2 million in loss that would result in 16-level increase to offense level if defendant refused to plead guilty).

124. *See United States v. Olis*, 429 F.3d 540, 547, n.11 (5th Cir. 2005) (recognizing that prosecutors were "persistently adopt[ing] aggressive, inconsistent, and unsupportable theories of loss" in securities fraud cases).

125. *See United States v. Granik*, 386 F.3d 404, 414 (2d Cir. 2004) (citing commentary to Section 6B1.4). *See also* notes 76-83, *supra*, and accompanying text for a more in-depth discussion of how prosecutors use "fact bargaining" to secure pleas.

126. *See, e.g.*, *United States v. Bala*, 236 F.3d 87, 93 (2d Cir. 2000).

127. The SOCs are listed in Sections 2B1.1(b)(2) through (19). Many have multiple subsections. The Commission recently proposed another SOC for fraud in the context of government benefits for social security and veterans' assistance. *See* United States Sentencing Commission, Proposed Amendments to the Sentencing Guidelines, Dec. 19, 2016, at 65, *available at* **http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20161219_rf_proposed.pdf**.

128. Professor Bowman has reasoned that, because the current loss table can increase the offense level so high, there is little room left for the SOC enhancements and role adjustments under Section 3B1.1 to have a meaningful impact in distinguishing relative culpability. *See* Bowman, III, *supra* note 109, at 278-79.

129. Professor Bowman was one of the "principal architects" of the 2001 version of the Guideline that consolidated Section 2B1.1 with Section 2F1.1. He has since acknowledged that numerous errors were made in fashioning the combined Guideline. *See* Bowman, III, *supra* note 58, at 1.

130. Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds after* Booker, 20 Fed. Sent'g Rep. 167, 170 (2008) (explaining that, by giving SOC factors independent weight, Commission imposed disproportionate increases in prison time).

131. Like the loss table adjustments, many of the SOCs were added to fulfill directives from Congress in response to financial crises/scandals. *See* Ellis, Steer & Allenbaugh, *supra* note 105, at 36-37 (SOC for conduct that "substantially jeopardized the safety and soundness" of a financial institution was added in response to savings and loan crisis in the 1980s and SOC for director or officer of an organization or more than 250 victims added in connection with passage of Sarbanes-Oxley Act).

132. As Professor Bowman has explained, the drafters of the 2001 consolidated guideline "failed to consider carefully the *combined effect* of the very large increases at the mid-to-high end of the new loss table and all the specific offense characteristics that survived the transition from the old separate guidelines to the new consolidated one." Bowman, III, *supra* note 109, at 272.

133. Section 2B1.1(b)(2).

134. Randall D. Eliason, *The Fraud Guideline: The Proposed Amendments, DOJ"s Opposition, and Where We Go from Here*, 27 Fed. Sent'g Rep. 284, 285 (2015).

135. Section 2B1.1(b)(10).

136. *See* Eliason, *supra* note 134, at 285; Bowman, III, *supra* note 109, at 280 (admitting that, although he advocated for enhancement in 1998, he "no longer think[s] it serves a useful purpose" because "[i]f loss is moderately large, courts virtually always find sophisticated means in any but the very simplest schemes, and often even in those").

137. Section 2B1.1(b)(10) (Application Note 9).

138. Application notes offer interpretation from the Sentencing Commission on how the Guidelines should be applied, and they are generally followed by the parties and the court.

139 . *See* Testimony of James E. Felman to United States Sentencing Commission, March 12, 2015, Tr. at 186 (describing how prosecutors use sophisticated means enhancement to penalize defendants who choose to go to trial: "If you go to trial, it was sophisticated, if I'm bargaining, they're willing to say, okay, if you plead, it's not...."), *available at* **http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Felman.pdf**.

140. Section 3B1.3.

141. *See* "Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform," United States Sentencing Commission (November 2004) at 137-38, *available at* **http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf**. *See also* Bowman, III, *supra* note 130, at 170 (explaining that, in his view, Guidelines do a "commendable" job of identifying relevant factors but a poor job of quantifying appropriate sentences when multiple factors interact).

142. *See, e.g.*, Fakhoury, *supra* note 123 (explaining that using certain devices to commit computer fraud can qualify as both "sophisticated means" and "special skill" and citing case where judge applied both, resulting in two separate 2-level increases for the same conduct).

143. *See* Lester, Jenson & Diehr, *supra* note 104, at 13 (explaining that average market capitalization for company listed on NYSE is $8.9 million, meaning that a loss of only 0.5 percent would equate with $44.5 million).

144. Even considering the Sentencing Commission's 2015 amendments, an offense causing $20 million in loss affecting just 10 victims would result in an offense level of 29. *See* Section 2B1.1(b)(1) & (2).

145. *See* Bowman, III, *supra* note 130, at 168 & n.20 (explaining that a corporate officer presiding over fraud causing only slightly more than $2.5 million could qualify for life imprisonment based on a base offense level of 7, an 18-level increase for loss greater than $2.5 million, a 2-level increase for deriving more than $1 million in gross receipts, a 6-level increase for more than 250 victims, a 2-level increase for sophisticated means, a 4-level increase for violation of the securities laws by an officer of a publicly traded company, and a 4-level increase for an aggravated role under Section 3B1.1). *See also* Ellis, Steer & Allenbaugh, *supra* note 105, at 37 (noting that a 2-level enhancement for abuse of trust could also apply in many of these cases).

146. In some jurisdictions, sentencing judges may impose the 4-level increase for an "organizer" or "leader" under Section 3B1.1(a) simply because the defendant is the highest officer of the company, even if he already received a 4-level increase as an officer of a public company under Section 2B1.1(b)(19)(A). *See, e.g.*, *United States v. Duncan*, 42 F.3d 97, 105-06 (2d Cir. 1994). This is double-counting in its truest sense.

147. The average sentence in 2015 for murder was approximately 24 years, for kidnapping was approximately 20 years, and for sexual abuse was approximately 10 ½ years. *See* United States Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Table 13, *available at* **https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table13.pdf**.

148. *See* Bowman, III, *supra* note 130, at 168 & n.20 (citing 25-year sentence of Bernie Ebbers (WorldCom) and Jeffrey Skilling (Enron) and noting that, had the judge relied on the then-current guidelines, he would have been required to depart downward 19 levels to reach those sentences).

149. *See, e.g.*, *United States v. Adelson*, 441 F. Supp. 2d 506, 508-09 (S.D.N.Y. 2006) (noting that Guideline calculation in securities fraud case for first-time, non-violent offender resulted in an "off-the-chart" offense level of 55, "a level normally only seen in cases involving major international narcotics traffickers, Mafia dons, and the like. How could it possibly apply here?").

150. Admittedly, this has not been true of all prosecutors. Even though the defendant in *United States v. Parris* took his case to trial, the AUSA readily admitted that the life sentence recommended by the Guidelines put the sentencing judge in a difficult position and acknowledged that "a reasonable sentence 'may well be less, perhaps significantly less, than the guidelines range.'" 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008).

But the Department of Justice and some U.S. Attorney's Offices continue to oppose any attempts at reform that would decrease guidelines sentences. *See* notes 160-162, *infra*, and accompanying text. In addition, as explained further below, prosecutors are willing to support 70-80 percent departures from the Guidelines in many cases involving economic crimes where the defendants plead guilty and cooperate in the prosecution of other offenders. *See* notes 173-193, *infra*, and accompanying text. This suggests that they do not really view the outrageously high Guidelines sentences as just; they are only pressing for greater leverage to secure pleas. *See also* Bowman, III, *supra* note 130, at 170 (noting magnitude of sentencing discounts for cooperators in WorldCom scandal was an "acknowledgement by both prosecutors and courts that the starting point for departures in these cases should be far lower than the Guidelines nominally require").

151. *See United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

152. *Id.* at 512.

153. *Adoption of Economic Crime Amendments*, 27 Fed'l Sent. Rptr. 322, 322 (2015) (publishing key portions of Commission's press release and Chair Patti B. Sarris's speech regarding the amendments).

154. *See* 2016 Guidelines Manual, Supplement to Appendix C, Amendments 791 & 792.

155. *See* James E. Felman, *Reflections on the United States Sentencing Commission's 2015 Amendments to the Economic Crimes Guideline*, 27 Fed. Sent'g Rep. 288, 290 (2015) (lamenting that "new amendments do virtually nothing to allow courts to consider the host of culpability considerations absent from the guideline"); Eliason, *supra* note 134, at 284 (observing that amendments were "merely a cautious first step"); Bowman, III, *supra* note 109, at 280 (calling results of Commission's multi-year study "damp squib").

156. Section 2B1.1(b)(2).

157. Felman, *supra* note 155, at 288.

158. Bowman, III, *supra* note 109, at 277.

159. *See* Berman, *supra* note 116, at 268; Letter from National Association of Criminal Defense Lawyers to the United States Sentencing Commission regarding Comments on Proposed Amendments for 2015 Cycle (Mar. 18, 2015), at 8, *available at* **http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150318/NACDL.pdf**.

160. *Adoption of Economic Crime Amendments*, *supra* note 153, at 324. *See also* Transcript of Public Hearing on 2015 Proposed Amendments, March 12, 2015, at 205 (acknowledging that Commission had not found a good way of dealing with high loss crimes in a way that it could "explain to Congress [was] different from just lowering punishments, for the fraudsters who cause the most harm"), *available at* **http://www.ussc.gov/sites/default/files/transcript_3.pdf**.

161. Bowman, III, *supra* note 109, at 274.

162. *See* Letter from Jonathan J. Wroblewski, Department of Justice Director of the Office of Policy and Legislation, to United States Sentencing Commission, March 9, 2015, at 13 (opposing long-anticipated changes to Section 2B1.1 because "[l]essening penalties for economic crimes would be contrary to the overwhelming societal consensus that exists around these offenses"), *available at* **http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/DOJ.pdf**.

163. Statement of Preet Bharara, United States Attorney for the Southern District of New York, to U.S Sentencing Commission, Feb. 16, 2011, *available at* **http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110216/Testimony_DOJ_%20Bharara.pdf**.

164. *See* Letter from Jonathan J. Wroblewski, Department of Justice Director of the Office of Policy and Legislation to United States Sentencing Commission, June 28, 2010, at 5 (referring to Bradley Stinn's 12-year sentence as "unacceptable," arguing that "the recent economic crisis" called for the imposition of "significant imprisonment terms"), *available at* **http://sentencing.typepad.com/files/annual_letter_2010_final_062810.pdf**; *id.* at 5, n.2 (suggesting Commission add enhancement to Section 2C1.1 that would increase penalties for cases involving military procurement fraud that occurs overseas).

165. *See* William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 Wake Forest L. Rev. 181, 191 (1988).

166. *1987 Federal Sentencing Guidelines Manual* § 3E1.1 ("(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial. (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."), *available at* **http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/Chapter_3.pdf**.

167. Section 3E1.1(b) only applies if a defendant's offense level is at least 16 before applying the two-level reduction of subsection (a).

168. Section 3E1.1(b).

169. *See* Alexa Chu Clinton, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines*, 79 Univ. of Chi. L. Rev. 1467, 1468-69 (2012).

170. The First, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits permit prosecutors to withhold a supporting motion under Section 3E1.1(b) as long as their refusal is "rationally related to a legitimate government end" and is not "animated by an unconstitutional motive." *See United States v. Moreno-Trevino*, 432 F.3d 1181, 1186 (10th Cir. 2005); *see also United States v. Beatty*, 538 F.3d 8, 15 (1st Cir. 2008); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008); *United States v. Debery*, 576 F.3d 708, 711 (7th Cir. 2009); *United States v. Smith*, 422 F.3d 715, 726 (8th Cir. 2005); *United States v. Johnson*, 581 F.3d 994, 1001 (9th Cir. 2009).

171. If a defendant's sentence falls within Zone B of the Sentencing Table, a judge is permitted to impose a sentence of community confinement or home detention *as an alternative* to imprisonment, meaning the defendant need not serve any jail time. *See* Section 5C1.1. If the sentence falls within Zone A, the entire term of the sentence may be served as probation. *See* Section 5B1.1. A two-level reduction can easily bump a sentence from Zone C to Zone B or from Zone B to Zone A.

    See also Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator's Dilemma*, 90 N.Y.U. L. Rev. 1722, 1730 (2015) (noting that a two-level reduction "can reduce the floor of the range by anywhere from three months (constituting a 75 percent sentence reduction from an original floor of four months) to 68 months (constituting an 18.9 percent reduction from an original floor of 360 months)").

172. *See* Albert W. Alschuler, *Departures and Plea Agreement Under the Federal Sentencing Guidelines*, 117 F.R.D. 459, 473 (1988) (warning that, without limits on prosecutorial plea bargaining, acceptance of responsibility reduction "could become simply an 'add on' — an extra benefit that a defendant receives after striking a bargain with an Assistant United States Attorney: 'Come to our showroom; make your best deal with one of our friendly sales personnel; and then use the enclosed certificate — Guidelines Section 3E1.1 — to receive an additional 20 percent discount from the price of your new car.'").

173. *See* Sept. 20, 2011 Memorandum Opinion in 1:08-cr-00274-ESH (D.D.C.) at 7-8 (quoting prosecution's oral argument in support of its initial sentencing recommendation).

174. *See* 2016 Guidelines Manual, § 5K1.1.

175. *See* Section 5K1.1, Application Note 2 (distinguishing substantial assistance from acceptance of responsibility because it "is directed to the investigation and prosecution of criminal activities by persons other than the defendant").

176. *United States v. Leonti*, 326 F.3d 1111, 1114, 1117 (9th Cir. 2003). *See also* Richard L. Lippke, *Rewarding Cooperation: The Moral Complexities of Procuring Accomplice Testimony*, 13 New Crim. L. Rev. 90, 91 (2010) ("Criminal defendants who face formidable sentences and have few prospects for leniency otherwise are eager, perhaps desperate, to offer authorities 'substantial assistance' and thereby reduce the time they will end up serving behind bars.").

177. United States Sentencing Commission, 2015 Sourcebook of Federal Sentencing Statistics, Table 6, *available at* **https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table06.pdf**.

178. *See* Knizhnik, *supra* note 171, at 1748 (noting that there is an especially strong incentive on the prosecution's part to sign up cooperators in antitrust and fraud cases because those types of crimes are almost impossible to prove without some inside information).

179. *See* Section 5K1.1(a)(1) (one of the factors courts should consider in evaluating "the significance and usefulness of the defendant's assistance" is "the government's evaluation of the assistance rendered"). *See also id.*, Application Note 3 (advising judges that "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance").

180. This figure has been relatively consistent for the past 10 years: 14.4 percent in 2006, 14.4 percent in 2007, 13.5 percent in 2008, 12.4 percent in 2009, 11.5 percent in 2010, 11.2 percent in 2011, 11.7 percent in 2012, 12.1 percent in 2013, 12.8 percent in 2014, 12.4 percent in 2015, 11.1 percent in 2016. *See* Table N in United States Sentencing Commission Sourcebook Archives, *available at* **https://www.ussc.gov/research/sourcebook/archive**. The rate of substantial assistance departures significantly varies from one jurisdiction to another. In the Tenth Circuit, only 5.9% of cases involved substantial assistance departures in 2015. But in the D.C. Circuit, 29.8% of defendants received the departure. These figures also do not capture those defendants who pled guilty in the hope of receiving a substantial assistance motion but did not get one.

181. *See The Use of Federal Rule of Criminal Procedure 35(b)*, United States Sentencing Commission, at 3 (2016) (explaining that "[b]efore the enactment of the Sentencing Reform Act of 1984, Rule 35(b) contained a strict time limitation but included no substantive restrictions on the bases by which a court could reduce or modify a sentence"), *available at* **http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/Rule35b.pdf**.

182. *See* § 5K1.1. Rule 35(b) was also amended to account for this shift in authority by adopting the "government motion" requirement from the Guidelines. Courts have since interpreted this amendment as a change in the purpose of Rule 35(b). Instead of providing an opportunity for defendants to seek leniency, it now "confer[s] an 'entitlement on the government' that allow[s] it to obtain 'valuable assistance' and then ask a sentencing court to reduce the defendant's sentence as 'compensation' for that assistance." *The Use of Federal Rule of Criminal Procedure 35(b)*, *supra* note 181, at 3 (quoting *United States v. Shelby*, 584 F.3d 743, 745 (7th Cir. 2009)).

183. *See Wade v. United States*, 504 U.S. 181, 185-86 (1992).

184. George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 17 (2000) ("The *sine qua non* of [cooperation] agreements is proffered testimony that will support the conviction of an accomplice or another suspect."); *see id.* at 50 (noting that prosecutorial authority is never exercised if the defendant proffers evidence exculpating others).

185. *See* Michael A. Simon, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 Vand. L. Rev. 1, 16 (2003) (noting that prosecution will look to "whether the defendant's information is cumulative of other evidence that [it] already has or can obtain").

186. *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 929 (1999) (describing the "race to the station house" among co-conspirators because "[t]he longer a defendant waits to cooperate, the less likely he is to have information that is still useful to the government"). In her interviews with defense attorneys, Professor Yaroshefsky heard complaints that, because speed is crucial, the attorneys were often forced to discuss cooperation with their clients before having any opportunity to fully review the case or even develop an attorney-client relationship with them. *Id.* at 929-30. *See also* Harris, *supra* note 184, at 53 ("Decision regarding offers of leniency may depend as much on the skill and promptness of defense counsel in soliciting a deal as on a carefully considered assessment of relative culpability.").

187. John Wesley Hall, Jr., *5K1.1 to be Obtained by Perjury — What to Do, What to Do?*, 7 Ohio State J. of Crim. L. 667 (2010) (criminal defense lawyer admitting that 5K1.1 puts "hydraulic pressure" on defendants to cooperate, and that many "will offer to say anything to cut their exposure"); Richard L. Lippke, *Rewarding Cooperation: The Moral Complexities of Procuring Accomplice Testimony*, 13 New Crim. L. Rev. 90, 111-17 (2010) (describing "powerful incentive" defendants have "to please prosecutors at some predictable cost to their truthfulness in revealing what they and their accomplices have done.").

188. *See, e.g.*, Lippke, *supra* note 187, at 111-117; Yaroshefsky, *supra* note 186.

189. *See* Yaroshefsky, *supra* note 186, at 943 (citing interview with former AUSA: "The incentives to please you are great and you might not even recognize them because you have come to develop what you believe to be a trusting relationship with your cooperator."); *id.* at 936 (citing another interview: "[A] cooperator can tell you about a telephone conversation he had with a defendant. When you ask for the date, the telephone records establish that they did, indeed, have a conversation on that date. So that's the corroboration for the substance of the conversation. You have no independent way to know the substance of the conversation.").

190. *See* Harris, *supra* note 184, at 49 (arguing that procedural safeguards during trial are not adequate to uncover false cooperator testimony in part because defense counsel is at an informational disadvantage, having had no opportunity to meet with the cooperator or take pretrial discovery).

191. *See* Knizhnik, *supra* note 171, at 1740.

192 . *See* Lippke, *supra* note 187, at 117 (noting "likelihood that many individuals implicated by their former associates will find it in their best interest to reach their own plea agreements with prosecutors").

193. *See* Charles Doyle, *Federal Mandatory Minimum Sentencing Statutes*, Congressional Research Service, at 9 (2013) (describing "inverted sentencing" that often results from substantial assistance departure: "a situation in which 'the more serious the defendant's crimes, the lower the sentence — because the greater his wrongs, the more information and assistance he had to offer to a prosecutor,' while in contrast the exception is of no avail to the peripheral offender who can provide no substantial assistance."), *available at* **https://fas.org/sgp/crs/misc/RL32040.pdf**.

194. Knizhnik, *supra* note 171, at 1726 (noting that low-level defendants can be held liable for conspiracy based on cooperator testimony even when they themselves have no information about the conspiracy and thus have no opportunity to benefit from a substantial assistance departure).

This disparity can quickly balloon out of control when combined with other factors. For instance, before the departure for substantial assistance is even considered, nearly every cooperating defendant will first get a reduction in their guidelines range because they accepted responsibility. Again, that reduction will apply regardless of whether they genuinely feel remorse. It is just as likely, if not more likely, that cooperating defendants plead guilty to take advantage of the benefit of Section 5K1.1 and not because they have truly accepted responsibility for their crimes. *See* Lippke, *supra* note 187, at 107 (arguing that it is implausible to assume genuine remorse "corresponds in any reliable way with the group of defendants who are first apprehended or first able to reach plea agreements with prosecutors").

195. 18 U.S.C. § 924(c)(1)(A)(i). This term is even longer if the gun is brandished (7 years) or discharged (10 years). 18 U.S.C. § 924(c)(1)(A)(ii) & (iii). It is also increased for particular types of firearms. Short-barreled and semi-automatic guns carry a 10-year minimum increase in sentence, and machine guns or guns equipped with silencers carry a 30-year minimum increase. 18 U.S.C. § 924(c)(1)(B).

Like many provisions of the Sentencing Guidelines, penalties under 924(c) have become significantly harsher over the years since it was first adopted. *See* Firearms Policy Team Report to United States Sentencing Commission on Sentencing for the Possession or Use of Firearms During a Crime, Jan. 6, 2000, at 3 (detailing a history of the increases to penalties under 924(c) since it was adopted in 1968), *available at* **http://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/firearms/20000106-use-firearms-during-crime/firearms.pdf**.

196. 18 U.S.C. § 924(c)(1)(D)(ii) ("[N]o term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.").

197. *See* 18 U.S.C. § 924(c)(1)(D)(i).

198. *See* 18 U.S.C. § 924(c)(1(C)(i). If the second or subsequent offense involves a machine gun or a gun with a silencer, the defendant faces a mandatory life sentence. 18 U.S.C. § 924(c)(1)(C)(ii).

199. Firearms Policy Team Report to United States Sentencing Commission on Sentencing for the Possession or Use of Firearms During a Crime, Jan. 6, 2000, at 16 ("Obviously, the length of an offender's prison term can be dramatically affected by" charging decisions of prosecutors.), *available at* **http://www.ussc.gov/sites/default/files/pdf/research/working-group-reports/firearms/20000106-use-firearms-during-crime/firearms.pdf**.

200. *An Offer You Can't Refuse*, *supra* note 27.

201. *See* Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 Ala. L. Rev. 571, 604 (2011) (noting that DOJ's consideration of "crimes of violence" involves a much narrower definition).

202. 18 U.S.C. § 924(c)(3)(B). In construing the term "crime of violence," courts have adopted a categorical approach, meaning that they examine the statutory elements of the crime, rather than the particular details of the defendant's conduct. *See* Ristroph, *supra* note 201, at 604.

203. *See* Ristroph, *supra* note 201, at 603 (noting that shift in sentencing law from conception of a threat of violence to a mere risk of violence caused the number of crimes that qualify as "violent" to explode and "is helping to fuel the vast expansion of the U.S. prison population").

204. The Supreme Court recently held that the definition of "violent felony" in § 924(e) is unconstitutionally vague. *See United States v. Johnson*, ___ U.S.___ , 135 S. Ct. 2551 (2015). The circuit courts are split on whether the reasoning in *Johnson* should extend "crimes of violence" under § 924(c). *See, e.g., United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016) (joining the Second and Sixth Circuits in upholding Section 924(c)(3)(B) against a vagueness challenge); *United States v. Brown*, 868 F.3d 297, 302 (4th Cir. 2017) (denying to extend the application of *Johnson* outside the ACCA context; finding that *Johnson* only recognized that ACCA's residual clause was unconstitutionally vague and did not touch upon the residual clause at issue in this case). *But see United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that "the residual clause in 18 U.S.C. § 924(c)(3)(B) is ... unconstitutionally vague"); *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016) ("extrapolate[ing] from the *Johnson* holding that § 924(c)'s residual clause is ... unconstitutional").

The Sentencing Commission, for its part, recognized that the Guidelines definition of "crime of violence" implicated many of the same concerns as in *Johnson*, and it revised its definition to remove the "risk of physical force" residual clause. *See* United States Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements*, at 52, *available at* **https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf**. The Commission has called on Congress to similarly amend the various statutory definitions of "crimes of violence," like in §924(c), to focus only "on those offenders with the most serious violent criminal backgrounds." *Id.* at 48.

205. Paul J. Hoffer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 Am. Crim. L. Rev. 41, 74 (2000) (As a whole, firearm sentence enhancement laws "show little or no impact," though enhancement laws have been "associated with a decrease in some types of crimes in a few states.").

206. *See id.*

207. 18 U.S.C. 3559(c) ("a person who is convicted in a court of the United States of a serious violent felony ***shall*** be sentenced to life imprisonment...") (emphasis added). The only exception to imposing a life sentence is a case where the death penalty applies instead. 18 U.S.C. § 3559(c)(5).

208. *See* American Civil Liberties Union, *10 Reasons to Oppose '3 Strikes, You're Out'* (arguing that three strikes rule "ties the hands of judges who have traditionally been responsible for weighing both mitigating and aggravating circumstances before imposing sentence. Judicial discretion in sentencing, which is admired all over the world for treating people as individuals, is one of the hallmarks of our justice system. But the rigid formula imposed by '3 strikes' renders the role of sentencing judges almost superfluous."), *available at* **https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out**.

209. Federal courts have uniformly rejected the argument that the three strikes rule violates the prohibition against double jeopardy, reasoning that it is not a re-punishment for past conduct but simply increased punishment for the current offense. *See, e.g., United States v. Kaluna*, 192 F.3d 1188, 1198-99 (9th Cir. 1999).

210. *See* Meredith McClain, *'Three Strikes and You're Out': The Solution to the Repeat Offender Problem?*, 20 Seton Hall Univ. Legis. J. 97, 97-100 (1996); David Schultz, *No Joy in Mudville Tonight: The Impact of 'Three Strike' Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 Cornell J.L. & Pub. Pol'y 557, 568 (2000) (three strikes laws were passed in "a frenzied emotional setting" when "fears of crime and victimization were running high," "[p]oliticians were appealing to this mood, and the media was increasing its coverage of violent crime").

211. *See 10 Reasons to Oppose '3 Strikes, You're Out,' supra* note 208.

212. The definition of "violent felony" emulates crimes of violence under § 924(c). It includes any offense "that has as an element the use, attempted use, or threatened use of physical force against the person of another or ***that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense***." 18 U.S.C. § 3559(c)(2)(F)(ii) (emphasis added). Under this definition, the offense must first carry a statutory maximum sentence of at least 10 years. There are also specifically enumerated crimes that automatically qualify as violent felonies, including: murder, manslaughter, assault with the intent to commit murder, assault with the intent to commit rape, aggravated sexual abuse, sexual abuse, abusive sexual conduct, kidnapping, aircraft piracy, robbery, carjacking, extortion, arson, firearms use, and firearms possession under § 924(c). 18 U.S.C. § 3559(c)(2)(F)(i).

213. *See 10 Reasons to Oppose '3 Strikes, You're Out,' supra* note 208.

214. When the Commission was first promulgating the Guidelines, Congress directed it to set sentences for habitual offenders "at or near the maximum term authorized." Sentencing Reform Act of 1984, 18 U.S.C. § 944(h).

215. *See* § 4A1.1(a)-(c).

216. *See* Section 4B1.1.

217. *See Report to the Congress: Career Offender Sentencing Enhancements*, *supra* note 204, at 34. Because the career offender guideline also applies to repeat drug offenders, the Commission divided its study into three groups: those convicted of only drug trafficking offenses, those convicted of only violent offenses, and those convicted of a mix of both. *Id.* at 27. According to the Commission's study, 47.4 percent of "violent only" career offenders received a sentence below the Guidelines range. *Id.* at 35 (Figure 15). *See also* Nkechi Taifa, '*Three-Strikes-and-You're-Out*' — *Mandatory Life Imprisonment for Third Time Felons*, 20 Univ. of Dayton L. Rev. 717, 721 (1995) (noting that a defendant convicted of assault with two prior offenses will receive, on average, a sentence of 68 months).

218. United States Sentencing Commission, *Amendments to the Sentencing Guidelines*, at 4-5, *available at* **https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160121_Amendments_0.pdf**.

219. In a recent report, the Sentencing Commission urged Congress to amend the definitions "crime of violence" under § 924(c) and "violent felony" under § 924(e) to remove the residual "risk of physical force" clause. The Commission pointed out "that the guideline's criminal history rules already take into account an individual's increased culpability and likelihood of recidivism." *Report to the Congress: Career Offender Sentencing Enhancements*, *supra* note 204, at 55. The Commission did not extend its recommendation to "violent felonies" under 3559(c), although it is unclear why. The same reasoning should apply.

220. *See also* United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, at 23 (noting that only 16 percent of individuals over 60 who were released from prison in 2005 recidivated, compared to 67.6 percent of those below age 21), *available at* **http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf**.

221 *See* Center for Justice at Columbia University, *Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety*, at 24-26, a*vailable at* **http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf**.

222. Although data is not available to show the rate at which the government chooses to forgo applying the three strikes enhancement, the Sentencing Commission has examined sentences where the career offender guideline would apply for "violent only" offenses. And those cases necessarily qualify for the three strikes enhancement. According to the Commission's study, the government supported a below-guidelines sentence for 24.6 percent "violent only" career offenders in 2014. That means that, in at least a quarter of the cases where the three strikes rule would otherwise apply, the prosecution has not chosen to seek it. *Report to the Congress: Career Offender Sentencing Enhancements*, *supra* note 204, at 35.

223. *United States v. Derden*, No. 12-cr-0012 (PJS/SER), 2016 WL 5858638, at *1 (D. Minn. Oct. 5, 2016).

224. *Id.* at *3.

225. *Id.* at *2.

226. *Id.* at *2, n.2.

227. *See* 18 U.S.C. § 3559(c)(3). Robbery and unenumerated offenses that otherwise meet the definition of "violent felony" will not count as one of the defendant's three strikes if the defendant proves that no firearm or dangerous weapon was used or threatened to be used and that the offense did not result in death or serious bodily injury. § 3559(c)(3)(A). Arson will not count as a strike if the defendant proves that the offense posed no risk to human life and that the defendant reasonably believed it posed no threat to human life. § 3559(c)(3)(B).

228 . *See* Daniel R. O'Connor, *Defining the Strike Zone — An Analysis of the Classification of Prior Convictions under the Federal Three Strikes and You're Out Scheme*, 36 B.C. L. Rev. 847, 878 (1994-1995).

229. *See United States v. Kaluna*, 192 F.3d 1188, 1201 (9th Cir. 1999) (Thomas, J., dissenting).

230. *See* 18 U.S.C. § 3553(a). *See also Judicial Responsibility for Justice in Criminal Courts*, NACDL, FCJ, and the Monroe Freedman Institute for the Study of Legal Ethics at Hofstra University's Maurice A. Deane School of Law (2017), *available at* **https://www.nacdl.org/judicialresponsibilityforjusticereport/**.

231. *See Nelson v. United States*, 555 U.S. 350, 352 (2009) ("Our cases do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable."); *Gall v. United States*, 552 U.S. 38, 49-50 (2007) ("The Guidelines are not the only consideration .... [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable.").

232. *See Rita v. United States*, 551 U.S. 338 (2007) (endorsing presumption of reasonableness for federal appellate courts).

233. *See id.* at 391 (Souter, J., dissenting).

234. One panel of the Second Circuit has complained that the Commission's "Statement of Reasons" form encourages judges to ignore their obligations under 3553(a). *United States v. Pruitt*, 813 F.3d 90 (2d Cir. 2016). Judges are required to complete a form identifying their reasons for the selected sentence in each case. However, the form does not require them to provide any written explanation for a sentence within the Guidelines range, as long as the high end of the range is no more than 24 months.

235. The Statement of Reasons form only requires a written explanation of a within-Guidelines sentence if the Guidelines range is wider than 24 months. As one panel of the Second Circuit has noted, 82.3 percent of all Guidelines ranges in 2014 were no wider than 24 months, so the form "conveys to sentencing judges that as long as they stay within a range that is not wider than 24 months, no reasons for the sentence are necessary. That message conflicts with the mandate in § 3553...." *United States v. Pruitt*, 813 F.3d 90, 94 (2d Cir. 2016).

236. *See, e.g.*, *United States v. Mason*, 410 F. App'x 881, 886 (6th Cir. 2010) ("As this court has previously stated, it is pointless for defendants who receive within-Guidelines sentences to raise unwarranted-disparity claims.") (internal quotation marks omitted); *United States v. Vaughn*, 431 F. App'x 507, 509-10 (7th Cir. 2011) ("because the guidelines are designed to avoid unwarranted disparities, a sentence such as Vaughn's that is within the guidelines range necessarily complies with § 3553(a)(6)"). *See also United States v. Treadwell*, 593 F.3d 990, 1011 (9th Cir. 2010) ("A district court need not, and, as a practical matter, cannot compare a proposed sentence to the sentence of every criminal defendant who has ever been sentenced before."); *United States v. Willingham*, 497 F.3d 541, 544-55 (5th Cir. 2007) ("National averages of sentences that provide no details underlying the sentences are unreliable to determine unwarranted disparity because they do not reflect the enhancements or adjustments for the aggravating or mitigating factors that distinguish individual cases.").

237. Most circuits allow co-defendant comparisons but have held that judges are not required to consider them. Matthew Benjamin, *Beyond Anecdote: Informing the Sentencing Court's 3553(a)(6) Duty*, 26 Fed. Sent'g Rep. 35, 38 n.34 (2013). *See, e.g.*, *United States v. Dowdy*, 216 F. App'x 178, 181 (3d Cir. 2007) (district courts are not required to consider sentencing disparities among co-defendants, and defendants cannot challenge their sentences on appeal based on disparity among co-defendants).

238. *United States v. Rodriguez-Milian*, 820 F.3d 26, 35 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 138 (2016) (finding that it is settled law in the circuit "that a co-conspirator who has elected to plead guilty is not similarly situated to a co-conspirator who has elected to stand trial.") (citing *United States v. Dávila–González*, 595 F.3d 42, 50 (1st Cir. 2010)); *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) (mentioning that § 3553 is aimed at eliminating national sentencing disparity [and not disparity between similarly situated defendants.]); *United States v. Spence*, No. 15-2593, 2017 WL 2983003, at *4 (3d Cir. July 13, 2017) (finding that identically situated conspirators can receive different sentences because some of them pled guilty, as "[a] court may extend[ ] leniency in exchange for a plea of guilty and ... not extend[ ] leniency to those who have not demonstrated those attributes on which leniency is based.") (citing *Corbitt v. New Jersey*, 439 U.S. 212, 224 (1978)) (internal quotations omitted); *United States v. Brainard*, 745 F.2d 320, 324 (4th Cir. 1984) (holding that disparity in sentences between a defendant who stands trial and a co-defendant who pleads guilty does not require appellate reversal); *United States v. Cannon*, 552 F. App'x 512, 517, 522 (6th Cir. 2014) (finding that a district court did not abuse its discretion by allowing a disparity between two co-conspirators, when one pled guilty and one went to trial, and that this leniency was the whole point of plea bargaining); *United States v. Pisman*, 443 F.3d 912, 916 (7th Cir. 2006) (noting corresponding reduction to sentence of defendant who pled guilty, when compared to a defendant who went to trial, was not an unwarranted disparity) (citation omitted); *United States v. Herra-Herra*, 860 F.3d 1128, 1133 (8th Cir. 2017) (noting that district court did not abuse its discretion in finding a disparity between a co-conspirator who went to trial and others who pled guilty); *United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2009) (noting that, so long as there is no indication of retaliation against a defendant for choosing to go to trial, taking into account that one defendant chose to go to trial while a similarly situated defendant pled guilty when sentencing is not unreasonable); *United States v. Lunnin*, 608 F. App'x 649, 665 (10th Cir. 2015) (acknowledging that choosing to plead guilty vs. go to trial is grounds for permitting disparity between otherwise similarly situated defendants); *United States v. Langston*, 590 F.3d 1226, 1237 (11th Cir. 2009) (finding no unwarranted disparity where a defendant who pled guilty received a lesser sentence than a defendant who chose to go to trial); *United States v. Mejia*, 597 F.3d 1329, 1344 (D.C. Cir. 2010) (noting that accepting responsibility by pleading guilty creates a disparity that merits a reduction in sentence compared to similarly situated defendants).

239. It is possible that judges find the 3553(a) factors complicated or even contradictory and so they opt to rely on the Guidelines range that has been calculated according to a defined and familiar formula. *See* "It's Time To Rethink Or Junk Entirely 18 U.S.C. § 3553(a)," Hercules and the Umpire, Blog by Judge Richard George Kopf, District of Nebraska (entry posted July 27, 2014) (expressing frustration that the 3553(a) factors "provide no meaningful guidance to the sentencing judge"), *available at* **https://herculesandtheumpire.com/2014/07/**.

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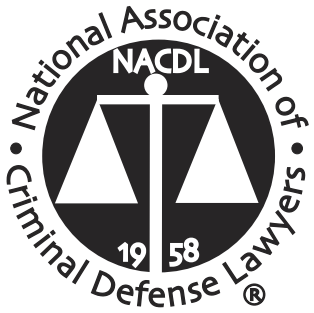

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