

“HOW MUCH TIME AM I LOOKING AT?”: PLEA BARGAINS,  
HARSH PUNISHMENTS, AND LOW TRIAL RATES IN  
SOUTHWEST BORDER DISTRICTS

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ABSTRACT

*Scholarship on the American trial penalty, vast and diverse, analyzes it in connection with plea bargaining’s dominance, its growth starting in the last third of the nineteenth century, and present-day racial disparities at sentencing. The overcriminalization and quick processing of people of color in southwest border districts cannot be understood without an analysis of how trial sanctions impact illegal entry and drug trafficking in these busy jurisdictions. Professor Ronald Wright wrote about the role of prosecutorial power and plea bargaining in the federal system, but he passed over how and why immigration crimes became widespread. Any discussion of prosecutors and plea bargaining requires an understanding of how they manage illegal entrants and drug couriers—the most prevalent defendants in federal court.*

*This Article analyzes the reasons for increasing plea rates and trial penalties in the southwest and how they helped enable the proliferation of fast-track programs. The plea-bargaining machine used racial stereotypes and stigmatizations of Latinx and African American populations to justify few trials and process as many migrants and drug couriers as possible. This paper provides practical advice for criminal defense lawyers when representing clients at the plea and sentencing stage of a case. It also unites a discussion of implicit bias to explain why judges disfavor racial minorities.*

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INTRODUCTION

The federal criminal justice system is one of plea-bargains, not trials.<sup>1</sup> When I transitioned from the Pima County Public Defender to the Federal Defender’s Office, in Tucson, Arizona, many experienced lawyers told me I would not be in trial often, maybe once a year. They were right. In Pima County, I was in trial at least three to four times a year.<sup>2</sup> I have been in the federal system, as of the writing of this article, for six and a half years. I have represented two clients at jury trial, despite having a full load of felony cases.<sup>3</sup> As a county public defender, I took thirty felony cases to trial over ten years. In my current office, I know lawyers who have spent eight years or more without taking a case to trial.

The lack of jury trials in federal court is problematic and a result of harsh<sup>4</sup> trial penalties.<sup>5</sup> These punishments lead criminal defendants to accept plea agreements in lieu of exercising their constitutional right to trial—the hallmark of the

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1. In 2018, 90% of federal criminal cases ended with a guilty plea, while prosecutors dismissed eight percent of cases. Only 2% of federal criminal cases proceeded to trial. See John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>. 67,610 federal offenders, or 97.4% of offenders, pled guilty to one or more offenses in 2018. This is the highest rate of guilty pleas in federal cases since the United States Sentencing Commission began reporting data in 1984. The lowest guilty rate was 85.4% in 1991. The percentage of guilty pleas in federal cases has swelled steadily since then. See Ripley Rand & David M. Palko, *Year One of Trump’s DOJ: The National Criminal Sentencing Statistics*, THE NAT’L L. REV. (June 4, 2019), <https://perma.cc/D5PP-TA2M>. Justice Kennedy wrote, in *Missouri v. Frye*, that in today’s criminal justice system “the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.” *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (holding that attorneys of criminal defendants have the duty to communicate plea bargains offered to the accused).

2. The felony criminal trial rate is higher in Pima County Superior Court compared to U.S. District Court in Tucson. The Pima County trial rate in fiscal year 2014, my last full year of practice there, was 5.78% (350 trials out of 6,057 total felony criminal filings). See ARIZ. SUPERIOR CT., SUPERIOR COURT CASE ACTIVITY, FISCAL YEAR 2014 (2014), <https://www.azcourts.gov/Portals/39/2014DR/SuperiorCourt.pdf#page=41>. In the District of Arizona, which includes Phoenix and Tucson, for fiscal year 2018, the criminal trial rate was 1.25% (sixty-two trials out of 4,957 filings). See ARIZ. DIST. CT., DISTRICT OF ARIZONA ANNUAL STATISTICAL REPORT FISCAL YEAR 2018 (2018), <https://www.azd.uscourts.gov/sites/default/files/documents/FY18%20Annual%20Report.pdf>.

3. As a mid-career supervisory lawyer in the office, I am frequently assigned more serious felony cases.

4. I use the term “harsh” because if trial penalties were low, or even modest, defendants would elect to reject plea agreements more often.

5. The trial penalty is the difference between the charge and sentence prosecutors offer for a plea and those sought at trial that arise irrespective of whether a prosecutor bargains by charging a higher crime first and offering to drop, or by charging a lesser crime first and threatening to add later. See Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1051 (2014). Trial tax means the same as trial penalty. This article uses the latter. J. Vincent Aprile has defined the term trial tax as “a euphemism for a judge imposing a more severe sentence on a defendant . . . because the accused, who elected to reject the prosecution’s plea agreement and go to trial, wasted judicial and prosecutorial resources involved in a trial.” See J. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 29 CRIM. JUST. 30, 30 (2014). Lawyers expand the concept to unsuccessful appeals when judges treat defendants harsher because the appeal used resources, just like the trial. *Id.*

American system of justice.<sup>6</sup> As plea rates increase, trials become rare; innocent people plead guilty;<sup>7</sup> lawyers lose practice or never get trial experience;<sup>8</sup> fewer juries decide cases;<sup>9</sup> and appellate courts have reduced opportunities to supervise the work of trial courts.<sup>10</sup>

This has not always been the case. Trials used to be the norm, not the exception.<sup>11</sup> The early twentieth century saw growing criminal filings, both federally and among states.<sup>12</sup> This increased pressure to avoid trial backlogs. People frowned on plea bargaining, but prosecutors in many cities offered them at the behest of state officials.<sup>13</sup> There was also overcriminalization and increasing complexity in trials, expanding their length.<sup>14</sup> To save time and resources, plea agreements gained

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6. Trials require proof beyond a reasonable doubt and test evidence through cross-examination of witnesses. The trial is the apogee of the legal adversarial process. “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” See Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1225 (2006) (citing *Herring v. New York*, 422 U.S. 853, 862 (1975) (invalidating a New York statute that allowed judges in nonjury criminal trials to deny counsel the chance to make a summation of evidence before rendering a verdict)).

7. See Allison D. Redlich, Vanessa A. Edkins, Stephanos Bibas & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339, 348 (2017) (remarking that innocent defendants have pled guilty).

8. See Nat’l Ass’n of Crim. Def. Law.’s, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 31 Fed. Sent. R. 331, 332 (2019) (noting that “[t]he decline in the frequency of trials impacts the quality of prosecutorial decision-making, defense advocacy, and judicial supervision.”). It is my experience that criminal defense lawyers get rusty and are not as sharp on trial skills when the rare trial arises. In federal courthouses, young lawyers do not get trial experience and lose out on training that their colleagues attained from state systems with higher trial rates or from the federal system when the trial rate was slightly higher. See William Glaberson, *Study Sees More U.S. Plea Bargaining*, N.Y. TIMES (Oct. 29, 1989), <https://www.nytimes.com/1989/10/29/nyregion/study-sees-more-us-plea-bargains.html>. In the Southern District of New York in 1980, for example, 18% of federal criminal cases went to trial. In 1987 9% of the cases ended in trials. *Id.*

9. See Thom Brooks, *The Right to Trial by Jury*, 21 J. APP. PHIL. 197, 197 (2004) (providing empirical evidence that juries foster democratic participation and public legitimation of legal decisions).

10. With fewer trials, appellate courts have fewer opportunities to perform their primary function. See Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 469-70 (1998) (Noting the primary purpose of an appeal is to correct errors by the trial court; the second is lawmaking).

11. See George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 899 (2000) (explaining plea bargaining accelerated in the nineteenth century due, in part, to prosecutorial workload).

12. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 117 (2005) (citing FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 29–30 (1996) (providing statistics indicating both increased crime and increased incarceration but noting that in the federal system growth was “complex.”)).

13. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 24–26 (1979). Professor Alschuler gives examples of corruption. The Mayor of Providence, Rhode Island acted as an intermediary with the state Attorney General in arranging a plea agreement for Richard Canfield, who later became an operator of illegal gambling casinos. *Id.* at 24. He discusses a New York defense attorney with an arrangement with a magistrate who stood out on the street in front of the night court to offer \$300.00 for ten days, \$200.00 for twenty days, and \$150.00 for thirty days. *Id.* Alschuler argues that the practice of corruption in large cities enabled its growth despite its illegality. *Id.* at 26.

14. *Id.* at 34, 38.

importance.<sup>15</sup> Despite these developments, the Supreme Court did not sanction plea bargains until 1970 in *Brady v. United States*.<sup>16</sup> By then, however, plea agreements were already the norm.<sup>17</sup> Harsh trial penalties made this possible but not without serious costs to justice, especially among busy southwest border districts, where trial rates are even lower than the tiny national average.<sup>18</sup>

Although scholars have produced a vast literature regarding the trial penalty problem,<sup>19</sup> they have largely ignored topics germane to the U.S.-Mexico border, the area with most federal criminal prosecutions, where trial penalties leave a large imprint.<sup>20</sup> Researchers have also failed to explain the role of cognitive biases at sentencing in accounting for disparities in trial penalties.<sup>21</sup>

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15. See Bruce A. Green, *Criminal Neglect: Indigent Defense from A Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1193 (2003) (noting that courts encourage early guilty pleas to promote judicial economy).

16. *Brady v. United States*, 397 U.S. 742, 758 (1970) (ruling that large sentencing discounts and threats of the death penalty are insufficient evidence of coercion).

17. See Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 58 (2012) (noting that plea bargaining began its rise to dominance well before it had been approved as a form of justice by the Supreme Court in 1970).

18. See *supra* notes 1 and 2. The national federal trial rate was 2.6% in 2018. The trial rate of the District of Arizona was 1.25% in 2014. Border districts include Arizona, New Mexico, Southern California, Southern Texas, and Western Texas. See Albert Llosas Barrueco, *Fast-Tracking United States v. Booker: Why Judges Should Not Fix Fast Track Disparities*, 6 CONN. PUB. INT. L.J. 65, 68 (2006).

19. The research on trial penalties is extensive, with varied conclusions, but there is good evidence trial penalties exist, vary across regions, and correlate with features of local jurisdictions. See, e.g., Nancy J. King, David A. Soule, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–75 (2005) (finding that defendants who pled guilty to certain offenses received lower sentences than those who had jury trials for the same offenses, even in states using sentencing guidelines in which a plea agreement was not a recognized ground for departure from the guideline recommendations); Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631 (2006) (examining Pennsylvania sentencing data and finding a substantial trial penalty that depends on characteristics of the individual offender and of the local court jurisdiction, including caseload, local crime rate, and population); HUM. RTS. WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 102–12 (Dec. 2013), [http://www.hrw.org/sites/default/files/reports/us1213\\_ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0.pdf) (documenting the trial penalty for various drug crimes in federal court); Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019) (finding that defendants convicted at trial, compared with those convicted by guilty plea, are more likely to go to prison and receive sentences that are fifteen to sixty percent longer, on average).

20. BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS, 2009 1 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf> (noting that five judicial districts along U.S.-Mexico border accounted for more than half of all federal arrests in 2009).

21. In a recent study of Latinx people and trial penalties, for example, Jeffrey Ulmer and Kaitlyn Konefal focus on how Latinx sentencing disparities in federal and state courts differ based on the concentration of Latinx populations in certain areas. But this study ignores the underlying problem of how negative stereotypes of Latinx people contributed to unequal outcomes. See Jeffery T. Ulmer & Kaitlyn Konefal, *Sentencing the "Other": Punishment of Latinx Defendants*, 66 UCLA L. REV. 1716, 1716 (2019). In another study of trial penalties, Jeffery Ulmer and Mindy Bradley found trial penalties for serious violent offenses is moderately larger in counties with greater numbers of Black residents, but do not explain any social psychology linking African Americans to criminality or their social control under the justice system. See Ulmer & Bradley, *supra* note 19, at 660. Other studies fail to examine the role of cognitive factors that impact judges' decisions at sentencing for minority defendants.

To fill this knowledge gap, this Article examines the way trial penalties helped create fast-track programs, affected drug courier and illegal entry prosecutions, and, with implicit bias, helped generate sentencing differences for racial minorities.<sup>22</sup> The Article also supplies strategies for trial lawyers to help mitigate increasingly long sentences. Its thesis is that fast-track programs, and the way illegal entry and drug courier prosecutions function today, would not have been possible without the plea-bargaining machine, a result of harsh trial penalties. As one fed the other, trial penalties and plea bargaining helped exploit stigmatization of outsiders like Latinx people, Black, and indigenous populations.

The Article continues as follows. Part I summarizes scholarship on trial penalties, focusing on its severity, its effect increasing prosecutorial power, and related public policy recommendations. Part II surveys plea bargaining's history—marked by declining trial rates and rising caseloads. This Part includes a section on why plea bargaining became a dominant force and paved the way for fast-track programs such as illegal entry and drug courier prosecutions along the southwest border. Part III focuses on how trial penalties influence the two most frequent charges in federal criminal courts: drug trafficking and illegal entry. Despite similarities between the two (both involve financial motives and people with low levels of criminal threat) their respective trial penalties are opposite (drug trafficking has more severe penalties).

Part IV examines how trial penalties impact Black and Latinx people, the two largest minorities charged in federal criminal cases. Unlike previous work, this Part emphasizes how implicit racial biases contribute to punishment disparities. Armed with historical and theoretical knowledge, Part V provides tips and strategies to help lawyers advise clients in accepting or rejecting plea offers, and to persuade trial judges to impose fairer punishments.

#### I. SCHOLARSHIP ON TRIAL PENALTIES: SEVERITY, PROSECUTORIAL POWER, AND POLICY RECOMMENDATIONS

This Part summarizes the extensive literature on trial penalties. The consensus finds that trial penalties exist, vary across jurisdictions, and correlate with features of localities.<sup>23</sup> To contextualize trial penalties' problems, this Section summarizes

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22. Scholars have studied the impact of harsh trial penalties on racial minorities, but they lack emphasis on implicit bias and a focus on Latinx people, the largest segment of federal criminal defendants, especially in the southwestern United States. Fast-track programs originated in the border districts as a mechanism for prosecutors to deal with heavy caseloads. See Sarah C. White, *Analyzing Federal Sentencing in the Border Districts, 1996-2008*, 76 *BROOK. L. REV.* 867, 868 (2011).

23. See Ulmer & Bradley, *supra* note 19, at 631 (explaining that Pennsylvania sentencing data points to a substantial trial penalty, which depends on characteristics of the individual offender and local court jurisdiction, including caseload, crime rate, and population); HUM. RTS. WATCH, *supra* note 19, at 102–12; King et al., *supra* note 19, at 973–75 (noting that defendants who pled guilty received lower sentences than those who went to trial for the same offenses).

the scholarship into three categories: trial penalties’ severity, prosecutorial power’s role in its rise, and policy recommendations to mitigate its effects.

### A. *Severity of Trial Penalties*

Economist David S. Abrams published an empirical study showing little support for the trial penalty.<sup>24</sup> His research from Chicago courts in the early 2000s instead supports a *plea* penalty.<sup>25</sup> Abrams concluded that expected sentences are at least one year longer in plea bargains than in trials, and incarceration is twice as likely to result.<sup>26</sup> Sometimes it is in the defendant’s best interest to accept a plea offer, but, on average, attorneys and clients should go to trial more frequently.<sup>27</sup> One reason high plea rates persist, despite penalties, is that “[o]verworked and underpaid defense attorneys may prefer the brevity of plea bargains” to time consuming trials, leading them to disloyally advise clients that their chances are worse than they are.<sup>28</sup> Abrams’ study is the first and only to reach these conclusions.<sup>29</sup>

Professor Andrew Chongseh Kim rebutted Abrams, arguing that the normal federal trial penalty is around 64%,<sup>30</sup> several times larger than the figure in Abrams’

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24. See David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 778 (2013). A trial penalty is punishment a court metes to a defendant for exercising his or her right to a jury trial. See Lieb, *supra* note 5, at 1058 (2014).

25. See Abrams, *supra* note 24, at 785. Chicago is in Cook County, Illinois, the largest unified criminal court in the United States. Cook County receives the bulk of its cases from the City of Chicago. *Id.* at 780.

26. *Id.* at 785–86.

27. *Id.*

28. *Id.*

29. See Dan Markel, *The Myth of the Trial Penalty?*, PRAWFSBLAWG (Feb. 19, 2014, 11:30 AM), <https://perma.cc/GC9T-VNUX> (asserting that competing claims to Abrams’ “should be ventilated in virtually every crim pro adjudication course.”); see also Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, 102 KY. L.J. 1, 30 n.168 (2013) (Abrams’ conclusions are “counter-intuitive to virtually everyone who has worked in the criminal justice system but definitely worthy of further exploration”). Examples of studies that come to the opposite conclusion to Abrams include Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1199–1200 (2015) (finding a federal trial penalty of sixty-four percent) and Nancy J. King, David A. Soulé, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–975 (2005) (finding trial penalties in Pennsylvania, Minnesota, Washington, Maryland, and Kansas between 1997 and 2004 ranged from 13% to 461%).

30. There is literature suggesting trial penalties in federal courts are more modest than Kim proposes. See Jeffery T. Ulmer, James Eisenstein, and Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 575 (2010) (finding federal trial penalty at 15%); Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 LAW & SOC’Y REV. 789, 805 tbl.2 (1997) (showing trial penalties of 6 to 14% for Black and white males charged with federal drug trafficking crimes); U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING B28-B31 (2006), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/200603-booker/Booker\\_Report.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/200603-booker/Booker_Report.pdf) (finding increases of only eleven percent in trial penalties one year after the 2005 Booker decision and the PROTECT Act). Congress enacted the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003), to strengthen law enforcement’s ability to prevent, investigate, prosecute, and punish violent crimes committed against children. “The acronym ‘PROTECT’ stands for Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today.”

study.<sup>31</sup> According to Kim, the average federal defendant who goes to trial in federal court would be better off if she instead pleads guilty, even after accounting for the chance of acquittal.<sup>32</sup> The few defendants who exercise their right to trial do so against their rational best interest.<sup>33</sup> Kim explains that Abrams' methodology assumes that defendants who pled guilty would have had the same chances for acquittal as those who went to trial; this, Kim asserts, is a false premise.<sup>34</sup>

Like Kim, Professors Jeffrey Ulmer and Brian Johnson confirm trial penalties in federal sentencing but with smaller differences between plea and trial outcomes.<sup>35</sup> After studying federal sentencing data for fiscal years 2000 to 2002, they found that just under two thirds of trial penalties are attributable to United States Sentencing Guidelines ("Guidelines") factors.<sup>36</sup> They also found a 15% sentence length difference, on average, between those who pleaded guilty and those convicted by trial.<sup>37</sup> Trial penalties are less for defendants with more serious criminal histories and are not conditioned by gender.<sup>38</sup>

A surprising finding of Ulmer and Johnson's study is that African American defendants experienced fewer trial penalties compared to white defendants.<sup>39</sup> The authors hypothesize that "nationally publicized controversies surrounding racial disparities in federal drug sentencing may have heightened concern about racial disparity in federal courts."<sup>40</sup> Federal judges probably imposed lower sentences for African Americans out of fear of appearing racist, given the higher publicity following trials compared to guilty pleas.<sup>41</sup> The authors' second hypothesis is that African Americans appeared more abstract in plea agreements, as "racially-based one-dimensional stereotypes," whereas trials allow courts to see them in more detailed ways.<sup>42</sup>

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Legal Almanac: The Law of Obscenity and Pornography § 4:30 (2012); *see also* United States v. Booker, 543 U.S. 220 (2005) (making the Guidelines discretionary on judges).

31. *See* Kim, *supra* note 29.

32. *Id.* at 1200.

33. *Id.*

34. *See* Kim, *supra* note 29, at 1201. Defendants decide to go to trial oftentimes because they know the evidence against them is not extraordinarily strong. *Id.* On the other hand, those who plead guilty often do so because the evidence against them is strong. *Id.* Abrams' methodology "implicitly assumes that defendants who pled guilty would have had the *same* odds of being acquitted as those defendants who *actually* went to trial." *Id.* This is a false assumption. *Id.*

35. *See* Ulmer et al., *supra* note 30, at 585.

36. *Id.* at 584.

37. *Id.*

38. *Id.*

39. *Id.* at 585.

40. *Id.*

41. *Id.*

42. *Id.*



### B. Increase in Prosecutorial Power

Several scholars have commented on the increasing power of prosecutors with the rise of trial penalties, their use of non-traditional methods to induce guilty pleas, and their use of mandatory minimums to avoid trials.

Professor Ronald Wright argues that federal defendants plead guilty because of large trial penalties.<sup>43</sup> The most compelling cause of rising guilty pleas and falling acquittals in recent decades has been a dramatic increase in prosecutorial resources.<sup>44</sup> Federal prosecutors have more power under sentencing laws to punish defendants severely for going to trial.<sup>45</sup> Federal law, Wright argues, must respond to increasing plea rates by “restoring counterbalances to prosecutorial bargaining power and by limiting the techniques available to reward defendants for waiving their trials.”<sup>46</sup> Brian Johnson, like Wright, argues that sentencing reforms in the late twentieth century increased prosecutors’ influence on sentencing.<sup>47</sup> This escalated trial penalties and reliance on plea bargaining.<sup>48</sup> Prosecutors used charging to prevent people from going to trial. Johnson cites studies that conclude prosecutorial workload may not explain the increase in trial penalties.<sup>49</sup>

Professor Lucius T. Outlaw focuses on prosecutors’ non-traditional methods for inducing guilty pleas. He wrote that prosecutors can threaten to charge third parties, like family members, to obtain guilty pleas.<sup>50</sup> Unfortunately, the law permits these tactics.<sup>51</sup> Prosecutors can also set a time limit on how long a defendant can decide on whether to sign or reject a plea offer.<sup>52</sup>

Mary Price, General Counsel for Families Against Mandatory Minimums, examined how mandatory minimums and long sentencing guidelines give prosecutors a “leg up” in plea bargaining, notwithstanding rules prosecutors must follow

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43. See Wright, *supra* note 12, at 85.

44. *Id.*

45. *Id.* at 84

46. *Id.*

47. Johnson, *supra* note 19, at 316.

48. *Id.* at 315.

49. *Id.* at 317 (citing James W. Meeker & Henry N. Pontell, *Court Caseloads, Plea Bargains, and Criminal Sanctions: The Effects of Section 17 PC in California*, 23 *CRIMINOLOGY* 119 (1985); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 *CRIM. L. QUARTERLY* 67 (2005); Malcolm M. Feeley, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1992)).

50. See Lucius T. Outlaw III, *An Honest Drug Offender Sentencing Letter*, 17 *OHIO ST. J. CRIM. L.* 481, 484 (2020).

51. *Id.* (citing *United States v. Seng Chen Young*, 926 F.3d 582, 591 (9th Cir. 2019) (“Every federal court of appeal to consider the issue . . . has held that plea agreements that condition leniency for third parties on the defendant’s guilty plea are permissible so long as the Government acted in ‘good faith,’ meaning that it had probable cause to prosecute the third party.”)).

52. *Id.* at 483 (citing *Kelly v. United States*, No. 6:09-cv-Orl-19KRS, 2010 WL 2991577, at \*8 (M.D. Fla. July 27, 2010) (holding it was permissible for a prosecutor to set a twenty-four hour time limit for accepting a plea offer)). “‘Exploding’ plea offers . . . expire if not accepted in a noticeably brief time, ‘to pressure defendants to resolve cases quickly and cheaply.’” See Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 *WASHBURN L.J.* 513, 517 (2012).

in negotiating pleas.<sup>53</sup> The U.S. Justice Manual tells prosecutors that, “[c]harges should not be filed simply to exert leverage to induce a plea; nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant’s conduct.”<sup>54</sup> Instead, Price comments, prosecutors “routinely overcharge to gain an advantage in bargaining with defendants.”<sup>55</sup> She points out, “[a]mong the many reforms to the system that would end the trial penalty or reduce the government’s ability to extort pleas and punish defendants to go to trial include abolishing mandatory minimums.”<sup>56</sup> Doing so, Price argues, will “minimize incentives to bully, remove the most powerful tool prosecutors use to punish, and may very well have an effect on lowering sentences for non-Guideline offenses.”<sup>57</sup>

### C. Policy Recommendations

Because trial penalties lead to unjust outcomes, scholars have proposed policy recommendations for increasing trial rates and lessening sentencing disparities between those who exercise the constitutional right to trial and those who plead guilty. The recommendations include changes to the sentencing guidelines, a fixed discount system between plea and trial sentencings, “second looks,” and evidentiary presumptions for prosecutors who steer judges away from standard sentencing ranges by overcharging or offering harsher than usual plea agreements.<sup>58</sup>

#### 1. Changes to U.S. Sentencing Guidelines

A report by the National Association of Criminal Defense Lawyers (“NACDL”) lists ten recommendations to lessen the trial penalty in the federal system.<sup>59</sup> They are:

##### 1. Amend the relevant conduct guideline.<sup>60</sup>

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53. See Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 FED. SENT. R. 309, 309 (2019).

54. *Id.* at 311 (citing U.S. Dep’t of Just., Just. Manual § 9-27.400 (2018)).

55. *Id.* at 312 (citing Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 & n.74 (2008)).

56. *Id.* at 313–14.

57. *Id.* at 314.

58. See Nat’l Assoc. of Crim. Def. Law.’s, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 31 FED. SENT’G. REP. 331, 332 (2019) (proposing amendments and repeal of certain sentencing guidelines and suggesting best practices for courts); Covey, *supra* note 55 (proposing a plea-based ceiling for sentencing); Doug Lieb, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014 (2014) (proposing a legal rule regulating vindictive charging to curb impact of trial penalty).

59. See Nat’l Assoc. of Crim. Def. Law.’s, *supra* note 58, at 332–33.

60. The relevant conduct guideline, a provision in the Guidelines, permits a judge to consider uncharged conduct “that [was] part of the same course of conduct or common scheme or plan as the offense of conviction” in deciding a defendant’s sentence. See Christine A. Neuharth, *Sentencing Enhancement Through Relevant Conduct: United States v. Galloway and the Implications for Due Process*, 27 CREIGHTON L. REV. 809, 810 (1994) (citing U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(2) (U.S. SENT’G COMM’N 1994)). In my experience, relevant conduct comes up when a probation officer makes a note of it in the pre-sentence report and increases

2. Amend acceptance of responsibility guidelines.<sup>61</sup>
3. Amend obstruction of justice guideline.<sup>62</sup>
4. Repeal mandatory minimum sentencing or create a judicial “safety valve.”<sup>63</sup>
5. Provide full discovery before entry of a plea (including exculpatory evidence).
6. Remove litigation penalties: do not condition pleas on pre-trial release or discovery, investigation, or litigation of statutory or constitutional pre-trial motions.
7. Provide limited judicial oversight of plea bargaining.
8. Provide judicial “second looks.”<sup>64</sup>
9. Assure proportionality between pre-trial and post-trial sentencing.
10. Amend 18 U.S.C. § 3553(a)(6) to require courts to consider the sentence for a defendant who pled guilty in the same matter.<sup>65</sup>

These changes to the Sentencing Guidelines, if made, will go a long way in meaningfully incentivizing some defendants to reject plea agreements and proceed to trial in select cases.

## 2. Fixed Discount Systems

Professor Russel Covey advocates stemming the trend away from trials by addressing the sentencing differential between plea bargains and trial outcomes.<sup>66</sup>

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the offense level. Prosecutors sometimes object when relevant conduct is not calculated in the pre-sentence report. As it relates to the trial penalty, acquitted charges may also become relevant conduct and thus enhance the sentence.

61. The acceptance of responsibility provision allows for a decrease by two or three levels in an offenders’ offense level for admitting guilt and otherwise demonstrating behavior consistent with acceptance of responsibility, such as ending criminal conduct and associations. U.S. SENT’G GUIDELINES MANUAL § 3E1.1 (U.S. SENT’G COMM’N 2018). It amounts to a sentence reduction of about 35%. *See* Stephanos Bibas, *Apprendi and the Dynamics of Guilty Pleas*, 54 STAN. L. REV. 311, 311 (2001).

62. A defendant convicted of any crime is subject to a more severe sentence if they are found to have obstructed justice by impeding the investigation or prosecution of their crimes. *See* U.S. SENT’G GUIDELINES MANUAL § 3C1.1 (U.S. SENT’G COMM’N 2018).

63. The safety valve provision authorizes a sentence below the statutory minimum for certain nonviolent, non-managerial drug offenders with little or no criminal history. *See* U.S. SENT’G GUIDELINES MANUAL § 5C1.2 (U.S. SENT’G COMM’N 2018); *see also* 18 U.S.C. § 3553(f). A Senate version of the First Step Act was signed into law in December 2018 which expanded the safety valve to include offenders with up to four criminal history points, excluding 1-point offenses, such as minor misdemeanors. *See* First Step Act of 2018, S. 3649, 115th Cong. (enacted).

64. *See* Janeanne Murray, *Ameliorating the Federal Trial Penalty Through a Systematic Judicial “Second Look” Procedure*, 31 FED. SENT’G. REP. 279, 279–80 (April 2019) (examining post-sentencing judicial “second look” after offender has served a substantial period in prison and sketching what process could look like at federal level).

65. 18 U.S.C. § 3553(a)(6) requires the trial judge to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”

66. *See* Covey, *supra* note 55, at 1240.

Fixed discounts offer a practical solution to the plea-bargaining problem.<sup>67</sup> Stakeholders can devise an effective fixed-discount system only if they shift the traditional fixed-discount paradigm.<sup>68</sup> As an example, Covey mentions a policy in England and Wales that adds a one-third “trial tariff” to plea offers when juries convict defendants.<sup>69</sup>

Covey proposes “plea-based ceilings” that establish mandatory caps or ceilings on trial sentences. Under the ceiling, “no defendant could receive a punishment after trial that exceeded the sentence he could have had as a result of a plea offer by more than a modest, predetermined amount.”<sup>70</sup> The ceiling would limit the sentencing difference and enforce a fixed discount by limiting the punishment the court could impose on a defendant who exercises their right to a jury trial. The United States has never imposed a system like this, but Italy has, with limited success.<sup>71</sup>

### 3. Evidentiary Presumptions for Prosecutors

In an article on vindictive prosecution, attorney Doug Lieb offers a plea-bargaining model to limit trial penalties.<sup>72</sup> He calls it “vindictiveness-as-vengeance.”<sup>73</sup> Lieb writes that most cases fall within a standard punishment range familiar to prosecutors and public defenders.<sup>74</sup> If the government overcharges, files uncommon sentencing enhancements, offers an unusually harsh plea, or does anything that raises the penalty beyond the standard range, the court can apply a “vindictiveness-as-vengeance” rebuttable presumption.<sup>75</sup> The prosecutor would then have to explain the over-charging, harsh plea, or unusual sentencing enhancement. Lieb acknowledges that the presumption is not perfect but can discourage harsh trial penalties.<sup>76</sup>

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67. *Id.* at 1241 (arguing that “fixed discounts offer the most promising practical solution to the plea-bargaining epidemic and that an effective fixed-discount system can be devised, but only if the traditional fixed-discount paradigm is radically shifted”).

68. *Id.* at 1241.

69. *Id.* (citing Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA*, in *THE JURY TRIAL IN CRIMINAL JUSTICE* 23, 26–27 (Douglas D. Koski ed., 2003) (comparing the U.S. plea-bargaining system to “trial tariff” in the English and Welsh systems)).

70. *Id.* at 1242.

71. See Nicola Boari & Gianluca Fiorentini, *An Economic Analysis of Plea Bargaining: The Incentives of the Parties in a Mixed Penal System*, 21 *INT’L REV. L. & ECON.* 213, 217 (2001) (noting that the Italian justice system resolves only an exceedingly small percentage of cases with plea bargains).

72. See Lieb, *supra* note 58, at 1046.

73. *Id.* at 1046.

74. *Id.* at 1051.

75. Lieb writes, “a prosecutor’s unreasonably excessive deviation from the jurisdiction’s normal trial penalty might give rise to a rebuttable presumption of vindictiveness-as-vengeance.” *Id.* at 1052.

76. *Id.* at 1058 (citing *Kevin Ring Sentenced to 20 Months in Lobbying Scandal*, *DAILY RECORD* (Oct. 26, 2011), <http://thedailyrecord.com/2011/10/26/kevin-ring-sentenced-to-20-months-in-lobbying-scandal>). Kevin Ring was a former Washington lobbyist. He was charged with corruption, with twenty other defendants in the Jack Abramoff scandal. The trial judge dismissed a sentencing enhancement and exercised something like vindictiveness-as-vengeance. See Walter Pavlo, *Kevin Ring, Abramoff Understudy, Sentenced to 20 Months In*

In all, scholarship on trial penalties recognizes that plea rates are too high and that prosecutorial power, sentencing guidelines, and mandatory minimums are to blame. Nonetheless, several authors have proposed policies to curb the trial penalty problem. The next Part provides a brief history of how we got to this point.

## II. HOW TRIAL PENALTIES POPULARIZED PLEA BARGAINING AND HELPED CREATE FAST-TRACK PROGRAMS

A plea agreement is a contract whereby a defendant waives their right to a jury trial in exchange for a more lenient sentence compared to trial.<sup>77</sup> Plea agreements, therefore, provide a way to avoid trials and, often, trial penalties.<sup>78</sup> Understanding the history of plea bargaining is necessary to understanding the history of trial penalties.

The rise of plea bargaining through the increase in trial penalties enabled the proliferation of immigration crimes and fast-track programs in the federal criminal justice system.<sup>79</sup> Plea bargaining and trial penalties enabled a criminal justice culture that accepted plea rates close to 100%.<sup>80</sup> The present justice system in busy districts in the southwestern United States can only function through the fast-track system, but illegal entrants, at least in Arizona, can go to trial and not face lengthy trial sentences.<sup>81</sup>

To understand these processes, this Part is divided into two sections. Section A surveys the history of plea bargaining from the nineteenth and early twentieth century to today. It describes a shift in the mid-twentieth century that legalized plea bargaining. Plea rates continued to increase through prosecutorial power, sentencing guidelines, and overcriminalization. Section B explains the rise of criminal immigration prosecutions in the southwest. The sharp increase was only possible because of fast-track programs, a system that drastically increased plea rates and efficiency.

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Prison, FORBES (Oct. 26, 2011), <https://www.forbes.com/sites/walterpavlo/2011/10/26/kevin-ring-abramoff-understudy-sentenced-to-20-months-in-prison/?sh=72bb00db6127>.

77. See *Plea Bargain*, BLACK'S LAW DICTIONARY (7th ed. 2000).

78. In the federal system defendants can also plead guilty to the formal accusation. This has certain benefits, such as the ability to file a sentencing appeal. See Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 N.Y.U. REV. L. & SOC. CHANGE 59, 91, n.120 (2019) (“Pleading ‘straight up’ means that the defendant pleads guilty to the charges as they are presented in the charging document without entering into any plea agreement with the government.”). Plea bargaining will not solve the fact that a prosecutor can file more charges through a superseding formal accusation. This may also result in trial penalties for not pleading guilty.

79. See *infra* Part II.B.1, 2.

80. See U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2012, DISTRICT OF ARIZONA (2012), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2012/az12.pdf> (showing trial rate in Arizona for immigration crimes is close to 1%).

81. See *infra* Part II.B.1, 2.

### A. *The Rise, Rate, and Rationale for Plea Bargaining*

#### 1. Nineteenth and Early Twentieth Centuries

The common law<sup>82</sup> has historically “rejected plea bargaining as impermissibly coercive and an affront to the truth-seeking mission of the criminal justice system, an approach still taken in many common law countries.”<sup>83</sup> Plea bargaining is a recent American invention that appeared before the American Civil War,<sup>84</sup> was used to further corruption<sup>85</sup> during the early twentieth century and became popular to accommodate overcriminalization.<sup>86</sup>

Plea bargains around the time of the Civil War suffered criticism from courts around the country.<sup>87</sup> Courts would routinely withdraw or revoke guilty plea agreements. For example, in 1871, the Supreme Court of California wrote, “[W]hen there is reason to believe that the plea has been entered through inadvertence . . . and mainly from the hope that the punishment, to which the accused would otherwise be exposed, may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.”<sup>88</sup> In 1877 the Supreme Court of Wisconsin wrote, “[Plea bargaining is] hardly, if at all, distinguishable in principle from a direct sale of justice.”<sup>89</sup>

In the late nineteenth century, courts continued to question and disfavor the act of pleading guilty, especially in response to inducements.<sup>90</sup> In *Bram v. United States*, the Supreme Court pronounced, “[The] true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.”<sup>91</sup> Not until 1892 did it affirm a guilty plea. In *Hallinger v. Davis*, the Court clarified that where a defendant pleads guilty, the high standard for the admissibility of confessions utilized in England was equally applicable.<sup>92</sup>

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82. See *Common Law*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining common law as “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions”).

83. See Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 Fed. Sent. R. 239 (2019), WL 2453389.

84. There is evidence of plea bargaining in Massachusetts as early as 1749 but it began to rise after the first third of the nineteenth century. See Alschuler, *supra* note 13, at 16, 18 (finding that “15% of all felony convictions in Manhattan and Brooklyn were by guilty plea in 1839,” that the percentage “increased steadily at decade intervals to 45, 70, 75, and 80,” and “[b]y 1926, 90% of all felony convictions in Manhattan and Brooklyn were by plea of guilty, and the figures for New York State as a whole revealed a comparable increase”).

85. See Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 743 (2013) (citing Alschuler, *supra* note 13, at 19–24 (describing the use of plea bargaining as a tool of corruption)).

86. *Id.*

87. See Dervan, *supra* note 83, at 240.

88. *People v. McCrory*, 41 Cal. 458, 462 (Cal. 1871).

89. *Wight v. Rindskopf*, 43 Wis. 344, 354 (Wis. 1877).

90. See, e.g., *Commonwealth v. Battis*, 1 Mass. 95, 95–96 (Mass. 1804).

91. 168 U.S. 532, 548 (1897) (citing *Wilson v. United States*, 162 U.S. 613, 623 (1896)).

92. 146 U.S. 314, 324 (1892).

Despite condemnation, plea bargaining continued to grow as the nation entered the twentieth century.<sup>93</sup> Scholars attribute this growth to two reasons. First, prosecutors and judges offered “plea agreements” to defendants as vehicles of corruption during the early 1900s.<sup>94</sup> Second, the United States embarked on a history of unprecedented overcriminalization.<sup>95</sup> Expansion in both the number of criminal offenses and the volume of individual prosecutions became more pronounced as the country entered the prohibition era.<sup>96</sup> Prosecutors became overworked and used plea bargaining to more quickly dispose of cases.<sup>97</sup>

Between the early twentieth century and 1925, pleas of guilty in the federal criminal justice system rose from 50% to 90% of convictions.<sup>98</sup> President Herbert Hoover’s Wickersham Commission Report in 1931 explained that federal prosecutions under the Prohibition Act in 1930 accounted for eight times the total of all pending federal prosecutions in 1914.<sup>99</sup> The only way of managing this situation in urban districts was for United States Attorneys to offer plea agreements for minor offenses so that defendants could resolve cases with shorter penalties.<sup>100</sup>

## 2. A Shift in Plea Bargaining in the Mid-Twentieth Century

Despite its illegality, the American criminal justice system relied on plea bargaining by the mid-twentieth century.<sup>101</sup> The American Bar Association endorsed the practice in 1968.<sup>102</sup> In 1970, prosecutors and defense lawyers resolved 90% of cases through pleas of guilty.<sup>103</sup> The Supreme Court invalidated all guilty pleas under its jurisdictional control induced by threats of punishment or promises of leniency.<sup>104</sup> But the need for plea bargaining had never been greater as people continued to negotiate in the shadows of the law.<sup>105</sup>

Because implementing defendants’ procedural rights during the due process revolution slowed trials and criminal filings continued to rise, prosecutors had no

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93. See Dervan, *supra* note 83, at 240 (“[P]lea bargaining continued to grow in the shadows as the nation entered the twentieth century.”).

94. See Alschuler, *supra* note 13, at 24–25.

95. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) (overcriminalization is the “abuse of the supreme force of a criminal justice system—the implementation of crimes or imposition of sentences without justification.”).

96. See Dervan, *supra* note 83, at 240.

97. *Id.*

98. See Dervan, *supra* note 17, at 59.

99. See Alschuler, *supra* note 13, at 32.

100. See NAT’L COMM’N ON L. OBSERVANCE & ENF’T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 100–01 (1931), <https://www.ncjrs.gov/pdffiles1/Digitization/44540NCJRS.pdf>.

101. See *Hallinger v. Davis*, *supra* note 92; *Bram v. United States*, 168 U.S. 532, 542–43 (1897); *United States v. Ford*, 99 U.S. 594 (1878).

102. See A.B.A., PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (1968).

103. See Dervan, *supra* note 17, at 81.

104. *Id.* at 76.

105. *Id.* at 65.

choice but to continue to offer plea agreements.<sup>106</sup> In 1970, the Supreme Court departed from its paradigm and upheld the constitutionality of plea bargaining in *Brady v. United States*.<sup>107</sup> The result was surprising because it contradicted over a century of precedent and the Court's animosity towards contractual bargaining.<sup>108</sup> Scholars dispute why the Court shifted so radically, but one answer is the rise of plea bargaining's power by 1970 combined with overwhelmed judges and prosecutors.<sup>109</sup>

### 3. Plea Bargaining Rates

Early records indicate that in the first half of the nineteenth century, only 10 to 15% of cases resulted in guilty pleas.<sup>110</sup> Shortly thereafter, however, the rate of conviction by guilty plea began an upward climb.<sup>111</sup> In 1908, fifty percent of all convictions in federal courts were by plea of guilty.<sup>112</sup> This percentage changed in 1916, when it increased to seventy-two percent.<sup>113</sup> As the number of filings in federal courts declined during 1916, caseloads do not explain this increase.<sup>114</sup> But numerous filings under the federal prohibition laws increased the plea-bargaining rate. By 1925, the percentage of convictions by guilty plea had reached ninety percent.<sup>115</sup> By 1960, the decade before *Brady*, ninety percent of cases in the American criminal justice system were resolved through guilty pleas.<sup>116</sup> In 1962, fifteen percent of federal criminal cases were resolved by trial; by 2002, that number had fallen to less than five percent.<sup>117</sup> The total number of federal criminal defendants more than doubled from 33,110 in 1962 to 76,827 in 2002, while the number of

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106. *Id.* at 76.

107. 397 U.S. 742, 758 (1970).

108. See Dervan, *supra* note 17, at 79. The *Brady* decision held that large sentencing discounts and threats of the death penalty, by themselves, do not amount to coercion. *Id.*

109. *Id.*

110. See Alschuler, *supra* note 13, at 10 (noting that Boston Police Court records from 1824 indicated that only 11% of defendants entered pleas of guilty); *id.* at 18 (noting that in 1839, 15% of all defendants in Manhattan and Brooklyn pleaded guilty).

111. See *id.* at 27 ("In the federal courts, the statistics date from 1908, when only about 50% of all convictions were by plea of guilty. This percentage remained fairly constant until 1916, when it increased to 72%.")

112. See *id.*

113. *Id.* (citing A.L.I., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS 58 (1934)).

114. *Id.*

115. *Id.*

116. See Diana Bortek, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 *Cardozo L. Rev.* 1429, 1439 n.43 (2004); see also Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea-Bargaining Context*, 80 *Wash. U. L.Q.* 1, 1 (2002) (noting that since the 1960s the plea-bargaining rate has been around ninety percent).

117. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 459, 492-93 (2004); see also Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 *STAN. L. REV.* 1721, 1722 (2005) (reviewing GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003)) (citing BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.22.2003 (2003), <http://www.albany.edu/sourcebook/pdf/t522.pdf>).



criminal trials went down from 5,097 in 1962 to 3,574 in 2002—a thirty percent decrease.<sup>118</sup>

Just after the implementation of the Sentencing Guidelines, guilty plea rates increased from 85.4% in 1991 to 95.5% in 2004.<sup>119</sup>

#### 4. Reasons for the Rise in Plea Bargaining

One reason plea bargaining was uncommon prior to the early twentieth century was because trials were much quicker when criminal defendants had few protections.<sup>120</sup> There was no reason to develop a way to avoid trials because they did not last long. Professor John H. Langbein discovered that jury trials were quick, as neither party had appointed counsel.<sup>121</sup> A jury might hear several cases before retiring because the law of evidence was undeveloped.<sup>122</sup> This led to twelve to twenty cases heard in a single day.<sup>123</sup> Accordingly, the administrative pressure for plea bargaining was small.<sup>124</sup>

Things changed in the twentieth century. The Supreme Court increased protections for defendants during the due process revolution.<sup>125</sup> This included the exclusionary rule, the right to counsel, and Miranda warnings.<sup>126</sup> These protections lengthened criminal trials and created pressures for prosecutors and defense lawyers to resolve cases through plea agreements.<sup>127</sup>

The second reason for the increase in plea bargaining concerns crime rates. The post-World War II baby boom and the increased numbers of young Americans in society led to a “crime wave” in the 1960’s. This resulted in higher caseloads.<sup>128</sup> There were also more criminal prosecutions because of overcriminalization.<sup>129</sup> Plea bargaining reduced trials and became a tool for judicial economy.

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118. See Galanter, *supra* note 117, at 493.

119. See Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1034 (2006).

120. See Alschuler, *supra* note 13, at 8–9.

121. See *id.* at 8.

122. *Id.*

123. *Id.*

124. See *id.* at 8–9.

125. “Due process revolution” refers to the increase in due process claims as the Warren and Burger Courts established additional rights under the due process clause. The 1970s saw a 350% increase in due process litigation from the previous decade but only a 70% increase in federal litigation. See Leonard Kreynin, *Breach of Contract as A Due Process Violation: Can the Constitution Be A Font of Contract Law?*, 90 COLUM. L. REV. 1098, 1099 n.7 (1990) (citing JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 9 (1985)).

126. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule).

127. See Alschuler, *supra* note 13, at 38 (“In the District of Columbia, the length of the average felony trial grew from 1.9 days in 1950 to 2.8 days in 1965, and in Los Angeles the length of the average felony jury trial increased from 3.5 days in 1964 to 7.2 days in 1968.”).

128. *Id.* at 34 (citing JAMES Q. WILSON, *THINKING ABOUT CRIME* 3–20 (1975)).

129. See Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL’Y 645, 650 (2011) (noting that by 1967 the relationship between plea bargaining and overcriminalization solidified). Overcriminalization is the process where the government

## 5. Power of Prosecutors in Plea Bargaining

Today, scholars agree that plea bargaining became hegemonic because prosecutors gained power in the criminal justice system.<sup>130</sup> During the last two hundred years, prosecutors retained control over charging decisions and sentencing recommendations. Their authority over plea bargaining, and hence complete domination of the justice system, increased through the 1900s.<sup>131</sup>

The enactment of the United States Sentencing Guidelines in 1987 increased prosecutorial control over the structure of plea agreements and their ability to force defendants into accepting them.<sup>132</sup> Today, prosecutors have almost unilateral capacity in plea negotiations. Their control of charging decisions and influence over sentencing contribute to their rule over the institution.<sup>133</sup> Prosecutors also decide what sentencing enhancements to file, whether a defendant is eligible for relief under 18 U.S.C. § 3553(f),<sup>134</sup> and whether to file a supervening formal accusation.<sup>135</sup>

Plea bargaining's dominance during the nineteenth and twentieth centuries would not have come about without prosecutorial hegemony.<sup>136</sup> Through such power, prosecutors can offer incentives to those willing to waive their right to a jury trial.<sup>137</sup> Today, sentencing differentials are at an all-time high.<sup>138</sup> The incentives for defendants to plead guilty are greater than at any previous point in the

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defines as criminal conduct that historically has not been criminal. Professor Eric Luna defines it as "not merely a problem of too many crimes akin to an opera having 'too many notes.' Instead, it encompasses a broad array of issues, including: what should be denominated as a crime and when it should be enforced; who falls within the law's strictures or, conversely, avoids liability altogether; and what should be the boundaries of punishment and the proper sentence in specific cases." See Luna, *supra* note 95, at 713. There are many reasons that explain the rise in overcriminalization. Luna explains that one reason is "law and order" politics in "recent years." *Id.* at 719–729.

130. See Dervan, *supra* note 17, at 61.

131. *Id.* at 62.

132. See Fisher, *supra* note 11, at 868; see also Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-Booker*, 37 WM. MITCHELL L. REV. 469, 478 (2011) (discussing the implementation of the United States Sentencing Commission's work on the Federal Sentencing Guidelines in 1987).

133. See Fisher, *supra* note 11, at 868.

134. 18 U.S.C. § 3553(f), otherwise known as the "safety valve," allows defendants to obtain less than the mandatory minimum of five or ten years if, among other requirements outlined in the statute, they provided a full and truthful account of the offense to the government before sentencing. Although the judge is the final arbiter of whether a person provided truthful information, prosecutors make the initial decision.

135. See Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1063 (2007) ("Prosecutors decide themselves whether to seek indictments and whether to allow plea agreements and cannot allow other officials in the government to make these decisions."). The safety valve law gives prosecutors tremendous power and helps shape plea bargaining. Prosecutors can take a hard line in accepting defendants' proffers if they do not accept plea agreements. A supervening accusation is an additional charge a prosecutor can seek if a defendant rejects a plea agreement.

136. See Dervan, *supra* note 17, at 64.

137. *Id.*

138. *Id.*

history of the American justice system.<sup>139</sup> Therefore, every year, over ninety-five percent of defendants accept the government’s offers of leniency and plead guilty rather than risk losing at trial.<sup>140</sup> The guilty plea rate in federal court today is close to ninety-seven percent.<sup>141</sup>

### *B. Increase in Southwest Border Prosecutions*

Criminalization of migration is not new.<sup>142</sup> Unauthorized entry and reentry have been federal crimes since 1929.<sup>143</sup> For much of the next eight decades, however, federal prosecutors did not use them much.<sup>144</sup> This changed in the last three decades. Between 1992 and 2012, the number of offenders sentenced in federal courts more than doubled, rising from 36,564 cases to 75,867.<sup>145</sup> Concurrently, the number of unlawful reentry convictions increased twenty-eight-fold, from 690 cases in 1992 to 19,463 in 2012.<sup>146</sup> This increase accounted for forty-eight percent of the growth in total sentences in the federal justice system over this period.<sup>147</sup>

The second fastest growing type of conviction is for drug offenses.<sup>148</sup> In the 1980s, the increase in federal drug prosecutions fueled the growth in federal filings.<sup>149</sup> Federal drug prosecutions have increased over the last forty years and have accounted for twenty-two percent of the growth in federal crimes since the early 1990s.<sup>150</sup> The rate of growth increased more rapidly in the early 1990s because of the “Southwest Border Initiative,” an attempt to eradicate illegal immigration along the Mexico border.<sup>151</sup> After the federal government began the initiative around 1995, “federal drug prosecutions [] almost doubled—from 12,000 to

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139. *Id.*

140. *Id.*

141. In U.S. federal courts between the years 2007 and 2011, guilty plea rates increased from 95.8% to 96.9% of all convictions; the percentage of convictions following trial declined from 4.2% to 3.1%. U.S. SENTENCING COMM’N, 2011 SOURCEBOOK OF FEDERAL SENTENCING fig. C (2011) [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/FigureC\\_0.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2011/FigureC_0.pdf). Guilty plea rates within each of the twelve federal circuits showed slight variation, ranging from 93.6% to 98.3% in 2011. *Id.* at tbl.10.

142. See Jennifer Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1835–50 (2007).

143. See Act of March 4, 1929, ch. 690, § 2, 45 Stat. 1551, 1551.

144. See, e.g., César Cuauhtémoc García Hernández, *Immigration Crime Cases in the 1970s*, CRIMMIGRATION.COM (Feb. 26, 2018, 12:18 AM), <http://crimmigration.com/2018/02/26/immigration-crime-cases-in-the-1970s/>.

145. See Michael T. Light, Mark Hugo Lopez & Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes*, PEW RSCH. CENT. (Mar. 18, 2014), <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>.

146. *Id.*

147. *Id.*

148. *Id.*

149. See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 911 (2000). This new growth peaked in 1989. *Id.*

150. Light et al., *supra* note 145.

151. Simons, *supra* note 149 at 911–12, 912 n.87 (discussing Chief Justice Rehnquist’s observation that the increasing criminal caseload was primarily due to immigration and drug filings in the districts along the border with Mexico).

22,000 each year—and much of that increase has come from the five southwest border districts”: Southern California, Arizona, New Mexico, Western Texas, and Southern Texas.<sup>152</sup>

### 1. Reasons for Higher Rates of Criminal Immigration Prosecutions

In the 1980s, 125,000 Cubans left the island from the port of Mariel heading toward the United States.<sup>153</sup> The American media popularly depicted the migration as the Castro regime’s effort to rid itself of unwanted scum and framed these Cubans as a threat unleashed in American cities.<sup>154</sup> 15,000 Haitians came to the United States during the same period.<sup>155</sup> By the mid-1980s, increased numbers of migrants from Central America, many from Indigenous communities, also came to the United States. People perceived and treated them as “immigration scofflaws or Marxist ideologues.”<sup>156</sup> The Reagan administration viewed migrants entering the United States similarly and stereotyped them as drug traffickers.<sup>157</sup>

These developments justified the southwest border’s oversized role in concerns about public-safety and immigration that persists today. As President George H.W. Bush explained when signing the Immigration Act of 1990 into law, the U.S.-Mexico border became the “front lines” of the war on drugs.<sup>158</sup> Federal law enforcement agencies increased priority for immigration offenses and the Border Patrol grew rapidly in size and budget.<sup>159</sup> The federal government launched high-profile operations to stop illegal immigration.<sup>160</sup> The 1994 omnibus crime bill

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152. Michael A. Simmons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 940 n.95 (2002).

153. See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1504 (2013) [hereinafter *Creating Crimmigration*] (citing JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON “ILLEGALS” AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY 82–83 (2d ed. 2010)).

154. See *Creating Crimmigration*, *supra* note 153, at 1504 (citing John S. Lang, *Castro’s “Crime Bomb” Inside U.S.*, U.S. NEWS & WORLD REP., Jan. 16, 1984, at 27).

155. See *Creating Crimmigration*, *supra* note 153, at 1504 (citing Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 579 (1998)).

156. See César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 201 (2018) [hereinafter *Deconstructing Crimmigration*].

157. *Id.* (citing *Creating Crimmigration*, *supra* note 153, at 1504–07).

158. See *Deconstructing Crimmigration*, *supra* note 156, at 201 (discussing President George H.W. Bush’s statements when signing the Immigration Act of 1990).

159. Thomas E. Gorman, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 479, 485 (2010); see also UNITED STATES GEN. ACCT. OFF., REPORT TO CONGRESSIONAL COMMITTEES: INS’ SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS 7–8 (Aug. 2001), <http://www.gao.gov/new.items/d01842.pdf> (noting that the number of active Border Patrol agents grew by more than 150% between 1993 and 2000); Ken Ellingwood, *Data on Border Arrests Raise Gatekeeper Debate*, L.A. TIMES (Oct. 1, 1999), <https://www.latimes.com/archives/la-xpm-1999-oct-01-mn-17298-story.html> (stating that the Border Patrol’s budget grew from \$374 million in 1993 to \$952 million in 1999).

160. See Gorman, *supra* note 159, at 485 (citing Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 299–300 (1998)).

increased punishment for illegal reentry after deportation and expanded the offense’s applicability to more defendants.<sup>161</sup>

Stigmatizing narratives about Latinx migrants from the south and anti-immigrant political priorities made it easy for the government and courts to increase criminal filings to deport and imprison this population.<sup>162</sup> The narratives, however, were not something new that the government had to create and disseminate. Since the early days of the nation, American media used white supremacy to portray Latinx migrants as foreign and a negative force in American society.<sup>163</sup>

## 2. Fast-Track Programs for Immigration and Drug Prosecutions

The increasing rate of federal criminal immigration and drug filings would not have been possible without the proliferation of plea agreements.<sup>164</sup> Specifically, the creation of early disposition programs, called “fast-track” sentencing programs, allowed federal prosecutors to offer a below-Guidelines sentence in exchange for a defendant’s prompt guilty plea and waiver of certain pretrial and postconviction rights.<sup>165</sup> Prosecutors have used fast-track sentencing to quickly process an

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161. See Gorman, *supra* note 159, at 485; see also 8 U.S.C. § 1326(b) (detailing criminal penalties for reentry of certain removed aliens).

162. See generally MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2005); LEO CHAVEZ, COVERING IMMIGRATION: POPULAR IMAGES AND THE POLITICS OF THE NATION (2001) (discussing how, since at least since the beginning of the twentieth century, political and media elites constructed Latino immigrants as threatening to the nation).

163. See, e.g., Camilo M. Ortiz, *Latinos Nowhere in Sight: Erased by Racism, Nativism, the Black-White Binary, and Authoritarianism*, 13 RUTGERS RACE & L. REV. 29, 30–31 (2012) (“[C]able television commentators, local radio show hosts, and politicians have repeated and endorsed the ideas that all undocumented individuals from Mexico are criminals, secretly harbor a ‘reconquista’ agenda, and are responsible for the rise in infectious diseases in the United States.”); see also JOHN MACK FARAGHER, ETERNITY STREET: VIOLENCE AND JUSTICE IN FRONTIER LOS ANGELES 263–280 (2016) (noting early use of lynching to punish and terrorize Latinx people in Los Angeles and Northern California); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 304–07 (2009) (exploring why the history of Latinx lynching is not better known); Martin G. Urbina, *A Qualitative Analysis of Latinos Executed in the United States Between 1975 and 1995: Who Were They?*, 31 SOC. JUST., no. 1/2, 2004, at 242 (explaining that prior research has followed a Black/white approach).

164. Federal courts in the southwest would be unable to accommodate high trial rates if defendants in fast-track prosecution programs like “flip-flop” cases and Operation Streamline (OSL) decided to reject plea agreements and proceed to trial. The numbers are too high. “Flip-flops” are a prosecution unique to the District of Arizona. See David Martin & Honorable James F. Metcalf, *Pretrial Services Along the Border: A District of Arizona Perspective*, 76 FED. PROBATION, no. 2, Sept. 2012, at 21–22. They are referred to as “mixed complaints,” where a defendant is charged with a felony and misdemeanor. *Id.* If he/she rejects the plea offer, he/she is prosecuted for the felony. If the defendant pleads guilty to the misdemeanor, the felony is dismissed, and the magistrate judge sentences the defendant without a presentence report either at the initial appearance or later, during the detention/change of plea/sentencing hearing. *Id.* Operation Streamline (OSL) is a Border Patrol program responsible for increasing workload in most border districts. *Id.* at 21. By 2008 the Department of Homeland Security reported that 723,825 illegal aliens had been arrested in fiscal year 2008 and that more than 74,000 illegal aliens had been prosecuted under OSL in Yuma, Laredo, and Tucson sectors. *Id.* at 24.

165. See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 115 (2005) (“In several federal jurisdictions with high immigration and drug caseloads, prosecutors created what they called ‘fast-track’ programs offering sentences far below Guidelines levels to defendants who waive almost all of their procedural rights.”) (citing U.S. GOV’T ACCOUNTING OFFICE, GAO-04-

overwhelming caseload of immigration offenses.<sup>166</sup> The substantial difference in penalty offered in fast-track pleas made it easy for prosecutors to resolve cases quickly.<sup>167</sup> Quick plea bargains saved prosecutorial resources, which allowed United States Attorney's Offices ("USAOs") to charge even more immigration cases.<sup>168</sup>

In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), a law that directed the Sentencing Commission to authorize fast-track programs.<sup>169</sup> The U.S. Attorney and the Attorney General must approve implementation of each program.<sup>170</sup> Before 2003, some U.S. Attorneys implemented the first fast-track program without congressional approval.<sup>171</sup> The Ninth Circuit sanctioned the program in 1995, writing that fast-track sentencing "benefits the government and the court system by relieving court congestion," and it "benefits [illegal reentry] defendants by offering them a substantial sentence reduction."<sup>172</sup>

In federal district courts, fast-track immigration crimes are processed through en masse hearings involving dozens of defendants.<sup>173</sup> District courts accommodate the substantial numbers of immigration cases through Operation Streamline ("OSL"). OSL fast-tracks criminal prosecutions of federal immigration offenses by conducting many hearings simultaneously.<sup>174</sup> For example, a judge had one hundred cases in a single OSL proceeding.<sup>175</sup>

OSL has not escaped controversy, even among judges. In one example, overwhelmed by the vast number of cases OSL allowed prosecutors to file, the chief judge of the United States District Court for Arizona declared a judicial emergency for thirty days resulting in the suspension of the Speedy Trial Act, the federal statute that ensures resolution of criminal cases in short periods of time.<sup>176</sup> The United States Court of Appeals for the Ninth Circuit extended the suspension for one year.<sup>177</sup> Even after the speedy trial suspension expired, OSL produced thousands of

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105, Federal Drug Offenses: Departures from Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001 app. III, at 50 (2003)).

166. See Alan D. Bersin and Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L. J. 285, 302 (1998) ("The fast track system allowed this explosion in filings to be accomplished in this area of prosecutorial activity with limited staff increases and, for the most part, without diverting resources from other prosecutive priorities.").

167. *Id.* at 301 ("Because most of the defendants face substantially more time under the Sentencing Guidelines for violating section 1326(b) than the two year cap proposed under the usual plea agreement, few refused the offer.").

168. See Gorman, *supra* note 159, at 485.

169. *Id.* at 479.

170. *Id.*

171. *Id.* at 485.

172. *United States v. Estrada-Plata*, 57 F.3d 757, 761 (9th Cir. 1995).

173. See *Deconstructing Crimmigration*, *supra* note 156, at 212.

174. *Id.* at 217.

175. *Id.*

176. *Id.* (citing *In re Judicial Emergency Declared in District of Arizona*, 639 F.3d 970, 971 (9th Cir. 2011)).

177. *Id.*

cases per year. In Tucson, federal judges oversaw on average 2,100 OSL cases per month in fiscal year 2014.<sup>178</sup> The overwhelming nature of the process also affects defense attorneys. Lawyers who regularly represent clients in OSL proceedings have described themselves as “not really practicing law” and characterized proceedings as akin to a “cattle call.”<sup>179</sup>

Plea bargaining used to be anathema to judges and lawyers before the last third of the nineteenth century, when it slowly began to grow. A shift took place in the mid-twentieth century, when the United States Supreme Court legally sanctioned plea bargaining, paving the way for fast-track programs and the decline of trial rates to what they are today.

### III. TRIAL PENALTIES AND SOUTHWEST BORDER CRIMES

Trial penalties affect drug trafficking and illegal entry prosecutions—two of the most prevalent federal crimes—but with higher numbers in southwest border districts.<sup>180</sup> In my experience, trial penalties impact drug couriers more compared to defendants charged with illegal entry. Understandably, trial rates for drug couriers are low. But trial rates for illegal entry are also low. In Arizona and in districts with low trial penalties for illegal entry, defense lawyers should encourage these clients to go to trial more often.

This Part describes how trial penalties impact trial rates for drug couriers and people charged with illegal re-entry. Section A details how mandatory minimums lead to low trial rates and how districts in the southwest vary in sentencing practices under pleas. Section B supplies reasons for low trial rates in illegal re-entry cases.

#### A. Trial Penalties for Drug Couriers

The United States-Mexico border stretches 1,954 miles from the far east of Brownsville, Texas, to the extreme west of San Diego, California.<sup>181</sup> It has fifty-

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178. *Id.* (citing OFFICE OF INSPECTOR GEN. U.S. DEPT. OF HOMELAND SEC., STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING 6 tbl. 1 (2015), <https://www.hsdl.org/?view&did=767752>); see OFFICE OF INSPECTOR GEN. U.S. DEPT. OF HOMELAND SEC., STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING 6 tbl. 1 (2015), <https://www.hsdl.org/?view&did=767752>.

179. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1351 n.405 (2010).

180. See ACLU, FACT SHEET: CRIMINAL PROSECUTIONS FOR UNAUTHORIZED BORDER CROSSING (2018), [https://www.aclu.org/sites/default/files/field\\_document/15\\_12\\_14\\_aclu\\_1325\\_1326\\_recommendations\\_final2.pdf](https://www.aclu.org/sites/default/files/field_document/15_12_14_aclu_1325_1326_recommendations_final2.pdf). Federal prosecutors can also charge Immigrants with fraud or misuse of official documents, such as passports or visas under 8 U.S.C § 1546. Combined, immigration and drug crimes have become the most federally prosecuted offenses. See *In re Approval of Judicial Emergency Declared in Dist. of Arizona*, 639 F.3d 970, 980 (9th Cir. 2011) (“Two categories of crimes dominate the caseload along the Southwest border—drugs and immigration.”).

181. See *The Wall: How Long is the U.S.-Mexico Border?*, U.S.A. TODAY (Sept. 20, 2017, 1:49 AM), <https://www.usatoday.com/story/news/politics/border-issues/2017/09/19/wall-how-long-us-mexico-border/676001001>.

two ports of entry (“POEs”) for cars to enter and leave the United States.<sup>182</sup> These POEs are critical points for drug trafficking organizations (“DTOs”) because they are the main entry points for drugs.<sup>183</sup> Once drugs cross the border, couriers transport them all over the United States.<sup>184</sup>

DTOs, whom the Mexican government has been fighting a war with since December 2006, recruit people who can legally cross into the United States.<sup>185</sup> These crossers generally belong to the lower middle class and could use additional money to support their families.<sup>186</sup> They also know little to nothing about DTOs.<sup>187</sup> The majority of those who agree to participate do so for a one-time trip or are in it for a short period.<sup>188</sup> Drug couriers include U.S. citizens and foreign nationals. In the weeks before the American and Mexican governments placed travel

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182. See Austin Rose & David Davidson, *Atlas of the Land Entry Ports on the U.S.-Mexico Border* (Border Pol’y Rsch. Inst., Border Pol’y Brief No. 30, 2010), [https://cedar.wvu.edu/cgi/viewcontent.cgi?article=1029&context=bpri\\_publications](https://cedar.wvu.edu/cgi/viewcontent.cgi?article=1029&context=bpri_publications).

183. See Josiah McC. Heyman, *U.S. Ports of Entry on the Mexican Border*, 43 J. SOUTHWEST 681, 683–84 (2001).

184. See León Krauze, *With coronavirus hurting the drug business, there’s an opportunity to corner cartels*, WASH. POST (May 26, 2020), <https://www.washingtonpost.com/opinions/2020/05/26/with-coronavirus-hurting-drug-business-theres-an-opportunity-corner-cartels/>. Undocumented migrants rarely carry drugs. See Siobhan O’Grady, *The largest-ever U.S. fentanyl bust came at a legal entry point. That shouldn’t come as a surprise*, WASH. POST (February 1, 2019), <https://www.washingtonpost.com/world/2019/02/01/fact-that-largest-ever-fentanyl-bust-came-legal-entry-point-should-come-no-surprise/>. Another source for the trafficking of drugs is through the mail system. See *How Do Illegal Drugs Cross The U.S.-Mexico Border?*, NAT’L PUB. RADIO (April 6, 2019), <https://www.npr.org/2019/04/06/710712195/how-do-illegal-drugs-cross-the-u-s-mexico-border>.

185. DTOs fight each other for control of territory. See *Mexican Drug War Fast Facts*, CNN (April 3, 2020), <https://www.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/index.html>. Sources show that people committed about 150,000 intentional, organized-crime-related homicides from 2006 to 2018. Annually, drug cartels take in between \$19 billion and \$29 billion from drug sales in the U.S. *Id.* The drug cartels are so powerful that one drug kingpin built his own medical facility due to reluctance to venture out of his network of rural hideouts. See Tom Phillips, *Top Mexican drug kingpin El Mencho builds own private hospital*, THE GUARDIAN (July 28, 2020), <https://www.theguardian.com/world/2020/jul/28/mexico-cartel-boss-drug-lord-el-mencho-hospital>.

186. See Kevin Lerman, Note, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. IRVINE L. REV. 679, 702 (2017) (“Often drug-trafficking organization recruiters—like others offering dangerous and risky employment—deliberately seek out people in dire circumstances to make them an offer they can’t refuse.”).

187. See Adam B. Weber, *The Courier Conundrum: The High Costs of Prosecuting Low-Level Drug Couriers and What We Can Do About Them*, 87 FORDHAM L. REV. 1749, 1767 (2019) (describing how couriers are often intentionally kept in the dark about the inner workings of the drug-trafficking organization and lose out on a valuable bargaining chip with prosecutors and are deprived of an opportunity to qualify for the substantial assistance departure.); see also Stephen J. Schulhofer, *Rethinking the Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211–13 (1993) (discussing how low-level offenders often lack valuable information to provide to authorities).

188. See Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. REV. 1471, 1494–95 (2000) (explaining how drug couriers play a peripheral role in the overall drug-trafficking conspiracy). Froyd wrote that oftentimes women are peripherally involved and do not know as much information about the drug enterprise compared to men. *Id.*



restrictions, court records showed that U.S. citizens made up about half of suspected drug smugglers who faced federal charges.<sup>189</sup>

### 1. Mandatory Minimums and Trial Penalties for Drug Couriers

First put in practice in the 1980s, mandatory minimum punishments are the main source of trial penalties for drug couriers.<sup>190</sup> After trial conviction, even defendants with clean records charged with offenses requiring these penalties come before judges who largely have no sentencing discretion<sup>191</sup> but to impose five or ten years, depending on the drug amount.<sup>192</sup> Facing such punishment, a vast majority of couriers accept plea offers.<sup>193</sup> Mandatory minimum punishments make trials rare, even for cases of actual innocence.<sup>194</sup> Only three percent of federal drug defendants go to trial.<sup>195</sup>

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189. See Curt Prendergast, *Restrictions due to coronavirus slow drug smuggling along the Arizona border*, ARIZ. DAILY STAR (April 18, 2020), [https://tucson.com/news/local/restrictions-due-to-coronavirus-slow-drug-smuggling-along-arizona-border/article\\_f8f5339b-e989-55b4-9fb8-662c9d5921c9.html](https://tucson.com/news/local/restrictions-due-to-coronavirus-slow-drug-smuggling-along-arizona-border/article_f8f5339b-e989-55b4-9fb8-662c9d5921c9.html).

190. The United States government passed most of the modern mandatory minimum statutes in 1986 and 1988, before the Sentencing Guidelines were even issued. See Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 559–60 (2002); see also Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (creating new mandatory minimum sentences for drug offenses); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (1988) (codified as amended in 21 U.S.C. §§ 846, 963) (establishing new mandatory minimums for drug trafficking and distribution). The Anti-Drug Abuse Act of 1988 applied mandatory minimums to drug conspirators and set up a minimum sentence for mere possession of crack cocaine. See 21 U.S.C. § 844.

191. In drug cases a defendant could qualify for the safety-valve, the most prevalent way to avoid drug mandatory minimum punishments. 18 U.S.C. § 3553(f); U.S. SENT’G GUIDELINES MANUAL §5C1.2 (U.S. SENT’G COMM’N 2021). Congress passed the First Step Act in 2018, which expands safety-valve to individuals with certain criminal histories. Pub. L. No. 115-391, 132 Stat. 5194 (2018). The other way to avoid mandatory minimum punishment is to provide substantial assistance to the government. 18 U.S.C. § 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”); U.S. SENT’G GUIDELINES MANUAL §5K1.1 (U.S. SENT’G COMM’N 2021) (“Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”).

192. See *United States v. Shonubi*, 962 F. Supp. 370, 372 (E.D.N.Y. 1997) (criticizing unduly harsh sentences for drug couriers).

193. See Jamie Fellner, *An Offer You Can’t Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty*, 26 FED. SENT’G REP. 276, 276 (2014) (explaining how federal prosecutors extract guilty pleas by threatening to charge defendants with counts requiring harsh mandatory minimum sentences).

194. Plea bargaining plainly makes it helpful for innocent defendants with good prospects of acquittal to plead guilty. See Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 921 (2016) (citing Shawn D. Bushway et al., *An Explicit Test of Plea Bargaining in the “Shadow of the Trial,”* 52 CRIMINOLOGY 723, 732, 733, 734 (2014)).

195. See Fellner, *supra* note 193, at 276. The trial rate for drug trafficking crimes only fell by half a percentage point after former United States Attorney General Jeff Sessions rescinded Eric Holder’s memo policy by requiring prosecutors to “charge and pursue the most serious, readily provable offense” in all cases. See Memorandum from Eric Holder, Att’y Gen., on Dep’t Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 1 (Aug. 12, 2013), <https://assets.documentcloud.org/documents/1094233/attorney-general-eric-holders-memorandum-on.pdf> (“[W]e now refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders . . . [O]ur most severe mandatory

Federal defendants charged with drug crimes who elect to proceed to trial face heavy trial punishments.<sup>196</sup> A survey of drug cases in 2012 revealed that the average sentence for federal drug offenders who pleaded guilty was five years and four months in contrast with sixteen years for those found guilty by a jury.<sup>197</sup> Drug defendants convicted of mandatory minimum charges convicted at trial received sentences that averaged 215 months (seventeen years and eleven months) compared with 82.5 months (six years and ten months) for those who pleaded guilty.<sup>198</sup>

To increase pressure on drug defendants facing these harsh penalties, prosecutors bring criminal charges carrying mandatory minimum sentences to enhance already severe punishment if the defendant exercises the right to a jury trial.<sup>199</sup>

## 2. Prosecutorial Power and Mandatory Minimums

While all prosecutors are in a powerful position in relation to criminal defendants, mandatory sentencing laws curtail the judiciary's function of ensuring that the punishment fits the crime.<sup>200</sup> This only strengthens the power of federal prosecutors in drug cases.<sup>201</sup> Judges have no choice but to impose mandatory minimum sentences after prosecutors pursue these charges and jurors convict.<sup>202</sup> Prosecutors effectively sentence convicted defendants by the charges they bring.<sup>203</sup> They typically charge drug defendants with offenses carrying mandatory minimum sentences.<sup>204</sup>

Two statutory sentencing provisions are the most powerful threats to increase a drug defendant's sentence. Under 21 U.S.C. § 841(b)(1), prior felony drug convictions can increase a mandatory minimum drug sentence.<sup>205</sup> And under 18 U.S.C. § 924(c), prosecutors can file charges to increase a defendant's sentence if a gun was

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minimum penalties are reserved for serious, high-level, or violent drug traffickers.”); Memorandum from Jeff Sessions, Att’y Gen., on Dep’t Charging and Sentencing Policy 1 (May 10, 2017), <https://www.documentcloud.org/documents/3719263-AG-Memo-on-Department-Charging-and-Sentencing.html>. In 2012 the trial date for drug trafficking in Arizona was 1.1% (25 trials), in 2014 1.2% (13 trials). In 2015 the trial rate in Arizona was 0.8% (9 trials), in 2016, 0.7% (8 trials), 2017 1.2% (14 trials), 2018 1.9%, and in 2019 0.5% (4 trials). See STATISTICAL INFORMATION PACKET, FISCAL YEAR 2012, DISTRICT OF ARIZONA, U.S. SENT’G COMM’N (2012), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2012/az12.pdf>.

196. See Fellner, *supra* note 193, at 276.

197. See Marc A. Levin, *A Plea for Reviving the Right to a Jury Trial and a Remedy for Assembly-Line Justice*, 31 FED. SENT’G REP. 272, 272 (2019) (citing Fellner, *supra* note 193).

198. *Id.*

199. See Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327, 329 (2014) (describing how prosecutors use charging and sentencing power to pressure defendants to plead guilty and cooperate).

200. See Fellner, *supra* note 193, at 277.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

involved in the drug offense.<sup>206</sup> Prosecutors will threaten to supersede indictments with these enhanced charges unless the defendant pleads guilty.<sup>207</sup> Prosecutors generally make good on these threats.<sup>208</sup>

### 3. Sentencing Differences in Arizona and the Southern District of Texas

Many agree sentences for drug cases are disproportionate to actual drug crimes.<sup>209</sup> For example, an addict who sells drugs to support his habit can get a ten year sentence.<sup>210</sup> A person hired to drive a box of drugs across town faces the same minimum sentence as a more deeply involved trafficker.<sup>211</sup> Prosecutors also threaten to increase defendants' sentences if they refuse to plead.<sup>212</sup>

Despite the power of prosecutors in drug cases nationally and within border districts, sentencing outcomes for drug cases vary in the southwest. Arizona, where judges hand down far shorter sentences on average than other districts, contrasts with the Southern District of Texas, where federal prosecutors draw a harder line with plea offers.<sup>213</sup> Average prison terms for drug conspiracy charges are eight times longer in South Texas compared to Arizona.<sup>214</sup> In fiscal year 2017, the average sentence where conspiracy was the lead charge was twelve months for 1,240 cases in Arizona, compared with a ninety-two-month average for 121 cases in South Texas.<sup>215</sup> In the same year, the average sentence for charges of possession with intent to distribute was twenty months for 760 cases in Arizona, while South Texas saw a sixty-three-month average for 800 cases.<sup>216</sup> The U.S. Sentencing Commission studied a dozen drug-smuggling charges and found the average sentence in Arizona's federal courts was twenty-eight months in fiscal year 2016, compared with fifty-seven months in South Texas.<sup>217</sup>

Marijuana backpackers, another type of drug courier, also face varying sentences in Arizona and South Texas.<sup>218</sup> Consider the real-life example of two men

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206. See John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 1957 (2015) (“Today, when prosecutors want to force a guilty plea from a drug dealer who possesses a gun during the time period in which he deals drugs, they use 18 U.S.C. § 924(c) to charge him with a separate illegal gun possession for each drug transaction.”).

207. *Id.*

208. *Id.*

209. *Id.* at 2033–34.

210. *Id.* at 1957.

211. *Id.*

212. *Id.*

213. See Curt Prendergast, *Drug smuggling sentences vary wildly along Mexico border*, ARIZONA DAILY STAR (Nov. 9, 2018), [https://tucson.com/news/local/drug-smuggling-sentences-vary-wildly-along-mexico-border/article\\_a45fca2d-b468-5a92-8072-55f6d073f2b1.html](https://tucson.com/news/local/drug-smuggling-sentences-vary-wildly-along-mexico-border/article_a45fca2d-b468-5a92-8072-55f6d073f2b1.html).

214. *Id.*

215. *Id.* (citing Clearinghouse data for fiscal year 2017).

216. *Id.*

217. *Id.*

218. See Mona Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, 35 JUST. Q. 1309, 1326–27 (2018).

arrested in Arizona in April of 2016, with eleven backpacks of marijuana seized, totaling 245 pounds.<sup>219</sup> In Texas, 1,000 miles to the southeast and two months earlier, agents arrested three men with 345 pounds of marijuana.<sup>220</sup> In Arizona, the court sentenced the defendants to six months in prison.<sup>221</sup> In Texas, the court sentenced one to sixty months, the other to thirty months.<sup>222</sup> Had they gone to trial and a jury convicted them, the court more than likely would not have qualified them for the safety valve.<sup>223</sup> The sentence would be sixty months, or five years. There appears to have been no incentive to plead guilty in Texas. In contrast, the defendants in Arizona have a greater incentive to plead guilty because the penalty after a trial conviction would be ten times greater.

#### 4. Examples of Drug Couriers and Trial Penalties

I have seen my share of clients negatively affected by harsh drug sentences. One example is a Native American woman whom I first represented in a fast-track prosecution involving just over six kilograms of marijuana.<sup>224</sup> Someone hid the drug inside one of her car's seats. In exchange for waiving her rights to a jury trial, she pled guilty to simple possession of marijuana, a misdemeanor, with thirty days of jail required. Three and a half months after the marijuana arrest, or two and a half months after release from custody, Customs and Border Protection ("CBP") officers arrested her in the same port of entry, this time with close to five kilograms of heroin and 380 grams of fentanyl. Someone hid the drugs in the dash area of another car she drove. The client had a drug problem and her boyfriend convinced her to drive with narcotics from Nogales, Sonora to Nogales, Arizona, for quick money. After her arrest, prosecutors charged her with offenses requiring the ten-year mandatory minimum punishment.<sup>225</sup> As she did not qualify for the safety-valve at the time (the First Step Act was not yet in effect), the plea offered reduced the ten-year mandatory minimum to five years.<sup>226</sup> She had no choice but to plead

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219. See Prendergast, *supra* note 213.

220. *Id.*

221. *Id.*

222. *Id.*

223. See Jon M. Sands, *How Does the Safety Valve Work? Sentencing Issues Under 18 U.S.C. § 3553(f) and U.S.S.G. § 5c1.2*, CHAMPION, Dec. 1996, at 37, 40. The safety-valve is available after trial but may not be possible if the defendant made false statements. See *United States v. Ivester*, 75 F.3d 182, 185 (4th Cir. 1996); *United States v. Flanagan*, 80 F.3d 143, 143 (5th Cir. 1996); *United States v. Ramirez*, 94 F.3d 1095, 1100 (7th Cir. 1996). *But see United States v. Jeffers*, 329 F.3d 94, 95 (2d Cir. 2003) (reversing lower court's decision to grant safety valve provision to defendant involved in drug conspiracy because he did not tell the complete truth until after trial).

224. I do not mention her name nor any client names to preserve anonymity.

225. The government charged the client with conspiracy to possess with the intent to distribute heroin (21 U.S.C. § 846); possession with intent to distribute heroin (21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(i)); conspiracy to import heroin (21 U.S.C. § 963); and importation of heroin (21 U.S.C. § 952(a) and §§ 960(a)(1) and 960(b)(1)(A)).

226. See note 63. Section 402 of the First Step Act broadened the safety valve. Defendants with no more than four criminal history points, such as my former client, are now eligible to obtain a sentence below the statutory

guilty as the evidence was too strong for a chance to win at trial. While this client committed a more serious drug offense within two months of release, the sentence of sixty months dwarfs the thirty days punishment required under her first plea agreement.

In 2016, I represented another woman indicted in a drug offense that went to trial. Federal prosecutors charged her with importation of methamphetamine and heroin. CBP officers arrested her as she tried to lawfully enter the United States from Mexico at the DeConcini Port of Entry in Nogales, Arizona. Someone hid drugs inside all car seats. She testified in front of a jury that she did not know the car had drugs and blamed someone who loaned her the car to drive to Tucson and back to Hermosillo to go shopping and visit an old friend.

Fortunately, the government charged her in 2015, when the “Holder Memo” was in effect.<sup>227</sup> She did not have to worry about qualifying for the safety-valve provision and testified.<sup>228</sup> The jury convicted her, and the judge imposed a sentence of sixty months. From my experience representing these cases, had she accepted the government’s plea agreement, the judge would have imposed no more than half of this sentence, or around thirty months. The judge had discretion to impose the same thirty-month sentence after trial. Although I did not ask the judge why she did not impose a sentence closer to what she normally sentences in similar cases with defendants who accept plea agreements, I strongly suspect the reason is to discourage criminal defendants from exercising the right to a jury trial. If the judge imposed a similar sentence to defendants who plead guilty, more criminal defendants facing the same charge with a fighting chance of acquittal would go to trial instead of accepting a plea agreement. This would clog the judge’s full docket.

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minimum. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018). My former client had more than one criminal history point and thus did not qualify for eligibility.

227. In 2013, U.S. Attorney General Eric Holder issued a memo that required federal prosecutors to avoid mandatory minimum sentences in certain low level, non-violent drug cases, citing the “unduly harsh sentences” and rising prison costs. Memorandum from Att’y Gen. Eric Holder to the U.S. Att’y and Assistant Att’y Gen. for the Crim. Div. (Aug. 12, 2013), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> (issuing new policy against prosecutorial charging decisions triggering mandatory-minimum sentences if certain criteria are satisfied, such as a nonviolent offense, no serious criminal history, and no major connection with organized crime). U.S. Attorney General Jeff Sessions rescinded the memo on May 12, 2017. Mr. Sessions directed all federal prosecutors to pursue the most severe penalties possible, including mandatory minimum sentences. *See* Sari Horwitz, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), [https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html) (“Attorney General Jeff Sessions said Friday that he has directed his federal prosecutors to pursue the most severe penalties possible, including mandatory minimum sentences, in his first step toward a return to the war on drugs of the 1980s and 1990s that resulted in long sentences for many minority defendants and packed U.S. prisons.”).

228. The safety-valve requires the client to provide all truthful information about the offense. If a jury finds a client guilty after a trial in which he/she testified, the prosecutor and the court are unlikely to agree the client met this provision. There are exceptions, but they are rare. *See* United States v. Sherpa, 110 F.3d 656, 661-62 (9th Cir. 1996) (finding that a jury’s guilty verdict does not preclude a defendant from obtaining safety valve relief).

## 5. Recommendations to Curtail Trial Penalties in Federal Drug Prosecutions

Mandatory minimum sentences and trial penalties have affected many criminal defendants, families, and communities.<sup>229</sup> International non-governmental organization Humans Right Watch issued recommendations for minimizing these atrocities in drug cases.<sup>230</sup> The first is to end mandatory drug sentences because “the one-size-fits-all approach of the mandatory minimum statutes prevents sentences tailored to the individual case.”<sup>231</sup> Mandatory minimum punishments are an unacceptable exercise of government power because they unduly pressure defendants into waiving their trial rights.<sup>232</sup> Second, the federal judiciary should have sentencing discretion to review and revise drug sentences to ensure that they satisfy the requirements of justice, thereby diminishing the power of prosecutorial threats.<sup>233</sup> Third, federal prosecutors must change charging policies. Human Rights Watch proposes the following:

1. Require Assistant United States Attorneys (“AUSAs”) to charge offenses carrying sentences proportionate to the defendant’s crime and culpability.
2. Set office policy to limit how much to discount from those sentences in exchange for guilty pleas.
3. Prohibit AUSAs from threatening superseding indictments with higher charges to secure a plea.
4. Prohibit AUSAs from filing such indictments to punish defendants who exercise their right to jury trial.<sup>234</sup>

The final set of recommendations is for Congress to abolish mandatory sentence increases based on the number and nature of prior convictions and mandatory consecutive sentences for drug defendants who use, carry, or possess firearms with their drug crime.<sup>235</sup>

### *B. Illegal Entry and Trial Penalties*<sup>236</sup>

In contrast to drug prosecutions, persons charged with illegal entry or re-entry in Arizona do not fare worse if they reject a plea agreement.<sup>237</sup> One reason is that

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229. See e.g., Maggie E. Harris, *The Cost of Mandatory Minimum Sentences*, 14 FLA. COASTAL L. REV. 419, 433–35 (2013) (summarizing cost of mandatory minimum sentences to taxpayers in Florida).

230. See Fellner, *supra* note 193, at 280.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. See 8 U.S.C. § 1325 (Improper Entry by Alien); 8 U.S.C. § 1326 (Reentry of Removed Aliens). Illegal entry is the crime of entering the United States without legal authorization. The federal government prosecutes first time crossers under 8 U.S.C. § 1325. The maximum punishment for this misdemeanor is six months in prison. If the government denied a person admission, excluded, deported, or removed the person and the person re-enters, or is at any time found in the United States, the government charges illegal reentry under 8 U.S.C.

there are no mandatory minimum punishments for illegal entry offenses.<sup>238</sup> Magistrate judges in Arizona try misdemeanor illegal entry cases within thirty days of the first appearance, even though these petty offenses carry no right to a speedy trial.<sup>239</sup> These trials are rare because most people in OSL do not reject fast-track plea agreements to time served.<sup>240</sup> Magistrate judges never penalize these clients for going to trial. Illegal re-entry trials under 8 U.S.C. § 1326 are equally rare in Arizona.<sup>241</sup> From 2012 to 2020, the trial rate was less than one percent.<sup>242</sup>

Even though clients face little to no trial penalties for these cases, defense lawyers do not recommend trial in lieu of pleading guilty for several reasons. First, many clients charged with these offenses want to accept responsibility quickly.<sup>243</sup> Second, defense lawyers are busy with incoming cases and recommend a guilty plea instead of trial to avoid mounting work.<sup>244</sup> Third, defense lawyers often see no prospect for a successful defense or opt to avoid the demanding labor of

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§ 1326. The maximum penalty for this offense is two years, but if the person has prior felony convictions, the maximum punishment increases to no more than ten or twenty years, depending on prior convictions.

237. I base this conclusion on personal experience and e-mail communications with lawyers in the Arizona Federal Public Defender's Office and and CJA panel members in Tucson. The consensus is that judges do not impose trial penalties for illegal entry clients who elect to go to trial.

238. In 2005 the House of Representatives passed a controversial bill that would have imposed mandatory minimum sentences for offenses involving illegal entry or re-entry after deportation. The bill never became law. See Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 35 (2007) (citing Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. §§ 203-204 (2005)).

239. A violation of 18 U.S.C. § 1325 has a maximum of six months' imprisonment and is a class B misdemeanor. Class B misdemeanors are petty offenses with no rights to speedy trial. See 18 U.S.C. § 19; see also *United States v. Fridman Santisteban*, 127 F. Supp. 2d 1304, 1304 (D.P.R. 2000) (finding that the Speedy Trial Act does not apply to Class B misdemeanors) (citing 18 U.S.C. § 3172(a) (1985) (defining “offense” to be “any Federal criminal offense which is established by Act of Congress (other than a Class B or C misdemeanor or an infraction)”)); see also *United States v. Salgado-Hernandez*, 790 F.2d 1265, 1268 (5th Cir. 1986) (stating that “Speedy Trial Act applies to felonies and to misdemeanors other than petty offenses”).

240. See Walter I. Gonçalves, Jr., *Banished and Overcriminalized: Critical Race Perspectives of Illegal Entry and Drug Courier Prosecutions*, 10 COLUM. J. RACE & L. 1, 10 (2020) (noting that the vast majority of OSL defendants plead guilty to the misdemeanor count, ranging from thirty to 180 days in custody depending on the number of voluntary departures, removals, deportations, or criminal history).

241. In contrast, the Southern District of California, where illegal entry is also prevalent, has a higher trial rate for these cases. In the Southern District of California, in San Diego, judges treat 1326s the same as drug trafficking and other crimes and impose a higher sentence at sentencing. E-mail from Kara Hartzler, Assistant Fed. Pub. Def., (Oct. 9, 2020) (on file with author). This is because the Southern District of California has a higher trial rate for illegal entry cases compared to the District of Arizona. Thus, they treat these clients more like defendants charged in other types of cases.

242. See ARIZ. SUPERIOR CT, *supra* note 2.

243. This observation is based on my experience representing people charged with illegal re-entry. The vast majority want to plead guilty quickly and do not insist on proceeding to trial. Most illegal entry defendants are apologetic for entering the United States after deportation and claim all they wanted was to re-unite with family or work to provide for family in their home countries. The former is a more common explanation for re-entering the United States.

244. Criminal defense lawyers are, generally, overburdened. See Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1947 (2019) (citing Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DEN. L. REV. 389, 392 (2018)).

investigating a client's immigration file for potential collateral attack motions under 8 U.S.C. § 1326(d).<sup>245</sup> Fourth, the guidelines for illegal entry have become less punitive over the last few years, a signal to lawyers and clients that a quick resolution leads to a quicker way out of custody.<sup>246</sup> Lastly, most illegal entry clients have little interest in pursuing trial, further contributing to high plea rates. They want to quickly return to work or find work to support their families and loved ones.<sup>247</sup>

Illegal entry charges are not victim-specific and people's reasons to re-enter the United States are largely non-criminal.<sup>248</sup> The motivations for these crimes also differ from motivations for victim-related crimes.<sup>249</sup> People cross the U.S.-Mexico border to work in the United States, temporarily or permanently, to send money to loved ones in developing countries.<sup>250</sup> Most people charged with illegal entry will not commit crimes in the United States.<sup>251</sup> Most often the only crime they commit in their life is crossing the U.S.-Mexico border without papers to find work.<sup>252</sup>

Judges do not believe illegal entry and re-entry crimes are as serious as drug trafficking or firearm offenses.<sup>253</sup> This might explain low trial penalties in places like

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245. This assertion is based on my experience defending illegal entry cases and collaborating with colleagues and lawyers in other firms who represent people charged with illegal entry.

246. The United States Sentencing Commission voted to amend the illegal entry guidelines, or §2L1.2, in 2016, to make them less severe. The amendment focused on three factors: 1) the number of illegal reentry convictions, 2) the length of a prior felony sentence before first deportation, and 3) the length of a felony sentence after the first deportation. Before the amendments, defendants with prior felony convictions faced higher offense levels. See U.S. SENT'G COMM'N, 2016 NEW AMENDMENTS TO § 2L1.2 (2016) [https://www.usssc.gov/sites/default/files/elearning/2016-guideline-amendments/story\\_content/external\\_files/Immigration.pdf](https://www.usssc.gov/sites/default/files/elearning/2016-guideline-amendments/story_content/external_files/Immigration.pdf).

247. See Miriam Jordan, *8 Million People are Working Illegally in the U.S. Here's Why That's Unlikely to Change*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/undocumented-immigrant-workers.html> (noting most undocumented immigrants are in the workforce and want to work).

248. See Patricia Hatch, *What Motivates Immigration to America?*, LEAGUE OF WOMEN VOTERS OF HENDERSON COUNTY, [https://www.lwvhnc.org/PDFs/ImmigrationStudy\\_Motivations\\_Hatch.pdf](https://www.lwvhnc.org/PDFs/ImmigrationStudy_Motivations_Hatch.pdf).

249. See Paulo R.A. Loureiro Mario, Jorge Cardoso Mendonca, Tito Belchior Silva Moreira & Adolfo Sachsida, *Crime, Economic Conditions, Social Interactions and Family Heritage*, 29 INT'L REV. L. & ECON. 202, 207 (2009) (noting that economic issues are the main factors that stimulate the practice of nonviolent crime while factors relating to family heritage and neighborhoods with socio-economic variables reduce violent crime).

250. See Nurith Aizenman, *Mexicans in the U.S. Are Sending Home More Money Than Ever*, NAT'L PUB. RADIO (Feb. 10, 2017, 8:14 AM), <http://www.npr.org/sections/goatsand-soda/2017/02/10/514172676/mexicans-in-the-u-s-are-sending-home-more-money-than-ever> (noting that in 2016, remittances to Mexico totaled forty percent of all money sent to foreign countries by individuals—more than any other country).

251. See Salvador Rizzo, *Trump's Claim that Immigrants Bring 'Tremendous Crime' Is Still Wrong*, WASH. POST (Jan. 18, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/01/18/trumps-claim-that-immigrants-bring-tremendous-crime-is-still-wrong/>.

252. See Michael T. Light, Jingying He, & Jason P. Robley, *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, 117 PNAS 342340, 32340–32347 (2020), <https://www.pnas.org/content/117/51/32340>.

253. See *supra* note 237. Simply because most judges do not impose trial penalties on illegal entry clients does not mean it has never happened or does not sometimes happen. For example, a district court in Montgomery, Alabama, sentenced Luis Samayoa-Castillo to 100 months' imprisonment after his first illegal reentry conviction in 2002. *United States v. Samayoa-Castillo*, 762 Fed. Appx. 846, 851 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 334 (2019). The court imposed the 100-month sentence because a court in Massachusetts convicted him of assault, the U.S. government deported him, and he came back.



Arizona. But there have not been increasing trial rates for illegal entry charges despite low trial penalties.<sup>254</sup> One could hypothesize that if there were more trials, judges would impose higher sentences to disincentivize trial to reduce workload. The high number of federal criminal filings overworks busy federal judges.<sup>255</sup>

Part of the reason judges do not impose trial penalties on illegal entry is they know that even without these criminal prosecutions, Border Patrol agents (“BPAs”), CBP officers, drones, fencing, and (some) walls, guard the U.S.-Mexico border.<sup>256</sup> They also know that people who cross the border without authorization are still subject to the administrative system Congress created to address violations of U.S. immigration law.<sup>257</sup> For example, BPAs still take undocumented persons into custody, place them into the administrative deportation system’s proceedings, and deport them if ineligible for asylum or other relief.<sup>258</sup> Immigration courts often hold people unnecessarily in ICE detention facilities for weeks, months, or longer.<sup>259</sup>

In jurisdictions where judges impose minimal or no trial penalties for illegal entry, it behooves trial lawyers to persuade clients to reject plea agreements and go to trial. Because these cases are defensible, clients have little to nothing to lose. Lawyers can assert the duress<sup>260</sup> defense, if applicable, the official restraint<sup>261</sup> defense, and insist on proof beyond a reasonable doubt for every element of the offense. One example of a successful defense is the government’s failure to prove its deportation of the person before he/she re-entered.<sup>262</sup> For illegal re-entry charges under 8 U.S.C. § 1326, there is also the possibility for collateral attack

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254. The trial rate for illegal re-entry in Arizona and nationally is lower than other crimes like drug trafficking. See The United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2020, District of Arizona, tbl. 3 p. 7, <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/az20.pdf> (last visited Feb. 8, 2022). Both are lower compared to violent crimes. See Paul G. Cassell, *Overstating America’s Wrongful Conviction Rate? Reassessing the Conventional Wisdom About the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815, 846 (2018) (noting that “those charged with the violent crimes of murder and rape may be slightly less likely to plead guilty than the average felon”).

255. See Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001, 2026 (2019) (“Since the 1980s, numerous critics have pointed out that the huge increases in federal court filings have created a workload crisis.”).

256. See Eleanor Acer, *Criminal Prosecutions and Illegal Entry: A Deeper Dive*, JUST SECURITY (July 18, 2019), <https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive/>.

257. *Id.*

258. *Id.*

259. *Id.*

260. See Walter I. Gonçalves, Jr., *Busted at the Border: Duress and Blind Mule Defenses in Border-Crossing Cases*, CHAMPION, Jan./Feb. 2018, at 46.

261. “Entry” as used in 8 U.S.C. §§ 1325 and 1326 is a term of art. It requires that the accused be free of official restraint at some point following the physical crossing. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1164 (9th Cir. 2000). If the government has always had a person under surveillance after they crossed, there is no “entry.”

262. Overcoming this defense requires the government to call as witness the BPA responsible for making sure authorities deported him/her to Mexico. The agent signs a Form I-205 (Warrant of Removal/Deportation) attesting to physically observing the person being taken to Mexico.

under subsection (d).<sup>263</sup> This section allows defense counsel to move to dismiss if the underlying removal order or exclusion process deprived the client of due process.<sup>264</sup> It is not unusual to find deficits in immigration files relating to these provisions. There is much for defense counsel to contest in collateral attack motions in illegal re-entry.<sup>265</sup> However, it can take weeks, and sometimes months, to obtain a client's immigration file, prepare and submit collateral attack motions, and proceed to the report and recommendation process with a magistrate judge.<sup>266</sup> Therefore, if the client has no criminal history or a minor criminal history, they may be better off avoiding a trial because the time to process the case may take longer.

Although trial penalties are rare for illegal entrants in Arizona, they are more common for defendants with egregious criminal records.<sup>267</sup> For example, an undocumented person with a prior violent criminal conviction may face more ire from a trial judge at sentencing, and thus face a steep trial penalty, compared to someone with no prior criminal record but with removals, or someone with a less serious criminal record.<sup>268</sup>

Drug trafficking defendants face steep trial penalties in Arizona. Even with low levels of involvement in drug trafficking schemes, these defendants have little incentive to go to trial because of mandatory minimum punishments. Illegal re-entry clients are in a different situation because, even though trial penalties are low for them, trial judges do not impose higher sentences if a jury decides he/she is guilty. Most illegal entry defendants, however, rarely go to trial.

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263. 8 U.S.C. § 1326(d) states that a non-citizen may not challenge the validity of the deportation order unless he/she demonstrates that (1) they exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. In these challenges, otherwise known as collateral attack motions, defense lawyers must request the client's immigration file, or the A-file, and review it for possible errors. The process can take a long time.

264. *See id.*

265. *See* Ryan Moore, *Motions to Dismiss Under 8 U.S.C. § 1326*, (unpublished outline) (on file with author).

266. *See* 28 U.S.C. § 636. As an example, it took two months for a magistrate judge to issue a report and recommendation on a motion to suppress pre-trial identification after an evidentiary hearing on one of my alien smuggling cases.

267. *See* Cassia Spohn, *Reforming Sentencing Policies and Practices in Arizona*, 52 ARIZ. ST. L.J. 1021, 1026 (2020) (noting that "most studies of sentences imposed in jurisdictions with presumptive guidelines conclude that sentencing across judges is more uniform and that sentences are more tightly coupled to the seriousness of the offense and the offender's criminal record").

268. *See*, for example, *United States v. Soto-Arreola*, 486 Fed. Appx. 735, 737–38 (10th Cir. 2012), where Rigoberto Soto-Arreola, only in his mid-twenties, had criminal history including shooting someone in the arm, methamphetamine possession, and illegal entry, among other infractions. Mr. Soto-Arreola asked for a sentence of seventy months. The government recommended a sentence within the guideline range, at the time, of between seventy to eighty-seven months. The district court declined to follow either recommendation, instead imposing a sentence of 120 months.

#### IV. TRIAL PENALTIES AND RACE

Scholars have acknowledged that we know little about race and trial penalties.<sup>269</sup> What is known is that the increase in racial disparities at sentencing is primarily due to the increase of mandatory minimum charging and punishment.<sup>270</sup> Research also shows that American courts treat Black and Latinx defendants more punitively than similarly situated white defendants at various stages of the criminal justice process,<sup>271</sup> although there is important variation by state, jurisdiction, and type of crime.<sup>272</sup>

This section summarizes findings linking African Americans and Latinx people to racial stereotypes historically embedded in American culture. These stigmatizing conceptions manifest in implicit bias among federal judges, which leads to higher trial penalties for those minority criminal defendants compared to white people.

##### A. African Americans

White people have linked Black people to criminality for most of American history.<sup>273</sup> Professor Randall Kennedy has explained that beliefs about predispositions of African American people toward criminality that originated in slavery “besieged” their reputation.<sup>274</sup> Even after the civil rights movement in the 1960s, American society continued to strengthen the linkage between Black people and crime.<sup>275</sup> It has been so successful that the stereotyping of Black people as

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269. See Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434, 448 (2019) (noting that legal scholars do not know if the race of the defendant makes the trial penalty more or less likely); Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 335 (2019) (“Despite the storied legacy of empirical research on race and sentencing relatively little empirical work focuses on the intersections of race, guilty pleas, and trial penalties.”).

270. See Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 731 (2012) (arguing that judicial discretion mitigates racial disparities in Guidelines sentencing).

271. See Cassia Spohn, *Racial Disparities in Prosecution, Sentencing, and Punishment*, in OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 166 (Sandra Bucerius & Michael Tonry eds., 2014); Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019), <https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system> (compiling dozens of studies demonstrating racial disparities in the criminal justice system, even after accounting for differences in crime rates).

272. See David C. Baldus, Charles A. Pulaski Jr. & George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 143 (1986) (discussing disparities in the death penalty context).

273. See William J. Drummond, *About Face: Blacks and the News Media*, 1 AM. ENTER. 23 (1990).

274. See Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 276 (2007) (citing RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997)) (discussing the cultural tendency after the civil rights movement to associate African American men with criminality).

275. *Id.*

criminals has become pervasive.<sup>276</sup> People use “criminal predator” as a euphemism for “young Black male.”<sup>277</sup>

These stereotypes are so ubiquitous they have led researchers to conclude that facial features play a prominent role in sentencing disparities. Professors Ryan King and Brian Johnson showed that darker-skinned Black defendants and white defendants with more Afrocentric features are sentenced more harshly than white people without these features.<sup>278</sup> In another study, King and Johnson found evidence that a defendant’s facial appearance is related to subjective impressions of criminal threat.<sup>279</sup> The findings show that certain facial characteristics are related to the judicial use of imprisonment, even after accounting for legally relevant sentencing factors.<sup>280</sup> A third study shows that males with more stereotypically Black characteristics are more likely to receive the death penalty.<sup>281</sup>

The connection of Black stereotypes to criminality is evident in the control exercised by the criminal justice system over this population. Social worker Jerome G. Miller conducted studies of the criminal justice system in various cities over the past decade.<sup>282</sup> One showed that fifty-six percent of young Black men were under correctional supervision in Baltimore on any day, and forty-two percent in Washington, D.C. were in an analogous situation.<sup>283</sup> Nationally, one in eleven Black people are in prison or under some judicial supervision.<sup>284</sup>

The disparate treatment of Black people is also evident in higher rates of criminal charging, sentencing disparities, and higher trial penalties. Research shows federal prosecutors are twice as likely to charge Black people with offenses that carry a mandatory minimum sentence than similarly situated white people.<sup>285</sup> Black defendants receive sentences ten percent longer than those of comparable white

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276. *Id.*

277. *Id.*

278. See Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice*, 122 AM. J. SOCIO. 90, 122 (2016) (showing a survey of 866 offenders in Minnesota found that darker skin tone and Afrocentric features were related to harsher sentences).

279. See Brian D. Johnson & Ryan D. King, *Facial Profiling: Race, Physical Appearance, And Punishment*, 55 CRIMINOLOGY 520, 537 (2017).

280. *Id.*

281. See Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Death Penalty Outcomes*, 17 PSYCH. SCI. 383, 385 (2006).

282. See Jerome G. Miller, *From Social Safety Net to Dragnet: African American Males in the Criminal Justice System*, 51 WASH. & LEE L. REV. 479, 487–88 (1994) (noting that racism is endemic in the structure and administration of the criminal justice system).

283. *Id.*

284. See PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), [https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp\\_1in31\\_report\\_final\\_web\\_32609.pdf](https://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf).

285. See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 7 (2013) (analyzing racial disparities in prosecutorial decision-making empirically).

defendants arrested for the same crimes.<sup>286</sup> The trial penalty applies to all defendants, regardless of race or ethnicity, but studies in Pennsylvania found that convictions increase the odds of incarceration more for Black people than they do for white people.<sup>287</sup>

One survey’s conclusion, however, presents an anomaly in these findings. In their study of federal district court cases from 2000 to 2002, sociologists Jeffrey Ulmer and Brian Johnson found that trial penalties are lower for those with more substantial criminal histories and Black men.<sup>288</sup> The researchers expected African American defendants to face a higher trial penalty, but found the opposite.<sup>289</sup> Their discoveries showed that differences in sentence length based upon race were smaller for cases that went to trial, where the race effect was a non-significant factor, compared to sentences from guilty pleas where the race effect was.<sup>290</sup> At least from federal sentencing data studied between the years 2000 to 2002, trials did not seem to worsen Black/white sentencing differences.<sup>291</sup> Ulmer and Johnson, however, hypothesized that judges may have intentionally over-corrected sentences for Black defendants in response to stories in the media about Black-white sentencing disparities.<sup>292</sup> Trials might present the opportunity for judges to see and sympathize with such defendants as unique people, rather than as racially-based stereotypes.<sup>293</sup>

### B. *Latinx People*<sup>294</sup>

Historically, media<sup>295</sup> has represented Latinx immigrants as people who deprive citizens of jobs, seek welfare, or are criminals.<sup>296</sup> Taken together, stereotypes of Latinx people paint a staggeringly negative view of America’s most populous

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286. *Id.* at 7, 28–30.

287. See JEFFERY T. ULMER, SOCIAL WORLDS OF SENTENCING: COURT COMMUNITIES UNDER SENTENCING GUIDELINES 64 (1997); Jeffery T. Ulmer & John H. Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383, 397–401 (1996).

288. See Ulmer et al., *supra* note 30, at 584.

289. *Id.* at 585.

290. *Id.* at 579. The “race effect” is the impact that a defendant’s race has on the trial penalty. *Id.*

291. *Id.*

292. *Id.* at 585.

293. *Id.*

294. Latinx people are now the modal defendants in the federal criminal justice system and the group whose incarceration rate is growing fastest. See Brendon McConnell & Imra Rasul, *Hispanic-White Sentencing Differentials in the Federal Criminal Justice System*, 108 AEA PAPERS AND PROCEEDINGS, 2018, at 29, [http://conference.iza.org/conference\\_files/transatlantic\\_2016/mcconnell\\_b6110.pdf](http://conference.iza.org/conference_files/transatlantic_2016/mcconnell_b6110.pdf). Latinx people are four times more likely to go to prison during their lives than white people. See Starr & Rehavi, *supra* note 285, at 2 (analyzing racial disparities in prosecutorial decision-making empirically).

295. Local news secretly conveys implicit biases into its watchers’ minds and normalizes that young Latinx men are crime-prone. See Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIAMI L. REV. 1, 66 (2018) (citing Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1551, 1553–54 (2005)) (describing the local news as a virus transmitting prejudices).

296. See Judith A. Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, J. OF SOC. & ECO. BOUNDARIES, Winter 2005–2006, at 56.

minority group, including criminal tendencies and laziness.<sup>297</sup> Most of these categorizations date to the nineteenth-century southwest.<sup>298</sup> These longstanding clichés against Mexican and other Latinx immigrants have manifested in racialized immigration enforcement.<sup>299</sup> Qualitative and quantitative evidence shows that post 9/11, anti-immigration and anti-Latinx sentiment rose and became persistent among average Americans.<sup>300</sup> To this day, Latinx people have a perceived “foreignness” to white Americans<sup>301</sup> and confront forms of racial framing through the lens of migrant “illegality.”<sup>302</sup> Regardless of legal status, Americans often think of Latinx people as “illegal aliens.”<sup>303</sup> Surprisingly, Americans’ affection for Latinx people is lower than for African Americans.<sup>304</sup> These historical and present-day formulas also pervade the criminal justice system and trial penalties.

Latinx representation in the criminal justice system is disproportionate to their numbers in the U.S. population.<sup>305</sup> In 2016, state prisons, federal prisons, and local jails held 2.3 million inmates.<sup>306</sup> Federal prisons and facilities held only about 200,000, or 8.6% of this total.<sup>307</sup> Meanwhile, Latinx people account for one half of all sentenced federal offenders, or more than triple their share of the U.S. adult

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297. See STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 11 (2003).

298. *Id.* at 12.

299. See KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 27–39 (2004).

300. See McConnell & Rasul, *supra* note 294, at 19.

301. SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 19–20, 241–42 (2004); Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POLICY, Mar./Apr. 2004, at 30, 44.

302. Nicholas P. De Genova, *Migrant ‘Illegality’ and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 420 (2002) (U.S. immigration law and the border patrol between the United States and Mexico produces “Mexican” as a subjugated and exploitable racial group).

303. *Id.* at 420–424.

304. See DARREN W. DAVIS, NEGATIVE LIBERTY: PUBLIC OPINION AND THE TERRORIST ATTACKS ON AMERICA 77–78 (2007).

305. Latinx people fare equally bad in other parts of the criminal justice system. The League of United Latin American Citizens (LULAC) has published the following statistics about Latinx people: (1) Fifty-six percent of Latinx people have had contact with the criminal justice system first hand or have a close family member that has; (2) Courts are forty-four percent more likely to convict Latinx people of property crimes than white people; (3) Courts are fifty-three percent more likely to convict Latinx people for drug crimes than white people; (4) Robbery, aggravated assault, and simple assault investigations are less likely to result in arrest when Latinx people are victims than when white people are victims; (5) Thirty-one percent of Latinx people live below the poverty line compared to thirteen-and-a-half percent for the general population; (6) Latinx people have the highest high school dropout rates compared to white people, Asian Americans and African Americans; (7) Courts are less likely to release Latinx people on their own recognizance; (8) Courts are more likely to set higher bail for Latinx people; and (9) Only thirty-three percent of Latinx people can post bail when given the option. See *Criminal Justice Reform*, LEAGUE OF UNITED LATIN AM. CITIZENS, [https://lulac.org/advocacy/issues/criminal\\_justice\\_reform/](https://lulac.org/advocacy/issues/criminal_justice_reform/) (last visited Jan. 22, 2022).

306. See Peter Wagner and Bernadette Rabuy, *Mass Incarceration: The Whole Pie*, PRISON POL’Y INITIATIVE (Mar. 14, 2017), <https://perma.cc/LN8C-JFPU>.

307. See *id.*; Mark Hugo Lopez & Michael Light, *A Rising Share: Hispanics and Federal Crime*, PEW RSCH. CTR. (Feb. 18, 2009), <http://www.pewhispanic.org/2009/02/18/a-rising-share-hispanics-and-federal-crime/>.

population of sixty million.<sup>308</sup> Latinx people’s exposure to all parts of the criminal justice system has also risen faster than their rising share of the population.<sup>309</sup> The share of all state and federal inmates who were Latinx increased from sixteen percent in 2000 to twenty percent in 2008.<sup>310</sup> During this period, the share of Latinx people in the adult U.S. population rose from eleven to thirteen percent.<sup>311</sup>

In 2007, Latinx defendants sentenced in federal courts were more likely than non-Latinx offenders to receive a prison sentence—ninety-six versus eighty-two percent. Latinx defendants who did not hold U.S. citizenship were more likely to receive a prison sentence in 2007 than those who were citizens—ninety-eighty versus ninety-one percent.<sup>312</sup> Latinos born in 2001 have a one in six chance of incarceration in their lifetime, while white men have a one in seventeen chance.<sup>313</sup> Latinas born in 2001 have a one in forty-five chance of incarceration, while white women have a one in 111 chance.<sup>314</sup>

Federal prosecutors are more likely to charge Latinx people with offenses with a statutory minimum than white people.<sup>315</sup> Prosecutors set initial charges with associated statutory minimums fourteen months longer (or sixty-three percent higher) for Latinx defendants than for white defendants.<sup>316</sup> Post 9/11, Latinx defendants are less likely to receive a downward departure.<sup>317</sup> Latinx defendants thus face higher trial penalties compared to white defendants. If historic trends continue, among the 2001 birth cohort one in six Latino men can expect to spend time in prison during their lives.<sup>318</sup>

Despite the above-described racial disparities, criminal courts treat Latinx people on an equal playing field and impose lower trial penalties where they form a higher percentage of the population. Professor Jeffrey Ulmer and PhD candidate

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308. See Luis Noe-Bustamante, Mark Hugo Lopez, & Jens Manuel Krogstad, *U.S. Hispanic population surpassed 60 million in 2019, but growth has slowed*, PEW RSCH. CTR. (July 7, 2020), <https://perma.cc/LY9D-Y9P4>.

309. See Mark Hugo Lopez & Gretchen Livingston, *Hispanics and the Criminal Justice System: Low Confidence, High Exposure*, PEW RSCH. CTR. (April 7, 2009) <http://www.pewhispanic.org/2009/04/07/hispanics-and-the-criminal-justice-system/>.

310. U.S. DEPT. OF JUST., BUREAU OF JUST. STA., PRISONERS IN 2009 (2011), <https://www.bjs.gov/content/pub/pdf/p09.pdf>.

311. See Lopez & Livingston, *supra* note 309.

312. See Light et al., *supra* note 145.

313. See Colin Hernandez, *We Need More Data to Understand the Impact of Mass Incarceration on Latinx Communities*, VERA INST. FOR JUST. (Oct. 14, 2019), <https://www.vera.org/blog/we-need-more-data-to-understand-the-impact-of-mass-incarceration-on-latinx-communities>.

314. *Id.*

315. See McConnell & Rasul, *supra* note 294, at 3.

316. *Id.* at tbl. 4.

317. *Id.*

318. See Press Release, The White House Off. of the Press Sec’y, CEA Report: Economic Perspectives on Incarceration and the Criminal Justice System (Apr. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>.

Kaitlyn Konefal studied the Latinx-white punishment disparity in federal courts.<sup>319</sup> They examined differences in the punishment of Latinx defendants in Pennsylvania state courts across counties that differ in terms of Latinx population size, immigration, and court caseload presence.<sup>320</sup> They found that courts punish Latinx defendants most harshly compared to white defendants in jurisdictions where Latinx populations are smallest.<sup>321</sup> Federal judges treat Latinx non-U.S. citizens charged with non-immigration offenses more harshly in places that are non-traditional Latinx immigration destinations.<sup>322</sup> Ulmer and Konefal concluded that such disparities reflect fear or distrust of “exotic others” with whom majority members have little experience.<sup>323</sup>

Despite this published knowledge about Latinx people, there is a scarcity of information about them in criminal justice compared to African American people.<sup>324</sup> One reason is that many jurisdictions do not account for ethnicity and assume Latinx people are white when tracking data.<sup>325</sup> For example, states that only count people as “Black” or “white” label most of their Latinx prison population “white,” inflating the number of “white” people in prison while masking the white/Latinx/Black disparity in the criminal justice system.<sup>326</sup>

### C. Judges

#### 1. Factors that Impact Judicial Decision-Making for Black and Latinx Defendants

Judges, like other humans, make decisions affected by their environment and their own limitations. Sociologist Celesta Albonetti notes that judges “attempt to manage uncertainty in the sentencing decision by developing ‘patterned responses’ that are . . . the product of an attribution process influenced by causal judgments.”<sup>327</sup> She argues that judges “rely on stereotypes that link race, gender and outcomes from earlier processing stages to the likelihood of future criminal activity.”<sup>328</sup> Because initial impressions based on appearance shape the application of

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319. See Ulmer & Konefal, *supra* note 21, at 1716 (finding Latinx defendants are punished most harshly relative to white defendants in jurisdictions where Latinx populations are smallest; Latinx disadvantage in federal court sentencing (for non-immigration offenses) appears to concentrate among non-U.S. citizens (especially those who are undocumented) and in places that are not traditional Latinx immigration destinations).

320. *Id.*

321. *Id.*

322. *Id.* at 1718.

323. *Id.* at 1732.

324. See Sarah Eppler-Epstein, Annie Gurvis & Ryan King, *The Alarming Lack of Data on Latinos in the Criminal Justice System*, URB. INST. (Dec. 2016), <http://apps.urban.org/features/latino-criminal-justice-data> (noting while forty states report race on arrest records only fifteen states report ethnicity).

325. *Id.*

326. *Id.*

327. See Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247, 250 (1991).

328. *Id.*



criminal attributions and stereotypes, they may be influential in sentencing.<sup>329</sup> Much like research subjects in studies of trait impressions, sentencing judges are likely to draw inferences about a defendant’s character based partly on his/her appearance, and in the face of complicated tasks like sentencing decisions, these attributions can meaningfully shape punishment.<sup>330</sup>

Judges also often make punishment determinations under time and information constraints.<sup>331</sup> This leads them to use cognitive heuristics, or decision-making shortcuts, that encourage reliance on experience and criminal stereotypes to help streamline punishment decisions.<sup>332</sup> As Professors Darrell Steffensmeier, Jeffery Ulmer, and John Kramer explained, when making inferences about the relative dangerousness or culpability of offenders, judges “share in the general stereotyping predominant in the community.”<sup>333</sup> Appearance characteristics tied to cultural stereotypes about crime or violence may prove influential in sentencing decisions.<sup>334</sup>

Ingroup biases<sup>335</sup> play a major part in trial judges’ decisions, thus increasing trial penalties for minority defendants.<sup>336</sup> Social psychologists have documented factors such as ethnicity, religiosity, and political affiliation as being salient across contexts in driving ingroup biases.<sup>337</sup> For example, economists Imran Rasul and Brendon McConnell have shown that federal districts with a higher proportion of Latinx judges have a reduced sentencing differential for downward departures between Latinx and white peoples.<sup>338</sup>

Even the political affiliation of judges impacts sentencing decisions among defendants of different races. A study found that Republican-appointed judges

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329. *Id.*

330. See Irene V. Blair, Charles M. Judd & Kristine M. Chappelle, *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCH. SCI. 674, 678 (2004) (arguing that Afrocentric features significantly correlate with harsher sentences).

331. See Darrell J. Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 767 (1998).

332. See Albonetti, *supra* note 327, at 250.

333. See Steffensmeier, Ulmer & Kramer, *supra* note 331, at 768.

334. *Id.* at 769.

335. Ingroup bias is a central aspect of human behavior whereby individuals aid members of a group they socially identify with more than members of other groups they do not identify with as strongly. See Henri Tajfel, M.G. Billig, R.P. Bundy & Claude Flament, *Social Categorization and Intergroup Behaviour*, 1 EUR. J. OF SOC. PSYCH. 149, 150 (1971).

336. See, e.g., David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 374 (2012) (finding gap between lengths of sentences that white and Black and Latinx defendants received was reduced when African American judges imposed the sentences); Moses Shayo & Asaf Zussman, *Judicial Ingroup Bias in the Shadow of Terrorism*, 126 Q. J. ECON. 1447, 1448–49 (2011) (finding Arab and Jewish judges in Israeli courts favor litigants who are members of their own ethnic groups).

337. *Id.* “People subconsciously hold embedded stereotypes” about many groups of people: from age groups to racial groups. Zane A. Umsted, *Deterring Racial Bias in Criminal Justice Through Sentencing*, 100 IOWA L. REV. 431, 434 (2014) (citing Justin D. Levinson, Danielle M. Young & Laurie Rudman, *Implicit Racial Bias: A Social Science Overview*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10–11 (Justin D. Levinson & Robert J. Smith eds., 2012)).

338. See McConnell & Rasul, *supra* note 294.

sentence Black defendants to three more months than similar non-Black defendants and female defendants to two fewer months than similar males compared to Democratic-appointed judges.<sup>339</sup> Researchers cannot explain these differences by other judge characteristics.<sup>340</sup> The differences also grow larger when judges have more discretion.<sup>341</sup> There are no significant gaps in the sentencing of Latinx versus non-Latinx white defendants by judge political affiliation, even though Latinx defendants receive longer sentences on average than white defendants.<sup>342</sup>

## 2. Federal Judges<sup>343</sup> and Implicit Bias<sup>344</sup>

Like the rest of us, judges harbor implicit racial biases.<sup>345</sup> In a study of federal judges conducted by professors Jeff Rachlinski, Sheri Johnson, Chris Guthrie, and Magistrate Judge Andrew Wistrich, seventy-four of eighty-five white judges, or 87.1%, exhibited a strong white preference on the Implicit Association Test (“IAT”).<sup>346</sup> The white judges performed the stereotype-congruent trial (white/good and Black/bad) 216 milliseconds faster than the stereotype-incongruent trial (Black/good and white/bad).<sup>347</sup> Black judges showed no discernable preference.<sup>348</sup> They produced IAT scores comparable to those seen in the sample of Black subjects obtained from the public on the Internet IAT. Comparing the mean IAT scores of the white judges with those of the Black judges revealed that the white judges expressed a larger white preference.<sup>349</sup> White judges also showed a stronger

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339. See Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J.: ECON. POL’Y 160, 185 (2019) (finding judge political affiliation contributes to racial and gender disparities in federal sentencing, and disparities grew larger after *U.S. v. Booker* decision).

340. *Id.*

341. *Id.*

342. See Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 75–76 (2015) (finding racial disparities in federal sentencing after *Booker* decision greater among judges appointed after *Booker*).

343. White capital defense attorneys, a group of people expected to have strong professional commitments to racial equality, show the same automatic preference for white people as the general population. See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1540 (2004).

344. Black Americans show less implicit bias than white Americans. See Rich Morin, *Exploring Racial Bias Among Biracial and Single-Race Adults: The IAT*, PEW RES. CTR. (Aug. 19, 2015), <http://www.pewsocialtrends.org/2015/08/19/exploring-racial-bias-among-biracial-and-single-race-adults-the-iat/>.

345. See Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1208 (2009).

346. *Id.* at 1210. The IAT is a computerized test that measures how the brain’s pattern recognition creates a “tendency for stereotype-confirming thoughts to pass spontaneously through our minds,” creating biases individuals may not even be aware they hold. See Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464 (1998).

347. Rachlinski et al., *supra* note 345, at 1210.

348. *Id.*

349. *Id.*

white preference than that observed among a sample of white subjects obtained from the Internet IAT.<sup>350</sup>

The judges who exhibited a white preference on the IAT gave harsher sentences to defendants when primed with Black-associated words rather than neutral words, while judges who exhibited a Black preference on the IAT gave less harsh sentences to defendants when primed with Black-associated words rather than neutral words.<sup>351</sup> The researchers concluded an “invidious homunculus” may be present among most judges in the United States, with the potential to produce racially biased outcomes in court decisions.<sup>352</sup> Fortunately, while implicit biases are widespread among judges and can influence their judgment, judges can learn of the potential for bias in themselves.<sup>353</sup> They also can avoid its impact.<sup>354</sup> When judges have the motivation to avoid the appearance of bias and face clear cues that risk a charge of bias, they can compensate for implicit bias.<sup>355</sup>

Professor Matthew Clair and postdoctoral research scholar Alix Winter studied how judges account for racial disparities in their decision-making.<sup>356</sup> Forty-one of forty-eight (eighty-five percent) of judges in their sample said they do not account for racial disparities when determining individual sentences.<sup>357</sup> Some, however, employ interventionist strategies at sentencing to account for disparate treatment at other stages of the criminal justice process.<sup>358</sup>

Clair and Winter document an example of an interventionist strategy employed by a white female judge. For her, crimes of the same nature are qualitatively different depending on the race and background of the defendant.<sup>359</sup> The judge often holds white defendants to a higher standard than Black defendants because white people are not subject to the same racial bias.<sup>360</sup> She said to the researchers, “[y]ou might see a white kid come in who has committed a crime and you think, ‘Really? Really? You have all the advantages that these [minorities] do not have because you’re white.’”<sup>361</sup> Judges who employ interventionist strategies by considering social problems faced by low-income Black and Latinx people before involvement

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350. *Id.* at 1211.

351. *Id.* at 1215.

352. *Id.* at 1221.

353. *Id.* at 1225.

354. *Id.*

355. *Id.*

356. See Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 *Criminology* 332, 353–54 (2016).

357. *Id.* at 349.

358. *Id.* at 332. Most judges attribute sentencing disparities to differential treatment by themselves and other criminal justice officials, while some judges attribute discrepancies only to the disparate impact of poverty and differences in offending rates. Non-interventionist strategies used by most judges unintentionally reproduces disparities. *Id.*

359. *Id.* at 350.

360. *Id.*

361. *Id.*

with the criminal justice system counter by identifying the impact of poverty and restricted life chances.<sup>362</sup>

Whether or not judges apply interventionist strategies, the trial process, which includes witness and sometimes defendant testimony, can have a positive or negative affect on the trial judge's opinion and implicit bias toward a defendant.<sup>363</sup> Although the judge may gain favorable information about a defendant during a trial, the judge may want to punish the person in conformity with how they have punished others.<sup>364</sup> Absent offenses requiring mandatory minimum sentences, judges in the federal criminal justice system have wide discretion to sentence below the guidelines if they find factual and legal reasons supporting a sentence.<sup>365</sup> But most judges will not use sentencing as an intervention method.<sup>366</sup> Judges that fall under this category may rely on U.S.S.G. §5H1.10, which prohibits the use of race, sex, national origin, creed, religion, and socio-economic status when determining a sentence.<sup>367</sup>

## V. PRACTICAL ADVICE FOR TRIAL LAWYERS AT PLEA AGREEMENTS AND SENTENCING

At least in theory, trials are vehicles for truth seeking.<sup>368</sup> In a world with more prosecutors, judges, defense lawyers, and little to no trial penalties, most cases would proceed to litigation. But the cost of rejecting a plea agreement can be more time in custody or the difference between a custodial and non-custodial sentence. With this in mind, this Section provides advice for criminal defense lawyers when representing clients at the plea and sentencing stage of a case.<sup>369</sup> The suggestions

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362. See generally MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995).

363. See Jerry Kang, Mark Bennett, Devon Carbado, Pam Cast, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1126 (2012) (“Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects.”).

364. See 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 (2014) (explaining the powerful cognitive “anchoring” effect of the Federal Guidelines which leads to overly harsh sentences and suggesting a modest, simple, and practical reform to reduce the anchoring effect).

365. See LISA M. SEGHEITTI & ALISON M. SMITH, *CONG. RSCH. SERV.*, RL32766, *FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS* 14, 15 (2007), <http://www.fas.org/sgp/crs/misc/RL32766.pdf>.

366. A small number of judges are known to be conscious of race when imposing sentencing. See Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 *SEATTLE J. FOR SOC. JUST.* 333, 361 n.167 (2020).

367. U.S. SENT'G GUIDELINES MANUAL § 5H1.10 (U.S. SENT'G COMM'N 2018).

368. One way to get to the truth is by requiring confrontation of witnesses through cross-examination. See Susan Howell Evans, *Criminal Procedure—Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism—Maryland v. Craig*, 26 *WAKE FOREST L. REV.* 471, 480 (1991) (“The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.” (citing *Lee v. Illinois*, 476 U.S. 530, 540 (1986))).

369. As courts recognize, “[s]entencing is probably the most challenging task faced by a federal district judge.” *Banks v. United States*, 614 F.2d 95, 99 (6th Cir. 1980) (quoting *United States v. Ruiz-Rodriguez*, 277

are based on the reality of severe trial penalties but would be similar if differences between plea and trial punishments was smaller.

### A. Preparation

The passion of the lawyer and time spent in preparation are unmistakable in better sentencing outcomes. Lawyers who care are motivated and willing to dedicate enough hours to do the work. Research shows that appointed or retained lawyers have a minor impact on conviction rates but may affect who gets incarcerated and the length of confinement.<sup>370</sup> Lawyers that demonstrate little effort at sentencing will affect the length of imprisonment.<sup>371</sup> Many claims of ineffective assistance of counsel today focus on the lawyer's preparation for and performance at the sentencing stage.<sup>372</sup> The individual lawyer should find the motivation to diligently prepare and plan all cases for sentencing. To accomplish this, lawyers need to discover if they care about their work and the difference it can make. Two practical resources for line federal defenders are the Sentence Resource Counsel Project and the Defender Services Office Training Division.<sup>373</sup> Both are organizations designed to help answer questions and to provide resources for sentencing and trial to defenders.

### B. Advice to Clients

To meet minimum requirements under the professional rules of responsibility, the lawyer must know, as best she can, the maximum punishment for charges and the client's prison exposure after trial conviction.<sup>374</sup> With this knowledge, the lawyer can estimate whether the client will get a similar result with a plea agreement.<sup>375</sup> The lawyer should compare this outcome to the punishment after accepting a plea offer and explain both to the client.<sup>376</sup> The sentence after trial conviction is the “punishment” the client faces if he/she exercises the right to go to trial. But the plea agreement differential is the time saved by avoiding a trial. If the

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F.3d 1281, 1292 (11th Cir. 2002)). Imposing a sentence is “probably the single most important duty performed by judges.” *United States v. Curry*, 767 F.2d 328, 331 (7th Cir. 1985).

370. See Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 437 (2002); see also James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 159 (2012) (“Compared to appointed counsel, public defenders in Philadelphia reduce their clients’ murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%.”).

371. *Id.* at 188, 195.

372. See 44 Am. Jur. *Trials* § 2 (2021); see also *Strickland v. Washington*, 466 U.S. 668 (1984).

373. See *Training Division Hotline*, DEF. SERVS. OFF., <https://www.fd.org/hotline> (Defender Services Training Division); *Resources*, THE SENT’G RES. COUNS. PROJECT, <https://www.src-project.org/resources/>.

374. See ABA Crim. Just. Standards for the Def. Function, Standard 4-6.3 Plea Agreements and Other Negotiated Dispositions (4th ed. 2017) (describing responsibilities of defense counsel in counselling and preparing clients to accept plea agreements).

375. *Id.*

376. *Id.*

client is unhappy with the difference between the sentencing after trial compared with the plea and rejects the agreement, the attorney must proceed with trial planning.

Whether the case results in litigation or settlement, the lawyer in a federal case must explain to the client how the sentencing guidelines work, informing the client about guideline ranges, variances, departures, whether mandatory minimums apply, and, if applicable, the concepts of safety-valve and relevant conduct.<sup>377</sup> It is wise to advise the client of the difficulty of accurately predicting a sentencing outcome due to the judge's punishment philosophy, predilection of the prosecutor, and the probation officer's recommendation to the court.<sup>378</sup>

### C. Guiding the Recalcitrant Client to Accept a Plea Agreement

Repetition is important for guiding a resistant client to sign a generous plea agreement he or she should accept.<sup>379</sup> Building good rapport with the client by being attentive should be a key principle of the representation.<sup>380</sup> The lawyer should make sure the client understands that he/she is the professional in control in a non-condescending manner.<sup>381</sup>

Sometimes, clients will provide to law enforcement and the defense lawyer stories that are unrealistic or do not make sense.<sup>382</sup> In these situations, the lawyer must calmly speak with the client to go over adverse evidence that will decide the

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377. *Id.*; see also 18 U.S.C. § 3553(f); U.S. SENT'G GUIDELINES MANUAL § 5C1.2 (U.S. SENT'G COMM'N 2018) (explaining the "safety-valve" provision); U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (U.S. SENT'G COMM'N 2018) (describing provisions for relevant conduct in federal sentencing). For more information see the United Sentencing Commission website, which provides links to primers on federal sentencing, including departures and variances, <https://www.ussc.gov/guidelines/primers>.

378. The law recognizes that lawyers are not ineffective when they fail to predict sentencing outcomes. See, e.g., *United States v. Foster*, 68 F.3d 86, 87–88 (4th Cir. 1995) (rejecting claim where defendant was sentenced as a career offender when counsel assured him otherwise before plea); *United States v. Lambey*, 974 F.2d 1389, 1395 (4th Cir. 1992) (en banc) (rejecting claim where counsel advised defendant before plea he faced 78–108 months and he received 360); *United States v. Rivera*, 898 F.2d 442, 447 (5th Cir. 1990) (rejecting claim where even though the sentence was greater than defendant expected, counsel's failure to predict sentencing range did not violate Sixth Amendment).

379. See John T. Cacioppo & Richard E. Petty, *Effects of Message Repetition on Argument Processing, Recall, and Persuasion*, 10 BASIC & APPLIED SOC. PSYCH. 3, 9 (1989) (discussing how moderate levels of message repetition promotes central processing by creating more opportunities for recipients to scrutinize the message's merits).

380. See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1227 (2004) (noting that "the notion of lawyer-as-best-friend puts an extraordinary burden on defenders to give their hearts away each time they represent a client, to figure out the limits in a lawyer-client relationship, and to find a way to 'go home' themselves.").

381. See Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541, 583 (1995) (noting client-centered interviews are not exercises in professional dominance and control but conversational, with the power and control evenly balanced compared to "traditional" interviews).

382. Clients frequently lie to lawyers. See Marvin E. Frankel, *Client's Perjury and Lawyers' Options*, 1 J. INST. FOR STUDY LEGAL ETHICS 25, 40 (1996) (noting "there may be no thoroughly happy solution" to the client lying under oath dilemma).

case for the prosecution. To accomplish this, the lawyer must be well-versed with all investigative reports, interview transcripts, and other documents authored by witnesses. The defense lawyer should have spent hours studying the case.<sup>383</sup>

Recommendations for accepting favorable plea offers are especially important for younger clients because they have difficulty recognizing, understanding, and carefully weighing consequences when making important decisions.<sup>384</sup> Neurological research on the frontal lobe—the part of the brain that manages impulse control, long-term planning, priority setting, calibration of risk and reward, and insight—supports this reality.<sup>385</sup> Younger clients have more difficulty in accepting plea agreements, especially if it requires imprisonment.<sup>386</sup>

As Professor Abbe Smith notes, lawyers are untrained in psychology, so it is difficult to persuade clients to accept plea offers when it is in their best interest.<sup>387</sup> Accordingly, lawyers should consider taking time to learn about the psychology of the grief process involved in having to accept a plea offer that requires a prison sentence.<sup>388</sup> Smith says it is equally important for prosecutors and judges to understand this literature, so that they may give the requisite time for the defense lawyer to consult with the client.<sup>389</sup> Many plea agreements have quick deadlines, but if the system wants to avoid trials, prosecutors and judges may go along with it.<sup>390</sup>

#### D. *Attacking the Voluntariness of the Crime*

Voluntary choice is central to culpability.<sup>391</sup> Scholars widely accept that the voluntary choice model, as formulated by legal philosopher H.L.A. Hart, is the principle of justice limiting imposition of punishment.<sup>392</sup> At sentencing, therefore, lawyers should explore facts that lessen, even if they do not eradicate, the

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383. See *supra* Part V, Section A. I agree with Professor Thomas P. Anderson that the three most important words of trial advocacy are preparation, preparation, and preparation. See Hon. V. Stuart Couch, *Dedication to Professor Thomas P. Anderson*, 34 CAMPBELL L. REV. 1, 2 (2011).

384. See Abbe Smith, “*I Ain’t Takin’ No Plea*”: *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 18–20 (2007), (citing Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 325, 331–33 (Thomas Grisso & Robert G. Schwartz eds., 2000) (summarizing studies on adolescent development and noting the stressful context in which accused juveniles make decisions)).

385. See Mary Beckman, *Crime Culpability, and the Adolescent Brain*, SCI., July 30, 2004, at 596 (noting that Dr. Jay Giedd of the National Institute of Mental Health “consider[s] 25 the age at which brain maturation peaks”).

386. See Smith, *supra* note 384, at 18, 21.

387. *Id.* at 28.

388. *Id.* at 30.

389. *Id.*

390. *Id.* (noting that “most judges want to resolve cases short of trial”).

391. See generally Douglas Husak, “*Broad*” *Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 468–69 (2012) (criminal law justifies inflicting punishment as a response to individuals’ voluntary choices).

392. See Richard Delgado, *Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 LAW & INEQ. 9, 17 (1985) (citing H.L.A. Hart, *Crime and the Criminal Law* by Barbara Wootton., 74 YALE L.J. 1325, 1328 (1965) (reviewing BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963))).

voluntariness of the act.<sup>393</sup> The lawyer can accomplish this through a discussion of psychological and environmental factors that played a part in the client's decision to commit the crime.<sup>394</sup> For example, the client may have been under duress when he/she accepted an offer to drive a car loaded with drugs. In this situation, the imperfect duress departure may be available under U.S.S.G. § 5K2.12. The defense lawyer can also ask for a downward variance from the guideline range. Often people commit crimes under a state of intoxication from drugs or alcohol.<sup>395</sup> Although intoxication is not a defense, it can mitigate the sentence.<sup>396</sup> Finally, lawyers can explore the general psychological condition of the client. This can be done by retaining an expert, such as a psychologist or psychiatrist, to explore whether the client has a learning disability, intellectual disability, or other mental defects that impact voluntariness and decision-making.<sup>397</sup>

### *E. Narrative Theory*<sup>398</sup>

All defense attorneys should develop persuasive sentencing narratives.<sup>399</sup> A powerful narrative can affect the court's decision-making in reducing prison

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393. See *id.* at 75.

394. See *id.* at 78 (“Evidence of rotten social background should be admissible during sentencing as a special circumstance which made conforming to the law especially difficult.”).

395. *Principles of Drug Abuse Treatment for Criminal Justice Populations*, NAT'L INST. ON DRUG ABUSE, 12 (2014), [https://www.drugabuse.gov/sites/default/files/txcriminaljustice\\_0.pdf](https://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf) (“[I]t is common for many offenses . . . to be committed by individuals who had used drugs or alcohol prior to committing the crime, or who were using at the time of the offense.”).

396. See Charles J. Felker, *Considering Offender Intoxication at Sentencing*, 2 FED. SENT'G REP. 192, 192–93 (1990). According to Felker:

Retributive theory indicates that intoxication should be a mitigating factor in cases where it reduces the offender's ability to appreciate the wrongfulness of his conduct at the time of the crime. But, according to retributive theory, intoxication should *not* be a mitigating factor if the offender simply drank to ‘get up his nerve’ to commit the crime or if the offender had frequently committed crimes while intoxicated to the extent that he was on notice of the likelihood that his decision to drink was also a decision to commit the ensuing crime.

*Id.*

397. See Jona Goldschmidt, *Has He Made His Bed, and Now Must Lie in It? Toward Recognition of the Pro Se Defendant's Sixth Amendment Right to Post-Trial Readmonishment of the Right to Counsel*, 8 DEPAUL J. SOC. JUST. 287, 338 (2015) (noting that for sentencing a defendant's “history and characteristics” may need to be established through “the possible use of experts (e.g., sentencing mitigation experts, psychologists, social workers, etc.)”).

398. The thesis of narrative theory is that humans “carry a primal yearning and ability to engage in storytelling as a way of creating meaning.” See Lori D. Johnson, *Redefining Roles and Duties of the Transactional Lawyer: A Narrative Approach*, 91 ST. JOHN'S L. REV. 845, 850 (2017) (citing Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012)); see also Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 276 (2011) (“[S]tories and images we acquire from our culture and experience provide mental blueprints that, for better or for worse, help us sort through and understand new things.”). Lawyers persuade by telling stories. See J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 53–54 (2008) (attributing the basis for this assertion to the work of James Boyd White).



exposure at sentencing.<sup>400</sup> To create emotionally and factually persuasive presentations, defense lawyers should draw on storytelling traditions.<sup>401</sup>

One example of a powerful narrative is discussion of tough conditions of confinement during pre-trial detention and facilities to which the Bureau of Prisons is likely to send the client. If the lawyer presents the narrative effectively, the judge might “pause before meting out [punishment] at the top of the sentencing range.”<sup>402</sup> To accomplish this, lawyers can incorporate information about conditions of imprisonment, such as time spent in solitary confinement, lack of adequate medical care, distance from family members, and scarcity of rehabilitation programs and jobs training; all in support of arguments for shorter sentences or against imprisonment. In doing so, defense lawyers promote the humanity of their clients in dire conditions of internment in jails and prisons. This can influence the court’s decision about a client’s sentence and impact the court’s view of systems of incarceration for future cases.<sup>403</sup>

Another powerful sentencing narrative involves mass incarceration. This narrative empowers lawyers to reframe factors common to many defendants as part of a larger story.<sup>404</sup> “In a broader, systemic context, markers of disadvantage—unemployment, criminal history, low education, family instability, racial or economic isolation—show that a defendant comes from an environment affected by mass incarceration.”<sup>405</sup> The defense lawyer can argue that the outcome of the sentence influences the well-being and stability of the defendant’s family, community, and public safety in the short and long term. Judges can consider these impacts in tailoring a sentence that fits the defendant and minimizes other harms.<sup>406</sup> “Gathering and presenting a mass incarceration narrative requires finding experts, witnesses,

399. See Hugh M. Mundy, *It’s Not Just for Death Cases Anymore: How Capital Mitigation Investigation Can Enhance Experiential Learning and Improve Advocacy in Law School Non-Capital Criminal Defense Clinics*, 50 CAL. W. L. REV. 31 (2013).

400. See Thomas P. Gressette Jr., *A Practical Guide to Storytelling at Sentencing*, CHAMPION, Jan. 2009, at 16 (arguing that “[y]our clients stand to gain or lose freedom in direct proportion to the story you tell for them.”).

401. See Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1605–06, 1616–17 (2015) (urging criminal defense lawyers to employ narrative to “convey the human context of stop and frisk” and noting that “[s]cholars have long recognized that narrative has the power to make human experience accessible and universal and that it can reveal social inequities in a way that stimulates change”).

402. See Robin Walker Sterling, *Narrative and Justice Reinvestment*, 94 DENV. L. REV. 537, 546 (2017) (citing Lindsey Webb, *Slave Narratives and the Sentencing Court* 17–18 (Univ. Denver Sturm Coll. Law Legal Research Paper Series, Working Paper No. 16-32, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2844872](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844872)).

403. See Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 137–140 (2018).

404. See Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 468 (2012).

405. *Id.*

406. See Dr. JoAnne Sweeny, “*Brock Turner Is Not A Rapist*”: *The Danger of Rape Myths in Character Letters in Sexual Assault Cases*, 89 UMKC L. REV. 121, 124 (2020) (“[T]he sole purpose of the character letter in pre-sentencing is to convince a judge to impose the lightest punishment available by using emotional appeals that emphasize a defendant’s humanity and the impact a prison sentence would have on the defendant’s life.”).

neighbors, and family members to explain how the conviction, any incarceration, and collateral consequences will affect them.”<sup>407</sup>

#### F. Individuation<sup>408</sup>

Just as narratives are central to sentencing, defense lawyers must individuate the client. As the United States Supreme Court wrote, “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”<sup>409</sup> Although individuation requirements are highest in capital cases,<sup>410</sup> all cases require at least some of it.<sup>411</sup>

Individuation relies on preventing stereotypic inferences by obtaining information from group members.<sup>412</sup> The lawyer individuates clients by obtaining character letters from family, friends, employers, and pastors to supply details about the client.<sup>413</sup> Details humanize the client and create a separation between stereotypes and reality.<sup>414</sup> Individuation can also reduce the negative effects of implicit bias, which result in sentencing disparities.<sup>415</sup>

It has been my experience that judges are more likely to impose lower sentences when lawyers supply them with more specific details about clients’ lives and their circumstances. A useful practice is to conduct interviews of the client leading up to sentencing—both to prepare the sentencing memorandum and before the actual hearing, to fill gaps in knowledge. Interviewing friends and family members is also helpful.

407. Traum, *supra* note 404, at 467; see also Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 105 (2014) (proposing a sentencing model that considers “the hurtful effect of excessive sentences on families and communities” by reducing reliance on incarceration).

408. Individuation is of utmost importance during sentencing. See Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer’s Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. FOR SOC. JUST. 333, 359 (2020) (citing Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 317 (2012)).

409. *Graham v. Florida*, 560 U.S. 48, 71 (2010) (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

410. “In capital cases the Constitution demands that society tailor the punishment both to the nature of the crime itself and to the defendant’s ‘personal responsibility and moral guilt.’” *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O’Connor, J., dissenting) (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

411. *United States v. Pinto*, 875 F.2d 143, 144–145 (7th Cir. 1989) (noting 18 U.S.C. § 3553(b) “hardly eliminates individuation in sentencing”—offense and offender characteristics matter a great deal).

412. See Patricia G. Devine, Patrick Forscher, Anthony J Austin & William T. L. Cox, *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267, 1271, 1276 (2012) (describing “compelling and encouraging evidence for the effectiveness of our multifaceted intervention in promoting enduring reductions in implicit bias”).

413. See Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C.D. L. REV. 745, 801 (2018) (noting the importance of character letters for reducing racial priming at sentencing).

414. See Devine et al., *supra* note 412, at 1270–71.

415. *Id.* at 1271.

### G. Problems with Factual Basis and Immigration Consequences

Sometimes, a client wants to plead guilty but may have problems admitting all facts in the plea agreement’s factual basis.<sup>416</sup> In these situations, it is wise to go over the facts the client can admit and figure out if they meet a different crime, a lesser crime, or if an amendment to the factual basis solves the problem. In drug trafficking cases, for example, a client can plead to a “deliberate ignorance” factual basis.<sup>417</sup> In this scenario, the client admits the reasons he or she strongly believed the car or bag contained drugs, without having to admit full knowledge of possession of controlled substances.<sup>418</sup>

In other cases, a client pleads guilty, but the conviction has collateral immigration consequences.<sup>419</sup> In this situation, the lawyer should become familiar with potential alternative crimes the client can accept to avoid or mitigate the negative immigration consequence. Both scenarios require skillful negotiation with the prosecution.<sup>420</sup> One negotiation strategy is to point out weaknesses in the government’s case such as a detention, seizure, or search that violated the Fourth Amendment. If there are potential violations, the defense attorney can persuade the prosecutor to amend the plea offer. Another strategy is to attempt to cooperate with the government by having the client supply helpful leads for future investigations. Even though most of the time such proffer sessions do not lead to an arrest, the prosecutor may reward the client with a modified plea because of his or her efforts to assist. Such sessions may also humanize the client before the prosecutor.<sup>421</sup>

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416. The factual basis for a plea agreement consists of a series of facts, stipulated by the prosecution and defense, for a judge to accept a guilty plea. STANDARDS FOR CRIM. JUST. § 14-1.6 (AM. BAR ASS’N 1999). Sometimes it is difficult to know whether the client truly is innocent of certain elements of the crime or whether he/she simply cannot bring him/herself to admit certain facts.

417. The mental state of deliberate ignorance is enough to satisfy the requirement of knowledge. See Jessica A. Kozlov-Davis, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. REV. 473, 481 (2001); see also Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge & the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 33–34 (1994). Prosecutors frequently request a “willful ignorance” jury instruction. See MANUAL OF MODEL CRIM. JURY INSTRUCTIONS, MODEL INSTRUCTION 5.7 (9TH CIR. 2010); see also *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) (“When Congress made it a crime to ‘knowingly . . . possess with intent to manufacture, distribute, or dispense, a controlled substance,’ 21 U.S.C. § 841(a)(1), it meant to punish not only those who know they possess a controlled substance, but also those who don’t know because they don’t want to know.”).

418. See, e.g., *United States v. Alvarez-Quiroga*, 901 F.2d 1433, 1438 (7th Cir. 1990) (defendant pled guilty under willful ignorance theory—he did not know he carried cocaine in a car from Texas to Chicago but admitted he had an illicit cargo of some kind, which should have prompted him to investigate).

419. See Megan Elman, *Unexpected Consequences: Why Criminal Defense Attorneys Have an Ethical Obligation to Inform Noncitizen Clients of the Immigration Consequences of Conviction*, 87 GEO. WASH. L. REV. 430 (2019) (arguing that criminal defense attorneys have an ethical obligation to understand and explain to clients immigration consequences and negotiate immigration-neutral outcomes); see also *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356, 360 (2010) (holding criminal defense attorneys must advise noncitizen clients about the deportation risks of a guilty plea).

420. There are many cases where the prosecutor does not agree to a modification of the agreement and the case may end up going to trial.

421. See Lance M. Africk, *Prosecutorial Discretion: Striking A Balance*, 36 LA. BAR J., no. 1, 1988, at 17, 18 (explaining benefits of cooperation with the government).

### *H. Persuading Trial Judges*

Some judges are more defense-oriented and have more sympathy and empathy than others.<sup>422</sup> Most judges tend not to care about socially critical issues without specific evidence of how they impact the defendant.<sup>423</sup> Even when a social problem directly affects a defendant, most judges do not seem to care. One example is the conditions of pre-trial detention. Judges, in my experience, are unwilling to impose shorter sentences when a defendant's pre-trial detention has been traumatic. Another example is implicit racial and ethnic bias. I have included a section in sentencing memorandums discussing how implicit racial bias creates sentencing disparities without identifying how it affects clients. Because the bias is implicit, I cannot describe it but provided numerous citations about how it affects pre-trial outcomes, such as bail determinations and sentencing. So far, in my practical experience, one federal judge in Tucson is not convinced lawyers should discuss implicit bias at sentencing without a connection to the client's life. Other judges have not addressed the issue during the sentencing hearing. The lesson for lawyers is that they must connect all issues and theories for sentencing to the client and explain how each influences the sentencing decision. The attorney can accomplish this by formulating a theory of sentencing and a storytelling method. A sentencing theory is important because it forces the defense lawyer to focus each fact and legal argument to the client's punishment, risk of recidivism, and rehabilitation.<sup>424</sup> Through the use of storytelling at sentencing, the defense lawyer focuses on the client's trajectory before and after the crime.<sup>425</sup> These efforts, however, may not be enough to persuade judges.

Judges' avoidance of implicit bias supports what critical race theorist Richard Delgado wrote about their tendency towards "narrow, formalistic forms of reasoning" and "little broad reading," and their experience with "upper class lives with minimal daily contact with poor people or cultures other than their own."<sup>426</sup> Delgado wrote that if a lawyer is a devoted storyteller, however, he/she may give

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422. See Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483, 1484 (2004) (explaining that most judges are not defense oriented).

423. Under federal sentencing guidelines judges must only consider factors in 18 U.S.C. § 3553(a). These factors include the history and characteristics of the defendant, deterrence, recidivism, protection of the public, the nature and circumstances of the offense, the seriousness of the offense, and sentencings in similar cases. *Id.* The defense lawyer must interweave relevant social issues to these factors in a creative way.

424. See Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U.L. REV. 161, 204 (2016) (arguing for a theory of mitigation that judges should follow that reduces sentences "whenever any of the punishment theories would support treating a fact or circumstance as mitigating").

425. See Thomas P. Gressette Jr., *A Practical Guide to Storytelling at Sentencing*, THE CHAMPION, Jan. 2009, at 16.

426. See Richard Delgado & Jean Stefancic, *Do Judges Cry? An Essay on Empathy and Fellow-Feeling*, 70 CASE W. RES. L. REV. 23, 50 (2019) (citing Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 140-142 (2013)).

pause to an occasional judge or “even get one to shed a tear or two.”<sup>427</sup> Delgado suggests that “if one wants to be on the right side of history, it behooves one, whether a lawyer or a judge, but especially the latter, to carefully analyze what one is doing for a living.”<sup>428</sup> He ends by saying that “consulting outsider texts,”<sup>429</sup> such as his paper, “may be a useful start.”<sup>430</sup>

Judges may be convinced that most crimes are committed for either a mental health reason or motivation.<sup>431</sup> They like to see people that have accepted responsibility for their actions, but who have also worked, before sentencing, to rehabilitate.<sup>432</sup> This is one reason most judges look favorably on letters written by family members, close friends, and the client’s employer or co-workers.<sup>433</sup> The client’s letter is also important.<sup>434</sup> If the client has underlying substance abuse or mental health problems which contributed to the commission of the offense, judges want to see that the person sought treatment. Family, friends, and counsellors can document the client’s efforts to rehabilitate.<sup>435</sup> Although services are easier to obtain out-of-custody, the advice also applies to in-custody clients.

### *1. Educating Judges About the Harshness of American Imprisonment*

One sentencing tactic is to explain to trial judges, in a footnote, a section at the end of the sentencing memorandum, or orally during the hearing, how the American criminal justice system is the most punitive among developed countries.<sup>436</sup> This information can hopefully begin to open the minds of judges to consider lower custodial sentences. A contrast between American and continental European punishment fits with 18 U.S.C § 3353(a)(2)(A) because it forces judges to question how American punishment marks seriousness and respect for the law.

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427. *Id.* Empathetic judges cry more often. Delgado provides the example of Judge David Bazelon, Justice Blackmun, Judge Nancy Gertner, and Justice Harlan as empathetic judges. *See id.* at 50. The problem is that there are few empathetic judges.

428. *Id.* at 51.

429. *Id.*; *see also* Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1931–32 (1991) (considering whether access to outsider texts can improve judges’ ability to identify with frames of reference other than their own).

430. Delgado & Stefancic, *supra* note 426, at 51.

431. *See* Allen Ellis, *Representing the “Challenging” Client at Sentencing*, FED. LAW., July/Aug. 2020, at 24–25.

432. *Id.*

433. *See* Kim Smith, *Letters Have an Impact, Judges Agree*, ARIZ. DAILY STAR (Dec. 17, 2006), [https://tucson.com/news/local/crime/letters-have-an-impact-judges-agree/article\\_0e0e2bd5-3d4a-5d1b-ab68-054e639b6157.html](https://tucson.com/news/local/crime/letters-have-an-impact-judges-agree/article_0e0e2bd5-3d4a-5d1b-ab68-054e639b6157.html).

434. *Id.*

435. *Id.*

436. *See* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016) (“Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes.”).

Although 18 U.S.C. § 3553(a)(2)(A) does not address comparisons to other countries, it also does not prohibit such useful analysis.<sup>437</sup>

To accomplish this, defense lawyers should know and explain to judges that despite trial convictions or guilty pleas, the United States imposes more prison time for most offenses compared to other industrialized nations.<sup>438</sup> And, the United States imprisons more people, per capita, compared to most industrialized nations.<sup>439</sup> Crime rates in the United States since 1991 have fallen to levels seen in the 1960s, but the imprisonment rate has increased for the last twenty-five years.<sup>440</sup> The inmate population in federal and state prisons reached an all-time high in 2009 and only decreased three percent by 2014.<sup>441</sup> Harsh sentencing laws enacted between 1984 and 1986 are the main cause for high numbers of people incarcerated.<sup>442</sup> Compared to other Western countries, who rarely jail anyone for longer than one year, prison terms in the United States are “extraordinarily long.”<sup>443</sup> In other Western countries, sentences over three years are unusual, and longer than five years, scarce.<sup>444</sup>

Further, when a client has prior convictions and already served a custodial sentence, the defense lawyer should explain to the court that some European countries do not add more time to the new sentence.<sup>445</sup> Continental European sentencing theory holds that the person already paid their debt to society and therefore should not face more time.<sup>446</sup> This may have weight for more liberal judges. A discussion of sentencing theory should explain how a sentence meets different goals of

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437. 18 U.S.C. § 3553(a)(2)(A) requires the judge to consider the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.

438. See Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at A Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/>; Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (April 23, 2008), [http://www.nytimes.com/2008/04/23/us/23prison.html?\\_r=1&fta=y](http://www.nytimes.com/2008/04/23/us/23prison.html?_r=1&fta=y).

439. Lorna Collier, *Incarceration Nation: The United States Leads the World in Incarceration*, 45 MONITOR ON PSYCHE 56, 56 (2014), <http://www.apa.org/monitor/2014/10/incarceration.aspx> (“While the United States has only 5 percent of the world’s population, it has nearly 25 percent of its prisoners—about 2.2 million people.”). “The United States and Canada have comparable crime rates, but the United States incarceration rate is more than four times the rate in Canada.” See Sandra Reed, *Do Borders Make A Difference Behind Bars? The Scope of Prisoners’ Free Exercise of Religion Protection in Canada and the United States*, 19 RUTGERS J.L. & RELIGION 212 (2018) (citing Ye Hee Lee, *supra* note 438; Liptak, *supra* note 438).

440. See Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 442 (2017).

441. *Id.* at 443.

442. *See id.* at 444.

443. *Id.* at 487.

444. *Id.*

445. The defense lawyer should tread carefully here and avoid theoretical discussions in front of judges that may react poorly to them. See Lisa Hay, *Sentencing: Thinking Like A Judge, Arguing As an Advocate*, CHAMPION, June 2014, at 20 (noting that some judges may react poorly to a lawyer who spends precious sentencing time quoting Jeremy Bentham, Immanuel Kant, H.L.A. Hart, or other theorists in support of a sentence).

446. *Id.*

punishment, including deterrence, incapacitation, rehabilitation, common ground, and retribution.<sup>447</sup>

### CONCLUSION

The reality of federal criminal practice in busy southwest border districts consists of low trial rates, harsh trial penalties, and the plea-bargaining machine. Fast-track programs control illegal entry and drug courier prosecutions. Prosecutors implemented them as the government militarized the U.S.-Mexico border. Many more Latinx people and others along the perimeter now find themselves in criminal court for entering the country without papers or in prison for lengthy sentences if charged as drug couriers for the first time.

Abysmally low trial rates pose difficulties for everyone in the criminal justice system, not just along the border. Clients in pretrial detention seldom meet other defendants going to trial or who went to trial because of plea bargaining's hegemony. Steep trial sentences lead to clients pleading guilty to charges they may be innocent of or that prosecutors cannot prove beyond a reasonable doubt. Black and Latinx defendants, already affected by overcharging and overzealous policing, are punished more severely compared to similarly situated white people. Young lawyers in public defender offices cannot get adequate trial experience to advise clients about the viability of a defense. Federal judges and prosecutors may benefit from less work because of low trial rates, but they also endure the injustices of the vanishing trial: judicial credibility lowers in public opinion and prosecutors' trial skills decline.

Legal scholars have responded with policy changes: curtailing or abolishing mandatory minimum sentencing laws, imposing trial sentencing ceilings, requiring prosecutors to provide adequate reasons for filing supervening indictments or sentencing enhancements when outcomes deviate from standard ranges, and changing management practices in prosecutors' offices.<sup>448</sup> Only a combination of changes can make a dent in an endemic problem decades in the making.

Trial lawyers all over the country must continue to accept the reality of today's practice and try as best as they can to advise clients to mostly accept plea agreements instead of exercising their right to trial by jury. They then must persuade trial judges to impose the fairest punishment through storytelling, favorable sentencing letters and educating them about implicit bias. The present study aims to begin a conversation of to how understand today's practice in the southwest, with an eye towards improving the future.

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447. *Id.* The federal sentencing guidelines apply a modified just dessert philosophy. See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 53 (2003)

448. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1016 (2009) (discussing why internal reform by prosecutors carries more promise than external regulation).