1980s Sentencing Reform and Its Impact on Federal Plea Bargaining and the Trial Penalty

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I. Introduction

U.S. Supreme Court Justice Antonin Scalia once described plea bargaining as a way to "beat the house, that is, to serve less time than the law says [an offender] deserves."[1] Indeed, federal sentencing laws reward defendants who plead guilty with more lenient sentences, as the United States Sentencing Guidelines explicitly authorize a sentence reduction based upon a defendant's trial waiver. Changes in sentencing patterns over the past thirty years include dramatic increases in the length of sentences and the size of the federal prison population. There have been process changes as well, including, among other things, a rapid decline in the federal trial rate. Today, in courtrooms around the country, 97 percent of criminal defendants forgo their right to trial, many of them knowing that they will, nevertheless, be sent to prison. In a nation where nearly everyone pleads guilty, a discount conceived as an incentive becomes its inverse in actuality—a penalty for those who fail to plead guilty.

To be sure, plea bargaining as a form of sentence discount is not a recent phenomenon; observers of the 1920s first lamented the nation's "vanishing jury."[2] Yet today's administration of justice bears witness to a seismic difference in the severity of punishment based upon a defendant's means of conviction. As Third Circuit Judge Stephanos Bibas notes, "The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain."[3] It is perhaps not surprising, then, that the United States is more dependent on plea bargaining than any other nation in the world. It also incarcerates a higher percentage of its population than any other nation.

As discussed below, 1980s sentencing reform efforts are chiefly to blame for the extraordinary price defendants pay to test the government's case at trial. As is now clear, trial rates are at historic lows because the administration of criminal justice is designed to make that decision far too costly, even for those with an excellent defense. Plea bargaining and corresponding sentencing reductions were a common feature of pre-Guidelines cases, yet recent patterns suggest that the trial penalty defendants now face is far greater and constitutionally worrisome.

II. Background

A. Plea Bargaining

Long before passage of the Sentencing Reform Act of 1984 (SRA), the decision to plead guilty was viewed through the lens of an everyday market transaction, insofar as prosecutors and defendants are parties to a transaction (of sorts) and are thought to act rationally. That analogy is closely associated with Judge Frank Easterbrook, who once wrote that plea bargaining may best "be understood as [an] element[] of a well-functioning market system."[4] According to this view, plea bargaining should largely reflect the outcomes that would have occurred at trial, minus some fixed discount.

In today's administration of justice, that view—even if correct—is far from complete. Tellingly, even while the SRA and Guidelines were being debated in Congress, its members observed that a rules-based approach to sentencing might be undercut by plea bargaining. This is because, as Professor Albert W. Alschuler presciently noted in 1978,

> Under a fixed sentencing regime, bargaining about the charge would be bargaining about the sentence. A nonjudicial officer would determine the exact outcome of every guilty plea case, and every defendant who secured an offer from a prosecutor in the plea bargaining process would be informed of the precise sentence that would result from his conviction at trial and also of the precise lesser sentence that would result from his conviction by plea.
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> Not only would plea negotiation assume a greater importance in this system than in our current sentencing regime, but this negotiation would take an even less desirable form—a form that would exhibit neither the shared discretion of today's charge bargaining nor the flexibility and accuracy in the labeling of offenses of today's sentence bargaining. Plea bargaining would probably become more frequent; its effect would be more conclusive; and it would be bargaining of about the least desirable type.[5]

In brief, the conventional wisdom that parties to a transaction "bargain" toward resolution is severely undermined when one party—by explicit design—may exact tremendous leverage over the other. As discussed below, although the 1980s reform efforts may have sought

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to achieve, among other things, parity among similarly situated defendants, they have in fact done just the opposite, at least insofar as concerns the gross divergence among sentences for defendants who plead guilty and those convicted after trial.

B. Passage of the SRA

For most of American history, judges possessed near boundless discretion to determine sentences, provided only that the time imposed fell within certain statutory limits. A byproduct of this generous discretion was sentencing disparities. Judge Marvin E. Frankel, who served as a federal district judge in the Southern District of New York, is most credited for calling these disparities to the attention of Congress and for suggesting the remedy of a federal sentencing commission. In the early 1970s, Judge Frankel, the "father of sentencing reform," observed that judges' "substantially unbounded discretion" produced "arbitrary, random, [and] inconsistent" sentencing decisions.[6] For Judge Frankel, the solution was for Congress to establish a "national commission" that would study sentencing and develop a "binding" "checklist of factors," including "some form of numerical or other objective grading," to be employed by judges at the sentencing stage.[7] This view struck a particular chord with Senator Edward Kennedy (D-MA) (it was during the 94th Congress, in late 1975, that Senator Kennedy originally introduced legislation to establish the Sentencing Commission).

Opposition to limiting the power of the judiciary was voiced most emphatically by Representative John Conyers, the House Judiciary Committee, and Senator Charles "Mac" Mathias in the Senate. Indeed, these members of Congress questioned the very premise that there was rampant, unjustifiable sentencing disparity in federal courts due to judicial discretion. By way of example, the House Judiciary Committee offered four reasons that "[t]he Judicial Conference of the United States is the appropriate body to promulgate the sentencing guidelines," including the fact that the it already had similar duties in promulgating the federal rules of practice, that providing the executive branch with significant control over the Sentencing Commission would raise constitutional concerns, and "is no more appropriate than granting such power to a consortium of defense attorneys."[8]

Certain members of the Senate were not convinced; when Senator Mathias, for example, voiced these same concerns in seeking to amend the Senate bill to have the Guidelines drafted by the Judicial Conference (rather than an independent agency), the response he received was that the judges had squandered any opportunity they might have had to play such a role:

> The proposed amendment would place the primary responsibility for the sentencing guidelines on the judges themselves. The present problem with disparity in sentencing, however, stems precisely from the failure of Federal judges—individually and collectively—to sentence similarly situated defendants in a consistent, reasonable manner. There is little reason to believe that judges will now begin to do what they have failed to do in the past.[9]

Senator Mathias opined that the Senate bill betrayed "a profound mistrust of the Federal bench. . . . I would like to be wrong on this—perhaps I shall be corrected in the course of debate."[10] As he suggested during debate on the Senate floor a few days later, "The proponents of the bill . . . argue in essence that judges cannot be trusted. You cannot trust a judge . . . you must not trust a judge."[11] Senator Mathias would ultimately cast the sole dissenting vote in the Senate. In hindsight, the inference was obvious: under a system of mandatory rules, prosecutorial discretion—and judicial constraint—were the means by which the goals of sentencing were to be accomplished.

C. Rise of Prosecutorial Discretion

In the pre-Guidelines era, prosecutors exercised relatively little direct influence on sentencing outcomes. That is, while charging and plea-bargaining decisions determined the offense of conviction and thus influenced minimum and maximum sentences, judges exercised unfettered authority over the imposed sentence within those broad statutory ranges, and parole officials controlled the percentage of the judicially imposed sentence that a defendant would ultimately serve.

In the Guidelines era, and in myriad ways, prosecutors incentivize a defendant's waiver of trial rights through a promise of leniency. As was feared, a fact-driven guideline system *ipso facto* bestows prosecutors with tremendous power to determine sentencing outcomes inasmuch as they are masters of the facts, the primary sources that trigger application of Guideline rules. To be sure, "relevant conduct" rules require judges to sentence defendants based on all information that concerns a defendant's criminal conduct, rather than merely on the crime of conviction or the facts agreed to in the plea agreement. Moreover, prosecutors are not—in theory, at least—to engage in "fact-bargaining," i.e., by negotiating terms that would in turn affect the possible sentence a court could impose. Yet it happens nonetheless, and its use has been of immense practical significance.

That unwarranted trial penalties would be, in large part, a product of prosecutorial behavior was a particular worry for certain members of Congress and, indeed, the Commission as well. A Senate Judiciary Committee report, for example, expressed concerns that a "prosecutor will use the plea bargaining process to circumvent the guidelines recommendation if he doesn't agree with [it]," and further noted that unchecked prosecutorial decisions "could effectively determine the range of sentence to be imposed."[12] Moreover, a bill introduced in the House would have required the Department of Justice to limit prosecutorial discretion by, among other things, issuing

a policy for charging decisions and plea negotiations. The bill's accompanying Committee Report stated that,

> Congress took a substantial step toward limiting sentence disparity in the Parole Commission and Reorganization Act of 1976. . . . Discretion appears to be an enduring component of any sentencing policy. [Restricting judicial discretion] will not eliminate discretion, but merely shift the discretion to an earlier stage.[13]

Although the Senate bill authorized the Sentencing Commission to issue policy statements regarding plea bargaining, this was insufficient, in the view of the House Judiciary Committee, to prevent prosecutors from assuming much of the discretionary authority over sentencing that traditionally had been exercised by the judiciary.

The Commission similarly expressed concern that a more lenient sentence, conditioned upon a guilty plea, would serve as an unconstitutional penalty for defendants who exercised their right to trial. Nevertheless, it was at the same time keenly aware of the outcomes derived from inducing a guilty plea. For instance, a preliminary draft of the Guidelines recognized that the system "relies heavily" on plea bargains, and that, from an administrative perspective, any drastic changes "would likely require a considerable increase in federal judicial resources."[14] The dilemma faced by the Commission, therefore, was how to encourage pleas while, at the same time, address then-Commissioner Stephen Breyer's particular recognition that "a discount for a guilty plea means an aggravated sentence for insisting upon one's right to a jury trial."[15]

One such result was to codify a fixed reduction for "acceptance of responsibility." Rather than rewarding guilty pleas *per se*, the Commission instead invited judges to provide a benefit to a defendant who "clearly demonstrates acceptance of responsibility for his offense." In doing so, the Commission's belief seems to have been that "[i]nvesting the Court with discretion to mitigate the sentence by a specified amount or amounts, rather than directing specified 'guilty plea credit' in all cases, would very much undercut any Constitutional objection to the plan."[16]

This reduction was also viewed as consistent with one of the underlying purposes of sentencing reform, that of "certainty" of punishment. In this regard, the Commission analyzed prior sentencing data to conclude that defendants who pled guilty received a sentence that averaged 30 to 40 percent lower than what would have been imposed had the defendant pled not guilty and subsequently been convicted at trial. The Commission thus concluded that they could rationally apply a fixed sentence reduction or discount for guilty pleas. Notably, the Commission decided that this offender characteristic was particularly appropriate for determination by the sentencing judge. To be sure, the decision to institutionalize a fixed reduction was not without controversy. A federal public defender, for instance, wrote to the Commission's chairman, Judge William W. Wilkins Jr., to note that he found the draft guidelines "very disturbing," in part because the Commission's approach to acceptance of responsibility "formulate[s] an incentive for pleading guilty" and a "disincentive or even punishment for going to trial," which he deemed "simply repugnant to the way we like to think our judicial system operates."[17]

In all, the Commission made clear that no "significant changes" would be made to the practice of plea bargaining. As it noted in the original manual, the decision to "leave plea bargaining roughly where it found it" was driven principally by the tension between upending current practices, on one hand, and creating a loophole in the guidelines structure, on the other.[18] Nevertheless, the Guidelines were said to offer two distinct advantages over pre-Guidelines plea-bargaining practices: first, the initial guidelines themselves could serve as a baseline for the prosecutor and defense counsel as they engaged in plea negotiations; second, the applicable guidelines range could serve as a "norm" for a judge in deciding whether or not to accept a plea bargain. Moreover, as judges would be required to read presentence reports prior to accepting a defendant's guilty plea, a judge would be provided with significant, perhaps otherwise unknown information about the defendant. The judge thus could stand in a better position to weigh the appropriateness of the plea bargain in light of the "real" offense conduct and Guidelines range.

III. Outcomes

Even with these checks, the overwhelming and dominant contributor to the increase in trial penalties is prosecutorial discretion. As a "charge-offense" based sentencing system, a sentence is derived primarily from the crime of conviction. This fact alone vastly increases the degree to which a prosecutor's charging decisions will impact a defendant's sentence, as they alone decide whether to charge, what to charge, and whom to charge. Although mandatory penalties, for example, may appear to reduce prosecutorial discretion, in practice it is just the opposite, as prosecutors choose whether to charge a crime triggering mandatory sentences and have the sole discretion whether or not to move the Court to impose a sentence below the mandatory minimum sentence.[19] In addition, the combination of high guideline and statutory sentences, coupled with the exclusive authority of the prosecutor to submit a substantial assistance motion, has given prosecutors a tremendously lopsided advantage in negotiating guilty pleas. A model of plea bargaining that is based upon principles of the marketplace presupposes that the parties can fairly calibrate bargains to reflect, among other things, probabilities at trial. The overarching problem with this model is not, as some would argue, that the actors behave irrationally, but that the trial penalty makes any choice but to plead guilty an irrational one. There is a lot of evidence to support these claims, but it can be demonstrated by one simple trend: since

Chart 1.
Federal Guilty and Nolo Pleas, 1970–2017
(percent of adjudicated cases)

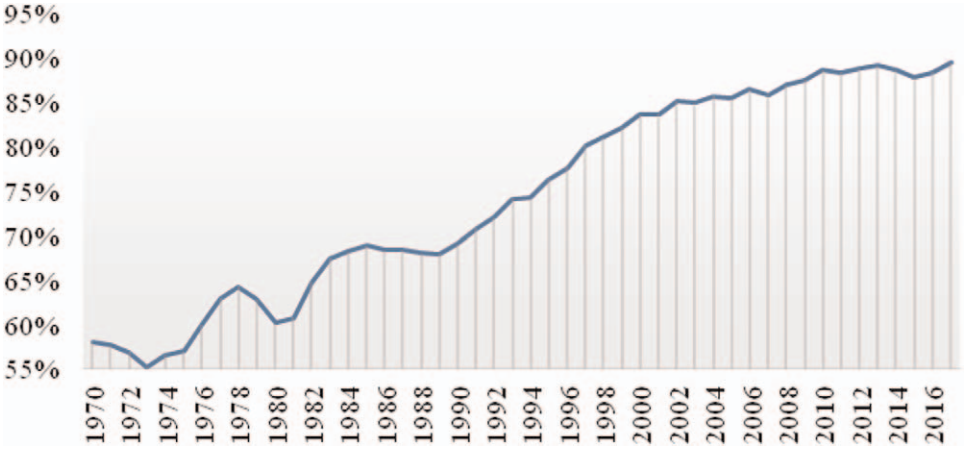
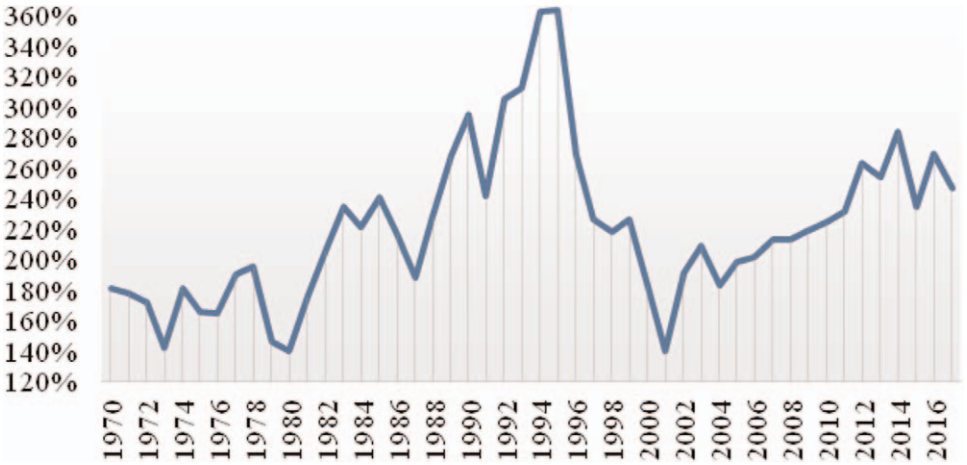


Chart 2.
Average Trial Penalty for All Offenses, 1970–2017



enactment of the Guidelines, nearly all defendants plead guilty (Chart 1).[20]

Ironically, some were of the view that because the sentences to be imposed were to become more severe, the Guidelines would prompt an *increase* in the trial rate, as defendants facing such severe sentences would have little to lose by going to trial. As Chart 1 reveals, those predictions turned out to be wrong.

Nationwide data evaluating sentences also reveals that, as the rate of guilty pleas steeply increased, so too did the difference in severity between those sentences and the ones imposed after conviction at trial (Chart 2).

As discussed above, one of the primary goals of the Guidelines was to eliminate disparity in the punishment of similarly situated defendants. To achieve that goal, the Commission sought to establish certain factors it deemed relevant, such as prior criminal history, and to eliminate disparity linked to factors it deemed irrelevant, such as the race, ethnicity, or gender of the defendant. The decision to plead guilty does not fit neatly into either category, yet it is now a leading contributor to disparate sentences.

Indeed, the government's desire to use the sentencing process to reward or punish defendants for reasons unrelated to the seriousness of their crimes is explicit and, as a corollary, readily measurable. Although *United States v. Booker* returned a level of discretion to judges and had an immediate and undeniable effect on sentences, it did not reestablish the balance needed in federal sentencing. That is, many Guideline provisions continue to be distorted by mandatory minimum statutes, most notably for drug trafficking offenses, but the Guidelines also exert a powerful gravitational pull even for offenses that do not carry mandatory minimums. Data from the last decade reveals that

Table 1. Average Incarceratory Sentence, 2010–2017 (in months)

Offense Category*	Plea/Nolo	Trial	"Trial Penalty"
Drug Trafficking	65.78	188.22	186%
Violent Crimes	66.35	178.10	168%
White Collar	20.37	72.75	255%

* Violent offenses were compiled using statistics for the offenses of Assault, Sexual Assault, and Robbery. White-collar offenses were compiled using statistics for the offenses of Fraud, Embezzlement, and Bribery.

the trial penalty is statistically significant in all offence categories (Table 1).

Although this quick analysis is by no means definitive as to the magnitude of the trial penalty, it certainly dispels the notion that the trial penalty can be explained away as a function of differing types of cases concluded at plea versus trial, or the idea that although the penalty exists, it is not severe.

Based on the data, there is little doubt as to the degree to which prosecutors influence the rates of guilty pleas. From 2005 to 2017, approximately 98 percent of defendants who plead guilty received a reduction for acceptance of responsibility, compared to only about 4 percent of the defendants who went to trial. In brief, sentencing credit for acceptance of responsibility effectively functions as a discount for waiving one's trial rights. Insofar as this serves as a benefit that is rarely awarded when a defendant goes to trial (rather than as a trial penalty), it may pass constitutional muster. Yet this fact can hardly be said to have been contemplated by the Commission; indeed, the very term "acceptance of responsibility" seems more evocative of remorse than of an automatic benefit derived from a calculated decision. Substantial assistance departures similarly affect guilty plea rates. From 2005 to 2017, the average incarceratory sentence for a defendant whose Guidelines range was departed downward pursuant to § 5K1.1 of the Guidelines was 51 months (in all offense categories). Yet in that same time period, those defendants' average Guidelines minimum was 208.5 months, amounting to a discount of approximately 76 percent. For the remaining defendants in that time period, the average sentence was 41.1 months and the average Guidelines minimum was 60.8 percent, a paltry discount of about 32.5 percent.

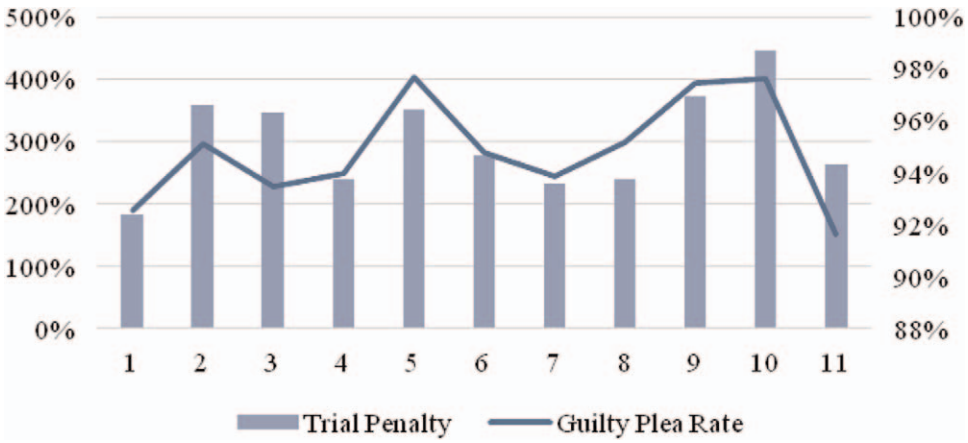
Even after controlling for type of crime, offense level, and other variables of a case, circuits with a larger average trial penalty were likely to have higher guilty plea rates (Chart 3). The data thus suggests that when the trial penalty is large and certain, guilty pleas will follow.

IV. Conclusion

The forms of criticism the SRA has received are legion, yet it appears that the Sentencing Commission largely implemented the statute in a manner consistent with Congressional intent. It is the SRA itself that effectively mandates the labyrinthine, severe, and inconsistent Guidelines, and leaves undisturbed prosecutors' unfettered charging discretion while bestowing them with novel and powerful forms of sentencing power.

Unwarranted sentencing disparities—such as the larger and more certain trial penalty—is predominantly a corollary of prosecutorial behavior. Whereas certain proponents may not take issue with disparate sentences between post-trial defendants under mandatory minimum statutes and those who, by agreeing to plead guilty, may have avoided triggering those statutes, the trial penalty affects all defendants who plead guilty even when the case is defensible or else face draconian punishment if convicted at trial. Indeed, U.S. Supreme Court Justice Anthony Kennedy once lamented that sentences imposed post-trial are often undeserved, insofar as they are more severe "than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes."[21] Nevertheless, U.S. Supreme Court precedent dictates that even the most severe trial penalties may be imposed on defendants, so long as the penalties

Chart 3.
Trial Penalty and Guilty Plea Rate, 1996–2017



threatened for conviction after trial are permitted by statute. So long as prosecutors have the dominant and, indeed, overwhelming voice in the federal sentencing system, punishments emerging from trial will rarely comport with fundamental principles of fair and just sentencing.

Notes

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1 Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting).

2 *See* Raymond Moley, *The Vanishing Jury*, 2 S. Cal. L. Rev. 97, 103 (1928).

3 Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012).

4 Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289 (1983).

5 Albert Alschuler, "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing," 126 U. Pa. L. Rev. 550 (1978).

6 Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 46 (1972).

7 Marvin E. Frankel, Criminal Sentences: Law Without Order 7–8, 11, 17–25, 43 (1973).

8 H.R. Rep. No. 1017, 98th Cong., 2d Sess. 94 (1984).

9 130 Cong Rec. at 976 (1984) (statement of Sen. Paul Laxalt).

10 *Id.* at 973 (statement of Sen. Mathias).

11 *Id*.

12 S. Rep. No. 225, 98th Cong., 2d Sess. 38, reprinted in 1984 U. S.C.C.A.N. 3182, 3246.

13 *Supra* note 8.

14 Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080, 35,086 (Oct. 1, 1986).

15 Stephen G. Breyer, Difficult Guideline Issues 25, 40 (Sept. 15, 1986) (unpublished manuscript).

16 U.S. Sentencing Comm'n, Public Hearings on Plea Agreements in Washington, D.C. 3 (Sept. 23, 1986) (testimony of William F. Weld, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice).

17 Letter from Michael G. Katz, Fed. Pub. Def., Office of the Fed. Pub. Def., Dist. of Colo., to William W. Wilkins, Jr., Chairman, U.S. Sentencing Comm'n 1–3 (Oct. 30, 1986).

18 Stephen G. Breyer & Kenneth R. Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 Crim. L. Bull. 5, 5 (1990); *see also Sentencing Guidelines: Hearings Before the Subcomm. on Crim. Justice of the S. Comm. on the Judiciary*, 100th Cong. 40 (1987) (statement of Stephen G. Breyer, Judge, U.S. Court of Appeals for the 1st Circuit).

19 Under 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), "substantial assistance" in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutory mandatory minimum. Section 5K1.1 of the USSG provides for a downward departure from the minimum only if the government files a motion stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. The amount of the reduction shall be determined by the court. The only exception is the "safety valve" provision, which is limited to defendants with very minor criminal histories.

20 The data referenced in this article derive from a series of datasets that each contain information regarding federal criminal cases that terminated in a given fiscal year, which the author has compiled into two databases that remain in the possession of the authors. The datasets comprising this database are as follows: Federal Judicial Center, Integrated Database SY 1970–FY 1995; Federal Judicial Center, Integrated Database FY 1996 to present; and the United States Sentencing Commission individual offender datafiles for fiscal years 2002–2017.

21 *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan L. Rev. 989, 1034 (2006)).