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Federal Public Defense in an Age of Inquisition

David Patton
Federal Defenders of New York, dep5u@hotmail.com

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DAVID E. PATTON

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ABSTRACT. This Essay asks whether federal criminal defendants receive fairer process today than they did in 1963, when *Gideon v. Wainwright* was decided. It concludes that in many situations they do not; indeed, they often receive far worse. Although *Gideon* and the Criminal Justice Act of 1964 undoubtedly improved the quality and availability of counsel in the federal courts, extraordinary damage has been done since then to the aspect of the criminal justice system that makes lawyers so valuable: the adversary process. Sentencing severity, the control of that severity by prosecutors rather than judges or juries, and high rates of pretrial detention have greatly limited defendants' ability to challenge the government's version of the facts and the law. This Essay briefly describes federal criminal practice as it existed in 1963 and illustrates the shifts that have occurred by discussing current practice in the federal public defender office in New York City.

AUTHOR. Executive Director, Attorney-in-Chief, Federal Defenders of New York. I am grateful for the many helpful comments from Jennifer Brown, Deirdre von Dornum, Elizabeth Eisenberg, Sean Hecker, Renagh O'Leary, and Fred Vars. And I thank John Hughes, Kathleen Maguire, Mark Motivans, and Douglas Palmer for their generous research assistance.

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INTRODUCTION

There seem to be two bad options when writing about my work as a federal public defender: describe it as it is and sound like a lunatic preaching the end of days, or engage in a more nuanced discussion and risk minimizing the injustices that exist. And when commemorating the fiftieth anniversary of *Gideon v. Wainwright*,[1] there is yet another balancing act: recognizing its considerable achievement while avoiding claims of progress where none exists. In this Essay I try to navigate those dangers by posing and attempting to answer the following question: would an indigent federal defendant prefer to be prosecuted in the system as it existed in 1963 with an ill-equipped, unpaid lawyer (or none at all), or would he prefer today's system? Although the answer surely depends on many factors, I conclude that in far too many scenarios, the rational defendant would choose 1963.

In answering the question, I examine who the defendants in the federal criminal justice system are and what opportunities they have for meaningful advocacy. I try not to rely on substantive law except to the extent that substance affects process. If the choice between 1963 and today was put to a defendant purely as a matter of substantive law, the answer would be far too easy. Federal criminal law has expanded so much,[2] and grown so much more punitive,[3] that 1963 would win in a landslide. But the process question is a closer call and directly implicates the holding of *Gideon*. On the one hand, the provision of funded and better-trained lawyers is an improvement that speaks for itself. On the other hand, even as lawyers have become better funded and trained, extraordinary damage has been done to the aspect of the criminal justice system that makes lawyers so necessary and valuable: the adversarial process. Extreme severity, the control of that severity by prosecutors, and high rates of pretrial detention have so curtailed defense lawyers' ability to do those

1. 372 U.S. 335 (1963).

2. *See, e.g.*, ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) (surveying the expansion of federal criminal law); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 & n.16 (2009) (citing a long list of scholars who have "chronicled and critiqued the expansion of federal criminal law"); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (describing the scope of contemporary federal criminal law as "breathtakingly broad").

3. *See, e.g.*, Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569 (2010).

things that *Gideon* considered vital—testing evidence, pressing arguments, and challenging the government's allegations before a neutral arbiter—that many defendants today would be better off in the system as it existed in 1963, with no lawyer or an incompetent one.

It may seem strange to discuss federally appointed counsel in a symposium about *Gideon*. After all, federal defendants obtained the right to counsel twenty-five years earlier in *Johnson v. Zerbst*,[4] and *Gideon* was a decision about incorporating the right and applying it to the states. Nonetheless, *Gideon* profoundly affected the federal system. Before 1964 and the passage of the Criminal Justice Act (CJA),[5] appointed attorneys were not paid to represent indigent federal defendants.[6] Nor was there any funding for case-related expenses, much less investigators or experts.[7] *Gideon*, along with the highly influential report of Professor Francis Allen to then-Attorney General Robert F. Kennedy (the Allen Report),[8] was a significant reason for passage of the CJA and for the creation of a funded federal defense system.

Part of why *Gideon* was so powerful was the simple logic and appeal of its reasoning. We operate in an adversarial system, governed by complex rules, and it works best when both sides engage on equal footing before a neutral arbiter—judge or jury. We have lawyers for the prosecution; therefore, we should have lawyers for the defense. "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime," the Court found, and "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[9]

And yet today, our criminal justice system is far from an adversary system with "fair trials." In 1963, nearly 15% of all federal defendants went to trial; in 2010, the figure was 2.7%.[10] As the Supreme Court recognized last year in

4. 304 U.S. 458 (1938).

5. Criminal Justice Act of 1964, Pub. L. No. 88-455, 62 Stat. 684 (codified as amended at 18 U.S.C. § 3006A (2006)).

6. *See* FRANCIS A. ALLEN ET AL., REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 48-49 (1963).

7. *Id.* at 45-46.

8. ALLEN ET AL., *supra* note 6.

9. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

10. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2010 (Kathleen Maguire ed.), http://www.albany.edu/sourcebook/pdf/t5222010.pdf (showing that in 1963, out of a total of 34,845 defendants "disposed of in U.S. District Courts," 5,186 defendants were convicted

Missouri v. Frye[11] and *Lafler v. Cooper*,[12] "criminal justice today is for the most part a system of pleas, not a system of trials."[13] Although the Court's recognition of that reality was important (and overdue), the statement also reflected a sad acceptance of a system thoroughly unmoored from its adversarial foundation.

In this Essay, I begin with a brief overview of federal criminal practice in 1963 and the impetus for the passage of the Criminal Justice Act of 1964, including *Gideon* and the Allen Report. I then discuss today's practice from my perspective as a federal public defender. I draw upon examples that illustrate the ways in which increased prosecutorial power disproportionately impacts poor people and minorities and greatly diminishes the more egalitarian process that *Gideon* was meant to champion. I attempt to demonstrate how we have moved away from an adversarial process toward an inquisitorial one and how that movement has affected the right to counsel.[14] In so doing, I discuss the right to counsel broadly and functionally, i.e., not just as the right to a warm body with a law degree, but as the right to do what we expect good defense lawyers to do: vigorously challenge the government's view of the facts and law.

I should note that in recent years, there have been rays of light for proponents of the adversarial process. Most prominent are the *Apprendi* line of cases,[15] including *United States v. Booker*,[16] which struck down the mandatory nature of the Federal Sentencing Guidelines, and *Crawford v. Washington*,[17] which gave teeth to the Sixth Amendment right of confrontation. But in the overall scheme of the federal criminal justice system, those cases represent only small corrections to an otherwise overwhelming movement toward prosecutorial power and inquisitorial process.

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or acquitted after trial, whereas the corresponding numbers for 2010 were 2,746 out of a total of 98,311).

11. 132 S. Ct. 1399 (2012).

12. 132 S. Ct. 1376 (2012).

13. *Id.* at 1388.

14. I acknowledge that the views in this Essay take as a given that a well-functioning adversarial process is a worthy goal. There are thoughtful scholars who think otherwise and who find much to commend in inquisitorial systems (at least the modern versions in continental Europe). *See, e.g.*, James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119 (2009).

15. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was the first of several Supreme Court cases, including most prominently *Blakely v. Washington*, 542 U.S. 296 (2004), to find that the Sixth Amendment required juries, not judges, to determine any facts leading to an increase in a sentence beyond the otherwise applicable statutory maximum.

16. 543 U.S. 220 (2005).

17. 541 U.S. 36 (2004).

I. *GIDEON* AND THE ALLEN REPORT

In April 1961 Attorney General Robert F. Kennedy created a committee to "identify some of the principal problems posed for the system of federal justice by accused persons of limited means and to offer suggestions for their solutions."[18] He appointed Professor Francis A. Allen to chair the Attorney General's Committee on Poverty and the Administration of Justice, and over the next two years Professor Allen and his colleagues studied the federal criminal justice system. The Allen Report proposed legislation that became the template for the landmark Criminal Justice Act of 1964.[19] The Report was submitted to Attorney General Kennedy on February 25, 1963, three weeks before the Supreme Court decided *Gideon*.[20]

At the time, a person accused of a federal crime who could not afford a lawyer was provided assigned counsel, but counsel was not paid—for hours worked or for case-related expenses.[21] In the absence of any congressional action after *Johnson v. Zerbst*, federal courts had placed "the entire burden of representation upon appointed attorneys who receive no compensation from the court, have available no fund to pay the cost of most essential defense services, and who in general do not receive compensation for even out-of-pocket expenses."[22] The system was unfair to both counsel and client, and woefully inadequate. To spend any significant time on a case was an expensive proposition. Those who signed on for the bargain tended to be inexperienced and unprepared: "A prominent defect is the dependence upon young, inexperienced lawyers for all but the most difficult or serious cases. The typical assigned counsel is little versed in the technicalities of the criminal law or the questioning of accused persons, and has had little if any previous courtroom experience."[23]

Across the country, the systems for assigning cases varied widely. In many small jurisdictions, the process was highly informal: judges appointed friends, acquaintances, or whoever happened to be in the courtroom. In larger jurisdictions, lawyers often either volunteered to be on a list of appointed

18. ALLEN ET AL., *supra* note 6, at vii.

19. *Id.* at 1. For an excellent and thorough history of the Criminal Justice Act of 1964, see Geoffrey Cheshire, *A History of the Criminal Justice Act of 1964*, FED. LAW., Mar. 2013, at 46.

20. ALLEN ET AL., *supra* note 6, at vii.

21. *Id.* at 15.

22. *Id.*

23. Bruce J. Havighurst & Peter MacDougall, Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 596 (1963).

counsel or were conscripted onto the list by virtue of their membership in the federal bar.[24]

In 1962, two *Harvard Law Review* editors researched the state of indigent defense in federal courts by compiling surveys and data covering ninety percent of federal districts, and engaging in field observations and interviews with federal judges and lawyers in nineteen major cities.[25] In describing the typical representation, they noted that "counsel's role is generally limited to appearances at arraignments and sentencing, discussions with his client and the prosecutor, and occasionally a brief investigation of the case in order to uncover mitigating circumstances."[26] Most respondents to the survey estimated that assigned counsel typically spent "less than three hours in out-of-court preparation, and in at least three-fifths of the cases he makes only one or two brief appearances in court."[27] If a client pleaded guilty, "a hurried ten-minute conference in a corner of the courtroom [was] often the sole prelude" to the plea.[28] Sadly, despite those findings, ninety-three percent of respondents to the survey considered the thoroughness of assigned counsel's preparation at least "adequate" and twenty percent found it "very adequate."[29]

The vast majority of judges reported that they had little difficulty finding counsel to appoint, citing the "considerable prestige of the federal courts" and the desire of younger lawyers "to become known to the district judge and other federal officials."[30] They also noted that "attorneys would be reluctant to refuse a judge's request when they might later have to appear before him on an *important matter*."[31]

In examining this system, the Allen Report concluded that the failure to provide funding for counsel did damage that went beyond the interests of the individuals accused. The lack of funding implicated "broader social interests" that included "no less than the proper functioning of the rule of law in the criminal area."[32] In so finding, the Report focused on what it found to be the "essential and invaluable" aspect of the American system of criminal justice:

24. *Id.*

25. *Id.* at 580.

26. *Id.* at 588.

27. *Id.*

28. *Id.* at 589.

29. *Id.* at 588.

30. *Id.* at 591.

31. *Id.* (emphasis added).

32. ALLEN ET AL., *supra* note 6, at 10.

the adversarial process.[33] The authors went on to describe what that meant: "The essence of the adversarial system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process."[34] The Report compared the American tradition to sixteenth- and seventeenth-century England, where trials "demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and to the larger interests of the community."[35]

This focus on the adversarial process accorded with the Supreme Court's primary rationale in *Gideon*: "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."[36]

The Allen Report found two statistics—the high rate of guilty pleas and the disparity in plea rates between those with retained counsel and those with assigned counsel—particularly telling evidence of the damage to the adversarial system from the lack of adequate counsel.[37] In the districts that they studied, researchers found the following guilty plea rates for defendants with retained counsel versus defendants with assigned counsel: in the Northern District of California, San Francisco, the guilty plea rate was 68% for retained, 81% for assigned; in the Northern District of California, Sacramento, 60% for retained, 82% for assigned; in the Northern District of Illinois, 47% for retained, 87% for assigned; and in the District of Connecticut, 56% for retained, 71% for assigned.[38]

The Report also found disturbing the high rate and duration of pretrial detention. In the three districts studied, it found the release rate was 60% for the Northern District of California (65% in San Francisco and 43% in Sacramento), 75% for the Northern District of Illinois, and 78% for the District of Connecticut.[39] The Report found these data "startling," especially in light of the seemingly disparate impact on poorer defendants, as measured by the

33. *Id.* at 11.

34. *Id.*

35. *Id.*

36. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

37. ALLEN ET AL., *supra* note 6, at 33-34.

38. *Id.* at 138-41 tbls.XI-A, XI-B, XI-C & XI-D.

39. *Id.* at 134 tbls.II & III.

number who could not meet relatively small cash bonds.[40] Also presenting "problems to the federal system of criminal justice" was the duration of pretrial incarceration, which averaged 25.3 days.[41]

These figures showing high guilty plea rates and high rates of pretrial detention were considered particularly disturbing given the large number of indigent defendants in the federal criminal justice system. Two months after *Gideon* was decided, Robert Kennedy testified before the Senate Judiciary Committee, urging passage of the Criminal Justice Act. In his statement, he cited the high number of indigent defendants as part of the need for reform: "Every year, nearly 10,000 persons—30 percent of all the defendants in federal criminal cases—receive court-appointed attorneys because they cannot afford to pay for their own."[42] The Allen Report noted that the percentage of defendants who were assigned counsel, which totaled twenty-five to thirty percent between 1959 and 1961, did not necessarily reflect all of the defendants who needed assigned counsel.[43] In some districts defendants routinely waived counsel. And the standards for appointment of counsel varied widely from district to district and judge to judge. Taking those factors into account, the Report concluded, based on its surveys and research, that somewhere between one-third and one-half of federal defendants were "financially unable to supply themselves with competent counsel."[44]

The picture painted was bleak: a large number of federal defendants were too poor to hire counsel, and they were receiving representation that did grave harm to the adversarial process. The signs of the broken system were the low numbers of trials and the high rates and long periods of pretrial detention.

40. *Id.* at 69.

41. *Id.* at 67-68.

42. *Criminal Justice Act of 1963 (Public Defender): Hearings on S. 63 To Provide for the Representation of Indigent Defendants in Criminal Cases in the United States District Courts and S. 1057 To Promote the Cause of Criminal Justice by Providing for the Representation of Defendants Who Are Financially Unable To Obtain an Adequate Defense in Criminal Cases in the Courts of the United States Before the S. Comm. on the Judiciary*, 88th Cong. 8 (1963) (statement of Robert F. Kennedy, Att'y Gen. of the United States).

43. ALLEN ET AL., *supra* note 6, at 19-20.

44. *Id.* at 20.

II. THE SYSTEM NOW

A. The Big Picture

The hue and cry of 1963 seems almost quaint in retrospect. Today, the trial rate is less than one-fifth what it was then.[45] Pretrial detention rates have doubled, and the duration of pretrial detention has quintupled.[46] Rather than the alarming one-third to one-half of all federal defendants requiring assigned counsel, the current figure is roughly three-quarters.[47] And in contrast to 1963, when around seventy percent of federal defendants were white,[48] today the racial ratio has flipped: only twenty-six percent of federal defendants are non-Hispanic whites.[49] In other words, in the fifty years since *Gideon* was decided and the Allen Report was published, defendants in federal court have become poorer, disproportionately more black and Hispanic, and subject to a system that affords them fewer trials and imposes more frequent, lengthier pretrial detention.

The meaning of criminal justice statistics is subject to debate and controversy, and drawing conclusions about the causes of these numbers is a difficult exercise. Moreover, the numbers cannot be viewed in isolation. The two big stories of criminal justice in the last fifty years have been the large fluctuations in crime rates (first a large increase and then an equally large decrease),[50] and an explosion in the incarceration rate, to the point that the

45. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., *supra* note 10.

46. *Compare* ALLEN ET AL., *supra* note 6, at 67-69, *with* Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, BUREAU OF JUST. STAT. tbls.1 & 7 (Nov. 2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/prmfdc0810.pdf.

47. Mark Motivans, *Federal Justice Statistics, 2009*, BUREAU OF JUST. STAT. 8 (Dec. 2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf.

48. MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, at 168 tbl.6-22 (1986).

49. *Final Quarterly Data Report 2011*, U.S. SENT'G COMMISSION 44 tbl.23 (2011), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2011_Quarter_Report_Final.pdf.

50. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 247 tbl.9 (2011) (showing murder rates in 1963 at 5 per 100,000, then spiking to 10, 9, and 10 per 100,000 in 1973, 1983, and 1993, respectively, before dropping down to 6 in 2003); *see also* Richard A. Oppel, Jr., *Steady Decline in Major Crime Baffles Experts*, N.Y. TIMES, May 23, 2011, http://www.nytimes.com/2011/05/24/us/24crime.html (describing the drop in violent crime to the lowest level in forty years).

United States now imprisons one in one hundred of its adults, a rate surpassing every other country in the world (and far surpassing most).[51]

Those changes and the connections between them have been widely discussed in popular and scholarly literature. Two recent and powerful accounts come from Michelle Alexander in *The New Jim Crow*[52] and the late William Stuntz in *The Collapse of American Criminal Justice*.[53] Alexander argues that the current crisis of mass incarceration cannot be explained by higher crime rates (they have been historically low for over a decade now, and other countries have experienced ebbs and flows similar to ours without the explosion in incarceration).[54] She argues that we are using the criminal justice system as a form of social control, creating a racial caste in which a "stigmatized racial group [is] locked into an inferior position by law and custom," just as with slavery and Jim Crow.[55] Stuntz, too, sees a tragic "unraveling" of our criminal justice system that disproportionately affects black males, for whom "a term in the nearest penitentiary has become an ordinary life experience, a horrifying truth that wasn't true a mere generation ago."[56] He lays the blame on three factors: (1) the collapse of the rule of law, resulting in "official discretion rather than legal doctrine or juries' judgments" defining outcomes; (2) worsening discrimination against both minority defendants and minority victims; and (3) a backlash in response to a more lenient justice system during a time of rising crime rates in the late 1960s and 1970s.[57]

Whatever the reasons for our current state of affairs, there is one feature of the federal system about which nearly all observers agree: power has shifted from judges and juries to prosecutors.[58] The causes of that shift include severe

51. Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES, Apr. 23, 2008, http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html (noting that the United States has less than five percent of the world's population but twenty-five percent of the world's prisoners).

52. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

53. STUNTZ, *supra* note 50.

54. ALEXANDER, *supra* note 52, at 101.

55. *Id.* at 12.

56. STUNTZ, *supra* note 50, at 1.

57. *Id.* at 2.

58. *See, e.g.*, Barkow, *supra* note 2; Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Symposium, *Panel Discussion: The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator*, 26 FORDHAM URB. L.J. 679 (1999); Ronald F. Wright, *Trial*

mandatory and determinate sentencing regimes,[59] an overlapping and expanded criminal code,[60] an emphasis on "flipping" defendants to get their cooperation,[61] changes to bail procedures,[62] and overall bargaining leverage permitted by case law and exacerbated by funding disparities.[63]

Rigid sentencing regimes mean that prosecutors now control not just the charge, as they always have, but also the final sentencing outcome, because the charge itself often dictates the sentence.[64] An expanded federal criminal code gives prosecutors a broad menu of charges—with virtually unlimited discretion to pick among them.[65] Severity means that the choices the prosecutor makes with respect to charges carry enormous consequences, and therefore create enormous pressures on defendants.[66] An emphasis on cooperation brings with it the need to make credible threats of severe punishment for anyone who does not cooperate—including low-level offenders—and to make offers of leniency to those who do cooperate.[67] And changes to bail procedures from the 1984 Bail Reform Act,[68] which make it more likely that defendants will be detained

Distortion and the End of Innocence in Federal Criminal Justice, 154 U. PA. L. REV. 79, 132 (2005).

59. *See* Stuntz, *supra* note 58, at 2559.

60. *See id.*; *see also* William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505, 514 (2001) (explaining how the vast expansion of the federal criminal code has turned prosecutors into de facto lawmakers and adjudicators); Symposium, *supra* note 58, at 682 (remarks of Gerard E. Lynch) ("Congress has cast the federal prosecutor in the role of God. It has criminalized everything and lets prosecutors decide what we really want to prosecute.").

61. ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009) (detailing the expanded use of cooperators and its effect on the criminal justice system).

62. For the seminal work on how bail affects criminal cases generally, see MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979). For discussion of the impact of bail on current federal cases, see *infra* Section II.B.

63. *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (detailing the reasons why plea bargains do not match expected trial outcomes, including imbalances of power and resources).

64. *See* Stuntz, *supra* note 58, at 2559 (explaining how rules-based sentencing guidelines like those in the federal system, as opposed to more discretionary sentencing regimes, "give[ ] prosecutors control—not just over bargained-for sentences, but over post-trial sentences as well").

65. *See id.*

66. *See infra* Section II.B.

67. *See* NATAPOFF, *supra* note 61.

68. 18 U.S.C. §§ 3141-3150 (2006).

pretrial unless the government agrees to their release, have added yet another bargaining chip to prosecutors' stacks.

Those features combine to create a system closer to an inquisitorial model of criminal procedure where a single government official is investigator, factfinder, and ultimate decisionmaker. And the diminishing role of adversarial challenge disproportionately impacts poor and minority populations because those are the people who are disproportionately in the federal system—to a far greater degree than in 1963.

To be sure, as a formal matter, prosecutorial power has not changed much since 1963. Then as now, prosecutors had virtually unlimited discretion to charge or bargain away charges. The American criminal justice system has never been a pure adversary system because prosecutors have always played a significant adjudicative role.[69] And discovery rules, broad substantive laws, and vast investigatory resources have always given federal prosecutors a strong hand to play.

But today there are overriding differences that have turned the system starkly away from a healthy adversarial process: extreme severity, the control of that severity by prosecutors, and high rates of pretrial detention. Although the differences may be in degree, not kind, they have created a fundamentally different process—one that has done great damage to the more egalitarian, adversarial model that *Gideon* envisioned.

B. The Federal Defenders of New York

In this Section, I offer a view from the ground meant to illustrate the shifts described above. My office, the Federal Defenders of New York, is the public defender office for the Eastern and Southern Districts of New York. Those two districts cover all of New York City, Long Island, and several counties north of the city. Roughly seventy percent of the federal defendants in the districts are black or Hispanic,[70] nearly double the percentage of the general population. About eighty percent of the districts' defendants require assigned counsel.[71] My

69. *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (challenging a simplistic notion of the adversarial/inquisitorial divide and explaining and defending the hybrid nature of the American criminal justice system).

70. *See Statistical Information Packet, Fiscal Year 2011, Southern District of New York*, U.S. SENT'G COMMISSION 1-2 fig.A & tbl.1, http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/nys11.pdf.

71. This figure is approximate and based on information from within my office and from the courthouse clerk's office. Obtaining a precise figure is difficult for a variety of reasons, including the fluidity of counsel's status (i.e., some defendants who initially retain counsel

office represents between forty and fifty percent of those defendants, and a panel of private attorneys, known as the CJA Panel, represents the rest.[72] Lawyers in our office have a caseload consisting of approximately fifty clients at any one time, and they average about one trial per year. For the most part, lawyers on the CJA Panel and in my office are experienced criminal defense lawyers, many of whom spent years as state public defenders or were engaged in appointed state work before transitioning to federal practice.

The most common types of charges handled by my office are drug distribution, immigration offenses, firearm possession, and an assortment of fraud offenses. At any given time, we also represent a smaller number of clients facing other charges, including terrorism-related offenses, various crimes of violence, and possession of child pornography.

A typical case for us begins with a call from the magistrate court clerk telling us that we have a new client in custody. We head to the courthouse to meet with him (and it is usually a "him," though between ten and fifteen percent of federal defendants are now women[73]). In a common drug case, the client may be accused of being a courier arrested at the airport with drugs in a suitcase. Or perhaps the client is alleged to be part of a conspiracy in which he played a discrete role: common scenarios include transporting drugs or money from one place to another for some set payment, or playing matchmaker by putting buyers and sellers together at the instigation of an undercover agent or a confidential informant. Or maybe the client was arrested by city police officers for a one-bag sale of crack or heroin, and he is now in federal court as part of an operation called "narco-lock"—the informal term used by prosecutors to describe an operation that turns state cases into federal ones for defendants with prior histories of similar small-time sales.[74] If so, the typical

later need counsel appointed and vice versa) and different methods of data collection (e.g., in the courthouse data, some clerks list federal defender attorneys by name, rather than as "Federal Defenders," and thus the lawyers appear in the statistical reports as though they had been retained).

72. The CJA Panel attorneys represent defendants for whom my office has a conflict (usually because of a multidefendant case or because we represent a cooperating witness), and they are paid statutory fees for their service.

73. *See Final Quarterly Data Report 2011*, *supra* note 49, at 45 tbl.24.

74. Because drug distribution is prohibited by both federal and state law, drug cases can be brought in either state or federal court, regardless of whether the arresting law enforcement agency is local, state, or federal. Recently, when I suggested to a high-ranking member of the United States Attorney's Office that the narco-lock program served no useful purpose by visiting draconian punishment on an unlucky few, he told me that despite all the studies to the contrary, he believed it would help to reduce crime if potential defendants thought that "lightning might strike."

twenty-dollar transaction will have him facing a sentencing range of fifteen to twenty years.[75]

When we meet our client, we begin trying to develop a relationship while also gathering information needed for the bail argument that will follow. The bail hearing might be five minutes or five hours away, depending on the time of day, the pace of the pretrial services division, the diligence of the prosecutor in providing the paperwork, and the schedule of the magistrate judge. Sometimes our client speaks English; often, he does not. As we begin piecing together the strands of our new client's life, we invariably learn difficult truths. We learn about abuse, poverty, dire family circumstances, substance abuse, and mental illness. Even the few without such issues are terrified of what lies ahead and agonize about the options we describe. We may see opportunities to challenge the government's case—issues relating to guilt or innocence like knowledge, identity, or entrapment. Did the client know the drugs were in the suitcase? Did the police arrest the right person after conducting the buy? How did the confidential informant convince our client to do the deal? There also may be promising challenges to police misconduct that could result in the case being dismissed for a bad stop or search.

But often, there is a decision to make at the outset that will render those possible challenges moot. In all likelihood, the prosecutor will have called to say that she wants to speak with our client to see what information he can offer, but that time is of the essence. Of course, prosecutors always say time is of the essence when it comes to the decision to cooperate. In any given case, it may or may not be true. But faced with a ten-year mandatory minimum or a "narco-lock" Guideline range,[76] the client must decide whether to cooperate without much time for reflection, much less an investigation or a review of discovery material. Regardless of how accurate or legitimate the current charges may be, if the client has information to provide, he may have a way out. By cooperating, and ultimately signing a plea agreement, he makes himself eligible to receive a coveted "5K letter" from the government at sentencing. The 5K letter is named after the Guideline provision that allows judges, upon its receipt, to depart downwardly from the Guidelines,[77] and more importantly, to

75. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2012) (the "career offender" provision of the Sentencing Guidelines).

76. *Id.* Even the least severe statutory charge, 21 U.S.C. § 841(b)(1)(C), carries a twenty-year maximum sentence, which in turn translates to a Guideline range of 210-262 months' imprisonment before any reductions for "acceptance of responsibility" or a cooperation agreement.

77. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2012).

sentence below an otherwise mandatory minimum.[78] The decision to cooperate also may mean agreement on bail, without which the client will likely be detained.

Forgoing the opportunity to cooperate in order to preserve the option of bringing a challenge of any sort to the case may come at a steep price. Those who are at all risk averse will jump at the chance to cooperate. Even those who have little useful information may see cooperation as the only option. But if it fails—if the decision to speak with the prosecutor and agents after a brief conversation with an unknown lawyer backfires—then the chance of a successful challenge to the case becomes even more remote.[79]

Of those clients who do not cooperate, most are detained. The Bail Reform Act contains a presumption against release in any drug case that carries a maximum sentence of ten years or more,[80] which is most drug cases. Even clients who can rebut the presumption might not be released for a variety of reasons, commonly because of their immigration status. They will be held in one of two federal detention centers in New York City: the Metropolitan Correctional Center (MCC) in Manhattan or the Metropolitan Detention Center (MDC) in Brooklyn. The MCC and MDC are always full beyond their intended capacity. Because of the lack of space and other administrative reasons, anyone held at the MCC will spend the first few weeks in the Segregated Housing Unit, which is the anodyne term for solitary confinement. There, they will sit in a cell for twenty-three hours a day until they are moved to a general unit. During this time, they cannot make phone calls or receive family visits, and legal visits are difficult and time consuming. Once they make it to a general unit, they will be confined to a small wing with little recreation and few educational or vocational programs.[81] Substance abuse treatment and mental health services are extremely limited. Inmates with medical issues have a particularly hard time. Medicine is dispensed sporadically, and treatment is

78. *See* 18 U.S.C. § 3553(e) (2006).

79. There are myriad ways in which the decision to speak to prosecutors can harm a client's case. Statements made are only lightly protected from future use, and the United States Attorney's Offices in the Southern and Eastern Districts require that defendants disclose all prior criminal conduct in order to be eligible for an agreement, meaning there is potential exposure to additional charges and a significantly higher sentence if no cooperation agreement is obtained.

80. 18 U.S.C. § 3142(e)(3) (2006).

81. Thanks to two dedicated and enterprising paralegals from my office, Justine Kentla and Alexandra Katz, that is starting to change. They recently started a project called Focus Forward that is part book club and part life-skills class for twelve inmates at a time.

often nonexistent or inexcusably delayed. It becomes all too easy to forget that this is a place for those who are, in theory, presumed innocent.

Our clients remain in this setting while their case works its way through the system. The wait is usually many months long, often more than a year, and sometimes much longer. During that time, there will be more difficult choices and more incentives not to go to trial or file suppression motions alleging police misconduct. If the client has no prior convictions and meets a variety of other criteria, he may be eligible for the "safety valve," which means that he will not be subject to a mandatory minimum if he speaks to the prosecutors about the offense.[82] If the client has a prior qualifying conviction, and is considering trial or a motion, the prosecutors will threaten to file a "prior felony information" that will double the mandatory minimum.[83] Few clients have the stomach to push back against those threats (which are not idle). And even without those threats, the Guidelines contain a built-in trial penalty through the "acceptance of responsibility" reduction that is presumptive for those who plead guilty, but presumptively inapplicable for those who go to trial.[84] In addition, prosecutors in our districts press judges to deny acceptance-of-responsibility points for defendants who file motions to suppress evidence, and they push for "obstruction of justice" enhancements[85] for those who testify at a hearing or trial.

Often, after months of difficult confinement and a steady stream of advice about the serious consequences of challenging the government's allegations, clients are simply beaten down and ready to be done with it all by pleading guilty. They hope to be sentenced quickly so that they will be sent to a prison facility that is less overcrowded and inhumane.

Clients charged with "illegal reentry,"[86] the crime of returning to the United States after having been deported, are our districts' second most common type of case. Here in New York, the vast majority of illegal reentry defendants are Dominican. The typical client spent most of his life in the United States but never became a citizen. Often, he first came here with his family as a child or teenager, and went on to have kids of his own. At some point he was convicted of a crime—usually a drug offense—and was deported

82. 18 U.S.C. § 3553(f) (2006).

83. 21 U.S.C. § 851 (2006).

84. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. 2 (2012) (noting that "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial," except in "rare situations").

85. *See id.* § 3C1.1.

86. 18 U.S.C. § 1326 (2006).

to a country with which he had few ties. He returned to New York to be with his mother, siblings, wife, or children.

Unless there was a defect in the deportation process (and there are rarely legally cognizable ones), there is virtually no defense to the charge. The client himself is Exhibit A. The typical Guideline sentence ranges from three to seven years, depending on a client's prior record.[87] Federal prosecutors in New York recently adopted a "fast-track" program (similar to those that have long been in place in other districts) whereby defendants are given a fixed reduction in their sentence in exchange for waiving discovery and motions, and instead quickly pleading guilty. Our work consists mostly of mitigation investigation and sentencing advocacy. Sentences of roughly two years (followed by further immigration detention and deportation) are often considered a success.

Another common case is the so-called "felon-in-possession."[88] This is the "trigger-lock" analogue to the "narco-lock" case: state prosecutions turned federal for illegal gun possession. They typically arise from an NYPD stop and frisk on the street or a search of a car or an apartment. A gun is found in a bag, or under a seat, or in a closet. The case is "federalized" because the client has a prior felony and will face more time in federal court. Almost invariably, our clients are shocked when we describe how much time they face—usually a Guideline range somewhere between three and seven years if they plead guilty, and more if they don't (as compared to the typical two years in state prison).[89] And for some it is far worse. If they have enough prior convictions, they may be considered an "Armed Career Criminal"[90] subject to a fifteen-year mandatory minimum[91] with a Guideline range above twenty years.[92]

One such case stands out in my career as particularly tragic. It was my first year as a federal public defender, and the clerk's office called to say that I had a new felon-in-possession client. But it was no run-of-the-mill felon-in-possession case. Daniel Ferraro[93] had been arrested at the hospital. He was there because he had shot himself in the head. The case was based on his possession of the gun he used to shoot himself.

87. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2012).

88. 18 U.S.C. § 922(g) (2006).

89. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (2012).

90. *Id.* § 4B1.4.

91. 18 U.S.C. § 924(e) (2006).

92. U.S. SENTENCING GUIDELINES MANUAL § 4B1.4 (2012).

93. Daniel Ferraro is not his real name.

I read the complaint and made my way to the cellblock to meet with him. He had been in the hospital for two weeks before being brought to court, and the bandage around his head was clean and well tended.

"Mr. Ferraro, I'm David Patton, and I'm going to be your lawyer."

"Okay."

"How do you feel, Mr. Ferraro?"

"I'm just tired."

His affect was flat, his face largely expressionless, and it was clear that he was severely depressed. But he was also lucid and thoughtful. After talking for a while about his wife and daughter and people that I could contact, we began to discuss what was going to happen at his first appearance in just a few minutes. I already had a copy of his rap sheet and knew that because of his prior drug felonies, he likely qualified as an "Armed Career Criminal" and that he faced a mandatory minimum of fifteen years' imprisonment. I couldn't bring myself to tell him so at that first meeting. Because of the sentencing exposure and his lack of any resources, he was not going to make bail. The big question was whether to ask for him to be put on suicide watch. It was obvious he was at risk, but suicide watch is no picnic: twenty-three hours a day of isolation in the Special Housing Unit. Needless to say, it has the potential to significantly aggravate mental illness. I talked it over with him, and we opted to seek regular housing with an order from the judge that he be given his antidepressant and antipsychotic medications (always a battle with the Bureau of Prisons, as it proved to be in his case).

After Mr. Ferraro's initial presentment, I hired a psychiatrist to evaluate him. I submitted his report to the prosecutor and pressed him to drop the case: Mr. Ferraro was not a danger to anyone but himself, and prison would only make that worse. He needed psychiatric treatment, not lengthy punishment. He could be committed to a mental institution. His criminal record sprang almost entirely from his lifelong heroin addiction, which itself sprang from a history of childhood abuse and poverty in his native Puerto Rico. At the very least, I argued, they should drop the Armed Career Criminal charge and let him plead to a standard unlawful possession count. The Guidelines range would call for approximately seven years in prison,[94] and I could argue to the judge for less. Even seven years was more time than most state defendants

94. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (2012) (resulting in a range of 84-105 months' imprisonment).

received for violent felonies like robbery, aggravated assault, or even some forms of homicide.[95]

The prosecutor wouldn't budge. He said that Mr. Ferraro's repeated history of drug offenses and his current gun possession showed that he had not learned his lesson and that he needed to be locked up for a long time. I went up the chain to his supervisor. Once again, the answer was no.

When Mr. Ferraro was indicted, the indictment was bare bones and only tracked the statutory language. I knew the judge would be disturbed by the actual facts of the case, but I also knew he would be unaware of them until there was a plea or trial. At the initial appearance, I requested more time than usual, telling the judge that we were exploring an insanity defense and explaining the circumstances of the case. The judge called the head of the Criminal Division of the U.S. Attorney's Office from the bench.

Some time later, the prosecutors agreed to forgo the Armed Career Criminal charge, but only if Mr. Ferraro signed a plea agreement that would forbid him from seeking a sentence below the Guideline range of seven to nine years. I spent many hours discussing the offer with Mr. Ferraro. The plea offer was still absurdly high, but our options were limited. At trial, we could argue diminished capacity (the law was terrible), hope for nullification (a slim chance), or plead not guilty by reason of insanity (also unlikely to succeed). In each instance, if we lost, he faced a mandatory fifteen years and far more under the Guidelines.[96] The decision was excruciating for him. Throughout our talks together, he would often ask me why everyone was so mad at him.

Mr. Ferraro took the deal. I wrote a sentencing letter that laid out the mitigating features of his life: his childhood abuse, his frequent psychiatric hospitalizations, his heroin addiction, his efforts against all odds to help support his five-year-old daughter. The letter, as required by the plea agreement, stopped short of explicitly requesting a downward departure from the Guidelines, which at the time were otherwise mandatory. I hoped the judge would depart downwardly of his own accord, but he did not. He said he thought the sentence was excessive and there were grounds for a departure, but the sentencing range was an agreed-upon deal, and if he reduced it, the U.S.

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95. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2010 (Kathleen Maguire ed.), http://www.albany.edu/sourcebook/pdf/t5222010.pdf (showing that in 1963, out of a total of 34,845 defendants "disposed of in U.S. District Courts," 5,186 defendants were convicted or acquitted after trial, whereas the corresponding numbers for 2010 were 2,746 out of a total of 98,311).

96. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.4 (2012). Under that provision, Mr. Ferraro's Guideline range after trial would have been at least 235 to 293 months.

Attorney's Office would be more reluctant to drop mandatory minimum charges in the future.

III. FAIRER PROCESS: THEN OR NOW?

So how might Mr. Ferraro have fared in 1963? Leaving aside the unlikelihood of his being prosecuted in federal court in 1963 (when there was no regular practice of federalizing state court cases), he would have had a much greater opportunity to challenge his prosecution in some form. The process of 1963 would have allowed him to present the horrifying circumstances of his case to a judge or jury without the intense pressure to sign his plea "agreement." The fifteen-year mandatory minimum under the Armed Career Criminal Act was still twenty years away. Although nullification by a jury would have been unlikely, he may have decided that it was worth the risk of some additional amount of time in prison to have his case heard. He may have decided that after a trial, without a mandatory minimum or a binding plea agreement, a judge was not likely to punish him more severely at all. And a trial would have forced the government to think much harder about its expenditure of resources and whether it was really committed to standing up in court and saying to a jury that the best way to deal with a suicidally depressed man was to criminally prosecute him. His lawyer in 1963 may have been inexperienced and without resources, but at least he would have had something to do. I was well trained and well versed in the Rules of Evidence and Criminal Procedure. I felt confident in my ability to examine witnesses and communicate with a jury. I had money for experts and investigators. But none of it mattered; I could put none of it to use.

Perhaps some readers are not troubled by the outcome in Mr. Ferraro's case or in the many other cases in which defendants are subject to mandatory minimum sentences and receive lengthy terms of imprisonment. Severity, after all, is in the eye of the beholder. But even for proponents of tough sentences, the damage that mandatory minimum sentences or rigid sentencing guidelines inflict on the adversary system should be concerning. Mandatory and severe sentencing regimes may seem on the surface like reasonable ways to constrain discretion and unwarranted disparity. In fact, however, those regimes merely shift discretion—away from judges and juries, to prosecutors. They do not result in more uniform, or even necessarily tougher, sentences. Instead, they result in less transparency and less challenge to government conduct (or misconduct).

The client who fares better today than in 1963 is the client who has legal or factual issues that can be litigated in practice, not just in theory. With better-trained, better-funded, more specialized defense lawyers in the current federal

system, issues that can actually be tried are more likely to be tried well. But as the above discussion demonstrated, far fewer issues can actually be litigated now as compared to 1963. When a client today decides whether to challenge the government's version of events—either in whole or in part—he faces the daunting prospect of five, ten, or twenty additional years in prison in exchange for exercising his right to a hearing or trial. Although defendants have always faced the prospect of some additional time for going to trial, the rigidity and severity of today's numbers are often all-consuming. In most cases, the choice weighs heavily in favor of folding without a fight. In 1963, defense counsel and pro se defendants may have been less prepared for that fight, but at least they could have it.

My office's many drug cases are instructive. The facts in those cases are rarely black and white. Drug conspiracy charges contain all sorts of questions about the quantity of drugs, the role in the offense, or what sort of conduct should be ascribed to one particular defendant as opposed to another. How a person became involved in the conspiracy or whether the government used illegal means to catch him (or ensnare him) are often messy questions. They are questions that should be answered by juries and judges with the evidence laid bare and critically examined. But they seldom are. The pressure to cooperate or plead guilty is immense. It comes from the threat of draconian punishment and the experience of being held in tightly restrictive conditions that will be relieved only after a conviction and designation to a permanent facility. And the pressure is not some accidental adjunct to the system—it is the deliberate intent of the current system. As Judge Lynch of the Second Circuit, a former head of the Criminal Division of the United States Attorney's Office for the Southern District of New York, recently wrote:

> [P]lea "bargaining" is not an aberration, but is our de facto system of criminal justice, and most pleas reflect precious little "bargaining" (in the sense of negotiation or haggling) and are hardly "bargains" (in the sense of cheap dispositions). The resulting sentences are not in any meaningful sense "discounts" from the system's intended outcomes: they *are* the intended outcomes of a system that is designed to produce pleas in large part by threatening defendants who go to trial with extreme sentences.[97]

97. Gerard E. Lynch, Frye *and* Lafler*: No Big Deal*, 122 YALE L.J. ONLINE 39, 40 (2012), http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/frye-and-lafler:-no-big-deal.

Today's defendant is typically better served by an attorney who is a skilled counselor, negotiator, and mitigation investigator than by a great trial lawyer. Most good defense work consists of marshaling mitigation evidence to more effectively beg prosecutors for reduced charges and lower sentences, followed by effective client counseling about the resulting offer and options. This is not to say that traditional trial skills are unimportant. Though only 2.7% of federal defendants go to trial,[98] those trials matter a great deal, and trial skills are still a vital part of good federal defense work. But as a relative matter they count much less than they used to. This is not a healthy development for the criminal justice system. A system that relies so heavily on judgment calls by attorneys and their clients about the risks and rewards of challenging the government loses sight of its primary function: to sort facts and assign punishment in an open and adversarial process.

One response to this critique might be: yes, federal defendants face tougher penalties and more limited options to challenge allegations, but that includes all federal defendants, rich and poor alike. Extraordinary sentences for white-collar defendants have also become commonplace. At least the system is more egalitarian in the limitations it has placed on defense lawyers. If *Gideon* was primarily about equal opportunity for criminal defendants to challenge the State's case, the system has done that, albeit by making it tougher for everyone.[99]

This response, however, fails to recognize that equality of severity on the back end of the process in the bargaining and sentencing phase only exacerbates the inequality that exists on the front end in the policing and charging phase. As discussed, poor people are still brought into the federal system at far higher rates than people with financial means—and at far higher rates than in 1963.[100] Nationally, the change in case mix and the racial makeup of federal defendants has been striking. In 1963, over fifty percent of all federal defendants were charged with some type of property or fraud offense,[101] and

98. HINDELANG CRIMINAL JUSTICE RESEARCH CTR., *supra* note 10.

99. *Cf.* Motivans, *supra* note 47, at 9 tbl.7 (showing that the 2009 trial rate for private counsel of 3.5% was roughly comparable to the CJA Panel attorney and public defender trial rates of 3.5% and 1.8%, respectively).

100. *See supra* Section II.A.

101. *United States Attorneys Statistical Report, Fiscal Year 1963*, U.S. DEP'T OF JUST. chart 4 (1963), http://www.justice.gov/usao/reading_room/reports/1960s/STATISTICAL_REPORT_FISCAL_YEAR_1963.pdf. Property or fraud offense categories consisted of "National Stolen Property" (11.4%), "Criminal Tax" (7.1%), "Counterfeiting & Forgery" (6.7%), "Postal Laws" (5.2%), "Fraud Against Government" (5%), "Embezzlement" (2.8%), "Occ. Tax, Gamblers" (2.6%), "Mail Fraud" (2.5%), and "Thefts, Interstate Commerce" (2.2%).

about seventy percent of all federal defendants were white.[102] Less than ten percent were charged with narcotics offenses, and immigration and firearms did not merit their own category on the statistical reports (meaning they amounted to less than two percent).[103]

Today, seventy-three percent of federal defendants are charged with a drug, immigration, or firearm offense, and only fifteen percent are charged with property and fraud offenses.[104] Over seventy percent of all federal defendants are racial or ethnic minorities.[105] Most of my office's clients would have fared better in the federal system as it existed in 1963 for a very simple reason: they would not have been in it. Illegal reentry prosecutions, the war on drugs, and the routine federalization of traditional state court cases like gun possession were still decades away. Those crimes existed on the federal books in 1963, but they weren't prosecuted, or at least not nearly to the degree that they are now. The vast majority of these new defendants are poor and nonwhite.[106] Once they find themselves in the system, there is little comfort for them in knowing that the few wealthy defendants who have also been charged are receiving equally inquisitorial process.

The policy prescriptions for a more egalitarian and adversarial process are not complicated. The elimination of mandatory minimum sentences, continued movement away from rigid sentencing guidelines, reduced sentencing severity, and serious attention to the presumption of innocence in the practice of pretrial release (not to mention fuller and more timely discovery—a problem that predates *Gideon*) would go a long way toward solving the problem. That the solutions are apparent, however, does not mean they will come easily. The harsh politics of crime and punishment have long acted as a one-way ratchet toward severity and prosecutorial control.[107]

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102. CAHALAN, *supra* note 48.

103. *United States Attorneys Statistical Report*, *supra* note 101.

104. *2011 Sourcebook of Federal Sentencing Statistics*, U.S. SENT'G COMMISSION fig.A (2011), http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/FigureA.pdf. Drug offenses constitute 29.1% of all federal convictions, immigration offenses constitute 34.9%, and firearms offenses constitute 9.2%. The fraud and property offenses are categorized as "fraud" (9.8 percent); "non-fraud white collar," which includes embezzlement, forgery/counterfeiting, bribery, money laundering, and tax (3.6%); and "larceny" (1.8%).

105. *Final Quarterly Data Report 2011*, *supra* note 49.

106. *Id.*

107. *See*, *e.g.*, Barkow, *supra* note 4, at 1277 ("The politics of sentencing over the past three decades have consistently produced longer prison terms and an escalation in tough-on-crime rhetoric, regardless of whether crime rates have been going up or down."). Most recently, the U.S. Sentencing Commission released its so-called "*Booker* Report," in which it

Although recently there have been small, hopeful signs of change, including Congress's slight reduction in the sentences for crack cocaine[108] and more judicial scrutiny of the Sentencing Guidelines,[109] far more meaningful reform will be required to restore the system to its healthier adversarial roots.

Until those changes come, celebrations of *Gideon* will be muted by the knowledge that its promise of a fairer, more just system remains unfulfilled. And many defendants with viable claims of innocence and violations of constitutional rights will plead guilty with well-qualified lawyers standing quietly by their side.

CONCLUSION

To observers of state courts, the failings of the federal system may not seem so dire. In many state and local jurisdictions, crushing caseloads, appointed attorneys who are incompetent, untrained, or both, and an appalling lack of resources have left the right to counsel in complete shambles.[110] I have practiced in some of those systems and seen others up close. The daily injustices are staggering, the choices absurd: plead guilty at the first appearance and get out of jail, or contest your guilt and sit in jail for months awaiting trial; post bail or get a lawyer, but not both; take the deal or roll the dice as one of your public defender's two hundred to three hundred clients.

But I leave the state systems for other, more qualified observers to discuss. Here, I have tried to describe my experience in the federal system. Although the injustices may be of a different sort, they are nonetheless real and pervasive and represent some of the worst aspects of the problems that *Gideon* was meant to address.

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recommends a return to more mandatory Guidelines. *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, U.S. SENT'G COMMISSION 9 (2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_A.pdf (advocating, among other things, congressional action to require that the Guidelines be given "substantial weight," and "more robust substantive appellate review" of sentences outside of the Guidelines).

108. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified at 21 U.S.C. § 841(b)(1)(A)(iii)) (reducing the disparity between crack and powder cocaine penalties from 100-to-1 to 18-to-1).

109. *See, e.g.*, United States v. Diaz, No. 11-821, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013) (critically examining the Guidelines in an opinion entitled "Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline").

110. *See, e.g.*, Steven B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. ___ (2013) **[ME: Insert first page once paginated.]**.