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DOES CRIMINAL DIVERSION CONTRIBUTE TO THE VANISHING CIVIL TRIAL?

John B. Meixner* and Shari Seidman Diamond**

INTRODUCTION

Professor Marc Galanter's seminal piece, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*,¹ has had a profound impact on public and scholarly discourse about the role of the trial in litigation.² Professor Galanter's work was the first to document the dramatic national downfall of the American trial,³ reporting a reduction in the rate of civil cases proceeding to trial in the federal courts from 11.5% in 1962 to only 1.8% in 2002.⁴ In addition to the precipitous general decline in both the raw number of civil trials and the rate of civil trials (i.e., the percentage of civil cases that reach trial), Galanter reported a reduced number and proportion

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1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

2. For example, a preview of the results was published on the front page of the *New York Times* on December 14, 2003. See Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial*, N.Y. TIMES, Dec. 14, 2003, at 1; see also ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL 2* (2009).

3. Others had reported pockets of evidence indicating reduced trial rates in American courtrooms before Galanter's 2004 piece. See, e.g., George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 189 tbl.6 (documenting a reduction in the number of jury trials in Cook County, Illinois between 1959 and 1979); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 1-3 (1996) (discussing possible reasons for increased settlement in civil trials); Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1936-37 (1997) ("[S]igns of decline [of the jury trial] are all around us . . . [t]he number of civil jury trials is indeed becoming insignificant."). However, Galanter's work was the first to systematically examine on a national scale a wide variety of variables related to trial rates, such as the type of dispute (e.g., torts, contracts), the length and complexity of trials, the number and type of civil filings, and criminal trial rates. See Galanter, *supra* note 1, at 460-98. His comprehensive research became the primary catalyst for immense academic discourse on the subject. See *infra* note 9 and accompanying text.

4. See Galanter, *supra* note 1, at 461.

of federal criminal trials,⁵ a shift from traditional contract and tort trials toward civil rights trials and prisoner claims,⁶ an increase in the number of long and complex trials,⁷ and an increase in the amount of pretrial adjudication by the court (primarily summary judgment).⁸ Perhaps most importantly, Professor Galanter's work brought the issue of the vanishing trial into the academic spotlight, triggering a bevy of symposia and follow-up work that have all reinforced the same common thesis: the civil trial is disappearing, and disappearing fast.⁹

While there is little remaining doubt that the American civil trial is an increasingly scarce commodity, there is still much debate as to what has caused the decline. Professor Galanter and the scholars who have followed him have identified a long list of possible explanations. We will group these possible explanations into two broad categories: "demand" explanations, which focus on reductions in the incentives and desires of the litigants to proceed to trial, and "supply" or "capacity" explanations, which focus on the resources of the legal system and its ability to handle trials.¹⁰

5. *Id.* at 492–94.

6. *Id.* at 468–73.

7. *Id.* at 477–81.

8. *Id.* at 481–84.

9. See, e.g., Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165; Lisa Blomgren Bingham, *When We Hold No Truths to Be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131; Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004); Christopher Honeyman, *Worlds in a Small Room*, 2006 J. DISP. RESOL. 107; John W. Kecker, *The Advent of the "Vanishing Trial": Why Trials Matter*, THE CHAMPION, Sept.–Oct. 2005, at 32; Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004); Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35; Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637 (2004); Frederic N. Smalkin & Frederic N.C. Smalkin, *The Market for Justice, the "Litigation Explosion," and the "Verdict Bubble": A Closer Look at Vanishing Trials*, 1 FED. CTS. L. REV. 417 (2006). *But see* John Lande, *Replace "The Vanishing Trial" with More Helpful Myths*, 23 ALTERNATIVES TO HIGH COST LITIG. 161 (2005) (characterizing the vanishing trial as a "myth" in that "accounts of the impending demise of the trial are exaggerated").

10. See Diamond & Bina, *supra* note 9, at 638; see also Galanter, *supra* note 1, at 500, 516–22. We characterize effects as "demand" effects based on whether there is a demand from the parties to move to trial. That is, if parties choose to settle before trial or use a method of alternative dispute resolution, the corresponding reduction in trial rate comes because there is no demand for the trial—the parties have decided to end litigation. We characterize capacity problems within the judicial system as "supply" effects because these theories propose that courts are not able to meet the supply of cases moving toward trial due to a lack of resources. The two, of

These proposed explanations are varied and include: a general reduction of the number of filings in trial courts,¹¹ an increased reliance on alternative dispute resolution,¹² increased costs of proceeding to trial due to the increased use of expert witnesses and specialized lawyering,¹³ changes in the law of summary judgment that increased the burden the nonmoving party must bear to fend off judgment on the motion,¹⁴ and a skewed perception of the risk of “out of control” juries and difficulty in predicting the outcome of trials.¹⁵ Many scholars have suggested that each of these explanations has likely played (and will continue to play) at least some limited role in the reduction of civil trials.¹⁶

Supply-side explanations have received more skepticism than demand-side explanations from the academic community. One supply-side hypothesis often suggested, based on claims by judges and attorneys, is that courts simply lack the resources, whether in terms of the raw number of judges or in terms of their time and resources, to conduct trials.¹⁷ Professor Galanter dismissed this hypothesis on the basis that “with fewer judges . . . and far less money, the federal courts 20 years ago were conducting more than twice as many civil trials.”¹⁸ We note, however, that while there were fewer judicial resources and more civil trials in the 1980s, the increase in judicial resources has not kept pace with the increase in filings, suggesting that constraints on

course, are not independent: a party may “prefer” settlement in part in order to avoid having to wait for a trial date, so that settlement can in fact be a response to a problem of supply.

11. See Galanter, *supra* note 1, at 516. Professor Galanter noted that this explanation is unlikely a major factor in the reduction of federal trials, as the filing rate has remained relatively steady for the past twenty years. *Id.* Professor Galanter noted, however, that the number of filings have declined in state courts, though not at the same rate as the number of trials. *Id.*

12. *Id.* at 517. Professor Galanter noted that this explanation is also unlikely to account for much of the decline in trials, as the decline seems ubiquitous across jurisdictions and ADR is not popular enough to be driving the effect. *See id.*

13. *See id.*

14. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“When the moving party has carried its burden . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”); see also Redish, *supra* note 9, at 1330 & n.5.

15. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255, 1263 (2005); Galanter, *supra* note 1, at 517–18.

16. See Diamond & Bina, *supra* note 9, at 638; Marc Galanter, *A World Without Trials?*, 2006 *J. DISP. RESOL.* 7, 23–33 (suggesting broad theories of the vanishing trial that incorporate many of these more discrete possible explanations).

17. See, e.g., Galanter, *supra* note 1, at 519.

18. *Id.*

judicial resources may in fact be contributing to the disappearance of the trial.¹⁹

Other possible supply-side causes of reduced trial rates are reductions in the number of experienced trial lawyers—resulting in an “atrophy of advocacy skills” and presumably reduced comfort with the thought of going to trial²⁰—and changes in the role that judges view themselves as playing, from being a more passive provider of trials to being an active resolver of disputes.²¹

One final possible supply-side explanation for the disappearing civil trial is that courts have given priority to the criminal docket, leading to a backlog of civil cases—we term this the “criminal diversion hypothesis.”²² The hypothesis posits that as the rate of criminal cases increases and the pressure to dispose of them quickly mounts, something has to give, and one possible way to relieve the pressure is to forgo the increasingly time-consuming and resource-intensive civil trial. This potential path to decreasing civil trials has been suggested by scholars,²³ attorneys,²⁴ and judges alike.²⁵ As one commentator stated, “Over the last few years the federal district courts have been transformed primarily into drug courts and . . . [have been] unable to move their civil dockets. In the southern district of California last

19. See Diamond & Bina, *supra* note 9, at 645–48, 654–57 (describing a negative correlation between trial rate and judicial supply).

20. See Galanter, *supra* note 1, at 521–22; see also Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 856–61 (1990).

21. See, e.g., Marc Galanter, “. . . A Settlement Judge, Not a Trial Judge”: *Judicial Mediation in the United States*, 12 J.L. & SOC’Y 1, 14–15 (1985). This hypothesis is a bit of a hybrid between a demand explanation and a supply explanation in that it refers to the judge’s actions in moving the case forward to trial, rather than the litigants’ (much like a supply explanation) but it is an issue of decision making rather than resources (much like a demand explanation).

22. See, e.g., Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 527 (1998) (“The . . . requirement that criminal cases receive preferential treatment has precluded numerous district judges from conducting a civil trial since 1995, while the district courts have a civil backlog of thousands of suits.”).

23. See, e.g., *id.*; Diana G. Culp, *Fixing the Federal Courts*, A.B.A. J., June 1990, at 62, 63–64; Diamond & Bina, *supra* note 9.

24. See, e.g., THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 36 (1990), available at [http://www.fjc.gov/public/pdf.nsf/lookup/repfcsc.pdf/\\$file/repfcsc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/repfcsc.pdf/$file/repfcsc.pdf) (“Drug filings not only increase the federal workload; they distort it. The Speedy Trial Act in effect requires that federal courts give criminal cases priority over civil cases. As a result, some districts with heavy drug caseloads are virtually unable to try civil cases and others will soon be at that point.”); *id.* at 160 (“Congress must appropriate resources to enable the federal courts to deal effectively with their enlarged criminal caseload.”).

25. See Tobias, *supra* note 22, at 540 & n.70 (referencing a conversation with Judge Raymond J. Dearie of the eastern district of New York suggesting that criminal dockets prevent judges from trying civil cases).

year, for example, one-half to two-thirds of the judges' time was spent on cocaine cases alone."²⁶

This argument has some support in the legal doctrine that governs how courts may dispose of cases. The Speedy Trial Act of 1974²⁷ changed the way courts process criminal cases by establishing automatic time limits that can be extended only through specific provisions of the Act.²⁸ Starting with the Act's full implementation in 1977, federal courts achieved high levels of compliance and decreased the time necessary to resolve criminal cases,²⁹ potentially diverting resources that could have been used for civil trials. Additionally, promulgation of the Federal Sentencing Guidelines in 1987 increased the time required of judges in criminal cases by making it more difficult to resolve sentencing hearings.³⁰ Many judges initially worried that the Guidelines would reduce the rate of plea bargaining, thus forcing more criminal cases to trial and further sapping resources away from civil trials.³¹ Finally, Department of Justice efforts to reduce plea-bargain rates worried attorneys and judges alike, both of whom saw the changes in government policy as likely to trigger an increase in resources spent on criminal cases, both on the bench and in the U.S. Attorney's office. This concern led one judge to state that the policy "will virtually rule out the trial of civil cases."³²

In this Article, we seek to explore the extent to which the federal criminal docket may be contributing to the rapid disappearance of the civil trial by taking priority in the distribution of court resources. To do this, we examined the dataset of all federal civil and criminal cases

26. See Culp, *supra* note 23, at 63.

27. 18 U.S.C. § 3161 (2006).

28. *Id.* § 3161(c)(1) ("In any case in which a plea of not guilty is entered, the trial of a defendant . . . shall commence within seventy days from the filing date . . . or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs."). Numerous other subsections also provide specific concrete deadlines. See, e.g., *id.* § 3161(c)(2) ("Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel . . .").

29. See George S. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 71 (1982).

30. See Culp, *supra* note 23, at 64 ("Ninety percent of the judges polled stated that the guidelines have made sentencing hearings more time-consuming."). Interestingly, in the same survey, over 70% of the judges stated that "the guidelines have reduced the incentives for a defendant to plead guilty, and that the percentage of guilty pleas in their current caseload has dropped." *Id.* As we will see, the data have not borne out this sentiment at all, and the Guidelines appear to be the trigger for one of the most rapid increases in plea rates in American history. See *infra* Part IV.

31. See Culp, *supra* note 23, at 64.

32. Kate Coscarelli, *Ashcroft Limit on Pleas: Crime Deterrent or Court Bottleneck?*, STAR-LEDGER, Sept. 24, 2003.

between 1996 and 2011. We discuss evidence showing that both the criminal trial rate and the civil trial rate have decreased as the criminal caseload has grown. Additionally, we provide novel data regarding the duration of criminal proceedings, which may shed some light on the amount of court resources dedicated to the criminal docket.

This Article proceeds in four parts. Part II describes the phenomenon of the vanishing criminal trial and briefly examines three major statutory and doctrinal events that have influenced criminal trial rates: the enactment of the Speedy Trial Act of 1974, the promulgation of the Federal Sentencing Guidelines, and the United States Supreme Court's ruling in *United States v. Booker*.³³ Part III assesses the criminal diversion hypothesis by comparing criminal trial rates with civil trial rates over the past fifteen years and examining changes in the duration of criminal proceedings over the same time period. On the whole, we find little evidence supporting the notion that the criminal docket can explain any portion of the vanishing civil trial rate. Part IV examines remaining alternative hypotheses regarding the vanishing trial and concludes by considering the consequences of the vanishing trial.

II. PLEA BARGAINING AND THE VANISHING CRIMINAL TRIAL

The criminal docket has rapidly increased over the past forty years. Professor Galanter reported an increase from 33,110 criminal filings in 1962 to 76,827 criminal filings in 2002,³⁴ which supports the criminal diversion hypothesis: as the number of criminal cases increases, the criminal docket may take more time from the federal judiciary, which may detract from the ability of the federal district courts to hear civil trials. At the trial level, however, the federal criminal trial has become an increasingly rare phenomenon, much like the civil trial. In Professor Galanter's 2004 article, he noted a sharp decrease in both the proportion of federal criminal cases that went to trial (dropping from 15% in 1962 to less than 5% in 2002) and in the absolute number of criminal cases tried (from just over 5,000 in 1962 to just over 3,500 in 2002).³⁵ Though he did not report new criminal data in his 2010 draft update to the vanishing trial project, Professor Galanter and his colleague Angela Frozena stated that "[s]o far as we can tell, much the same story of continued absolute and percentage declines could be

33. See *U.S. v. Booker*, 543 U.S. 220 (2005).

34. See Galanter, *supra* note 1, at 492.

35. See *id.* at 492-93.

told about federal criminal cases.”³⁶ One possible cause of the reduction in criminal trials is an increase in plea bargaining.

Plea bargaining has become such a common phenomenon that Sixth Amendment doctrine is being reshaped to ensure that defendants are given a fair defense when they nearly inevitably negotiate a plea bargain. In its most recent Term, the Supreme Court ruled in *Missouri v. Frye*³⁷ that the guarantee of effective legal representation applies to plea agreements, signaling a recognition by the Court that plea bargaining has become as important as any other criminal procedural step.³⁸ Writing for a 5–4 majority, Justice Kennedy noted that “[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process.”³⁹ In *Lafler v. Cooper*, the companion case the Court handed down the same day, Justice Kennedy recognized that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas,”⁴⁰ leading to the conclusion that any view ignoring constitutional rights during the plea-bargaining process “ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials.”⁴¹

In the remainder of this Part, we discuss the major changes to the landscape of criminal procedure that may have influenced criminal trial rates over the last forty years. Specially, we focus on three landmark changes to the law regarding criminal procedure and plea bargaining: the Speedy Trial Act of 1974, the Federal Sentencing Guidelines, and *United States v. Booker*.

36. Marc Galanter and Angela Frozema, “A Grin Without a Cat”: Civil Trials in Federal Courts 1 n.2 (May 1, 2010) (unpublished manuscript), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Marc%20Galanter%20and%20Angela%20Frozema,%20A%20Grin%20Without%20a%20Cat.pdf>. The draft reports civil data through the 2009 fiscal year. *Id.* at 3 tbl.1. In this Article, we extend Professor Galanter’s results through 2011 for both criminal and civil trials.

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

38. See Robert Barnes, *Justices Expand Rights of Accused*, WASH. POST, Mar. 22, 2012, at A1 (“What makes these cases so important is the Supreme Court’s full-on recognition of the centrality of plea bargaining in the modern criminal justice system . . .” (quoting Margaret Colgate Love, co-author of an American Bar Association amicus brief for the case) (internal quotation marks omitted)).

39. *Frye*, 132 S. Ct. at 1407.

40. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). It should be noted here that Justice Kennedy was referring to the rates of pleas among all *convictions*, rather than the rates of pleas among all *indictments*. In this Article, we examine all criminal cases, both convictions and acquittals, as we are interested in the total burden that the criminal docket places on the court. See *infra* Part III.

41. *Lafler*, 132 S. Ct. at 1388.

A. *The Speedy Trial Act of 1974*

In 1974, Congress enacted the Speedy Trial Act with the purpose of protecting the Sixth Amendment guarantee to a speedy criminal trial.⁴² At its time of enactment, there was general public concern about high crime rates.⁴³ The Act was seen as a way to prevent further crimes from being committed by defendants who were released prior to their criminal trials without being forced to jail them in anticipation of trials, providing the judge “supervision and control of dangerous defendants.”⁴⁴ In addition to this “public” right to a speedy trial,⁴⁵ proponents of the Act were concerned with “burgeoning caseloads” and sought to increase the rate at which courts could dispose of criminal cases.⁴⁶

The current language of the Act creates two intervals⁴⁷ with maximum time limits: (1) the interval between arrest and the filing of a charge with the court is not to exceed thirty days⁴⁸ and (2) the interval between indictment and trial is not to exceed seventy days.⁴⁹ If either of the time limits is exceeded, the statute mandates dismissal of the action.⁵⁰ However, the judge retains discretion over whether the dismissal should be with or without prejudice based on three factors: “the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this [Act] and on the administration of justice.”⁵¹ Additionally, several other provisions of the Act provide exceptions

42. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. § 3161 (2006)). The relevant Sixth Amendment language states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. amend. VI.

43. See Bridges, *supra* note 29, at 50.

44. 115 CONG. REC. 34,334-35 (1969) (statement of Rep. Abner J. Mikva).

45. Interestingly, the Act was among the first pieces of law to propose that the Sixth Amendment guarantee applies to the public, in addition to the criminal defendant. See Bridges, *supra* note 29, at 50 n.1.

46. See *id.* at 51 (quoting 120 CONG. REC. 41,618) (1974) (statement of Sen. Sam J. Ervin)).

47. In the Act’s initial incarnation, there were three intervals rather than two: the indictment-to-trial interval was initially divided into an indictment-to-arraignment interval and an arraignment-to-trial interval. See *id.* at 56. The two intervals were joined into the single seventy-day interval through amendments passed in 1979. See *id.*

48. 18 U.S.C. § 3161(b) (2006).

49. *Id.* § 3161(c).

50. *Id.* § 3162(a)(1) (“If . . . no indictment or information is filed within the time limit required by section 3161(b) . . . such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.”); *id.* § 3162(a)(2) (“If a defendant is not brought to trial within the time limit required by section 3161(c) . . . the information or indictment shall be dismissed on motion of the defendant.”).

51. *Id.* § 3162(a)(1).

for various pretrial procedures that may lead to delay.⁵² Because of the major impact expected of the Act, Congress allowed for a gradual implementation: the Act was signed into law on January 3, 1975, and its provisions went into effect on July 1, 1975.⁵³ Moreover, the time limits allowed to complete each interval were initially more forgiving, and gradually shortened each year to the current thirty- and seventy-day windows, which went into effect on July 1, 1979.⁵⁴

An initial study of the Act's effectiveness revealed that, despite the flexibility provided by the discretion of the judge and the exceptions for pretrial procedures, courts typically complied with the time limits during the initial years of the Act's existence.⁵⁵ Additionally, anecdotal evidence from government attorneys supports the notion that the Act had a real effect on giving priority to criminal cases.⁵⁶ However, even in the early years of the Act, the use of exceptions provided in the statute increased.⁵⁷ Additionally, while the Act had a clear effect on those criminal cases that were longest in duration, the median time from filing to disposition remained nearly constant at around 100 days during the first five years of the Act's existence.⁵⁸

B. *The Federal Sentencing Guidelines*

The enactment of the Federal Sentencing Guidelines in 1987 dramatically changed the landscape of criminal prosecutions. Until the U.S. Sentencing Commission enacted the Guidelines, judges typically had great discretionary control over sentencing decisions.⁵⁹ The Guidelines substantially reduced that control. Through a 258-celled sentencing table, the Guidelines placed each offense/offender combination into a particular sentencing category, based on a criminal defendant's "history score," ranked in points from one to six, and his offense level, ranked from one to forty-three.⁶⁰ Each history score

52. See Bridges, *supra* note 29, at 53–54 (“Many of the exceptions pertain to delays resulting from litigating activities such as mental competency proceedings, interlocutory appeals, or motion hearings.”).

53. See ANTHONY PARTRIDGE, FED. JUDICIAL CTR., LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 20 (1980).

54. See 18 U.S.C. § 3161(f)–(g) (2006) (describing specific time limits for each interval during the first three years of the Act).

55. See Bridges, *supra* note 29, at 72.

56. See THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 24, at 36.

57. See Bridges, *supra* note 29, at 62 & tbl.3.

58. See *id.* at 66, 67 fig.1.

59. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 210 (2003).

60. U.S. SENTENCING COMM'N, GUIDELINES MANUAL 406–07 (2011), available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/5a_SenTab.htm.

combined with offense level yielded a particular range of sentence in months, within which the judge had discretion to choose.⁶¹

As the drafters worked on the Guidelines, the immediate concern was that the Guidelines would transfer sentencing discretion from the judge to the prosecutor.⁶² Under the Guidelines, prosecutors could strongly influence the outcome of sentencing by simply deciding how many charges to press.⁶³ In an effort to combat this discretion, the drafters put in place several checks designed to limit the extent to which prosecutors could manipulate a sentence.⁶⁴ The most powerful of these checks allowed the judge to consider the "broadly defined '[r]elevant [c]onduct' of the defendant" when making a sentencing decision and gave the judge discretion to reject a plea bargain that would undermine the purpose of the Guidelines.⁶⁵

While it was hoped that these efforts would cabin prosecutorial power, one analyst suggested that they eventually had the opposite effect, as judges took the opportunity to impose harsher sentences than those in the Guidelines and frequently aligned themselves with prosecutors.⁶⁶ Because prosecutors were given the right to appeal judge reductions from the Guidelines range based on one of the checks mentioned above, judges were hesitant to reduce the specified sentence below the Guideline range for fear of being reversed on appeal.⁶⁷ In stark contrast, following the Guidelines would ensure nearly complete safety from reversal.⁶⁸

A number of early studies documented the effects of the Guidelines on plea rates. Though the Guidelines were enacted in 1987, their real force did not take effect until January 1989, when they were declared constitutional in *Mistretta v. United States*.⁶⁹ Prior to that case, they were, in many circuits, either not applied at all or applied nonuniformly.⁷⁰ One early study of the Fifth Circuit found significant

61. See FISHER, *supra* note 59, at 210, 212.

62. See U.S. SENTENCING COMM'N, *supra* note 60, at 1-15.

63. This concern is specifically mentioned in the introduction to the Guidelines. *Id.* at 6. ("One of the most important [drawbacks of the Guidelines] is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment.").

64. See FISHER, *supra* note 59, at 212-13.

65. See *id.* (internal quotations omitted).

66. See *id.*

67. See *id.* at 217.

68. *Id.*

69. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

70. Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 402 (1991).

decreases in plea-bargaining rates for a number of different offenses.⁷¹ However, that study found no significant increase or decrease across all offense types.⁷² More recent examinations have revealed significant increases in overall plea-bargaining rates that seem to coincide with the outcome in *Mistretta*. While overall plea-bargaining rates remained somewhat steady between 84% and 85% from 1984 to 1989, rates began to climb soon after, reaching 94% by 2001.⁷³

C. United States v. Booker

More recently, the scope of the Federal Sentencing Guidelines took on a new form as a result of a series of cases that would eventually render the Guidelines merely advisory. In *Apprendi v. New Jersey*,⁷⁴ a criminal defendant pleaded guilty to possession of a firearm, which carried a prison sentence of five to ten years under New Jersey's statutory scheme.⁷⁵ Following the guilty plea, the prosecutor filed a motion to extend the sentence based on a separate New Jersey statute that provided for an "extended term" if the defendant was found to have committed a hate crime.⁷⁶ The trial judge, after hearing testimony on the issue, found that a hate crime had been committed and extended the sentence.⁷⁷ The U.S. Supreme Court overruled the trial judge on grounds that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."⁷⁸

This concept was later applied to mandatory sentencing in *Blakely v. Washington*, in which the Supreme Court invalidated Washington's mandatory sentencing guidelines on the basis that sentences were in part determined based on facts found by the judge, rather than by the jury based on a beyond-a-reasonable-doubt standard.⁷⁹ Though the United States submitted an amicus curiae brief urging the Court to uphold Washington's guidelines, presumably based on the assumption

71. *Id.* at 403–04, 405 tbl.1 (documenting statistically significant decreases in plea-bargaining rates for credit card fraud, cocaine distribution, alien reentry, and larceny).

72. *Id.* at 404.

73. FISHER, *supra* note 59, at 223 tbl.9.1.

74. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

75. *See id.* at 468–70.

76. *Id.*

77. *Id.* at 470–71.

78. *Id.* at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)) (internal quotation marks omitted).

79. *See Blakely v. Washington*, 542 U.S. 296, 303–05 (2004).

that the highly similar Federal Sentencing Guidelines would be next on the chopping block, the Court specifically noted that it “express[ed] no opinion” on the Federal Guidelines.⁸⁰

The Government’s instinct proved prescient, however, as just six months later in *United States v. Booker*, the Supreme Court addressed the question of whether the *Blakely* rule applied to the Federal Sentencing Guidelines.⁸¹ As the government had anticipated, the Court ruled that “there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*].”⁸² As an alternative to abandoning the Guidelines altogether, the Court noted that the Sixth Amendment protection would not be implicated if the Guidelines were interpreted to be advisory; the Court thus severed those provisions that made the Guidelines mandatory and binding on district judges, which led to the advisory Guidelines that are in place today.⁸³

While the full effect of *Booker* is not yet entirely clear, the case seems to have influenced sentencing. Initial studies indicate that district courts readily used their newfound discretion. One study reported that in 2004 (one year before *Booker* was decided) 71.8% of sentences were within the Guidelines range, but that percentage immediately dropped to 61.6% the year following *Booker* and continued to fall to 56.8% by 2009.⁸⁴ The number of below-Guidelines sentences has nearly tripled, from 4.6% in 2004 to 12.1% in 2006.⁸⁵ Likewise, above-Guidelines sentences have doubled, from 0.6% in 2004 to 1.6% in 2006.⁸⁶ The author of that study noted, however, that there had been other rapid drops of within-Guidelines sentences prior to *Booker*, so it is difficult to say whether these shifts were a direct result of *Booker*.⁸⁷

80. *Id.* at 305 n.9.

81. *See United States v. Booker*, 543 U.S. 220, 226–27 (2005).

82. *Id.* at 233.

83. *See id.* (“If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”); *id.* at 259 (“Application of these criteria indicates that we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range . . .”).

84. D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After Booker*, 49 DUQ. L. REV. 641, 661–62 (2011).

85. *Id.* at 662–63.

86. *Id.* at 663.

87. *See id.* at 662 (noting a drop from 83.4% in 1990 to 64% in 2001).

Substantial changes have occurred over time in the way criminal cases are handled in the federal courts. These changes were initially set in motion by the Sentencing Guidelines and modified by recent Supreme Court decisions that have changed the role of the judge in sentencing. In our analysis, we consider the potential role that these changes, as well as the criminal trial, have played in the decline of the civil trial.

III. ASSESSING THE CRIMINAL DIVERSION HYPOTHESIS

Having sketched the recent major shifts in criminal procedure that likely influenced criminal trial rates, and thus potentially influenced civil trial rates, we now turn to the task of assessing the criminal diversion hypothesis by examining court caseload data. Specifically, this Part examines several predictions that a proponent of the criminal diversion hypothesis might make regarding civil and criminal trial rates. First, if the criminal diversion hypothesis is correct, civil trials and trial rates should continue to decrease over time because an increasing number of court resources are occupied by the criminal docket. Second, if resources are being diverted from civil cases to criminal cases, the number of criminal trials should increase at the same time as, or just after, the decrease in civil trials. Third, the total duration of time spent on criminal proceedings, both before disposition and between disposition and sentencing, should increase if judges are prioritizing criminal cases over civil cases. We will test each of these hypotheses below.

A. *The Criminal Diversion Hypothesis and Civil Trial Rates*

A necessary premise of the criminal diversion hypothesis is that civil trials have decreased over time both as a raw number of trials and as a percentage of civil filings. Professor Galanter clearly demonstrated this phenomenon in his seminal 2004 article,⁸⁸ and showed in his update using data through 2009 that the trend has continued: the absolute number of civil trials in federal courts dropped from nearly 4,000 in 2004 to just over 3,000 in 2009.⁸⁹ In that article, Professor Galanter framed the story as “*no news* and *big news*” in that “[t]he *no news* story is that the trend lines regarding trials are unchanged. The *big news* story is that the civil trial is approaching extinction.”⁹⁰ Fig-

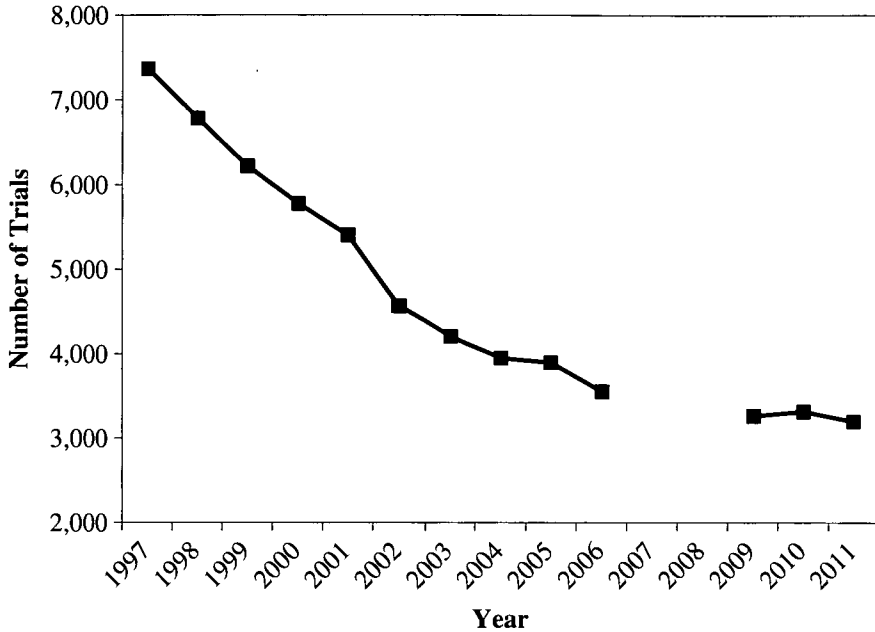
88. See Galanter, *supra* note 1, at 462–66.

89. Galanter & Frozema, *supra* note 36, at 2 fig.1.

90. *Id.* at 1.

ure 1 updates these numbers with the absolute number of civil trials from 2010 and 2011.⁹¹

FIGURE 1: ABSOLUTE NUMBER OF FEDERAL CIVIL CASES REACHING TRIAL, 1997–2011⁹²



91. According to George Cort of the Federal Judicial Center, the number and rate of civil trials for 2007 and 2008 were artificially inflated due to two large class actions. Professor Galanter reported a similar problem in his 2010 draft, noting an “apparent jump . . . due to misreporting of aggregate cases in [the] middle district of Louisiana,” though Professor Galanter identified 2006 and 2007 as the misreported years. Galanter & Frozena, *supra* note 36, at 3 n.3. In the civil data that we report, there are large outliers in only the 2007 and 2008 data; with that exception, we find a steady decline in the absolute numbers of criminal trials from 3,951 in 2004 to 3,194 in 2011. See *infra* Figure 1. In that range, each year has fewer recorded trials than the last. In 2007, however, there were 9,832 recorded trials, and in 2008 there were 4,723. We do not believe that these numbers reflect representative trial numbers, so we have excluded these two years from all figures of civil trials in this Article.

92. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 152 tbl.C-4 (1997); STATISTICS ON FEDERAL CIVIL CASES, *supra*, at 166 tbl.C-4 (1998); STATISTICS ON FEDERAL CIVIL CASES, *supra*, at 160 tbl.C-4 (1999); *id.*, at 159 tbl.C-4 (2000); *id.*, at 154 tbl.C-4 (2001); *id.*, at 153 tbl.C-4 (2002); *id.*, at 150 tbl.C-4 (2003); *id.*, at 156 tbl.C-4 (2004); *id.*, at 182 tbl.C-4 (2005); *id.*, at 182 tbl.C-4 (2006); *id.*, at 169 tbl.C-4 (2007); *id.*, at 167 tbl.C-4 (2008); *id.*, at 165 tbl.C-4 (2009); *id.*, at 168 tbl.C-4 (2010); *id.*, at 149 tbl.C-4 (2011). It is important to note that the Administrative Office of the U.S. Courts releases several different annual tables, which report trial statistics in various formats. In this Article, we report statistics from the following tables: C-4 and D-4, which provide information regarding the number, type, and progress of cases terminated in a given year (for civil and criminal cases, respectively); C-3 and D-3, which provide information on the number, type, and progress of cases commenced in a

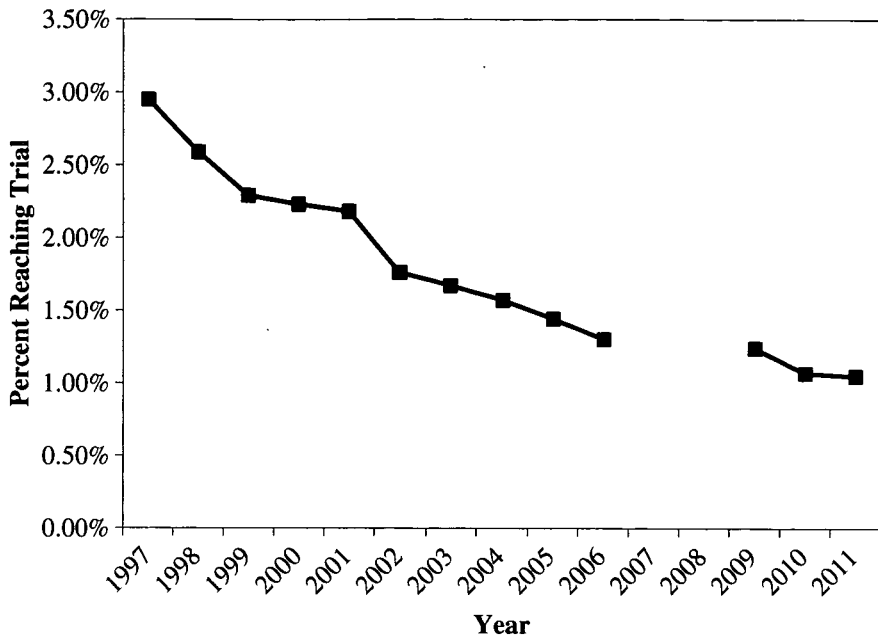
The most recent data slightly modify the story of the downfall of the trial. An extremely low number of civil cases reach trial, but the 2009–2011 data indicate that, for the first time since 1998, no further losses have been occurring in the raw number of trials. In fact, 2010 saw a small increase in the absolute number of civil cases reaching trial, from 3,271 trials in 2009 to 3,309 in 2010. It is, however, far too early to tell whether this is indicative of a “bottoming out” of the number of civil trials; a similar trend can be seen between 2004 and 2005, when the number of trials only dropped from 3,951 (in 2004) to 3,899 (in 2005) before resuming the steep downward trend.⁹³

Turning to the percentage of civil cases that reach trial, Figure 2 shows a very similar shape to the curve—the continuing downward trend as originally reported by Professor Galanter, followed by a leveling off in 2011.

given year; and T-1, which provides the number of contested proceedings involving the presentation of evidence, including evidentiary hearings and sentencing hearings for both civil and criminal trials. In his 2004 article, Professor Galanter relied primarily on trial data from table C-4, so we initially present our updated trial data based on that table. For additional explanation of the various tables provided by the Administrative Office, see Herbert M. Kritzer, *The Trials and Tribulations of Counting “Trials”*, 62 DEPAUL L. REV. 415 (2012). Finally, we also present data not available in the Administrative Office Annual Report in the form of data on the duration of trials. See *infra* Figures 13–14.

93. See *supra* note 92 and accompanying Figure. We also calculated both the absolute number of civil trials per judge and the absolute number of criminal defendants disposed of by trial per judge. We have not presented these data graphically because the number of active judges over the past fifteen years has remained relatively steady, and thus the data convey little information not already conveyed in Figures 1 and 5. In 1996, there were 603 active Article III judges and 502 magistrate judges. These numbers fluctuate from year to year with a slow rise, ending with 646 active Article III judges and 574 magistrate judges in 2011—a difference of 115 judges, or a 9% increase. This increase was not enough to account for the quickly diminishing criminal and civil trial rates; that is, the number of civil and criminal trials per judge has steadily decreased over the past fifteen years.

FIGURE 2: PERCENT OF FEDERAL CIVIL CASES REACHING TRIAL, 1997–2011⁹⁴

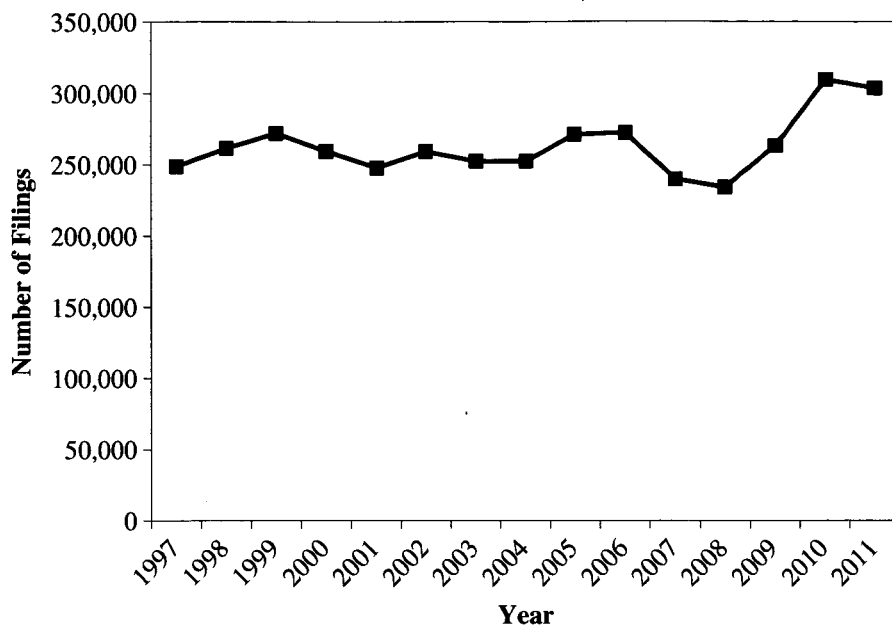


The increase in absolute trial numbers in 2010 is not reflected in the percentage of cases reaching trial, however, which dropped from 1.24% to 1.07% between 2009 and 2010. Nonetheless, the percentage drop from 1.07% to 1.05% between 2010 and 2011 is the smallest drop in the entire sample and the smallest drop since 1993–1994, when the percentage of civil cases resulting in trial moved from 3.4% to 3.5%.⁹⁵ As with the absolute trial numbers, we must wait for future years to know whether the trial rate has finally hit rock bottom or will continue to fall.

While this drop in civil trials would be unsurprising if the number of civil filings were decreasing, this is not the case, as we have learned from Professor Galanter's and others' previous work. Figure 3 displays the relatively steady levels of civil filings over the past fifteen years, hovering around 250,000 filings per year, with a sharp increase in filings between 2008 and 2010. Despite this sharp increase, there is no corresponding increase in the absolute number of civil trials or the percentage of civil cases reaching trial.

94. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See *supra* note 92.

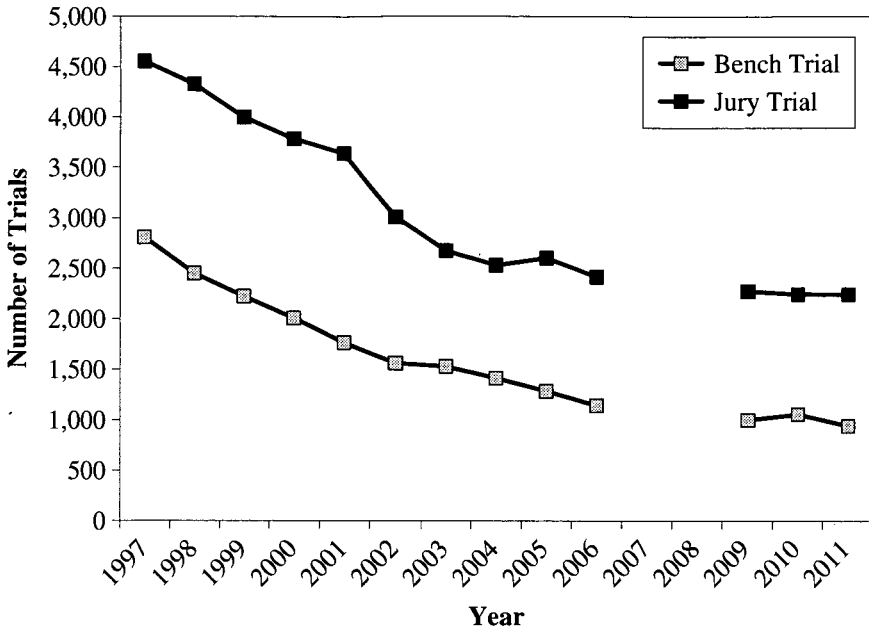
95. See Galanter, *supra* note 1, at 534 tbl.A-2.

FIGURE 3: TOTAL CIVIL FILINGS, 1997–2011⁹⁶

The drop in number of civil trials over time, as Galanter showed, has not been confined to jury trials. As Figure 4 indicates, the numbers of both jury and bench trials have decreased over time. Moreover, both appear to have leveled off between 2009 and 2011.

96. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See *supra* note 92.

FIGURE 4: ABSOLUTE NUMBERS OF CIVIL BENCH AND JURY TRIALS, 1997–2011⁹⁷



At bottom, the overall pattern of civil trials and civil trial rates from 1997 through 2011 lays the groundwork for the criminal diversion hypothesis by providing evidence that federal courts have been spending less and less time on civil trials: both the absolute number of federal civil trials and the rate of federal civil trials have declined over the past fifteen years as they did in decades before. Next, we turn to the question of whether the increased federal criminal docket explains any portion of this decline.

B. *The Criminal Diversion Hypothesis and Criminal Trial Rates*

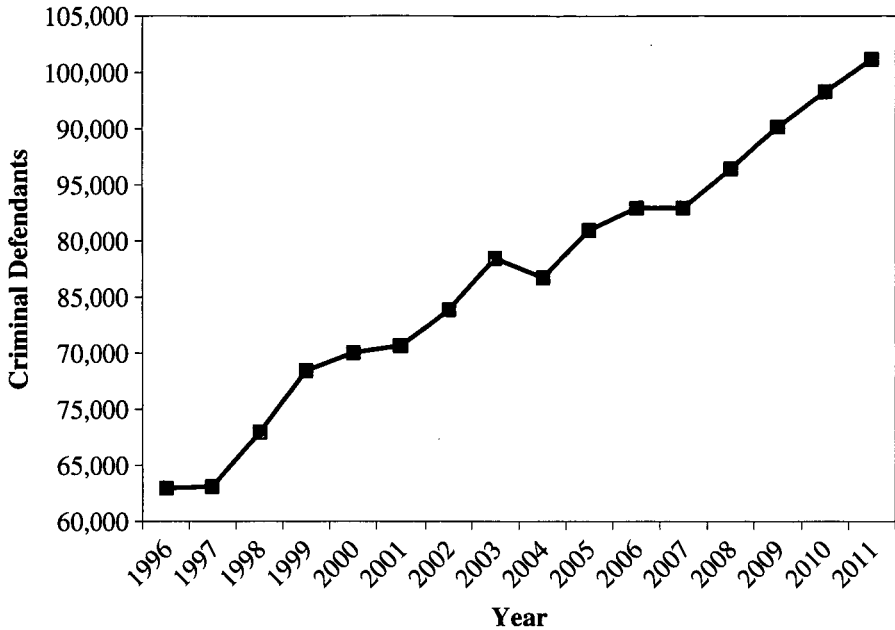
One might expect that the chief predictions made by the criminal diversion hypothesis would relate to the number of criminal trials that are being conducted by the federal judiciary. The trial is one of the most resource-demanding elements of litigation—courts managing a trial must deal with preparation for the trial, including pretrial motions, jury selection, and evidentiary hearings; the management of the trial itself; and sentencing, which can involve additional determinations of fact. Thus, one can safely assume that, given a consistent

97. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See *supra* note 92.

criminal caseload, courts will be more burdened by the criminal docket if more criminal cases go to trial.

Given this reasoning, if the criminal diversion hypothesis is correct, there should be a relative increase in the number of criminal trials and the criminal trial rate as compared to the number of civil trials and the civil trial rate. If the criminal docket (i.e., the total number of cases) is expanding along with a constant or increasing rate of criminal cases that go to trial, it will produce a greater relative demand for the court's time. Thus, even if there is not specific priority given to criminal trials, judges may simply have to deal with a heavy criminal docket that takes a great amount of time, and this dedication of resources to the criminal docket means less time for civil trials. Therefore, civil litigants' motives to go to trial are reduced (based on the knowledge that it may take a long time to have the case tried, the court may devote fewer resources and less energy to the trial, and so on), leading to fewer civil trials overall. Obviously, a larger number of criminal trials as compared to civil trials, a shift toward more criminal trials and fewer civil trials, or both, would support this hypothesis. We now turn to the evidence regarding the number of criminal trials and criminal trial rates to determine whether there is support for the criminal diversion hypothesis.

Figure 5 presents the number of criminal defendants disposed of in the federal courts from 1996 to 2011.

FIGURE 5: TOTAL CRIMINAL DEFENDANTS DISPOSED, 1996–2011⁹⁸

The data clearly show an increasing federal criminal docket. While civil filings have increased only 21% over the past fifteen years (from 249,336 filings in 1997 to 302,922 filings in 2011), criminal dispositions have nearly doubled, from 63,148 total dispositions in 1997 to 101,148 in 2011. Based on this, one can infer that courts might be spending an increasing amount of time on criminal cases and thus have reduced ability to move civil cases through trial.

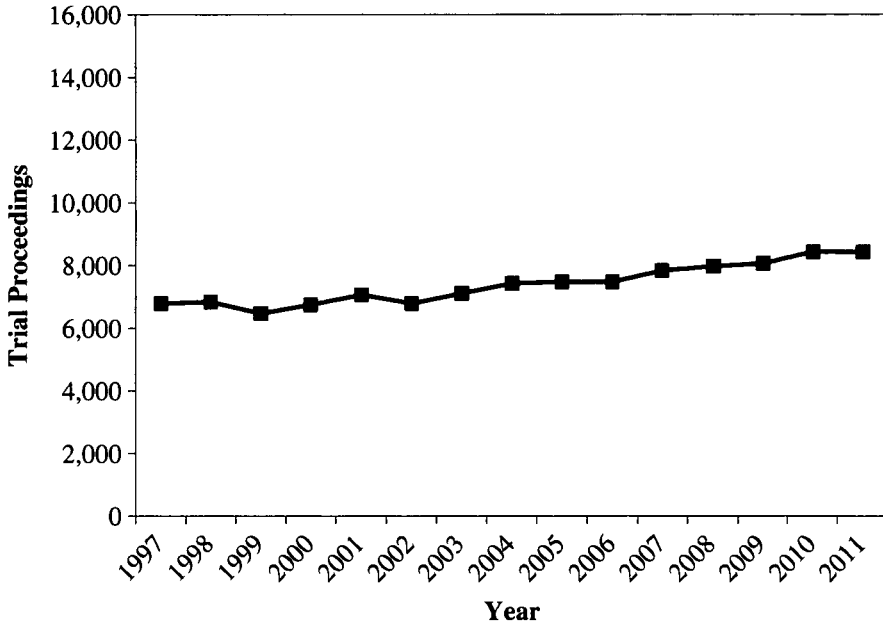
Turning to trial numbers, Figures 6 and 7 display the total number of federal criminal trials from 1997 to 2011. The Administrative Office of the U.S. Courts defines a “trial” as a “contested proceeding[] before a court or jury at which evidence is introduced.”⁹⁹ This broad definition includes sentencing hearings as well as hearings on motions such as preliminary injunctions and temporary restraining orders. We refer to these contested hearings with evidence as “trial proceedings.” Because sentencing hearings are relatively brief and may not be as

98. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 221 tbl.D-4 (1996); *id.*, at 214 tbl.D-4 (1997); *id.*, at 228 tbl.D-4 (1998); *id.*, at 222 tbl.D-4 (1999); *id.*, at 221 tbl.D-4 (2000); *id.*, at 211 tbl.D-4 (2001); *id.*, at 211 tbl.D-4 (2002); *id.*, at 211 tbl.D-4 (2003); *id.*, at 217 tbl.D-4 (2004); *id.*, at 245 tbl.D-4 (2005); *id.*, at 249 tbl.D-4 (2006); *id.*, at 246 tbl.D-4 (2007); *id.*, at 244 tbl.D-4 (2008); *id.*, at 239 tbl.D-4 (2009); *id.*, at 242 tbl.D-4 (2010); *id.*, at 230 tbl.D-4 (2011).

99. *Id.* tbl.T-1 n.1.

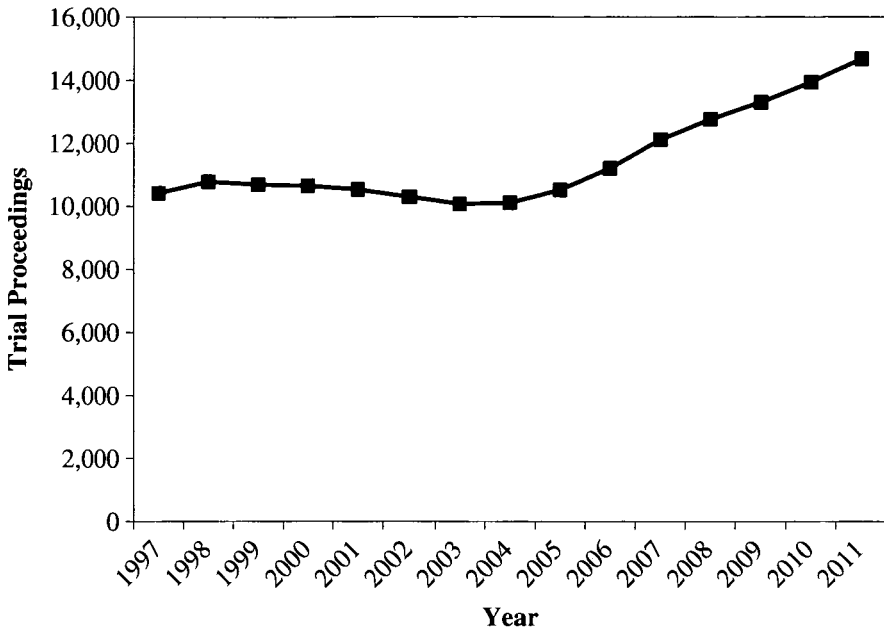
burdensome on the courts as other proceedings, instead primarily reflecting input from other legal actors (such as probation officers charged with preparing presentence reports), we present data both including and excluding sentencing hearings.

FIGURE 6: TOTAL CRIMINAL TRIALS (EXCLUDING SENTENCING HEARINGS), 1997-2011¹⁰⁰



100. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, tbl.T-1 (1997) *id.*, at 374 tbl.T-1 (1998); *id.*, at 365 tbl.T-1 (1999); *id.*, at 377 tbl.T-1 (2000); *id.*, at 366 tbl.T-1 (2001); *id.*, at 371 tbl.T-1 (2002); *id.*, at tbl.T-1 (2003); *id.*, at 375 tbl.T-1 (2004); *id.*, at 409 tbl.T-1 (2005); *id.*, at 395 tbl.T-1 (2006); *id.*, at 390 tbl.T-1 (2007); *id.*, at 388 tbl.T-1 (2008); *id.*, at 383 tbl.T-1 (2009); *id.*, at 388 tbl.T-1 (2010); *id.*, at 374 tbl.T-4 (2011). We present data from table T-1 of the annual report, which reports the number of trials commenced, rather than data from Table D-4, which reports the number of defendants disposed of through trial. Here, we are interested in the burden that the criminal docket places on the court, and dispositional data do not provide complete information on that burden because the defendant may reach a plea-bargaining agreement before the conclusion of the trial. While such a trial certainly places a burden on the court, it is not represented in the dispositional data reported in table D-4. Thus, our data consider all trials commenced, regardless of the way the case was disposed.

FIGURE 7: TOTAL CRIMINAL TRIALS (INCLUDING SENTENCING HEARINGS), 1997–2011¹⁰¹



While Figure 1 displayed a decreasing pattern of civil trials, Figures 6 and 7 show that the number of criminal trials and trial proceedings have increased over the past fifteen years.¹⁰² Figure 6 shows that when sentencing hearings are excluded, this increase has been rather modest, from 6,814 total trials in 1997 to 8,453 in 2011. The increase, shown in Figure 7, has been more dramatic when sentencing hearings are included, from 10,426 trials in 1997 to 14,656 trials in 2011. While the number of total trial proceedings including sentencing hearings actually declined by 314 between 1997 and 2004 (from 10,426 in 1997 to 10,112 in 2004), the total trial proceedings increased by 4,544 between 2004 and 2011. *Booker* was decided on January 12, 2005,¹⁰³ likely influencing trial rates in 2005 and beyond. *Booker* has been interpreted as reducing the power of the prosecutor in eliciting plea bargains, so an increase in both the absolute number of trials and the percentage of criminal cases that go to trial would be expected.¹⁰⁴

101. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See *supra* note 100.

102. As we did with the civil trial numbers, we calculated the absolute number of criminal trials per sitting federal judge and saw no appreciable difference from what is depicted here. See *supra* note 93.

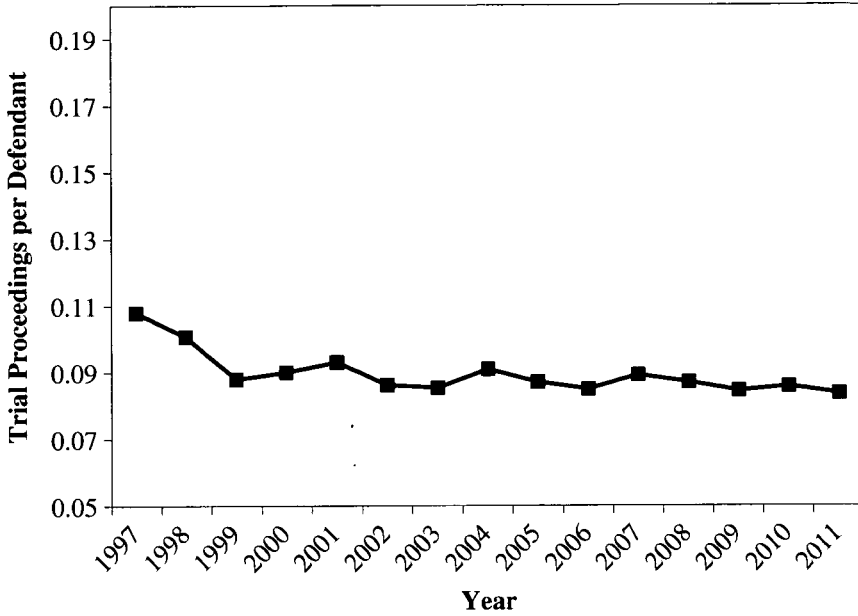
103. *United States v. Booker*, 543 U.S. 220 (2005).

104. See *supra* notes 84–87 and accompanying text.

Additionally, as made clear by Figure 7, *Booker* has required courts to make additional findings of fact in order to reach a sentencing decision, producing a substantial increase in the number of sentencing hearings.

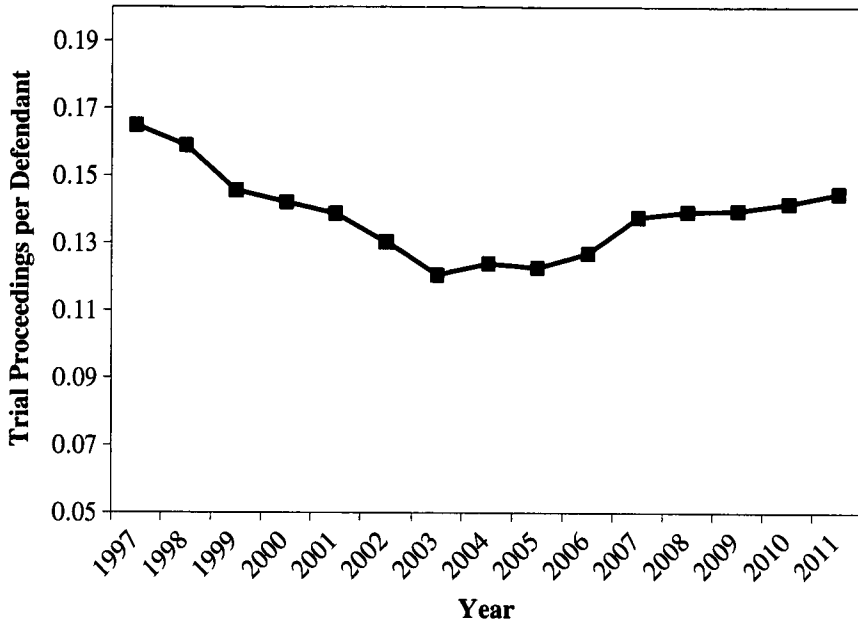
Combining Figures 6 and 7 with Figure 5 yields a rate of trial proceedings per disposed defendant, as depicted in Figures 8 and 9.

FIGURE 8: CRIMINAL TRIALS (EXCLUDING SENTENCING HEARINGS) PER DISPOSED DEFENDANT, 1997–2011¹⁰⁵



105. See *supra* notes 98, 101 and accompanying Figures.

FIGURE 9: CRIMINAL TRIALS (INCLUDING SENTENCING HEARINGS) PER DISPOSED DEFENDANT, 1997-2011¹⁰⁶

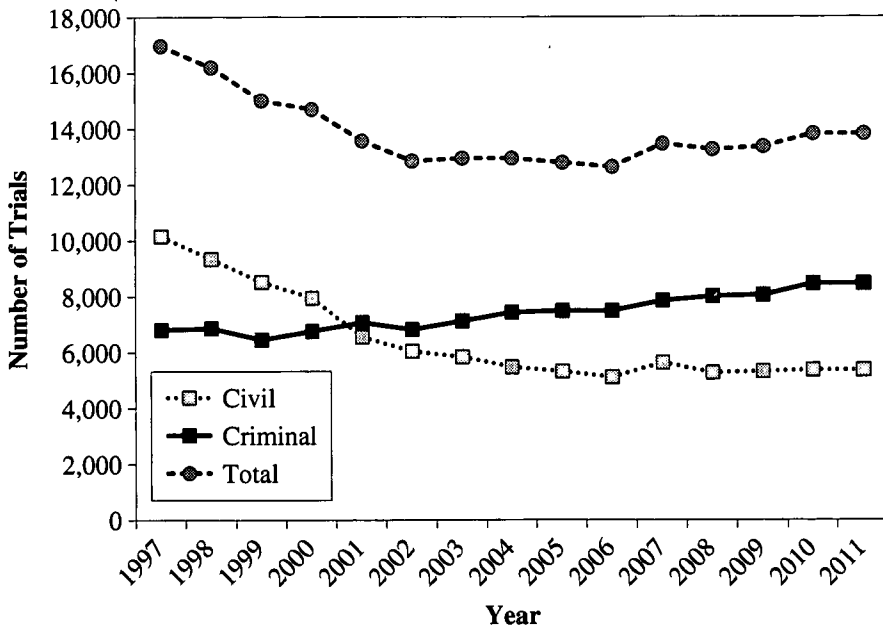


The shape of the curves in Figures 8 and 9 demonstrate that while the raw number of criminal trial proceedings has increased over time, the trial rate is not keeping pace with the increase in the number of defendants disposed of. When sentencing hearings are excluded, there is a slow but steady decline in trial rate, from about 0.11 trials per defendant in 1997 to roughly 0.08 trials per defendant in 2011. Similarly, when including sentencing hearings, there were roughly 0.17 trial proceedings per defendant disposed of in 1997, but only 0.14 per defendant in 2011, though this number was up from the low of 0.12 trial proceedings per defendant in 2003.

106. See *supra* notes 98, 101 and accompanying Figures.

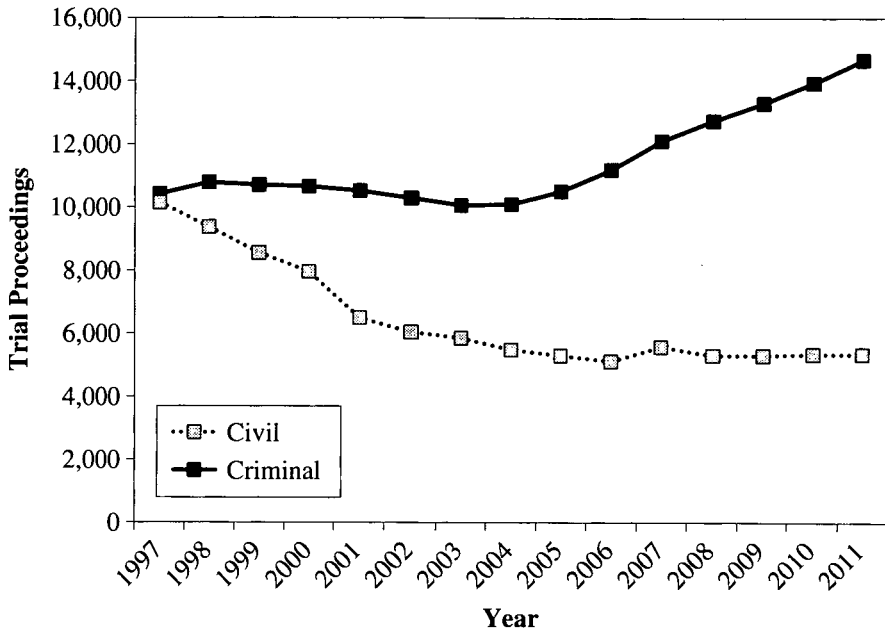
Despite these statistics, recall that in order to support the criminal diversion hypothesis, one need not show that there is an increase or leveling off in criminal trial rates over time. Instead, evidence that more court resources are being diverted to criminal proceedings over time is the key. Thus, the increase in raw numbers of criminal trial proceedings over time provides some support for the hypothesis. A further test, shown in Figures 10 and 11, compares civil and criminal trials between 1997 and 2011 to determine whether criminal and civil trial levels display a complementary pattern of change over time, and are thus consistent with the notion that substitution of criminal for civil trials has been occurring.

FIGURE 10: TOTAL CIVIL AND CRIMINAL PROCEEDINGS
(EXCLUDING SENTENCING HEARINGS), 1997–2011¹⁰⁷



107. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See *supra* note 100.

FIGURE 11: TOTAL CIVIL AND CRIMINAL TRIALS (INCLUDING SENTENCING HEARINGS), 1997–2011¹⁰⁸



The strongest support for the criminal diversion hypothesis would be a figure depicting a crossover interaction between civil and criminal trial numbers in which civil trials decline over time and criminal trials show a complementary increase over the same period. That is not what the figures show. Figure 10 shows that the major decline in civil trials occurred between 1997 and 2003, a period during which the civil trial declined by nearly 50% (from 10,155 trials in 1997 to 5,830 in 2003). However, there is no corresponding increase in criminal trials during that period that could explain the decrease in civil trials, as the criminal diversion hypothesis would predict.¹⁰⁹ When including sentencing hearings (Figure 11), the total number of criminal trial proceedings actually declined during that period, before a sharp increase starting with *Booker* in 2005. That sharp increase, however, did not result in a subsequent decrease in civil trials. Instead the number of civil trials begins to level off in 2005 (there were 5,830 civil trials in 2003 and 5,357 in 2011), at precisely the time when the criminal diversion hypothesis would predict a reduction based on the increased

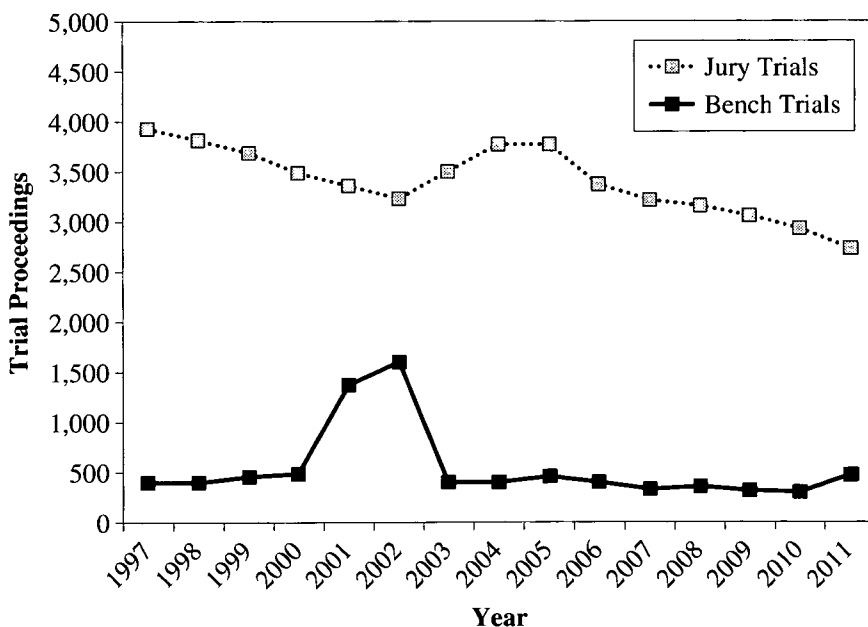
108. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See *supra* note 100.

109. We also examined the patterns over time within each circuit and found no evidence that criminal trials displaced civil trials between 1997 and 2003, when civil trials showed their most dramatic drop. In all, the individual circuit data look much like the data shown in Figure 10.

criminal trial rate. Even when discounting criminal sentencing hearings, the criminal diversion hypothesis cannot account for the civil trial rates; the sharp reduction in civil trials from 1997 to 2003 is not accompanied by a corresponding increase in criminal trials in Figure 10.

Another source of diversion would be possible if criminal bench trials dropped over time, but criminal jury trials remained steady or increased over time. Jury trials are generally perceived to be more resource-intensive for the courts, so an increased number of jury trials may demand more court resources even while holding constant the total number of trials (bench plus jury). As Figure 12 shows, however, jury trials have declined over time, while bench trials have remained steady. Following a temporary increase in 2005, jury trials showed a continued decline, at least through 2011.

FIGURE 12: TOTAL CRIMINAL JURY AND BENCH TRIALS, 1997–2011¹¹⁰



In sum, the criminal trial rates provide little support for the criminal diversion hypothesis. In terms of total trials, while the number of criminal trials has risen, that rise occurred after most of the reduction in civil trials took place, while the criminal diversion hypothesis would

110. Derived by authors from the Annual Reports of the Administrative Office of U.S. Courts. See *supra* note 100.

predict that reductions in civil trials would *follow*, or at least accompany, increases in criminal trials. Moreover, while civil trial rates have declined, those declines are not matched by corresponding increases in criminal trials or trial proceedings. As a proportion of the overall caseload, criminal trial rates have also declined since 1997. However, this examination of trials and trial rates does not paint the full picture of the criminal diversion hypothesis. While trials are extremely time and resource consuming, the possibility remains that other parts of the criminal docket, such as motion practice and sentencing, take resources away from the judge that could be used for the expeditious processing of civil cases to trial. The real measure that would be most informative is the total amount of time and resources spent by the judge on civil cases and on criminal cases—trial rates are simply one of many potential proxies for this measure. We know of no comprehensive measure of this resource allocation, but in the next Subpart, we attempt to approximate a measure of the total resources spent by the court by examining the duration of federal criminal cases over time.

C. *The Criminal Diversion Hypothesis and Criminal Case Durations*

While trial rates are easily measured, the allocation of work by a federal judge is far more complicated to assess. As a result, it is difficult to determine how much time, absolutely or relatively, federal judges spend on criminal versus civil cases. Here we use one, albeit imperfect, proxy: the number of days that a criminal case remains in the federal system between indictment and trial or plea. Specifically, we measured the time from an individual's indictment to the beginning of trial or entering of a plea. We chose this particular timeframe primarily because it is likely to be the time that the court is spending the most time on a criminal case, and thus the greatest contributor to possible diversion.

Additionally, there are two reasons why we have chosen to use the number of days as our measure: (1) it is definite and objectively measurable and (2) it can be measured at the single case level—we can identify the duration of each and every case that is processed in the federal courts. Of course, the obvious major downside of using this variable as a proxy for judicial workload is that it may not represent judicial workload at all: cases may sit idly for long intervals without requiring action from the judge, increasing the total duration of the case but not using judicial resources. Nonetheless, the Speedy Trial Act reduces the possible interval of inactivity for criminal cases, unless

the defendant permits a longer delay by waiving his right to a speedy trial. We further discuss this limitation below in our assessment of the meaning of our results.

The federal courts track criminal case duration data in three different intervals: (1) from a suspect's arrest to his indictment or first appearance before a court, (2) from the defendant's indictment to either his trial or his plea bargain, and (3) from the defendant's conviction to his sentencing.¹¹¹ The Speedy Trial Act has a definite influence on these durations. Most notably, it provides time limits on the first two intervals: the time from a suspect's arrest to the filing of a charge against him cannot exceed thirty days¹¹² and the duration from a defendant's indictment to his trial or plea bargain cannot exceed seventy days.¹¹³ While these limitations provide only hard ceilings to guide the court and thus do not severely limit what can be extrapolated from the data, they are worth bearing in mind as we move forward.

Here, we focus on the second of these intervals: the duration from the defendant's indictment to his trial or plea. We focus on this interval because it is the period of time when the judge is likely to be most heavily involved in the case. The first interval, from arrest to indictment, occurs largely before the court gets involved in the proceeding—law enforcement and the prosecution are investigating the case and preparing for indictment while the court plays only a minimal role. The third interval, conviction to sentencing, requires court resources, but absorbs much less judicial time, particularly if a plea agreement has already been reached. The second interval, indictment to either trial or a guilty plea, is the timeframe in which the judge is most heavily involved in the case, handling motions from the parties and working to move the case toward trial or other disposition within the seventy-day window.¹¹⁴

111. Unfortunately, we do not have access to case-level data on the duration of trials, which would also be valuable information in assessing the extent to which the criminal trial is a burden on the system and limits the availability of the courts for civil trials.

112. 18 U.S.C. § 3161(b) (2006).

113. *Id.* § 3161(c)(1).

114. The seventy-day window can, of course, be extended through a variety of procedures, such as "delay" resulting from mental competency hearings, other charges against the defendant, interlocutory appeal, pretrial motions, transfer of the case, or consideration of plea agreements. *Id.* § 3161(h)(1). Defendants cannot, however, expressly waive the right to a speedy trial since the Supreme Court's decision in *Zedner v. United States*, in which the Court concluded that the public's interest in a speedy trial is also protected by the Act. See *Zedner v. United States*, 547 U.S. 489, 500–01 (2006). If the defendant wishes to waive the right, however, he may be able to do so using one of the many devices provided for in the Act. In our dataset, 10% of cases lasted longer than seventy days between indictment and trial or plea.

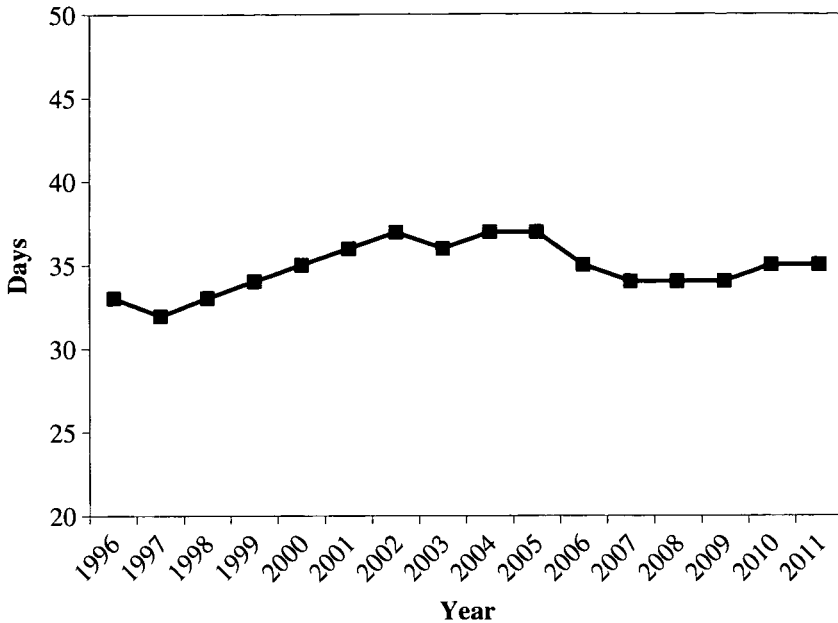
Applying these intervals to our assessment of the criminal diversion hypothesis, if the hypothesis is correct, there should be an increase in court resources spent on criminal trials, which may be driving a drop in civil trials if resources are being “diverted” from civil to criminal trials. The first form this could take would be an increase in the average time spent per criminal trial from indictment to trial or plea.¹¹⁵ The second form would be a growth in the total number of days occupied by all criminal cases. We begin with duration per case.

Turning to the data, Figure 13 presents the median duration from indictment to either a trial or a plea bargain.¹¹⁶

115. There is some potential argument that a shift in either direction could support the criminal diversion hypothesis. If the average duration of a criminal case *increases* over time, it could mean that courts are spending more time and resources on criminal cases; the more time that the case is in the judge’s hands, the more energy he likely devotes to it. However, the contrary explanation might also carry some weight: an increased duration of criminal trials could mean that judges are devoting less time to processing cases quickly, taking the maximum time afforded to them under the Speedy Trial Act, which might not be burdening the court to the point that civil trials are compromised. Likewise, if the average duration of criminal cases decreases over time, it could mean either that judges are devoting maximum resources to them in order to speedily move them through the system, or it could mean that the cases are simply easier to resolve—with fewer going to trial and a reduced amount of work spent on each case. We find the first hypothesis much more plausible—there is no reason to expect that judges are suddenly spending more resources on criminal cases to resolve them more quickly. If anything, the increased docket makes quick resolution more difficult. Thus, we proceed on the assumption that the criminal diversion hypothesis would predict an *increase* in the duration of criminal cases, thereby reducing the amount of time the court has for civil trials.

116. These data were collected from a large database kept by the Federal Judicial Center of all federal criminal defendant dispositions. One variable in the database coded for the “net days consumed from indictment or information, or first appearance before a judicial officer where charges are pending to trial . . . or a plea of guilty or nolo.” INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, FED. COURT CASES INTEGRATED DATABASE 25 (2007). This variable ranged from a minimum value of zero days to a maximum value of 999 days. When examining the dataset, we discovered abnormal shifts in the coding of interval lengths of zero, one, and seventy and above, which seemed to be indicative of changes in coding methodology over time. Thus, we restricted our sample to only cases in which the interval was between two and sixty-nine days and were disposed of by trial or a plea. This restricted sample contained approximately 60% of all cases in the dataset. The combined interval lengths of zero and one were approximately evenly distributed over time, as were the lengths of seventy and above, so we have no reason to believe that this restriction in sampling systematically affected our observed intervals over time. Nonetheless, this limits the conclusions that we can draw from these data.

FIGURE 13: MEDIAN DURATION FROM INDICTMENT TO TRIAL OR PLEA, 1996–2011¹¹⁷



The figure tells a story of relatively little change in the median amount of time required for criminal cases between indictment and trial or plea over the past fifteen years.¹¹⁸ The median duration was thirty-three days in 1996, followed by a small but steady climb to a high point of thirty-seven days in 2002. After 2004, the duration has remained relatively stable, never shifting outside of a thirty-four-to-thirty-seven day range, and finishing with a median of thirty-five days in 2011. None of these shifts appear to be representative of a larger overall trend because the duration is not changing over time.

However, even though the median and mean number of days during this interval have not changed, there is another way in which diversion can be expressed. Recall that the number of criminal cases handled by the federal courts has nearly doubled over time—from 63,148 in 1997 to 101,149 in 2011.¹¹⁹ Thus, the sheer volume of criminal cases to

117. Derived by authors from data provided by the Federal Judicial Center (on file with authors).

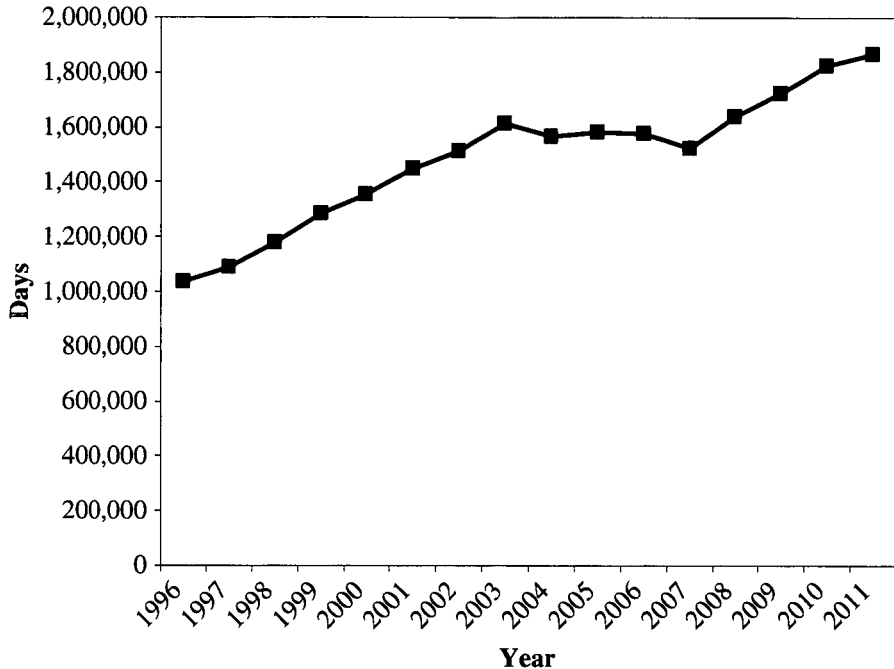
118. The mean duration, which we do not present, takes on nearly the exact same shape as the median duration. In 2006, the mean duration from indictment to trial or a plea bargain was 33.5 days, with a steady, small increase to a high level of 36.3 days in 2004, and has remained stable since then, with a mean of 34.9 days in 2011.

119. See *supra* Figure 5.

handle might divert the court to the criminal docket even if the average time to trial or plea remained constant.

Aggregating the average values of processing time above, in Figure 14 we arrive at a total number of days spent processing federal criminal cases from indictment to trial or plea bargaining.

FIGURE 14: TOTAL PROCESSING TIME FROM INDICTMENT TO TRIAL OR PLEA, 1996–2011¹²⁰



This figure represents the grand total number of days that criminal cases are open during the interval most burdensome to the federal courts. Here, we see a different picture of the amount of strain that the criminal docket places on the court. As the overall criminal docket has nearly doubled and the average duration of the proceedings leading up to the plea or trial has remained steady, the overall number of days that the court must devote to these cases in this interval has likewise nearly doubled, from 1.04 million total days in 1996 to 1.87 million in 2011. Thus, if the number of days criminal cases spend in the system before trial or plea is a good proxy for the amount of resources the court must put into the criminal docket, these data do provide some evidence for the criminal diversion hypothesis. While

120. Derived by authors from data provided by the Federal Judicial Center (on file with authors).

the average duration of each criminal case from indictment to trial or plea has remained constant over the past fifteen years, this fact combined with the fact that the docket has increased has led to a much greater number of days that criminal cases are before the court.

IV. CONCLUSION

The story told by the data presented here is a modest one: we find some limited, potential support for the criminal diversion hypothesis in the period between 1996 and 2011. To summarize our findings, we have shown that the decreases in civil trial rates demonstrated by Professor Galanter in 2004¹²¹ and again in 2010 (with data through the 2009 fiscal year)¹²² persist through 2011, though the recent years suggest the possibility that the civil trial rate has finally hit its floor and begun to level off. As Galanter has suggested, however, there is little room for further decrease. Despite the rapidly increasing number of criminal defendants moved through the federal court system, the number of federal criminal trials has only increased slightly when one does not consider sentencing hearings as trials. Even when sentencing hearings are included, the increase in criminal trial proceedings has not led to an accompanying or subsequent decrease in civil trials. In terms of a percentage of the total docket, criminal trial rates have remained steady. While this doesn't necessarily discount the criminal diversion hypothesis as criminal docket factors (such as changes in the mix of cases) could be in part responsible for the decline of the civil trial, this evidence provides no clear support for the theory that criminal trials themselves are responsible for reducing the number of civil trials.

Of course, the trial is not the only criminal procedure that burdens the federal courts—courts must also move cases through the system toward the trial or plea. Our data regarding the duration of federal criminal cases are more difficult to interpret because they are an imperfect proxy for the judicial workload, but they offer some indication that the increasing number of criminal cases in the system may demand greater attention from judges, providing some support for the criminal diversion hypothesis. The average time per case for the phase in which the court is most involved (between indictment and plea or a trial) has remained unchanged over the past fifteen years, indicating that judges are spending no more time with each criminal case on their docket. Over the same interval, however, the criminal

121. See Galanter, *supra* note 1.

122. See Galanter & Froznea, *supra* note 36.

caseload of the federal courts has grown, as have the total days devoted to criminal cases between indictment and trial or plea. While it is unclear whether this means judges are prioritizing criminal cases over civil ones or if they are actually spending more time on criminal cases, the pattern does offer some support for the criminal diversion hypothesis.

Our results clearly do not explain the precipitous drop in federal civil trials that Professor Galanter identified nearly a decade ago. As he suggested, many other sources are likely explanations for the vanishing civil trial. He cataloged a number of these explanations in a 2005 article in the *Stanford Law Review*,¹²³ including:

- A change in the mix of cases being filed, with fewer trial-prone types of cases in the mix;
- Increasing complexity and cost of going to trial;
- Longer wait times in order to reach trial;
- Exaggerated estimations of plaintiff success by corporate defendants;
- An increased use of alternative dispute resolution; and
- A shift of the judicial role from trial judge to dispute resolver, and an increased pretrial judicial role.

Our data here do not speak directly to any of these competing theories, although our results do suggest that judges may be spending an increased amount of their time on criminal matters. Yet we have no direct measure of the extent to which there is a longer wait time for civil trials than there was in the past. We note one important way, which we could not measure here, that an expanding criminal docket without an increase in number of trials could be displacing civil trials on the docket. If criminal defendants plead guilty on the eve of trial, a trial does not take place although court time has been reserved for that trial. And defendants do enter pleas on the eve of trial.¹²⁴ We cannot know whether last minute pleading by defendants on the growing criminal docket could be causing a serious displacement of the civil trial without studying trial dates and last minute pleas. That is a study waiting to be done.

One other result from our current research offers a limited survival sign for the vanishing civil trial. Our modest update of Galanter's trends through 2011 suggests that federal civil trial rates may finally be leveling off. The question that remains on the table, if we find that the

123. Galanter, *supra* note 15, at 1262–63.

124. See, e.g., Times Topics, *Bernard B. Kerik*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/k/bernard_b_kerik/index.html (last updated May 18, 2010); Press Release, U.S. District Attorney's Office, *Lawyer Pleads Guilty to Felony Charges on Eve of Trial* (Feb. 23, 2010), available at <http://www.fbi.gov/lasvegas/press-releases/2010/lv022310.htm>.

decline has finally hit bottom and the smile of the Cheshire cat still remains, is whether the remnant is enough to provide “a legal system in which judges and juries devise public standards and assess accountability.”¹²⁵ We are among the many who would have doubts.

125. Galanter, *supra* note 15 at 1273–74.

