Brigham Young University Journal of Public Law

Volume 24 | Issue 1 Article 2

5-1-2009

The Swinging Pendulum of Sentencing Reform: Political Actors Regulating District Court Discretion

Lydia Brashear Tiede

The Swinging Pendulum of Sentencing Reform: Political Actors Regulating District Court Discretion

Lydia Brashear Tiede[*]

ABSTRACT

In this article, application of the U.S. Sentencing Guidelines and changes to the law, limiting and expanding judicial discretion under the Guidelines are analyzed from 1999 to 2006 for a sample of drug trafficking cases. Despite a large number of studies on the impact of the U.S. Sentencing Guidelines and their reform, this is the only recent study that specifically controls for case fact variation so that the effect of the law and reforms can be properly tested. Most previous studies of the Guidelines to date do not adequately consider how the facts of the cases may drive the decisions that judges are making. This study substantially advances our understanding of the Guidelines by analyzing cases with similar case facts. The method employed allows for a specific analysis of how the Guideline system both allows for and prevents political actors from controlling disparity in sentencing. The results show that when district court judges use sentencing tables required by the Sentencing Guidelines they overwhelmingly focus their decisions at the very minimum of those ranges, suggesting judicial preferences that are at odds with those of Congress. Further, disparity in sentencing persists among the circuits despite laws that constrain judicial discretion, such as the PROTECT Act of 2003, and laws or cases that broaden discretion, such as the decision of the United States Supreme Court in United States v. Booker. Although disparity is often viewed by politicians and judicial scholars negatively, I argue, based on my quantitative analysis as well as judges' opinions collected from an original nationwide survey and live interviews, that such disparity correctly reflects local realities faced by district court judges in various regions across the country.

---

* Assistant Professor, Department of Political Science, University of Houston. This project was supported by award #2007-IJ-CX-0015 awarded by the National Institute of Justice, Office of Justice Programs, United States Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this publication are those of the author and do not necessarily reflect the views of the Department of Justice. I would like to thank federal district court judges across the country who responded to the district court survey and/or agreed to an interview to increase my understanding of sentencing reform. Without their willingness to take the time to answer my inquiries, this project would not have been possible.

I. INTRODUCTION

Sentencing law reform is a manifestation of the constant battle waged between politicians who want to appear tough on crime and judges who want to act independently to apply their expertise and judgment in adjudicating criminal cases. Politicians worldwide are concerned about what voters think, and this electoral connection[1] makes them especially interested in the public's opinion on issues concerning law, order, and security. As a result, legislators enact and amend criminal and sentencing laws at a constant pace in the hope of constraining judges deemed to be too soft on crime and a judicial branch deemed to be too independent. Sometimes, higher courts assert themselves in the reform process by ruling legislation unconstitutional or directing lower courts regarding interpretation of the law.

Continuous reform and reaction to reforms are manifested throughout the federal and individual state sentencing systems, and sentencing reforms that are politically in favor at one time often are deemed out of favor at a later time. For example, in the last two decades stiff sentencing penalties aimed at limiting judicial discretion and providing tough penalties, especially to offenders involved in drug crimes, have predominated the criminal justice agenda. However, recently the U.S. Supreme Court found the federal Guidelines and many state sentencing systems unconstitutional.[2] The Court's decisions have coincided with economic challenges associated with maintaining a burgeoning prison system.[3] Now state and federal legislators are considering less rigid penalties for some offenses to reduce prison overcrowding and the concurrent impact on state and federal budgets.

The Federal Sentencing Guideline system provides a further example

---

1. DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (2d ed. 2004) (arguing that Congressmen single-mindedly seek to be re-elected). As a result, politicians often advocate certain policies and legislative action in hopes of pleasing their constituency, such that they are re-elected. For Mayhew, congressmen are not necessarily concerned with enacting good policy, but rather with enacting policy that will improve their re-election chances. *Id.* at 16. To be re-elected, congressmen engage in three specific activities: "advertising, credit claiming and position taking." *Id.* at 73. When congressmen advocate and vote on legislation supporting or opposing a certain position they engage in all three of these activities.

2. In a series of cases leading up to United States v. Booker, 543 U.S. 220 (2005), the U.S. Supreme Court found sentencing schemes in the following states unconstitutional and required their modification. *See* Cunningham v. California, 549 U.S. 270 (2007) (finding the California determinate sentencing law unconstitutional); Blakely v. Washington, 542 U.S. 296 (2004) (finding the Washington state system violated the Sixth Amendment); Ring v. Arizona, 536 U.S. 584 (2002) (holding that the court must find that an aggravating factor under state law exists beyond a reasonable doubt in order for the defendant to be sentenced to death); Apprendi v. New Jersey, 530 U.S. 466 (2000) (finding the New Jersey system flawed).

3. Sean Hayes, *The End of Determinate Sentencing: How California's Prison Problem Can be Solved with Quick Fixes and a Long Term Commission*, Working paper of the California Sentencing and Corrections Policy Series, Stanford University Criminal Justice Center (2007).

of the swinging pendulum of sentencing reform and is the focus of this Article which tests the impact of the federal Guidelines and recent reforms on case outcomes. The current federal sentencing system was created in 1984 when Congress passed the U.S. Sentencing Reform Act.[4] One of the purposes of this Act was to rein in what were thought to be recalcitrant district court judges whose sentencing decisions were largely inconsistent with one another.[5] The Act created the use of Sentencing Guidelines requiring federal judges to choose sentences for specific crimes from a pre-determined range of possibilities. The U.S. Sentencing Guidelines system, put in place by this Act, is thought to constrain district court judges in sentencing more than any other system in the United States or abroad. Although, the U.S. Sentencing Guidelines were applied to all federal criminal cases, Congress further restrained judicial discretion in 2003 only for the Supreme Court to completely emasculate the Guideline system in the landmark case of *United States v. Booker*.[6]

This article analyzes the Federal Guideline system and reform to this system in order to ascertain whether the intent behind the Guidelines and their reform was achieved.[7] In this way, the article seeks to address the following questions: Did the Guidelines achieve their intended purposes? Did district court judges respond to legislative attacks on their discretion implicit in the Guidelines and their 2003 reforms? Can legislators really

4. Pub. L. No. 98-473, 98 Stat. 1987. Although the Sentencing Reform Act was the first comprehensive piece of legislation which tackled disparity in federal sentencing, President Lyndon Johnson created a National Strategy on Crime in 1966 to deal with the problems related to the federal criminal code and sentencing system. UNITED STATES SENTENCING COMMISSION, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES IN RESPONSE TO SECTION 401(M) OF PUBLIC LAW 108–21, B-2, at 3-5 (2003) [hereinafter USSC Report, 2003]. This strategy resulted in the creation of the Brown Commission which was tasked with revising the entire federal criminal code and reforming sentencing. *Id*.; *see also*, William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 365 (1991) (noting the work of the Brown Commission). One recommendation of the Brown Commission with lasting implications to the Sentencing Reform Act was the listing of authorized sentences for specific federal crimes. REP. NO. 97-307, 1st Sess., at 6 (1981).

5. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 39 (1973) (providing one of the first criticisms of sentencing disparity due to district court judges' unbridled discretion in sentencing). One cannot underestimate the criticism of Frankel, a federal judge and scholar regarding the discretion afforded to judges in sentencing prior to the Guidelines. He stated, "[t]he sentencing power of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all." *Id*. at 8.

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

7. S. REP. NO. 98-225, 1st Sess. (1983) (providing the legislative history of the Sentencing Reform Act); USSC Report, 2003, *supra* note 4, B-1 to B-5 (providing a succinct description of the legislative history of the Sentencing Reform Act of 1984, which created the Sentencing Guidelines as well as the United States Sentencing Commission); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993); Kate Stith & Steve Y. Yoh, *The Politics of Sentencing Reform: The Legislative History of Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (providing a discussion of the legislative history and political discussion relating to the Guidelines).

control judicial discretion through sentencing guidelines, and if so, should they? Finally, should some disparity in sentencing prevail to allow for variations in regional culture? For example, certain regions, such as those along the southwest border of the United States, must deal with unique and heavy case loads related to criminal immigration violations. As a result, these regions may appropriately employ disparate sentencing practices from the rest of the regions in the United States with fewer of these types of cases. The questions addressed above are answered by a unique quantitative analysis of a small group of federal drug trafficking cases which are matched by similarity of case facts and defendants' criminal history. The above questions also are analyzed qualitatively by reference to survey and interview responses. The results of both the quantitative and qualitative analysis show that disparity of sentencing can be controlled by politicians to some extent, is not as serious a harm as suggested by tough-on-crime politicians, and where disparity persists it may be appropriate.

Specifically, this analysis will focus on whether the U. S. Sentencing Guideline scheme, as originally conceived, effectively constrained judges when sentencing defendants for federal drug crimes from 1999 to 2006.[8] Although many studies have been written on the effect of the Guidelines, no recent studies have employed a method controlling for case facts so that the effect of the Guidelines and changes to the Guideline scheme can be tested directly. This analysis not only compares judges' sentencing decisions when they apply Guideline ranges in sentencing tables and depart from these ranges, but also focuses on how the most significant and recent changes in the Guideline scheme mandated by Congress and the U.S. Supreme Court in *United States v. Booker* affected case outcomes, departure rates, and disparity of decisions. This analysis is supplemented with information from interviews and surveys of individual district court judges across the United States to provide insights into how district court judges perceive and react to constraints on their discretion.

In Part II of this article, I review how politicians and higher courts control lower court judges by attempting to curtail their discretion. As seen from this review, most of the scholarly literature refers to intermediate appellate courts rather than trial courts as "lower courts." As a result, this study's focus on district court decision-making adds to a more general understanding of the thought processes of judges at the trial

8. Data for this study was derived from the Inter-University Consortium of Political and Social Research ("ICPSR"), http://www.icpsr.umich.edu. The ICPSR data used for this analysis are entitled "Monitoring of Federal Criminal Sentences" ICPSR study numbers 3106 (1999), 3496 (2000), 3497 (2001), 4110 (2002), 4290 (2003), 4633 (2004), 4630 (2005), and 20120 (2006). Data files generated for this study on two federal drug crimes are available upon request of the author.

court level. In Part III, I provide a description of the Guidelines and how they can be used to answer the questions related to discretion and disparity addressed in this paper. In part IV, I examine recent changes to the Guideline scheme, including the PROTECT Act and *U.S. v. Booker*. In parts V and VI respectively, I test hypotheses, provide results, and comment on their implications regarding the effectiveness of the Guidelines and their reforms. In part VII, I argue that policy makers should not view sentencing disparity due to judicial discretion and regional variations negatively. First, disparity of sentencing may be completely appropriate where judges face different caseloads and types. Second, in order for sentencing to remain individualistic rather than a mechanical application of the law to the facts, some disparity should be expected.

II. CONTROLLING THE LOWER FEDERAL COURTS

Rational choice and strategic interaction theories are largely used to explain how political institutions control the courts.[9] These theories analyze how judges or politicians make strategic decisions based on how they believe other political actors will respond. Generally, the focus of these models is exclusively on how political institutions control either the Supreme Court or the judiciary as a whole.[10] Some, however, focus on how legislators and higher courts control lower appellate courts. In this regard, scholars ask two general questions relating to whether legislators or higher courts can control lower courts' decision-making processes.

First, in the judicial decision-making literature, scholars inquire whether legislation effectively controls lower courts. Mathew McCubbins, Roger Noll and Barry Weingast[11] show that legislatures use structure and process as a means of controlling these courts. These scholars suggest that politicians expand the federal judiciary in order to force the Supreme Court to alter doctrine in a way preferred by political officials.[12] John DeFigueirido and Emerson Tiller also find that Congress

9. LEE EPSTEIN & STEPHEN KNIGHT, THE CHOICES JUSTICES MAKE (1997) (suggesting that Supreme Court justices make decisions based on their own self- interest as well as their beliefs about how other political actors will act).

10. John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990); Rafael Gely & Pablo Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON & ORG. 263 (1991).

11. McCubbins et al., *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995) [hereinafter McCubbins, *Politics*]; *see also* McCubbins et al., *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006) (extending prior studies to show the conditions under which politicians may change the size of the judiciary in order to control it).

12. McCubbins, *Politics*, *supra* note 11.

controls the federal judiciary by its "ability to balance or stack the courts through the creation of federal judgeships."[13]

Politicians also determine how judges make decisions on certain matters by including language in statutes that explicitly includes the standards for review that judges must employ when deciding cases and by stating what types of decisions they may review.[14] Huber and Shipan argue that the length of statutes affects judicial discretion. Short statutes provide judges with fewer instructions regarding their decision-making and thus allow judges to use their own individual discretion.[15] Alternatively, longer statutes provide more detailed instructions about how judges should act and thus curtail discretion.[16] Some scholars strongly oppose the view that law and process exclusively affect decision-making and instead espouse the attitudinal model, which posits that judges make decisions based on their policy or political preferences rather than strict adherence to the law.[17] In the sentencing arena, Schanzenbach and Tiller[18] and Cross and Tiller[19] show that the compliance of lower courts is a function of the political composition and political proclivities of lower court judges via the court of appeals.

Second, judicial scholars ask whether higher court precedent

13. John DeFigueriredo & Emerson Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 435 (1996) (noting that Congress is more inclined to expand the judiciary when the nominating president and confirming Senate are politically aligned).

14. *See* McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444–45 (1989) ("[O]ne potential means of protecting against judicial readjustment of policy is to use either explicit legislation or administrative procedures in an attempt to constrain judicial decisions.").

15. JOHN HUBER & CHARLES SHIPAN, DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY 44–77, 176–83 (2002).

16. *Id.* Huber and Shipan argue that the number of words present in a statute define how much discretion judges have. *Id.* at 44. For example, statutes with many words are supposed to put more constraints on judges' discretion and statutes with fewer words are supposed to contain fewer constraints. *Id.* at 44–45. While Huber and Shipan correctly assert that the written law guides the amount of discretion that Congress provides judges, making this dependent on the number of words in a given statute is not a proper measure of discretion. Some statutes may appear short because they incorporate other, possibly more specific statutes, defining judges' discretion. Likewise, some statutes may be very long because they include many details unrelated to judicial discretion.

17. JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); *see also* JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

18. Max Schanzenbach & Emerson Tiller, *Strategic Judging under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2006) (showing that the political composition of both circuit courts and district courts affects sentencing decisions). The authors find that judges appointed by Republicans issued higher sentences for street crimes and lower sentences for white collar and environmental crimes than their Democratic counterparts. *Id.* at 52. These authors also analyze how the political composition of the circuits in which they sit affects district court judges' sentences. *Id.* at 44–52.

19. Frank Cross & Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeals*, 107 YALE L. J. 2155, 2155–76 (1998).

effectively controls lower courts. On one side of the debate, scholars believe that lower court judges defy precedent issued by higher courts.[20] In many instances higher courts fail to sanction these lower courts for non-compliance because there are too many lower courts and cases to monitor. McCubbins, Noll and Weingast show that to deal with its inability to fully monitor all lower courts, the Supreme Court expands judicial doctrine to widen the range of acceptable decisions near its ideal policy.[21] McCubbins, Noll, and Weingast specifically state:

When the Supreme Court's resources are extensive and most lower courts do not disagree substantially with the Court, the Court can enforce a doctrine that focuses narrowly on its preferred interpretation. In contrast, when most lower courts differ substantially from the preferred doctrine of the Supreme Court, the problem of noncompliance becomes important. Our theory suggests that the Supreme Court will expand the range of lower court decisions that it finds acceptable when faced with substantial noncompliance by the lower courts. By expanding the latitude allowed under its precedents, the Court both cajoles some lower bench jurists to abide by the new precedents and isolates those who do not. The Court can then focus its attention on the most egregiously nonconforming lower court decisions, and on the issues it most cares about.[22]

By cajoling lower courts to comply with Supreme Court doctrine, the higher court is in fact curtailing the independence of lower court judges, who have their own individual preferences and ideology. Thus, within the judiciary, lower court judges are arguably not independent of senior appellate judges or the preferences of these judges. In this way, these authors find that *stare decisis* is a "self-enforcing equilibrium in strategic interaction for the Supreme Court and lower courts" and that the greater the potential for non-compliance by lower courts, the more lax is judicial doctrine.[23]

On the other side of the debate regarding higher court precedent are

20. Many scholars believe that lower court judges are unconcerned with being reversed, and consequently the fear of reversal does not drive their actions. *See* JACK PELATSON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971) (providing one of the first analyses that show that district court judges did not comply with the U.S. Supreme Court's precedent in desegregation cases); B.C. Canon & D. Jaros, *External Variables, Institutional Structure and Dissent on State Supreme Courts*, 4 POLITY 185 (1974); *see also* David Klein & Robert Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 602 (2003) (suggesting that while lower courts seem to comply with higher courts, it is not due to a fear of reversal from these higher courts, but rather due to shortcuts judges must make in order to handle heavy case loads).

21. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636–40 (1995) (explaining how the Supreme Court "induces" the lower courts to comply with the Supreme Court's own doctrinal choices).

22. *Id*. at 1634.

23. *Id*. at 1635.

scholars who generally believe that lower courts are loyal to and comply with higher court precedent.[24] These scholars not only vary in methodology, but also differ in the justifications provided for why these courts comply. Songer, Segal, and Cameron argue that the Supreme Court controls the discretion of circuit court judges due to its position in the judicial hierarchy.[25] These scholars find that in search and seizure cases, the courts of appeal are highly congruent (i.e. follow Supreme Court policy) and responsive (i.e. change policy when the Supreme Court changes). Songer, Segal, and Cameron conclude that in the limited instances when the courts of appeals fail to comply, they are prevented from excessive shirking as a result of litigants who sound fire alarms when the lower appeals courts' interpretation diverges too greatly from the Supreme Court.[26]

For some scholars, arguing that lower courts comply with higher court precedent, compliance is due to lower court judges' fear of reversal by a higher court.[27] Alternatively, Klein and Hume suggest that lower

24. Many political scientists, studying public law and judicial politics, find that a variety of lower courts follow the precedent set by higher courts. Although many lawyers assume that lower courts follow higher court precedent, some scholars analyze the theory behind this assumption and also test it using quantitative methods. *See* Lawrence Baum, *Responses of Federal District Courts to Court of Appeals Politics: An Exploration*, 33 W. POL. Q. 217, 223 (1980) (assessing how well district courts follow precedent set by courts of appeals); Sara Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 534 (2002) (finding that "unanimity, complexity, and the age of overruled precedent, as well as the likelihood of Supreme Court review," all affect how lower courts respond to Supreme Court precedent); Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents*, 46 STAN. L. REV. 817, 872 (1994) (reviewing the various theoretical arguments supporting the necessity of lower courts to follow higher court precedent); John Gruhl, *The Supreme Court's Impact on Law of Libel: Compliance by Lower Federal Courts* 33 W. POL. Q. 502, 517 (1980) (showing that district courts and courts of appeals comply with Supreme Court precedent in libel suits); Charles Johnson, *Law, Politics and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21(2) LAW & SOC'Y. REV. 325, 338 (1987) (indicating that lower courts tend to follow the Supreme Court "if facts, issues, or (especially) litigants are generally similar between cases in the two courts"); Donald Songer and Reginald Sheehan, *Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Court of Appeals*, 43 W. POL. Q. 297, 313(1990) (showing that the courts of appeals have high rates of compliance with two major U.S. Supreme Court decisions). However, courts of appeals are less likely to follow Supreme Court reasoning than lower district courts. Johnson, *supra* note 24, at 338; *see also*, SARAH BENESH, THE U.S. COURT OF APPEALS AND THE LAW OF CONFESSIONS: PERSPECTIVES ON THE HIERARCHY OF JUSTICE (2002); Donald Songer, Jeffrey Segal & Charles Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 Am. J. Pol. Sci. 673 (1994); Donald Songer, *The Impact of Supreme Court Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830 (1987).

25. Songer, Segal & Cameron, *supra* note 24, at 673–96.

26. *Id.*

27. Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77 (1994) (stating that there is much anecdotal knowledge suggesting that judges fear being reversed because their colleagues will not respect them and that high rates of reversal may hinder professional advancement); *see also* H.W. Elder, *Property Rights Structures and Criminal Courts: An Analysis of State Criminal Courts*, 7 INT'L. REV. L. & ECON. 21 (1987); W. Hansen, Robert Johnson, & Isaac Unah, *Specialized Courts, Bureaucratic*

court compliance is derived from shortcuts for coping with increased caseloads and the desire "to reach legally sound decisions."[28] Still others believe that lower court compliance is due to lower court judges' training or belief that they are required to follow precedent set by higher courts. Compliance is viewed as a manifestation of respect for higher court authority,[29] or as a belief that to do so is a major part of their job as judges. Alternatively, Johnson[30] and Kornhauser[31] imply that following higher court decisions results in more consistent or accurate decisions.

This Article specifically tests whether lower federal courts comply with legislative mandates in the form of the U.S. Sentencing Guidelines and reform as well as with Supreme Court precedent. This is done in two ways. First, sentencing cases, with identical fact patterns, where Guideline sentencing ranges are applied are compared to cases where Guideline ranges are not applied. Second, *changes* in the sentencing Guideline scheme mandated by both Congress and the Supreme Court that restricted or expanded discretion are analyzed. For this part of the analysis, the following changes to the Guidelines are tested: (1) The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003,[32] ["the PROTECT Act"] and the controversial Feeney Amendment, in which Congress restricted the ability of judges and prosecutors to depart from sentencing guidelines, (2) *Blakely v. Washington*,[33] in which the Supreme Court found that the Washington state guideline system was unconstitutional, and (3) *United States v. Booker*,[34] in which the Supreme Court found the federal Guideline system unconstitutional and converted the Guidelines from mandatory to advisory constraints on judges' sentencing discretion. The PROTECT Act limited judicial discretion while the two Supreme Court

---

Agencies and the Politics of U.S. Trade Policy, 39 AM. J. POL. SCI. 529 (1995).

28. Klein & Hume, *supra* note 20, at 602; *see also* VIRGINIA A. HETTINGER ET AL, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING (2006); BENESH, *supra* note 24.

29. *See generally*, Lawrence Baum, *Lower Court Response to Supreme Court Decisions: Reconsidering a Negative Picture*, 3 JUST. SYS. J. 208 (1977); Richard Pacelle & Lawrence Baum, *Supreme Court Authority in the Judiciary: A Study of Remands*, 20 AM. POL. Q. 169 (1992).

30. Charles A. Johnson, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325, 338–39 (1987) (suggesting that judges often follow the legal reasoning in precedent as opposed to following personal political philosophy).

31. Lewis Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1605–07 (1995) (viewing the judicial system as a team that "seeks to maximize the expected number of 'correct' answers").

32. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21. *See* USSC Report, 2003, *supra* note 4, app. B (analyzing the complete legislative background of the PROTECT Act).

33. 542 U.S. 296 (2004).

34. 543 U.S. 220 (2005).

cases expanded it. The legal changes are used to analyze whether lower courts comply with both mandates from Congress and the Supreme Court.

III. THE UNITED STATES SENTENCING GUIDELINES: A TEST CASE IN LIMITING DISCRETION BY LIMITING JUDICIAL CHOICES

Prior to the Guideline system implementation in 1989, judges had broad discretion to determine criminal sentences and parole boards had the power to reduce these sentences by freeing defendants from prison after only serving part of their sentences. While this system had certain advantages, allowing judges to fashion sentences based on defendants' education, work experience, age, and likelihood of committing other crimes;[35] many in the legal community were concerned with the disparate treatment of similarly situated defendants across the nation. This concern, exhibited in the 1950s and 1960s, manifested itself in Congressional debates concerning the federal criminal code and sentencing disparity.[36] This in turn led to the introduction of substantial sentencing reform legislation by Senator Edward Kennedy in 1975.[37] After significant bipartisan efforts, as part of the Sentencing Reform Act of 1984, Congress finally enacted the concept of sentencing guidelines and established the United States Sentencing Commission ("USSC"), an independent agency of the judicial branch. The Guidelines, however, did not become effective until 1989, when the Supreme Court found that the USSC and the Guidelines were constitutional. In *Mistretta v. United States*,[38] the Supreme Court held that in establishing the USSC and

35. To supplement my understanding of judicial decision-making in sentencing, I conducted interviews of district court judges in the Southern, Eastern, and Central judicial districts of California between May 2007 and June 2008. During an interview, one senior-status district court judge, who had served both prior to and after the enactment of the federal Guidelines, stated he had enjoyed the flexibility of the pre-Guideline system allowing him to give young defendants suspended sentences after serving one or two days in county jail so as to dissuade them from committing further crimes. Interview with federal district court judge in S.D. California. (May 9, 2007).

36. USSC Report, 2003, *supra* note 4, app. B; William Wilkins, Phyllis Newton & John Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 366 (1991).

37. USSC Report, 2003, *supra* note 4, B-3.

38. 488 U.S. 361 (1989). In *Mistretta*, the Supreme Court held that the power of the United States Sentencing Commission (USSC) to set Sentencing Guidelines for federal courts was neither an unconstitutional delegation of legislative authority, nor a violation of the separation of powers doctrine.

The original case was brought by a defendant indicted in the United States District Court for the Western District of Missouri. *Mistretta* 488 U.S. at 370. This defendant argued that the Guidelines were invalid because the manner in which the USSC had been created violated the doctrine of separation of powers and that Congress had delegated excessive legislative authority to the USSC in relation to its powers to set guidelines. *Id.* The District Court upheld the constitutionality of the Guidelines. *Id.* Although the defendant originally filed a notice of appeal to

allowing it to create the Guidelines, Congress had violated neither doctrine of separation of powers nor non-delegation.[39]

In enacting the Guidelines and amendments, the USSC and the legislature were given almost exclusive authority to shape how judges could make decisions for certain types of federal criminal cases. In other words, the USSC and Congress could specifically mandate what factors judges could consider in sentencing decisions and could limit their choice of sentences. Pursuant to the United States Code, amendments to the Guidelines suggested by the USSC become enforceable if Congress does not affirmatively overturn them within a 180-day waiting period.[40]

---

the U.S. Court of Appeals for the Eighth Circuit, both the defendant and the prosecution subsequently petitioned the United States Supreme Court for certiorari. *Id.* at 361.

In an opinion by Justice Blackmun joined by Justices Rehnquist, White, Marshall, Stevens, O'Connor, Kennedy, and in pertinent part Brennan, the Supreme Court held that in establishing the USSC and allowing it to create Sentencing Guidelines, Congress had not violated the non-delegation doctrine, because Congress itself had previously defined important criminal offenses and established gradations of punishment. As to the non-delegation doctrine, the Supreme Court indicated the following:

> [The Guidelines] do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations–impose sentences within the broad limits established by Congress.
>
> . . . .
>
> . . . Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law.

Id. at 407. According to the Supreme Court, the USSC's Guidelines were similar to internal regulations enacted by courts. *Id.* at 391.

Scalia was the lone Justice to dissent to the substance of the majority opinion. His dissent was based only on the non-delegation doctrine. Justice Scalia wrote that the Sentencing Reform Act that established the USSC was an invalid delegation of legislative power and authority because the USSC's rule-making power in establishing Guidelines was a legislative power and not a part of a valid exercise of judicial or executive power. *Id.* at 420-21 (Scalia, J., dissenting). Scalia opined that Congress established the Commission only to exercise law-making powers that are exclusively reserved for the legislature. *Id.* at 422 (Scalia, J. dissenting).

The majority also ruled that the establishment of the USSC in the judicial branch did not violate the separation of powers doctrine for several reasons, but most importantly because the functions of the USSC to establish rules and make judgments about sentencing were deemed appropriate for the judicial branch. *Id.* at 408. Furthermore, the creation of the USSC did not violate the separation of powers doctrine because the USSC was not a court and did not hear individual cases and thus did not improperly unite judicial and political power. *Id.*

The effect of the *Mistretta* decision has been far reaching. Sentencing Guidelines established by the USSC and upheld by *Mistretta* and their amendments were applied to approximately 700,000 federal criminal cases between 1989 and 2005 when the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), found that the Guidelines were unconstitutional and rendered their further use as advisory only, rather than mandatory constraints on district court judges.

39. *Id.* at 412.

40. *See* 28 U.S.C. § 994(p) (2006).

The Guidelines enacted by the USSC indicate how much discretion judges can exercise depending on the fact pattern of particular cases and the role that prosecutors take in advocating Guideline departures.

The Guidelines and their amendments have been applied to more than 700,000 federal criminal cases between 1989 and 2005,[41] when the Supreme Court in *United States v. Booker*[42] found the Guidelines unconstitutional and rendered their further use to be only advisory, rather than mandatory constraints on district court judges. Until the *Booker* decision the USSC used the Guidelines as a vehicle for constraining the authority of district court judges by specifying the actual amount of discretion that judges had to sentence defendants in particular types of cases. Through Guidelines, the USSC and Congress specifically chose to limit federal judges' discretion by mandating that judges sentence defendants to specific amounts of time in prison which fall within a certain range of possible sentences in a sentencing table.[43] Although the Guidelines limited district court discretion, they also limited the ability of circuit courts to review district court sentences. Most sentences were reached by plea bargains (studied extensively in this article), and in many cases defendants waived their rights to appeal to a higher court in the plea bargain itself.

41. U.S. SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION (2005) 2, http://www.ussc.gov/general/USSCoverview_2005.pdf.

42. 543 U.S. 220 (2005).

43. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2005). Below is a partial depiction of Sentencing Table, Offense levels range from 1 to 43, with 1 referring to the least serious crimes or facts.

Table N1. Partial depiction of sentencing table in months in prison (Source: USSC)

	Criminal History Category (Criminal History Points)						
	Offense Level	I (0-1)	II (2-3)	III (4,5,6)	IV (7,8,9)	V (10,11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
Zone B	2	0-6	0-6	0-6	0-6	0-6	1-7
	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Zone C	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	78-108	97-121	110-137	130-162	140-185
	29	87-108	97-108	108-135	121-151	140-175	151-188
…	. . .	. . .	. . .	. . .	. . .	. . .	. . .
Zone D	43	life	Life	Life	Life	Life	Life

Specifically, lower district court judges determine criminal sentences by using the USSC's sentencing table. The table has two axes: a horizontal axis which determines a defendant's criminal history category and a vertical axis which classifies the severity of a defendant's offense. To determine the sentence of any offense under the Guidelines, judges first must determine a defendant's criminal history category. Second, lower court judges must determine the offense level ranging from 1 to 43. The Guidelines categorize crimes by type and the offense level is based on whether the crime involved certain additional factors, such as the presence of a firearm or a victim. The offense level may be further altered depending on defendant's role in the crime and his acceptance of responsibility.[44]

Once these two determinations have been made, the district court judge (until the Supreme Court's 2005 decision in *Booker*) was required to sentence a defendant to a prison term that fell within the range determined by the intersection of the criminal history and offense level axes of the sentencing table. In other words, the sentencing table was a mandatory constraint on judicial discretion. In this way, judicial discretion in sentencing decisions was limited to sentencing choices defined by the table ranges that varied as little as six months (i.e. 0 to 6 months or 24-30 months) to those that varied by as much as the length of time between 360 months (30 years) to a defendant's natural life. As a result, discretion to sentence was "cabined within a guideline range that may be a small fraction of the statutory limit."[45] The legislature, upon the recommendation of the USSC, determines this range specifically. Furthermore, when particular offenses have statutory minimum or maximum sentences, the statutory limit is generally controlling. However, in certain instances, judges may apply a "safety valve" provision that allows them to sentence below the statutory minimum. I used cases in which judges applied sentencing table ranges as my control group to compare to a group of cases where even more discretion is afforded through the use of departures.

The Sentencing Guidelines also allow judges to exercise their discretion and depart from the Guideline ranges in very limited circumstances.[46] The limited use of departures has been duly recorded by

44. U.S. SENTENCING GUIDELINES MANUAL, ch. 3 (2005).

45. LUCIEN B. CAMPBELL & HENRY BEMPORAD, AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING 1 (8th ed. 2004) (providing a description of how attorneys should apply the Federal Guidelines).

46. The only Guideline departures analyzed in this paper are those that are "judge-driven." It should be noted, however, that there are "prosecutor-driven" departures where prosecutors and not judges must initially ask for the departure by motion. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005). One example of this type of departure exists when prosecutors ask judges to depart downward from the Guidelines to reward defendants who substantially assisted the government. 18

the USSC which has shown that decisions involving departures constitute just a small percent of all such sentencing decisions.[47] According to the Guidelines, district court judges may sentence outside of the fixed ranges or depart due to "specific offender characteristics" including age, education, and socio-economic background.[48] Although judges may sentence below the Guidelines based on these specific offender characteristics, the USSC determined that these factors "are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range."[49] It should be remembered that the Guidelines were originally adopted to avoid disparities in sentences and to treat similar cases similarly.[50] Consequently, the USSC suggested that special offender characteristics should not be considered except in certain unusual cases.[51]

Departures also may be warranted when "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the USSC in formulating the Guidelines that should result in a sentence different from that described."[52] The Guidelines include a list of twenty specific exceptions which allow judges to depart from the Guidelines.[53] Some of these

---

U.S.C. § 3553(e) (2006). Substantial assistance departures are warranted *only if* the government requests such a departure by motion and the judge grants the motion. *See* Stefanos Bibas, *Federalism: Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137 (2005) (showing that whether departures from substantial assistance are warranted is largely driven by prosecutorial, rather than judicial discretion and may vary with regional practices of prosecutors' offices).

47. USSC Report, 2003, *supra* note 4, at 31.

48. U.S. SENTENCING GUIDELINES MANUAL ch. 2, pt. H, introductory cmt. (2008). Guideline §§ 5H1.1 to 5H1.12 list the following specific offender characteristics:

> 1) age, 2) education and vocational skills, 3) mental and emotional conditions, 4) physical condition including drug or alcohol dependence or abuse; gambling addiction, 5) employment record, 6) family ties and responsibilities 7) role in the offense, 8) criminal history, 9) dependence upon criminal activity for a livelihood, 10) race, sex, national origin, creed, religion and socio-economic status, 11) military, civic, charitable or public service, employment related contributions, record of prior good works, 12) lack of guidance as a youth, 13) relief from disability.

49. *Id.* ch. 5, pt. H, introductory cmt.

50. *Id.* § 1A1.1, p.s. ("Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar conduct by similar offenders.").

51. *Id.* ch.5, pt. H1.1. For specific offender characteristics, see the policy statement at page 444.

52. 18 U.S.C. § 3553b(1). Section 3553 is now used as the legal basis given by district court judges for most departures after *U.S. v. Booker* rendered the guidelines advisory.

53. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.1-2.24 (2008). The twenty-three "other" grounds for departure found in §§ 5K2.1-5K2.21 include:

> 1) death, 2) physical injury, 3) extreme psychological injury, 4) abduction or unlawful restrain, 5) property damage or loss, 6) weapons and dangerous instrumentalities, 7) disruption of governmental function, 8) extreme conduct, 9) criminal purpose 10) victim's conduct, 11) lesser harms, 12) coercion and duress, 13) diminished capacity, 14) public welfare, 15) voluntary disclosure of offense, 16) semiautomatic firearms capable of accepting large capacity magazine, 17) violent street gangs 18) post-sentencing

reasons warrant sentences above the sentencing range, some below the Guideline table range, and some both above and below the range. One of the most significant of these departure reasons allows judges to depart where there are certain circumstances of a kind not adequately taken into consideration.[54] Finally, the government and defendants may reach a plea agreement that allows for a sentence outside of the sentencing ranges.[55] However, such plea agreements are *not* binding and the judge has discretion to disregard them entirely.[56] Judge driven departures serve as a treatment or test group that I analyze.

IV. CHANGES IN THE GUIDELINE SCHEME

Not only does this article include tests on the effect of the Sentencing Guideline scheme on sentencing outcomes, but also includes tests concerning how changes in the law governing this scheme affect sentences, disparity, and departure rates. This is done using an interrupted time series to test the applicability of the law after three major changes to the Guideline scheme described below. Interrupted time series analysis helps scholars analyze how events, such as changes in the law, affect the variables of interest over time.

A. The PROTECT Act/Feeney Amendment: Legislation Restricting Judicial Discretion

On April 30, 2003, Congress passed the PROTECT Act.[57] Heralded as the most significant amendment to the Sentencing Guidelines since their inception, Congress enacted the PROTECT Act because of a growing concern that judges and prosecutors had increasingly been using departures to avoid the Guidelines' sentencing mandates especially in cases along the southwestern border and in cases involving child exploitation.[58] Further, in enacting this law, Congress also voiced concern that federal prosecutors were using departures and case facts as

---

rehabilitative efforts, 19) aberrant behavior, 20) dismissed and uncharged conduct. 21) Specific offender characteristics for downward departure in child crimes and sexual offenses, 22) discharged terms of imprisonment, 23) commission of offense while wearing or displaying unauthorized or counterfeit insignia or uniform.

Note: section 5K2.15 was deleted. Further, this list of grounds for departures has changed slightly since the enactment of the Sentencing Guidelines as referenced in the legislative history of each section referenced. See pages 459 to 468.

54. *Id.* § 5K2.0(2).

55. *Id.* §§ 6B1.1-1.2.

56. *Id.* § 6B1.1. *See also* FED. R. CRIM. P. 11(c)(3)(A).

57. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 [hereinafter "PROTECT Act"].

58. *See generally* USSC report, 2003, *supra* note 4.

bargaining chips to get the sentences they desired, in blatant disregard of Congressional intent as demonstrated in the Sentencing Guidelines.[59]

The PROTECT Act had four major provisions. First, the Act sought to prohibit departures related to crimes against children and sex offenses.[60] Second, it changed the standard of review by appellate courts for "sentencing matters" to *de novo*, while continuing the standard of clearly erroneous for factual determinations.[61] Third, the controversial Feeney Amendment required district courts to provide specific written reasons for departures from the Guidelines.[62] Fourth, the Act enhanced the pre-existing requirements that courts report on sentences to the USSC.[63] The Commission published the related amendments to the Guidelines on May 16, August 1, and October 21, 2003.[64]

Although the PROTECT Act/Feeney Amendment changed the departure scheme generally, Congress directed that the USSC thoroughly review all sentencing practices according to the intent of the legislature and that it make its own recommendations as to specific changes in the Guidelines.[65] On October 8, 2003, the USSC adopted emergency amendments effective on October 21, 2003.[66] The amendments that the USSC proposed with the acquiescence of Congress, as well as actions taken by U.S. Attorney General John Ashcroft, in conjunction with the PROTECT Act, substantially changed the Guideline departure system.

To meet Congressional concerns regarding departures, the USSC

---

59. *See generally* USSC report, 2003, *supra* note 4, app. B (providing a history and analysis of the issues giving rise to the PROTECT Act); Interviews of district court judges in S.D. Cal. (May 7 and May 11, 2007) (confirming that prosecutors' charging practices had indeed resulted in unwarranted sentencing disparity and that prosecutors in certain districts were so lenient as to ignore the Guidelines' intent and purposes).

60. PROTECT Act, *supra* note 57 § 401(b).

61. *Id.* § 401(d)(2).

62. *Id.* § 401(c); *see* Max Schanzenbach, *Have Federal Judges Changed Their Sentencing Practices? The Shaky Empirical Foundations of the Feeney Amendment,* 2 J. EMPIRICAL LEGAL STUD. 1, 10 (2005) (providing a complete discussion of the Feeney Amendment). Although the Act placed more rigid restrictions on reporting departures, the USSC had always had a Congressional mandate to collect and disseminate data on sentences imposed and district court judges' use of and reasons for departures. See 28 U.S.C. §§994(w), 995(a)(8) (2008).

63. PROTECT Act, *supra* note 57 § 401(h).

64. Notice of (1)(A)(i) Congressional Amendments to the Sentencing Guidelines Made Directly by the PROTECT Act, Pub. L. No. 108–21, and Effective April 30, 2003, 68 Fed. Reg. 26,960 (May 16, 2003). The Commission stated that these amendments did not comply with the normal notice and public comment rules and deadlines because Congress enacted the changes effective on April 30, 2003, making "it impracticable to publish the conforming amendments in the *Federal Register* to provide an opportunity for public comment before the congressional amendments became effective." *Id.* (Emphasis added). Further amendments were published at 68 Federal Register 39173 (August 1, 2003) and 68 Federal Register 60153-60176 (October 21, 2003). See, http://www.ussc.gov/notice.htm for a complete list of the amendments and federal register notices.

65. *Id.* § 401(m).

66. USSC Report, 2003, *supra* note 4, at v.

eliminated nine grounds for departures. Two of these grounds related to criminal history categories and two related to departures based on aberrant behavior. The remaining five now "forbidden" departures included

[1] the defendant's acceptance of responsibility for the offense; [2] the defendant's aggravating or mitigating role in the offense; [3] the defendant's decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; [4] the defendant's fulfillment of restitution obligations only to the extent required by law; and [5] the defendant's addiction to gambling.[67]

The USSC amendments also increased restrictions for using departures based on multiple factors, a defendant's family ties and responsibilities, conduct of the victim, coercion and duress, and diminished capacity.[68]

While the PROTECT Act required the USSC to draft extensive amendments to the Guideline system, it also directed the Department of Justice to enact detailed policies and procedures to ensure that the Guidelines would be followed by federal prosecutors when designing plea bargains and that assistant U.S. attorneys would oppose departures if they were "not supported by the facts and the law."[69] As a result, then U.S. Attorney Ashcroft also required attorneys to affirmatively oppose sentencing adjustments and downward departures that were not consistent with the facts and the law and to follow a more rigorous appeals protocol.[70]

Most controversially, as directed by Congress in the PROTECT Act, Ashcroft established a system for reporting to Congress how individual federal judges handled sentencing. One commentator claimed "that last mandate to monitor downward departures was particularly worrisome to judges, who saw it as an intimidation tactic and a serious encroachment on the independence of the judiciary."[71] In fact, several district court judges expressed anger at the PROTECT Act and one judge saw it as a direct threat from a co-equal branch of government.[72] The U.S. Judicial Conference opposed the Amendment publicly.[73] It has been suggested

67. USSC Report, 2003, *supra* note 4, at vi, 19–20.

68. *Id*. at vii, 19.

69. *Id*. at 10.

70. Memorandum from John Ashcroft, Attorney General, U. S. Dep't of Justice, to all Assistant U.S. Attorneys regarding Departmental Guidance on Sentencing Recommendations and Appeals (July 28, 2003), http://www.nacdl.org/public.nsf/legislation/ci_03_32/$FILE/AG_Guidance_Stcg_Recs.pdf.

71. Dan Christensen, *The Short Life of the Feeney Amendment*, DAILY BUS. REV., Jan. 24, 2005), http://www.law.com/jsp/article.jsp?id=1105968948840.

72. Interview with U.S. District Court Judge from the C.D. of Cal. (Nov. 29, 2007).

73. Alan Vinegrad, *The New Federal Sentencing Guidelines: The Sentencing Commission's Response to the Feeney Amendment*, 16 FED. SENT'G REP. 98, 98 (2003).

that the Supreme Court's subsequent decision in *Booker* may have been motivated in part by Congress's strict monitoring of judges under the PROTECT Act.[74]

On September 22, 2003, Ashcroft distributed a more detailed memorandum regarding policy changes consistent with the PROTECT Act.[75] This memorandum reiterated that prosecutors should allow departures in only very "rare" circumstances and set forth "limited" exceptions for allowing departures.[76] Further, Ashcroft ordered prosecutors not to "fact bargain" or accept a plea agreement.

B. Blakely *and* Booker*: Supreme Court Cases Augmenting Judicial Discretion*

As stated above, the Federal Sentencing Guidelines became effective in 1989. From that time, until the decision in *United States v. Booker* on January 12, 2005, the Guidelines were deemed *mandatory* constraints on judicial decision-making. The mandatory nature of the Guidelines was later called into question in the Supreme Court case of *Blakely v. Washington*,[77] which challenged the Washington State Sentencing Guideline scheme. In this case, the defendant had plead guilty to kidnapping his estranged wife.[78] The State recommended a sentence within the Guideline range of forty-nine to fifty-three months.[79] However, after hearing the wife's account of the kidnapping, the judge sentenced the defendant to ninety months, which was thirty-seven months greater than the maximum prescribed by the guidelines.[80] After the defendant objected to this increase, the judge held a three-day bench hearing to take testimony, but still chose to uphold the exceptional sentence based on deliberate cruelty.[81]

The Supreme Court in *Blakely* explicitly stated that its decision was based on the application of the prior rule it had enunciated in *Apprendi v. New Jersey*[82] which was that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

74. See Christensen, *supra* note 71.

75. Memorandum from John Ashcroft, Attorney General, U. S. Dep't of Justice, to all Assistant U.S. Attorneys regarding Department Principles for Implementing an Expedited Disposition or "Fast Track" Prosecution Program in a District (September 22, 2003), http://www.usdoj.gov/ag/readingroom/ag-092203.pdf.

76. *Id.* at 3.

77. Blakely v. Washington, 542 U.S. 296 (2004); *see also* Apprendi v. New Jersey, 530 U.S. 466, 523 (2000) (O'Connor, J., dissenting) (previously calling the federal guidelines into question).

78. *Blakely*, 542 U.S. at 298.

79. *Id.* at 298.

80. *Id.* at 300.

81. *Id.*

82. *Id.* at 301.

statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[83] The Court applied *Apprendi* to the defendant's case despite the fact that it involved a plea bargain rather than a jury trial, because the defendant had not admitted the facts leading to the judge's elevated sentence in the plea bargain.[84]

While *Blakely* involved a state guideline scheme, the Court's dissenters questioned, but did not decide, the issue of whether the Federal Guidelines, similar to the Washington Guidelines, were constitutional as mandatory constraints. In her dissent, Justice O'Connor, joined by Justice Breyer, emphasized the negative impact that *Blakely* would have on the Federal guideline system. O'Connor stated:

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you –dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional, *ante*, at 308; for as residents of "*Apprendi*-land" are fond of saying, "the relevant inquiry is one not of form but of effect." *Apprendi*, *supra*, at 494; *Ring v. Arizona*, 536 U.S. 584, 613 (2002) (SCALIA, J., concurring). The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing.[85]

Although *Blakely* did not challenge the Federal Guidelines, following this decision, many district court judges subsequently refused to use the Guidelines to sentence defendants, reasoning that *Blakely* dicta showed that the Guidelines were unconstitutional[86]

Sixth months after *Blakely*, in *United States v. Booker*,[87] the U.S. Supreme Court decided that the Sixth Amendment right to a jury trial also applied to cases involving the federal Sentencing Guidelines.[88]

---

83. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

84. *Blakely*, 542 U.S. at 303–304.

85. *Id.* at 314 (O'Connor, J., dissenting).

86. See Memorandum from Kelly Land (Staff Attorney) to Tim McGrath (Staff Director), Re: Office of General Counsel's *Blakely* Database (November 30, 2004), *available at* http://www.ussc.gov/sc_cases/11_30_04.pdf (enumerating district courts' decisions that questioned the constitutionality and continued application of the guidelines in individual cases immediately following *Blakely*).

87. U.S. v. Booker, 543 U.S. 220 (2005).

88. It was no coincidence that *Booker* was decided six months after the *Blakely* decision. After diverse lower court reaction to this decision, Congress and the executive requested the Supreme Court to expedite a decision on the constitutionality of the Federal Guidelines. *See* Timothy

Booker involved two lower court decisions. In defendant Booker's case, the Supreme Court ruled that the lower court had violated *Apprendi* by sentencing the defendant to prison time greater than the Guideline range, which was based on additional findings made by the judge under the preponderance of the evidence standard.[89] In defendant Fanfan's case, the lower court refused to add time to the sentence, despite findings of additional facts that allegedly warranted a greater sentence based on *Blakely*.[90] In *Booker*, the U.S. Supreme Court affirmed that *Blakely* did indeed apply to the Federal Guidelines. The Court also reaffirmed the *Apprendi* rule that any additional facts supporting a sentence greater than the Federal Guideline maximum must be admitted by a defendant in a plea agreement or proved to a jury beyond a reasonable doubt.[91]

While *Booker* held that the Sentencing Guidelines violated the Sixth Amendment right to a jury trial, this did not result in the demise of the Guideline system. Instead, the Justices reasoned that severing the section of the Guidelines rendering them mandatory would remedy the Sixth Amendment problem they had identified.[92] As a result, *Booker* converted the Guidelines from mandatory constraints on judicial discretion to purely advisory.[93] In essence, the Justices argued that faced with the Sixth Amendment challenge, Congress would *not have intended* to invalidate the entire Federal Guideline scheme, but would seek to preserve it in any way possible.[94] For the Justices in *Booker*, such preservation was only possible by rendering the scheme advisory.[95] The Supreme Court's conversion of the Guidelines to advisory constraints also ended the Congressional requirements of reporting adverse departures of individual sentencing judges to Congress as required by the PROTECT Act.[96]

In *Booker*'s wake, district court judges were instructed to use the now advisory Sentencing Guidelines as one of the many factors to consider when determining the appropriateness of a defendant's sentence.[97] Furthermore, the Supreme Court mandated a

---

Lynch, *One Cheer for* U.S. v. Booker, 2004-05 CATO SUP. CT. REV., 223 (2005); Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

89. *Booker*, 543 U.S. at 222–23.

90. *Id.* at 220.

91. *Id.* at 268.

92. *Id.* at 227.

93. *Id.* at 233.

94. *Id.* at 249.

95. *Id.*at 246. District court judges have emphasized the conversion of the Guidelines from mandatory to advisory constraints. In sentencing hearings I observed on May 9 and May 18, 2007 in the District Court for the Southern District of California, judges, prosecutors and defense attorneys always prefaced reference to guidelines as "advisory" (i.e. "the Advisory Guidelines").

96. Christensen, *supra* note 71.

97. 18 U.S.C. §3553(a).

"reasonableness" standard for appellate review of district court sentences.[98] Subsequent to the decision in *Booker*, the definition of reasonableness was addressed by the circuit courts in a variety of conflicting and controversial ways.[99] Finally, in *Kimbrough v. United States*[100] and *Gall v. United States*[101] the Supreme Court expanded district court discretion by providing guidance on the meaning of reasonable sentences. Although outside of the scope of this article, the Supreme Court's 2007 decisions in *Kimbrough* and *Gall* broadened district court discretion and signaled that after *Booker*, courts of appeals should give district courts' sentences great deference.[102]

V. TESTING THE EFFECTS OF THE SENTENCING GUIDELINE SCHEME

Studies of the U.S. Sentencing Guidelines,[103] of which there are many, analyze different crimes and case facts together, controlling only for a limited number of case variables. However, these studies fail to control for the vast majority of case facts that vary among seemingly similar cases and that would dictate different outcomes. As a result, almost all prior analyses suffer from serious omitted variable bias.[104] In

98. *Booker*, 543 U.S. at 262.

99. *See* Selected Guideline Application decisions by circuit at www.ussc.gov/training/court.htm.

100. 128 S. Ct. 558, 564 (2007).

101. 128 S. Ct. 586, 602 (2007).

102. *See Kimbrough*, 128 S. Ct. 558 (holding that a district court was justified in sentencing outside the guidelines and finding that the controversial crack/powder disparity was at odds with §3553(a)). The Supreme Court further held that because the guidelines were no longer mandatory under *Booker*, there was no longer any reason to believe that the disparate ranges given for crack and powder cocaine offenses were likewise mandatory. *Id.*; *see also Gall*, 128 S. Ct. 586 (regarding standards of review). In *Gall*, the Supreme Court held that while the difference between a sentence and the guideline range was relevant, courts of appeals must review all sentences (whether inside or outside of the Guidelines) under a "deferential abuse of discretion standard." *Id* .

103. U. S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004) [hereinafter USSC Report, 2004] (analyzing a multitude of studies concerning the effectiveness of the Guidelines). The studies and their descriptions are found in chapter 3 of the report. *Id*. at 79-112.

104. Omitted variable bias means that the researcher has left out an important variable that may have caused changes in the dependent variable. Omitted variable bias results in researchers assuming that certain independent variables show clear causation when the real variable of causation has been omitted.

The only study that provided an analysis similar to the one employed here, which controls for case fact variation in order to avoid omitted variable bias, is one conducted by the USSC in 1991. *See* U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING AND USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, EXECUTIVE SUMMARY (1991) [hereinafter USSC Report, 1991] (summarizing the findings of a preliminary analysis of the effect of the Sentencing Guidelines on sentences use a case fact matching procedure). The USSC's 1991 analysis compared sentences for several crimes based on specific fact patterns prior to the Guidelines and after the Guidelines. The sample of Guideline

other words, most studies of the Guidelines to date do not adequately consider how the facts of the cases may drive the decisions that judges are making. This study substantially advances our understanding of the Guidelines by analyzing cases with similar case facts. In this way, matching of case facts allows for an analysis of the law's impact free from analysis limitations where facts rather than law may be driving case outcomes.

To examine the effect of the legal constraints on judicial discretion found in the Guidelines, case facts are matched and thus controlled for in order to specifically test the effect of the law on sentencing outcomes. The case pattern matching eliminates issues of unconfoundedness[105] and the comparison of dissimilar cases. This is an improvement over other empirical studies that attempt to test the effect of the Guidelines by comparing all types of cases without controlling specifically for facts.[106] Here, two drug trafficking crimes that differ only as to drug amounts are used for the analysis.[107] The first crime [hereinafter "drug crime #1" or

---

cases was very small. The USSC analyzed cases involving heroin and cocaine distribution that were similar to cases analyzed here except that the drug amounts were smaller. The results of the pre-guideline analysis by the Sentencing Commission was as follows:

Table N2. Pre-guideline case statistics.

Statistic	Heroin Distribution (100g – 400g)	Cocaine Distribution (500g – 2kg)
Minimum sentence	0.00	0.00
Maximum sentence	180.00	108.00
Mean	40.18	31.66
Standard Deviation	40.17	22.92
N	40	81

Id. at 295, 298. Although not a perfect pre-test, the above results are instructive for a general comparison of pre-guideline sentencing, showing that the standard deviation and thus variance of sentencing decisions was fairly significant prior to the Guidelines.

105. Guido Imbens & Jeffrey Wooldridge, *What's New in Econometrics: Estimation of Average Treatment Effect under Unconfoundedness*, NATIONAL BUREAU OF ECONOMIC RESEARCH SUMMER INSTITUTE (July 30, 2007) (video and slides available at www.nber.org). According to Imbens and Wooldridge, "Unconfoundedness. . . refers to the case where (non-parametrically) adjusting for differences in a fixed set of covariates removes biases in comparisons between treated and control units, thus allowing for a causal interpretation of those adjusted differences." *Id*. at 1. By ensuring that observations or cases in a study are substantially similar, the effect of a treatment, such as a law or policy intervention, can be isolated.

106. *See* USSC Report, 2004, *supra* note 103 (summarizing quantitative studies on the impact of the Guidelines using a methodology that analyzes all case types together).

107. U. S. SENTENCING GUIDELINES MANUAL, § 2D1.1 (2005) (showing the difference in drug amounts for the two crimes analyzed here).

"amount #1"] involves smaller quantities of four drugs (cocaine, heroin, marijuana, and methamphetamine) than the second crime [hereinafter "drug crime #2" or "amount #2"]. The cases are matched by analyzing only those cases with substantially similar facts and relatively simple fact patterns. Specifically, these cases involve identical single convictions after guilty pleas of conspiracy to transport certain controlled substances under 21 U.S.C. §841(a)(1) and fall under the U.S. Sentencing Commission's Guideline Manual, §2D1.1. All of the cases involved one of four possible drugs; namely, cocaine, heroin, marijuana, and methamphetamine and carried a statutory minimum sentence of 10 years.[108] Despite the statutory minimum, the respective judge applied a safety valve provision allowing him or her to sentence defendants below this minimum under certain circumstances.[109] In all of the cases, defendants had a criminal history level of I, meaning that defendants had no prior convictions or only one prior conviction with a sentence of less than 60 days.[110] Additionally, the defendants in all of these cases accepted responsibility for their crimes such that the original base offense level was reduced by three points (i.e. setting guideline ranges at 70 to 87 months in prison for drug amount #1 and 87 to 108 months for drug amount #2). Furthermore, there was no adjustment in the sentence due to the defendant's role in the offense.

To test simply whether the mandated use of the sentencing table in the Guideline scheme affects case outcomes, the cases are further subdivided into either a control or treatment group. The control group included all cases in which judges chose *not* to depart from the sentencing table.[111] The second group is a test or treatment group that included cases where judges used their discretion to depart from the table ranges. The observations consist of the average sentence for each drug

Table N3. Drug amounts for two crimes analyzed.

Drug amount	Heroin	Cocaine	Methamph-etamine	Marijuana
1	700 G to < 1 KG	3.5 to < 5KG	350G to < 500G	700KG to < 1,000KG
2	1 to < 3 KG	5 to < 15KG	500G to <1.5 KG	1,000KG to < 3,000KG

These amounts have not changed between 1998 and 2006, the period studied. *See* 1998 to 2006, USSG §2D1.1, *available at* http://www.ussc.gov/guidelin.htm.

108. 21 U.S.C. §841(a)(1) (2006).

109. 18 U.S.C. §3553(f) (2006); U.S. SENTENCING GUIDELINES MANUAL §5C1.2, 410-12 (2008).

110. U.S. SENTENCING GUIDELINES MANUAL, §4A1.1 (2008). To receive a criminal history point, the prior offense carrying a sentence of less than 60 days must have occurred within ten years of the current offense if the defendant was 18 or over and within five years if the defendant was under eighteen years old.

111. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A (2005). Guideline range is a range of sentences measured in months in prison that is determined from the intersection of offense level and criminal history on the sentencing table.

amount, the variance of case outcomes, and an analysis of left and right censorship of the guideline versus non-guideline cases.

The two groups of cases analyzed are derived from federal sentencing cases, using databases created by the USSC and deposited with the Inter-University Consortium of Political and Social Research ("ICPSR").[112] Out of nearly half a million district court cases, I analyze a total of 1,752 drug distribution cases with the described fact patterns. Out of these cases, 1,112 cases had the fact pattern described as Group #1, and 640 cases involved facts described in Group #2.

A. Guideline Scheme Hypotheses, Predictions, and Results

The two groups of cases, described above, allow for several hypotheses and predictions regarding the Guideline Scheme as follows:

- *Mandatory Guidelines Hypotheses:*

H_1 = Mandatory U.S. Sentencing Guidelines constrain district court judges.

- *Advisory Guidelines Hypotheses:*

H_2 = Advisory U.S. Sentencing Guidelines constrain district court judges.

The above two hypotheses essentially compare application of the Sentencing Guidelines when mandatory (prior to *Booker)* and when advisory (after *Booker)*. These hypotheses lead to specific predictions which if true would confirm that judges act differently when their discretion is constrained by the Guideline sentencing table as compared to when they were allowed to depart. The predictions are as follows:

1. Prediction 1

If the U.S. Sentencing Guidelines' (mandatory or advisory) sentencing ranges are applied, judges will sentence the majority of all defendants not only within the Guideline range, but also to the very minimum of that range,[113] whereas, when judges depart from the Guidelines, judges will not sentence the majority of defendants to the

112. See ICPSR, *supra* note 8, for the study numbers.

113. Seventy months for drug amount #1 and eighty-seven months for drug amount #2. *See* Guideline table reproduced at *supra* note 43 (drug amount #1 fits into offense level 27 and drug amount #2 fits into offense level 29).

minimum (0 months) of possible sentences.

The logic behind this first prediction is that judges do not like to have their discretion constrained by Congress.[114] To voice this discontent and perhaps to exhibit a generally more case-specific approach towards crime than that desired by elected politicians, judges applying the sentencing table ranges will consistently choose the minimum sentence allowed by the Sentencing Guideline ranges. I predict that the majority of judges who depart from the mandated range will not choose a sentence of zero or effectively acquit defendants because to do so would represent an approach to crime that is too soft or liberal for most judges.

2. Prediction 2

The average sentence under the Guideline ranges will be longer than the average sentence for identical cases where the Guideline ranges are not applied. Deviations of the actual outcomes from the predicted outcomes will be negative and significant for non-Guideline range cases and positive and significant for Guideline cases.

The logic behind this prediction is that when judges apply Guideline ranges, the sentences will be higher than when they depart from the ranges.[115] This prediction is based on the belief that legislators desire to appear tough on crime in order to be re-elected, and they thus enact legislation that raises sentence length. Preferences of politicians for higher sentences should diverge from preferences of most federal judges who analyze the law and facts on a case-by-case basis.

3. Prediction 3

The standard deviation of cases sentenced within the Guideline ranges will be smaller than the standard deviation of cases sentenced outside these ranges. Moreover, the distribution of sentences for Guideline cases will be left (lower) censored at the minimum guideline range amount.

---

114. During interviews held on May 7, May 9, 2007, and July 6, 2007, some Southern California district court judges said that they did not like Congress constraining their sentencing discretion as Congressmen do not have sentencing or criminal law expertise and re-election is their main motivation for enacting changes in sentencing law.

115. This rather obvious prediction is based on the fact that judges rarely depart above the Guideline ranges. Instead, the majority of departures are below the Sentencing Guidelines. For example, in 2008, judges departed above the Guidelines 1.5% of the time, but departed downward due to substantial assistance 25.6% of the time and for other non-governmental reasons 13.4%. U.S. Sentencing Comm'n, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table N (2008), *http://www.ussc.gov/ANNRPT/2008/TableN.pdf*. This outcome is consistent for all years when the Guidelines have been in force. These reports are provided by the U.S. Sentencing Commission,http://www.ussc.gov/annrpts.htm.

This final prediction is based on one of the underlining intentions of the Guideline system.[116] Congress enacted the Guidelines in general to reduce disparities in sentences of identical or similar crimes.[117] Therefore, the variance of sentences when Guideline table ranges are applied should be smaller than that of sentences when judges depart. Further, the prediction of the left censorship of cases in which judges do not depart is based on the general belief that judges would follow the Guidelines as Congress intended, but sentence on the low end. If the predictions are validated by the tests, this will show that Guidelines matter and effectively constrain judges and the Guideline minimums and maximums serve as effective barriers against unfettered judicial discretion.

The quantitative results confirm the predictions delineated above and fail to reject Hypotheses 1 and 2. In other words, Guidelines matter and constrain judges. However, these constraints are imperfect because they still provide judges with discretion to depart from the Guidelines. First, when judges are constrained by the Guidelines, they sentence defendants to more time in prison than when not constrained by the Guidelines. For example, in comparing cases from 2004, sentences from the Guideline group were higher than the sentences from the departure group. The Guideline group had an average sentence of 71.32 months with a standard deviation of 3.78. The departure group had an average sentence of 54.80 months with a standard deviation of 11.69. In fact, on average, district court judges sentenced defendants to almost 1.4 to 2.8 years more time when their cases were sentenced inside the Guideline table ranges as compared to outside (See Table 1 below).

Similarly, for cases in 2004 with drug amount #2, judges sentenced defendants on average to 88.33 months when the Guidelines were applied, as compared to an average of 61.40 months when Guidelines were not applied. Again, even with a higher Guideline range allowed due to greater quantities of drugs, judges still sentenced defendants to approximately 2 to 4 years more time in prison when the Guidelines were applied as compared to when they were not. This pattern, in fact, holds true for all of the cases from 1999 to the post-*Booker* cases, and no differences are seen in the period directly after either the PROTECT Act, *Blakely*, or *Booker*.[118]

---

116. The policy has been set out in each Guideline Manual. The policy portions are available in the introduction. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, 2-5 (2008).

117. *Id*. The policy statement includes three reasons for the enactment of the Guidelines. One of these was as follows, "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Id.* at 2.

118. Statistics from ICPSR were collapsed into a data base of drug trafficking cases described in this article. These smaller data sets are available upon request of the author at lbtiede@uh.edu.

Table 1. Results of Post-Tests (1999-2006).

Drug Amount	Treatment Guideline Application	Post-Tests by year sentence average (standard deviation)						
	Guidelines							
	1999	2000	2001	2002	2003	2004	2005	2006
1	71.06	72.17	72.30	71.53	71.07	71.32	71.67	71.27
	(3.29)	(4.49)	(4.90)	(3.97)	(3.50)	(3.78)	(4.24)	(3.44)
	No Guidelines							
	1999	2000	2001	2002	2003	2004	2005	2006
	50.43	54.67	39.30	43.58	52.41	54.80	51.86	49.60
	(11.24)	(14.08)	(14.85)	(15.76)	(13.15)	(11.69)	(13.56)	(19.92)
	Guidelines							
	1999	2000	2001	2002	2003	2004	2005	2006
2	87.78	87.23	87.46	89.43	87.72	88.33	88.61	88.65
	(1.97)	(1.38)	(1.84)	(5.26)	(2.41)	(3.39)	(4.15)	(4.34)
	No Guidelines							
	1999	2000	2001	2002	2003	2004	2005	2006
	65.33	52.33	40.75	62.56	60.86	61.40	65.09	64.28
	(11.93)	(22.84)	(11.76)	(8.66)	(17.61)	(11.27)	(18.48)	(18.41)

Note: Sentences are average sentences in months in prison.

Second, the prediction concerning the distribution of minimum sentences was also borne out by the tests. The sentencing guideline range for the crime studied with drug amount #1 was 70 to 87 months, allowing judges the discretion to choose sentences within a seventeen-month window. The guideline range for the same crime with drug amount #2 was 87 to 108 months, allowing judges the discretion to choose sentences which could vary as much as 21 months. Despite this 17 to 21 month spread of sentencing choices, for cases applying the Guideline, district court judges overwhelmingly sentenced defendants to *the minimum amount of time* allowed under the table ranges regardless of what the Guideline stated minimum was. For the crimes analyzed for 2004, for drug amount #1, district court judges sentenced defendants to the minimum sentence of 70 months in prison 84 percent of the time. Similarly, in 2004, for drug amount #2, judges sentenced defendants to the minimum sentence of 87 months 83 percent of the time. As indicated in Table 3, this pattern was repeated for all of the years examined with the percentage of sentences at the minimum no less than 73 percent and sometimes as high as 95 percent.

Table 2 Percent sentenced at minimum by group (1999-2006)

Year	Drug Amount	Guideline Applied % at 70 or 87 months (expected 100%)	Guideline Not Applied: (Departures) % at 0 months (expected 0%)
1999	1	86	0
	2	82	0
2000	1	74	0
	2	95	0
2001	1	80	0
	2	92	0
2002	1	76	0
	2	73	0
2003	1	88	0
	2	90	0
2004	1	84	0
	2	83	0
2005	1	82	2
	2	83	5
2006	1	82	0
	2	81	0

Note: "% at" refers to the percent of cases in which sentences in each group were 0, 70 or 87 months in prison.

A related prediction about whether judges sentence defendants to the minimum amount concerned, left censorship of guideline cases as compared to non-Guideline cases. The Guideline cases were left censored at the minimum of the Guideline table range. (See Figures 1 and 2 below). Conversely, for non-Guideline cases—judges, as we would expect—did not sentence the majority of the defendants to the minimum possible sentence of zero months in prison. For cases based on departures authorized by the Guidelines, there were no sentences of zero months in prison for 1999 to 2004. In 2005, district court judges sentenced defendants in this category to zero months in prison 2 to 5 percent of the time.

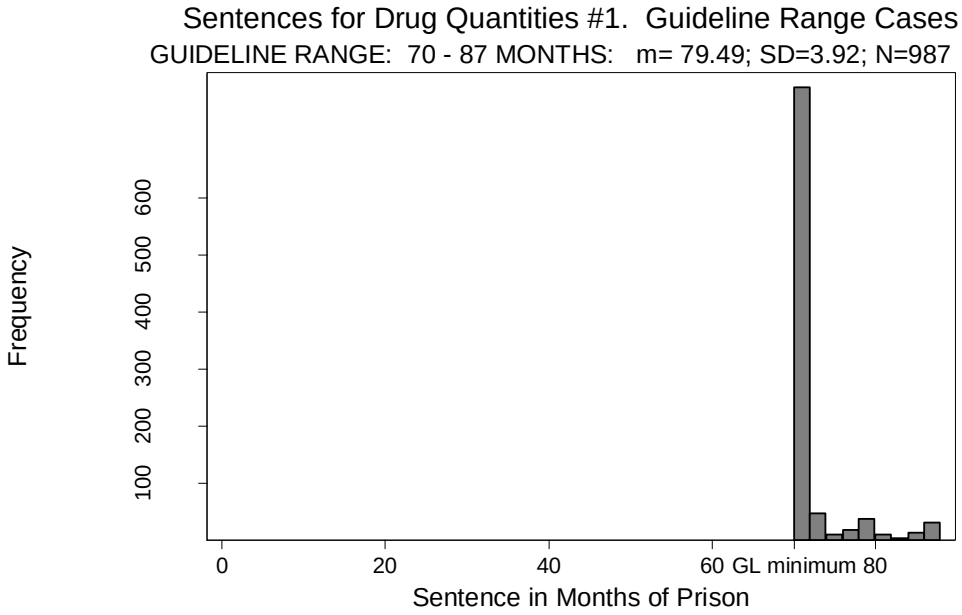

Figure 1. Drug amount #1: guideline range cases only (1999-2006)

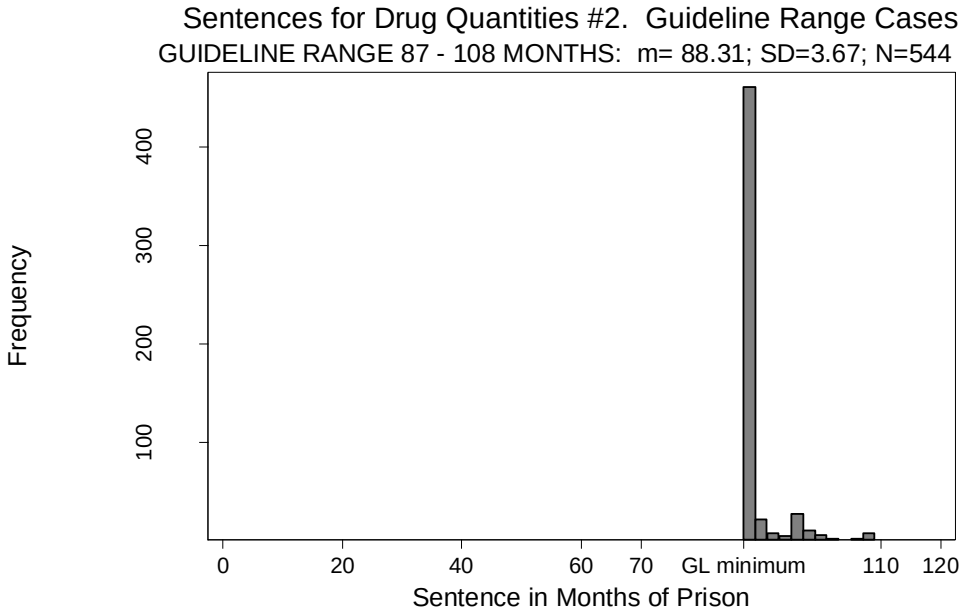

Figure 2. Drug amount #2: guideline range cases only (1999-2006)

Third, the predictions regarding the standard deviation[119] and distribution of cases were also confirmed. The standard deviation of total sentences for Guideline table range cases was considerably smaller than the standard deviation for non-Guideline cases in all of the tests. Conversely, sentences had a greater standard deviation and thus varied more widely when judges were not constrained by the Guidelines. As seen in Table 2, for 2004, the standard deviation, for cases sentenced under the Guidelines for drug amount #1 and #2, was about three times smaller than those not sentenced under the Guidelines. In fact, in all instances examined the standard deviation for cases sentenced under the Guidelines was considerably smaller than that for cases sentenced outside of the Guidelines. This result persisted even after *Booker*.

Cases where *advisory* guidelines were applied had considerably less variance than cases with observed departures. This conclusion was supported by district court judges interviewed in 2007, who claimed that after *Booker*, they still follow the Guidelines most of the time and in the same manner as prior to *Booker*.[120]

B. Changes in the Law Hypotheses and Results

Besides testing the effect of the overall Guideline scheme, I also test whether reforms to that scheme affected case outcomes. The effects of reforms to the Sentencing Guidelines on case outcomes are tested using an interrupted time series analyses. The hypotheses for the reforms in law are as follows:[121]

- H_3 = Legal reforms which decrease judicial discretion will:
  - a) Increase sentence length
  - b) Decrease disparity
  - c) Decrease the number of departures

119. Variance of sentences is a measure of how widely individual district court judges' sentences vary from each other. It is measured by the standard deviation or square root of the variance defined as the spread of possible sentences around the average of all sentences.

120. District court judge interviews, *supra* note 35.

121. Hypothesis testing allows social scientists to determine the causal relationship between variables of interest. Basic regression analysis allows social scientists to determine the degree that one variable (i.e. a dependent variable) is explained by another variable (i.e. the independent variable). For this part of the analysis, the dependent variables are such things as a) sentence length, b) disparity, and c) number of departures. The main causal or independent variables are the decision to depart as well as legal reforms that increase judicial discretion (i.e. U.S. v. Booker) or decrease it (i.e. the PROTECT Act). A regression equation attempts to capture the causal relationship by holding other factors constant to isolate the effect of the independent variable on the dependent variable. In regression equations, the dependant variable is placed on the left hand side of the equation and the independent variables or causal variables are placed on the right hand side of the equation.

- H_4 = Legal reforms which increase judicial discretion will:
  - a) Decrease sentence length
  - b) Increase disparity
  - c) Increase the number of departures

These hypotheses are based on the theory that the amount of discretion afforded judges is directly related to disparity and number of departures and inversely related to sentence length. In other words, when judges have their discretion taken away by Congress in the form of the Guidelines or subsequent legislation, such as the PROTECT Act, sentence length will increase while sentencing disparity and number of departures will decrease. Likewise, when district court judges are afforded more discretion as they were after *Blakely* and *Booker*, sentence length will decrease while disparity in sentences of similar cases and departures will increase.

The basic regression model for these hypotheses using sentence length as a dependent variable is as follows:

$$\text{SENTENCE LENGTH} = \beta_0 + \beta_1\text{PROTECT} + \beta_2\textit{Blakely} + \beta_3\textit{Booker} + \beta_4\text{Depart} + \beta_5(\text{vector of year dummies}) + \beta_6(\text{vector of circuit dummies}) + \varepsilon$$ [122]

Where,

SENTENCE LENGTH= the sentence defendants received in months in prison less the guideline minimum.

PROTECT = The PROTECT Act (0 if district court case occurred before the Act, 1 if after Act).

Blakely = The decision in *Blakely v. Washington* (0 if district court case occurred before court decision, 1 if after).

Booker = The decision of *U.S. v. Booker* (0 if district court case occurred before court decision, 1 if after).

---

122. This regression equation is used to determine the effect of each independent variable on sentence length when all other independent variables are held constant. Social scientists strive to include all causal variables in their regression equation. Thus, while the particular year in which a case was decided may not *per se* be of interest, it is included in the equation as it may contribute to variations in the outcome or dependent variable. By including independent variables, such as a vector of circuit and year dummies, the social scientist controls for factors that may be leading to changes in the dependent variable—here sentence length—in order to isolate the effect of the legal change.

Depart = Departure type (0 if no departures and Guideline sentencing ranges followed, 1 if departures and sentencing ranges not followed.

Vector of year dummies = representation of the year in which each case was decided.

Vector of circuit dummies = A representation of the particular circuit in which each case was decided (1 though 12 correspond to each circuit. The 9th Circuit is left out of the regression).[123]

In one regression, I use data which includes cases prior to the PROTECT Act and before *Blakely/Booker* to isolate the effect of the PROTECT Act on sentences. In a second regression, I use all of the data to analyze the three legal reforms together. Hypotheses relating to departure rates and disparity are tested by comparing standard deviations and number of departures graphically during specific time periods. Further, I compare whether the location of a case within a specific judicial circuit affects disparity and departure rates.

The direct impact of the PROTECT Act and the Supreme Court decisions in *Blakely* and *Booker* was examined through Hypotheses 3 and 4 above. In the first regression, the effect of the PROTECT Act on sentence length was isolated by limiting the data to cases prior to the PROTECT Act and prior to *Blakely*. The regression results are as follows:

1. For Drug Amount #1

$$\text{SENTENCE LENGTH} = 1.68 + \underset{(1.64)}{-1.38}\ \text{PROTECT} + \underset{(1.02)}{\textit{-13.39}}\text{Departure} + \underset{(0.45)}{\quad} \beta_3(\text{years}) + \beta_4(\text{circuits}) + \varepsilon$$

$N = 571$. Adj. $R^2 = 0.63$
Significant coefficients in italics; standard errors in parentheses.

123. Dummy variables, such as circuit and year, simply indicate where a case is placed temporally and spatially (i.e. the case occurred in the Ninth Circuit or not). To use such dummy variables correctly, a base group must be designated for comparison. The interpretation of coefficients for each different group of cases (i.e. cases occurring in the Second Circuit) is made in relationship to the base group (here the Ninth Circuit). For example, if the coefficient for the second circuit is 1.9, this means that a case occurring in the second circuit will have a sentence of 1.9 months longer than that occurring in the Ninth Circuit. The Ninth Circuit was chosen as a base group as this was the largest circuit.

2. For Drug Amount #2

SENTENCE LENGTH = 2.47 + -1.44PROTECT + *-15.84*Departure +
(2.38) (1.55) (0.58)
β_3(years) + β_4(circuits) + ε

N = 315. Adj. R^2 = 0.74.

These results (presented in full in Table A1 of the Appendix) show that the PROTECT Act had no statistically significant effect on sentence length. Instead, the only statistically significant determinant of sentence length was the judges' decision to depart or not, which is embedded in the original Guideline scheme discussed at the beginning of this paper.

In the second set of regressions, the effect of all three legal changes is tested using all of the data, but as in the first regression set, the decision to depart significantly lowers the sentence length. The full results for the second set of regressions are presented in Table A2 of the Appendix. For sentence length, the changes in the law had no effect for either drug type. The results are as follows:

1. For Drug Amount #1

SENTENCE LENGTH = 0.59 + -1.00PROTECT + 0.56*Blakely* +
(1.99) (1.31) (1.00)
1.36*Booker* + *-11.27*Departure + β_5(years) + β_6(circuits) + ε
(2.07) (0.33)

N = 1,112 . Adj. R^2 = 0.54 .

Significant coefficients in italics; standard errors in parentheses.

2. For Drug Amount #2

SENTENCE LENGTH = 1.73 + -1.25PROTECT + -0.37*Blakely* +
(3.24) (2.18) (1.41)
2.21*Booker* + *-13.61*Departure + β_5(years) + β_6(circuits) + ε
(3.66) (0.48)

N = 640. Adj. R^2 = 0.59

As shown by the two regressions above, whether judges depart from the Guidelines has the largest impact on sentence length. None of the legal changes had any statistically significant effect on sentence length.

While the above results show that the three legal reforms had little or no effect on sentence length for sentences that either followed the Guideline structure or a departure scheme, the question remains: What effect did the legal changes have on disparity and the number of departures? To determine the effect of the legal changes on disparity, the standard deviation of case decisions around the average sentence for each drug type before and after legal reform was analyzed. For this part of the analysis, which relies on several graphic depictions, the periods of time analyzed are 1) prior to the PROTECT Act, 2) between the PROTECT Act and the decision in *Blakely,* and 3) after the *Blakely* decision. For graphical analysis, the date of *Blakely* in 2004 is used to define groups because *Blakely* marked the first instance when the Supreme Court signaled that district court judges might be afforded more discretion.

Prior to any legal amendments to the Guidelines, the standard deviation for all cases (Guideline table and departures) was 9.68 for drug amount #1 and 12.24 for drug amount #2. After Congress reduced the ability of judges to depart in the PROTECT Act, the average standard deviation was reduced to 6.73 for drug amount #1 and 8.72 for drug amount #2. Finally, after *Blakely*, which signaled a new era of sentencing, and allowed judges to have greater discretion, the standard deviation increased to 11.41 for drug amount #1 and 13.82 for drug amount #2. The disparity of decisions after *Blakely* exceeded both the pre-PROTECT Act and post-PROTECT Act period. These results indicate that the legal amendments, while having little effect on average national sentence length of Guideline range or departure cases, did affect disparity of decisions across judicial circuits.

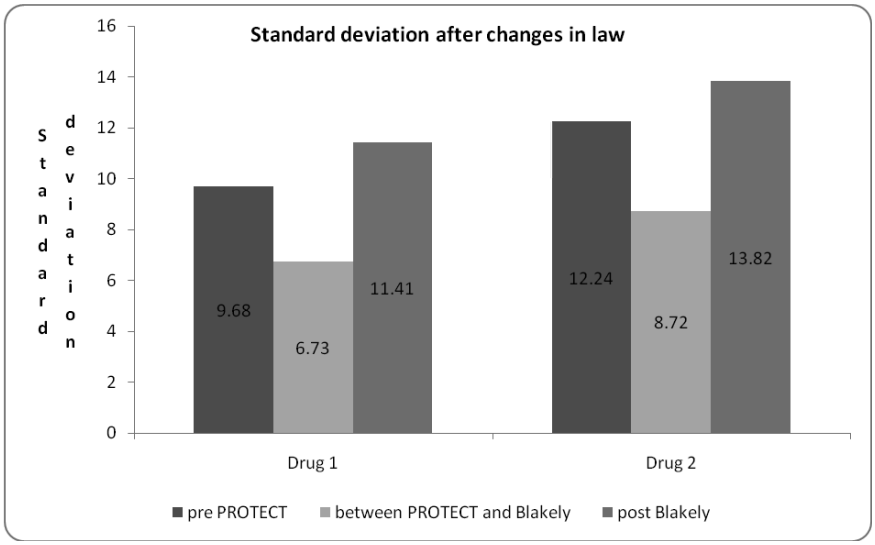

Figure 3. Disparity of sentencing decisions.

To determine the effect of the legal reforms on departure rates (Changes in Guideline Scheme, Hypothesis 5), rates of departure for three periods were explored to isolate the effect of each legal change on departure rates. As seen in Figure 4, prior to the PROTECT Act, for drug amount #1 judges departed from the guidelines about 9.56% and for drug amount #2 12.97% of the time. As intended by the PROTECT Act, departure rates following this Act were dramatically reduced to 3.26% for drug amount #1 and 4.62% for drug amount #2. After *Blakely/Booker*, departure rates for both drugs increased dramatically, exceeding those from the pre-PROTECT period. For example, departures increased to18.85% for drug amount #1 and 20.31% for drug amount #2 after the *Blakely* decision. The additional discretion afforded by *Blakely*/*Booker* caused judges to depart substantially more.

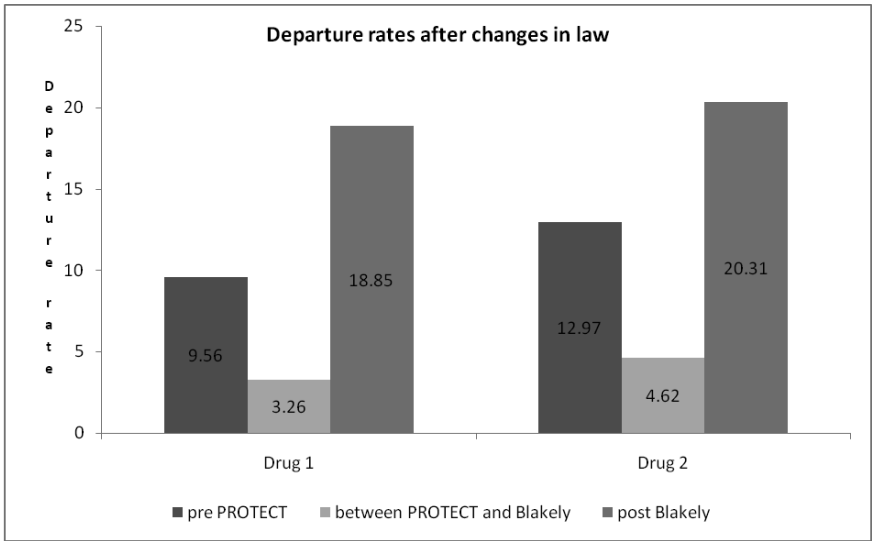

Figure 4. Departure rates.

The above results show the effect of changes in laws on sentencing disparity and departure for the entire nation. As previously mentioned, these overall results mask variation among the districts and circuits. As seen in Figure 5, sentence length varies among the circuits for each time period analyzed when data for both drug crimes is pooled together to allow for a meaningful circuit level comparison.[124] In the period prior to the PROTECT Act, average sentences varied widely among the circuits. District courts in the Ninth Circuit on average sentenced defendants to

124. It should be noted that some circuits have more cases than others. It is possible that the proportion of one type of drug case relative to another type of cases could affect the results.

less time for the crimes analyzed, while the Third Circuit had the highest average sentences for this period.

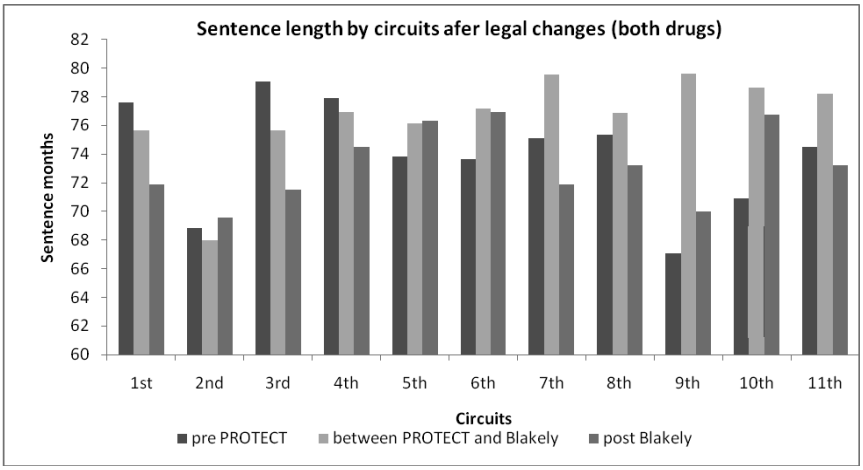

Figure 5. Sentence length by circuit after major changes in the law.

In the second time period, it was expected that sentence length would increase because judges were supposed to depart less after the PROTECT Act, which in turn would increase average sentence length. Congress enacted the PROTECT Act to target judicial districts where it was believed that judges were departing too much and had average sentencing lengths that were too low. In other words, Congress seemed to be specifically targeting most Southwest states as well as a few other districts that had high departure rates prior to the PROTECT Act as compared to the rest of the nation.[125] While the majority of circuits were responsive to the legislators' intent, judges in the First through Fourth Circuits defied this trend by sentencing defendants to less time. The Ninth Circuit did, however, comply as intended and substantially increased sentence length during this period. Finally, after *Blakely*/*Booker* it was expected that sentence length would substantially decrease because judges would have more discretion to depart, and it was assumed that they would use this discretion. While sentence length did decrease in eight of eleven judicial circuits, it remained about the same in the Fifth and Sixth Circuits and increased only slightly in the Second Circuit. Further, post-*Booke*r, sentence length was lower than the pre-PROTECT Act period in only six circuits, suggesting that *Booker* did not trump the effect of the PROTECT Act in all circuits.

Disparity and departure rates within circuits also varied considerably depending on the circuit. Prior to the PROTECT Act the disparity of

125. USSC Report, 2003, *supra* note 4, at 34-35.

average sentences varied significantly by circuit with the Ninth Circuit having the highest rate of disparity (See Figure 6 below). The PROTECT Act was supposed to limit the ability of judges to depart, and in theory limit the disparity of decisions. Disparity decreased in five circuits appreciably after the PROTECT Act. In two of the circuits (First and Third), there was no appreciable difference in disparity for this time period. After *Blakely*/*Booker*, judges' expanded discretion was thought to lead to an increase in disparity as noted in the dissent by Justice Breyer in *Booker*.[126] However, as with the analysis of other time periods, not all the circuits acted the same. Disparity actually decreased in the First, Second, Sixth, and Tenth Circuits.

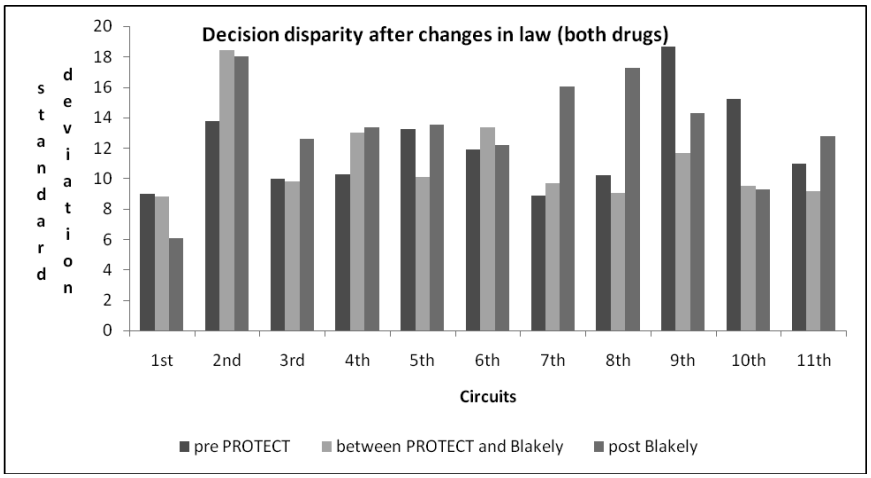

Figure 6. Disparity by circuit after major changes in the law.

Finally, departure rates did not increase as dramatically as expected after *Booker*. The circuit-level departure rate analysis is similar to the sentence length and disparity analyses. In short, district courts located in particular circuits varied widely in the amount they departed during certain time periods. Some circuits acted as expected, departing less after the PROTECT Act and more after *Booker*, while other circuits acted quite differently.

VI. DISCUSSION AND IMPLICATIONS OF EMPIRICAL RESULTS

What do the results tell us about the regulation of judicial discretion? As seen by the sentencing data, the Guideline scheme—in which the USSC and Congress specify the amount of judicial discretion to be exercised in specific cases—matters and has a profound effect on case

126. United States v. Booker, 543 U.S. 220, 329 (2005) (Breyer, J., dissenting).

outcomes even where the effects are not necessarily those intended by the legislature. First, cases implicating the Guideline's table ranges result in higher sentences. If elected politicians want to limit judicial discretion in sentencing and appear tough on crime, this goal can be accomplished by highly specific legislation in which they limit judges' discretion. As shown by the results, higher sentences are achieved if judges are compelled to use the sentencing tables. When case facts and the law allow for departures, sentences are lower and may subvert the intent of Congress.

Second, the variance of sentences is highly dependent on whether judges apply Guideline ranges or not. When judges depart, the variance of possible outcomes increased three to six times. This suggests that where judges' discretion is not constrained and they choose to apply departures there is greater disparity in case outcomes for similar cases. Analysis of the variance of case outcomes by group makes it clear that Congress' goal of reducing disparity in sentences nationally was achieved, but only when judges used the sentencing table, not when they departed from it.

Third, when judges applied Guideline ranges from the sentencing table, they sentenced the overwhelming majority of these defendants to the absolute *minimum* sentence of the sentencing range. Although sentencing tables allowed judges to choose one sentence out of seventeen to twenty-one choices, judges nationwide chose the lowest sentence in the range 73% to 95% of the time. While the sentencing guideline boundaries constrain judges' discretion, the lower limit provides a focal point for judges' decisions in the majority of cases. This implies that judges are constrained only by the *minimum* sentence and not the range of possible sentences.

Fourth, the dramatic changes in Guideline laws do not seem to affect sentence length significantly for either the Guideline group or departure group nationwide, but did affect departure rates and disparity. Despite what were thought to be the two most dramatic changes in the Federal Sentencing Guideline system since its inception, the PROTECT Act and *Booker*, these changes seem to have had little effect on sentences *within* each of the two groups. As a result, sentence length is driven most significantly by district court judges' choice to depart and drug amount. Congress's attempt to limit departures and the Supreme Court's decision to render the Guidelines advisory rather than mandatory did not alter sentence length *within* the Guideline and departure categories, at least not immediately. This suggests that the Guideline application is path dependent. Judges who had been trained in Federal Guidelines when they were mandatory continued to apply them in the same way, even after they were transformed into advisory constraints judges. Finally, legal

regulation of discretion directly affected departure rates. When discretion is constrained (after the PROTECT Act) departure rates go down, and when discretion is augmented (after *Blakely* and *Booker)* departure rates increase—at least when national averages are analyzed. Legal regulation also affected the disparity of sentencing decisions for similar defendants convicted of similar crimes. When discretion is constrained the disparity of outcomes decreases; when discretion is augmented case outcomes are more disparate nationwide.

The circuit-level analysis revealed wide variation in decision making across circuits in all three time-periods. Although one of the main reasons for enacting the Sentencing Guidelines was to reduce the disparity of outcomes based on location, sentence length, departure rates, and disparity varied by circuit. This variation continued when I specifically analyze the period after the PROTECT Act and after *Booker*. As far as the PROTECT Act, seven out of eleven circuits acted in the way that the legislature intended—i.e. raised sentences, lowered departure rates, and lowered disparity of outcomes. However, district courts in the First through Fourth Circuits were not so responsive. Rather than increase sentence length in these circuits, sentence length actually decreased from pre-PROTECT Act sentences. However, if legislators only intended to target certain district courts such as those located in the Ninth Circuit, as suggested by some of the legislative history,[127] then they were highly successful. In the Ninth Circuit the average sentence for both crimes increased from 67.07 months in prison to 79.65 months in prison after the PROTECT Act.

Likewise, *Booker* had mixed effects depending on court location. In every circuit but three (the Second, Fifth, and Sixth), sentence length decreased from the post-PROTECT era cases to the post-Booker era cases. However in four circuits the decrease did not render sentences lower than the pre-PROTECT period. As a result, *Booker* did not have the feared effect of reducing sentences substantially. The circuit-level analysis of disparity and departure rates shows again that there was great variation in district court responses to the changes in law. Altering discretion of lower court judges did not always have the intended effect; only in some of the circuits was an increase in discretion met with lower sentences and greater disparity and decrease in discretion met with higher sentences and less disparity.

127. USSC 2003, *supra* note 4, at 34-35.

VII. A CASE FOR ALLOWING SENTENCING DISPARITY TO PERSIST

The results of this study have shown that the Sentencing Guidelines effectively constrain judges when those judges apply the sentencing table ranges. In other words, when the legislator limits the sentencing choices of judges through the use of the sentencing table, judges heed these limitations. However, the Guideline system provides an imperfect way of constraining judicial discretion because the system itself allows judges to depart from the sentencing table ranges in certain instances and these departures lead to much of the disparity in sentencing.

Although the USSC and many politicians argue that disparity resulting from judges' discretionary departure is unwanted and creates unfairness, there are indeed arguments for allowing district court judges to use their discretion. Information supporting the arguments in favor of discretion and disparity comes from the quantitative analysis presented here as well as from interviews and a nationwide survey which I conducted in 2007 and 2008. [128]

128. In order to understand more effectively what judges think about constraints imposed on their sentencing discretion, I conducted a nationwide survey of district court judges replicating that done by the USSC in 1991. U. S. Sentencing Comm'n, NATIONAL SURVEY OF JUDGES AND COURT PRACTITIONERS (1991) (ICPSR SURVEY NO. 9837) (Codebook and data deposited with ICPSR in Ann Arbor, Michigan). I then compared responses in 1991 to 2007/2008. The survey also was supplemented with responses to questions I posed directly to judges in the Eastern, Central and Southern judicial districts of California during live interviews. In the USSC's 1991 survey, 415 active district court judges provided opinions about the Guidelines and their application. *Id.* In the 2008 survey that I conducted, 125 judges responded including fourteen from districts in California who agreed to live interviews to complete the survey. The 2008 responses were added to the USSC's 1991 database to create a data file containing 540 observations for two time periods.

The 2008 survey included twenty-seven questions from the USSC's 1991 survey on topics regarding sentencing disparity, plea bargains, guideline departures, and Congressional restrictions on discretion such as mandatory minimums, consecutive sentences, and the Guidelines themselves. The majority of questions provided multiple-choice responses with either a range of choices or simply a yes or no response. All of the questions allowed judges to respond with "don't know." For the questions on disparity, respondents had six choices regarding the prevalence of a stated event which ranged from "in all or most cases" to "in no cases." Many of the multiple choice questions were followed with open ended questions which in the 1991 survey were coded to fit into categories defined by the USSC. The 1991 responses to open ended questions were unavailable. The open ended responses to the 2008 survey have been recorded but were not coded using the USSC rules as this would involve a subjective determination.

In the 2008 survey, I excluded some case specific questions asked to judges in 1991, but included additional questions on the political party appointing the judge, year of appointment, location of judges, advantages and disadvantages of the Guideline system, and finally opinions concerning the effect of the PROTECT Act and *U.S. v. Booker*. The surveys were confidential and the majority of judges did not provide their names. After mailing surveys to over 600 district court judges between October 2007 and February 2008, in March 2008, I sent a one page letter to judges asking them to respond to the previously mailed survey if they had not already done so. My efforts resulted in 125 completed surveys. In some instances, judges did not answer all of the survey questions. In a few instances, there was missing data on one or more of the variables for district location, year of appointment, or party of appointing president.

First, disparity should be seen as positive when it allows judges to exercise their discretion to fashion just sentences. District court judges are more qualified and have more experience than Congress and higher court judges when it comes to sentencing individual defendants because they oversee thousands of Sentencing Guideline plea bargains and hundreds of trials during their careers on the bench. These are two tasks that neither Congress nor appellate courts ever undertake. [129]

Second, although judges do not like their discretion constrained, it does not follow that they will abuse their discretion when such constraints are removed. District court judges surveyed nationwide, and interviewed in person in California, indicated that they do not like discretion limiting legislation such as the PROTECT Act and preferred discretion expanding policies by the Supreme Court in *Booker*. Indeed, eighty-two percent of judges surveyed and interviewed indicated that they preferred sentencing after *Booker* as compared to during the pre-*Booker* period.[130] Although it can generally, and not surprisingly, be said that judges who have experienced the Guidelines for some time do not like their discretion constrained,[131] it does not follow that judges would fail to apply the law as written. Rather, judges apply Guideline ranges and continue to do so even though the Guidelines are no longer mandatory constraints in the majority of their cases.[132]

The third justification for allowing disparity in sentencing is that there are many variations in local case loads and practices which suggest that cases in one area of the country should not be treated the same as cases in the other part of the country. For example, disparity is often due

129. One active district court judge explained that during confirmation hearings, many Congressmen are very supportive of the appointees, but after the confirmation process they claim these same judges are "renegades" Interview 7303, November 29, 2007. Several judges also voiced the concern of one district court judge that Congressmen were "grossly ignorant" of the sentencing laws and did not have a "rational basis" for reforms, but simply enact them to appease the voting public (Interview 7401, May 7, 2007; Interview 7402, May 9, 2007; Interview 7303, November 29, 2007). Despite the negative reaction to Congress, judges are compelled to follow the law and do indeed follow it in the vast majority of cases they hear.

130. LYDIA BRASHEAR TIEDE, THE POLITICS OF CRIMINAL LAW REFORM: A COMPARATIVE ANALYSIS OF LOWER COURT DECISION-MAKING (unpublished Ph.D. dissertation, University of California, San Diego) (on file with the Department of Political Science).

131. Prior to *Booker*, judges referred to themselves as "not judges," but as orangutans or automatons. Interview with a senior district judge, June 13, 2007; Survey response 101. One district court judge from the First Circuit stated that he "emphatically" preferred sentencing after *Booker* because "*Booker* restored [him] to the role of judge rather than an automaton mouthing the sentence the executive pre-determined" District court survey response 101.

132. While judges indicated that *Booker* had a dramatic effect on their sentencing decisions, judges still indicated that in the majority of cases, sometimes up to 99%, they still apply the Guidelines. This was confirmed by both interviews and survey responses conducted in 2007/2008. Judges did, however, indicate that besides giving them more discretion, *Booker* makes sentencing defendants take considerably more time as judges now list all the factors they consider for sentencing and often make a written record of all the factors that contributed to the sentence, as shown me by one district judge in Santa Ana California (Interview 7307, October 11, 2007).

to pre-sentencing differences in prosecutors' charging and pleading practices;[133] the availability of certain types of defense attorneys;[134] caseloads;[135] and local case-processing practices.[136] Still others believe disparity is primarily due to gender, race, and ethnicity.[137] Finally, disparity often corresponds to the specific regions where district court judges are located.[138] Because pre-sentencing procedures are so diverse and pervasive, judges should be able to alter their sentencing practices to respond in kind.

VIII. CONCLUSION

In this Article, the effect of the Sentencing Guidelines that limit district court judges' discretion on outcomes of cases has been tested using a unique method to control for variations in case facts. Whether judges apply sentencing table ranges or depart from them dramatically affects sentencing outcomes and disparity of sentencing results. Legal changes of the Guideline scheme had little effect on sentence length *within* groups when departures were controlled for. In other words, cases where sentences are based on the Guideline ranges have varied little despite the legal changes to the Guideline scheme. Likewise, cases which did not employ Guideline ranges also varied little. However, sentence length was affected by legal changes when cases were analyzed at the circuit level. The results also suggest that Congress may have enacted laws changing the Guideline system to rein in some recalcitrant agents, such as the district courts in the Ninth Circuit, without giving much thought to their effect on other districts.

The legal changes also affected rates of departure nationwide and by circuits. When judges' discretion was limited, as after the PROTECT Act, judges' rates of departure as a whole decreased. When judges' discretion was expanded after *Booker*, departure rates increased. Further,

133. USSC Report, G (2004) *supra*, note 103; Stephano Bibas, *Federalism: Regulating Local Variations in Federal Sentencing*, 58 STANFORD LAW REVIEW 137, 142–44 (2005).

134. Douglas Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel under Guideline Sentencing*, 87 IOWA L. REV. 435 (2002).

135. William Braniff, *Local Discretion, Prosecutorial Choices, and the Sentencing Guidelines*, 5 FED. SENT'G REP. 309 (1993).

136. J. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255 (2005).

137. M. Free, *The Impact of Federal Sentencing Reforms on African Americans*, 28 J. BLACK STUDIES 268 (1997); David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001); L. Pasko, *Villain or Victim: Regional Variation and Ethnic Disparity in Federal Drug Offense Sentencing*, 13 CRIM. J. POL. REV. 307 (2002).

138. U. S. Sentencing Comm'n (2008), *supra* note 115 (showing the sentences for criminal categories by circuit and state). By analyzing these tables as well as those for other years, it is clear that the sentence length and departure rates for particular crimes vary by region.

the legal changes affected the rates of disparity in sentencing as measured by the standard deviation. When judges are given more discretion, similarly situated criminal defendants are treated more disparately. However, this result also depends on where the district courts are located. When both drug types are pooled, district courts located in various circuits vary in how they react and comply with Supreme Court decisions and legislation. Such results indicate that the lower courts' responsiveness to higher court precedent and legislation varies by court location and, while the intent of the legislature may be achieved for some circuits, other district courts fail to comply with the legislative intent. The lack of a pattern in compliance and non-compliance suggests the need for new theories regarding lower court decision making via other political actors.

This analysis shows that written laws that constrain judicial discretion can work and that judges follow the constraints delineated in the four corners of the statute. However, where there is room for judges to exercise their own discretion they will do so, allowing departures in cases where they believe they are warranted. Finally, this study has shown that if Congress really wants to constrain judges, it can by specifically stating so in the law. The real question is, after *Booker*, does Congress want to revert back to a system of limiting discretion?

Appendix

Table A1 Multiple Regression Analysis of Sentence on PROTECT Act

Independent Variables	SENTENCE LENGTH Drug Amount #1	Drug Amount #2
PROTECT Act	-1.38	-1.44
	(1.02)	(1.55)
Departure	*-13.39***	*-15.84***
	(0.45)	(0.58)
Year 1999	1.85	-2.66
	(1.64)	(2.38)
Year 2000	2.25	*-4.00*
	(1.65)	(2.35)
Year 2001	1.67	*-4.03*
	(1.67)	(2.42)
Year 2002	0.59	-0.46
	(1.61)	(2.32)
Year 2003	1.39	-1.16
	(1.74)	(2.59)
Year 2004	2.55	-0.02
	(1.92)	(2.77)
Year 2005	-	-
Year 2006	-	-
Circuit1	-0.76	0.54
	(1.54)	(2.16)
Circuit2	*-2.98**	-0.96
	(1.23)	(1.83)
Circuit3	-0.83	2.36
	(2.01)	(1.72)
Circuit4	-1.35	1.39
	(1.17)	(1.37)
Circuit5	-1.39	1.28
	(0.98)	(1.14)
Circuit6	-0.02	2.77
	(1.33)	(1.82)
Circuit7	-1.15	1.13
	(1.26)	(1.56)
Circuit8	-0.78	0.43
	(1.08)	(1.33)
Circuit10	-1.56	-0.12
	(1.36)	(1.52)

Circuit11	*-2.45**	0.67
	(1.07)	(1.29)
Intercept	1.67	2.47
	(1.64)	(2.38)
N	571	315
Adjusted R^2	0.63	0.74

Note: Coefficients are un-standardized ordinary least squares (OLS) regression values; standard errors are in parentheses. Coefficients in italics are significant at p<.10, *p< 0.05 and ** p<0.00.

Table A2 Multiple Regression Analysis of Sentence on all legal changes

Independent Variables	SENTENCE LENGTH Drug Amount #1	Drug Amount #2
PROTECT Act	-1.00	-1.25
	(1.31)	(2.18)
Blakely	0.56	-0.37
	(1.00)	(1.41)
Booker	1.36	2.21
	(2.07)	(3.66)
Departure	*-11.27***	*-13.61***
	(0.33)	(0.48)
Year 1999	1.82	-1.69
	(2.08)	(3.38)
Year 2000	2.24	-3.60
	(2.09)	(3.33)
Year 2001	1.32	-3.46
	(2.11)	(3.44)
Year 2002	0.45	0.03
	(2.05)	(3.30)
Year 2003	1.47	-0.51
	(2.21)	(3.66)
Year 2004	2.38	0.73
	(2.45)	(3.92)
Year 2005	0.92	-0.01
	(3.24)	(5.40)
Year 2006	0.92	-0.61
	(3.32)	(5.50)
Circuit1	0.42	1.09
	(1.55)	(2.77)
Circuit2	-1.77	0.32
	(1.04)	(1.63)
Circuit3	2.36	0.27
	(1.71)	(2.99)
Circuit4	0.09	1.74
	(0.92)	(1.41)
Circuit5	-0.46	0.73
	(0.76)	(1.07)
Circuit6	0.72	2.11
	(1.13)	(1.66)
Circuit7	-1.59	0.68
	(1.09)	(1.66)
Circuit8	-1.60	-1.26

	(0.85)	(1.18)
Circuit 10	-0.10	0.40
	(1.08)	(1.55)
Circuit11	-0.93	-0.15
	(0.86)	(1.34)
Intercept	0.59	1.73
	(1.99)	(0.53)
N	1,112	640
Adjusted R^2	0.54	0.59

Note: Coefficients are un-standardized ordinary least squares (OLS) regression values; standard errors are in parentheses. Coefficients in italics are significant at $p<0.01$