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The Year of Jubilee or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker

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ARTICLE

THE YEAR OF JUBILEE . . . OR MAYBE NOT: SOME PRELIMINARY OBSERVATIONS ABOUT THE OPERATION OF THE FEDERAL SENTENCING SYSTEM AFTER *BOOKER*

*Frank O. Bowman, III**

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On January 12, 2005, the U.S. Supreme Court found the Federal Sentencing Guidelines unconstitutional as applied and then, by judicially amending the Sentencing Reform Act of 1984,¹ transformed the Guidelines from a mandatory to an “effectively advisory” system.² Some observers greeted the decision in *United States v. Booker* as a sort of Emancipation Proclamation for federal sentencing judges,³ making 2005 a juridical Year of Jubilee.⁴ Others, notably federal prosecutors and some in Congress, have reacted with a marked lack of enthusiasm,⁵ viewing *Booker* less as an emancipation of repressed jurists and more as a release of the beast of unfettered judicial discretion among the orderly flocks of defendants being shepherded through the federal criminal system toward a Guidelines sentence.

1. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

2. *United States v. Booker*, 125 S. Ct. 738, 743 (2005).

3. Federal District Judge Nancy Gertner characterizes at least the more exuberant judges in this camp as the “free at last” group. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 579 (2005).

4. The notion of a Year of Jubilee originates in the story of the Israelites’ flight from Egypt, during which God tells Moses that the fiftieth year after the Israelites enter the land he will give them should be declared a “jubilee,” during which the people “shall . . . proclaim liberty throughout the land to all its inhabitants.” *Leviticus* 25:10–17. The idea of jubilee was adopted by African-American slaves to describe the time of their release from bondage, appearing in spirituals, see, e.g., *Rise and Shine*, in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 935 (Emily Morison Beck ed., 15th ed. 1980) (“Rise and shine and give God the glory[,] For the year of Jubilee.”), and at least one song of the Civil War era written by a white abolitionist, HENRY CLAY WORK, *Marching Through Georgia*, in SONGS 17, 19–20 (1974) (“Hurrah! Hurrah! we bring the Jubilee! Hurrah! Hurrah! the flag that makes you free! So we sang the chorus from Atlanta to the sea, While we were marching through Georgia.”). For the complete lyrics of *Marching Through Georgia*, and biographical information about its composer, see generally HENRY CLAY WORK, SONGS, *supra*.

5. For example, Rep. Thomas Feeney (R. Fla.) called *Booker* “an egregious overreach into Congress’ constitutional power’ that ‘flies in the face of the clear will of Congress’ that the sentencing guidelines be mandatory.” Dan Christensen, *The Short Life of the Feeney Amendment*, DAILY BUS. REV., Jan. 24, 2005, available at <http://www.law.com/jsp/article.jsp?id=1105968948840> (quoting Press Release, U.S. House of Representatives, Feeney Comments on Supreme Court Sentencing Ruling (Jan. 12, 2005), available at http://www.house.gov/apps/list/press/fl24_feeney/SupremeCourtOpinion.html).

This Article is not about the theoretical merits of *Booker*,⁶ but about its immediate effects. It examines the available statistics on sentencings in federal district court from January 13, 2005 through December 21, 2005,⁷ and attempts to answer four empirical questions: (1) What effect did *Booker* have on the proportion of cases sentenced within the applicable guideline range? (2) To the extent that the proportion of sentences within the guideline range has declined in the wake of *Booker*, which sentencing actors—judges or prosecutors—are primarily responsible for the decline? (3) What effect has the *Booker* decision had on the severity of sentences imposed in federal court? (4) What effect has *Booker* had on regional sentencing disparity in the federal courts? Because the answers to these questions may have considerable impact on the current debate about what, if any, action should be taken by Congress or the Sentencing Commission in response to *Booker*, this Article concludes with some reflections on what the available data means and how policymakers should think about the questions it raises.

I. THE FEDERAL SENTENCING STORY BEFORE *BOOKER*

The *Booker* decision and its aftermath can only be understood as part of a longer story about the institutional competition for control of the federal sentencing process among Congress, the central administration of the Justice Department, local U.S.

6. There already exists a flourishing literature analyzing the *Booker* decision and its immediate predecessors, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”) and *Blakely v. Washington*, 124 S. Ct. 2531, 2538, 2543 (2004) (striking down Washington’s sentencing guideline system as violative of the Sixth Amendment right to trial by jury). See, e.g., Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005) (reviewing the potential pitfalls *Apprendi* presents to substantive criminal law); M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533 (2005) (examining the implications of *Blakely* and advocating changes designed to protect defendants’ Sixth Amendment jury rights and ensure uniformity in sentencing); Margareth Etienne, *Into the Briar Patch?: Power Shifts Between Prosecution and Defense After United States v. Booker*, 39 VAL. U. L. REV. 741 (2005) (arguing that the Court’s solution in *Booker* is the best possible remedy for federal sentencing problems). My contributions to this metastasizing genre include Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149 [hereinafter Bowman, *Beyond Band-Aids*], Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235 (2005) [hereinafter Bowman, *Time Machine*], and Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004).

7. For a description of the data analyzed in this Article and a discussion of the limitations of that data, see Part II.B.1.

Attorney's Offices, federal trial and appellate judges, the U.S. Sentencing Commission, and the federal defense bar. The full tale is beyond the scope of this Article, but a brief synopsis will suffice to set the stage.

Prior to the passage of the Sentencing Reform Act of 1984 (SRA) and the subsequent adoption of the Guidelines in 1987, sentencing authority over federal defendants rested primarily with federal judges and the U.S. Parole Commission. Judges had virtually unlimited discretion to impose a sentence within broad upper and lower limits set by statute.⁸ Once a sentence was imposed, if it included a term of imprisonment, the Parole Commission had significant discretionary power to determine the length of time actually served through the exercise of its parole release authority.⁹ Federal prosecutors could influence sentences to some degree through their charging authority and plea bargaining power, but once the offense or offenses of conviction were set, they could do little to influence sentences imposed or served beyond arguing that judges or the Parole Commission should exercise their sentencing discretion in a particular way. Congress influenced sentence lengths in broad strokes by defining crimes and setting statutory maximum and minimum sentences, but otherwise customarily left the details of sentencing to the judicial and parole systems.¹⁰

For a variety of reasons—which included concern that unbridled judicial sentencing discretion combined with prosecutorial plea bargaining power was generating unwarranted disparity, distrust of the hidden back-end discretionary authority of parole officials, and, in some quarters, the view that lazy prosecutors, soft judges, and unresponsive parole officials were together letting dangerous criminals get away with unduly lenient sentences—the former regime of broad sentencing discretion was found to be deficient.¹¹ Accordingly, the SRA abolished federal

8. As Judge Marvin E. Frankel said of the pre-Guidelines federal sentencing system, “[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.” MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973).

9. The powers of the Parole Commission as it existed immediately before the adoption of the Federal Sentencing Guidelines are set out in 18 U.S.C. §§ 4201–4218 (2000), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 218(a)(7), 98 Stat. 1987, 2027.

10. For a more complete discussion of the spheres of congressional and judicial sentencing power before and after the Guidelines, see Bowman, *Time Machine*, *supra* note 6, at 237–43.

11. For discussions of the dissatisfactions with the pre-Guidelines federal sentencing system that led to the adoption of the Sentencing Reform Act of 1984 (SRA),

parole altogether,¹² substituting a requirement that defendants must serve at least 85% of their stated sentences before becoming eligible for release.¹³ The Act also replaced largely unfettered front-end judicial discretion with a guidelines system. The Federal Sentencing Guidelines were designed to cabin, though not to eliminate, the sentencing discretion of federal district judges. Their designers accomplished this end by creating a complex grid of sentencing ranges and a complex set of rules for placing defendants within these ranges based on post-conviction judicial findings of fact, by mandating that defendants be sentenced within the applicable ranges absent unusual circumstances meriting a “departure,” and by delegating to appellate courts the authority to police compliance with the rules through the process of appellate review.¹⁴ Before *Booker*, the Guidelines were not really “guidelines” as a layman would understand the term,¹⁵ but a form of positive law, binding on federal trial and appellate judges alike.¹⁶

Notably, the SRA and the Guidelines placed no formal legal constraints on prosecutorial charging or plea bargaining discretion. However, recognizing that prosecutors could effectively dictate sentencing outcomes through charge bargaining if guideline sentences were based entirely on the charge or charges of conviction, the original Sentencing Commission structured the

see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680–89 [hereinafter Bowman, *Quality of Mercy*], and Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

12. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 218(a)(7), 98 Stat. 2027.

13. An inmate can earn up to fifty-four days of good time credit per year beginning at the end of the first year of his term. 18 U.S.C. § 3624(b) (2000); see also U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3), introductory cmt. (2003) (noting that Congress’s sentencing policy sought to abolish “good time” credits).

14. This is, of necessity, an abbreviated description of the pre-*Booker* federal sentencing guidelines system. For a more complete account, see Bowman, *Quality of Mercy*, *supra* note 11, at 689–704.

15. An illustration of this point from popular culture is the response of Captain Barbosa, in the film *The Pirates of the Caribbean*, to his captive’s plea to apply the “Pirate’s Code”: “First, your return to shore was not part of our negotiations or our agreement, so I must do nothin’. And secondly, you must be a pirate for the pirate’s code to apply and you’re not. And thirdly, the code is more what you call guidelines than actual rules. Welcome aboard the *Black Pearl*, Miss Turner.” Wikiquote, *Pirates of the Caribbean: The Curse of the Black Pearl*, http://en.wikiquote.org/wiki/Pirates_of_the_Caribbean:_The_Curse_of_the_Black_Pearl (last visited Apr. 22, 2006) (emphasis added) (quoting THE PIRATES OF THE CARIBBEAN (Walt Disney Pictures 2003)).

16. *United States v. Kloda*, 133 F. Supp. 2d 345, 348 (S.D.N.Y. 2001) (“Under the Sentencing Guidelines, a judge must be concerned with positive law, and only indirectly with philosophies of just punishment and compassion.”).

Guidelines as a so-called “modified real offense system.”¹⁷ In this system, the judge calculates the presumptive sentencing range based on numerical values assigned to the offense(s) of conviction and to a variety of facts that are not themselves elements of the offense(s) of conviction.¹⁸ The non-element facts are found by the judge using a preponderance of the evidence standard.¹⁹ The result is that a defendant’s sentencing range is in large measure determined by facts neither found by a jury nor expressly admitted to by the defendant—so-called “relevant conduct.”²⁰

Everyone recognized from the outset that the effectiveness of the relevant conduct rules in constraining prosecutorial power rested in large measure on the continuing commitment of the Justice Department and individual prosecutors to providing sentencing courts with full and accurate information and the continuing resolve of judges to insist on full prosecutorial disclosure.²¹ The Justice Department has, since the advent of the Guidelines, maintained policies requiring that prosecutors charge and accept pleas only to the most serious readily provable offense and provide full and accurate disclosure to courts of facts relevant to sentencing.²² However, the phrasing of the official formulations of these policies has been modified several times by different administrations to reflect greater or lesser toleration of prosecutorial bargaining discretion.²³

Once the Guidelines went into full force (which did not occur nationally until after the Supreme Court affirmed their constitutionality in 1989),²⁴ their effect, in combination with various statutory minimum mandatory sentences Congress enacted in the

17. For a description and defense of the Guidelines’ modified real offense structure, see Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997).

18. *Id.* at 1354–61.

19. *Id.* at 1388.

20. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2005). For discussion of the rationale for and operation of the relevant conduct rules, see William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1990).

21. The primary institutional check on prosecutorial manipulation of sentencing facts has been the U.S. Probation Office, an agency within the Judicial Branch whose officers are charged with investigating and reporting sentencing facts in the presentence investigation report. For discussion of this role of probation officers, see Bowman, *Quality of Mercy*, *supra* note 11, at 730–32.

22. *Id.* at 727–28.

23. See *infra* note 38 and accompanying text (recounting the fluctuations in prosecutorial bargaining discretion associated with changes of administration).

24. *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (finding constitutional Congress’s delegation of the guidelines development task to the Judicial Branch).

late 1980s for drug offenses,²⁵ was pronounced. The percentage of federal defendants sentenced to a purely probationary sentence fell from roughly 48% in 1984,²⁶ to 14% in 1992.²⁷ Within only a few years, the length of imposed sentences was nearly triple the average prevailing before the SRA.²⁸ Furthermore, because the SRA abolishes parole and requires defendants to serve at least 85% of the prison term imposed, the amount of time actually spent in prison has increased even more than the length of the sentences nominally imposed.²⁹ As a consequence, since the 1980s, the federal inmate population has increased by more than 600%.³⁰

As the 1990s progressed, however, both the degree of adherence to the Guidelines and the overall severity of the sentences imposed gradually declined. From 1990–1996, the percentage of cases sentenced within the applicable guideline range fell from 83.4% to 69.6%.³¹ The average term of imprisonment imposed on federal defendants peaked in 1992 at 66.9 months, but

25. See, e.g., Anti-Drug Abuse Act (ADAA) of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 (adopting, inter alia, a stringent regime of quantity-based mandatory minimum sentences for drug offenses). For discussion of the effect of the ADAA on the structure of the drug provisions of the Federal Sentencing Guidelines and on drug sentence severity in the federal courts, see Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001).

26. 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, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 58 fig.14 (1991) [hereinafter U.S. SENTENCING COMM'N, 1991 STUDY].

27. U.S. SENTENCING COMM'N, 1992 ANNUAL REPORT 61 fig.D [hereinafter 1992 REPORT].

28. From 1984 to 1990, the mean sentence imposed by judges for all federal crimes increased from 24 months to 46 months. U.S. SENTENCING COMM'N, 1991 STUDY, *supra* note 26, at 60. By 1993, the mean sentence imposed increased by almost another 50% to 66.9 months. U.S. SENTENCING COMM'N, 1995 ANNUAL REPORT 61 fig.F, available at http://www.ussc.gov/ANNRPT/1995/annf_95.pdf [hereinafter 1995 REPORT].

29. For example, a federal defendant sentenced to ten years in 1986 would, on average, have served slightly less than six years before release on parole. Today, a defendant sentenced to ten years will serve 8.5 years before release. See Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENT'G REP. 12, 13 (1999) (reporting that offenders sentenced prior to the passage of the SRA on average served 58% of their term, whereas offenders sentenced after the SRA's enactment serve between 87–100% of their term).

30. Compare ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEPT OF JUSTICE, PRISONERS IN 1994, at 1 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf> (tallying 24,363 federal prison inmates in 1980), with PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEPT OF JUSTICE, PRISONERS IN 2002, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf> (tallying 163,528 federal prison inmates in 2002).

31. U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 39 fig.G [hereinafter 1996 SOURCEBOOK].

by 1996 had dropped to 62.2 months.³² In 1996, the Supreme Court decided *Koon v. United States*, which loosened the standard of appellate review of district court departures from the Guidelines³³ and which was widely interpreted as signaling encouragement or at least increased tolerance of departures. From 1996 until the end of the Clinton Administration in 2000, the proportion of sentences imposed within the applicable guideline range continued to fall, from 69.6% in 1996 to 64.5% in 2000.³⁴ Average sentence length continued to decline as well, from 62.2 months in 1996 to 55.1 months in 2000.³⁵

Prosecutorial policies and behavior plainly contributed to the downward trend in guidelines compliance and average sentence length during the 1990s. Indeed, very early in the history of the Guidelines, the government became the primary initiator of downward departures through motions for sentence reductions based on cooperation (“substantial assistance departures”), as well as requests for departure on other grounds agreed to in plea negotiations.³⁶ For example, by 1995, one in every five federal defendants was the beneficiary of a substantial assistance departure.³⁷ Similarly, whereas the Justice Department of the first President Bush emphasized vigorous charging and bargaining policies and strongly discouraged prosecutorial fact bargaining or manipulation, the Clinton Justice Department under Attorney General Reno adhered to the same general line, but in 1993 relaxed its policies somewhat to permit greater local and individual prosecutorial autonomy.³⁸ My colleague Michael Heise and I have

32. *Id.* at 23 fig.E.

33. *Koon v. United States*, 518 U.S. 81, 97–100 (1996).

34. See U.S. SENTENCING COMM’N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.G, available at <http://www.ussc.gov/ANNRPT/2000/fig-g.pdf> [hereinafter 2000 SOURCEBOOK].

35. See *id.* at fig.E, available at <http://www.ussc.gov/ANNRPT/2000/fig-e.pdf>.

36. Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 13–15, 15 n.44 (1999).

37. 1995 REPORT, *supra* note 28, at 89 tbl.31, available at <http://www.ussc.gov/ANNRPT/1995/anntb95.pdf> (reporting that 19.7% of federal defendants convicted in 1995 received a substantial assistance departure).

38. Attorney General Richard Thornburgh issued the first policy statements on Guidelines practice by federal prosecutors. See Memorandum from Richard Thornburgh, U.S. Att’y Gen., to U.S. Attorneys on Plea Policy for Federal Prosecutors (Mar. 13, 1989), reprinted in 1 FED. SENT’G REP. 421–22 (1989) (“The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government’s ability readily to prove a charge for legal or evidentiary reasons The Department’s policy is only to stipulate to facts that accurately represent the defendant’s conduct.”). In 1993, Attorney General Reno issued her own statement containing language clearly intended to give prosecutors somewhat more leeway than had been the case under the Bush Administration:

examined the decline in the length of federal drug sentences during the 1990s and concluded that it resulted in significant part from the exercise of discretionary choices by both prosecutors and judges.³⁹

This having been said, a thorough and nuanced explanation for the drops in the overall guideline compliance rate and the average sentence length during the 1990s is beyond the scope of this Article. Likewise, this Article expresses no view on the desirability of the declines in guidelines compliance and sentence severity in this period. The important point for present purposes is not so much the actual cause or substantive merit of the declines as the consternation they caused among some in Congress and some conservative observers of federal sentencing.

For some members of Congress, the gradual erosion of judicial adherence to guideline ranges was seen as an implicit rejection of congressional policy choices favoring stringent sentences as a centerpiece of national crime policy, and thus as a challenge to congressional authority. For the Department of Justice as a whole, the judiciary's increasingly assertive embrace of the departure power not only produced some sentences that prosecutors thought unduly low, but also reduced prosecutorial control over sentencing outcomes, thereby reducing the government's leverage in negotiations for guilty pleas and cooperation.⁴⁰

It should be emphasized that charging decisions and plea agreements should reflect adherence to the Sentencing Guidelines. However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.

Memorandum from Janet Reno, U.S. Att'y Gen., to Holders of U.S. Attorneys' Manual, Title 9, on Principles of Federal Prosecution (Oct. 12, 1993), *reprinted in* 6 FED. SENT'G REP. 352 (1994).

The Reno Memo drew from Senator Orrin G. Hatch an immediate and disapproving response in the form of a letter to the Attorney General. *See* Letter from Senator Orrin G. Hatch, Ranking Member, Senate Judiciary Comm., to Janet Reno, U.S. Att'y Gen. (Jan. 13, 1994), *reprinted in* 6 FED. SENT'G REP. 353 (1994). Attorney General Reno replied with a letter that appeared to disavow any intention to change previous policy. *See* Letter from Janet Reno, U.S. Att'y Gen., to Senator Orrin G. Hatch, Ranking Member, Senate Judiciary Comm. (Mar. 8, 1994), *reprinted in* 6 FED. SENT'G REP. 353 (1994). The result appeared to be a reversion to previous policy, at least in form. *See* James K. Bredar & Jeffrey E. Risberg, *The Reno Retreat: New Department of Justice "Bluesheet" DOA*, 6 FED. SENT'G REP. 313, 314 (1994) (contending that the net result of the Hatch-Reno exchange was a retreat by the Department to the position of the Thornburgh Memo).

39. *See* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 554-58 (2002).

40. *See* William W. Mercer, U.S. Attorney, Dist. of Mont. & Paul K. Charlton, U.S. Attorney, Dist. of Ariz., Testimony Before the U.S. Sentencing Commission 7-9 (Mar. 25,

Of course, judges were by no means the sole source of sentences outside the guideline range. As noted above, it is clear that, over time, U.S. Attorneys' Offices and individual prosecutors came to employ a wide array of techniques to facilitate sentences lower than the Guidelines strictly applied would call for.⁴¹ For an influential group of political appointees who entered the Department of Justice in the second Bush Administration, the number of departures being requested or acquiesced in by prosecutors, as well as the other non-departure guideline manipulation techniques employed by prosecutors to facilitate pleas, were troublesome. The new appointees were concerned that the combined effect of judicial and prosecutorial behavior created unjustifiable inter-district sentencing disparities, undercut the federal crime control program by reducing sentence lengths, and subverted the plain meaning of the law.⁴²

The confluence of administration and congressional concern produced a number of policy changes and at least one controversial legislative enactment. First, by all accounts, early in its tenure the central administration of the new Bush Justice Department began promoting aggressive prosecution, tough charging and plea bargaining policies, and increased adherence to the Guidelines.⁴³ Second, in 2003, Congress passed the Feeney Amendment to the so-called PROTECT Act,⁴⁴ a provision that legislatively reversed the *Koon* decision, thus reinstating a tighter standard of appellate review of district court departures, and directed the Commission to

2003), available at http://www.ussc.gov/hearings/3_25_03/DOJ_test.pdf [hereinafter Testimony of Mercer and Charlton] (disapproving what the Department of Justice viewed as the judiciary's excessive use of downward departures).

41. See *supra* notes 36–39 and accompanying text (describing the means prosecutors employed to alleviate burdens placed on their sentencing control by the Guidelines).

42. One of the primary architects of Bush's Justice Department policies on Guidelines matters has been William W. Mercer, U.S. Attorney for the District of Montana. Mr. Mercer's concern about guidelines compliance is evident in his public statements and occasional writings. See, e.g., Testimony of Mercer and Charlton, *supra* note 40, at 7–9; William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G REP. 43, 46 (2003) (remarking that downward departure data suggests "the fundamental principle of the SRA . . . is in jeopardy").

43. See, e.g., Frank O. Bowman, III, *Pour Encourager Les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM L. 373, 411–31 (2004) (analyzing how the Bush Justice Department pushed for tougher penalties for economic crime in the wake of the Sarbanes-Oxley Act of 2002); Testimony of Mercer and Charlton, *supra* note 40, at 2–4 (urging the Commission to "heed the voices of the President and Congress" by significantly increasing fraud guideline penalties).

44. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(m), 117 Stat. 650, 675.

amend the Guidelines to further limit departures (which it did).⁴⁵ Shortly after the passage of the PROTECT Act, Attorney General Ashcroft issued an internal Justice Department policy memorandum reemphasizing the importance of prosecutorial adherence to the Guidelines.⁴⁶ As we will see below, these changes in law and policy had observable effects on sentencing patterns from 2001 to 2004.⁴⁷

It was against this background of intense institutional struggle over sentencing policy that the Supreme Court decided first *Blakely v. Washington* in June 2004, in which the constitutionality of the Guidelines was cast into doubt,⁴⁸ and then *United States v. Booker* in January 2005, in which the formerly mandatory guidelines were, with a touch of the judicial wand, rendered “effectively advisory.”⁴⁹ The transformation generated both an immense amount of immediate labor, as lawyers and courts struggled to interpret and apply the *Booker* decision,⁵⁰ and an upwelling of uncertainty, hope, and concern about what the future would bring. To somewhat oversimplify a complex and evolving debate, there are at present three bodies of opinion about *Booker*. One group (which includes many federal judges and members of the defense bar) feels that the post-*Booker* advisory regime, though not ideal, is an improvement over the pre-*Booker* mandatory guidelines and is in any event far preferable to any replacement regime likely to be advanced by the current Congress and Administration.⁵¹ A second group (which includes some important Republican congressmen and central decisionmakers in the Justice Department) is profoundly

45. See U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES § 5K2.0 (2003), available at <http://www.ussc.gov/2002suppc/OCT03CON.pdf> (listing instances in which departures from the sentencing guidelines are prohibited).

46. See Memorandum from John Ashcroft, U.S. Att’y Gen., to All Federal Prosecutors on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencings (Sept. 22, 2003), available at <http://www.crimelynx.com/ashchargememo.html> (regarding the PROTECT Act and reaffirming “Congress’ intention that the Sentencing Reform Act and the Sentencing Guidelines be faithfully and consistently enforced”); see also U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-2.170(B), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.170 (“United States Attorneys’ Offices . . . should report all adverse, appealable district court decisions to the Appellate Section . . .”).

47. See *infra* text accompanying notes 117–122.

48. *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004).

49. *United States v. Booker*, 125 S. Ct. 738, 757 (2005).

50. See Nancy J. King, *Reasonableness Review After Booker*, 43 HOUS. L. REV. 325 (2006) (commenting on the developing reasonableness standard in appellate review of federal sentences).

51. See James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENT’G REP. 295, 295 (2005) (urging those who prefer expanded judicial discretion in sentencing decisions to defend against advocates of the reinstatement of the pre-*Booker* system).

dismayed by *Booker* because it views the Court's decision as a challenge to congressional authority over sentencing policy and to prosecutorial dominance of sentencing practice.⁵² It suspects that *Booker* will produce markedly lower judicial compliance with the Guidelines, and as a result, federal sentences that will become progressively less stringent and more disparate.⁵³ Those in the second group are likely to favor a legislative response to *Booker*—one that would, so far as now constitutionally possible, reinstate a facsimile of the pre-*Booker* guidelines system. The third group is comprised of those who believe that the pre-*Booker* federal sentencing system was significantly flawed, but do not view the post-*Booker* advisory system as a viable long-term replacement and thus hope the systemic disruption caused by *Booker* will provide an occasion for fundamental reform.⁵⁴

Essential to an intelligent debate between these groups is an accurate understanding of *Booker's* real-world effects. If judges have largely abandoned reliance on the Guidelines and now routinely impose sentences outside guideline limits, and if in consequence sentences are either markedly more lenient or markedly more disparate, then those who want immediate legislation effectively restoring the old regime have gained a powerful argument. If, on the other hand, judges continue to behave much as they did before, generally imposing sentences in accordance with the Guidelines and keeping sentence lengths and sentencing disparity much the same, then those who argue for continued application of the advisory system have arrows in their quiver. The next section evaluates the available evidence on these issues.

II. THE EXTENT AND CAUSES OF CHANGES IN GUIDELINES COMPLIANCE AFTER *BOOKER*

A. *The Problem of Quantifying the Exercise of Sentencing Discretion*

Booker undeniably conferred additional sentencing discretion on federal district judges. It may or may not have reduced the

52. See Christensen, *supra* note 5 (criticizing judicial activism in sentencing guidelines as overreaching into Congress' constitutional power); Alberto Gonzales, U.S. Att'y Gen., Sentencing Guidelines Speech (June 21, 2005) (transcript available at <http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm>) (opining that the sentencing system works best when judicial discretion is bound by mandatory guidelines).

53. See Gonzales, *supra* note 52.

54. See Bowman, *Time Machine*, *supra* note 6, at 256–58 (critiquing the advisory guidelines system as an unsustainable solution under political fire from, among others, Attorney General Gonzales).

degree of discretionary authority exercised by prosecutors over sentencing outcomes. The difficult problem is quantifying *Booker's* effect. The difficulty flows from several sources. First among these is the near-impossibility of *measuring* an increase or decrease in something as amorphous as "discretion." Discretion is another word for power—power to make certain kinds of decisions. In the sentencing context, judicial discretion means the power of a district judge to select a punishment for one convicted of crime unconstrained by a priori rules or post hoc appellate review. Conversely, prosecutorial sentencing discretion means the power to impose limits on judicial sentencing discretion in individual cases through charging decisions, plea agreements, departure motions, evidentiary presentations in support of guideline facts, and other mechanisms. Assigning numerical values to these exercises of power is difficult.

Quantifying the relative amount of discretion enjoyed by actors in different sentencing systems is a particularly tricky proposition. For example, the pre-*Booker* mandatory guidelines system was built around a sentencing grid consisting of 258 sentencing ranges designed to fall inside of and to be narrower than the ranges set by statute for conviction of crimes.⁵⁵ Once a judge made the post-conviction findings of guideline facts necessary to generate a guideline sentencing range, he or she could sentence anywhere within the guideline range but could not sentence outside the range unless the defendant qualified under standards delineated by statute, guidelines, and case law for a departure.⁵⁶ This system plainly decreased judicial discretion relative to the almost purely discretionary system that preceded the Guidelines, but it is difficult to quantify the decrease. One might compare the width of statutory sentencing ranges to the width of guideline ranges and pronounce that judicial discretion was reduced in exact proportion to the reduction in the width of the range within which judges could select sentences at will, but such an approach would plainly oversimplify the picture. Even under the Guidelines, judges retained the power to impose sentences throughout the full extent of the statutory range, subject to the limitations of the departure rules (which, in the case of certain classes of departures, require a government motion).⁵⁷ By the mid-1990s, judges, often in cooperation with prosecutors, were exercising the departure power in roughly one-

55. See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1333–34 (2005).

56. See *id.* at 1326, 1334–35.

57. 18 U.S.C. § 3553 (2000); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

third of all cases.⁵⁸ Thus, granting that the Guidelines decreased judicial sentencing discretion relative to the pre-Guidelines system, it is difficult to say by how much.

The quantification difficulty exists even when comparing degrees of discretion in different sentencing systems of the same basic type. Consider the Guidelines before and after *Booker*. *Booker* did not abolish the Guidelines.⁵⁹ Neither did it render them voluntary, in the sense that judges may choose to employ them or not.⁶⁰ Rather, it appears that judges still must make post-conviction findings of guideline facts⁶¹ and must apply the Guidelines' rules to determine a sentencing range, just as they did before *Booker*.⁶² District judges have an increased measure of power to impose a sentence outside that range and appellate judges have less power to insist that a sentence within the range is the correct one. In post-*Booker* case law, the debate about how much power district judges have gained is expressed in disputes over the weight that should be accorded the Guidelines by district and appellate judges. Some courts say that the Guidelines should be accorded "heavy weight";⁶³ others say the Guidelines are but one co-equal factor among a number listed in 18 U.S.C. § 3553(a).⁶⁴ Some courts suggest that a sentence within the guideline range is presumptively a reasonable

58. See *infra* p. 301 fig.2. Judicial power to affect sentencing outcomes was not limited to the powers of departure and selection of a sentence within the applicable guideline range. In addition, the obligation to make post-conviction findings of guideline facts carried with it a de facto discretionary power to influence sentencing outcomes through decisions on disputed facts.

59. *United States v. Crosby*, 397 F.3d 103, 111–12 (2d Cir. 2005).

60. *Id.*

61. *Id.* at 112; see also *United States v. Crawford*, 407 F.3d 1174, 1181–82 (11th Cir. 2005) (examining a district court's grant of a sentence departure based on its findings of a combination of guideline facts).

62. See *United States v. Pepper*, 412 F.3d 995, 997 (8th Cir. 2005) ("[C]alculating the guidelines sentence remains an important part of the sentencing decision after *United States v. Booker*, even when a departure is involved" (citation omitted)); *Crawford*, 407 F.3d at 1181–83 (reversing for resentencing where district judge relied on legally impermissible grounds in granting a departure); *United States v. Schlifer*, 403 F.3d 849, 854–55 (7th Cir. 2005) (remanding for resentencing because of a "misapplication of the guidelines").

63. See, e.g., *United States v. Wilson*, 355 F. Supp. 2d 1269, 1286–87 (D. Utah 2005).

64. See, e.g., *Crosby*, 397 F.3d at 112–13 (finding that sentencing judges must "consider" the Guidelines together with other factors listed in § 3553(a)). Judge Tjoflat of the Eleventh Circuit has suggested that a judge may sentence outside the guideline range because he or she disagrees with the Commission's policy judgment in setting guideline ranges for particular offenses or offenders, but that position has not so far been adopted by his court. *United States v. Rodriguez*, 406 F.3d 1261, 1287–89 (11th Cir. 2005) (Tjoflat, J., dissenting). See generally Gertner, *supra* note 3 (discussing the status of Guidelines post-*Booker*).

one;⁶⁵ others say not so;⁶⁶ and the Sixth Circuit cannot seem to make up its mind.⁶⁷ For the would-be empiricist, the problem with these debates is that, while the choice of verbal formula may give a sort of directional signal (i.e., if the Guidelines are to be accorded “great weight” or a presumption of reasonableness, the amount of additional discretion granted by *Booker* is relatively small, while if the Guidelines are only one factor among several, the amount of discretion granted by *Booker* is somewhat greater), verbal formulas cannot quantify how *much* more discretion judges have after *Booker*.

One saving grace of the *Booker* remedial opinion from the point of view of the empirically inclined is that, because *Booker* left the Guidelines themselves intact, albeit advisory, judges and prosecutors are working within the same procedural framework now as they were before, and thus we can more readily compare before and after behavior. Both before and after *Booker* judges found facts and employed the Guidelines’ rules to calculate sentencing ranges. Likewise, the rules governing sentence reductions based on cooperation with the government (“substantial assistance departures”) and participation in early disposition

65. See, e.g., *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (holding that a sentence within properly calculated guidelines range “is afforded a rebuttable presumption of reasonableness”); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) (holding that a “sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness”); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) (holding that a sentence “within the properly calculated Guidelines range . . . is presumptively reasonable” (quoting *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir. 2005))); *United States v. Cawthorn*, 429 F.3d 793, 802 (8th Cir. 2005) (“When a defendant’s sentence is within the guidelines range, it is presumptively reasonable.”); *United States v. Williams*, 425 F.3d 478, 481 (7th Cir. 2005) (“[A] sentence imposed within a properly calculated guidelines range is presumptively reasonable.”), *cert. denied*, 126 S. Ct. 1182 (2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (“The best way to express the new balance [created by *Booker*], in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.”).

66. See, e.g., *United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) (rejecting *per se* presumption of reasonableness of within-range sentence); *United States v. Zavala*, No. 05-30120, 2006 WL 914528, at *3, *5 (9th Cir. Apr. 11, 2006) (same); *United States v. Myers*, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005) (refusing to presume reasonable all guideline sentences because such a presupposition would, in actuality, make the Guidelines mandatory).

67. In *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006), the court seemed to have adopted a presumption of reasonableness for within-range sentences by “join[ing] several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness.” However, in *United States v. Foreman*, 436 F.3d 638, 644 (6th Cir. 2006), the court remarks dismissively of its *Williams* holding that, “Although this statement seems to imply some sort of elevated stature to the Guidelines, it is in fact rather unimportant,” and then makes a series of statements suggesting that whether a sentence is within the guidelines range is of no particular consequence at all.

programs (“fast-track departures”) appear to remain in operation largely unaffected by *Booker*.⁶⁸ Therefore, the Commission is able to collect pre- and post-*Booker* statistics about how often judges sentenced inside and outside of the judicially determined guideline range and also about what proportion of sentences outside the range were sought or acquiesced in by the government. It thus appears that one reasonable, if by no means perfect, measurement of the effect of *Booker* on institutional sentencing discretion is the change in percentage of sentences outside the applicable guideline range—which for ease of reference will be called the “guidelines compliance rate.”

B. A Word About Data and Terminology

1. *Data.* This Article examines the sentencing data published by the U.S. Sentencing Commission on federal sentences imposed from January 13, 2005, the day after *Booker* was decided, through December 21, 2005. That such an analysis is possible at all is due to the Commission’s commendable “Special Post-*Booker* Coding Project,” which, since the spring of 2005, has gathered, coded, and published selected categories of sentencing information on cases sentenced after *Booker*.⁶⁹ This Article was written in late 2005 and early 2006. Though the Commission continues to produce updated data every few months, two considerations led me to focus on the 2005 data.⁷⁰ The first was the need for closure in the face of a publication deadline, coupled with the conclusion that a year of data is a reasonable amount upon which to base provisional conclusions. Second, even though the Commission continues updating the post-*Booker* data, the additional cases so far reported for early 2006 do not materially change the picture painted by the 2005 data. In a few instances where available 2006 data from the “Post-*Booker* Coding Project” seems suggestive, I have mentioned it.

After this Article was completed and in the midst of the publication process, the Commission released a lengthy report (the

68. See *infra* notes 92–97 and accompanying text (explaining these sentence reduction methods and their availability).

69. All of the data compilations in the Special Post-*Booker* Coding Project are available at <http://www.ussc.gov/bf.htm>. As this Article goes to press, the most recent version collects data on all post-*Booker* cases sentenced and reported to the Commission as of March 16, 2006. U.S. SENTENCING COMM’N, SPECIAL POST-*BOOKER* CODING PROJECT 1 & n.1 (2006), available at https://www.ussc.gov/Blakely/PostBooker_033006.pdf [hereinafter MARCH 2006 POST-*BOOKER* CODING] (data extraction as of March 16, 2006).

70. This Article is based primarily on the material collected through December 21, 2005. U.S. SENTENCING COMM’N, SPECIAL POST-*BOOKER* CODING PROJECT 1 & n.1 (2006), available at https://www.ussc.gov/Blakely/PostBooker_010506.pdf [hereinafter DECEMBER 2005 POST-*BOOKER* CODING] (data extraction as of December 21, 2005).

“Booker Report”) on the impact of *Booker* on federal sentencing.⁷¹ The *Booker* Report covers a slightly longer period of time than does this Article, addressing cases reported to the Commission through mid-February 2006. Consequently, the figures in the Commission’s report will not exactly match the figures in this Article.⁷² Moreover, while the report contains a great volume of interesting material, with one notable exception relating to sentence severity,⁷³ it adds relatively little new information on the particular points under examination here and will thus receive less attention in this Article than it doubtless will in other venues.

One cautionary note about the data collected by the Commission for 2005 should be sounded. The immediate post-*Booker* period was chaotic and confusing for both the courts and the Commission. Although the Commission acted with commendable promptness in beginning its data collection effort so soon after the *Booker* decision, that effort was understandably and quite inevitably attended with difficulties. The courts were initially uncertain how they were supposed to proceed at sentencing in light of *Booker*, which led to considerable variation in actual practice. Similarly, the Commission was unsure of what data could and should be collected and of how to go about collecting it. For example, it appears that a number of different reporting forms were employed by the courts throughout 2005, and that judges and their staffs may have been inconsistent in how (or even whether) they completed and submitted the forms to the Commission.⁷⁴ These difficulties, as well as difficulties experienced by the Commission in coding the information submitted on the forms,⁷⁵ suggest that

71. U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf [hereinafter *BOOKER REPORT*].

72. The figures in this Article and the Commission’s *Booker* Report will not match exactly for one other reason. In compiling the data in the Special Post-*Booker* Coding Project, the Commission elected to code only those cases that involved a single guideline calculation. Cases with counts of conviction involving more than one guideline were omitted from the project. See, e.g., DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 15 n.3. However, the Commission then included all cases, regardless of the number of guidelines involved, in its comprehensive post-*Booker* report. See *BOOKER REPORT*, *supra* note 71, at D-4 n.1. Consequently, the Commission’s comprehensive report covers a slightly larger data set than does its special coding project. In general, the trends revealed in the two different data sets are effectively identical, but the Commission’s choice to use different data sets in these two presentations is puzzling and produces some confusion.

73. See *supra* note 72 and accompanying text.

74. Some of the reporting and data collection difficulties encountered by the Commission and the courts in this period are described in the Commission’s March 2006 report on the effects of *Booker*. *BOOKER REPORT*, *supra* note 71, at 38–40.

75. One point of particular concern is whether the Commission has accurately distinguished departures or variances sought or acquiesced in by the government and those awarded solely on the motion of the defense or on the court’s own motion over the

researchers and policymakers should view the Commission's statistics as useful guides to general trends, but should avoid basing important policy judgments on small statistical variations reflected in the Commission's post-*Booker* data.

2. *Terminology.* At various points in this Article, the term "guidelines compliance rate" or "compliance rate" is used to refer to the percentage of cases sentenced within the otherwise applicable guideline range. Several knowledgeable observers of federal sentencing have raised concerns about the use of "compliance" in this way.⁷⁶ They point out, quite sensibly, that a sentence outside the guideline range may be perfectly "compliant" with the scheme of the Federal Sentencing Guidelines inasmuch as the Guidelines explicitly provide for departures both above and below guideline ranges at the request of the parties or on the court's own motion. They express concern that use of the term "compliance" implies that outside-the-range sentences are illegitimate, an implication that can be used to suggest that judges (and other parties) who award or sanction departures are behaving illegitimately, even illegally.

Despite these concerns, for two reasons I have elected to retain the term "compliance" in some places. First, it is difficult to think of another single word that means "outside of the otherwise applicable guideline range," or to fit the longer phrase in the heading of a chart. Second, the term "guidelines compliance" conveys an important idea. Considering the federal sentencing system as a whole, the guideline ranges represent a norm, or set of norms, of sentence severity, departure from which was supposed to be relatively rare. Thus, I think it not unreasonable to characterize the proportion of sentences within the guideline range, and thus congruent with the norms established by the Guidelines, as a measurement of compliance with those norms—a "compliance rate." It is not a perfect measurement, because it includes many cases that all would agree should fall outside the range. But it seems idle to deny that a rise in the rate of non-guidelines sentences is at least one indicator of decreased compliance with the Guidelines' norms. That said, the use of the term "compliance rate" to describe the percentage of outside-the-range sentences should not be construed as expressing any view about the legitimacy of any particular sentence or group of sentences.

objection of the government.

76. Professors Dan Freed and Doug Berman, as well as Judge Gerard Lynch, raised this point in discussions of an earlier draft of this Article.

C. *Measuring and Explaining the Post-Booker Decline in Guidelines "Compliance," as Measured by Fraction of Sentences Within the Guidelines Range*

The most statistically obvious fact about federal sentencing in the year following the *Booker* decision is that compliance with the Guidelines, as measured by the percentage of sentences imposed within the applicable guideline range, has declined. During 2004, about 72% of all federal sentences were within range.⁷⁷ In the eleven-month period of 2005 following *Booker*, the percentage of all federal sentences within range dropped to 61.2%.⁷⁸ Unfortunately, standing alone, these numbers tell us very little. Does the changed national average reflect a uniform national trend, or does it mask considerable regional variation? Is a roughly 10% decline in guidelines compliance a notable change in historical terms or merely a normal statistical fluctuation? Why has compliance dropped, or more particularly, whose behavior (that is, the behavior of which sentencing actors) has caused the drop? Finally, is the decline an intolerable devolution from a system of law to one of disorderly discretion⁷⁹ or an indication of relative continuity between the pre- and post-*Booker* worlds? Answering these questions requires teasing apart the aggregate national figures on guidelines compliance.

77. The Sentencing Commission has published some sentencing statistics for fiscal year (FY) 2004. Operating on the assumption that the Supreme Court's decision in *Blakely v. Washington*, which raised but did not decide the question of the Guidelines' constitutionality, might have affected sentencing behavior, the Commission has provided tables that report pre- and post-*Blakely* sentencing data for FY 2004. Except where specifically noted, all references below to sentencing statistics in 2004 refer to the Commission's pre-*Blakely* data. In FY 2004, pre-*Blakely*, 72.2% of federal sentences were within the guideline range; in the three months of FY 2004 after *Blakely*, 71.8% were within range. See U.S. SENTENCING COMM'N, SELECTED 2004 SOURCEBOOK TABLES, tbls.26 (pre-*Blakely*) & 26 (post-*Blakely*), available at https://www.ussc.gov/ANNRPT/2004/selected_2004.pdf [hereinafter SELECTED 2004 TABLES].

78. DECEMBER 2005 POST-BOOKER CODING, *supra* note 70, at 1. As of March 16, 2006, the rate of within-range sentences had increased slightly to 61.7%. MARCH 2006 POST-BOOKER CODING, *supra* note 69, at 1. The Commission's *Booker* Report reflects a within-range rate of 62.2%. BOOKER REPORT, *supra* note 71, at 62 tbl.1.

79. This appears to be the view of important elements of the Department of Justice. For example, Attorney General Alberto Gonzales expressed concern about the decline in within-range sentences in a speech to the National Center for Victims of Crime on June 21, 2005, and suggested that in consequence, the post-*Booker* advisory guidelines "must be improved." See Alberto Gonzales, *supra* note 52. See also Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 800, 803 (2005), in which the authors, the First Assistant U.S. Attorney and the Appellate Chief for the U.S. Attorney's Office for the Eastern District of Texas, note the decline in within-range sentences to 61.7% as of August 3, 2005, and suggest this decline "portend[s] the return to a sentencing system characterized by unfairness and inconsistency as predicted by Justice O'Connor in her *Blakely* dissent." *Id.* at 800.

1. *All Sentencing Is Local.* On one point at least the drop in the national guidelines compliance rate is an accurate reflection of the state of the entire federal system—the post-*Booker* decline in within-range sentences was nearly universal. As Figure 1 illustrates, after *Booker*, the percentage of cases sentenced within range dropped in every circuit. However, the national average conceals the reality that the response to *Booker* differed markedly in degree from region to region. After *Booker*, sentences imposed within range declined by as little as 6.3% in the D.C. Circuit and as much as 14.9% in the Ninth Circuit. Eight of the twelve circuits experienced declines in the percentage of sentences within range greater than the national average of about 10%. In the Second and Ninth Circuits, a guidelines sentence became the exception rather than the rule, with compliance rates declining below 50%. Only the relatively modest declines in the case-rich Fifth, Tenth, and Eleventh Circuits⁸⁰ held the overall national rate of within-guidelines sentences above 61%.

**Figure 1: Change in Guidelines Compliance Rate
After *Booker*, by Circuit⁸¹**
(% Sentences Within Range)

<i>Circuit</i>	<i>2004</i>	<i>2005</i>	<i>Difference</i>
DC	59.2	52.9	- 6.3
1st	79.6	64.8	- 14.8
2nd	63.8	49.5	- 14.3
3rd	62.6	51.3	- 11.3
4th	78.9	66.2	- 12.7
5th	80.2	70.7	- 9.5
6th	69.7	57.6	- 12.1
7th	75.4	62.8	- 12.6
8th	77.0	64.7	- 12.3
9th	61.8	46.9	- 14.9
10th	73.9	65.9	- 8.0
11th	74.7	67.9	- 6.8

80. For example, between January 12, 2005 and December 21, 2005, the Fifth, Tenth, and Eleventh Circuits processed 39.5% of all defendants entering pleas in federal district courts. DECEMBER 2005 POST-BOOKER CODING, *supra* note 70, at 16–18.

81. The data in the 2004 column are for the period of FY 2004 preceding the *Blakely* decision. SELECTED 2004 TABLES, *supra* note 77, at tbl.26 (pre-*Blakely*). I have not included the post-*Blakely* period of FY 2004 (between June 25 and September 30) in this particular chart both because the lack of certainty during that period about whether the Guidelines remained good law and the consequent uncertainty about the effects of *Blakely* on judicial behavior and because the circuit-wide statistics for those three months do not differ markedly from the nine months of FY 2004 preceding *Blakely*. Data in the 2005 column are drawn from DECEMBER 2005 POST-BOOKER CODING, *supra* note 70, at 16–18.

The district data shows even greater variation in responses to *Booker*. More than 90% of all districts reported lower percentages of sentences within range after *Booker*, but guidelines compliance in a few districts actually went up.⁸² Among the vast majority of districts in which compliance declined, some experienced only minor drops,⁸³ but in others the change was dramatic. For example, in the Eastern District of Wisconsin, the percentage of sentences within range fell 31.8% between 2004 and 2005, from 84.7% to 52.9%; the rate in Massachusetts fell 28.1%, from 79.7% to 51.6%; compliance in the Western District of Washington fell 27%, from 64.3% to 37.3%; and in the Southern District of Iowa, the decline was 27.1%, from 73.7% to 46.6%.⁸⁴ And in at least a few districts, the rate of guidelines compliance has become astoundingly low. In 2005, within-range sentences accounted for only 40% of the cases in the Eastern District of Pennsylvania (Philadelphia), 37.7% of the cases in the District of Idaho, 34.9% of the cases in the Eastern District of New York, and 28.6% of the cases in the District of Arizona.⁸⁵

2. *Guidelines Compliance in Historical Context.* As striking as the foregoing figures may seem, they compare only partial years before and after the *Booker* decision.⁸⁶ They do not reveal whether a 10% year-to-year change in the national Guidelines compliance rate is significantly out of the ordinary, nor do they tell us how the post-*Booker* rate of 61.2% of sentences within range compares to the historical norm since the advent of the Guidelines in 1987. Both questions are answered in some measure by Figure 2 below.

82. Out of the ninety-four federal districts, ten (Maine, Delaware, Western Pennsylvania, Virgin Islands, Northern Mississippi, Eastern Tennessee, Central California, Eastern Oklahoma, Middle Alabama, and Northern Florida) registered an increase in the percentage of sentences within range in the period of 2005 after *Booker* by comparison with the period of FY 2004 preceding *Blakely*. Compare SELECTED 2004 TABLES, *supra* note 77, at tbl.26 (pre-*Blakely*), with DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 16–18.

83. Nine of ninety-four districts experienced declines of 5% or less post-*Booker* in the rate of cases sentenced within the applicable guideline range. Compare SELECTED 2004 TABLES, *supra* note 77, tbl.26 (pre-*Blakely*), with DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 16–18.

84. Compare SELECTED 2004 TABLES, *supra* note 77, tbl.26 (pre-*Blakely*), with DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 16–18.

85. DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 16, 18.

86. That is, the 2004 data is for the period of FY 2004 before *Blakely*, and the 2005 data is for the period of FY 2005 after *Booker*.

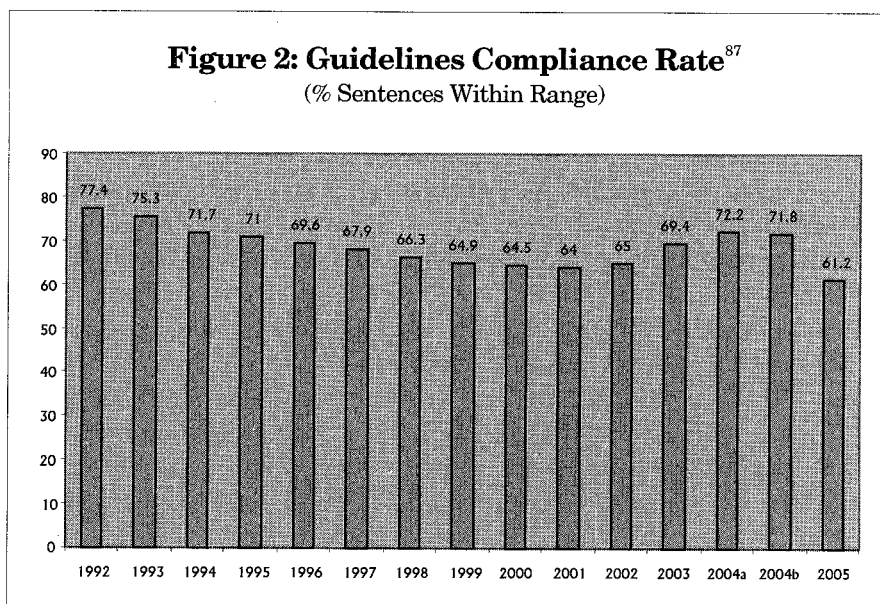


Figure 2 shows that the post-*Booker* decline in within-range sentences was not merely a statistically unremarkable fluctuation. Rather, the roughly 10% post-*Booker* drop was more than double the largest previous year-to-year variation in rate of within-guidelines sentences.⁸⁸ Of course, given that *Booker* transformed the Guidelines from a mandatory to an advisory system, it would be shocking if there were not some decline in the degree of guidelines compliance. Under the circumstances, the magnitude of the change may be remarkable primarily for its relative modesty.

Indeed, many observers have been at pains to downplay the size of the drop in guidelines compliance, emphasizing that the 61.2%

87. The data in Figure 2 are drawn from DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 7 (reporting guideline application trends for FY 2001, FY 2002, FY 2003, FY 2004 pre-*Blakely*, FY 2005–06 post-*Blakely* through December 21, 2005); SELECTED 2004 TABLES, *supra* note 77, tbl.26 (providing FY 2004 post-*Blakely*); 2000 SOURCEBOOK, *supra* note 34, fig.G (reporting guideline application trends for 1996–2000); 1995 REPORT, *supra* note 28, at 89 tbl.31; U.S. SENTENCING COMM’N, 1994 ANNUAL REPORT 83 tbl.33 [hereinafter 1994 REPORT]; U.S. SENTENCING COMM’N, 1993 ANNUAL REPORT 161 tbl.66 [hereinafter 1993 REPORT]; 1992 REPORT, *supra* note 27, at 127 tbl.50. FY 2004 post-*Blakely* data is shown on the bar designated 2004b and FY 2004 pre-*Blakely* is shown as 2004a.

88. The largest previous year-to-year change in rate of within-guidelines sentences was the 4.4% increase from 2002 to 2003. Compare U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53 tbl.26, available at <http://www.ussc.gov/ANNRPT/2002/table26.pdf> [hereinafter 2002 SOURCEBOOK] (listing the overall compliance rate for 2002 as 65%), with U.S. SENTENCING COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26, available at <http://www.ussc.gov/ANNRPT/2003/table26.pdf> [hereinafter 2003 SOURCEBOOK] (listing the overall compliance rate for 2003 as 69.4%).

rate of 2005 was only slightly lower than the rate prevailing as recently as 1999–2002,⁸⁹ and arguing that the post-*Booker* sentencing environment thus represents no significant change from the pre-existing regime.⁹⁰ While it is striking that the rate of compliance with the post-*Booker* advisory system is only 3% to 4% lower than the rate that prevailed during four of the seventeen years during which the Guidelines were legally mandatory, critics of the post-*Booker* regime would doubtless characterize the focused comparison between 2005 and 1999–2002 as fatally limited.

First, even if one knew nothing about the legal and political history of federal sentencing over the last decade, the narrow focus on 2005 and 1999–2002 would obviously be misleading because it ignores the fact that compliance rates were significantly higher both before 1999 and during 2003–2004. Indeed, the average (mean) annual rate of within-range sentencing for the period 1992–2004 exceeds 69%, markedly higher than the 2005 post-*Booker* rate of 61.2%.

Second, the argument that the post-*Booker* compliance rate is acceptable because it is roughly comparable to the 1999–2002 rate necessarily presupposes that the 1999–2002 rate was desirable, or at least acceptable. However, as noted above, for a number of influential figures in Congress and the Bush Justice Department, the compliance rates prevailing in 1999–2002, far from being a desirable norm, were evidence of creeping laxity verging on lawlessness on the part of both federal sentencing judges and many U.S. Attorneys' Offices. As Figure 2 illustrates, the rates of within-range sentencing prevalent during 1999–2002 represent the trough in a compliance curve that sloped steadily downward through the 1990s, reversed direction soon after the Bush Administration took over the Justice Department, and began to climb steeply upward during 2003 when

89. For example, Judge Ricardo H. Hinojosa, Chair of the U.S. Sentencing Commission, has consistently emphasized in public statements the relative modesty of the post-*Booker* decline in within-range sentences. See *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 45–47 (2005) (statement of Judge Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission) (noting that preliminary statistics available in February 2005 showed a rate of sentences within range exceeding 63.9%). Judge Hinojosa expressed a similar view in his remarks at the symposium that provided the occasion for this Issue.

90. See, e.g., *Oversight Hearing on United States v. Booker: One Year Later—Chaos of Status Quo?*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter *Oversight Hearing*] (statement of James E. Felman, Partner, Kynes, Markman, & Felman, P.A.) (contending that post-*Booker* sentencing could best be characterized as “status quo”).

the PROTECT Act and ensuing Guidelines amendments limiting departures were passed.⁹¹

3. *Who Caused the Decline in Within-Range Sentences?* Given that the percentage of sentences imposed within the guideline range has declined nationally since *Booker*, the next question is who is responsible for the drop. Those unfamiliar with the details of the federal sentencing system are likely to assume that the decline must necessarily be the result of judges exercising their enhanced discretionary power. And while that turns out to be substantially correct, prosecutorial behavior has also played a role, and one can only allocate responsibility for the changes in 2005 after carefully analyzing the contribution of all the institutional actors.

Before *Booker*, certain types of departures from the otherwise applicable guideline range were legally available only upon motion of the government. The SRA mandated that downward departures from a statutory minimum mandatory sentence based on a defendant's cooperation with the government in the investigation or prosecution of others—substantial assistance departures—required a government motion.⁹² Though it need not have, the original Sentencing Commission adopted this government motion requirement into the Guidelines for departures below the low end of a guideline range.⁹³ Thus pre-*Booker*, a judge could not grant a substantial assistance downward departure from either a mandatory minimum or the low end of the applicable guideline range without the affirmative, formal request of the government.⁹⁴ Beginning in 2003, the Feeney Amendment to the PROTECT Act authorized a new kind of departure for defendants in high-caseload districts, so-called “fast-track” departures.⁹⁵ In districts designated by the

91. Note that one consequence of the Feeney Amendment to the PROTECT Act was the legitimization of fast-track departures under new section 5K3.1, which became effective October 27, 2003. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 651 (2005). It is unclear how many of these departures were captured and properly classified in FY 2003. By FY 2004, the Commission created a new statistical category for them, but before reporting and data collection could become regularized, *Blakely* was decided in June 2004. It is therefore somewhat difficult to determine the effect on compliance rates of the PROTECT Act's legitimization of fast-track departures.

92. 18 U.S.C. § 3553(e) (2000).

93. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

94. For discussions of substantial assistance practice before *Booker*, see ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1541–51 (2004); Bowman, *supra* note 36, at 13–16; SUBSTANTIAL ASSISTANCE WORKING GROUP, U.S. SENTENCING COMM'N, FEDERAL COURT PRACTICES: SENTENCE REDUCTIONS BASED ON DEFENDANT'S SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT, reprinted in 11 FED. SENT'G REP. 18, 28 (1998).

95. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(m), 117 Stat. 650, 675.

Attorney General, judges could depart downward up to four offense levels for defendants who pled guilty very early in the process and waived various trial and appellate rights.⁹⁶ Fast-track departures were likewise available only on motion of the government.⁹⁷ In addition, a good many departures based on neither substantial assistance nor a fast-track program are endorsed by the prosecution pursuant to a plea agreement. In such cases it would be inaccurate to say that the government controls the decision about whether a departure was available, but the reality is that government endorsement of or acquiescence in a proposed departure is a major factor in the judge's decision to grant or deny it.

It is difficult to determine precisely who was primarily responsible for what fraction of sentences outside of the guideline range in the period just before and after *Booker*. The difficulty flows partly from the fact that the law and nomenclature concerning non-guideline sentences changed three times between the beginning of fiscal year (FY) 2003 and the close of FY 2005, and the Commission changed its data collection and reporting practices several times in the same period to keep up with developments. Before the PROTECT Act, the Commission recognized three categories of departures for reporting purposes: upward departures, substantial assistance departures, and all other downward departures.⁹⁸ The debate before and after passage of the PROTECT Act about whether judges or prosecutors were primarily responsible for what some viewed as unacceptably high departure rates,⁹⁹ together with the Act's creation of the new category of fast-track departures, led the Commission to begin examining cases with non-substantial assistance departures to determine whether the departure was initiated or consented to by the government. The data resulting from this coding effort was first published as part of the Commission's report to Congress on departures in 2003,¹⁰⁰ and began appearing as a regular feature of the

96. For a more complete explanation of fast-track or early disposition programs, see HAINES, BOWMAN & WOLL, *supra* note 94, at 1684–86.

97. U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2005).

98. *See, e.g.*, 2002 SOURCEBOOK, *supra* note 88, fig.G, *available at* <http://www.ussc.gov/ANNRPT/2002/fig-g.pdf> (breaking sentences into four categories: within range, substantial assistance departures, other downward departures, and upward departures).

99. *See, e.g.*, Frank O. Bowman, III, *When Sentences Don't Make Sense*, WASH. POST, Aug. 15, 2003, at A27 (noting that the proportion of cases in which the government requests or acquiesces in departures equals or exceeds the proportion in which judges depart without government approval); William W. Mercer, U.S. Attorney Dist. of Mont. & James E. Felman, Partner, Kynes, Markman, & Felman, Testimony Before the U.S. Sentencing Commission, 6–7, 14–15 (Aug. 19, 2003), *available at* <https://www.ussc.gov/hearings/0819USSC.pdf>.

100. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 60 fig.15 (2003), *available at*

Commission's data analysis in the Commission's 2003 Sourcebook of Federal Sentencing Statistics.¹⁰¹ Then, in June 2004, the Supreme Court decided *Blakely*, which did not directly address the Federal Sentencing Guidelines or departures from guideline ranges, but created a wave of litigation and general uncertainty about all aspects of guideline sentencing, including departures. In January 2005, *Booker* put the capstone on the general confusion by creating an advisory system in which it was unclear whether a "departure" remained a meaningful concept.

A year after *Booker*, although much remains uncertain, the dust has settled somewhat. First, the departure concept remains significant (at least so far). Because the *Booker* decision invalidated only two sections of the SRA and left the Guidelines intact (albeit advisory),¹⁰² the government motion requirement for sentence reductions based on substantial assistance or participation in a fast-track program appears to have survived largely unscathed. Thus far, for example, every circuit to consider the question has upheld the government motion requirement for substantial assistance departures below a statutory mandatory minimum,¹⁰³ and the majority seem to have upheld the government motion requirement for substantial assistance departures below the low end of a guideline range.¹⁰⁴ Likewise, it appears that government and defense counsel continue to think it important to negotiate agreements involving government motions for, or government acquiescence in defense motions for, non-guideline sentences. The continuing legal requirement of government motions for substantial assistance and fast-track departures means that such motions are still routinely made and granted and can be counted by the Commission. Similarly, the practical importance of agreements between the parties favoring non-guideline sentences means that these agreements, too, continue to be made and continue to be

<https://www.ussc.gov/departprpt03/departprpt03.pdf>.

101. 2003 SOURCEBOOK, *supra* note 88, tbls.25, 25A & 26A.

102. *United States v. Booker*, 125 S. Ct. 738, 756–57 (2005).

103. *Booker* does not apply to statutory mandatory minimum sentences. Consequently, it does not affect the requirement of a government motion as a prerequisite for a departure below a statutorily created mandatory minimum sentence. *United States v. Mullins*, 399 F.3d 888, 889, 890 n.2 (8th Cir. 2005).

104. *United States v. Ziesman*, 409 F.3d 941, 956–57 (8th Cir. 2005) (finding no error in government's refusal to file a substantial assistance motion and implicitly holding that such a motion is a prerequisite for a substantial assistance departure), *cert. denied*, 126 S. Ct. 579 (2005); *United States v. Bermúdez*, 407 F.3d 536, 541, 545–46 (1st Cir. 2005) (same), *cert. denied*, 126 S. Ct. 304 (2005); *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (same); *United States v. Daniels*, 147 Fed. App'x 869, 871 (11th Cir. 2005). *But see* *United States v. Fernandez*, No. 05-1596-CR, 2006 WL 851670 at *11–*12 (2d Cir. Apr. 3, 2006) (suggesting that district court may consider cooperation in the absence of a government motion).

counted by the Commission. Finally, the Commission's data collection arm responded to *Booker* by creating a new statistical category—the *Booker* “variance,” which is a sentence below the otherwise applicable guideline range that (1) was not sought or sanctioned by the government as part of a substantial assistance motion, approved fast-track program, or plea agreement, and (2) was justified by the court at least in part by reference to some factor that the Commission interpreted as constituting reliance on the authority granted by *Booker*.¹⁰⁵

As a result of all this legal and statistical upheaval, any conclusions about institutional responsibility for non-guideline sentences during the 2003–2005 period must be advanced with caution. Nonetheless, some reasonable conclusions are possible.

First, both before and after *Booker*, the institution most responsible for initiating sentences outside the guideline range has been the Department of Justice. Figure 3A shows the total percentage of cases sentenced outside the applicable guideline range during 2003–2005 and the percentage of cases in each category of non-guideline sentences for which data is available—upward departures, substantial assistance departures, other government-initiated departures, downward departures granted by courts without government sanction, and *Booker* variances. Figure 3B aggregates the foregoing categories to compare the proportion of non-guideline sentences for which judges and the government were responsible. As Figure 3B illustrates, the ratios of government-sponsored to court-sponsored sentences below the guideline range during the 2003–2005 period were roughly 3-to-1 in 2003, 4-to-1 in 2004, and 2-to-1 in 2005.

Second, the *Booker* decision produced an immediate jump in the percentage of defendants receiving judicially initiated (or at least non-government-sanctioned) below-range sentences. The proportion of defendants receiving such sentences more than doubled from 5.2% in 2004 to 12.8% in 2005.

Third, the percentage of defendants receiving below-range sentences sanctioned by the government also increased after *Booker*, from 21.9% in 2004 to 24.4% in 2005.

Fourth, as illustrated in Figure 3C, during 2005, the proportion of court-initiated departures declined, while the proportion of government-initiated departures increased.

105. DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 11 n.3. In truth, the footnotes describing how the Commission categorized cases as “variances” are quite confusing. The description in the text of what the Commission did is based in part on the text of the Commission’s footnotes and in part on discussions with Commission staff.

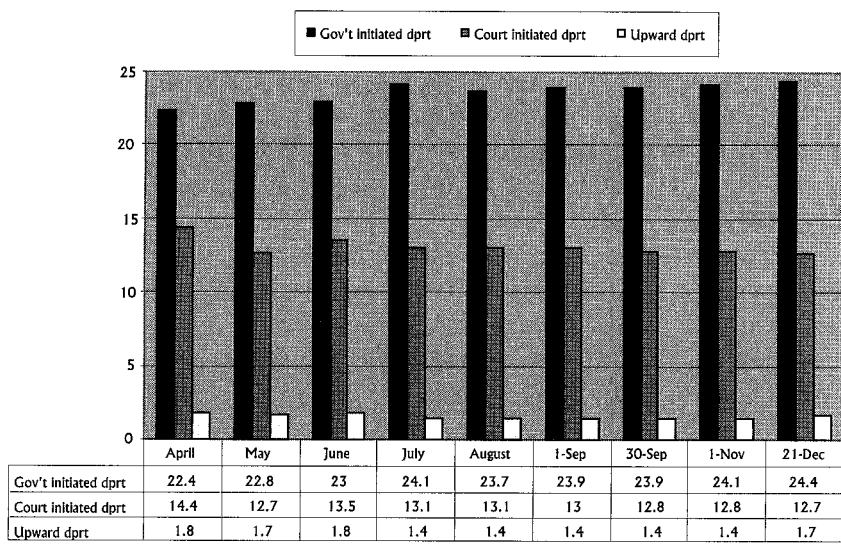
Figure 3A: Cases Sentenced Outside Guideline Range
2003–2005¹⁰⁶

	2003	2004	2005
TOTAL OUTSIDE GUIDELINE RANGE	30.50%	27.90%	38.90%
Upward departures	0.80%	0.80%	1.70%
Substantial assistance departures	15.90%	15.50%	14.80%
Other government-initiated downward departures	6.30%	6.40%	9.60%
Court-initiated downward departures/variances	7.50%	5.20%	3.20%
<i>Booker</i> variances			9.60%

Figure 3B: Cases Sentenced Outside Guideline Range
2003–2005¹⁰⁷

	2003	2004	2005
TOTAL OUTSIDE GUIDELINE RANGE	30.50%	27.90%	38.90%
Upward departures	0.80%	0.80%	1.70%
All government-initiated downward departures	22.20%	21.90%	24.40%
Court-initiated downward departures/variances	7.50%	5.20%	12.80%

Figure 3C: Sources of Departures/Variances
April 2005–December 2005¹⁰⁸



106. *Id.* at 7.

107. *Id.*

108. *Id.* at 1 (data extraction as of December 21, 2005); U.S. SENTENCING COMM'N SPECIAL POST-BOOKER CODING PROJECT 1 (2005), available at <https://www.ussc.gov/>

In sum, the number of non-guideline sentences increased by 11.0% from 2004 to 2005. Of that increase, 0.9% were upward departures, 2.5% were departures requested by the government, and 7.6% were departures or variances initiated by the judiciary. Thus, it is fair to say that the judiciary is primarily responsible for the *increase* in the percentage of below-range sentences that followed *Booker*, but the government remains, by a roughly two-to-one margin, the greatest institutional source of below-range sentences.

D. *The Extent of Departure or Variance from the Guideline Range*

As important as the percentage of cases sentenced within and without the applicable guideline range is to an assessment of the post-*Booker* system, it is also important to assess the *degree* of departure or variance from the Guidelines. For example, one might view a situation in which a great many sentences were imposed below the guideline range, but only by a very small amount, quite differently than one in which deviations from the Guidelines were both large in number and substantial in degree. In truth, of course, the distinction between substantial and minor deviations from the Guidelines is largely in the eye of the beholder. All this Article can do is present the available figures and attempt to place them in historical context. Even this modest ambition is rendered more difficult by the shifts in law and terminology during 2003–2005 detailed above, and the fact that the Commission has not yet published data on degree of departures for FY 2004. Figure 4 sets out the limited available data. It shows the median

Blakely/PostBooker_120105.pdf (data extraction as of November 1, 2005); U.S. Sentencing Comm'n, Special Post-Booker Coding Project 1 (2005), available at https://www.ussc.gov/Blakely/PostBooker_101305.pdf (data extraction as of September 30, 2005); U.S. Sentencing Comm'n, Special Post-Booker Coding Project 1 (2005), available at https://www.ussc.gov/Blakely/PostBooker_091505.pdf (data extraction as of September 1, 2005); U.S. Sentencing Comm'n, Special Post-Booker Coding Project 1 (2005), available at https://www.ussc.gov/Blakely/PostBooker_082305.pdf (data extraction as of August 3, 2005); U.S. Sentencing Comm'n, Special Post-Booker Coding Project 1 (2005), available at https://www.ussc.gov/Blakely/PostBooker_080805.pdf (data extraction as of July 12, 2005); U.S. Sentencing Comm'n, Special Post-Booker Coding Project 1 (2005), available at http://www.ussc.gov/Blakely/PostBooker_060605Extract.pdf (data extraction as of June 6, 2005); U.S. Sentencing Comm'n, Special Post-Booker Coding Project 1 (2005), available at http://www.ussc.gov/Blakely/PostBooker_5_26.pdf (data extraction as of May 5, 2005); Memorandum from Linda Dragzga Maxfield, Office of Policy Analysis, U.S. Sentencing Comm'n, to Judge Hinojosa, Chair, U.S. Sentencing Comm'n, and Tim McGrath, Staff Director, U.S. Sentencing Comm'n, on Numbers on Post-*Booker* Sentencings: Data Extract on April 5, 2005 (Apr. 13, 2005), available at http://www.ussc.gov/Blakely/booker_041305.pdf.

percentage decrease and the median decrease in months from the bottom of the otherwise applicable guideline range. (The blacked-out area for 2000–2002 reflects the fact that the Commission did not divide non-substantial assistance departures into court-initiated and government-initiated departures in that period and thus comparison of 2000–2002 with 2003 and 2005 is impossible.)

Figure 4: Size and Degree of Variances and Departures

	Substan. Assist. %	Substan. Assist. Months	Gov't Downwd %	Gov't Downwd Months	Court Downwd %	Court Downwd Months	Upwd %	Upwd Months
2000	50.3%	27					36.7%	16
2001	50.0%	25					33.3%	17
2002	50.0%	27					37.7%	14
2003	49.9%	26	28.1%	8	40.0%	12	39.3%	12
2005	49.9%	28	27.1%	9	34.0% ¹⁰⁹	12 ¹¹⁰	33.3%	14

The data in Figure 4, read in conjunction with the data in Figure 3A above, suggests only modest conclusions. First, the magnitude of both government-initiated and court-initiated departures seems to have remained roughly constant before and after *Booker*. There does not appear to be anything special about the way either the government or district judges approach the magnitude of deviations from the Guidelines in the post-*Booker* world. The size of the median substantial assistance departure remains at a bit over two years. The median size of other government-initiated downward departures has held at eight to nine months, and the median size of a court-initiated downward departure or variance has stayed flat at twelve months.

Second, we can therefore say that, in the year after *Booker*, about 0.7% fewer defendants received multi-year substantial assistance departures. About 3.2% more

109. This figure represents an approximation, though it should be accurate within plus or minus 1%. The Commission's 2005 data splits court-initiated sentences below the guideline range into two categories: "other downward departure[s]" and "otherwise below guideline range." DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 21–22. The median percentage decrease from the guideline range in cases with "other downward departure[s]" is 34.2%. *Id.* at 21. The median percentage decrease from the guideline range in cases "otherwise below guideline range" is 33.3%. *Id.* at 22.

110. Although the Sentencing Commission divided court-initiated sentences below the guideline range, the median term decrease in both categories was twelve months. *Id.* at 21–22.

defendants received eight to nine month non-substantial assistance departures sought by the government. And 7.6% more defendants (a little over 4,000 of the 54,624 defendants sentenced between January 12 and December 21, 2005) received judge-initiated sentence reductions of a median length of one year.

III. THE STATE OF SENTENCE SEVERITY AFTER *BOOKER*

Given that virtually all non-guideline sentences both before and after *Booker* have been below the otherwise applicable range, one would expect an increase in non-guideline, below-range sentences to produce a decline in the average length of sentences imposed in federal court. As of December 21, 2005, that had not proven to be the case. To the contrary, as Figure 5 illustrates, the average length of a federal criminal sentence in 2005 stayed at 56 months, exactly the same as it was in 2004, the year before *Booker*.¹¹¹ The average sentence for drug trafficking stayed flat.¹¹² The average immigration sentence declined by two months, and the average fire-arms sentence by one month, while the average theft or fraud sentence increased by two months.¹¹³

Figure 5: Average (Mean) Sentence Length of Federal Defendants, 2000–2005 (In Months)¹¹⁴

	ALL OFFENSES	Drug Trafficking	Immigration	Firearms	Theft/Fraud
2000	50	72	36	53	14
2001	50	70	35	52	15
2002	51	71	30	53	16
2003	52	77	28	56	16
2004	56	83	29	59	19
2005	56	83	27	58	21

The picture presented as of December 2005 is modestly complicated by the sentence severity data in the latest version of the Post-*Booker* Coding Project, which compiles data through March 16, 2006, and the Commission's *Booker* Report, which analyzes data through February 22, 2006. The Coding

111. *Id.* at 15.

112. *Id.*

113. *Id.*

114. *Id.* at 13–15.

Project data shows a slight *decline* in average sentence for all offenses to 55 months,¹¹⁵ while the *Booker* Report reflects a slight *increase* to 58 months.¹¹⁶ The difference may be accounted for by the fact that the *Booker* Report includes cases with multiple guideline calculations, which may be on average somewhat more serious than the cases involving only one guideline reported by the Coding Project. Resolving the inconsistencies in the Commission's reporting methods is beyond the scope of this Article. It is nonetheless fair to say, using either the Post-*Booker* Coding Project data or the larger data set analyzed in the *Booker* Report, that average sentence length stayed roughly constant in the year or so following *Booker*.

How one views these figures depends very much on the perspective one brings to them. One can argue that because the average federal sentence length held steady from 2004 to 2005, *Booker* has effected no material alteration of federal sentencing reality. However, if one considers the movement of sentence lengths over the past decade or so in conjunction with political and legal developments in the same period, a somewhat different story emerges. As described above, important Republican lawmakers and decisionmakers in the Bush Justice Department concluded that in the Clinton years enforcement of the Guidelines' rules had become too lax and the sentencing process too lenient.¹¹⁷ Beginning in 2001, they set out to reverse the trend and, by mid-2004, before the *Blakely-Booker* earthquake began to rock the federal system, they were apparently succeeding. The perceived problems of prosecutorial and judicial guideline evasion seemed to be yielding to treatment. For example, as shown in Figure 6, the percentage of government-sponsored substantial assistance departures had fallen to its lowest level in thirteen years.¹¹⁸ And as illustrated by Figure 2 above, from 2001–2004, the overall rate of guidelines compliance increased by more than 8%.¹¹⁹

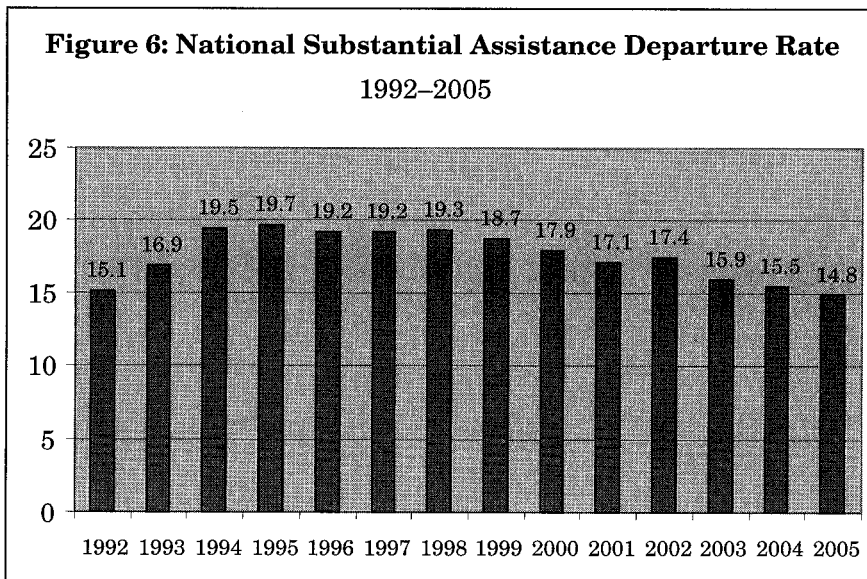
115. MARCH 2006 POST-*BOOKER* CODING, *supra* note 69, at 15.

116. *BOOKER* REPORT, *supra* note 71, at 71 tbl.3.

117. *See supra* notes 42–46, 91 and accompanying text.

118. The data in Figure 6 are drawn from DECEMBER 2005 POST-*BOOKER* CODING, *supra* note 70, at 7 (data for 2001–2005); 2000 SOURCEBOOK, *supra* note 34, fig.G (data for 1996–2000); 1995 REPORT, *supra* note 28, at 89 tbl.31; 1994 REPORT, *supra* note 87, at 83 tbl.33; 1993 REPORT, *supra* note 87, at 161 tbl.66; 1992 REPORT, *supra* 27, at 127 tbl.50.

119. *See supra* text and figure accompanying notes 87–88.



Moreover, the measures to control judicial and prosecutorial discretion appeared to be having the desired effect on sentence length. From 2001 to 2004, the average sentence for all federal crimes increased by six months, or 12%.¹²⁰ And this increase was not driven by trends in a single crime type; average sentence lengths in three of the four major federal crime categories—drugs, firearms, and theft or fraud—increased substantially. From 2001 to 2004, the average drug trafficking sentence increased by thirteen months, or 18.5%; the average firearms sentence by seven months, or 13.5%, and the average theft or fraud sentence by four months, or a whopping 27%.¹²¹ Only the length of immigration sentences declined¹²² and there is no indication that increasing the severity of immigration penalties has been a priority of the Bush Administration.

Careful examination of the available data suggests that the increases in sentence length from 2000 to 2004 were not entirely attributable to restrictions on the exercise of judicial and prosecutorial discretion. For example, examination of the mix of drug types prosecuted from the late 1990s through 2003 suggests that, beginning in 2002, a marked increase in the proportion of high-average-sentence methamphetamine cases combined with a significant decrease in the proportion of low-average-sentence marijuana cases contributed to the increase in the length of the overall average drug sentence in this period. Figures 7 and 8 show

120. DECEMBER 2005 POST-BOOKER CODING, *supra* note 70, at 13–15.

121. *Id.*

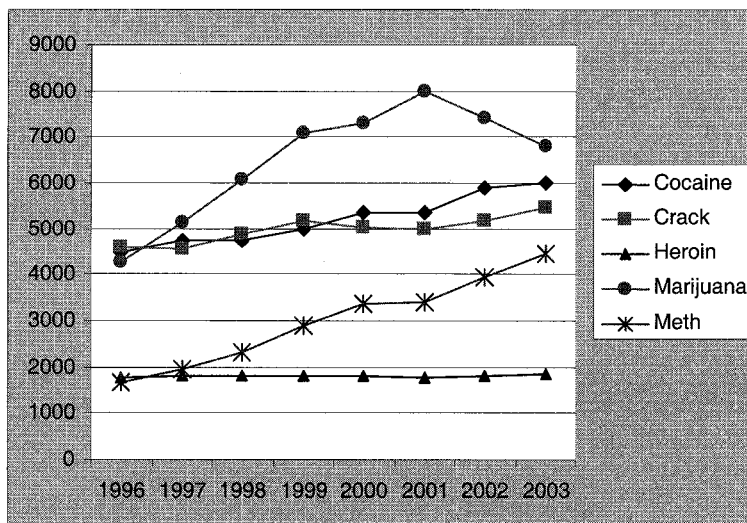
122. *Id.*

the movement of average sentence lengths within drug type, and the change in drug type mix.

Figure 7: Average Sentence by Drug Type¹²³
(In Months)

	Cocaine	Crack	Meth	Heroin	Marijuana
1992	98.0	121.0	111.0	80.0	50.0
1993	96.5	123.1	106.0	72.3	45.4
1994	94.1	133.4	93.1	76.2	46.5
1995	89.4	130.7	102.1	63.6	43.1
1996	83.6	125.4	97.2	61.0	42.1
1997	82.2	125.0	95.1	59.0	39.0
1998	79.3	122.4	96.8	58.1	37.0
1999	79.1	120.3	88.8	61.6	33.7
2000	77.0	119.5	87.8	63.2	36.4
2001	77.0	115.0	88.5	63.4	38.0
2002	78.2	119.3	93.5	62.7	32.9
2003	80.6	123.0	96.3	63.0	33.9

123. The data underlying Figure 7 are drawn from the following sources: 2003 SOURCEBOOK, *supra* note 88, fig.J; 2002 SOURCEBOOK, *supra* note 88, fig.J; U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 81 fig.J [hereinafter 2001 SOURCEBOOK]; 2000 SOURCEBOOK, *supra* note 34, at 81 fig.J; U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 81 fig.J [hereinafter 1999 SOURCEBOOK]; U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig.J [hereinafter 1998 SOURCEBOOK]; U.S. SENTENCING COMM'N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 81 fig.J [hereinafter 1997 SOURCEBOOK]; 1996 SOURCEBOOK, *supra* note 31, at 56 fig.I; 1995 REPORT, *supra* note 28, at 110 fig.K & W; 1994 REPORT, *supra* note 87, at 115 fig.K; 1993 REPORT, *supra* note 87, at 144 fig.G.

Figure 8: Number of Defendants per Major Drug Type¹²⁴

Although the Commission has not yet published the data for 2004–2005 that would be necessary to determine whether the trend in drug case mix that began in 2002 continued through 2004–2005, it is not unreasonable to suppose that this was the case. In any event, the contribution of changing case mix to changing sentence length deserves further investigation.

Similarly, the increase in average theft or fraud sentences that began in 2001 and continued through the post-*Booker* year of 2005, is surely related to the three rounds of statutory and Guidelines amendments toughening sentences for many of these offenses, beginning with the so-called “Economic Crime Package” of Guidelines amendments in 2001¹²⁵ and continuing through the statutory and Guidelines amendments required by the Sarbanes-Oxley Act of 2002.¹²⁶ The Sentencing Commission’s *Booker* Report provides some data supporting the hypothesis that these statutory and guidelines amendments were affecting sentence lengths in 2003–2004, and continued to do so in 2005.¹²⁷ The *Booker* Report also suggests that the severity of economic crime cases brought by

124. 2003 SOURCEBOOK, *supra* note 88, fig.K.

125. For a discussion of the 2001 Economic Crime Package, see Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001).

126. For discussion of the sentencing provisions of the Sarbanes-Oxley Act and ensuing guidelines amendments, see Bowman, *supra* note 43.

127. *BOOKER* REPORT, *supra* note 71, at 73–74 (noting rise from 2003–2005 in percentage of economic crime cases in which increased base offense level for fraud offenses adopted after the Sarbanes-Oxley Act was applied, and in percentage of cases in which guidelines enhancement adopted in 2001 for number of victims was applied).

the Justice Department from 2003–2005 progressively increased, at least if severity is measured by the median loss amount involved in each case. According to the Commission, the median loss amount in economic crime cases increased “from \$33,929 pre-PROTECT Act, to \$41,595 post-PROTECT Act, to \$54,566 post-*Booker*.”¹²⁸ An increase in median loss amount would tend to increase the applicable guideline range.

Regardless of the fine points, it is difficult to dispute the proposition that a variety of measures undertaken by Congress and the Bush Justice Department—with the conscious objectives of decreasing discretion of front-line sentencing actors, increasing guidelines compliance, and increasing sentencing length—were achieving their desired effects as of the *Blakely* summer of 2004. Seen in this light, the 2004–2005 pre-*Booker* to post-*Booker* plateau in average sentence length looks less like stasis than a check of the movement to longer sentences that had been engineered and nurtured by the dominant elements of Congress and the Department of Justice.

IV. ASSESSING REGIONAL DISPARITY UNDER THE *BOOKER* ADVISORY SYSTEM

The concerns of Congress and the Justice Department about lower rates of guidelines compliance relate primarily to questions of institutional control and sentence severity. However, the national and regional figures on guidelines compliance raise at least one issue for those concerned with achieving the goals of the SRA but uninterested in preserving a high degree of congressional or prosecutorial influence over sentencing outcomes. A primary purpose of the SRA and the ensuing Guidelines was to reduce unwarranted sentencing disparity. “Disparity” is a protean term in the federal sentencing debate,¹²⁹ but it is clear that one objective of the Guidelines was to impose at least rough parity on the sentences ordered for similarly situated defendants sentenced in different federal districts across the country.¹³⁰

Intuitively, one would think that the substitution of advisory guidelines in place of legally mandatory ones would produce greater sentencing disparity from region to region, judge to judge, and

128. *Id.* at 74.

129. Studies of unwarranted disparity in federal sentencing have considered differences between otherwise similarly situated defendants based on the identity of the sentencing judge, the district or region in which cases are sited, race, ethnicity, national origin, gender, and other issues.

130. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988).

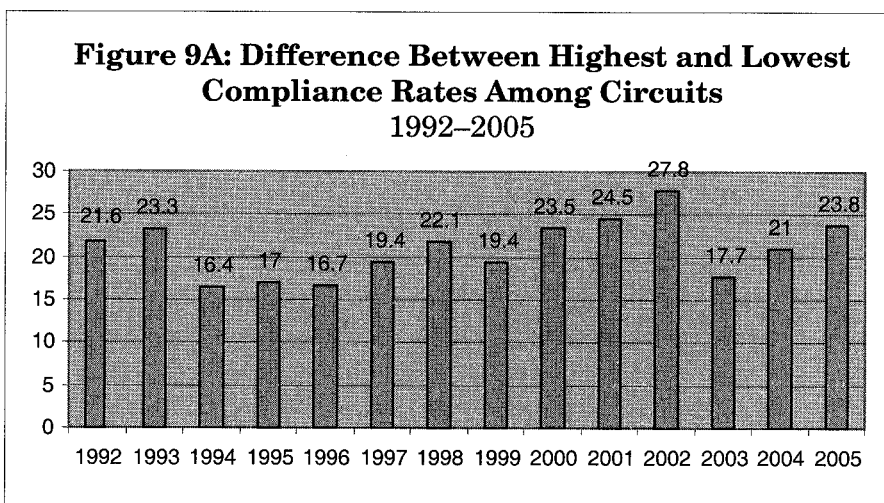
defendant to defendant as a result of the relaxation of controls on judicial sentencing discretion. At present, however, there is insufficient data in the public realm to allow detailed analysis or definitive conclusions regarding the effect of *Booker* on sentencing disparity. Attempting to compare the degree of sentencing disparity in two different sentencing systems or within the same system in two different periods is a difficult and uncertain enterprise under the best of circumstances. To do it properly requires detailed sentencing data on each individual offender in the different systems or periods being compared.¹³¹ The Commission has not released such data for the post-*Booker* period. One can, however, get some sense of general trends at least in regional disparity by examining available data that can stand in as a rough proxy for more precise measures.

For example, the difference in rates of guidelines compliance between circuits or districts should be a decent rough proxy for the degree of regional sentencing disparity. That is, it is not unreasonable to assume, at least as a first-level approximation, that two jurisdictions that adhere to the Guidelines at the same rate are treating similarly situated defendants roughly equally. This assumption is subject to some obvious caveats. For example, one jurisdiction may consistently sentence within the guideline range for marijuana cases, but not for crack cases, and another jurisdiction may have precisely the reverse tendency, with the result that, while their overall guidelines compliance rates might be identical, the disparity of treatment between two classes of similarly situated defendants sentenced in the two jurisdictions would be stark indeed. Likewise, different jurisdictions have different caseloads and different mixes of case types and may adopt local practices of deviation from the Guidelines in response to local conditions that affect only one or two categories of defendant. Even with these caveats, comparing the rates of guidelines compliance among circuits and districts probably tells us something about regional sentencing disparity. This should be particularly true if one considers trends over a period of years inasmuch as local case mixes and the differing sentencing practices that may evolve in response to them are unlikely to change dramatically from year to year.

Figure 9A shows the difference in percent between the circuits with the highest and lowest guidelines compliance rates in each

131. Even working with complete data sets, judging relative disparity is difficult. For exposure to several of the best extant efforts to do so, see James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999), and Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239 (1999).

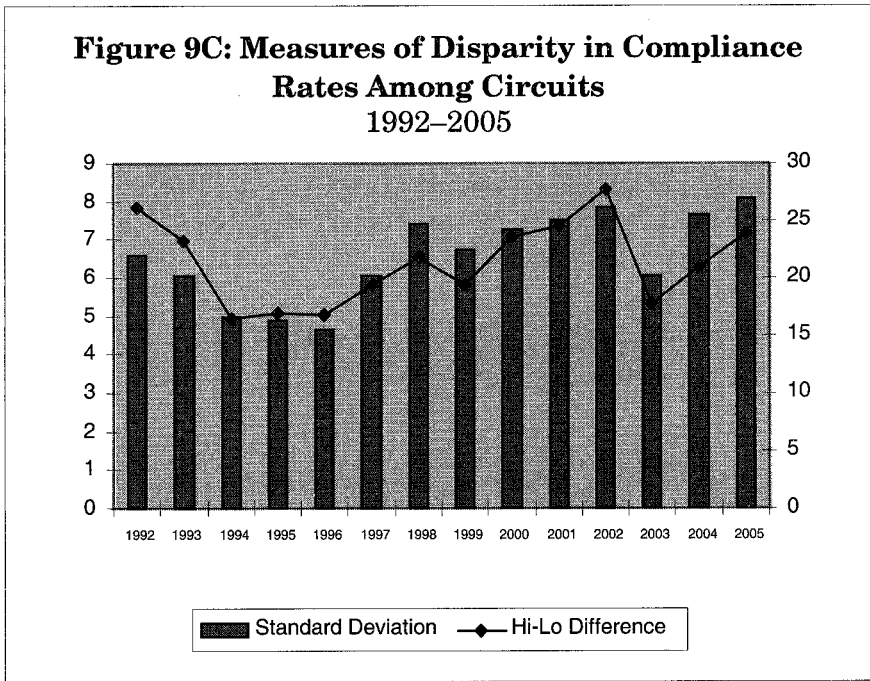
year from 1992 to 2005. Figure 9B shows the standard deviation from the mean rate of guidelines compliance among circuits in each year from 1992 to 2005. Figure 9C superimposes graphs of these two statistics in a single visual representation.¹³²



**Figure 9B: Standard Deviation Among Compliance Rates of Circuits
1992–2005**

Year	Std Deviation	Year	Std Deviation
1992	6.598691	1999	6.714615
1993	6.06562	2000	7.237544
1994	4.963595	2001	7.483249
1995	4.887616	2002	7.845492
1996	4.662512	2003	6.034164
1997	6.034013	2004	7.663545
1998	7.385038	2005	8.071949

132. The data in Figures 9A–9C are derived from DECEMBER 2005 POST-BOOKER CODING, *supra* note 70, at 16–18; SELECTED 2004 TABLES, *supra* note 77, tbl.26; 2003 SOURCEBOOK, *supra* note 88, tbl.26; 2002 SOURCEBOOK, *supra* note 88, tbl.26; 2001 SOURCEBOOK, *supra* note 123, tbl.26; 2000 SOURCEBOOK, *supra* note 34, tbl.26; 1999 SOURCEBOOK, *supra* note 123, tbl.26; 1998 SOURCEBOOK, *supra* note 123, tbl.26; 1997 SOURCEBOOK, *supra* note 123, tbl.26; 1996 SOURCEBOOK, *supra* note 31, at 41 tbl.26; 1995 REPORT, *supra* note 28, at 89 tbl.31; 1994 REPORT, *supra* note 87, at 83 tbl.33; 1993 REPORT, *supra* note 87, at 161 tbl.66; 1992 REPORT, *supra* note 27, at 127 tbl.50.

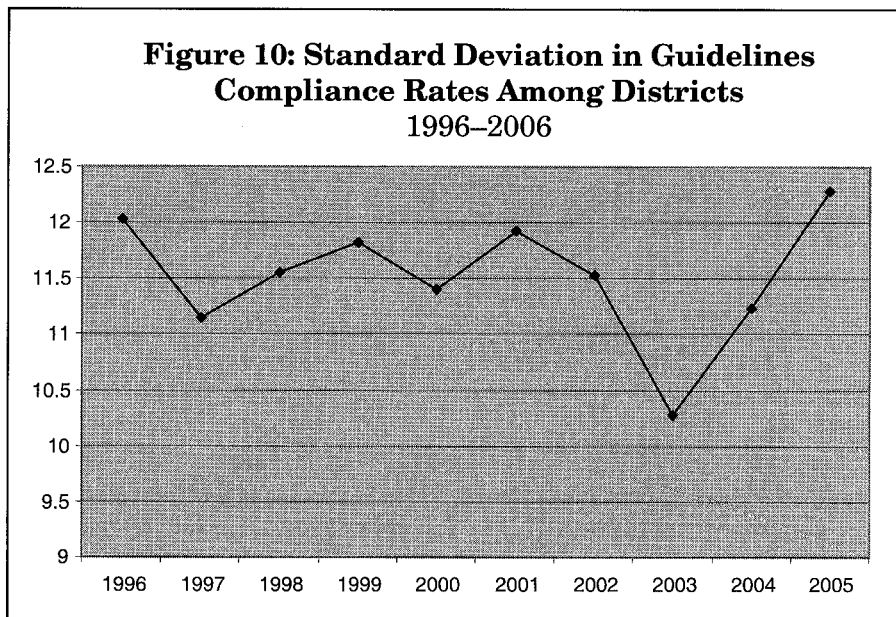


On the one hand, both the difference between the circuits with the highest and lowest compliance rates and the standard deviation from the mean compliance rate for all circuits increased slightly following *Booker*. On the other hand, the Hi-Lo difference in 2005 was less than it had been in three previous years. And while the standard deviation from the mean compliance rate was greater in 2005 than ever before, one standard deviation in 2005 was a mere .226% greater than in 2002, and within one percentage point or less of the figure in four other previous years.

District-level data points to the same ambiguous conclusion. Figure 10 shows the standard deviation among guidelines compliance rates of the ninety-four federal districts from 1996 through 2005.¹³³ As with the circuit data, 2005 shows the largest standard deviation in the series, but the difference between 2005 and the other years in the series is tiny. Moreover, a somewhat more refined statistical comparison between the degrees of inter-district variability in 2004 before *Blakely* and 2005 after *Booker*

133. The data underlying Figure 10 are derived from DECEMBER 2005 POST-BOOKER CODING, *supra* note 70, at 16–18; SELECTED 2004 TABLES, *supra* note 77, tbl.26; 2003 SOURCEBOOK, *supra* note 88, tbl.26; 2002 SOURCEBOOK, *supra* note 88, at 53 tbl.26; 2001 SOURCEBOOK, *supra* note 123, at 53 tbl.26; 2000 SOURCEBOOK, *supra* note 34, at 53 tbl.26; 1999 SOURCEBOOK, *supra* note 123, at 53 tbl.26; 1998 SOURCEBOOK, *supra* note 123, at 53 tbl.26; 1997 SOURCEBOOK, *supra* note 123, at 53 tbl.26; 1996 SOURCEBOOK, *supra* note 31, at 41 tbl.26.

reveals that the difference in inter-district variability between these two years is not statistically significant.¹³⁴ Indeed, perhaps the most striking thing about Figure 10 is the degree to which inter-district variability stayed roughly constant over time. In short, although the degree of guidelines compliance has varied widely from district to district in any given year, that has been true for a long time, and the degree of variation has fluctuated only modestly from year to year in the last decade.



The foregoing figures provide no clear indication that the post-*Booker* regime is, or will in time prove to be, notably better or worse than its predecessor in controlling regional sentencing disparity.

V. WHAT DOES IT ALL MEAN?

What, then, should we conclude from the available information about post-*Booker* federal sentencing trends? Five points, at least, seem reasonably clear, and I will add a sixth personal observation.

First, the time that has elapsed since *Booker* has been short and the data on sentencing behavior in that period is, so far, either incomplete or imperfectly reported and analyzed. Consequently, it is reasonable to conclude both that the federal sentencing system is still adjusting to its new advisory form and that we do not have a

134. An F-Test run comparing the variability of guidelines compliance rates among districts in the pre-*Blakely* period of 2004 and the post-*Booker* period of 2005 yields a P value of 0.392, indicating that the difference in variability between these two years is not statistically significant at conventional levels.

complete picture of what it will look like if allowed to progress to a state of post-*Booker* equilibrium. That said, we can make some educated guesses about the probable shape of such an equilibrium based on data on trends in guidelines compliance, sentencing severity, and regional disparity.

Second, the effects of *Booker*, at least viewed at the national level, have been strikingly modest—so far. This is not to say that *Booker* has had no observable impact on sentencing practice and outcomes. It has. Nonetheless, the norms of procedure and substance engrained by years of practice under the mandatory Guidelines have proven surprisingly durable. If the *Booker* regime of advisory Guidelines is not displaced by legislation, it seems reasonable to predict that the Guidelines will remain the predominant factor in determining individual sentences for years to come. Of course, if legislation is not immediately forthcoming and it were to become clear that no legislation was in prospect for the foreseeable future, it also seems reasonable to predict that there would be a slow decay in guidelines compliance, although one cannot know how long that decay would continue or how far it would progress.

Third, precisely because *Booker* has had such relatively modest immediate consequences, the interpretations placed on the available information are likely to exemplify the adage that “where you stand depends on where you sit”—with some (including the Justice Department and some members of Congress) claiming that the sentencing sky has fallen, or will do so shortly, and thus that immediate remedial legislation is required, and others (including many in the judiciary and the defense bar, and other members of Congress) maintaining that things are pretty much the same as they always were and therefore that we should continue to watch and wait.

Fourth, how one views the data depends in large part on whether one focuses on the magnitude of observable trends or on their direction. It is one thing to say that guidelines compliance has declined only to levels comparable to those prevailing earlier in the Guidelines era. It is another to recognize that the post-*Booker* drop in compliance not only took compliance to a historic low, but reversed a strong recent trend in the opposite direction. Likewise, it is one thing to observe that sentence severity stayed roughly flat from 2004 to 2005, and another to note that this flattening cut short a movement toward higher sentences and arguably frustrated the objectives of those in the Justice Department and Congress who were consciously engineering that movement.

Fifth, one’s perspective on post-*Booker* developments is likely to differ depending on whether one sees them from a national or

local perspective. This will be particularly true, I suspect, on the question of adherence to the Guidelines by the judiciary. Given that *Booker* transformed the Guidelines into an advisory system, a 10% decline in the national rate of within-range sentences driven primarily by a 7% increase in judicial departures or variances is unsurprising. Viewed nationally it ought not be that alarming, even to those most interested in keeping departures down and sentences up. Indeed, the curious combination of a declining guideline compliance rate and a flat (or, if the Commission's *Booker* Report data is to be believed, slightly increased) average sentence strongly suggests that judges as a class are deeply reluctant to depart very far or very often from Guidelines norms and that prosecutors as a class have many tools for increasing sentence length when that is their aim. However, this Olympian perspective may not carry the day among prosecutors and others concerned with limiting judicial sentencing discretion.

The Justice Department, in particular, does not experience the post-*Booker* world in terms of aggregate national statistical trends. The eyes, ears, and other sensory organs of the Department are its Assistant U.S. Attorneys, whose conclusions about *Booker* and ultimate recommendations to national departmental policymakers will be based on their local, personal experiences. Whatever the national statistical averages may be, the voices that will sound loudest in departmental councils will be those of prosecutors from the districts where *Booker* has already led to marked drops in guidelines compliance. In the end, it may not matter that the Fifth and Tenth Circuits have largely adhered to the Guidelines. In the Department's view, high rates of guideline compliance and concomitantly high degrees of prosecutorial influence over pleas and sentences are, or at least should be, the unremarkable norm. It is the fact that circuits like the Second and Ninth are now so far off the Guidelines reservation that will cause consternation. Put another way, what is most likely to drive the Justice Department is its perception of what it has lost, and not what it has held onto. This assessment of the Justice Department's mindset may account for its decision in March 2006 to advocate legislation designed to achieve de facto restoration of the pre-*Booker* status quo in the form of so-called "topless" or "minimum" guidelines.¹³⁵

I close with a final personal observation. The frame of reference of this Article has, to this point, been what I perceive to be the

135. See *Oversight Hearing*, *supra* note 90 (statement of William M. Mercer, U.S. Attorney for the District of Montana); see also Bowman, *Beyond Band-Aids*, *supra* note 6, at 194-96 (explaining "topless guidelines" and other possible post-*Booker* remedial legislation).

realpolitik of contemporary federal sentencing. That is, we are operating in a highly politicized, institutionally imbalanced environment in which influential elements in Congress and the Administration perceive ever-more-stringent sentences to be both substantively and politically desirable, and judicial sentencing discretion to be a challenge both to congressional authority over sentencing rulemaking and to prosecutorial authority over sentencing outcomes.¹³⁶ In this environment, the default assumption of important voices in Congress and the executive branch is that a material decrease in either the rate of guidelines compliance or the overall length of federal criminal sentences is both bad policy and a gesture of institutional defiance from the federal judiciary.

Let me suggest an alternative, moderate, and I think more sensible reading of the post-*Booker* Year of Jubilee. The drafters of the SRA never entertained the illusion that the Sentencing Commission, or indeed Congress itself, was omniscient or that the sentencing levels selected by those bodies would necessarily be "right." Rather, everyone understood that the Commission would do the best job it could in selecting sentencing levels and would thereafter rely on feedback from the judges and lawyers who operated the sentencing guidelines system, in addition to the guidance of Congress and the input of its own experts, to adjust the Guidelines over time. Some of this feedback would come in the form of formal commentary from individuals and groups, but the primary mode of feedback would be the *behavior* of those applying the Guidelines to real cases. Since 1987, the idea that feedback from front-line sentencing actors is an important component of the federal sentencing model has somehow been lost. Instead, for a variety of reasons related to the interplay of politics, the structure of the Guidelines, and institutional competition for control of criminal justice policy, sentences outside the otherwise applicable guideline range have come to be viewed as illegitimate, even deviant. If we could recapture for a moment the original spirit of the Guidelines and listen to what the professionals who operate the federal criminal justice system have told us through their conduct in 2005, we might learn something important.

In that spirit, consider four facts about 2005. First, in 2005, the majority of all federal judges were appointed by Republican presidents¹³⁷ and the U.S. Department of Justice was in the hands

136. For further discussion, see Bowman, *Time Machine*, *supra* note 6.

137. As of April 2005, Republican appointees constituted a majority of the judges on ten of the nation's thirteen federal courts of appeals. Warren Richey, *Conservatives Near Lock on U.S. Courts*, CHRISTIAN SCI. MONITOR, Apr. 14, 2005, available at <http://www.csmonitor.com/2005/0414/p01s02-uspo.html>. As of September 2004,

of a Republican Administration. Second, in 2005, prosecutors initiated sentences below the guideline range twice as often as did judges. Third, in 2005, prosecutors as well as judges sought sentences below the guideline range more often than they had in 2004.¹³⁸ Fourth, during 2005, in an advisory sentencing guidelines system operated by a predominantly Republican judiciary and a markedly conservative Republican Justice Department, almost 40% of all sentences were outside the guideline range and the ratio of sentences below the applicable guideline range to those above it was roughly 22-to-1.¹³⁹

These facts about the post-*Booker* experience reinforce conclusions many observers have reached about federal sentencing throughout the Guidelines era. First, the behavior of the careful, cautious, public-safety-conscious judges and prosecutors who run the federal criminal justice system shows that they will obey the law, but also strongly suggests that they believe the severity of sentences called for by the Guidelines is often (though by no means always) greater than necessary to achieve the ends of justice. Second, the high severity levels that characterize the federal system can only be maintained by unremitting efforts at central control of the federal criminal process. The experience of the Clinton period demonstrated that relaxation of central control produced a slow, steady decline in guideline compliance and sentence severity driven by the behavior of both judges and prosecutors.¹⁴⁰ The Bush Administration and some in Congress set out to reverse that trend by re-imposing central control through legislation, Guidelines amendments, and directives from the central administration of the Justice Department to U.S. Attorney's Offices. The counter-revolution worked, at least until *Booker* was decided and the strictures of central control were relaxed. Once that happened, the upward curve of increased guidelines compliance reversed direction, and the upward trend in sentence severity plateaued. It is, therefore, fair to conclude from the experience of the Clinton years and the post-*Booker* year of 2005, that, under the existing federal guidelines system, whenever the amount of sentencing discretion

Republican appointees to the district court bench outnumbered Democratic appointees 356 to 310, a ratio that has obviously tilted further toward Republicans in the ensuing year-and-a-half. Greg Gordon, *All Eyes on Aging Justices*, SACRAMENTO BEE, Sept. 27, 2004, available at <http://www.sacbee.com/content/politics/story/10892870p-11810491c.html>; see also Adam Nagourney, Richard W. Stevenson & Neil A. Lewis, *Glum Democrats Can't See Halting Bush on Courts*, N.Y. TIMES, Jan. 15, 2006, at 1.

138. See *supra* fig.3B.

139. *Id.* In 2005, 37.1% of all cases were sentenced below the guideline range, while 1.7% were sentenced above the range, a ratio of 21.82-to-1.

140. See Bowman & Heise, *supra* note 39, at 554–58.

available to judges and prosecutors increases, the proportion of sentences below the guideline range increases and the severity of the sentences the system would otherwise generate moderates.

What practical lesson flows from this conclusion? The simplest lesson is that we have a federal sentencing system with a severity level that, at least for some common offenses, is pegged higher than the day-to-day judgments of the legal professionals who operate it will support. I do not suggest that most front-line actors perceive current sentence severity levels to be unjust (though some surely do), only that the behavior of judges, prosecutors, and defense lawyers demonstrates that they commonly perceive the sentences called for by strict application of the Guidelines to be, at the least, unnecessary. Because the severity level of the system is so consistently at odds with the professional judgments and institutional goals of its front line actors, only tight centralized controls can keep it propped up. Those tight central controls in turn breed evasion and institutional conflict.

If one is willing to grant that the judgment of front-line sentencing actors is entitled to considerable deference when making sentencing rules, one component of any post-*Booker* reform proposal should surely be a serious, bipartisan, interbranch, and interdisciplinary reexamination of at least those sentencing levels and Guidelines' rules most productive of evasion by the front-line actors who know the system best. I recognize that in some quarters such a suggestion will be immediately dismissed as the soft-headed maundering of an unworldly academic. But having spent more than thirteen years as a federal and state prosecutor avidly seeking to lock up the criminal element, I can bear that sort of critique with equanimity. A more telling criticism is that, in the current political environment, any hint that any federal sentencing law should be revised downward is pure wishful thinking, a dream foredoomed. That is a fair point. And I confess that as I write this concluding paragraph, the title track of *The Man of La Mancha*¹⁴¹ keeps welling up unbidden in the back of my mind. But whether it be tilting at windmills or not, someone needs to remind federal policymakers of an obvious truth—if laws are widely and persistently evaded by the very officials assigned to enforce them, at some point one should start questioning the wisdom of the laws rather than the fidelity of the enforcers. In the end, one very good way to promote guidelines compliance is to write guidelines that call for outcomes those who run the system are happy to accept.

141. MAN OF LA MANCHA (MGM 1973) (musical version of the classic work, MIGUEL DE CERVANTES, DON QUIXOTE DE LA MANCHA (1605)).
