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Prolegomenon on the Status of the Hopey, Changey Thing in American Criminal Justice

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In the fall of 2008, *Federal Sentencing Reporter* published an issue titled “American Criminal Justice Policy in a ‘Change’ Election.” In it, we brought together an all-star cast of lawyers, judges, elected and appointed officials, and academics to discuss the criminal justice questions they thought should be raised in the upcoming election and the initiatives that should be pursued once the results were known. In truth, crime did not feature largely in the national political conversation before the 2008 polling. Nonetheless, November 4, 2008, was a momentous occasion. Whatever else may come, an America that has found in a black man’s face the features of an American president is an America irrevocably changed. But here at *FSR* we aren’t licensed to muse too much on the long roll of history. We do crime and punishment. So, as a new election approached, we wanted to know whether, if 2008 was, as advertised, a “change” election, anything has really changed in criminal justice in the two years since.

Once again we have assembled a wide array of thoughtful observers, some who contributed their thoughts in 2008, and some new voices, as well. In the latter category, we are pleased to welcome a working journalist, in the person of Ted Gest, who offers a view of the media’s role in framing public debate on corrections reform,¹ and two rising young sentencing scholars, Carissa Byrne Hessick and Andy Hessick.² In the articles that follow this essay, our guests describe—and often criticize—what has happened in the last two years, they prognosticate about what the near-term future may bring, and they prescribe a few remedies for what ails the American criminal justice process.

In this introductory essay, I focus primarily on the federal system. Part I paints a statistical picture of trends in federal criminal practice and sentencing over the last half-decade or so, with particular emphasis on sentence severity and the degree of regional and inter-judge sentencing disparity. Part II discusses the durability of the post-*Booker* advisory guideline system and the prospects for federal sentencing reform generally. Part III introduces a series of terrific contributions on state criminal justice developments. And Part IV tips the editorial hat to Judge Robert Pratt’s stimulating thoughts on the addition of Justice Sotomayor, a former trial judge, to the Supreme Court.

I. Crime and Punishment in the Federal Courts Since 2004

The federal criminal system has been in a near-constant state of uncertainty since the summer of 2004, when *Blakely v. Washington*³ first intimated that the Federal Sentencing Guidelines and all of the institutional understandings and relationships built upon them might be swept away—clear-cut like a dense patch of woodland to await congressional replanting with some fresh, new sentencing regime. But the *Booker*⁴ remedy for the *Blakely* problem—the simultaneous invalidation and resurrection of, suddenly advisory, Guidelines—was less akin to an honest woodsman’s ax than to the ministrations of a quarrelsome team of mad bonsai gardeners. And the result has been, not an orderly new planting, but a tangled thicket of strange and fantastic growths previously unknown to the law.⁵ Overlaid on the disorientation created by *Booker* were two national elections—the 2006 midterms and the 2008 presidential canvass—that brought change in control of Congress in 2006 and of the White House, and thus the Justice Department, in 2008. And as this issue of *FSR* is being written, the 2010 midterms shuffled the political deck once again.

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One consequence of all this legal and political movement is that it is difficult even to accurately assess the current state of the federal criminal system and still more difficult to evaluate the likely shape of near-term developments. Nonetheless, whatever the 2010 elections bring, it is surely helpful to begin thinking about their aftermath with as clear a picture as possible of the how the system now stands. In the next few pages, I have attempted to assemble such a picture, but the task is surprisingly difficult, reminding me simultaneously of the parable of the blind men and the elephant⁶ and of the classic Japanese film *Rashomon*.⁷ Which is to say that how one understands the current state of federal criminal justice depends both on which part of the huge, ungainly beast one focuses on and what biases one brings to the task.

A. Sentence Severity: Expectations vs. Statistics

Given the events of the past five years, one might have expected a dramatically liberalizing trend in the federal criminal system. After all, *Booker*'s mandate of advisory guidelines has been broadly hailed by the defense community as at least a partial remedy for federal sentencing rules thought to be too rigid and too punitive. Moreover, in January 2007, control of the House and Senate and their crucial judiciary committees passed from Republicans, who have generally favored sternly punitive criminal laws and disapproved of judicial mitigation of the law's severity, to Democrats disposed to question the severity of at least some laws and to approve of the mitigating exercise of judicial discretion. The change in congressional control also provided an opening to the Sentencing Commission to relax guidelines rules if it wished to do so, with less concern that ameliorative amendments would be blocked by congressional vote. And in January 2009, the Justice Department was taken over by Democrats who were, to be sure, dedicated to vigorous enforcement of the criminal law, but were expected to prove less unyieldingly punitive than their predecessors.

The reality reflected in national statistics is remarkably mixed. First, the expectation that *Booker* would produce a substantial increase in the exercise of judicial sentencing discretion and a progressive abandonment of the strictures of the Guidelines has begun to prove correct. As Figure 1 illustrates, the percentage of cases sentenced within the applicable guidelines range has dropped from 70.9% in the portion of FY 2005 preceding *Booker* to 54.8% during the first three quarters of FY 2010.⁸ The drop occurred in two phases, one immediate and triggered by *Booker* itself, the second more gradual following *Kimbrough v. United States*.⁹ After the January 2005 *Booker* decision, within-range sentences dropped 9% in the nine months remaining in the 2005 fiscal year, but the rate stabilized through 2006–2007 while the courts determined how binding the newly advisory guidelines would be. Once *Kimbrough*, decided in December 2007, made clear that the advisory guidelines were just that and that appellate courts had little power to review exercises of district court sentencing discretion, the decline in within-range sentences resumed and shows no immediate sign of stopping.

Second, as Figure 2 illustrates,¹⁰ the expectation that increased judicial discretion, a Democratic Congress, and, most recently, a Democratic Justice Department would combine to produce less severe federal sentences *seems*, at least on the surface, to have been borne out by the statistics.

Figure 1
Percent Sentences Within-Range

Figure 2
Mean (Average) Federal Sentence [in months]

But the reality behind these gross national figures is complex and ambiguous. For example, if increased post-*Booker* judicial discretion was supposed to generate lower sentences, why did the three years following *Booker* produce the highest average sentences of the Guidelines era? One might explain this apparent anomaly by observing, first, that during 2005–2008, the Bush administration was in office and Republican U.S. Attorneys may have employed a variety of nonguidelines mechanisms to constrain the free exercise of judicial discretion¹⁷ and, second, that district judges were uncertain of the extent of their new power until *Kimbrough* in December 2007 and cautious about provoking congressional backlash until Democrats were firmly in control of both Congress and the executive. These factors might help account for the severity plateau from 2005–2007, as well as the timing of the decline in average sentence length that began in FY 2008, but a closer look suggests that factors other than either prosecutorial tactics or judicial behavior played a major role.

Statistically, the most notable change in federal criminal practice since 2007 has been the huge increase in immigration prosecutions. As shown in Figure 3, between 2004 and 2009, the numbers of people sentenced annually in federal court rose from 69,932¹² to 81,372,¹³ an increase of about 11,000 defendants per year. As Figures 3A, 3B, and 3C illustrate, almost the entire increase was in immigration cases, which rose from 15,717, or 22.5% of all federal cases, in 2004¹⁴ to 25,927 (31.9%) in 2009.¹⁵

The jump in immigration prosecutions coincided with enhanced immigration enforcement initiatives beginning in 2007 that produced dramatic increases in funding for both civil and criminal components of the U.S. Immigration and Customs Enforcement agency.¹⁶ For our purposes, however, the important point is that increasing the proportion of federal defendants sentenced for immigration crimes drives down the national average sentence length. Of the three largest general crime categories in federal court—drugs, economic offenses, and immigration—since 2005, immigration has had the lowest average sentence.¹⁷ In 2009, the average sentence for drug defendants sentenced to a term of imprisonment was 79.5 months; economic crime defendants received an average of 28.3 months; and immigration offenders received only 18.9 months.¹⁸ In short, a significant contributor to the recently lowered average federal sentence has been the increased percentage of low-sentence immigration offenders—a consideration unrelated to any post-*Booker* blossoming of judicial discretion or a more merciful disposition on the part of President Obama’s prosecutors.

Moreover, the effect of rising immigration case numbers has been compounded by the fact that the average sentence for an immigration offender has itself decreased steadily—from 23.5 months in 2006 to 18.9 months in 2009.¹⁹ This decrease might have a small connection to judicial behavior after *Booker* inasmuch as three circuits have concluded post-*Kimbrough* that a judge may vary from a guideline sentence in order to avoid disparity created by the availability in some districts and not others of “fast-track departures,”²⁰ which are particularly common in immigration cases.²¹ But any such connection is surely very small. Similarly, the decrease in average immigration sentence length has little to do with any new spirit of lenity introduced by Democratic U.S. Attorneys, because the biggest drop occurred between 2007 and 2008, when the Bush administration was still in office. Almost certainly, the drop in length of immigration sentences is a consequence of processing an ever-larger number of low-seriousness immigration offenders through fast-track programs in border districts.²²

Figure 3
Federal Defendants Sentenced

Figure 3A: Immigration Defendants

Figure 3B: 2004

Figure 3C: 2009

In addition, some of the recent decline in average federal sentence length is attributable to trends in drug cases, which make up roughly one third of the federal criminal docket.²³ The average sentence for drug offenders declined from an all-time high of 84.4 months in 2007 to 79.5 months in 2009. Changed judicial behavior in response to *Booker* and *Kimbrough* may have had something to do with this decline, but the more obvious correlation is to the Sentencing Commission's November 1, 2007, amendment reducing the crack guidelines by two levels.²⁴ From 2007 to 2008, the average sentence for crack cocaine offenders dropped from 129 months to 114, and then, in 2009, nudged back up to 114.8 months. In the same period, the sentences for marijuana and methamphetamine decreased a bit while average powder cocaine and heroin sentences actually increased.²⁵

Figure 4
Percent Offenders Receiving Prison Only

Meanwhile, the average sentence imposed on economic offenders who received prison terms has trended upwards, from 25 months immediately after *Booker* to an all-time high of 28.6 months in 2008, followed by a slight tick down to 28.3 months in 2009.²⁶ Between 2007 and the third quarter of 2010, the average robbery sentence declined, but the average pornography sentence went up.²⁷

One of the most surprising nuggets buried in federal sentencing data concerns probationary sentences. The first decision a judge must make in fashioning a sentence is the in-out choice—whether to send a defendant to prison or to grant probation or some intermediate sanction. One might have thought that the first consequence of the advent of truly advisory guidelines would be a surge in the use of probation and other nonprison sanctions. In fact, as shown in Figure 4, the reverse has occurred.²⁸ Since 2004, the fraction of federal defendants receiving prison-only sentences has climbed, slowly but steadily, from 84.1% to 87.5%, whereas the use of nonprison sanctions has seen a concomitant decline.

In sum, despite a 16% increase since 2005 in the number of cases sentenced outside the guideline range, judges are imposing prison sentences more and probation less than ever, average sentence length has declined—but so far by only about six months—and an unknown (but surely substantial) fraction of that decline is attributable to vastly increased immigration numbers and the Commission's 2007 crack amendment. Indeed, based on currently available data and analysis, it is difficult to determine whether, with the exception of crack and possibly immigration cases, there has been a general post-*Booker* decline in the sentence lengths of similarly situated federal defendants.

B. Sentencing Disparity

One of the primary objectives of the Federal Sentencing Guidelines was to minimize unjustifiable sentencing disparities—that is, significant differences in sentencing outcomes between similarly situated defendants. Whether the Guidelines ever accomplished this objective in their mandatory period was always a subject of heated debate. The difficulty in settling the question arose partly because there are different types of potential disparity—between judges in the same district, between districts or regions, between defendants of different race, national origin, or sex—and partly because measuring any of them is very difficult. The issues of disparity based on race, nationality, or sex are beyond the scope of this essay (though Federal Defenders Tom Hillier and Amy Baron-Evans argue in this issue that advisory guidelines have not exacerbated racial disparity).²⁹ Nonetheless, the effect of advisory guidelines on interdistrict, regional, and inter-judge disparity is reasonably clear.

In its fifteen-year review of practice under the Guidelines from 1989 to 2004, the Sentencing Commission concluded, “The results of the latest analysis indicate that the guidelines have significantly reduced inter-judge disparity compared to the preguidelines era. . . . The available evidence suggests that regional disparity remains under the guidelines, and some evidence suggests it may even have increased among drug trafficking offenses.”³⁰ Whatever the other merits of the advisory system *Booker* introduced in 2005, there can be little serious doubt that it has increased geographical disparity in federal sentencing, and the available evidence suggests that inter-judge disparity has increased as well.

Figure 5
Difference Between Highest & Lowest In-Range Rates Among Circuits (1994–2009)

A precise quantification of the degree of geographic disparity before and after *Booker* would require analysis of detailed data on each person sentenced in the two periods. This sort of analysis has not, to my knowledge, been performed on the post-*Booker* period. However, one can get a good sense of trends by examining data that can stand in as a rough proxy for more detailed measures. For example, the differences in rates of sentences within the applicable guidelines range between circuits or districts is 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 adhering to the Guidelines at the same rate are treating similarly situated defendants roughly equally. At the very least, a large difference in the rates at which two jurisdictions adhere to the Guidelines is nearly conclusive proof that the sentencing *process* in the two places is different, and it strongly suggests that the *outcomes* for similarly situated defendants are likely to differ. This assumption is subject to some caveats,³¹ but even with those caveats in mind, comparing the rates of within-range sentencing among circuits and districts tells something important about regional sentencing disparity. This conclusion holds particularly true if one considers trends over a period of years inasmuch as local case mixes are unlikely to change dramatically from year to year.

Figure 5 shows the difference in percent between the circuits with the highest and lowest rate of within-range sentences in each year from 1994 to 2009.³² The gap between the highest and lowest rates of in-range sentences among circuits is now nearly double what it was in 2003, the year before *Blakely* cast the constitutionality of the Guidelines into doubt. In hard numbers, in 2003, courts in the First Circuit sentenced 71.3% of all defendants within the applicable range and the Ninth Circuit sentenced 59.6% in-range, for a difference of 17.7%. In 2009, courts in the Fifth Circuit sentenced 71.7% of defendants within range, whereas the Ninth Circuit sentenced only 40% within range, for a difference of 32.3%.

Of course, Figure 5 considers only the annual difference between the two most extreme circuits. A better measure of the variability of within-range sentencing among all circuits is the size of the standard deviation in within-range rates. Figure 6 charts the trend in standard deviation and it, too, shows a marked increase in inter-circuit variability beginning in 2004 (*Blakely* year) and accelerating in 2006 and 2007.

Figure 6
Standard Deviation of In-Range Sentencing Rates Among Circuits (1994–2009)

Figure 7
Standard Deviation of In-Range Sentencing Rates Among Districts (2001–2010)

As striking as these numbers are, comparisons of the sentencing practices of circuits may camouflage even larger differences between districts inasmuch as the circuit rate of within-range sentences is necessarily an average of the sentences imposed in all the districts of which it is composed. Figure 7 illustrates both that interdistrict variability has always been greater than inter-circuit variability and that the variability of within-range sentencing among districts has also markedly increased since 2004.

Comparison of Figures 6 and 7 reveals another important fact about the effect of *Booker* on geographic disparity. Note that inter-circuit variability is lower in absolute terms than interdistrict variability. Between 2003 and 2009, the standard deviation of within-range sentence rates varied between 6.034 and 10.429 for circuits, and between 10.283 and 13.299 for districts. But the same figures show that inter-circuit variability increased more than interdistrict variability in that period. This result seems counterintuitive. Because circuits are aggregates of districts, one would expect that the process of averaging trends in multiple districts to calculate a circuit-wide average would decrease differences between circuits. But, as regular observers of federal sentencing practice have long known, judicial attitudes toward the guidelines are highly regionalized. Broadly speaking, rates of guidelines compliance have long correlated with locally dominant political and social attitudes. For example, federal courts in the Northeast and on the West Coast have generally sentenced within the guideline range at lower rates (and thus less harshly) than courts in the South and Mountain West. Because the federal circuits are regional, aggregating the statistics of their districts and comparing them with the aggregated statistics of districts in other circuits actually highlights regional differences.

As Figure 8 illustrates, the judges in the Second and Ninth Circuits, who in 2003 already sentenced defendants within range less than judges virtually anywhere else, by 2009 had dropped their within-range rates by nearly an additional 20%. By comparison, the judges in the Fifth and Eleventh Circuits, who had adhered to the guidelines at higher rates than virtually anyone else in 2003, sentenced within range less in 2009, but only by 2% in the Fifth Circuit and a modest 8.9% in the Eleventh. In short, Figures 6, 7, and 8 demonstrate graphically a fact obvious from even a casual perusal of post-*Booker* statistics—federal sentencing practice has become markedly more regionalized than it was.

Moreover, these aggregate statistics fail to convey the yawning chasms that have opened between the sentencing practices of individual districts throughout the country. In 2009, Minnesota sentenced 32.1% of its defendants within range, whereas the Southern District of Mississippi sentenced

Figure 8
Increased Regional Disparity in Within-Range Sentencing

	2003	2009	Difference
<i>Northeast and West Coast Circuits</i>			
Second Circuit	63.2%	43.5%	-19.7%
Ninth Circuit	59.6%	40.0%	-19.6%
<i>South and South Atlantic Circuits</i>			
Fifth Circuit	73.7%	71.7%	-2.0%
Eleventh Circuit	74.5%	65.6%	-8.9%

80.7% within range.³³ In 2003, the Minnesota figure had been 63% and the Mississippi number 81.4%. As one would expect from examination of the circuit-to-circuit comparisons, the greatest district-to-district disparities occur between districts like Minnesota and Mississippi separated by both geography and culture that used the Guidelines differently even before *Booker*. Nonetheless, remarkable gaps have appeared between districts in the same geographic region, and sometimes even in the same state. In 2003, the Northern District of Illinois sentenced 68.4% of defendants within range, and the rate in the Southern District of Illinois was 73.4%, only a 5% difference. In 2009, the Northern District of Illinois sentenced 45.2% of defendants within range, whereas the Southern District of Illinois figure was 72.6%, and the difference grew to 27%.³⁴ In 2003, the within-range rate in the Northern District of New York was 59.6% and rose to 63.5% in 2009; in the Eastern District of New York, it was 55.3% in 2003, but fell to 35% in 2009. As a result, a 4% difference in within-range sentencing grew to a 28% gap.

In sum, although the degree of the *Booker* effect remains to be precisely quantified, there can be no serious question that advisory guidelines have markedly increased geographic disparities in federal sentencing practice.

The fact that geographic sentencing variations are increasing certainly implies that inter-judge disparities—that is, differences between the sentencing practices of judges within a district—may have increased as well. Unfortunately, it is nearly impossible to measure this phenomenon directly because the Sentencing Commission has long refused to release sentencing data with judge identifiers. One clever researcher, Professor Ryan W. Scott, has managed to circumvent this difficulty to examine the pre- and post-*Booker* sentencing practices of the judges in the District of Massachusetts. He finds that since *Booker*, *Kimbrough*, and *Gall*, the effect of judges on sentencing outcomes has more than doubled.³⁵ Regrettably, the sentencing practices of the Massachusetts federal court that permitted Professor Scott to do his work are unique, but his results should surprise no one.

The nearly inescapable conclusion is that where a federal defendant is sentenced and by whom now matter more to the punishment he receives than they have at any time since the Guidelines went into effect in 1987. In this issue, Federal Defenders Tom Hillier and Amy Baron-Evans vigorously dispute this conclusion.³⁶ In essence, they argue that judicial divergence from sentencing levels set by the guidelines or influenced by prosecutorial charging and bargaining choices is good because it corrects what they view as the unwarranted uniformity and severity imposed by the former mandatory guidelines regime. But even if one agrees that the former system was both too rigid and too severe, the fact that more judges now deviate from the guidelines hardly proves that the current system creates less disparity.

Disparity is not a measurement of severity; it is a measurement of irregularity—the degree to which a system generates different outcomes for similarly situated defendants. Mr. Hillier and Ms. Baron-Evans like the current system because they perceive it as generating a larger number of lower sentences. That may well be a good thing, but it proves nothing about the relative degrees of inter-judge, interdistrict, or regional disparity before and after *Booker*. With respect to geographic disparity, in particular, Mr. Hillier and Ms. Baron-Evans say only that it has always existed.³⁷ Although true enough, this observation neither refutes the evidence that geographic disparity has increased post-*Booker* nor does it explain why, in a national system of criminal law, significant differences in sentencing outcomes should be permitted to depend so largely on the fortuities of geography or the judicial selection wheel.

Increased disparity may be a price we are willing to pay for whatever advantages attend advisory guidelines, but it seems fruitless to deny that disparity has increased since 2005. The only real question is whether the resurgence of disparity matters enough to policymakers to create impetus for a significant alteration of the advisory system.

II. The Future of Advisory Guidelines and Federal Sentencing Reform

In the end, the very complexity and seeming contradictions in the foregoing picture probably have contributed to the rather surprising persistence of the *Booker* advisory system.

Unsurprisingly, the increased availability of nonguideline sentences has made advisory guidelines more attractive to judges and defense lawyers. The occupational conceit of lawyers is that we are both clever and persuasive. The occupational conceit of judges is that they are wise. Purely advisory guidelines give defense lawyers more room for argument and judges more room to decide, and thus allow both lawyers and judges to indulge their own characteristic conceits. Less facetiously, defense lawyers and many judges believe that the Guidelines, strictly applied, often dictate sentences

higher than are either practically useful or morally justifiable. The new system *permits* lower sentences in particular cases and *appears* to be gradually, if irregularly, delivering them across the board. For these reasons and others, the defense bar has embraced the advisory regime.³⁸ And a recent Sentencing Commission survey of federal judges found they seem to like the new system's combination of fact-driven standards and broad discretion. Seventy-five percent prefer it to no guidelines, pre-*Booker* mandatory guidelines, or mandatory guidelines driven by jury-found facts.³⁹

The Justice Department is more conflicted. Advisory guidelines undoubtedly are less attractive to prosecutors than their mandatory predecessors. Nonetheless, from the government's perspective, the guidelines have proven gratifyingly sticky. That is, most judges continue to sentence within guideline ranges most of the time and, even when they do not, the guidelines remain the required starting point for sentencing decisions, which tends to anchor even variances in the general neighborhood of the guideline range. Sentencing Commission figures suggest that, on average, downward departures and variances now produce sentences between 28.5% and 48.9% below the applicable guideline range.⁴⁰ Although this spread may seem large, in guidelines terms, it equates to reductions of no more than roughly two to four offense levels for most types of departure or variance and perhaps six offense levels for substantial assistance departures. Thus, given the general stringency of guidelines sentences, even post-reduction sentences will usually be quite significant.

Moreover, probationary sentences are rarer than ever and the government retains a variety of tools, notably including minimum mandatory sentences, to restrict the availability of really egregious deviations from acceptable stringency. The sentencing outcomes produced by the new dispensation, when considered as a national aggregate, are not terribly different than the pre-*Booker* status quo. The increasing regional and inter-judge variability of guidelines practice must be of concern to the Department of Justice, but so far that concern has not proven dispositive. And though no one in the Department would ever say so, it is at least tempting to surmise that the erosion of average sentence length would not be unpalatable to the Obama administration, so long as the erosion remains slow and occurs in such areas as drug crime, where rigid enforcement has always been suspect to many Democratic constituencies. We are pleased to publish in this issue of *FSR* a progress report by Assistant Attorney General Lanny Breuer on the status of the work of the Attorney General's Sentencing and Corrections Working Group. Mr. Breuer reports that the Justice Department has decided not to press for legislative reinstatement of mandatory guidelines.⁴¹ Rather, it will continue to rely on mandatory minimum sentences to maintain sentencing discipline in what it views as key areas and continue to "study alternative sentencing structures."⁴²

For the first four years after *Booker*, the institution most conspicuous for its sphinxlike silence was the U.S. Sentencing Commission. On the one hand, as former assistant U.S. attorney Bill Otis pointedly observes in this issue, the Commission never proposed structural modifications to the Guidelines to restore their binding character.⁴³ On the other hand, neither did the Commission respond to calls that it should begin relaxing the severity of the Guidelines to reflect the judicial feedback embodied in the rising percentage of downward variances from the guideline range.⁴⁴ Emboldened by the Democratic takeover of Congress in 2006, the Commission in 2007 at long last amended the drug guidelines to reduce the effect of the infamous 100-1 crack-powder ratio.⁴⁵ Otherwise, the Commission kept its head down.

However, in the last two years, the Commission has begun to sponsor real, if cautious, change. In February 2009, the Commission launched a series of regional hearings on federal sentencing policy.⁴⁶ Although such meetings can easily be derided as mere public relations events, at least some of the ideas and concerns expressed in the hearings were translated into guideline amendments passed in the 2010 amendment cycle. Among the changes are (1) a modification of the Sentencing Table to widen the zones permitting imposition of alternatives to incarceration; (2) amendments to the departure provisions of the guidelines to permit judicial consideration of certain defendant characteristics, such as age, mental or emotional condition, and alcohol or drug dependence, that had previously been deemed "not ordinarily relevant" to the imposition of a sentence outside the range; (3) another amendment adding cultural assimilation as a permissible departure factor in immigration cases; and (4) elimination of enhancements to criminal history score for recency of convictions.⁴⁷ In addition, the Commission finally wrote a guideline clarifying the proper procedure for imposing a sentence under the *Booker* advisory system.⁴⁸

In isolation, these amendments may not seem terribly significant. Viewed in the context of the Commission's recent paralysis, they are striking, and appear to manifest a new willingness within the Commission to translate feedback from judges, practitioners, and external experts into guideline

amendments that reduce sentence severity. The increased institutional self-confidence that produced these amendments is surely related to at least two factors. First, since gaining control of Congress in 2006, Democrats such as Congressman Robert C. “Bobby” Scott, chair of the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee, have taken a very different view of the Sentencing Commission than their immediate Republican predecessors. As Congressman Scott writes in this issue, “Sentencing policy has also been improved in recent years by the emergence of a legislative climate in which the Sentencing Commission is encouraged to enact the sentencing policy changes it deems appropriate with confidence it will be supported by Congress instead of being overruled.”⁴⁹ Even so, the changed climate did not emerge overnight. The 2006 elections gave Democrats only slim legislative majorities, and it was not until 2008 that Democrats gained solid majorities in both chambers, as well as occupancy of the White House and control of the Justice Department. In early 2009, for the first time in many years, the political landscape appeared hospitable to guidelines changes that welcomed increased judicial discretion and ameliorated the severity of federal sentences.

The second important factor was internal to the Commission. In 2009, the chairmanship of the Commission passed from Chief Judge Ricardo Hinojosa of the Southern District of Texas, appointed to the Commission by President George W. Bush, to Judge William Sessions of Vermont, appointed by President Clinton. The views of these two excellent jurists about sentencing, the Guidelines, and the proper role of the Commission are markedly different. A crude shorthand way of illustrating the difference is to note that, in 2009, the District of Vermont sentenced only 30.8% of defendants within range, the lowest rate for any nonborder district and the second lowest in the country, whereas the Southern District of Texas sentenced 63.8% of defendants within range, despite a heavy volume of immigration cases and an active fast-track departure program.⁵⁰ Since becoming chair, Judge Sessions has carefully, thoughtfully, but unmistakably, altered the Commission’s course.

For those who applaud the Commission’s recent initiatives, the results of the 2010 elections do not bode well. Perhaps the most poignant aspect of Congressman Scott’s article is that, despite Democratic control of Congress since 2006 and despite his own oft-expressed view that federal law overpunishes many offenders, the primary legislative accomplishments to which he can point (other than the laudable crack-powder bill of 2010⁵¹) are abstentions—abstention from meddling with ameliorative Sentencing Commission amendments and abstention from passing even more criminal penalty enhancements and mandatory minimum sentences.⁵² In short, despite all the apparent advantages arising from two years of Democratic control of both Congress and the executive, liberal sentencing reform advocates in Congress have been able to do little more than maintain the legal status quo. This is not to suggest that very much more could reasonably have been expected. But the fact that liberalizing reform has been so difficult while the levers of congressional power have been in the hands of members like Chairman Scott suggests that the pendulum could swing back now that Republicans control the House and Democrats maintain only a narrow edge in the Senate. At a minimum, one wonders whether there is much immediate hope for additional steps such as those advocated in this issue by Jennifer Stitt of Families Against Mandatory Minimums⁵³ and Kyle O’Dowd, Shana Regon, and Michael Price of the National Association of Criminal Defense Lawyers.⁵⁴

Anyone seeking a bellwether of the changes Republican victory may bring need look no further than the floor statement of Congressman Lamar Smith opposing the 2010 crack-powder legislation. Congressman Smith is now the ranking minority member of the House Judiciary Committee and its probable chairman now that the House has changed hands. As his floor statement (reproduced in this issue⁵⁵) makes clear, he is a proud and unapologetic criminal justice hardliner. It seems, at best, unlikely that any liberalizing criminal legislation would emerge from a committee he leads, and quite likely that he would be, at the least, skeptical of liberalizing actions by the Sentencing Commission. And it is hardly out of the question that Republican control will mean renewed congressional enthusiasm both for higher criminal penalties and for reining in the increased judicial sentencing discretion granted by *Booker*.

III. The States: It’s the Economy, Stupid

The federal criminal justice system is remarkably resistant to change. As a federal sentencing specialist, I sometimes feel as though I have spent most of my professional life locked in a room endlessly recycling variants of the same arguments with roughly the same people, to no obvious effect. Even the *Booker* earthquake, though it has made a dog’s breakfast of the Sixth Amendment and incrementally shifted the balance of sentencing authority toward district judges and away from

Congress, federal prosecutors, the Sentencing Commission, and the appellate courts, left the basic federal sentencing structure intact.

The criminal justice picture in the states is, in this respect at least, refreshingly different. States have proven far more willing to innovate than their counterparts in the sclerotic federal government. A full explanation for this flexibility is beyond the scope of this essay, but one big factor is the current recession. Federal criminal justice policy has never been constrained by economics. But states are always obliged to balance their budgets, and in times of fiscal austerity, innovations that might otherwise founder on the shoals of political calculation can seem attractive alternatives to cutting programs like schools, roads, and health care.⁵⁶

We are pleased to publish in this issue articles by three distinguished observers of state criminal practice, each of which provides a unique window on state sentencing reform efforts. Roger Warren, president emeritus of the National Center for State Courts, provides an overview of the efforts in numerous states to adopt measures employing evidence-based sentencing.⁵⁷ The Honorable Michael A. Wolff, judge of the Missouri Supreme Court and chair of the Missouri Sentencing Advisory Commission, discusses state sentencing reforms generally and developments in Missouri in particular, with special emphasis on the sometimes contradictory effects of state budgetary difficulties.⁵⁸ And Chief Justice Randall T. Shepard of the Indiana Supreme Court provides his own take on the causes and directions of state sentencing trends, as well as a fascinating survey of path-breaking innovations in Indiana in the areas of problem-solving courts and risk assessment.⁵⁹ The contributions by Judge Wolff and Chief Justice Shepard are especially heartening inasmuch as they both describe tremendously creative work in states that could fairly be described as quite socially conservative. In each state, jurists like Judge Wolff and Chief Justice Shepard have joined forces with representatives of all the affected institutional actors and observers of all political stripes to design and implement programs aimed at promoting public safety in ways both humane and cost effective.

IV. And Justice Sotomayor, Too

Finally, Chief Judge Robert W. Pratt of the U.S. District Court for the Southern District of Iowa discusses his fascination with the recent arrival on the U.S. Supreme Court of Justice Sonia Sotomayor, the only current justice with experience as a trial judge. Judge Pratt examines Justice Sotomayor's views on voir dire expressed in *Skilling v. United States*⁶⁰ as one indicator of what the addition of a trial judge's perspective may mean to the high court's deliberations.⁶¹

Notes

- ¹ Ted Gest, *Corrections Reform—Where Are the News Media?* 23 FED. SENT. REP. 163 (2010).
- ² Carissa Byrne Hessick & F. Andrew Hessick, *Federal Sentencing Changes Since the Change Election*, 23 FED. SENT. REP. 143 (2010).
- ³ 542 U.S. 296 (2004).
- ⁴ 543 U.S. 220 (2005).
- ⁵ See Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, U. CHI. L. REV. 367 (2010).
- ⁶ See generally http://www.noogenesis.com/pineapple/blind_men_elephant.html. For the English language poem that first popularized the older Indian parable in the west, see John Godfrey Saxe, "The Blind Men and the Elephant," THE POEMS OF JOHN GODFREY SAXE, COMPLETE EDITION (1873).
- ⁷ See [http://en.wikipedia.org/wiki/Rashomon_\(film\)](http://en.wikipedia.org/wiki/Rashomon_(film)).
- ⁸ The data in Figure 1 are drawn from U.S. SENTENCING COMMISSION, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. G (2010) (hereinafter 2009 SOURCEBOOK); and U.S. Sentencing Commission, Preliminary Quarterly Data Report, 3d Qtr. Release, tbl.1 (2010), available at http://www.ussc.gov/sc_cases/USSC_2010_Quarter_Report_3rd.pdf (hereinafter 2010 3d Qtr. Data).
- ⁹ 552 U.S. 85 (2007).
- ¹⁰ The data in Figure 2 are taken from Table 13 of the U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics for the years 2001–2009, and 2010 3d Qtr. Data, *supra* note 8, at tbl.19. Sentence lengths are calculated counting sentences to probation as zero months of imprisonment.
- ¹¹ For discussion of sentence severity in the year immediately following *Booker*, see Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUSTON L. R. 279, 309–14, 319–20 (2006).
- ¹² U.S. SENTENCING COMMISSION, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (tbl.3) (2005).
- ¹³ 2009 SOURCEBOOK, *supra* note 8, at tbl.3.
- ¹⁴ 2004 SOURCEBOOK, *supra* note 12, at tbl.3.
- ¹⁵ 2009 SOURCEBOOK, *supra* note 8, at tbl.3.
- ¹⁶ For example, the personnel budget for Immigration and Customs Enforcement (ICE) was \$3.1 billion in 2006, but increased by more than 22% to \$3.8 billion in 2007, and thereafter rose to \$4.6 billion in 2008, \$4.9 billion in 2009, and \$5.34 billion in 2010. In four years, the ICE personnel budget jumped \$2.24 billion

- or more than 41%. See Immigration and Customs Enforcement Fact Sheets for FY 2006–2010, available at <http://www.ice.gov/news/library/factsheets/#Chief%20Financial%20Officer%20%20Management%20and%20Budget>.
- ¹⁷ 2009 SOURCEBOOK, *supra* note 9, at fig. E.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ Fast-track departures are sentence reductions awarded to defendants, generally in border districts, who plead guilty at a very early stage of the criminal process. For discussion of fast-track departures, see ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, *FEDERAL SENTENCING GUIDELINES HANDBOOK*, 2009–2010 ed., § 2L1.2, Authors' Discussion § 6 (2009).
- ²¹ *United States v. Camacho-Arellano*, 614 F.3d 244, 248-50 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 149 (3d Cir. 2009); and *United States v. Rodriguez*, 527 F.3d 221, 231 (3d Cir. 2008).
- ²² For example, in the District of Arizona, the number of immigration defendants sentenced increased from 2,193 in 2006 to 2,682 in 2009; the mean (average) sentence for such cases dropped from 26.7 months to 22.0 months. Compare U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B at 176 (2007) with 2009 SOURCEBOOK, *supra* note 8, App. B at 180.
- ²³ See 2009 SOURCEBOOK, *supra* note 8, at fig. A.
- ²⁴ U.S.S.G. App. C, amends. 705, 706, 711 (Nov. 1, 2007).
- ²⁵ Compare U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig. J (2008) (hereinafter 2007 SOURCEBOOK) with 2009 SOURCEBOOK, *supra* note 8, at fig. J.
- ²⁶ 2009 SOURCEBOOK, *supra* note 8, at fig. E.
- ²⁷ Compare 2007 SOURCEBOOK, *supra* note 25, at tbl.13, with U.S. Sentencing Commission, *Preliminary Quarterly Data Report, 3d Quarter 2010*, tbl.19, available at http://www.ussc.gov/sc_cases/USSC_2010_Quarter_Report_3rd.pdf.
- ²⁸ The data in Figure 4 are drawn from Table 16 of the U.S. Sentencing Commission's SOURCEBOOK OF FEDERAL SENTENCING STATISTICS for the years 2004–2009, and 2010 3d Qtr. Data, *supra* note 8, at tbl.18.
- ²⁹ Thomas W. Hillier II & Amy Baron-Evans, *Six Years After Booker, the Evolution Has Just Begun*, 23 Fed. Sent. Rep. 132 (2010).
- ³⁰ United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 94, available at http://www.ussc.gov/15_year/chap3.pdf. See also 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).
- ³¹ 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, although 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 deviate from the guidelines in response to local conditions that affect only one or two categories of defendant.
- ³² The data in Figure 5 are drawn from the U.S. Sentencing Commission's SOURCEBOOK OF FEDERAL SENTENCING STATISTICS for the years 1996–2009, and the U.S. Sentencing Commission's Annual Reports for the years 1994–1995.
- ³³ 2009 SOURCEBOOK, *supra* note 8, at App. B.
- ³⁴ *Id.*
- ³⁵ Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446744.
- ³⁶ Hillier & Baron-Evans, *supra* note 29.
- ³⁷ *Id.* at 135.
- ³⁸ *Id.* at 133 (providing a spirited defense of the advisory guidelines system).
- ³⁹ U.S. Sentencing Commission, *Results of Survey of United States District Judges* tbl.19 (June 2010), available at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.
- ⁴⁰ 2009 SOURCEBOOK, *supra* note 8, at tbls.30–31D.
- ⁴¹ Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT. REP. 110, 112 (2010).
- ⁴² *Id.* at 112.
- ⁴³ William Otis, *The Slow, Sad Swoon of the Sentencing Suggestions*, 23 FED. SENT. REP. 115 (2010).
- ⁴⁴ See Hillier & Baron-Evans, *supra* note 29, at 133.
- ⁴⁵ U.S. SENTENCING GUIDELINES HANDBOOK, app. C, amends. 705, 706, and 711 (effective Nov. 1, 2007).
- ⁴⁶ U.S. Sentencing Commission, 2009 Annual Report, available at <http://www.ussc.gov/ANNRPT/2009/AR2009YIR.pdf>.
- ⁴⁷ See http://www.ussc.gov/2010guid/20100503_Reader_Friendly_Proposed_Amendments.pdf.
- ⁴⁸ *Id.*
- ⁴⁹ Robert C. "Bobby" Scott, *Congressional Activities Affecting Federal Sentencing Policy*, 23 FED. SENT. REP. 106, 106 (2010).
- ⁵⁰ 2009 SOURCEBOOK, *supra* note 8, at App. B, 255, 259.
- ⁵¹ The Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010).
- ⁵² See Scott, *supra* note 49, at 107.

- ⁵³ Jennifer Seltzer Stitt, *Worth Fighting For: Keeping the Promise of Sentencing Reform*, 23 FED. SENT. REP. 126 (2010).
- ⁵⁴ Kyle O'Dowd, Shana Regon, & Michael Price, *Notes from the Defense Bar: Fighting for Sentencing Reform on Three Fronts During the Obama Administration*, 23 FED. SENT. REP. 120 (2010).
- ⁵⁵ Floor Statement of Congressman Lamar Smith, 23 FED. SENT. REP. 109 (2010).
- ⁵⁶ Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1345–46 (2005).
- ⁵⁷ Roger K. Warren, *Evidence-Based Sentencing: Are We Up to the Task?* 23 FED. SENT. REP. 153 (2010).
- ⁵⁸ Michael A. Wolff, *What Is Changing? "The Future Is Not What It Used to Be,"* 23 FED. SENT. REP. 150 (2010).
- ⁵⁹ Randall T. Shepard, *The Great Recession As a Catalyst for More Effective Sentencing*, 23 FED. SENT. REP. 146 (2010).
- ⁶⁰ 554 U.S. 237 (2008).
- ⁶¹ Robert W. Pratt, *A Trial Judge on the Supreme Court*, 23 FED. SENT. REP. 159 (2010).