Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level with Michael Heise

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I. INTRODUCTION

In May 2001, we published an article entitled Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences,1 (“Rebellion I”), which explores the reasons for the persistent decline throughout the 1990s in the average sentence imposed in federal court for narcotics violations. We were intrigued by the fact that although federal drug sentences rose sharply in the years immediately following the passage of the Sentencing Reform Act of 19842 and the resultant adoption of the Federal Sentencing Guidelines (“Guidelines”) in 1987, starting in roughly 1991-1992, federal drug sentences commenced a steady decline that continued through the year 2000. According to the Administrative Office of the United States Courts (AO), the average federal drug sentence rose from 65.7 months in 1984, to its all-time high of 95.7 months in 1991.3 However, in the eight years between 1991 and 1999, AO statistics show that the average federal prison sentence for a drug offender decreased from 95.7 months to 74.6 months: a drop of 22%, or nearly two years per defendant.4 United States Sentencing Commission statistics report a somewhat less precipitous, but still unmistakable, seven-year decline in the average drug sentence from a high of 88.2 months in 1992, to 75.2 months in 1999: a drop of 14.7%.5

4. Id.
5. The United States Sentencing Commission figures for the years 1992 through 1998 appear in the TRAC study, supra note 3. The average drug sentence reported by the U.S. Sentencing Commission for 1999 is from the Commission’s 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 32, fig.E (2000) [hereinafter 1999 SOURCEBOOK]. These United States Sentencing Commission figures represent the mean prison sentence imposed on federal narcotics offenders who were actually sentenced to prison. Cases in which probation-only sentences (i.e., probationary sentences with no prison term, even if they included some form of home or community confinement) were imposed are not included. The number of such sentences ranged from 9% of the total number of defendants convicted on drug charges in 1992 See UNITED STATES SENTENCING COMMISSION, 1992 ANNUAL REPORT [hereinafter 1992 ANNUAL REPORT] (1993), at 60 tbl.20, to 5.8% in 1999; 1999 SOURCEBOOK, supra, at 28 tbl.12. If probationary sentences are included in the average drug sentence calculation as zero months of imprisonment, the yearly averages are slightly lower. For example, according to our calculations using Sentencing Commission data, the mean drug sentence in 1999 would be roughly 73 months, id. at 29 tbl.13, rather than roughly 75 months. The TRAC study, supra note 3, states that if straight-probation sentences were included, the average drug sentence reported in 1999 by the AO would drop from 74.6 months to approximately 69 months. Regardless, the overall downward trend remains the same.
Sentencing Commission statistics released after the publication of Rebellion I show that the average drug sentence continued to drop in 2000 to 74.4 months.  

In Rebellion I, we examined national statistics for the federal courts in an effort to answer three questions. First, is the decline in the length of federal drug sentences since 1991-1992 “real”? That is, has the decline been sufficiently sustained in duration and pronounced in magnitude that one can be confident it represents a meaningful trend, rather than a mere random statistical fluctuation? Second, assuming that the decline is “real,” to what degree can it be attributed to “non-discretionary factors”? We defined non-discretionary factors as changes in statutory or sentencing guidelines law, alterations in the mix of criminal cases brought to the federal system, or other considerations that are outside of the range of discretionary choice available to individual federal prosecutors, defense attorneys, probation officers, and district judges handling individual federal drug cases.  

Third, to what degree can the decrease in federal drug sentences be attributed to “discretionary factors,” that is, to evolutionary changes in the way sentencing actors such as prosecutors, defense lawyers, judges, and probation officers exercise their discretion in individual cases?  

We concluded that the decrease in average federal drug sentence length throughout the 1990s was indeed real. We also concluded that at least some of the decrease is attributable to “non-discretionary” causes. Finally, we concluded that the downward trend in drug sentence length since 1991-1992 cannot be entirely explained on non-discretionary grounds. Rather, the continuing downward movement is, to a significant degree, the product of an array of discretionary choices by judges, prosecutors, defense counsel, and probation officers. As we wrote in Rebellion I:

Although we are unable to perform a regression analysis that would quantify precisely the relative effect of each of the various factors, viewed in the aggregate, the evidence we have reviewed shows the following: (1) at virtually every point in the Guidelines sentencing process where prosecutors and judges can exercise discretionary authority to reduce drug sentences, they have done so; and (2) where we can measure trends, the trend since roughly 1992 has


7. Bowman & Heise, supra note 1, at 1067.

8. The list of discretionary factors considered in Rebellion I included the choice to enter into a plea agreement, id. at 1105-07, acceptance of responsibility rates, id. at 1105-07, the position of imposed sentences within the applicable Guideline range, id. at 1107-08, the award of upward and downward departures, id. at 1108-18, charge bargaining, id. at 1119-22, and fact bargaining, id. at 1122-24.
always been toward exercising discretion in favor of leniency with increasing frequency.\textsuperscript{9}

Our first article necessarily left some questions unanswered. For example, we looked only at national data that aggregated information on drug sentences from every federal district. Therefore, we were unable to determine whether there might be local or regional phenomena that either magnified or dampened the broad national downward trend. The existence of regional variation in drug sentencing patterns would be of significance not only to empirical inquiry into the decline in federal drug sentence length, but also to the larger question of the success of the Federal Sentencing Guidelines in eliminating, or at the least reducing, unwarranted sentencing disparity.

Likewise, while we were able to arrive at compelling conclusions regarding the \textit{discretionary mechanisms} employed by sentencing actors to effect the gradual reduction in federal drug sentences, our discussion of the \textit{motives} for this behavior was far more tentative. We examined national data on Assistant U.S Attorney caseload and judicial caseload, but found little support in those figures for the proposition that caseload pressures have driven the drug sentence decline.\textsuperscript{10} We also suggested that among the reasons for the drug sentence decrease might be a widespread perception among judges, lawyers, and probation officers “that the federal narcotics sentences generated by a scrupulous adherence to the Federal Sentencing Guidelines and the mandatory minimum sentencing statutes are often, if not always, too high, or at the least are higher than necessary to achieve the institutional objectives of the system’s front line actors.”

After completing the first article, we surmised that local and regional data might enhance our understanding of motive as well as mechanism. For example, although caseload figures at the national level provide little support for the hypothesis that prosecutors have needed to give increased sentencing discounts to move defendants through the system,\textsuperscript{12} some individual districts might have experienced caseload increases that created pressures to offer leniency to expedite case processing.\textsuperscript{13} Consequently, we decided to refine the analysis of declining federal drug sentences contained

\textsuperscript{9} \textit{Id.} at 1126.
\textsuperscript{10} \textit{Id.} at 1127-29.
\textsuperscript{11} \textit{Id.} at 1132. We also noted that the onset of the decline corresponded roughly with the transition from the Bush Administration to the Clinton Administration, but could only speculate about the effect this might have had. \textit{Id.} at 1129-30. We offer neither data nor additional speculation on this point in the present Article.
\textsuperscript{12} \textit{Id.} at 1127-28.
\textsuperscript{13} For example, in \textit{Rebellion I}, we observed that sentencing patterns in districts along the Mexican border deserved more detailed analysis. \textit{Id.} at 1128 n.351. We provide such analysis here. \textit{See infra} Part II.B.3 and accompanying text (analyzing sentencing patterns along the U.S.-Mexican border).
in our first article by adding an examination of available drug sentencing data at the district and circuit level. Unfortunately, data on many of the factors we examined at the national level were not readily available on a district-by-district basis. However, there was sufficient information to address a number of key points, including whether the decline in national average drug sentence was experienced uniformly across the country, whether any observed local variations were associated with variables such as district size or population density, whether local variations were associated with changes in the mix of drug types prosecuted in a district, and whether declines in the average drug sentence within a district correlated with changes in judicial or prosecutorial workload. After analyzing the data, we have reached the following conclusions:

First, in 2000, the average federal drug sentence continued to decline, although there are some indications that the decline is finally bottoming out.

Second, while the national average drug sentence trended steadily downward from 1992 to 1999, at the district and circuit level there was a remarkable degree of variation in both sentence length and change in average sentence length. For example, in 1992, the average drug sentence within a district ranged from 22 months to 176 months, and forty-one of the ninety-four judicial districts actually had higher average drug sentences in 1999 than in 1992.

Third, our district-based regression analyses viewed in conjunction with a re-examination of national descriptive data have caused us to modify our earlier conclusion that changes in the mix of drug types prosecuted in federal courts did not contribute to the decline in average drug sentence between 1992 and 1999. It now appears that, all else being equal, changes in drug type would have increased drug sentences from 1992-1996, but may have contributed to the decline in average drug sentence between 1996 and 1999, largely because of events in the five judicial districts along the Mexican border.

Fourth, neither population density nor district size as expressed by the number of Assistant United States Attorneys employed by the district shows a statistically significant relationship to the increase or decrease of the average drug sentence within a district.

14. District level data on all the points we considered in Rebellion I are publicly available in the sense that the U.S. Sentencing Commission has placed its annual databases in public repositories. However, these databases are so large and unwieldy that an attempt to refine and manipulate the information on the 15-20,000 drug cases sentenced annually from 1992-2000 into usable district level data on all the points we considered in Rebellion I was impractical. For a more complete discussion of the data analyzed and methods employed in this Article, see infra notes 258-73 and accompanying text.

15. Infra note 247 and accompanying text.

16. Infra note 244 and accompanying text.
Fifth, increases in prosecutorial workload correlate consistently with decreases in drug sentence length, but oddly, increases in judicial workload demonstrate virtually no such relationship.

Finally, our basic conclusions in Rebellion I—that the decline of federal drug sentences in the 1990s was real and that the decline was in significant part attributable to discretionary choices by front line sentencing actors—remain unchanged, except insofar as our new findings suggest that events in the Mexican border districts exerted particular influence from 1996-1999.

II. REVIEW AND UPDATE OF THE FINDINGS OF REBELLION I

This section explains the approach and findings of our first Article. Where possible, we have added and analyzed data for the years 1992 and 2000 not available to us at the time the first article was published. For reasons of space, we have omitted introductory material on the history and structure of the Federal Sentencing Guidelines generally and the Guidelines' drug sentencing provisions in particular. Readers desiring such an introduction should consult Rebellion I.17

A. THE RISE AND FALL OF FEDERAL DRUG SENTENCES

As Figure 1 and Table 1 below illustrate, the length of drug sentences imposed by federal judges moved upwards markedly following the passage of the Sentencing Reform Act of 1984, which authorized the creation of the Federal Sentencing Guidelines, and the Anti-Drug Abuse Act of 1986 (ADAA),18 which imposed quantity-based minimum mandatory sentences for drug crimes. Federal drug sentence length peaked in 1991-1992 at an historically unprecedented level. However, the average length of federal drug sentences has declined fairly steadily ever since.19

19. Following the publication of Rebellion I, the Justice Department's Bureau of Justice Statistics issued a report that seemed to suggest drug sentences had moved steadily higher since 1984. See John Scalia, Federal Drug Offenders, 1999, with Trends 1984-99, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, NCJ 187285 (August 2001). There was some discussion in the media about the apparent contradiction between our figures (or more properly the AO and USSC figures we reported) and the results of the BJS report. See Jerry Seper, Scholars Dispute Justice Report on Drug Prison Terms, WASH. TIMES, Aug. 20, 2001, at A5, available at http://www.washtimes.com/national/20010820-72435714.htm (on file with the Iowa Law Review); Glenda Cooper, Drug Cases, Sentences Up Sharply Since 1984, WASH. POST, Aug. 20, 2001, at A2, available at http://www.washingtonpost.com/wp-dyn/articles/A33515-2001Aug19.html (on file with the Iowa Law Review). However, there is no contradiction between our conclusions and those of the August 2001 BJS report. The tension that drew media scrutiny arises from the fact that the BJS reported only that 1999 sentences were higher than they were in 1986, without mentioning the rise and fall in between.

Nonetheless, there is a more substantial conflict between AO and USSC figures and an earlier BJS report. William J. Sabol & John McGready, Time Served in Prison by Federal Offenders, 1986-97, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, NCJ 171682 (June 1999). This study
attempted to measure changes over time in the length of sentences actually served by convicted offenders, as distinct from the sentences imposed by judges. It found an increase in average real sentences for drug offenders from 61 months in 1991 to 69.4 months in 1996, with a decrease to 66.2 months in 1997. Id. at 5 tbl.2. We believe this result is erroneous. The BJS does not dispute that the average sentence imposed by judges on drug offenders fell between 1991 and 1996. See e-mails from John Scalia, Statistician, Bureau of Justice, to Frank Bowman, (Aug. 22 2001, 11:26AM EDT) (on file with authors). Thus, the Sabol and McGready report can only be correct if there were some policy or practice of the Bureau of Prisons (BOP) that required a drug defendant sentenced in 1996 to serve a greater percentage of his judicially imposed sentence than a drug defendant sentenced in 1991. We are unaware of any such policy or practice, and BJS has been unable to identify any such policy or practice in response to our inquiries on the point.

The explanation for the erroneous conclusions of the Sabol and McGready report appears to lie in its method of computing what it calls "average time to be served by offenders entering Federal prison," a term the report defines as follows:

"Time to be served" is the amount of time that offenders who enter prison on a U.S. district court commitment in a given year serve before their first release from prison. Time to be served by offenders entering Federal prison is based on a combination of actual data on time served for offenders who were also released during the study period and estimates of time to be served for those who had not been released.

Sabol & McGready, supra at 5 (emphasis added). In short, Sabol and McGready calculate the average "time to be served" in each past year by mixing two kinds of numbers: (1) BOP statistics reporting exactly how long prisoners sentenced in the target year, but since released, actually served, and (2) a set of predictions about how long those inmates sentenced in the target year, but not yet released, will serve before release. The difficulty lies in the method of calculating the predictions. In essence, Sabol and McGready take the sentence imposed on the sentencing date and discount it by 13%, the maximum permissible reduction for good time under the SRA. The trouble is that using the sentence imposed on the date of the original sentencing does not account for later reductions in sentence arising from: (a) FED. R. CRIM. P. 35(b) substantial assistance motions post-sentencing; (b) FED. R CRIM. P. 35(a) reductions resulting from resentencings on remand following appeal; or (c) BOP programs leading to early release, most notably the one authorized by 18 U.S.C. § 3621(e)(2)(B) giving inmates with drug problems a year off for completing a drug education program.

In consequence of these omissions, Sabol and McGready's estimate of the amount of time yet to be served by inmates still inside at the time of measurement will always be longer than that group of inmates will actually serve. Because the proportion of inmates with uncompleted sentences changes over time and grows larger as one approaches the year in which the measurement is made, there is a built-in bias toward showing later years as having a longer "sentence to be served" than earlier years. This distorts efforts to measure the relative change in sentences from year to year. This hypothesis about the Sabol and McGready figures was recently confirmed. Following the August 2001 newspaper coverage of the discrepancy between the figures in Rebellion I and BJS numbers, the BJS requested that the Urban Institute recalculate time-to-be-served figures for 1986-1997 using the most current Bureau of Prisons statistics. The revised figures showed a decrease in "sentence to be served" in every year, with the amount of decrease growing progressively larger in later years. For example, while the original Sabol and McGready study estimated average sentence to be served in 1991 as 61 months, in 1996 as 69.4 months, and in 1997 as 66.2 months, the revised figures report sentence to be served in 1991 as 60.2 months, in 1996 as 65.8 months, and in 1997 as 63.9 months. See e-mail from John Scalia, Statistician, Bureau of Justice, to Frank Bowman, (Oct. 23, 2001, 1:47 PM EST) (on file with authors). This result was entirely predictable because in each annual entering cohort the 2001 recalculation included more released defendants whose terms of imprisonment were actually known, and fewer defendants still in prison whose "sentence to be served" is artificially inflated.

In any event, for our purposes it is not necessary to resolve the questions regarding actual time served raised by Sabol and McGready's study and the Urban Institute/BJS recalibrations. There is no dispute that average sentences imposed by courts in drug cases have declined. We are concerned both here and in *Rebellion I* with explaining that undeniable trend.


Two other trends should be noted. First, although the focus of this Article is to explain trends in the average sentence length of drug defendants sentenced to prison, it should not be forgotten that, since the enactment of the ADAA and the Guidelines, the number of convicted drug offenders who receive a nonincarcерative probationary sentence has plummeted, from 22% in 1986, to 3.7% in 1999. Second, the number of

21. The sources for the statistics in Table 1 are AO and USSC data published in the TRAC study, supra note 3, the 1999 SOURCEBOOK, supra note 5, and the 2000 SOURCEBOOK, supra note 6.


23. 1999 SOURCEBOOK, supra note 5, at 28 tbl.12. The Sentencing Commission reported that, in 1999, 21,862 persons were sentenced for drug trafficking offenses, 395 were sentenced for drug offenses involving a communication facility, and 671 were sentenced for simple possession. Of these groups, 475 drug trafficking defendants, twenty-three communication facility defendants, and 361 simple possession defendants received a straight nonincarcerative probationary sentence. Id. The drop-off in straight probationary sentences was not limited to drug crimes. In 1988, the fiscal year in which the Guidelines were implemented, the use of probation for all types of crime was cut by over half. Hofer & Semisch, supra note 19, at 15. For white collar crimes, between 1984 and 1991, straight probation declined from over 50% of all cases to roughly 25%. Id. at 15 fig.4.

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<td>2000</td>
<td>74.4</td>
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REBELLION II

convicted federal drug offenders more than doubled in the 1990s. In 1990, 11,124 drug offenders were sentenced in federal courts. By 2000, the number was 23,424. The combination of historically high, even if now gradually declining, average sentence lengths, the near-elimination of probation in drug cases, and steadily rising numbers of federal drug convictions had the predictable effect on the population of federal prisons. The number of persons serving sentences in the Bureau of Prisons for drug offenses has leapt higher since 1986, both in absolute numbers and as a percentage of the federal prison population. In 1986, 12,119, or 38%, of the total of 31,831 federal inmates were serving drug sentences. By May 1998, the number of drug offenders in federal facilities had more than quadrupled to 56,291, or 59% of the total of 95,522 federal inmates.

B. THE EFFECT OF NON-DISCRETIONARY FACTORS ON FEDERAL DRUG SENTENCES

In Rebellion I, we considered the effect of seven non-discretionary factors on average federal drug sentence length: (1) changes in federal sentencing statutes; (2) changes in the Federal Sentencing Guidelines; (3) changes in federal case law affecting drug sentences; (4) changes in proportion of drug type prosecuted in federal courts (i.e., changes in the relative percentages of marijuana, powder cocaine, crack cocaine, and heroin cases); (5) changes in drug quantity per defendant; (6) changes in defendant role (i.e., whether the government was prosecuting an increasing percentage of low-level offenders); and (7) changes in the average criminal history category of defendants (i.e., whether the government was prosecuting an increasing percentage of first-time offenders).

1. Statutory Changes

Since the effective date of the Guidelines in 1987, all but one of the numerous changes in federal statutory law governing narcotics sentences have either defined more conduct as criminal or lengthened prescribed terms of imprisonment. The lone exception is the so-called “safety valve.”

27. Meierhoefer, supra note 22, at 34.
28. See Bowman & Heise, supra note 1, at 1068-74 (discussing effect of statutory changes); id. at 1074-82 (discussing effect of Guidelines amendments); id. at 1082-87 (discussing effect of case law); id. at 1087-90 (discussing effect of changes in proportion of drug type); id. at 1090-94 (discussing effect of changes in drug quantity per defendant); id. at 1094-100 (discussing effect of changes in defendant role); and id. at 1100-01 (discussing effect of changes in defendants criminal history).
29. Id. at 1069 n.96 (listing numerous changes in federal statutes increasing penalties for
Effective September 23, 1994, Congress amended 18 U.S.C. § 3553 to provide that a qualifying first-time nonviolent drug offender should be sentenced under the applicable provision of the Guidelines, even if an otherwise applicable minimum mandatory sentence would raise his sentence above the bottom of the guideline range. The statutory safety valve seems to have had little, if any, immediate effect on average drug sentences.

The statutory safety valve is not retroactive. Delgado v. United States, 162 F.3d 981, 983 (8th Cir. 1998); United States v. Sanchez, 81 F.3d 9, 12 (1st Cir. 1996); United States v. Rodriguez-Lopez, 63 F.3d 892, 893 (9th Cir. 1995). But see United States v. Clark, 110 F.3d 15, 18 (6th Cir. 1997) (holding that safety valve applies to cases that were pending on appeal on September 23, 1994).

The statutory safety valve provision, 18 U.S.C. § 3553(f) (1994), permits imposition of a sentence determined under the Sentencing Guidelines in lieu of a mandatory minimum sentence if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

1. the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
2. the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
3. the offense did not result in death or serious bodily injury to any person;
4. the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and
5. not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.


The timing of the adoption of the statutory safety valve allows an unusually accurate estimate of its overall effect on average drug sentences in the following year. The statutory
Fiscal Year (FY) 1995, the first year following its enactment, the statutory safety valve was applied in 2610 out of 15,282 drug cases, or 17.07% of all drug cases. Nonetheless, sentencing figures from the Administrative Office of the U.S. Courts show an increase in average drug sentence from 1994 to 1995 (from 84.3 to 88.7 months), and Sentencing Commission statistics record a decrease from 1994 to 1995 of only one month (from 87.6 to 86.6 months).

The absence of any immediate observable impact of the statutory safety valve is not terribly surprising. In those cases to which it applies, the statute allows the Guidelines to operate as if there were no minimum mandatory sentence. However, the drug provisions of the Guidelines were written to conform to the structure of minimum mandatory sentences set out in the Anti-Drug Abuse Act of 1986. Hence, the minimum mandatory sentence for any given quantity of drugs is always very close to the range set by the Guidelines for that quantity of drugs. For example, possession with intent to distribute five kilograms of powder cocaine carries a statutory minimum mandatory sentence of ten years (120 months) imprisonment, while the base offense level set by the Guidelines for the same quantity is 32, which carries a sentencing range of 121-151 months. Thus, in a case involving five kilograms of cocaine in which the defendant went to trial, the safety valve became effective on September 23, 1994, and applied to every drug case sentenced on or after that date, regardless of when the conduct or conviction occurred. Moreover, the effective date fell exactly one week before the commencement of Fiscal Year 1995 on October 1, 1994. Both the AO and the Commission prepare their statistical reports based on the fiscal year calendar. See U.S. SENTENCING COMMISSION, 1995 ANNUAL REPORT xvi (1996) [(hereinafter 1995 ANNUAL REPORT) (“This annual report covers fiscal year 1995 (October 1, 1994, through September 30, 1995).”); LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 14 (2000), available at http://www.uscourts.gov/judbus1999/contents.html (last visited Nov. 19, 2001) (noting that data in the Annual Report of the Director of the Administrative Office of the United States Courts is collected by fiscal year) (on file with the Iowa Law Review). Consequently, only one week’s worth of cases reported in the 1994 figures by either agency would have been sentenced under the statutory safety valve, whereas all of the 1995 cases were subject to it.

34. TRAC study, supra note 3.
35. Id.
36. For a discussion of whether the safety valve exerted a differential racial impact on defendants sentenced for crack and powder cocaine offenses, see Celesta A. Albonetti, The Effects of the “Safety Valve” Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender’s Ethnicity, 87 IOWA L. REV. 401 (2002).
39. See UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (U.S.S.G.) §§ 2D1.1(c)(4) & 5A (2001). A sentencing range of 121-151 months assumes a Criminal History Category of I.
would have no impact at all because the guideline sentence would be higher than the minimum mandatory sentence.

Even a defendant who pleads guilty and receives a two- or three-level decrease for acceptance of responsibility under § 3E1.1 would probably receive no direct benefit from the statutory safety valve unless the drug amount in his case happens to fall exactly at, or just above, the trigger point for a mandatory minimum sentence. By way of illustration, if a defendant eligible for the statutory safety valve possessed with intent to distribute exactly five kilograms of powder cocaine (thus triggering the ten-year minimum mandatory sentence) and received a two-level acceptance of responsibility reduction, his guideline sentencing range would be 30, or 97-121 months. The safety valve would waive the 120-month mandatory minimum, so the judge could sentence the defendant to 97 months rather than 120 months, a definite benefit to the defendant. However, if the same defendant possessed fifteen or more kilograms of cocaine, his base offense level would be at least 34. Thus, his guideline range, even with the two-level acceptance reduction, would be at least 32, or 121-151 months. Hence, waiver of the 120-month mandatory minimum would be of no service at all.

This same phenomenon occurs with all drug types—unless the drug quantity attributed to the defendant is at or just above a mandatory minimum trigger point, the statutory safety valve provides little direct relief. The real boon that the statutory safety valve grants to defendants is indirect. That is, by eliminating the minimum mandatory floor on the legally permissible sentence, the statutory safety valve permits the operation of other wholly or partly discretionary mitigating guideline provisions, such as non-substantial assistance departures and reductions for mitigating role in the offense. These and other provisions will be discussed in detail below. For the moment, the key point is this: we list the statutory safety valve as a "non-discretionary factor" because it is a congressional enactment; however, its true significance is that for eligible first-time offenders it opens the door to an array of discretionary choices previously foreclosed to lawyers and

40. U.S.S.G. § 3E1.1 (2001). Section 3E1.1(a) provides for a two-offense-level decrease where a defendant "clearly demonstrates acceptance of responsibility for his offense." Section 3E1.1(b) provides an additional one-level reduction for defendants who demonstrate acceptance of responsibility and also timely notify authorities of their intention to plead guilty and provide "complete information to the government concerning [their] own involvement in the offense."

41. In addition, even a defendant whose drug quantity is near the mandatory minimum trigger point and who receives an acceptance of responsibility reduction under U.S.S.G. § 3E1.1 (2000), may garner no benefit from the statutory safety valve if he is subject to guideline enhancements or adjustments such as those for abuse of trust or special skill, U.S.S.G. § 3B1.3 (2000), or using a minor to commit a crime, U.S.S.G. § 3B1.4 (2000). (All figures in the example set out in the text assume a Criminal History Category of I.)


43. Id. § 3B1.2.
judges by operation of the mandatory minimum sentence statutes.\textsuperscript{44} There is little evidence that the statutory safety valve itself directly caused drug sentences to decline, and its passage certainly did not compel front line sentencing actors to exercise the discretion granted them by other elements of the guideline system to reduce drug sentences. Nonetheless, we view the 1994 passage of the statutory safety valve as an important precondition for some of the discretionary drug sentence reduction that followed.\textsuperscript{45}

In sum, excepting the safety valve, all the numerous changes in federal drug sentencing statutes between 1989 and 1999 would tend to increase the average length of drug sentences. The significance of the statutory safety valve is that it clears the way for increased exercises of sentencing discretion in those cases to which it applies.

2. Guidelines Changes

Between 1991 and 1999, the Sentencing Commission adopted a number of amendments to the drug guidelines, some of which increased and some of which decreased drug sentences. In \textit{Rebellion I}, we considered the possible effect on average drug sentence length of the most significant of these amendments: the 1995 adoption of a Guidelines safety valve;\textsuperscript{46} the 1992 amendment of the acceptance of responsibility guideline to offer an additional one-level reduction to those who plead guilty promptly and reveal the extent of their own misconduct to the prosecution;\textsuperscript{47} the 1994 elimination of the top two levels of the drug quantity table;\textsuperscript{48} the change in weight equivalency for marijuana plants;\textsuperscript{49} changes to the application notes defining "mixture or substance";\textsuperscript{50} the amendment to the scope of

\textsuperscript{44} Moreover, the applicability of the safety valve is itself a mixed question of fact and law subject to a degree of discretionary choice by both prosecutors and judges. Bowman \& Heise, supra note 1, at 1072-73.

\textsuperscript{45} Important though the statutory safety valve doubtless is, it is possible to overemphasize its impact. After all, by 2000, only 26.1\% of all drug cases were subject to either the statutory safety valve or the guideline safety valve, U.S.S.G. § 2D1.1(b)(6) (2000), enacted in 1995. 2000 SOURCEBOOK, supra note 6, at 79 tbl.44.

\textsuperscript{46} U.S.S.G. § 2D1.1(b)(4) (1995). The section has subsequently been rearranged so that subsection (b)(4) is now subsection (b)(6). U.S.S.G. § 2D1.1(b)(6) (2000).


\textsuperscript{48} Id. amend. 505 (Nov. 1, 1994).

\textsuperscript{49} Id. amend. 516 (Nov. 1, 1994) (adding Paragraph 4 of the "Background" to U.S.S.G. § 2D1.1).

\textsuperscript{50} Id. amend. 484 (Nov. 1, 1993) (amending U.S.S.G. § 2D1.1, application note 1 to state, \textit{inter alia}, "[m]ixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used").
conspiratorial liability under the relevant conduct guideline, § 1B1.3; and five different amendments increasing penalties for methamphetamine.

We have been unable to quantify the net effect of these amendments on average drug sentence length. However, we think it fair to conclude that, with the possible exceptions of the guideline safety valve and the acceptance of responsibility amendment, as a group these Guidelines changes have only a weak explanatory connection to the continuing decline in drug sentences. Excepting the safety valve and acceptance provisions, the amendments lowering sentences would have affected only a small number of cases. Each amendment would have had its greatest effect on the overall average drug sentence in the year following its adoption, with little measurable impact on the change in overall average in ensuing years. Yet all the amendments we have identified with a potential to push average sentences down were enacted from 1992-1995, and would have taken effect no later than 1996. Thus, these amendments cannot help explain the continuing decline in average sentences in 1997-2000. Furthermore, the downward pressure exerted by some Guidelines amendments would have been counteracted by other amendments (particularly those involving methamphetamine enacted between 1995 and 1997) that increased drug sentences. This having been said, a few additional comments about the guideline safety valve and the amendment to the acceptance of responsibility guideline are in order.

a. The Guideline Safety Valve

In 1995, the Sentencing Commission followed Congress’s lead and enacted a “safety valve” of its own. The Commission amended the drug guideline to provide that a defendant who has an offense level of 26 or greater, and otherwise meets the requirements of the statutory safety valve, will receive a two-level decrease in offense level. The new guideline safety valve became effective for cases sentenced on or after November 1, 1995. It applies to all drug offenses, not merely those listed in 18 U.S.C. § 3553(f) which carry minimum mandatory sentences. In Rebellion I, we noted that

51. Id. amend. 503 (Nov. 1, 1994) (amending U.S.S.G. § 1B1.3 to state that a “defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to the defendant’s joining the conspiracy, even if the defendant knows of the conduct”).
52. Bowman & Heise, supra note 1, at 1080-82.
53. Id. at 1074-82.
54. Id. at 1080-82.
56. United States v. Osei, 107 F.3d 101, 104 (2d Cir. 1997); United States v. Mertilus, 111 F.3d 870, 874 (11th Cir. 1997).
the advent of the guideline safety valve doubtless had some immediate impact on average drug sentences.\textsuperscript{57} In 1996, the first year in which the guideline safety valve was in effect, 19.2\% of all drug defendants received a guideline safety valve reduction.\textsuperscript{58} Unsurprisingly, the award of a new two-offense-level credit to nearly one in five drug defendants seems to have had an impact on average sentence length. In 1996, AO sentencing figures showed a dramatic drop in average drug sentence (from 88.7 months in 1995, to 82.5 months in 1996),\textsuperscript{59} and the Commission reported a two-month decrease from the preceding year (from 86.6 months in 1995, to 84.3 months in 1996).\textsuperscript{60}

As we also noted in \textit{Rebellion I}, however, the percentage of cases in which the guideline safety valve applied increased only modestly from 1996 to 1997 (from 19.2\% in 1996,\textsuperscript{61} to 23.7\% in 1997\textsuperscript{62}), and hardly at all from 1997 to 1999 (from 23.7\% in 1997,\textsuperscript{63} to 24.7\% in 1998,\textsuperscript{64} and 24.9\% in 1999\textsuperscript{65}). Thus, the guideline safety valve likely had only a slight direct effect on the continued decline in average sentence length in 1997-1999. In 2000, the guideline safety valve rate accelerated slightly more markedly (from 24.9\% in 1999\textsuperscript{66} to 26.1\% in 2000\textsuperscript{67}).

Moreover, there is another interesting correlation that we did not highlight in \textit{Rebellion I}. Recall that both the statutory and guideline safety valves are available only to first-time offenders. Nonetheless, while the percentage of defendants to whom one or the other safety valve was awarded increased from 1995 to 1999 (from 17.07\% in 1995\textsuperscript{68} to 26.1\% in 2000\textsuperscript{69}), during the same period the percentage of defendants who were first-time offenders eligible for the safety valve decreased (from 57.8\% in 1995,\textsuperscript{70} to 56.0\% in 2000\textsuperscript{71}). The fact that the courts awarded an increasing percentage

\begin{thebibliography}{99}
\bibitem{57} Bowman & Heise, \textit{supra} note 1, at 1071-72.
\bibitem{59} TRAC study, \textit{supra} note 3.
\bibitem{60} Id.
\bibitem{61} 1996 Sourcebook, \textit{supra} note 58, at 54 tbl.39.
\bibitem{63} Id.
\bibitem{65} 1999 Sourcebook, \textit{supra} note 5, at 79 tbl.44.
\bibitem{66} Id.
\bibitem{67} 2000 Sourcebook, \textit{supra} note 6, at 79 tbl.44.
\bibitem{69} 2000 Sourcebook, \textit{supra} note 6, at 79 tbl.44.
\bibitem{70} 1995 Annual Report, \textit{supra} note 32, at 106 tbl.41.
\bibitem{71} 2000 Sourcebook, \textit{supra} note 6, at 72 tbl.37. The quoted percentages are drug defen-
of mitigating safety valve adjustments to a declining percentage of eligible defendants is at least suggestive of an increasing tendency to exercise discretion in the direction of leniency.

b. "Super Acceptance of Responsibility"

In 1992, the Sentencing Commission amended § 3E1.1 to authorize an additional one-level reduction over and above the already existing two-level acceptance of responsibility reduction for those who plead guilty promptly, reveal the extent of their own misconduct to the prosecution, and have a guideline range of 16 or greater. This additional reduction is referred to colloquially as "super acceptance of responsibility." One point about the incidence of "super acceptance" adjustments noted in Rebellion I is worth reemphasizing here. From 1993, the first year in which "super acceptance" adjustments were available, through 2000, the percentage of drug cases in which at least the original two-level acceptance reduction was awarded grew from 80.4% to 90.1%. By contrast, in the same period, the percentage of cases in which "super acceptance" was awarded increased from 50.8% of all drug trafficking offenders in 1993, to 82.1% of all drug offenders in 2000.

While the two-level acceptance adjustment has always been a nearly automatic benefit of a guilty plea, the award of the third "super acceptance" level is contingent on satisfaction of additional criteria. The required determinations of whether the notification of intention to plead guilty was sufficiently prompt and whether the disclosure to the government was "complete" are both highly subjective, and thus partly discretionary,
judgments. Thus, although the award of the third level is mandatory once the judge has found that the defendant has met its factual prerequisites,\textsuperscript{79} a judge has tremendous de facto discretion to award or withhold the adjustment.

Assigning a reason for the increased incidence of “super acceptance” adjustments in drug cases is a more daunting challenge. It might be that system actors have been consciously seeking to reduce drug sentences. Alternatively, all or at least a significant part of the seven-year 31% rise in “super acceptance” reductions might be attributable to a sort of “learning curve,” during which all the actors in the system, most notably defendants and their lawyers, became habituated to the additional benefit the “super acceptance” provision confers on early pleas and changed the timing of their decision-making accordingly. Closer examination of acceptance of responsibility statistics sheds some interesting light on these competing hypotheses.

**TABLE 2: ACCEPTANCE OF RESPONSIBILITY**\textsuperscript{80}

<table>
<thead>
<tr>
<th>Year</th>
<th>3-level Drug Cases</th>
<th>3-level Non-Drug Cases</th>
<th>Guilty Plea Rate, Drug Cases$^{81}$</th>
<th>Guilty Plea Rate, All Cases$^{82}$</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>50.8%</td>
<td>20.7%</td>
<td>85.3%</td>
<td>88.5%</td>
</tr>
<tr>
<td>1994</td>
<td>65.9%</td>
<td>30.2%</td>
<td>87.8%</td>
<td>90.5%</td>
</tr>
<tr>
<td>1995</td>
<td>70.6%</td>
<td>31.4%</td>
<td>89.8%</td>
<td>91.9%</td>
</tr>
<tr>
<td>1996</td>
<td>74.7%</td>
<td>32.9%</td>
<td>90.2%</td>
<td>91.4%</td>
</tr>
<tr>
<td>1997</td>
<td>76.1%</td>
<td>35.3%</td>
<td>91.9%</td>
<td>93.2%</td>
</tr>
<tr>
<td>1998</td>
<td>78.8%</td>
<td>39.3%</td>
<td>92.5%</td>
<td>93.6%</td>
</tr>
<tr>
<td>1999</td>
<td>80.2%</td>
<td>43.3%</td>
<td>94.2%</td>
<td>94.6%</td>
</tr>
<tr>
<td>2000</td>
<td>82.1%</td>
<td>45.3%</td>
<td>95.3%</td>
<td>95.5%</td>
</tr>
</tbody>
</table>

\textsuperscript{79} See ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1008 (West Group 2001) (stating that “[t]he extra one-level reduction ... is not discretionary if the required showing is made” and collecting cases in support of that proposition).

\textsuperscript{80} The data underlying the figures in the first two columns of Table 2—"3-level Drug Cases" and "3-level Non-Drug Cases"—are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 90 tbl.29; U.S. SENTENCING COMMISSION, 1994 ANNUAL REPORT 70 tbl.26 (1995) [hereinafter 1994 ANNUAL REPORT]; 1995 ANNUAL REPORT, supra note 32, at 76 tbl.24; 1996 SOURCEBOOK, supra note 58, at 33 tbl.19 and 51 tbl.36; 1997 SOURCEBOOK, supra note 62, at 43 tbl.19; 1998 SOURCEBOOK, supra note 64, at 43 tbl.19; 1999 SOURCEBOOK, supra note 5, at 43 tbl.19; 2000 SOURCEBOOK, supra note 6, at 43 tbl.19.

\textsuperscript{81} The data underlying the “Guilty Plea Rate, Drug Cases” column of Table 2 for the period 1993-1999 are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 140 tbl.55; 1994 ANNUAL REPORT, supra note 80, at 111 tbl.50; 1995 ANNUAL REPORT, supra note 32, at 113; 1996 SOURCEBOOK, supra note 58, at 50 tbl.33; 1997 SOURCEBOOK, supra note 62, at 43 tbl.19 and 73 tbl.40; 1998 SOURCEBOOK, supra note 64, at 45 tbl.19 and 73 tbl.38; 1999 SOURCEBOOK, supra note 5, at 43 tbl.19 and 73 tbl.38; 2000 SOURCEBOOK, supra note 6, at 43 tbl.19 and 73 tbl.38.

\textsuperscript{82} The data underlying the “Guilty Plea Rate, All Cases” column of Table 2 are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 69 tbl.21; 1994 ANNUAL REPORT, supra note 80, at 51 tbl.19; 1995 ANNUAL REPORT, supra note 32, at 53 tbl.16; 1996 SOURCEBOOK, supra note 58, at 16 tbl.10; 1997 SOURCEBOOK, supra note 62, at 21 tbl.10; 1998 SOURCEBOOK, supra note 64, at 21 tbl.10; 1999 SOURCEBOOK, supra note 5, at 21 tbl.10; 2000 SOURCEBOOK, supra note 6, at 21 tbl.10.
As illustrated in Table 2, the percentage of drug cases in which the "acceptance" provision confers on early pleas and changed the timing of their decision-making accordingly. Closer examination of acceptance of responsibility statistics sheds some interesting light on these competing hypotheses. The three-level "super acceptance of responsibility" adjustment was awarded jumped from 50.8% in 1993, its first year of operation, to 65.9% in its second year, 1994. It is not unreasonable to attribute this dramatic initial rise to a period of adjustment of plea bargaining patterns and timing. For our purposes, the more revealing period is 1995-2000. The percentage of drug defendants to whom the "super-acceptance" adjustment was awarded continued rising significantly even in the third and fourth years of its operation, increasing from 65.9% in 1994, to 70.6% in 1995, and again to 74.7% in 1996. Thereafter, in 1997-2000, the rate of "super acceptance" adjustments in drug cases continued to increase, albeit by a much lower percentage. Even in this period, however, the increase in percentage of "super acceptance" adjustments in drug cases (which rose by 7.4% from the end of 1996 through 2000) exceeded the increase in percentage of guilty pleas in such cases (which rose by only 4.9% in the same interval). This latter observation is at least suggestive because an award of the "super acceptance" reduction is conditioned on a guilty plea; hence, from the end of 1996 through 2000 the proportion of drug defendants who received "super acceptance" adjustments increased at a faster rate than the pool of defendants eligible for such reductions.

The significant increases in drug case "super acceptance" adjustments in 1995 and 1996 are particularly intriguing. It seems improbable that in 1995-1996, three to four years after the enactment of the "super acceptance" adjustment in 1992, significant numbers of lawyers were just discovering the fact that the "super acceptance" provision made early pleas advantageous. By comparison, in non-drug cases, the rate of "super acceptance" adjustments jumped by nearly 10% from 1993 to 1994, but increased by only about 5% over the next three years.\(^3\) For some reason peculiar to drug cases, the proportion of drug defendants to whom the system was prepared to award "super acceptance" adjustments did not plateau after only two years, but continued to increase substantially for two additional years. Moreover, even in 1997-2000, the rate of "super acceptance" adjustments in drug cases increased faster than the rate of guilty pleas. We have no definitive

\(^3\) As reflected in Table 2 above, the rate of super acceptance adjustments in non-drug cases rose substantially from 1997-2000. This increase appears largely attributable to changes in immigration offenses. Between 1997 and 2000, the number of immigration cases sentenced increased from 4965 (13.7% of all federal cases) to 8919 (19.9% of all federal cases). \textit{Compare} 1997 \textit{SOURCEBOOK}, supra note 62, at 11 fig. A and 43 tbl.19, \textit{with} 2000 \textit{SOURCEBOOK}, supra note 6, at 11 fig. A and 43 tbl.19. In the same period, the percentage of immigration defendants receiving three-level acceptance adjustments rose from 37.5% to 58.7%. \textit{Compare} 1997 \textit{SOURCEBOOK}, supra note 62, at 43 tbl.19, \textit{with} 2000 \textit{SOURCEBOOK}, supra note 6, at 43 tbl.19.
explanation for these facts; however, they are consistent with the hypothesis that for nearly a decade lawyers and judges have tended—to an ever increasing degree—to exercise discretion in drug cases in the direction of leniency.

c. Summary of Guidelines Changes

In sum, during 1992-2000, some changes to the Guidelines would have tended to push sentences higher. Others would have tended to push them lower. Neither individually nor in the aggregate do any of the guideline changes appear sufficient to account for the seven-year downward trend.

It is also critical to emphasize here a point we may have stressed inadequately in Rebellion I. For purposes of analysis, we categorized potential causes of declining drug sentences as either discretionary or non-discretionary. We placed statutory and guideline amendments in the non-discretionary category because they were the acts of national lawmaking bodies, not of individual sentencing actors, and they applied to whole subclasses of drug defendants. We think our taxonomy makes sense as a first cut, but one must constantly be alert to the distinction between the immediate effects of enactment of a new statute or guideline, on the one hand, and subsequent changes in the frequency of its application, on the other. The Guidelines safety valve and the “super acceptance of responsibility” provision both illustrate this distinction. In both cases, the decision of the Sentencing Commission to enact these amendments had the immediate effect of reducing the sentences of a core percentage of drug defendants. This immediate effect is properly thought of as the result of a non-discretionary factor. However, if the judges and lawyers administering the Guidelines steadily expand the application of a mitigating guideline amendment to a proportion of drug defendants substantially larger than the original core group, the expansion ought to be examined as a source of discretionary change (at least in the absence of evidence that the population of defendants is changing in a way that would itself cause increased application of the new guideline). In the cases of the Guidelines safety valve and the “super acceptance” amendment, the immediate non-discretionary impacts on a significant percentage of drug defendants were followed by steady yearly increases in application of the new provisions, increases that appear to stem at least in some part from discretionary choice.
3. Changes in Case Law

In Rebellion I, we examined the decisions of the U.S. Supreme Court to identify changes in case law between 1992 and 1999 that might have affected the average length of drug sentences. Four cases or groups of cases stood out. First, we noted the group of decisions in which the Court upheld important features of federal drug sentencing law that tend to keep drug sentences high.

Second, in addition to cases directly concerning the Federal Sentencing Guidelines, the Court handed down decisions in cases originating in state courts that have had the effect of foreclosing challenges to stiff federal drug sentences.

Third, we discussed the 1996 Supreme Court decision in Koon v. United States, an opinion universally interpreted as conferring greater discretion on district court judges to depart from the otherwise applicable guideline range. The effect of Koon will be revisited below.

Fourth, Rebellion I discussed the December 1995 Supreme Court decision in Bailey v. United States. Bailey construed the language of 18 U.S.C. § 924(c), which imposed a five-year or greater mandatory minimum prison sentence.

84. We are aware of no decision handed down since the manuscript of Rebellion I was finalized that would have materially affected average drug sentences in 2000.

85. These included Mistretta v. United States, 488 U.S. 361 (1989) (upholding the constitutionality of the Sentencing Reform Act of 1984); Edwards v. United States, 523 U.S. 511 (1998) (relying on the relevant conduct section, § 1B1.3, in upholding a sentence based on the offense level for crack, even though the jury found conspiracy to sell powder cocaine or crack); United States v. Watts, 519 U.S. 148 (1997), (upholding controversial guidelines rule that conduct underlying charges of which a defendant has been acquitted may be relied upon in sentencing); Melendez v. United States, 518 U.S. 120 (1996) (holding that a government motion under U.S.S.G. § 5K1.1 is not sufficient to make a defendant eligible for a departure below a statutory minimum mandatory sentence absent a separate government motion under 18 U.S.C. § 3553(e)); Stinson v. United States, 508 U.S. 36 (1995) (holding the Guidelines Manual's commentary is authoritative and binding on federal courts); Wade v. United States, 504 U.S. 181 (1992) (holding that both 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 give "the Government a power, not a duty, to file a motion when a defendant has substantially assisted"). The Supreme Court has also ruled on particular drug-related Guidelines provisions. See Chapman v. United States, 500 U.S. 453, 461-62 (1991) (holding that 21 U.S.C. § 841(b)(1) requires that the "carrier medium" for drugs such as LSD (typically blotter paper or sugar cubes) must be included when determining the weight of the drug for purposes of determining a mandatory minimum sentence).

86. See Harmelin v. Michigan, 510 U.S. 957 (1991) (holding that a state sentence of life imprisonment without parole for a first-time offender who possessed one-and-one-half pounds of cocaine was not cruel and unusual punishment). Relying on Harmelin, the circuit courts have uniformly rejected Eighth Amendment challenges to long federal drug sentences. See HAINES, BOWMAN & WOLL, supra note 79, at 24 n.57 (listing numerous cases rejecting Eighth Amendment cruel and unusual punishment challenges to federal drug sentences).


88. See supra notes 188, 218, and accompanying text.

term, consecutive to any other sentence, on any person who "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm." The Supreme Court held that a § 924(c) conviction for "use" of a firearm during and in relation to a drug crime could not be sustained unless the defendant "actively employed" the weapon in relation to the predicate offense. The decision produced a wave of litigation from prisoners convicted of § 924(c) counts and a substantial number of reversals of those counts. Effective November 13, 1998, Congress enacted a "Bailey-fix" that broadened the language of § 924(c) to cover anyone who "in furtherance of any [drug trafficking] crime, possesses a firearm." In effect, the new legislation brought most of the cases excluded from § 924(c) by Bailey back into the ambit of the statute.

We concluded that the Bailey decision might have had a modest lowering effect on average drug sentences imposed between December 1995 and November 1998. Sentencing Commission drug sentence figures include sentence enhancements imposed for § 924(c) convictions if the defendant was also convicted of a drug offense. For example, a defendant sentenced to five years under 21 U.S.C. § 841(a) for selling cocaine, and an additional five years for violating § 924(c) by displaying a pistol during the sale, is counted by the Sentencing Commission as receiving a ten-year sentence for drug trafficking. Therefore, it is reasonable to conclude that a decline in the percentage of drug defendants with § 924(c) convictions would, all else being equal, cause some decline in the national average sentence length. However, we were unable to prove the existence of a "Bailey effect," or to measure its magnitude.

Our appreciation of the complications of the drug-firearms nexus has been enhanced since Rebellion I by a recent study from the Bureau of Justice Statistics (BJS) on the prosecution and sentencing of federal firearm offenders. The BJS study found an immediate precipitous decline in federal firearms prosecutions in January 1996, the month following the

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90. A defendant must be sentenced to five years, to be served consecutively to any other sentence, for his first conviction under 18 U.S.C. § 924(c), and to twenty years consecutive "in the case of his second or subsequent" conviction. Moreover, the twenty-year penalty applies even if the defendant suffers his second or subsequent § 924(c) conviction in the same trial as his first. Deal v. United States, 508 U.S. 129, 132 (1993).
92. Bailey, 516 U.S. at 144.
93. For a discussion of a representative sample of such cases, see HAINES, BOWMAN & WOLL, supra note 79, at 415 nn.630-33.
95. Bowman & Heise, supra note 1, at 1085-86.
The study also suggested that federal prosecutors engage in a high rate of charge bargaining in cases with § 924(c) counts. However, the effect of these observations on the downward trend in average drug sentences remains unclear. First, we have been unable to find statistics showing the annual figures for only those § 924(c) convictions in which the predicate offense is a drug infraction. The BJS report does not distinguish § 924(c) drug cases from other § 924(c) convictions. Similarly, Sentencing Commission statistics do not distinguish between drug cases with § 924(c) convictions and drug cases with other types of firearm enhancements. Therefore, we can only draw rough inferences from the available mixed data.

Second, although the number of § 924(c) convictions declined following Bailey, we are not sure how many fewer § 924(c) cases involving drugs were filed in 1996-1997 than had previously been the case. The 2000 BJS report on federal firearm offenses states that the number of § 924(c) cases declined from 1685 in 1995, to 1392 in 1996, and 1231 in 1997, before rising to 1337 in 1998. However, because BJS does not separate out those cases in which the underlying offense is a drug violation, we cannot know what impact these declines would have made on drug sentencing statistics.

Third, even if we knew how many fewer drug cases involving § 924(c) convictions occurred immediately following Bailey, the causal relationship between Bailey and the decline would remain in doubt. The number of § 924(c) convictions had been declining precipitously in the two years before Bailey was decided, falling from a high of 2350 in 1993, to 1985 in 1994, and 1685 in 1995. Whether Bailey caused further decline after 1995, or whether those declines would have occurred anyway in response to pre-existing trends, is unknowable.

Finally, determining the magnitude of the sentence decrease in any case where a § 924(c) count was not filed due to Bailey is rendered more difficult because the Sentencing Guidelines provide for a two-offense-level enhancement “if a dangerous weapon (including a firearm) was possessed” in connection with a narcotics offense. This enhancement does not apply if the defendant has been convicted of a § 924(c) count for the same

98. Id. at 3, 9 tbl.8.
99. Id. at 6-7.
100. See 1999 SOURCEBOOK, supra note 5, at 74 tbl.39 n.2 (describing contents of table measuring weapon involvement in drug cases and noting that the table combines Guidelines adjustments for weapons possession under U.S.S.G. § 2D1.1(b)(1) and convictions under 18 U.S.C. § 924(c)).
101. BJS FIREARMS REPORT, supra note 95, at 9 tbl.8.
102. Id.
103. U.S.S.G. § 2D1.1(b)(1) (1998). Application Note 3 to § 2D1.1 states that, “The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” Id.
weapon in the same case.\textsuperscript{104} Thus, a defendant who escaped a § 924(c) count might nonetheless receive a guideline weapon enhancement of roughly 25%. In the end, all we can say is that a drop in the percentage of drug convictions accompanied by a § 924(c) count would depress average drug sentence length. But whether such a drop occurred, what its magnitude might have been, and whether \textit{Bailey} caused it or whether it resulted wholly or in part from other causes altogether, is unclear.\textsuperscript{105}

In sum, with the exception of a possible transitory effect of \textit{Bailey} on cases involving firearms, Supreme Court case law between 1992 and 1999 seems to have had no direct downward impact on drug sentences. For our purposes, the more important development in Supreme Court jurisprudence was the 1996 \textit{Koon} decision insofar as it created a more hospitable climate for the exercise of discretionary choice by sentencing judges, a point to which we will return presently.

4. Changes in Type of Case or Type of Defendant

In \textit{Rebellion I}, we considered the possible effect on average drug sentences of four variables related to changes in the type of cases or defendants prosecuted for drug crimes in federal court from 1992-1999: (1) changes in drug type; (2) changes in drug amount; (3) changes in defendants' role in the offense; and (4) changes in average criminal history category of the defendant.

\textit{a. Changes in Drug Type}

Federal drug prosecutions involve five major drug types: powder cocaine, crack cocaine, heroin, methamphetamine, and marijuana. Although federal law criminalizes possession or trafficking in many other drugs (e.g., LSD, PCP, steroids, etc.\textsuperscript{106}), these five types account for almost 98% of all federal narcotics cases.\textsuperscript{107} The average sentence imposed for each of the five primary drug types differs significantly. For example, in 2000, the mean sentences for marijuana, heroin, powder cocaine, methamphetamine,
and crack cocaine were, respectively, 36.4 months, 63.2 months, 77.0 months, 87.8 months, and 119.5 months. Therefore, significant variations in the proportions of drug types for which offenders are prosecuted might affect the national average drug sentence. For example, if during the study period the number of crack offenders (2000 average sentence 119.5 months) had dramatically decreased, while the number of marijuana offenders (2000 average sentence 36.4 months) dramatically increased, and the number of cases involving the other three drugs remained constant, the effect would be to push the overall average sentence down.

As illustrated in Figures 2 and 3 below, from 1992-2000, both the absolute number of cases of each major drug type and the proportion of each drug type to the whole population of sentenced drug defendants varied considerably.

**Figure 2: Number of Drug Offenders, by Drug Type**

![Graph showing number of drug offenders by drug type from 1992 to 2000](image)

108. 2000 SOURCEBOOK, supra note 6, at 81 fig. J.

109. The data underlying Figure 2 are drawn from the following sources: 1992 ANNUAL REPORT, supra note 5, at 89 tbl. 32; 1993 ANNUAL REPORT, supra note 73, at 144 fig. C; 1994 ANNUAL REPORT, supra note 80, at 115 fig. K; 1995 ANNUAL REPORT, supra note 32, at 110 fig. K; 1996 SOURCEBOOK, supra note 58, at 56 fig. I; 1997 SOURCEBOOK, supra note 62, at 81 fig. J; 1998 SOURCEBOOK, supra note 64, at 84 fig. J; 1999 SOURCEBOOK, supra note 5, at 81 fig. J; and 2000 SOURCEBOOK, supra note 6, at 81 fig. J.
Despite these variations, in *Rebellion I* we concluded that changes in the proportions of drug types prosecuted in federal courts between 1992 and 1999 did not cause the decline in average drug sentence length in that period.\(^{111}\) The most important evidence supporting this conclusion is the fact that between 1992 and 1999 the average sentence imposed within all five major drug types declined.\(^{112}\) Beginning in 1994, this decline was nearly uninterrupted in every major drug type.\(^{113}\) With the exception of methamphetamine sentences (which fluctuated throughout the period, presumably in response to statutory changes\(^{114}\)) and a single uptick in heroin sentences from 1998 to 1999, the average sentence for all major drug types declined every year between 1994 and 1999.

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112. *Infra* notes 115-16 and accompanying figure and table.

113. *Id.*

In 2000, the sentence decline within drug type continued for the drugs with the highest average sentences—powder cocaine, crack cocaine, and methamphetamine—while heroin moved slightly up again and average marijuana sentences increased for the first time since 1994. Moreover, in 2000, average sentences for all five drug types remained below 1992 levels, and from thirteen to twenty-three months lower than their peak levels. Declines of this magnitude in average sentences within every drug type would unquestionably have reduced the overall national average drug sentence independent of any variation in drug type mix. The overall decline is depicted graphically in Figure 4, and numerically in Table 3.

**FIGURE 4: AVERAGE PRISON SENTENCE, BY DRUG TYPE (MONTHS)**

![Graph showing average prison sentence by drug type (months) from 1992 to 2000.]

**TABLE 3: AVERAGE PRISON SENTENCE, BY DRUG TYPE (MONTHS)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Cocaine</th>
<th>Crack</th>
<th>Meth.</th>
<th>Heroin</th>
<th>Marij.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>98</td>
<td>121</td>
<td>111</td>
<td>80</td>
<td>50</td>
</tr>
<tr>
<td>1993</td>
<td>96.5</td>
<td>123.1</td>
<td>106</td>
<td>72.3</td>
<td>45.4</td>
</tr>
<tr>
<td>1994</td>
<td>94.1</td>
<td>133.4</td>
<td>93.1</td>
<td>76.2</td>
<td>46.5</td>
</tr>
<tr>
<td>1995</td>
<td>89.4</td>
<td>130.7</td>
<td>102.1</td>
<td>63.6</td>
<td>43.1</td>
</tr>
<tr>
<td>1996</td>
<td>83.6</td>
<td>125.4</td>
<td>97.2</td>
<td>61.0</td>
<td>42.1</td>
</tr>
<tr>
<td>1997</td>
<td>82.2</td>
<td>125</td>
<td>95.1</td>
<td>59</td>
<td>39</td>
</tr>
<tr>
<td>1998</td>
<td>79.3</td>
<td>122.4</td>
<td>96.8</td>
<td>58.1</td>
<td>37</td>
</tr>
<tr>
<td>1999</td>
<td>79.1</td>
<td>120.3</td>
<td>88.8</td>
<td>61.6</td>
<td>33.7</td>
</tr>
<tr>
<td>2000</td>
<td>77.0</td>
<td>119.5</td>
<td>87.8</td>
<td>69.2</td>
<td>36.4</td>
</tr>
</tbody>
</table>

115. The data underlying Figure 4 are derived from 1993 ANNUAL REPORT, supra note 73, at 144 fig.G; 1994 ANNUAL REPORT, supra note 80, at 115 fig.K; 1995 ANNUAL REPORT, supra note 32, at 123 fig.W; 1998 SOURCEBOOK, supra note 64, at 81 fig.J; 1999 SOURCEBOOK, supra note 5, at 81 fig.J; and 2000 SOURCEBOOK, supra note 6, at 81 fig.J.

116. Id.
In addition, if average sentences within drug type had remained constant throughout 1992-2000 while the proportions of drug types varied as in fact they did, all else being equal, the national average drug sentence would have been higher in 2000 than it was in 1992.\footnote{If the average sentence for each of the five major drug types had remained constant from 1992-2000, the changed mix in drug types during that period would have raised the overall average drug sentence from 87.74 months in 1992 to 88.82 months in 2000. For further discussion of this point, see \textit{infra} note 289 and accompanying text.}

Although we were able to conclude in \textit{Rebellion I} that changes in proportions of drug type did not, in themselves, cause the decline in average drug sentences between 1992 and 1999, we did not consider whether such changes might have contributed to the decline \textit{during some intervals} of the 1992-1999 study period. In Section III below, we address this issue with the aid of district sentencing data and the addition of figures from 2000.

\textbf{b. Changes in Drug Quantity Per Defendant}

Because federal drug sentences are so heavily driven by drug quantity, average sentences would decrease if the average amount of drugs per defendant decreased. Unfortunately, no data exactly measuring drug quantity per defendant is available. Nonetheless, national data on drug seizures and Sentencing Commission data on base offense levels provide rough proxy measurements of drug quantity. As detailed in the following two sections, both sets of data suggest that drug quantity per defendant increased from 1992-1999. Thus, all else being equal, drug sentences should have increased during that period.

\textit{i. Federal Drug Seizures}

Data from the White House Office on Drug Policy, presented in Figure 5, reflect a 180\% increase between 1992 and 1999 in the amount of drugs seized by federal law enforcement agencies. During the same period, the number of federal drug defendants increased by only 35\%, from 16,728 offenders in 1992\footnote{Not every drug seizure becomes the basis for a criminal prosecution. The total quantity of drugs seized is not distributed evenly among all federal drug defendants. Not all the drugs actually seized in connection with a case may be reported to the court. Some drugs seized by state officers may become the basis of a federal prosecution. In so-called "reverse" cases, the government offers to sell nonexistent drugs, the amount of which agreed to by the defendant becomes the basis for his sentence.} to 22,682 in 1999.\footnote{UNITED STATES SENTENCING GUIDELINES COMMISSION, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13(1994) [hereinafter 1999 SOURCEBOOK].} There is, at best, an imperfect correlation between the reported quantity of federal drug seizures and the amounts that make their way into presentence reports as the basis for a guideline sentence.\footnote{1999 SOURCEBOOK, supra note 5, at 67 fig.I n.1.} Nonetheless, during a period in which the amount of...
narcotics seized increased roughly four times faster than the number of drug defendants sentenced, it is reasonable to infer that drug quantity per defendant increased, or at least did not decline, during these same years.

**FIGURE 5: TOTAL FEDERAL DRUG SEIZURES (LBS.)**

![Diagram showing the increase in total federal drug seizures from 1992 to 2000.](image)

### ii. Base Offense Levels

A more direct measurement of drug quantity per sentenced federal defendant is the Base Offense Level (BOL) assigned by the Guidelines to each defendant. The type and amount of drugs attributable to the defendant pursuant to the Guidelines' relevant conduct rules determine his base offense level. Thus, base offense levels should correspond closely to drug quantity levels, at least so long as the parties provide complete information to the probation department and the court. The higher the drug quantity, the higher the BOL. The higher the BOL, the higher the resultant sentence.

Between 1992 and 1999, the overall blended BOL average in drug cases increased by just over one full level (from a BOL of 26.31 in 1992, to a BOL

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122. The close nexus between base offense levels and drug quantity is underscored by the U.S. Sentencing Commission's use of BOL as a proxy for drug quantity in its own reports through 1996. **1995 ANNUAL REPORT**, supra note 32, at 113-16.


124. If, however, the parties fail to report drug quantities accurately to probation officers writing presentence reports, the base offense levels appearing in those reports will underrepresent the quantity of narcotics actually involved in the case. Underreporting of drug quantity is a possible source of sentence manipulation discussed in Bowman & Heise, supra note 1, at 1122-24.
of 27.33 in 1999). This increase was not the product of an uninterrupted rise. Between 1992 and 1996 the average BOL increased by almost two full levels (from a BOL of 26.31 in 1992, to a BOL of 28.24 in 1996), but between 1996 and 1999 decreased from 28.24 to 27.33, or almost one full level. The drop in BOL between 1996 and 1999 (which will enter into the discussion again below) reduced but did not erase the increase experienced between 1992 and 1996.

The 1992-1999 increase in blended BOL average for all drug cases is significant inasmuch as such an increase would tend to generate a higher average drug sentence. However, the cause of an increase in blended BOL average for all drug cases might be a changing mix of drug types within the population of federal drug offenders, rather than of an increase in drug quantity per defendant. To check this possibility, we examined the movement of base offense level averages within drug type. As illustrated in Figure 6, with the exception of marijuana, average BOLs for all major drug types increased between 1992 and 1999. As for marijuana offenders, their average annual base offense level increased from 22.1 months in 1992 to 23.3 in 1994, and then decreased slightly over the next five years to 21.9 months. Therefore, the increase in overall average BOL from 1992-1999 seems likely to be, at least in part, a product of increased drug quantity in cocaine, crack, methamphetamine, and heroin cases.

125. The USSC graciously supplied us with unpublished data, performed requested data runs, and provided us unpublished BOL level data, 1992-1999, through private correspondence. E-mail from Christine Kitchens, USSC, to Michael Heise (July 21, 2001) (on file with authors).

126. Id.

127. See infra notes 290-93 and accompanying text.

128. Specifically, BOLs for the five drug types in 1992 and 1999 were: powder cocaine, 27.4 (1992) and 28.9 (1999); crack cocaine, 28.3 (1992) and 31.2 (1999); heroin, 28.0 (1992) and 28.3 (1999); marijuana, 22.1 (1992) and 21.9 (1999); and methamphetamine, 28.7 (1992) and 30.6 (1999). Base offense level data by drug type was received by e-mail from U.S. Sentencing Commission, supra note 125.

129. Id.
Finally, *Rebellion I* considered the possibility that the increase in the overall BOL average reflected dramatic changes in the percentage of sentences at either high or low BOLs.¹³¹ We found no such changes and concluded that the overall increase in average base offense level for drug offenders from 1992-1999 resulted from neither a dramatic increase in sentences at the high BOLs nor a dramatic decrease in sentences at the low BOLs. Rather, the overall increase in average BOL appears to flow from a systematic increase in BOLs throughout the range of levels.

In summary, both the national drug seizure data and base offense level data suggest that between 1992 and 1999 average drug quantity per defendant actually increased, a factor that should have produced upward pressure on sentence length. At the very least, data from these sources provide no evidence supporting the hypothesis that average drug sentences decreased because drug quantity per defendant decreased.

### c. Changes in Defendants’ Role in the Offense

Although drug quantity sets the base offense level for drug offenses, both reductions and increases in offense level are possible depending on a defendant’s role in the offense. Section 3B1.1 of the Guidelines provides for increases of two, three, or four offense levels if a defendant plays an “aggravating role” in cases of group criminality.¹³² Conversely, § 3B1.2

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¹³⁰ The data underlying Figure 6 are drawn from unpublished U.S. Sentencing Commission data. See *supra* note 125.

¹³¹ Bowman & Heise, *supra* note 1, at 1092-94.

¹³² U.S.S.G. § 3B1.1 (2001). The number of levels added depends on the size and com-
REBELLION II

provides that defendants in cases involving groups may receive decreases in offense level of two, three, or four levels for "mitigating role." Consequently, average drug sentences could decrease if: (a) the average amount of additional time imposed on defendants as a result of upward adjustments for aggravating role decreased over time, or (b) the average amount of sentence reduction received by defendants as a result of downward adjustments for mitigating role increased over time.

**Figure 7: Percentage of Role Adjustments, by Year**

![Graph showing percentage of role adjustments by year.](image)

As Figure 7 indicates, the percentage of downward mitigating role adjustments increased every year from 1992-1999 (from 15.9% in 1992, to 26.2% in 1999), but decreased slightly to 24.3% in 2000. Conversely, the percentage of upward aggravating role adjustments decreased steadily from 1992-2000 (from 10.7% in 1992, to 6.5% in 2000). Because we are unable to obtain precise data on the number of levels of decrease or increase received by defendants in the mitigating and aggravating categories (i.e., did they receive two, three, or four levels up or down), we are unable to quantify the complexity of the criminal organization and the defendant's position in it. For example, four offense levels are added if "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," U.S.S.G. § 3B1.1(a) (2000), while only three levels are added if "the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive," Id. § 3B1.1(b).


134. The data underlying Figure 7 are drawn from the following sources: 1992 ANNUAL REPORT, supra note 5, at 92 tbl.54; 1993 ANNUAL REPORT, supra note 73, at 141 tbl.56; 1994 ANNUAL REPORT, supra note 80, at 112 tbl.61; 1995 ANNUAL REPORT, supra note 12, at 108 tbl.44; 1996 SOURCEBOOK, supra note 58, at 51 tbl.35; 1997 SOURCEBOOK, supra note 62, at 75 tbl.40; 1998 SOURCEBOOK, supra note 64, at 75 tbl.40; 1999 SOURCEBOOK, supra note 5, at 75 tbl.40; and 2000 SOURCEBOOK, supra note 6, at 75 tbl.40.

135. Id. There was a very slight uptick from 1993-1994.
the precise effect of this trend on average drug sentences. However, a roughly 50% decrease in upward adjustments combined with a greater than 50% increase in downward adjustments seems likely to have lowered sentence averages.

Just as was true with the safety valve and “super acceptance of responsibility,” changes in the proportion of cases to which aggravating and mitigating role adjustments are applied might stem from changes in the objective characteristics of the population of sentenced defendants or from changes in the way prosecutors, probation officers, and judges apply the role adjustment provisions of the Guidelines. In Rebellion I, we examined the concededly scanty data bearing on which of the two explanations is the more probable. We found no concrete evidence to support the hypothesis that federal prosecutors are charging an ever-increasing percentage of low-level drug traffickers, and some evidence tending to undermine this hypothesis. On the other hand, one cannot rule out such a possibility. The safest conclusion is that both discretionary and non-discretionary factors have influenced the steady trends in aggravating and mitigating role adjustments since 1992.

d. Changes in Criminal History Category

A defendant’s sentence is affected, not only by his Offense Level, which determines his position on the vertical axis of the Guidelines’ Sentencing Table, but also by his position on the horizontal axis of the Sentencing Table, which is determined by his placement in one of six Criminal History Categories. Persons in Criminal History Category I have essentially no prior criminal record, while those in Categories II through VI have increasingly serious records of recidivism. An increase in criminal history category generates a corresponding increase in sentencing range. Thus, average drug sentences might be reduced if, over time, the government prosecuted a population of defendants with a progressively decreasing average criminal history score. This does not appear to have been the case. Indeed, the trend has been in the opposite direction. From 1992 through 2000, the percentage of convicted drug defendants in Criminal History Category I (first-time offenders) decreased from 63.1% to 56.0%.

136. Bowman & Heise, supra note 1, at 1096-100.
137. Moreover, as discussed infra notes 294-300 and accompanying text, at least during 1996-1999, prosecution trends in the Mexican border districts may support the hypothesis that an increasing percentage of low-level drug defendants was prosecuted in that period.
141. The percentages of sentenced federal drug defendants in Criminal History Category I from 1992 through 1998 were as follows: 1992: 63.1%, 1992 ANNUAL REPORT, supra note 5, at 93-
Likewise, from 1992 to 2000, the average criminal history category (and thus the average severity of drug defendants’ prior criminal records) increased from 1.79 to 2.12.\footnote{142}

**FIGURE 8: AVERAGE CRIMINAL HISTORY CATEGORY, 1992-2000\footnote{143}**

Prior convictions not only increase a defendant’s Criminal History Category, but a defendant with at least two prior violent or drug trafficking felonies may receive additional enhancements for “career offender” status under U.S.S.G. § 4B1.1.\footnote{144} As illustrated in Table 4, between 1992 and 2000, both the number and percentage of drug trafficking defendants categorized as career offenders increased.

\footnote{142}{These figures were determined by multiplying the percentage of defendants in each criminal history category by that category’s numerical value (e.g., if 7.4% of the drug defendants sentenced in 1998 fell into Criminal History Category VI, the product of these values was $7.4 \times 6$), adding the resulting products from all six criminal history categories, and dividing by one hundred. The average criminal history category from 1992 through 2000 was as follows: 1992: 1.79, 1992 ANNUAL REPORT, supra note 5, at 95 tbl.35; 1993: 1.87, 1993 ANNUAL REPORT, supra note 73, at 138 tbl.53; 1994: 1.98, 1994 ANNUAL REPORT, supra note 58, at 49 tbl.32; 1995: 2.02, 1995 ANNUAL REPORT, supra note 62, at 106 tbl.41; 1996: 2.10, 1996 SOURCEBOOK, supra note 58, at 49 tbl.32; 1997: 2.06, 1997 SOURCEBOOK, supra note 62, at 72 tbl.37; 1998: 2.08, 1998 SOURCEBOOK, supra note 64, at 72 tbl.37; 1999: 2.12, 1999 SOURCEBOOK, supra note 5, at 72 tbl.37; 2000: 2.12, 2000 SOURCEBOOK, supra note 6, at 72 tbl.37.}

\footnote{143}{Id.}

\footnote{144}{See U.S.S.G. § 4B1.1 (2001) (providing that a defendant with at least two prior convictions for crimes of violence or drug crimes shall be categorized as a "career offender," requiring that the Criminal History Category of such offenders be Category VI, and setting enhanced minimum offense levels for the crime of conviction).}
Table 4: Career Offenders

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of drug trafficking defendants sentenced as Career Offenders</th>
<th>Percentage of drug trafficking defendants sentenced as Career Offenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>347</td>
<td>2.59</td>
</tr>
<tr>
<td>1993</td>
<td>521</td>
<td>3.03</td>
</tr>
<tr>
<td>1994</td>
<td>609</td>
<td>3.93</td>
</tr>
<tr>
<td>1995</td>
<td>501</td>
<td>3.53</td>
</tr>
<tr>
<td>1996</td>
<td>633</td>
<td>3.89</td>
</tr>
<tr>
<td>1997</td>
<td>738</td>
<td>4.10</td>
</tr>
<tr>
<td>1998</td>
<td>830</td>
<td>4.27</td>
</tr>
<tr>
<td>1999</td>
<td>874</td>
<td>4.01</td>
</tr>
<tr>
<td>2000</td>
<td>979</td>
<td>4.21</td>
</tr>
</tbody>
</table>

All else being equal, the upward movement in average Criminal History Category, combined with the increase in percentage of defendants receiving career offender enhancements, would tend to have increased, rather than decreased, the average sentence of narcotics defendants between 1992 and 2000.147

C. THE EFFECT OF DISCRETIONARY CHOICES ON FEDERAL DRUG SENTENCES

In Rebellion I, we discussed the effect on average drug sentence length of eight categories of discretionary choices by sentencing actors: (1) guilty plea rate, (2) acceptance of responsibility adjustments, (3) the position of drug sentences within the applicable guideline range, (4) upward departures, (5)

145. The data in the “Number of drug trafficking def's sentenced as Career Offenders” column of Table 4 are derived from the following sources: 1992 ANNUAL REPORT, supra note 5, at 82 tbl.28; 1993 ANNUAL REPORT, supra note 73, at 95 tbl.31; 1994 ANNUAL REPORT, supra note 80, at 74 tbl.28; 1995 ANNUAL REPORT, supra note 32, at 80 tbl.26; 1996 SOURCEBOOK, supra note 58, at 37 tbl.22; 1997 SOURCEBOOK, supra note 62, at 47 tbl.22; 1998 SOURCEBOOK, supra note 64, at 47 tbl.22; 1999 SOURCEBOOK, supra note 5, at 47 tbl.22; 2000 SOURCEBOOK, supra note 6, at 47 tbl.22.

146. The figures in the “Percentage of drug trafficking def's sentenced as Career Offenders” column of Table 4 are calculated by dividing the raw number of drug defendants sentenced as career offenders in the preceding column and dividing it by the number of drug trafficking defendants sentenced in that year.

147. The reader might wonder how the rise in both criminal history category and career offender enhancements squares with the thesis advanced below, see infra notes 307-08 and accompanying text; Bowman & Heise, supra note 1, at 1130-33, that prosecutors may be exercising their discretion to lower drug sentences. Why, one might ask, if prosecutors are manipulating the Guidelines to produce lower sentences do they not manipulate the horizontal criminal history axis and career offender enhancements with the same facility as the vertical offense level axis? We suggest that the answer lies in two considerations: first, the fact that the determination of criminal history score depends on facts in the public record that are not nearly as subject to manipulation as issues like drug quantity or role in the offense; and second, that the calculation of criminal history is, as a matter of practice, performed almost exclusively by probation officers with little input from the parties. Probation officers lack the institutional incentives that move prosecutors, defense attorneys, and even judges to push for lower sentences.
substantial assistance downward departures, (6) non-substantial assistance downward departures, (7) charge bargaining, and (8) fact bargaining.\textsuperscript{148} Our findings can be summarized as follows.

1. Guilty Plea Rates

A precondition for most discretionary methods of influencing sentencing outcomes is a plea bargain. For example, a charge bargain in which the government agrees to dismiss or not file a charge carrying enhanced penalties (such as a weapons count under 18 U.S.C. § 924(c)) only occurs as part of a negotiated plea. Likewise, “fact bargains”—agreements between the prosecution and defense as to the facts relevant to sentencing which will be urged upon the probation department and the court—can, by definition, be reached only in plea negotiations.\textsuperscript{149} Similarly, the government only rarely agrees to recommend a substantial assistance departure for cooperation in the prosecution of others for a defendant who has put the government to its proof at trial. Even a non-substantial assistance departure, for which a government motion is not a prerequisite, is more likely in the case of a defendant who has admitted guilt and exhibited some measure of contrition by entering a plea than for a defendant convicted after a trial. More subtly, a prosecutor’s decision to recommend that the court grant a “super acceptance” or mitigating role reduction, or refrain from imposing an aggravating role enhancement, will be powerfully influenced by whether the defendant pleads guilty. Consequently, if sentencing system actors were, to an increasing extent, employing discretionary means of circumventing strict application of the Guidelines, one would expect to see a steadily increasing percentage of cases resolved by plea rather than trial. That is what we found. As Table 5 illustrates, the guilty plea rate for drug trafficking offenses climbed steadily from 82\% in 1992 to 96.1\% in 2000.

2. Acceptance of Responsibility

The discretionary choices of the government and defendant to make, and the court to accept, a plea agreement have a direct effect on sentence length because the Guidelines provide a reduction in offense level of either

\textsuperscript{148} Bowman & Heise, supra note 1, at 1103-05 (discussing effect of guilty plea rate); id. at 1105-07 (discussing effect of acceptance of responsibility rates); id. at 1107-08 (discussing effect of position of sentences within the guideline range); id. at 1108-09 (discussing effect of upward departures); id. at 1110-13 (discussing effect of substantial assistance departures); id. at 1113-16 (discussing effect of nonsubstantial assistance downward departures); id. at 1119-22 (discussing effect of charge bargaining); id. at 1122-24 (discussing effect of fact bargaining).

\textsuperscript{149} For discussions and critiques of fact bargaining, see Frank O. Bowman, III, To Tell the Truth: The Problem of Prosecutorial “Manipulation” of Sentencing Facts, 8 FED. SENTENCING REP. 324 (1996) [hereinafter Bowman, To Tell the Truth], and David Yellen, Probation Officers Look at Plea Bargaining, and Do Not Like What They See, id. at 339.
two or three levels for "acceptance of responsibility." As indicated in Table 5, between 1992 and 2000 the guilty plea rate for drug offenses stayed in a tight band four to six per cent above the acceptance of responsibility rate. Consequently, the steady rise in guilty plea rate for drug offenses between 1992 and 2000 should, in itself, have caused some reduction in average sentence length merely by virtue of causing an increase in acceptance of responsibility adjustments.

### TABLE 5: GUILTY PLEAS AND ACCEPTANCE OF RESPONSIBILITY

<table>
<thead>
<tr>
<th></th>
<th>Guilty Plea Rates (%)</th>
<th>Accept. Respon. Rates (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>82</td>
<td>78.1</td>
</tr>
<tr>
<td>1993</td>
<td>85.3</td>
<td>80.9</td>
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<td>1994</td>
<td>87.8</td>
<td>81.8</td>
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<td>1995</td>
<td>89.8</td>
<td>84.6</td>
</tr>
<tr>
<td>1996</td>
<td>90.2</td>
<td>85.5</td>
</tr>
<tr>
<td>1997</td>
<td>91.9</td>
<td>87.1</td>
</tr>
<tr>
<td>1998</td>
<td>92.5</td>
<td>88.5</td>
</tr>
<tr>
<td>1999</td>
<td>94.2</td>
<td>89.7</td>
</tr>
<tr>
<td>2000</td>
<td>96.1</td>
<td>90.1</td>
</tr>
</tbody>
</table>

An even more telling indicator of the role of discretion in the plea process and in the progressive decrease in drug sentences is the rise in three-level "super acceptance of responsibility" adjustments under U.S.S.G. § 3E1.1(b), already discussed in some detail above. As previously noted, the

150. U.S.S.G. § 3E1.1 (1998) (providing a two-level reduction where “the defendant clearly demonstrates acceptance of responsibility for his offense” and a three-level reduction for defendants whose base offense level is sixteen or higher and who (a) timely provide complete information to the government about their own involvement in the offense, and (b) timely notify authorities of their intention to plead guilty “thereby permitting the government to avoid preparing for trial, and permitting the court to allocate its resources efficiently”). For a discussion of the 1992 Guidelines amendment adding U.S.S.G. § 3E1.1(b) providing an additional third level of reduction for early acceptance, see supra notes 72-83 and accompanying text.

151. In addition to the data reported in Table 5, see 1996 SOURCEBOOK, supra note 58, at 62 fig.S (providing bar graph showing that acceptance of responsibility rates increased in every drug type from 1992 through 1996).

152. The data underlying the “Guilty Plea Rates” column of Table 5 for the period 1993-1999 are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 140 tbl.55; 1994 ANNUAL REPORT, supra note 80, at 111 tbl.50; 1995 ANNUAL REPORT, supra note 32, at 113; 1996 SOURCEBOOK, supra note 58, at 50 tbl.33; 1997 SOURCEBOOK, supra note 62, at 73 tbl.40; 1998 SOURCEBOOK, supra note 64, at 73 tbl.38; 1999 SOURCEBOOK, supra note 5, at 73 tbl.38; 2000 SOURCEBOOK, supra note 6, at 73 tbl.38. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 32, at 113.

153. The data underlying the “Accept. Respon. Rates” column of Table 5 for the period 1993-1999 are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 150 tbl.60; 1994 ANNUAL REPORT, supra note 80, at 118 tbl.55; 1995 ANNUAL REPORT, supra note 32, at 120; 1996 SOURCEBOOK, supra note 58, at 51 tbl.35; 1997 SOURCEBOOK, supra note 62, at 76 tbl.41; 1998 SOURCEBOOK, supra note 64, at 76 tbl.41; 1999 SOURCEBOOK, supra note 5, at 76 tbl.41; 2000 SOURCEBOOK, supra note 6, at 76 tbl.41. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 32, at 120.

154. Supra notes 72-83 and accompanying text.
percentage of drug cases in which at least the basic two-level form of
acceptance was awarded grew from 80.9% in 1993 (the first year “super
acceptance” was available)\textsuperscript{155} to 90.1% in 2000.\textsuperscript{156} As Table 5 illustrates, this
increase tracked almost exactly the increase in guilty plea rate for that
period. During the same period, the proportion of drug cases in which
“super acceptance” was awarded increased by more than half, from 49.1% in
1993,\textsuperscript{157} to 82.1% in 2000.\textsuperscript{158} It is difficult to avoid the conclusion that this
increase represents a change in patterns of discretionary decision-making by
sentencing system actors.

3. Sentencing Within Range

Each intersection on the grid of the Guidelines’ Sentencing Table\textsuperscript{159} is a
range of months, the top of which is a minimum of six months and a
maximum of 25% higher than the bottom.\textsuperscript{160} The judge retains effectively
unfettered discretion to sentence within this range.\textsuperscript{161} In Rebellion I, we
observed two notable facts about judicial sentencing behavior for within-
range drug sentences. First, throughout the Guidelines period, judges have
sentenced the overwhelming majority of drug defendants sentenced within
range at or near the bottom of the range.\textsuperscript{162} Second, although it is difficult
to be precise because the Sentencing Commission changed the way it
reports statistics on within-range sentences in 1997,\textsuperscript{163} the available evidence
suggests that from 1992 through 2000 judges sentenced an increasing
percentage of drug defendants to the low end of the applicable guideline

\textsuperscript{155} 1993 ANNUAL REPORT, supra note 73, at 150 tbl.60.
\textsuperscript{156} 2000 SOURCEBOOK, supra note 6, at 76 tbl.41.
\textsuperscript{157} 1993 ANNUAL REPORT, supra note 73, at 150 tbl.60.
\textsuperscript{158} 2000 SOURCEBOOK, supra note 6, at 76 tbl.41.
\textsuperscript{159} U.S.S.G. § 5A (2000).
\textsuperscript{160} This ratio is set by statute. 28 U.S.C. § 994(b)(2) (1994).
\textsuperscript{161} Bowman & Heise, supra note 1, at 1058(emphasis deleted).
\textsuperscript{162} For example, in 1993, 72.7% of all drug defendants were sentenced within the lowest
one-quarter of the applicable guideline range. 1993 ANNUAL REPORT, supra note 73, at 165
tbl.67. In 1999, 71.2% of drug trafficking defendants were sentenced at the absolute bottom of
the applicable range, and 81.3% were sentenced below the midpoint in the range. 1999
SOURCEBOOK, supra note 5, at 59 tbl.29. (The Sentencing Commission changed its method of
reporting sentences within range in 1997.) See Alex Kosinski, Carthage Must Be Destroyed, 12 Fed.
SENTENCING REP. 67, 67 (1999), in which Judge Kosinski of the United States Court of Appeals
for the Ninth Circuit describes his experiences as a trial judge: “Once I have figured out the
range, I always sentence at the very bottom . . . .” Id.
\textsuperscript{163} From 1993-1996, the Sentencing Commission reported the percentage of defendants
sentenced within each quartile of the sentencing range. See 1993 ANNUAL REPORT, supra note 73,
at 165 tbl.67. Beginning in 1997, the Commission stopped providing figures by quartile, and
instead reported the percentage of defendants sentenced to: (a) the minimum possible sen-
tence within the range, (b) between the minimum and the midpoint in the range; (c) the mid-
point in the range; (d) between the midpoint and the maximum possible sentence in the
range; and (e) the maximum possible sentence within the range. See 1997 SOURCEBOOK, supra
note 62, at 59 tbl.29.
range. From 1992 to 1996, the number of drug trafficking defendants sentenced within the lowest quartile of the applicable sentencing range increased from 70% to 74.8%.\textsuperscript{164} From 1997 to 2000, the number of drug trafficking defendants sentenced to the minimum possible sentence within the applicable range increased from 65.9% to 71.7%.\textsuperscript{165}

A complementary trend appears at the high end of the guideline range. From 1992 to 1996, the percentage of drug trafficking defendants sentenced in the highest quartile of the application guideline range dropped from 11% to 9.2%.\textsuperscript{166} From 1997 to 2000, the number of drug trafficking defendants sentenced to the maximum possible sentence within the applicable range declined from 10.8% to 9.7%.\textsuperscript{167}

4. Upward Departures

Once a sentencing judge has determined a defendant’s offense level and criminal history category, and thus established the defendant’s sentencing range, the judge may nonetheless, under certain circumstances, impose a sentence above or below the range. A sentence outside the applicable guideline range is a “departure.”\textsuperscript{168} An “upward departure” is a sentence higher than the top of the applicable guideline range. A “downward departure” is a sentence below the bottom of the applicable guideline range. The number of upward departures for all types of crimes sentenced under the Guidelines has always been very small. For example, in 1990, only 2.3% of all defendants received upward departures.\textsuperscript{169} From 1992-2000, both the rate and absolute number of upward departures in drug cases started out small and declined almost to the vanishing point. As Table 6

\textsuperscript{164} The percentage of drug trafficking defendants sentenced within the lowest quartile of the applicable sentencing range from 1993 to 1996 was as follows: 1992: 70%, 1992 ANNUAL REPORT, supra note 5, at 132 tbl.52; 1993: 72.7%, 1993 ANNUAL REPORT, supra note 73, at 165 tbl.67; 1994: 72.9%, 1994 ANNUAL REPORT, supra note 80, at 87 tbl.34; 1995: 74.5%, 1995 ANNUAL REPORT, supra note 32, at 92 tbl.32; 1996: 74.8%, 1996 SOURCEBOOK, supra note 58, at 44 tbl.27. The figures in the Commission reports for this period are expressed as percentages of the entire group of drug trafficking defendants sentenced within the reporting year, rather than as a percentage of defendants sentenced within range. However, the conversion to percentage of all defendants sentenced within range within a given quartile is easily accomplished.

\textsuperscript{165} The percentages of drug defendants sentenced to the Guideline minimum from 1997-2000 were as follows: 1997: 65.9%, 1997 SOURCEBOOK, supra note 62, at 59 tbl.29; 1998: 68.79%, 1998 SOURCEBOOK, supra note 64, at 59 tbl.29; 1999: 71.2%, 1999 SOURCEBOOK, supra note 5, at 59 tbl.29; 2000: 71.7%, 2000 SOURCEBOOK, supra note 6, at 59 tbl.29.

\textsuperscript{166} 1992 ANNUAL REPORT, supra note 5, at 132 tbl.52; 1996 SOURCEBOOK, supra note 58, at 44 tbl.27.

\textsuperscript{167} The percentage of drug trafficking defendants sentenced at the top of the applicable Guideline range from 1997 to 1999 was as follows 1997: 10.8%, 1997 SOURCEBOOK, supra note 62, at 59 tbl.29; 1998: 10.1%, 1998 SOURCEBOOK, supra note 64, at 59 tbl.29; 1999: 9.4%, 1999 SOURCEBOOK, supra note 5, at 59 tbl.29; 2000: 9.7%, 2000 SOURCEBOOK, supra note 6, at 59 tbl.29.

\textsuperscript{168} See generally U.S.S.G. ch. 5K (2001) (governing departures).

\textsuperscript{169} UNITED STATES SENTENCING COMMISSION, 1990 ANNUAL REPORT 74, tbl.7S (1991).
REBELLION II

illustrates, the rate of upward departures in drug cases was 0.6% in 1992 and declined steadily to 0.2% in 1999 and 2000. By 1999, only 38 out of 21,942 drug defendants, or one in every 577 persons sentenced for drug crimes, received an upward departure. To the extent that upward departures represent one manifestation of judicial opinion about the relative severity of Guidelines sentences for various crime types, it is worth noting that the rate of upward departures in non-drug cases has consistently stayed three to five times higher than in drug cases.

TABLE 6: UPWARD DEPARTURES

<table>
<thead>
<tr>
<th>Year</th>
<th>Upward Depart. (Non-Drug) (%)</th>
<th>Upward Depart. (Drug Cases) (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>2.0</td>
<td>0.6</td>
</tr>
<tr>
<td>1993</td>
<td>1.6</td>
<td>0.5</td>
</tr>
<tr>
<td>1994</td>
<td>1.6</td>
<td>0.6</td>
</tr>
<tr>
<td>1995</td>
<td>1.3</td>
<td>0.3</td>
</tr>
<tr>
<td>1996</td>
<td>1.4</td>
<td>0.3</td>
</tr>
<tr>
<td>1997</td>
<td>1.2</td>
<td>0.3</td>
</tr>
<tr>
<td>1998</td>
<td>1.2</td>
<td>0.2</td>
</tr>
<tr>
<td>1999</td>
<td>0.6</td>
<td>0.2</td>
</tr>
<tr>
<td>2000</td>
<td>0.9</td>
<td>0.2</td>
</tr>
</tbody>
</table>

5. Substantial Assistance Departures

Substantial assistance departures are departures below the otherwise applicable guideline range granted by the sentencing judge on motion of the government to defendants who have "provided substantial assistance in the investigation or prosecution of another person who has committed an offense." When we speak of "substantial assistance departures" we include

170. 1999 SOURCEBOOK, supra note 5, at 80 tbl.45; 2000 SOURCEBOOK, supra note 6, at 80 tbl.45.
171. 1999 SOURCEBOOK, supra note 5, at 80, tbl.45.
172. The data in the “Upward Depart. (Non-Drug)” column of Table 6 are drawn from 1992 ANNUAL REPORT, supra note 5, at 90 tbl.33, 127 tbl.50; 1993 ANNUAL REPORT, supra note 73, at 143 tbls.58, 156; 1994 ANNUAL REPORT, supra note 80, at 83 tbl.33, 113 tbl.53; 1995 ANNUAL REPORT, supra note 32, at 89 tbl.31, 109 tbl.46; 1996 SOURCEBOOK, supra note 58, at 41 tbl.26, 55 tbl.40; 1997 SOURCEBOOK, supra note 62, at 53 tbl.26, 80 tbl.45; 1998 SOURCEBOOK, supra note 64, at 63 tbl.32, 80 tbl.45; and 1999 SOURCEBOOK, supra note 5, at 63 tbl.32, 80 tbl.45.
173. The data in the “Upward Depart. (Drug Cases)” column of Table 6 for the period 1993-98 are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 143 tbl.58; 1994 ANNUAL REPORT, supra note 80, at 113 tbl.53; 1995 ANNUAL REPORT, supra note 32, at 109 tbl.46; 1996 SOURCEBOOK, supra note 58, at 55 tbl.40; 1997 SOURCEBOOK, supra note 62, at 80 tbl.45; 1998 SOURCEBOOK, supra note 64, at 80 tbl.45; 1999 SOURCEBOOK, supra note 5, at 80 tbl.45; 2000 SOURCEBOOK, supra note 6, at 80 tbl.45. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 32, at 120.
174. 28 U.S.C. §994(a) (1994). For more comprehensive discussions of the law and procedure of substantial assistance motions, see HAINES, BOWMAN & WOLL, supra note 79, at 1264-97; Bowman & Heise, supra note 1, at 1110-13; 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 (1999); and Frank O. Bowman, III, Defending Substantial Assistance:...
both departures from the statutory minimum mandatory sentence pursuant to 18 U.S.C. § 3553, and to departures below the otherwise applicable guideline range pursuant to § 5K1.1.

As Table 7 illustrates, since 1993, between one in three and one in four federal drug defendants has received a substantial assistance departure.\textsuperscript{175} Even more strikingly, from 1992-2000 the rate of substantial assistance departures in drug cases consistently remained roughly \textit{triple} that for all other crimes.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
 & (Non-Drug Cases) (\%)\textsuperscript{176} & (Drug Cases) (\%)\textsuperscript{177} \\
\hline
1992 & 8.1 & 24 \\
1993 & 8.8 & 27.2 \\
1994 & 10.6 & 31.7 \\
1995 & 11.5 & 31.9 \\
1996 & 11.2 & 30.6 \\
1997 & 11.6 & 30.6 \\
1998 & 11.3 & 30.1 \\
1999 & 10.4 & 28.5 \\
2000 & 10.9 & 27.1 \\
\hline
\end{tabular}
\caption{Percentage of Cases Receiving Substantial Assistance Departures}
\end{table}


\textsuperscript{175} The percentages in Table 7 understated the frequency of substantial assistance reductions because, although the Sentencing Commission only counts substantial assistance reductions accomplished at the time of the original sentencing through § 5K1.1 motions, a number of districts commonly grant these reductions only \textit{after} sentencing under Rule 35, FED. R. CRIM. P. See Linda Drazga Maxfield & John H. Kramer, \textit{Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice}, UNITED STATES SENTENCING COMMISSION 5 n.11 (1998) (noting that Rule 35(b) data is not collected, but estimating that Rule 35(b) motions occur in roughly 500 cases per year).

\textsuperscript{176} The data in the "Sub. Assist. Depart. (Non-Drug Cases)" column of Table 7 are drawn from the following sources: 1992 ANNUAL REPORT, supra note 5, at 127 tbl.50 and 132 tbl.52; 1994 ANNUAL REPORT, supra note 80, at 83 tbl.33 and 113 tbl.53; 1995 ANNUAL REPORT, supra note 32, at 89 tbl.31 and 109 tbl.46; 1996 SOURCEBOOK, supra note 58, at 41 tbl.26 and 55 tbl.40; 1997 SOURCEBOOK, supra note 62, at 56 tbl.27; 1998 SOURCEBOOK, supra note 64, at 56 tbl.27; 1999 SOURCEBOOK, supra note 5, at 56 tbl.27; 2000 SOURCEBOOK, supra note 6, at 56 tbl.27.

\textsuperscript{177} The data in the "Sub. Assist. Depart. (Drug Cases)" column of Table 7 for the period 1993-2000 are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 143 tbl.58; 1994 ANNUAL REPORT, supra note 80, at 113 tbl.53; 1995 ANNUAL REPORT, supra note 32, at 109 tbl.46; 1996 SOURCEBOOK, supra note 58, at 55 tbl.40; 1997 SOURCEBOOK, supra note 62, at 80 tbl.45; 1998 SOURCEBOOK, supra note 64, at 80 tbl.45; 1999 SOURCEBOOK, supra note 5, at 56 tbl.27; 2000 SOURCEBOOK, supra note 6, at 56 tbl.27. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 32, at 120.
The very high percentage of substantial assistance departures in narcotics cases has undoubtedly been a significant factor in holding down average drug sentences throughout 1992-2000. In addition, the 7.7% increase in drug case substantial assistance departures from 24% of all drug defendants in 1992 to 31.7% in 1994 was likely a contributing factor in the decline in average drug sentences in that two-year period.

Nonetheless, substantial assistance departures do not appear to have contributed to the continuing decrease in average drug sentences after 1994. First, as illustrated in Table 7, between 1994 and 2000, the proportion of drug defendants to whom substantial assistance departures were awarded actually fell, from 31.7% in 1994 to 27.1% in 2000. Second, as illustrated in Table 8, between 1995 and 2000, the average size of substantial assistance departures also decreased. From 1993 to 1995, the average substantial assistance departure in a drug trafficking case increased in length from 48 months to 51 months. In 1996, the average substantial assistance departure declined to 46 months, and in 1997, dropped nine months to 37 months. Since 1997, the size of substantial assistance departures has held roughly steady (37 months in 1998, 38 months in 1999 and 2000). However, expressed as a percentage of the low end of the otherwise applicable guideline range, the size of substantial assistance departures has dropped steadily since 1994 (from 53.8% in 1994 to 47.8% in 2000).

We have no definitive explanation for the decrease in the average size of substantial assistance departures in drug cases. However, the trend is consistent with anecdotal information suggesting that U.S. Attorney's Offices and district judges are increasingly adopting standardized local practices regarding the size of substantial assistance departures. Such local practices tend to create customary discounts for substantial assistance, expressed as a percentage of the bottom of the otherwise applicable guideline range.

178. 1995 ANNUAL REPORT, supra note 32, at 120.
179. 1994 ANNUAL REPORT, supra note 80, at 113 tbl.53.
180. Id.
181. 2000 SOURCEBOOK, supra note 6, at 80 tbl.45.
182. See United States v. Cosgrove, 73 F.3d 297, 302 (11th Cir. 1996) (approving district judge's announced practice of awarding a standard substantial assistance reduction of one-third off the low end of the applicable Guidelines range); United States v. King, 53 F.3d 589, 591-92 (3d Cir. 1995) (describing district court's practice of reducing sentence of cooperators under § 5K1.1 by three levels by analogy to acceptance of responsibility reduction).
## Table 8: Size of Substantial Assistance Departures in Drug Trafficking Cases\(^ {183}\)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>48</td>
<td>53.2</td>
</tr>
<tr>
<td>1994</td>
<td>50</td>
<td>53.8</td>
</tr>
<tr>
<td>1995</td>
<td>51</td>
<td>53.3</td>
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<td>1996</td>
<td>46</td>
<td>50</td>
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<td>1997</td>
<td>37</td>
<td>49.6</td>
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<td>37</td>
<td>48.6</td>
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<td>1999</td>
<td>38</td>
<td>48.5</td>
</tr>
<tr>
<td>2000</td>
<td>38</td>
<td>47.8</td>
</tr>
</tbody>
</table>

### 6. Non-Substantial Assistance Departures Under § 5K2.0

"Non-substantial assistance" departures are those awarded pursuant to § 5K2.0 of the Guidelines.\(^ {184}\) A judge may depart either upward or downward from the otherwise applicable guideline range if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."\(^ {185}\) As shown in Table 9, the percentage of downward departures in drug cases pursuant to U.S.S.G. § 5K2.0 increased steadily from 1992-1999. Intriguingly, in 2000, the percentage of non-substantial assistance drug departures fell for the first time, from 15.3% to 14.7%. Moreover, in 2000, again for the first time, the § 5K2.0 departure rates for drug cases and all cases diverged by more than about a single percentage point, with the general rate rising to 17%.

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183. The data in Table 8 on the size of substantial assistance departures in months and as a percentage of the otherwise applicable Guideline range from 1993 to 1996 are taken from Sentencing Commission figures provided in a fax to Frank Bowman from Courtney Semisch, U.S. Sentencing Commission (Apr. 18, 2000) (on file with author). The data in Table 8 for 1997-2000 are drawn from 1997 SOURCEBOOK, supra note 62, at 61 tbl.30; 1998 SOURCEBOOK, supra note 64, at 61 tbl.30; 1999 SOURCEBOOK, supra note 5, at 61 tbl.30; and 2000 SOURCEBOOK, supra note 6, at 61 tbl.30.


185. Id. (quoting 18 U.S.C. § 3553(b) (2001)).
Table 9: Non-Substantial Assistance Departures

<table>
<thead>
<tr>
<th>Year</th>
<th>Down. Depart. Sec. 5K2.0 (Drug Cases) (%)</th>
<th>Down. Depart. Sec. 5K2.0 (All Cases) (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>6.3</td>
<td>6.0</td>
</tr>
<tr>
<td>1993</td>
<td>6.5</td>
<td>6.6</td>
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<td>1994</td>
<td>7.2</td>
<td>7.6</td>
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<tr>
<td>1995</td>
<td>8.4</td>
<td>8.4</td>
</tr>
<tr>
<td>1996</td>
<td>9.1</td>
<td>10.3</td>
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<tr>
<td>1997</td>
<td>12.0</td>
<td>12.1</td>
</tr>
<tr>
<td>1998</td>
<td>12.8</td>
<td>13.6</td>
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<tr>
<td>1999</td>
<td>15.3</td>
<td>15.8</td>
</tr>
<tr>
<td>2000</td>
<td>14.7</td>
<td>17.0</td>
</tr>
</tbody>
</table>

As we observed in Rebellion I, the Supreme Court's 1996 decision in Koon v. United States 188 may have encouraged district judges to depart even more than had previously been the case, thus perpetuating a trend of ever-greater numbers of non-substantial assistance departures that had been under way since 1992. 189 It is too early to tell what the 2000 drop in both substantial assistance and non-substantial assistance departures may portend. Nonetheless, the two trends in tandem may provide some part of the explanation for the fact that, although the national average drug sentence fell again in 2000, it did so by only a tiny margin. 190

7. Charge Bargains

Prosecutors can use their discretionary charging power to reduce sentences. Charge bargaining may take the form of charging or accepting a plea to an offense less serious than the defendant's conduct would support, or to fewer counts than the government could actually prove, thus in theory subjecting the defendant to liability for only a limited subset of all his criminal conduct. The Guidelines do not explicitly prohibit charge

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186. The data in the "Down. Depart. Sec. 5K2.0 (Drug Cases)" column of Table 9 for the period 1993-2000 are drawn from the following sources: 1993 ANNUAL REPORT, supra note 73, at 143 tbl.58; 1994 ANNUAL REPORT, supra note 80, at 113 tbl.53; 1995 ANNUAL REPORT, supra note 32, at 109 tbl.46; 1996 SOURCEBOOK, supra note 58, at 55 tbl.40; 1997 SOURCEBOOK, supra note 62, at 80 tbl.45; 1998 SOURCEBOOK, supra note 64, at 80 tbl.45; 1999 SOURCEBOOK, supra note 5, at 80 tbl.5; 2000 SOURCEBOOK, supra note 6, at 80 tbl.5. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 32, at 120.

187. The data in the "Down. Depart. Sec. 5K2.0 (All Cases)" column of Table 9 for the period 1993-1998 are drawn from the 1998 SOURCEBOOK, supra note 64, at 51 fig.G. The figures for 1999 and 2000 are from 1999 SOURCEBOOK, supra note 5, at 80 tbl.5; 2000 SOURCEBOOK, supra note 6, at 80 tbl.5. The figure for 1992 is from 1995 ANNUAL REPORT, supra note 32, at 86 fig. H.


189. Bowman & Heise, supra note 1, at 1114-16.

190. See 2000 SOURCEBOOK, supra note 26, at 32 (showing a decline in average drug sentence from 75.2 months in 1999 to 74.4 months in 2000).
bargaining. However, the relevant conduct feature of the Guidelines is designed to nullify the effect of such bargains.\textsuperscript{191} As a result, the judge is to sentence each defendant for everything he actually did in relation to the course of criminal conduct that led to his conviction, regardless of the specific offense to which he pled guilty. The judge is to include both uncharged and acquitted conduct, if proven at sentencing by a preponderance of the evidence.\textsuperscript{192}

If the sentencing judge has full information about the case, i.e., all the facts about the entire course of conduct that resulted in the defendant's conviction, charge bargaining should influence the sentence only if the statutory maximum sentence for the bargained-for offense is less than the Guidelines sentence for the same course of conduct. Because of the high statutory maximum sentences for drug crimes, charge bargaining often will have little effect in drug cases. By way of illustration, assume a defendant sold one kilogram of cocaine to Buyer X the first week of the month, and then sold five kilos to Buyer X each of the remaining three weeks in the month. The government could choose to charge him with only one count of distribution of one kilo, but even if it did so, the judge would still be obliged to calculate the defendant's offense level based on all sixteen kilos because the entire month's transactions were plainly part of the "same course of conduct or common scheme or plan."\textsuperscript{193} The Guidelines dictate a sentence of at least 151-188 months (about twelve to fifteen years) for distribution of sixteen kilos of cocaine. Therefore, because the statutory maximum sentence for a single count of cocaine distribution is twenty years,\textsuperscript{194} a plea to a single count will not cap the sentence below the guideline range.

Nonetheless, charge bargains can be structured to reduce sentences for some drug defendants, even if the judge has full information. In \textit{Rebellion I}, we described several types of charge bargains. These included promising to dismiss (or not to file) a weapon count under 18 U.S.C. § 924(c), thus sparing the defendant a five-year addition to his sentence,\textsuperscript{195} promising not

\begin{itemize}
\item \textsuperscript{191} Pursuant to U.S.S.G. § 1B1.3, the sentencing judge is required to take into account in setting the base offense level and all adjustments "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," U.S.S.G. § 1B1.3(a)(1)(A) (2000), as well as all the foreseeable acts of his co-conspirators, U.S.S.G. § 1B1.3(a)(1)(B) (2000), that occurred in relation to the offense of conviction or as "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(A)(2) (2000) (emphasis added). For further discussion of relevant conduct, see William W. Wilkins, Jr. & John R. Steer, \textit{Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines}, 41 S.C. L. Rev. 495 (1990).
\item \textsuperscript{192} See United States v. Watts, 519 U.S. 148 (1997) (holding relevant conduct includes acquitted conduct proven by a preponderance of evidence at sentencing); HAINES, BOWMAN & WOLL, supra note 79, at 118 ("All circuits agree that relevant conduct includes uncharged conduct outside the offense of conviction.").
\item \textsuperscript{193} U.S.S.G. § 1B1.3(a)(2) (2000).
\item \textsuperscript{194} 21 U.S.C. § 841(b)(1)(C) (1994).
\item \textsuperscript{195} For a discussion of the operation of 18 U.S.C. § 924(c), see supra notes 89-105 and ac-
to file a "second offender information," which is a pleading triggering doubled penalties when a defendant has been convicted of a prior felony drug offense;\(^1\) agreeing to dismiss or not file a charge of "engaging in a continuing criminal enterprise" (CCE) under 21 U.S.C. § 848\(^1\) (which carries a minimum mandatory penalty of twenty years imprisonment) in lieu of a plea to another drug offense with a lower penalty; or substituting for substantive drug offenses a plea to use of a communication facility to carry out a drug trafficking offense under 21 U.S.C. § 843(b), an offense with a statutory maximum sentence of four years known as a "phone count."

In Rebellion\(I\), we noted statistical indicators tending to establish the existence of charge bargains in drug cases involving second offender informations\(^2\) and phone counts.\(^2\) In June 2000, the Bureau of Justice Statistics published a study offering persuasive evidence that charge bargains involving dismissal of a § 924(c) weapons count became increasingly frequent between 1992 and 1998.\(^3\) Although the study lumped together both drug and non-drug § 924(c) cases, its results are nonetheless suggestive. The percentage of cases in which a § 924(c) count was charged, but dismissed as part of a plea agreement, nearly tripled from 24.4% in 1992 to 65.7% in 1996.\(^4\) In 1997-1998, the percentage of such bargains decreased to 56.1% and 54.3% respectively, but the rate remained double that prevailing in 1992.\(^5\) The fact that charge bargains dismissing § 924(c) counts peaked in 1996, the year following the December 1995 decision in Bailey v. United States,\(^6\) may have been a response to that case. Nonetheless, in 1995, § 924(c) counts were dismissed in fully 50.3% of all cases in which they were charged, and in 1997 and 1998, § 924(c) counts were dismissed in 56.1% and 54.3% of all cases in which they were charged.\(^7\)

All this having been said, despite solid evidence of the existence of charge bargaining and some evidence suggesting that the prevalence of charge bargains in drug cases with § 924(c) counts rose substantially


\(^{197}\) A defendant commits the crime of "engaging in a continuing criminal enterprise" when: (a) he commits a felony narcotics crime in violation of Title 21, United States Code, (b) that violation is part of a "continuing series of violations" undertaken by the defendant in concert with at least five other persons "with respect to whom [the defendant] occupies a managerial or supervisory position," and (c) the defendant "obtains substantial income or resources" from the enterprise. 21 U.S.C. § 848(c) (1994).

\(^{198}\) Bowman & Heise, supra note 1, at 1121.

\(^{199}\) Id. at 1121-22.

\(^{200}\) BJS FIREARM REPORT, supra note 95.

\(^{201}\) Id. at 6, tbl.5.

\(^{202}\) Id.


\(^{204}\) BJS FIREARM REPORT, supra note 95, at 6 tbl.5
between 1992 and 1996, we are unable to quantify the frequency of charge bargaining in drug cases or its quantitative effect on average drug sentences.

8. Fact Bargaining

The most direct method of evading a fact-driven real offense sentencing system is for the parties to conceal (or for the court to turn a blind eye to) facts that would increase the sentence beyond the agreed upon level. While no experienced observer doubts that fact bargaining occurs, there is considerable controversy over its frequency. The debate is peculiarly difficult to resolve because fact bargains are entered into for the express purpose of keeping facts from the probation department and the sentencing judge, and thus out of the record. The Sentencing Guidelines are a self-contained system. That is, if a sentencing judge finds Fact A to exist, and if the Guidelines dictate certain sentencing consequences upon a finding of Fact A, then those consequences must follow and both Fact A and its consequences will appear in the record and can be tabulated by Sentencing Commission researchers. Conversely, if Fact A exists, but is suppressed by the parties pursuant to a plea agreement, its existence will be reflected nowhere except the files of the prosecutor. The suppressed fact will therefore not appear in the presentence report, will not be reported to the Sentencing Commission, and will thus remain invisible to researchers.

In Rebellion I, we were able to offer only anecdotal evidence and opinion survey evidence regarding the existence and prevalence of fact bargaining. We have found no lode of additional data in the intervening months. Thus, we are still unable to say more than that some fact bargaining undoubtedly does occur in federal drug cases and that the effect of such bargains is to reduce some sentences. It is, however, impossible to quantify the frequency of this practice or the magnitude of the effect on average drug sentences. Nor is it possible to determine whether fact bargaining has become more or less common over time.

205. See Yellen, supra note 145, at 340 (describing "fact bargaining and guideline-factor bargaining" as "the surest way to influence the sentence of a defendant who pled guilty").

206. Compare Letter of Francesca D. Bowman, Chair, First Circuit, Probation Officers Advisory Group, to Richard P. Conaboy, Chairman, United States Sentencing Commission (Jan. 30, 1996), 8 FED. SENTENCING REP. 303 (1996) (reporting result of survey in which many probation officers expressed the opinion that prosecutors commonly withheld facts from the Probation Department, and thus from the sentencing judge "to protect a plea agreement") (Ms. Bowman is no relation to the author of this Article), with Bowman, To Tell the Truth, supra note 145, passim (questioning whether the phenomenon of fact bargaining was widespread).

D. REBELLION I: A SUMMARY

1. Summary of Non-Discretionary Factors Affecting Average Drug Sentence Length

The non-discretionary factors we have been able to identify do not appear to provide an adequate explanation for the decline in average federal drug sentence length between 1991-1992 and 2000. Moreover, those non-discretionary factors that have had the greatest probable effect prove, on closer examination, to have a significant discretionary component.

First, statutory penalties for federal drug offenses have, with a single exception, increased since 1988.208 The sole exception was the statutory safety valve passed in 1994, which, standing alone, had no immediate observable downward effect on drug sentences.209 However, the Sentencing Commission’s passage of a Guidelines safety valve provision in 1995 was followed immediately in 1996 by a decrease in drug sentences.210 The modest increases in percentage of cases to which the statutory and guidelines safety valves were applied in 1997 through 2000 make it unlikely that these safety valves had a significant direct role in the reductions in average sentence that occurred in those years.211 Nonetheless, by eliminating the constraint of mandatory minimum sentences in 23.2% of cases by 2000,212 the statutory safety valve permitted the application of other Guidelines provisions, some having discretionary aspects, that certainly lowered many drug sentences.

Second, between 1991 and 2000, the Sentencing Commission adopted a number of amendments to the drug guidelines, some of which increased and some of which decreased drug sentences. Although we are unable to quantify the net effect of these amendments on average drug sentences, it is fair to conclude that, taken as a group, these Guidelines amendments have only a weak explanatory connection to the continuing decline in drug sentences. With the exception of the guideline safety valve (considered in the preceding paragraph on statutory changes) and the “super acceptance of responsibility” credit,213 the amendments lowering sentences would have affected only a small number of cases.214 Each amendment would have had its greatest effect on the overall average drug sentence in the year following

208. Supra notes 29-31 and accompanying text.
209. Supra notes 32-45 and accompanying text.
210. Supra note 59 and accompanying text.
211. Supra notes 61-67 and accompanying text.
212. 2000 SOURCEBOOK, supra note 6, at 79 tbl.44.
213. Supra notes 72-83 and accompanying text.
214. Bowman & Heise, supra note 1, at 1076-77 (discussing small number of cases affected by the elimination of top two levels of drug quantity table), and id. at 1078-80 (discussing small number of cases affected by amendments relating to amendments on “mixture or substance” in which drugs are found and on the definition of relevant conduct in a drug conspiracy).
its adoption, with little measurable impact on the overall average in ensuing years. Yet all the amendments we have identified with a potential to push average sentences down were enacted from 1993-1995, and would have taken effect no later than 1996.\(^{215}\) Thus, these amendments cannot help explain the continuing decline in average sentence in 1997-2000. Additionally, the downward pressure exerted by some Guidelines amendments would have been counteracted by other amendments (particularly those involving methamphetamine enacted between 1995 and 1997\(^{216}\)) that increased drug sentences.

Third, there have been only two Supreme Court decisions altering case law in ways that would tend to reduce federal drug sentences, the 1995 Bailey decision interpreting 18 U.S.C. § 924(c),\(^{217}\) and the 1996 Koon decision on departures.\(^{218}\) There was a marked decrease in cases with “weapon involvement” in the two years following Bailey, but the decline leveled off in 1998.\(^{219}\) Whatever effect Bailey may have had on the overall average federal drug sentence, it cannot explain the decline between 1991-1992 and 1995, and can have, at best, a tenuous connection to the continued decline between 1997 and 2000. Moreover, the decline in cases with sentences involving weapon enhancements may be in part attributable to discretionary prosecutorial choices during the charging and plea bargaining phases of the process. The effect of the Koon decision is discussed below as a discretionary factor, because its essence was an encouragement of discretionary choice to depart.

Fourth, we continue to have a high degree of confidence that the change in mix of drug type for which defendants were sentenced during 1992-2000 did not in itself cause the decline in sentence length during this period. Most importantly, the average sentence for each of the major drug types was lower in 2000 than it was in 1992.\(^{220}\) Likewise, if average sentence lengths within drug type had remained constant at 1992 levels, all else being equal, the overall average drug sentence would have been longer in 2000 than it was in 1992.\(^{221}\) Nonetheless, we no longer feel confident in asserting, as we did in Rebellion I, that the change in mix of drug types between 1992-1999 “did not contribute to the decline in average federal narcotics sentence.”\(^{222}\) A re-examination of the national data, in conjunction with our study of district and regional data, leads us to the conclusion that, at least

\(^{215}\) Id. at 1080 n.150.

\(^{216}\) Id. at 1080-82.

\(^{217}\) Bailey v. United States, 516 U.S. 137, 143 (1995); see also notes 89-105 and accompanying text (discussing effects of Bailey decision on sentence length in drug cases).


\(^{219}\) Supra note 101 and accompanying text.

\(^{220}\) Supra notes 112-16 and accompanying text.

\(^{221}\) Supra note 117 and accompanying text.

\(^{222}\) Bowman & Heise, supra note 1, at 1103 (emphasis added).
during the period 1996-1999, large increases in the number of marijuana prosecutions in the Mexican border districts, acting in conjunction with the “fast track” sentencing policies adopted in drug prosecutions on the border, may well have contributed to the declining national average sentence. We will discuss this issue in detail below.\textsuperscript{223}

Fifth, to the extent we have been able to determine it, the average quantity of drugs per sentenced defendant increased from 1993-1999. More conservatively, there is no evidence that the average quantity of drugs per sentenced defendant decreased.\textsuperscript{224} Thus, there is no evidence that changes in drug quantity caused the decrease in average drug sentences.

Sixth, the steady rise in percentage of mitigating role adjustments from 1992-1999, combined with the steady decline in aggravating role adjustments in the same period, certainly contributed to the overall decrease in average drug sentence in that period. (In 2000, the decline in aggravating role adjustments continued, but mitigating role adjustments decreased slightly as well.)\textsuperscript{225} In \textit{Rebellion I}, we concluded tentatively that “these complementary trends are more likely to have been the result of evolutionary changes in discretionary judicial and prosecutorial behavior than of real changes in the population of defendants upon whom the Guidelines were operating.”\textsuperscript{226} Again, analysis of regional data has made us a bit less sure of this already tentative conclusion.\textsuperscript{227} Now we think it safer to say that both changes in defendant population and discretionary choices by sentencing actors have probably influenced the trends in role adjustments for drug offenders.

Seventh, between 1993 and 2000, the number of first-time offenders prosecuted for federal drug crimes decreased, the seriousness of the prior criminal records of federal drug defendants grew progressively worse, and the number and percentage of drug defendants classified as career offenders increased.\textsuperscript{228} These trends would, if anything, have increased average narcotics sentences.

Finally, and perhaps most importantly, all of the “non-discretionary” factors with the largest probable downward effect on overall drug sentence average have markedly discretionary components. The implementation of the statutory and guideline safety valves, the award of two- and three-level acceptance of responsibility reductions, the choice of whether to file and pursue gun charges and enhancements, and the steady alteration in role adjustments (aggravating role down, mitigating role up) are all subject to significant influence from the discretionary choices of judges, prosecutors,
and defendants. And, as noted, the *Koon* decision is an invitation to increased exercise of judicial sentencing discretion.\(^{229}\)

2. Summary of Discretionary Factors Affecting Average Sentence Length

In the aggregate, the discretionary factors discussed above have certainly exerted a powerful downward influence on average drug sentences in the years since 1992.

First, the increase in percentage of federal drug cases disposed of by plea from 82% in 1992 to 96.1% in 2000\(^{230}\) would, in itself, have tended to reduce average sentence length because virtually all defendants who plead guilty receive a two or three level reduction for "acceptance of responsibility" under U.S.S.G. § 3E1.1.\(^{231}\) Moreover, a negotiated plea is a necessary precondition for the exercise of other discretionary choices by prosecutors, defense lawyers, and judges that can produce far larger sentence reductions. At the very least, the consistent increase in pleas is suggestive of an environment increasingly hospitable to such exercises of discretion.

Second, the dramatic rise in so-called "super acceptance of responsibility" adjustments (the subtraction of a third offense level for those defendants receiving the regular acceptance reduction who also plead guilty early and provide full information about their crime\(^{232}\)), from 49.1% in 1993 to 82.1% in 2000,\(^{233}\) would likely have reduced the average length of drug sentences and is strongly indicative of an increasingly lenient exercise of discretion by prosecutors and judges.

Third, although the data is not conclusive, our research strongly suggests that between 1992 and 2000 judges sentenced an increasing percentage of drug defendants to the low end of the applicable guideline range.\(^{234}\)

Fourth, the number of upward departures in drug cases, tiny to begin with, decreased even further throughout the period 1992-2000.\(^{235}\)

Fifth, throughout the period 1992-2000, the rate at which prosecutors recommended and judges awarded substantial assistance departures in drug cases increased at a rate roughly triple that of all other types of cases.\(^{236}\) The rate of substantial assistance departures was sufficiently high to support an inference that such departures were commonly being used, not to secure needed evidence, but as tools of case management or sentence

\(^{229}\) *Supra* notes 87, 118, 189, and accompanying text.

\(^{230}\) 2000 SOURCEBOOK, *supra* note 6, at 73 tbl.38.

\(^{231}\) *Supra* notes 150-53 and accompanying text.

\(^{232}\) *Supra* notes 72-83 and accompanying text.

\(^{233}\) 2000 SOURCEBOOK, *supra* note 6, at 76 tbl.41.

\(^{234}\) *Supra* notes 159-67 and accompanying text.

\(^{235}\) *Supra* notes 168-71 and accompanying text.

\(^{236}\) *Supra* notes 176-77 and accompanying text.
manipulation. However, although the rate of substantial assistance departures increased markedly between 1992 and 1994—rising from 24% to 31.7%—it then leveled off.\textsuperscript{237} Indeed, the drug case substantial assistance rate actually declined from 1995 to 2000, dropping from 31.9% to 27.1%.\textsuperscript{238} Between 1993 and 1995, the evidence suggests that the size of substantial assistance departures increased; however, the size of such departures decreased from 1995 to 1999, both in number of months and as a percentage of the otherwise applicable Guidelines minimum sentence.\textsuperscript{239} Accordingly, the continuing high percentage of substantial assistance departures kept average drug sentences down throughout the study period. Similarly, the increase in the number of substantial assistance departures between 1992 and 1995, and in the size of such departures from 1993 through 1995, probably contributed to the decline in average drug sentence in those periods. Nonetheless, we conclude, somewhat to our surprise, that substantial assistance has no observable causal connection to the decrease in average drug sentences between 1995 and 2000.

Sixth, by contrast, non-substantial assistance departures under U.S.S.G. § 5K2.0 more than doubled in drug cases from 6.3% in 1992 to 15.3% in 1999, with a slight decline to 14.7% in 2000.\textsuperscript{240} This increase was doubtless encouraged by the Supreme Court’s 1996 decision in \textit{Koon v. United States}, but the trend substantially predates \textit{Koon}. The markedly increased use of non-substantial assistance downward departures was purely discretionary in character and undoubtedly contributed to the reduction in average drug sentences up through 1999.

Finally, our study supports the conclusion that prosecutors employ both charge and fact bargaining to confer sentencing discounts on some defendants.\textsuperscript{241} However, despite the prevalence of anecdotal information,\textsuperscript{242} there is insufficient data to determine empirically whether the incidence of charge and fact bargaining increased between 1992 and 2000.

3. The Combined Effect of Discretionary and Non-Discretionary Factors on Federal Drug Sentences

In light of our findings on discretionary and non-discretionary factors, it seems clear that an important, and perhaps dominant, mechanism driving the 1992-1999 decrease in drug sentence length was a steady increase in discretionary choices by system actors to shorten sentences. The figures for 2000 are mixed in this regard, with some mechanisms of discretionary

\begin{footnotes}
\item 237. \textit{Id.} The rate of substantial assistance departures stayed essentially flat in 1994-1995, changing by only 0.2%, from 31.7% in 1994 to 31.9% in 1995. \textit{Id.}
\item 238. \textit{Id.}
\item 239. \textit{Supra} notes 181-83 and accompanying text.
\item 240. \textit{Supra} notes 186-87 and accompanying text.
\item 241. \textit{Supra} Part II.B.7.
\item 242. \textit{Id.}
\end{footnotes}
leniency rising and others declining for the first time since the early 1990s.

We are aware that our conclusions so far are subject to the critique that we did not test the interactions of the many factors bearing on drug sentence length with statistical tools such as regression analysis. We are somewhat skeptical that one could gather the quantity and quality of data that would be necessary to perform such an analysis, at least if the objective were to analyze all the factors we have identified as potentially relevant for all 150,000-plus drug defendants sentenced in the period 1992-2000. We are also skeptical of the feasibility of creating a statistical model that would produce useful results in a nine-year longitudinal study of a system in which the legal rules and other factors affecting outcomes are constantly changing. At any event, we did not undertake this formidable task, either in Rebellion I or in this Article. Although one of us (Heise) is trained as an empirical social scientist, in Rebellion I our approach to ferreting out the cause of declining drug sentences was the approach of the trial lawyer, not of the statistician. That is, we examined, one by one, each of the likely discretionary and non-discretionary factors that might affect average drug sentence length. The evidence we reviewed shows that (1) non-discretionary factors do not appear to provide a satisfactory explanation of why drug sentences have declined; (2) at virtually every point in the Guidelines sentencing process where prosecutors and judges can exercise discretionary authority to reduce drug sentences, they have done so; and (3) where we can measure trends, the trend since roughly 1992 has always been toward exercising discretion in favor of leniency with increasing frequency. As lawyers, we found these conclusions sound, if not unassailable.

The new data for 2000 discussed above is interesting on two broad grounds. On the one hand, the overall downward motion of the average federal drug sentence continued for another year. On the other hand, the 2000 statistics reveal a slowing, and in some instances a reversal, in the steady yearly increases in discretionary leniency that began in 1991-1992. Whether 2000 will prove to be the bottom of a statistical valley or only a bump on the path leading further down the canyon remains to be seen.

III. AN EXAMINATION OF DECLINING FEDERAL DRUG SENTENCES AT THE DISTRICT AND CIRCUIT LEVEL

We felt that the conclusions we reached by examining national trend lines would be enriched, and perhaps challenged, if we took a second look at drug sentencing, this time focusing on trends at the district and circuit level from 1992 through 1999.\footnote{Because of publication deadlines for this Article, the regression analyses presented below contain data from 1992-1999, but not data from FY 2000, which only became fully available in the early fall of 2001.} We had three general objectives. First, we hoped to test our original conclusions. Second, we hoped to refine some of
our original conclusions. Third, we expected that examination of local and regional data might expose some considerations we had not thought of before. We think that each of these objectives has been fulfilled, at least in part.

A. ANY "REBELLION" IS REGIONAL

Almost all of the national trend lines discussed in Rebellion I are remarkably smooth, from the consistent yearly decline in the average federal drug sentence itself, to the complementary upward and downward arcs of mitigating and aggravating role adjustments, to the ever-rising proportion of non-substantial assistance departures. An unblinking focus on these national trend lines could lead one to the conclusion that the federal drug sentencing scene from Maine to Southern California has been one homogenous whole, in which the entire country has moved in rough unison toward ever lower sentences. The reality is far otherwise.

It turns out that from 1992-1999, of the ninety-four federal districts, the average drug sentence declined in fifty-one districts, but increased in forty-one districts.\(^{244}\) Despite the near equipoise in the number of districts in which sentences rose or fell, the national average drug sentence declined as markedly as it did because, while sentences went down in only 54% of all districts, the districts in which sentences declined handled a far larger percentage of federally prosecuted drug cases—72% in 1999.\(^{245}\)

Not only did drug sentences actually increase in many districts, but between 1992 and 1999 the degree of variation among districts in average drug sentences and of change in average drug sentences within districts was remarkable. For example, in 1992, the average drug sentence varied from a low of 40 months in the Western District of Kentucky to a high of 174 months in the Southern District of Georgia.\(^{246}\) In 1999, the lowest average drug sentence was 22.4 months in the Southern District of California, and the highest average drug sentence was 176 months in the Eastern District of

\(^{244}\) Compare 1992 ANNUAL REPORT, supra note 5, at app. B, with 1999 SOURCEBOOK, supra note 5, at app. B. The average sentence length in 1992 of two districts, Guam and the Northern Marianas, is not reported in Sentencing Commission sources. Therefore, no measurement of change in average sentence length from 1992-1999 was possible. Our observation that drug sentences seem to vary substantially from district is consistent with a variety of studies showing substantial inter-district violation in sentence length departure rates, and other factors affecting sentence length. See Jeffery T. Ulmer, John H. Kramer & Brian Johnson, District Matters: An Analysis of Inter-District Variation in Federal Sentencing, paper presented at annual meeting of American Society of Criminology, Nov. 9, 2001 (Draft Summary on file with authors) (finding that district in which defendant was sentenced during FY 1996-98 affected sentence length to a statistically significant degree). Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, The Effect of the Federal Sentencing Guidelines on Inter-fudge Sentencing Disparity, 90 J. CRIM. L. & CRIMINOLOGY 239, 240 (1999) (concluding that adoption of Guidelines reduced intra-district sentencing disparity, but may have increased inter-district disparity, particularly in drug cases).

\(^{245}\) 1999 SOURCEBOOK, supra note 5, at app. B.

\(^{246}\) 1992 ANNUAL REPORT, supra note 5, at app. B.
North Carolina. Between 1992 and 1999, the average drug sentence in the Middle District of Georgia dropped by 70 months, falling from 160.7 months to 87.5 months. In the same period, the average drug sentence in the Eastern District of North Carolina increased by 74.4 months, jumping from 101.8 months to 176.2 months.

Of course, the foregoing examples are merely the endpoints of the spectrum of sentence severity and sentence variation, and it is unsurprising that in a system of ninety-four districts some districts will differ considerably from the national mean. Nonetheless, we were quite surprised by the degree of variation. Moreover, the disparities both in average drug sentence length and in change in average drug sentence length over time are almost as pronounced at the circuit level as they are among districts. As Figures 9A and 9B illustrate (we could not fit all twelve circuits on a single graph), between 1992 and 1999, eight circuits experienced decreases in average drug sentence, while the average drug sentence in four circuits increased.

**Figure 9A: Average Drug Sentence by Circuits: First Through Sixth, 1992-1999**

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247. 1999 Sourcebook, supra note 5, at app. B.
248. 1992 Annual Report, supra note 5, at app. B.
249. 1999 Sourcebook, supra note 5, at app. B.
250. 1992 Annual Report, supra note 5, at app. B.
251. 1999 Sourcebook, supra note 5, at app. B.
At the circuit level, just as in the districts, the degree of variation in both average drug sentences and of change in average drug sentences is striking. In 1992, average circuit-wide drug sentences varied from a low of 70.9 months in the Second Circuit to a high of 133.3 months in the Eleventh Circuit. By 1999, average circuit-wide drug sentences ranged from a low of 65.8 months in the Second Circuit to a high of 123.3 months in the Fourth Circuit. Between 1992 and 1999, the average drug sentence increased by thirty-one months (from 91.8 months to 123.3 months) in the Fourth Circuit, but decreased by twenty-three months (from 133.3 months to 110 months) in the Eleventh Circuit.254 The variations between circuits are not quite as dramatic as those between districts, but by any standard they are quite pronounced.

The marked differences in average drug sentence at both the district and circuit level have several important implications for anyone seeking to explain the national decline in average drug sentence length. At the most general level, the wide regional variations supply an immediate dose of humility to anyone seeking to explain the national trend, and they inspire caution about ascribing any particular motivation to the entire class of sentencing system actors.

More particularly, the wide regional variations provide to the researcher both a challenge and an opportunity. The challenge is to explain, to the

253. Id.
254. The Tenth Circuit experienced a similar twenty-three month decline between 1993 and 1999, from 110.8 months to 87.2 months. This steady six-year decline was preceded by a one-year jump upward from 91 months in 1992 to 110.8 months in 1993. Id.
extent possible, the reasons for the local and regional variations. The opportunity arises from the fact that each of the ninety-four judicial districts is a separate sentencing system with essentially identical structural components (i.e., U.S. Attorneys prosecuting drug cases under federal statutes in front of life-tenured district judges who sentence convicted defendants by applying the Federal Sentencing Guidelines with the assistance of federal probation officers). Hence, each district can serve as a unit of analysis in examining national trends. That is, one can identify factors that might affect average drug sentence length (such as changes in caseload or mix of drug type over time) and create regression equations using judicial districts as the unit of analysis to determine whether such factors affected average drug sentences to a statistically significant degree. This approach, described in detail in the next section, is a primary source of new insights in this Article.

B. **District Level Regression Analyses**

In *Rebellion I*, we concluded that both discretionary and non-discretionary factors contributed to the decline in average federal drug sentence length between 1992 and 1999, but that discretionary factors appeared to predominate. We suggested in a footnote that events in the busy Mexican border districts might have had a disproportionate impact on national sentencing averages. We also considered briefly the question of why system actors were increasingly exercising discretion in the direction of leniency for drug offenders, suggesting that some part of their motivation might be a perception that drug sentences are higher than necessary. The analyses of district-level sentencing data presented below cast light on each of these three subjects.

1. Data, Variables, and Methodology

   a. **Data**

   The primary source of data employed in this analysis is United States Sentencing Commission statistics. Most of the Sentencing Commission data employed here are from Sentencing Commission publications; however, some unpublished data, particularly the figures on drug type by district for the years 1992-1994, were provided to us by Commission staff. Data on the

256. *Id.* at 1128 n.351.
257. *Id.* at 1131-34.
258. For the years 1992-1995, we drew principally from the U.S. Sentencing Commission’s *Annual Report*, and for the years 1996-1999, we drew principally from the U.S. Sentencing Commission’s yearly *Sourcebook of Federal Sentencing Statistics*.
259. The USSC graciously supplied us unpublished district drug type data, 1992-1994, through private correspondence. E-mail from Barbara Sharp, USSC, to Michael Heise (June 20,
number of active district judges in each district annually were derived from publications of the Administrative Office of the United States Courts.\textsuperscript{260} Other data, such as the number of Assistant U.S. Attorneys in each district annually, came from other published sources.\textsuperscript{261}

Our reliance on published government data imposed certain constraints on this research. The first of these stems from the fact that the smallest practicable unit of analysis using published data is the federal judicial district. For a good many of the factors potentially affecting average drug sentence length, there exist published national statistics, but no published district-by-district statistics. Thus, we were limited to studying those factors as to which district-level data has been published.\textsuperscript{262} Happily, published data do exist on several key issues about which we were most in doubt at the conclusion of \textit{Rebellion I}, including the effect on average sentence length of events in the busy Mexican border districts, as well as changes in drug type mix and judicial and prosecutorial workload.

Nonetheless, while using districts as the unit of analysis is useful because each district is a separate system operating under essentially identical rules, the approach carries some methodological limitations. Notably, because our analysis treats each federal district as an equal entity, it treats developments in the District of South Dakota, with an annual drug caseload of roughly eighty, as equivalent to developments in the Southern District of California, which now handles nearly two thousand drug cases per year.\textsuperscript{263} We have had to be sensitive to any distortions that this approach might introduce.

Despite the limitations, we believe examination of data structured at the federal district court level represents an important refinement of the methods employed in \textit{Rebellion I}. By observing each of the ninety-four federal judicial districts we can examine the data with more rigor and gain a more


\textsuperscript{261} E-mail from Dr. Linda Roberge, Assistant Research Professor, Transactional Records Access Clearinghouse (TRAC), Syracuse University, to Michael Heise (July 20, 2001) (on file with the authors).

\textsuperscript{262} Ideally, one would employ data structured at the individual case-level. Although such data exists, the size of the data set one would have to assemble (some 150,000 individual cases from 1992-2000) and the form of the databases in which it is maintained rendered the use of individual case statistics impractical for us. See Cindy R. Alexander, et al., \textit{Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms}, 42 J. L. & ECON. 393, 401-03, 419-20 (1999) (commenting unfavorably on the usability of Commission databases). We recognize the inherent limitations of our approach, and look forward to having our conclusions in both \textit{Rebellion I} and this Article tested or refined by future researchers willing to tackle the problem at the individual case level.

\textsuperscript{263} 2000 \textit{SOURCEBOOK}, \textit{supra} note 6, at app. B.
nuanced picture of the national trend toward average drug sentence reduction.

b. Variables

Our dependant variable is the change in average drug sentence in each district between 1992 and 1999. Our independent variables fall into one of three groups: drug type, workload, and district.

i. Drug Type

In Rebellion I, we used national data to examine the hypothesis that the downward trend in average drug sentence from 1992 to 1999 may simply reflect changes in the mix of types of drug cases prosecuted. We concluded that changes in mix of drug type do not seem to have caused the 1992-1999 decline. To analyze this possibility further at the district level, we generated one variable for each of the five major drug types that captures the change in the drugs' relative share (as a percentage) of the overall drug mix in each district during the time interval under analysis. For example, for each drug type, COKE, CRACK, HEROIN, MARIJ., and METH., we computed that drug type's percentage share of the drug cases sentenced in each district in 1992, and again in 1999. For each district, we then subtracted each drug's 1992 percentage from its 1999 percentage. A positive number indicates that a drug's relative share increased between 1992 to 1999. A negative number indicates that the drug's relative share declined over those eight years.

264. The Sentencing Commission did not release 2000 federal sentencing data until the fall of 2001. Due to publication and editing deadlines, we were unable to obtain and analyze district-level data for 2000 in time to include it in this Article.
265. Bowman & Heise, supra note 1, at 1087-90.
266. We also performed an identical set of regressions in which we used as independent variables the change in raw numbers of each drug type within each district, rather than the change in percentage. On reflection, we concluded that, except in very small U.S. Attorney's Offices where a few marijuana or crack cases more or less can effect a large change in district percentage figures for those drugs, changes in the relative proportions of the five major drug types in a district's caseload are likely to have a greater impact on the average drug sentence in that district than variations in raw numbers of cases. Accordingly, in the text we have focused on the results of the percentage regressions, mentioning the raw number analyses in footnotes where they appear relevant. In any event, the results of the raw number regressions were consistent with those using percentages in the sense that factors found to be significant using raw numbers of drug cases virtually always also register as significant in the runs using percentages. However, factors found statistically significant using percentages often did not register as significant in the runs using raw numbers of drug cases.
In *Rebellion I*, we categorized the change in drug type mix over time as a non-discretionary factor. We continue to do so here, but some additional explanation of our taxonomy may be in order. A great deal of the variation in average sentence level among districts, and to a lesser degree even among circuits, is doubtless attributable to factors we have labeled “non-discretionary,” particularly differences in drug type and quantity. For example, the fact that District A consistently has a much lower average drug sentence than District B may be ascribable to the fact that District A prosecutes a lot of low-quantity marijuana cases while District B prosecutes a lot of high-quantity methamphetamine cases.267 This apparently unremarkable assertion conceals an important point about the structure and aims of the research in both *Rebellion I* and this Article.

Consider the districts with the lowest and highest average drug sentences in the nation in 1999: the Southern District of California, with an average sentence of 22.4 months, and the Eastern District of North Carolina, with an average sentence of 176.2 months. In 1999, 63% of the 185 drug defendants sentenced in the Eastern District of North Carolina were sentenced for crack, which carries the highest average sentence of the five major drug types. In 1999, the Southern District of California sentenced 1932 drug defendants—1632 defendants (84%) for marijuana, the drug type with lowest average sentence, and exactly zero defendants for crack. In all of the United States of America and its possessions in the year 1999, only four other judicial districts had zero crack cases—Idaho, North Dakota, the Northern Mariana Islands, and Guam. It is clear beyond the possibility of rational dispute that in 1999 in San Diego and environs people were selling and smoking crack, and that policemen were catching them,268 and thus that the U.S. Attorney's Office in San Diego made a quite deliberate decision to prosecute lots of marijuana cases, but not to prosecute crack cases at all. It is only slightly less obvious, but equally true, that the U.S. Attorney in the Eastern District of North Carolina could have prosecuted lots of marijuana cases and few or no crack cases, but chose not to.

267. One of the questions our regression analyses examine is whether change in drug type was a statistically significant factor affecting average sentence length within districts. *Infra* notes 288-302 and accompanying text.

268. For example, a study of state search warrants executed in drug cases in San Diego County in the first six months of 1998 revealed that crack cocaine was the third most commonly seized drug (after methamphetamine and marijuana) in searches conducted pursuant to warrants. Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 Cal. W. L. Rev. 221, 250-51 (2000).
The choices of U.S. Attorneys to emphasize one type of drug prosecution over another are in some measure dictated by local drug trafficking and use patterns, but are also in large measure discretionary with the U.S. Attorney. Nonetheless, in neither Rebellion I nor this Article have we included this component of prosecutorial discretion in our category of “discretionary” factors. In Rebellion I, we looked at national data that provided no insight into local priorities on drug types. In this Article, although we examine district data, it is impossible to determine how much of the drug type mix in any district is attributable to local trafficking patterns and how much to prosecutorial priorities. Finally, the objective of both articles is to determine the cause of the decline in average drug sentence nationally between 1992-1999, and more particularly to ascertain whether that decline was caused by systemic changes beyond the control of individual sentencing actors or by progressive changes in discretionary choices by those individual actors about how similarly situated defendants should be sentenced. Thus, we are somewhat less interested in why districts prosecute particular mixes of drug types than in whether those mixes changed from 1992-1999. The regression analyses reported below can tell us whether changes in drug type mix over time correlate with changes in the length of the average drug sentence, but will not tell us whether such changes were the product of changed local conditions or conscious local policy changes. Therefore, in this Article we leave drug type mix in the “non-discretionary” category.

ii. Workload

The workloads confronted by judges and prosecutors might plausibly influence average drug sentence length. Specifically, we hypothesized that an increase in the workloads of a district’s Assistant U.S. Attorneys (AUSAs) and district judges might correspond with a decrease in average drug sentences. AUSAs might be inclined to settle drug cases on terms more favorable to defendants in response to an increased workload. Similarly, judges might be inclined to approve plea agreements more favorable to defendants as a mechanism to manage a growing docket.

To account for this possibility we examine workload in two different manners for AUSAs and judges. Specifically, we consider workload from the perspective of drug caseloads and overall criminal caseloads. AUSA CRIM. and AUSA DRUG capture changes in AUSA workloads in the years from 1992 to 1999 for all criminal and drug cases. To compute AUSA CRIM., we divided a district’s total number of all criminal cases in each year by the

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269. The Southern District of California in 1999 is the rare case in which the complete absence of one drug type is obviously the result of a local policy choice. Even in Southern California, however, it is impossible to determine what the “natural” proportion of crack cases might be in the absence of the apparent prosecutorial moratorium on such prosecutions in federal court.
district's allocation of AUSAs in the same year. We computed AUSA DRUG by dividing a district's total number of all drug cases in each year by the district's allocation of AUSAs in the same year. The JUD. CRIM. and JUD. DRUG variables were computed in a similar way. For these two variables we divided each district's total number of all criminal cases and total number of drug cases in each year by that year's figures for "judge months." Judge months for each judicial district was computed by multiplying the number of authorized judgeships in that district by twelve, and then subtracting the total number of months in which one or more of the authorized judgeships in the district stood unfilled (a figure published annually by the Administrative Office of the U.S. Courts).270

iii. District

Districts vary, not only in terms of their size and location, but also with respect to the federal presence within each district. These variations might influence drug sentence lengths. To control for each district's size (or urbanicity) we include in our analyses POP. DENSITY that measures each district's population density for 1995.271 A district's geographic location is also important. In Rebellion I, we noted the need to examine with more care districts located at or near the Mexican border.272 At least three factors might distinguish border districts from their non-border counterparts. First, we note a sharp rise in the absolute and relative number of marijuana prosecutions around 1996. Second, this sharp rise in marijuana prosecutions coincides with these districts' adoption of "fast-track" case management policies. That is, each of these districts has adopted special plea bargaining policies that grant extraordinary sentencing concessions to defendants who agree to plead guilty very early in the criminal process. We will discuss the specifics of those policies below.273 Third, unlike non-border districts, drug cases prosecuted in a border district often possess immigration and international law dimensions. Consequently, how federal districts on international borders—especially the Mexican border—handle drug cases might systematically differ from how non-border districts treat similar drug cases. To identify such districts, BORDER is a dummy variable coded "1" for those districts located at or near the Mexican border and "0" for all other districts.

271. Unlike in other variables, data limitations forced us to apply a district's 1995 population count constant throughout the eight years of our study's scope. We are reasonably comfortable that actual population counts did not dramatically change in a manner that would distort our analyses.
272. Bowman & Heise, supra note 1, at 1128 n.351.
273. Infra notes 296-300 and accompanying text.
Finally, federal presence in each district also varies. We construe federal presence in terms of the numbers of federal district judges and AUSAs assigned. Variations in the numbers of available federal prosecutors and judges influence how districts manage their judicial systems. How a judicial system is managed bears on drug sentence lengths. We define judicial presence in terms of the number of “judge months” available to each district each year (“JUD. MONTHS”). This variable was computed by multiplying the number of authorized judgeships in a district by twelve, and then subtracting the total number of months in which one or more of the authorized judgeships in the district stood unfilled. We also look to the number of available line prosecutors as a factor contributing to a district’s federal presence. For this variable we consider each district’s allocation of AUSAs (“AUSA”).

iv. Summary Statistics

Table 10 provides a short description of the variables included in our standard analyses, and Table 11 provides a statistical summary of these variables including means and standard deviations.

TABLE 10: DESCRIPTION OF STANDARD VARIABLES

<table>
<thead>
<tr>
<th>Variable</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Def.</td>
<td></td>
</tr>
<tr>
<td>SENTCHG</td>
<td>Change in average sentence length, 1992-1999 (months)</td>
</tr>
<tr>
<td>Ind. Drug</td>
<td></td>
</tr>
<tr>
<td>COKE</td>
<td>Change in cocaine’s % of drug total, 1992-1999</td>
</tr>
<tr>
<td>CRACK</td>
<td>Change in crack’s % of drug total, 1992-1999</td>
</tr>
<tr>
<td>HEROIN</td>
<td>Change in heroin’s % of drug total, 1992-1999</td>
</tr>
<tr>
<td>MARIJ.</td>
<td>Change in marijuana’s % of drug total, 1992-1999</td>
</tr>
<tr>
<td>METH.</td>
<td>Change in methamphetamine’s % of drug total, 1992-1999</td>
</tr>
<tr>
<td>Workload</td>
<td></td>
</tr>
<tr>
<td>JUD. DRUG</td>
<td>Change in judicial drug caseload, 1992-1999</td>
</tr>
<tr>
<td>JUD. CRIM.</td>
<td>Change in judicial criminal caseload, 1992-1999</td>
</tr>
<tr>
<td>AUSA DRUG</td>
<td>Change in AUSA drug caseload, 1992-1999</td>
</tr>
<tr>
<td>AUSA CRIM.</td>
<td>Change in AUSA criminal caseload, 1992-1999</td>
</tr>
<tr>
<td>District</td>
<td></td>
</tr>
<tr>
<td>BORDER</td>
<td>District located at or near Mexican border (1=yes)</td>
</tr>
<tr>
<td>POP. DENSITY</td>
<td>District’s population density (1995)</td>
</tr>
<tr>
<td>JUD. MONTHS</td>
<td>Change in District’s total number of “judge months,” 1992-1999</td>
</tr>
<tr>
<td>AUSA</td>
<td>Change in District’s total number of AUSAs, 1992-1999</td>
</tr>
</tbody>
</table>
### Table 11: Summary of Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>S.D.</th>
</tr>
</thead>
<tbody>
<tr>
<td>De.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SENTCHG</td>
<td>-1.16</td>
<td>28.01</td>
</tr>
<tr>
<td>Ind.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drug Type</td>
<td></td>
<td></td>
</tr>
<tr>
<td>COKE</td>
<td>-.24</td>
<td>.16</td>
</tr>
<tr>
<td>CRACK</td>
<td>.15</td>
<td>.16</td>
</tr>
<tr>
<td>HEROIN</td>
<td>1.52 (e-02)</td>
<td>5.94 (e-02)</td>
</tr>
<tr>
<td>MARIJ.</td>
<td>-5.22 (e-02)</td>
<td>.15</td>
</tr>
<tr>
<td>METH.</td>
<td>.13</td>
<td>.16</td>
</tr>
<tr>
<td>Workload</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JUD. DRUG</td>
<td>7.01 (e-02)</td>
<td>5.27</td>
</tr>
<tr>
<td>JUD. CRIM.</td>
<td>-.10</td>
<td>16.50</td>
</tr>
<tr>
<td>AUSA DRUG</td>
<td>.57</td>
<td>2.37</td>
</tr>
<tr>
<td>AUSA CRIM.</td>
<td>1.23</td>
<td>4.65</td>
</tr>
<tr>
<td>District</td>
<td></td>
<td></td>
</tr>
<tr>
<td>BORDER</td>
<td>5.32 (e-02)</td>
<td>.23</td>
</tr>
<tr>
<td>POP. DENSITY</td>
<td>352.27</td>
<td>1105.61</td>
</tr>
<tr>
<td>JUD. MONTHS</td>
<td>7.34</td>
<td>13.32</td>
</tr>
<tr>
<td>AUSA</td>
<td>6.33</td>
<td>8.26</td>
</tr>
</tbody>
</table>

### c. Methodology: Modeling Average Drug Sentences Within Judicial Districts

Guided by results from the previous descriptive analyses presented above in Part II and elsewhere, in this Part we turn to a model for analyzing potential causes of changes in average drug sentences in the ninety-four federal judicial districts. We discuss results from multivariate regression analyses that explore the model's efficacy. Our continuous dependant variable—the average annual drug sentence (in months) in each district—is modeled as a function of the three groups of variables described in detail above: (1) drug type, (2) workload, and (3) district. Due to multicollinearity concerns, we present results from four separate but related models.

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274. See generally Bowman & Heise, supra note 1.

275. Ordinary Least Squares (OLS) multiple regression was used to generate the coefficients for the model. Basic regression assumptions, including multicollinearity, were examined and appear to have been satisfied. For a general discussion of OLS regression, see Michael S. Lewis-Beck, Applied Regression: An Introduction (1980).

276. Although no firm "rule" on multicollinearity exists within the literature, we adopted a conservative approach, especially where variables were theoretically or practically similar. See, e.g., George W. Bohnstedt & David Knoke, Statistics for Social Data Analysis 407 (2d ed. 1988) (suggesting the exclusion of variables where coefficients exceed 50%); Michael O. Finkelstein & Bruce Levin, Statistics for Lawyers 352 (1990) ("A simple (but not foolproof) test for multicollinearity involves looking for high correlations (e.g., in excess of .9) in pairs of explanatory variables. . ."); Michael S. Lewis-Beck, Applied Regression: An Introduction 60 (1980) (suggesting a .80 threshold).

277. Not surprisingly, the number of federal judges authorized for a district correlate with the number of authorized AUSAs. Also expected is that the total criminal and drug case workloads for judges and AUSAs correlates. Consequently, we could not include these combinations...
We wanted to know not only whether any of the independent variables had a statistically significant effect on the movement of average drug sentences within districts over the entire 1992-1999 study period, but also whether any of these variables exhibited effects during shorter intervals within the study period. Accordingly, we applied our model not only to the period 1992-1999, but also to subintervals running forward from 1992 and backward from 1999. That is, we applied the model to the periods 1992-1993, 1992-1994, 1992-1995, and so on, as well as to the periods 1998-1999, 1997-1999, 1996-1999, and so on.

2. Regression Results and Discussion

Table 12 presents results from our model of change in average drug sentence length from 1992 to 1999. Four interesting points emerge from these results. First, our district level analysis supports the conclusion in Rebellion I that, if one looks only at the beginning and ending points of the 1992-1999 period, changes in drug type mix do not emerge as a causal factor in the decline of average drug sentence length. Second, neither judicial caseload nor urbanicity (expressed as population density) appears significant. Third, increases in both AUSA drug caseload and criminal caseload correlate at the \( p < .01 \) level to decreases in average drug sentence length in a judicial district. Finally, and somewhat oddly, increases in the number of AUSAs in a district also correlate (albeit only at the \( p < .05 \) level) with a decline in drug sentence length.

In a single regression equation. Instead, we ran the basic model four times and toggled between judges and AUSAs and criminal and drug case workloads.
### TABLE 12: IMPACT ON CHANGE IN AVERAGE DRUG SENTENCE LENGTH, 1992-1999

<table>
<thead>
<tr>
<th>Drug Type:</th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>COKE</td>
<td>8.80</td>
<td>9.12</td>
<td>-17.9</td>
<td>-18.59</td>
</tr>
<tr>
<td>CRACK</td>
<td>29.33</td>
<td>30.28</td>
<td>18.70</td>
<td>14.92</td>
</tr>
<tr>
<td>HEROIN</td>
<td>-24.58</td>
<td>-23.82</td>
<td>-32.22</td>
<td>-28.38</td>
</tr>
<tr>
<td>MARIJ.</td>
<td>-20.58</td>
<td>-20.36</td>
<td>-31.31</td>
<td>-29.56</td>
</tr>
<tr>
<td>METH. (ref.)</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Workload:</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>JUD. DRUG</td>
<td>.47</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>JUD. CRIM.</td>
<td>—</td>
<td>.21</td>
<td>—</td>
</tr>
<tr>
<td>AUSA DRUG</td>
<td>—</td>
<td>—</td>
<td>-3.49 **</td>
</tr>
<tr>
<td>AUSA CRIM.</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>District:</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>BORDER</td>
<td>-18.91</td>
<td>-20.24</td>
<td>-12.2</td>
</tr>
<tr>
<td>POP. DENSITY</td>
<td>-1.58 (e-03)</td>
<td>-1.60 (e-03)</td>
<td>-3.50 (e-03)</td>
</tr>
<tr>
<td>JUD. MONTHS</td>
<td>-2.27</td>
<td>-2.4</td>
<td>—</td>
</tr>
<tr>
<td>AUSA</td>
<td>—</td>
<td>—</td>
<td>-1.11 *</td>
</tr>
<tr>
<td>(constant)</td>
<td>.97</td>
<td>1.03</td>
<td>2.24</td>
</tr>
<tr>
<td>$R^2$ (adj.)</td>
<td>.04</td>
<td>.05</td>
<td>.14</td>
</tr>
<tr>
<td>Std. Error</td>
<td>27.48</td>
<td>27.31</td>
<td>25.9</td>
</tr>
<tr>
<td>F-Stat</td>
<td>1.45</td>
<td>1.54</td>
<td>2.86 **</td>
</tr>
<tr>
<td>N $^{279}$</td>
<td>92</td>
<td>92</td>
<td>90</td>
</tr>
</tbody>
</table>

*p < .05; ** p < .01$^{280}$

278. For each district in every year, the summation of the five drug type percentages equals 100%. As a result, we were forced to select one drug type to serve as the reference group and omit it from our regression equations. Although the particular drug type selected is arbitrary and no particular selection would be "wrong" (see MELISSA A. HARDY, REGRESSION WITH DUMMY VARIABLES 10 (1993)), we nonetheless took the additional step of re-running our basic regression equation with alternative drug types serving as the reference. Our selection of the reference drug type did not appear to influence or destabilize our results. See generally MICHAEL S. LEWIS-BECK, APPLIED REGRESSION: AN INTRODUCTION 68 (1980).

279. Although ninety-four federal districts exist in the United States federal judicial system, by default the listwise deletion function in the regression analyses excludes any district that contains any missing data from any variable included in the equation. See Marija J. Norusis, SPSS 10.0: Guide to Data Analysis 460 (2000). Consequently, our N values across the four columns vary slightly.

280. Within the context of Tables 12, 13A, and 13B, and our related discussion, we use the term statistical significance as it is conventionally used in the social science literature. More specifically, we adopt the p<.05 threshold for statistical significance. Used in this manner, statistical significance means that the probability that the observed relation occurred due to random chance is less one-in-twenty (or 5 percent). See John Lande, Failing Faith in Litigation? A Survey of Business Lawyers' and Executives’ Opinions, 3 HARV. NEGOTIATION L. REV. 1, 11-12 n.37 (1998) (citing JOHN NETER ET AL., APPLIED STATISTICS 310-38 (3rd ed. 1988)).
Regression runs on the forward-looking and backward-looking subintervals also produced interesting results. The first of these was that AUSA caseload consistently emerged as significant. AUSA drug caseload, criminal caseload, or both achieved statistical significance in seven of the twelve subinterval regression runs. In each case, increased AUSA caseload correlated with decreased average drug sentence. Second, the finding that judicial caseload was not significant over the entire 1992-1999 period is corroborated by the sub-interval regressions. Judicial caseload appears statistically significant in only two of the twelve subintervals. Third, although for the period 1992-1999 an increase in the number of AUSAs in a district correlates with a decrease in average drug sentence (at the p<.05 level), that somewhat counterintuitive correlation appears in only two of twelve subinterval regressions. Finally, although change in the proportion of drug types within districts does not emerge as a statistically significant factor in declining drug sentences within districts from 1992-1999, an increase in the proportion of marijuana cases in a district correlates at the p<.05 level to a decline in average drug sentence in four of the twelve subintervals: 1992-1993, 1992-1995, 1992-1998, and 1996-1999. As explained in detail below, we consider these subinterval findings highly suggestive. For reasons of space, we do not include tables containing the results of all twelve subinterval regressions. Tables 13A and 13B present the results of the regression analyses of subintervals 1996-1999 and 1992-1995.


283. Judicial drug caseload and criminal caseload correlated to decreased average drug sentence length in 1992-1993 at the p<.01 level. In 1994-1999, judicial drug caseload only correlated at the p<.05 level.

284. An increase in the number of AUSAs in a district correlated to decreased average drug sentence length in 1992-1998 at the p<.05 level, and in 1994-1999 at p<.01 in one run and p<.01 in another.
<table>
<thead>
<tr>
<th>Table 13A: Impact on Change in Average Sentence Length, 1996-1999</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Drug Type:</strong></td>
</tr>
<tr>
<td>COKE</td>
</tr>
<tr>
<td>CRACK</td>
</tr>
<tr>
<td>HEROIN</td>
</tr>
<tr>
<td>MARIJ.</td>
</tr>
<tr>
<td>METH. (ref.)</td>
</tr>
<tr>
<td><strong>Workload:</strong></td>
</tr>
<tr>
<td>JUD. DRUG</td>
</tr>
<tr>
<td>JUD. CRIM.</td>
</tr>
<tr>
<td>AUSA DRUG</td>
</tr>
<tr>
<td>AUSA CRIM.</td>
</tr>
<tr>
<td><strong>District:</strong></td>
</tr>
<tr>
<td>BORDER</td>
</tr>
<tr>
<td>POP.</td>
</tr>
<tr>
<td>DENSITY JUD.</td>
</tr>
<tr>
<td>MONTHS AUSA</td>
</tr>
<tr>
<td>(constant)</td>
</tr>
<tr>
<td>R² (adj.)</td>
</tr>
<tr>
<td>Std. Error</td>
</tr>
<tr>
<td>F-Stat</td>
</tr>
<tr>
<td>N²⁸</td>
</tr>
</tbody>
</table>

* p < .05; ** p < .01

285. Although ninety-four federal districts exist in the United States federal judicial system, by default the listwise deletion function in the regression analyses excludes any district that contains any missing data from any variable included in the equation. See Marija J. Norusis, SPSS 10.0: Guide to Data Analysis 460 (2000). Consequently, our N values across the four columns vary slightly.
TABLE 13B: IMPACT ON CHANGE IN AVERAGE SENTENCE LENGTH, 1992-1995

<table>
<thead>
<tr>
<th>Drug Type</th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>COKE</td>
<td>-35.72</td>
<td>-34.78</td>
<td>-40.0</td>
<td>-34.23</td>
</tr>
<tr>
<td>CRACK</td>
<td>21.96</td>
<td>21.77</td>
<td>25.61</td>
<td>24.41</td>
</tr>
<tr>
<td>HEROIN</td>
<td>-28.80</td>
<td>-23.41</td>
<td>-20.16</td>
<td>9.89</td>
</tr>
<tr>
<td>MARIJ</td>
<td>-48.57</td>
<td>-48.67</td>
<td>-51.99 *</td>
<td>-50.94 *</td>
</tr>
<tr>
<td>METH. (ref.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Workload:

<table>
<thead>
<tr>
<th>Drug Type</th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>JUD. DRUG</td>
<td>-.40</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JUD. CRIM.</td>
<td></td>
<td>-8.50 (e-02)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AUSA DRUG</td>
<td></td>
<td></td>
<td>-6.13 **</td>
<td></td>
</tr>
<tr>
<td>AUSA CRIM.</td>
<td></td>
<td></td>
<td></td>
<td>-3.71 **</td>
</tr>
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</table>

District:

<table>
<thead>
<tr>
<th>Drug Type</th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>BORDER</td>
<td>-5.47</td>
<td>-6.08</td>
<td>2.27</td>
<td>-10.08</td>
</tr>
<tr>
<td>POP. DENSITY</td>
<td>-1.43 (e-03)</td>
<td></td>
<td>-1.99 (e-03)</td>
<td>-2.86(e-03)</td>
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<tr>
<td>JUD. MONTHS</td>
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<td>-8.38 (e-02)</td>
<td></td>
</tr>
<tr>
<td>AUSA</td>
<td></td>
<td></td>
<td>-5.9</td>
<td>-92</td>
</tr>
<tr>
<td>(constant)</td>
<td></td>
<td></td>
<td>10.51</td>
<td>9.57</td>
</tr>
<tr>
<td>R² (adj.)</td>
<td>.04</td>
<td>.04</td>
<td>.17</td>
<td>.21</td>
</tr>
<tr>
<td>Std. Error</td>
<td>26.48</td>
<td>26.51</td>
<td>24.56</td>
<td>24.05</td>
</tr>
<tr>
<td>F-Stat</td>
<td>1.48</td>
<td>1.45</td>
<td>3.31 **</td>
<td>3.88 **</td>
</tr>
<tr>
<td>N</td>
<td>92</td>
<td>92</td>
<td>90</td>
<td>90</td>
</tr>
</tbody>
</table>

*p < .05; ** p < .01

C. Drug Types

Our regression analyses of district data, read in conjunction with descriptive national data, have caused us to alter our view that the "non-discretionary" factor of changed drug type mix had no relationship to the decline in average drug sentence length from 1992-1999. Although ninety-four federal districts exist in the United States federal judicial system, in two districts—Guam and Northern Marianas—data were unavailable. Due to these two districts' lack of complete data, the listwise deletion function excluded these districts from the analysis.

Bowman & Heise, supra note 1, at 1087-90, 1103.
our descriptive and statistical analyses point to three conclusions: (1) Change in drug type mix did not in itself cause the decline in average drug sentence from 1992-1999. (2) Indeed, all else being equal, the change in national drug type mix from 1992-1996 actually would have increased sentences in that period. (3) Change in national drug type mix probably contributed to the decline in the national average drug sentence from 1996-1999, in part because of two developments along the Mexican border. First, the number of drug sentencings in the already busy Mexican border districts (the Southern District of California, Arizona, New Mexico, and the Western and Southern Districts of Texas) nearly doubled, with the vast majority being marijuana cases, which carry the lowest average sentence of any of the five major drug types. Second, between 1995 and 1997, the Mexican border districts adopted so-called "fast track" case processing schemes pursuant to which defendants charged with relatively low-seriousness drug crimes at the border—usually marijuana offenses—receive extra sentence discounts not contemplated by the Guidelines for early pleas. Thus, the rise in percentage of marijuana cases, which in itself tends to lower average drug sentence length, was accompanied by a wholesale increase in other sentence-reducing prosecutorial concessions. These conclusions flow from the following observations:

For the period 1992-1999, variations in none of the drug types achieve statistical significance in our regression analyses of district trends. However, during this interval, coefficients for drug types generally comport with expectations. Marijuana and heroin coefficients are negative, meaning that average drug sentences tend to fall as the proportion of these drugs within the total drug prosecutions in a district rises. This makes sense because average sentences for marijuana and heroin convictions are shorter than for the other drug types. Conversely, the positive coefficient for the crack variable reflects its position as the drug that receives the longest average sentence. That the coefficient for cocaine is both positive and negative reveals little more than its close proximity to methamphetamine in terms of average sentence length.

Despite the lack of statistical significance of variations in drug type mix over the entire 1992-1999 period, the regression series for time intervals within the 1992-1999 study period reveal that the negative coefficient for marijuana becomes statistically significant in four sub-intervals. Three of these intervals—1996-1999, 1992-1995, and 1992-1998—seem particularly significant when read in conjunction with national descriptive data. First, as shown in Figure 10 below, if one plots the hypothetical trajectory of average drug sentences that would have occurred if the average drug sentence for each drug type had remained constant at 1992 levels while the mix of drug

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288. More precisely, marijuana and heroin sentences are typically shorter than sentences for our reference group—methamphetamine.
types varied as it actually did, the graph shows a rise in average drug sentences between 1992 and 1996. This rise is followed by a decline in 1996-1998, and virtually no change from 1998-2000. In other words, national changes in drug type mix would have tended to push sentences up from 1992-1996 and down from 1996-1998. The 1992-1995 and 1996-1999 regression runs converge from different temporal directions on precisely the point at which the proportion of marijuana in the national drug type mix begins to rise sharply. The endpoint of the 1992-1998 interval coincides with the year in which, under the assumptions of the foregoing hypothetical, the rising marijuana percentage stops driving down the national average drug sentence.


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289. Holding average sentences constant at 1992 levels while varying the drug type mix as it actually did vary, the national average drug sentence would have varied within a range of 11/10ths of a month, from 88.87 months in 1998, to 88.93 months in 1999, to 88.82 months in 2000.
Second, as shown in Figure 11 below, the national data on average base offense level (which can be affected both by changes in drug quantity and changes in drug type) show an increase in national average base offense level from 1992-1999, with a peak in 1996, followed by a decrease between 1996-1999. In Rebellion I and above, we note that the 1992-1999 BOL increase might be the result of an increase in drug quantity per case or of a change in drug type mix.\(^{290}\) Given that BOLs within drug type increased from 1992-1999 for every drug but marijuana, increased drug quantity in cocaine, crack, heroin, and methamphetamine cases appears to have been at least one cause for the general upward 1992-1999 movement of average BOL. Similarly, the relative decrease in BOL from 1996 to 1999 might be the result of a progressive decrease in drug quantity per defendant, but it is also consistent with a rising proportion of cases involving a low-sentence drug such as marijuana. In this case, the fact that between 1996 and 1999 the average base offense level within drug type held steady or increased for every drug except marijuana\(^{291}\) renders the latter hypothesis more probable than the former.

**Figure 11: Average Base Offense Level, by Year\(^{292}\)**

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290. Bowman & Heise, supra note 1, at 1090-94; supra notes 114-26 and accompanying text.

291. Supra note 111 and accompanying text.

292. The data underlying Figure 11 are drawn from unpublished U.S. Sentencing Commission data, supra note 125.
Third, our conclusion about the more probable explanation of the downward dip in BOL from 1996-1999 requires that the percentage of marijuana cases have increased in this period. As illustrated in Figure 3 above, the percentage of marijuana cases nationally dipped from 1994-1996, but increased steadily from 1996-1999.293

Fourth, from 1996-1999, the number of drug cases sentenced in the five Mexican border districts more than doubled from 3186 to 6605, with 80% of the increase (2737 out of 3419 cases) being marijuana cases.294 These trends are especially significant because, by 1999, drug prosecutions in these five districts accounted for roughly 30% of all drug cases nationally.295

Fifth, the steep rise in drug prosecutions generally, and in marijuana prosecutions in particular, along the Mexican border occurred in conjunction with an important innovation in prosecutorial policy in the border districts. Beginning in 1995 in the Southern District of California, U.S. Attorney’s Offices along the Mexican border began adopting so-called “fast track” case processing policies for relatively low-level narcotics offenders, usually those carrying marijuana, caught crossing the Mexican border. Although the specifics have differed over time and from district to district, the essence of these programs is an offer of extraordinary sentence reductions to defendants willing to plead guilty pre-indictment to an information. At present, in the Southern District of California a defendant willing to enter such a plea typically receives a three-level “super acceptance of responsibility” reduction,296 a two-level reduction for minor role,297 and a two-level “fast track departure.”298 The “super acceptance” reduction would always have been available to a defendant willing to enter an early plea; however, an award of minor role to a drug courier or mule is by no means assured,299 and a departure for pleading guilty quickly is unknown except on the border.300

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293. Supra note 93 and accompanying text.
295. Id.
299. The courts have held that being a courier or mule does not necessarily entitle a defendant to a role reduction. See HAINES, BOWMAN & WOLL, supra note 79, at 899-900 (discussing
Sixth, the advent of border “fast track” programs may be visible in national statistics other than those on average drug sentences. In addition to the increase in the national proportion of marijuana cases beginning in 1996, national statistics on role adjustments are suggestive. As shown in Figure 7 above, the percentage of defendants awarded minor or minimal role adjustments increased from 1992-1995, and then plateaued in 1995-1996. However, in 1996, the year border “fast track” programs began to come into full effect, the percentage of mitigating role adjustments resumed its climb at an even steeper rate than before.

Finally, although trends in the Mexican border districts from 1996-1999 doubtless exerted a disproportionate effect on national sentencing averages because of the number of cases handled in them, the border does not in itself explain either the impact of marijuana on national averages or the continued decline of the national average drug sentence from 1996-1999.

To test the border effect, we ran additional regressions for the periods 1992-1999 and 1996-1999 using the same variables described in Table 11 above, but removing the border districts. For 1992-1999, the change in percentage of marijuana cases within a district remained statistically insignificant as a predictor of change in average drug sentence length. However, for 1996-1999, when the border districts are excluded, marijuana remains correlated to a decline in average drug sentence, albeit to a lesser degree than when those districts are included.

These findings are important, but should not be over-interpreted. They cause us to modify our conclusions in Rebellion I insofar as changes in drug type mix, specifically large increases in marijuana prosecutions in the border districts, seem to correlate with reduced average drug sentences from 1996-1999. However, our data does not permit any quantification of the effect of changing drug type mix either before or after 1996. Moreover, to the extent events in the border districts in 1996-1999 affected national drug sentence averages, those effects resulted in part from changes in drug type mix resulting from government choices to prosecute increased numbers of marijuana offenders, and in part from border district policies under which prosecutors offer and judges sanction extraordinary sentence discounts. We will discuss the implications of these policies below in Section IV.

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300. For discussion of whether such a departure is appropriate under the Guidelines, see Section IV below.

301. Supra note 110 and accompanying text.

302. Supra note 135.
D. WORKLOAD

We hypothesized that average drug sentence would decrease as drug and overall criminal case workloads increased. This hypothesis was supported with respect to the drug and overall criminal caseloads of Assistant U.S. Attorneys. As noted above, increased AUSA caseload correlates to a decrease in district-wide average drug sentence in 1992-1999 and in seven of the twelve subinterval regressions. The finding that increased AUSA caseload correlates with decreased average drug sentence length may be reinforced by the apparently anomalous observation that, in the period 1992-1999, increases in the number of AUSAs in a district correlate with a decline in average drug sentence length. Assuming that the Department of Justice reacted rationally to caseload increases, it would have augmented the attorney resources of those districts experiencing the greatest additional workload. To the extent increases in workload are associated with decreases in average sentence, an increase in AUSA numbers might also correlate with decreased sentence length.

Our most puzzling workload findings are that, in the 1992-1999 regression, neither judicial criminal nor drug caseloads emerged as significant, and even more surprisingly, the workload coefficients were positive, rather than the expected negative. That is, our results for 1992-1999 suggest that as judicial workload in a district increased, drug sentences tended to go up (albeit not to a statistically significant degree). In the subinterval regressions, judicial caseload variables presented as significant in only two subintervals, and with negative coefficients. Judicial drug and criminal caseload correlate to a decrease in average drug sentence at the p<.01 level in 1992-1993, and judicial drug caseload only correlates with a decrease in average drug sentence in 1994-1999 at the p<.05 level.

We are not entirely sure what to make of the fact that increased AUSA caseload seemed to correlate to decreased drug sentences so consistently, while judicial caseload seemed to make no real difference. This outcome seems particularly odd in light of the fact that caseload increases would generally have had a larger numerical impact on judges than on AUSAs because there are far fewer judges than prosecutors in each district, and because district court staffing stayed essentially static throughout the period. No new judgships were created and the only variation in number of judges from year to year occurred due to the opening and filling of vacancies among existing judgships. By contrast, the staffing of U.S. Attorney's Offices increased markedly throughout the 1990s, even if it did not match the rise in number of cases. It may be that district court judges are simply less sensitive to caseload pressure than prosecutors. Or it may be that

303. Supra note 282 and accompanying text.
prosecutors are better able to manipulate sentencing outcomes to relieve caseload pressure than are judges.

E. DISTRICT

While none achieve statistical significance, the population and district location (BORDER) variables perform as hypothesized. Our previous work and analyses of descriptive data and trends suggested that activities in the border districts warranted special care. Because of their physical location, typical drug crimes in border districts—unlike their non-border district counterparts—raise immigration and international law issues with greater regularity. Also, as noted above, around 1996 both the absolute and relative quantity of marijuana cases increased notably. The second point informs our hypothesis of a possible effect of border districts on average sentence length. Specifically, we surmised that average drug sentences in border districts would fall below that of their non-border district counterparts. The negative coefficients in all four runs comport with our expectation. However, when the identical analyses performed for Table 11 are run excluding all border districts the results do not materially change. 304 Thus, we do not want to over-emphasize the role border districts play with respect to variations in average drug sentence length during the eight-year scope of our data.

Another salient district characteristic relates to population density. Through this variable we sought to capture “urbanicity.” We surmised that in urban settings, prevailing norms about drug use might distinguish those districts’ treatment of drug crimes. Alternatively, U.S. Attorney’s Offices in urban centers might not have the resources or the interest in prosecuting particular drug cases (e.g., cases involving relatively small amounts of drug) that might interest nonurban districts. In any event, we expected that an increase in population density would correspond with a decrease in average drug sentence length. Although population density did not achieve statistical significance, the negative coefficients in all four runs comport with our expectation.

We were concerned that the size of a U.S. Attorney’s Office might influence drug sentence length independently of either urbanicity or caseload. Federal prosecutors in urban areas with high population density might treat drug offenders differently than their more rural counterparts. At the same time, a comparatively large U.S. Attorney’s Office confronting a high volume of drug cases might approach such cases differently than a smaller, lower-volume office. Not surprisingly, the population density and total AUSA variables co-vary. Consequently, multicollinearity concerns compelled us to choose between them. For our standard runs we opted for population density area as a more helpful variable. However, to insure that our selection did not influence the results, we re-ran all the regressions and

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304. Results for this unreported analysis are available from the authors upon request.
substituted for population density a variable measuring the total number of AUSAs in a district in the period under examination. Overall, the substitution did not alter the results in any meaningful manner.

The coefficients for our dual measures for federal presence in a district (JUD. MONTHS and AUSA) are negative rather than the expected positive and none achieve significance. As a result, the data suggest that the presence of large numbers of judges and prosecutors in a district corresponds with a reduction in the average length of a federal drug sentence. One explanation for these perhaps counterintuitive findings might be that our federal presence variables are reflecting something other than what we initially suspected. For example, an increased federal presence might reflect overall district population or volume of drug cases. If so, the observed negative coefficients would make more sense.

IV. THE WHOLE STORY: COMBINING NATIONAL AND REGIONAL DATA

With the benefit of the foregoing regression analyses and another full year of national sentencing data, we think we have a more complete picture of the movement of federal drug sentences over the past fifteen years. As we now see it, there have been four sometimes-overlapping story lines. First, mandatory minimum sentencing statutes and the Sentencing Guidelines sharply increased drug sentence length from roughly 1986 through 1991-1992.

Second, beginning around 1992, national policy-making organs made a series of decisions that were either consciously directed at lowering drug sentences or had that effect. In 1992, the Sentencing Commission amended § 3E1.1 to permit a third offense level decrease for “super acceptance of responsibility.” In 1994, the Commission eliminated the top two levels of the drug quantity table. In 1995, Congress passed the statutory safety valve, which was followed in 1996 by the Sentencing Commission’s adoption of a guideline safety valve. In 1996, the Supreme Court decided \textit{Koon v. United States}, with its tacit encouragement of increased non-substantial assistance departures.

Third, beginning in about 1992, every available indicator suggests that front-line actors in the sentencing system employed their discretion to an ever-increasing degree to lower drug sentence length. The percentage of mitigating role adjustments climbed steadily upward as the percentage of aggravating role adjustments declined. Guilty plea rates climbed, and “super acceptance of responsibility” rates climbed even faster. More and more

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305. That is, we added the number of serving AUSAs in a district in each year of the period studied. For example, if the period under scrutiny was 1992-1994, and a district had ten AUSAs in 1992, twelve AUSAs in 1993, and fourteen AUSAs in 1994, the district would be deemed to have an AUSA variable of thirty-six.

306. Results of alternative runs are available from the authors upon request.

sentences were imposed at the bottom of the applicable guideline range. The tiny fraction of upward departures in drug cases fell still further, while the percentage of non-substantial assistance departures rose two-and-a-half times between 1992 and 1999. Beginning in 1992, the fraction of substantial assistance departures grew from 24% to more than 30% of all drug cases (though the percentage plateaued in the mid-1990s and even declined slightly in the late 1990s). Charge and fact bargaining certainly occurred, although we cannot say how often. The general trend toward discretionary mitigation of drug sentences is, we think, unmistakable at the national level. Nonetheless, large sections of the country did not participate: sentences in many districts held basically steady throughout the nineties, and in some districts moved sharply upward.

Finally, from 1996 to 1999, the statistical trend to ever-lower national average drug sentences was abetted by prosecutorial “fast track” initiatives in the five Mexican border districts, the purpose of which was not to mitigate drug penalties, but to impose them on a broader swath of border-crossing offenders. The influx into the 1996-1999 sentencing averages of thousands of new relatively low-sentence marijuana offenders, whose sentences were often reduced still further by extraordinary “fast track” sentencing concessions, assuredly reduced the national average drug sentence length even faster than it would otherwise have fallen.

As complex as this picture appears, ascertaining the motives of those whose decisions produced ever-lower average drug sentences is more complicated still. Nonetheless, our work suggests several conclusions, which we advance with varying degrees of confidence. To begin, the original increase in drug sentences following the implementation of the Sentencing Reform Act of 1984, the Anti-Drug Abuse Act of 1986, and the Federal Sentencing Guidelines was a conscious objective of at least the socially conservative members of the congressional coalition that crafted federal sentencing reform. Likewise, the original Sentencing Commission drafted sentencing guidelines for drug offenses knowing that the structure they created would raise drug sentences over historical norms.

The second phase of the federal drug sentencing story is one in which Congress, the Sentencing Commission, and the Supreme Court all made decisions that were either expressly designed to ameliorate the severity of the original Guidelines drug sentencing structure, or at the very least were made fully anticipating that effect. The statutory and Guidelines safety valves fall into the first category, while the “super acceptance of responsibility” reduction and the Supreme Court’s *Koon* decision fall into the second.
The thinking of the thousands of judges, prosecutors, defense attorneys, and probation officers whose discretionary case-by-case choices have been whittling away at drug sentence lengths for almost ten years is harder to pigeonhole. In *Rebellion I*, we suggested that one theme in the thinking of these front-line actors has been the belief that drug sentences are often, though not always, either too long as a matter of equity or longer than necessary to achieve the personal or institutional objectives of the decision-makers. The new analyses in this Article, at a minimum, pose several challenges to this thesis.

First, the finding that drug sentences have held steady or even increased dramatically in some judicial districts is not in itself surprising. Any large system composed of numerous semi-autonomous units will have some behavioral outliers. However, the number of districts in which sentences increased, as well as the size of the increases in some of those districts, did surprise us. If indeed there is a quiet rebellion against the severity of federal drug sentences, or at least a falling away from uniform and disciplined enforcement of drug sentencing rules, that movement has not swept into every corner of the land. Rather, there is a substantial minority of districts who continue addressing drug sentences more or less as they always have or, as in the Fourth Circuit, have striven for even higher sentences. Thus, if there has been a quiet rebellion against federal drug sentence severity, the rebellion has been regional, and there remain large pockets of drug enforcement loyalists.

Second, our finding that increased prosecutorial caseload within judicial districts correlates consistently with decreased drug sentence length is hardly surprising. Indeed, it squares perfectly with common wisdom about plea bargaining. However, one might argue that the salience of prosecutorial workload in our results renders less compelling the hypothesis that drug sentences are falling because of judicial and prosecutorial judgments that drug sentences are more severe than necessary. In other words, maybe “it’s the workload, stupid.” To this suggestion there are several responses. First, workload doubtless plays a role in prosecutorial sentencing choices—the question is whether it is the whole story. We are inclined to think not.

Average caseloads of Assistant U.S. Attorneys are just not very high, particularly as compared to those of state prosecutors. For example, a 1987 study found that the mean annual number of felony dispositions for a state prosecutor was 137.75, roughly thirteen times greater than the average caseload for AUSAs during the 1990s. Moreover, national figures for

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508. *Joan Jacoby, Case Weighting Systems for Prosecutors: Guidelines and Procedures* (1987); *see also*, Bowman & Heise, *supra* note 1, at 1128 n.350 (describing Bowman’s experience as a Deputy District Attorney in Denver, Colorado in the late 1980s, when his annual felony caseload customarily exceeded 200 cases).

509. *See Table 14, infra* (showing average AUSA caseloads ranging from 9.163 to 11.678 dur-
average AUSA caseload set out in Table 14, reveal two key points: (a) that criminal and drug caseloads were only fractionally higher in 1999 than they were in 1992, and (b) that criminal and drug caseloads actually fell from 1992 to 1995 before rising gradually to their current levels. The notion that all across America AUSAs have felt constrained to make deals for ever-lower drug sentences merely because, over an eight-year stretch, their average annual caseload increased by one criminal case or 0.6 drug case per prosecutor is implausible on its face. More importantly, if caseload were determinative, one would expect to see sentences rise when caseloads fall, yet the fluctuation in caseloads from 1992-1999 has no observable correlation to the continuous downward movement of drug sentences in the same period.

TABLE 14: AVERAGE AUSA CRIMINAL AND DRUG CASELOADS, 1992-1999

<table>
<thead>
<tr>
<th>Year</th>
<th>AUSA Crim. Caseload</th>
<th>AUSA Drug Caseload</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>10.446</td>
<td>4.129</td>
</tr>
<tr>
<td>1993</td>
<td>11.671</td>
<td>4.851</td>
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<td>1994</td>
<td>10.803</td>
<td>4.211</td>
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<td>1995</td>
<td>9.163</td>
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<td>10.918</td>
<td>4.216</td>
</tr>
<tr>
<td>1998</td>
<td>10.979</td>
<td>4.391</td>
</tr>
<tr>
<td>1999</td>
<td>11.678</td>
<td>4.749</td>
</tr>
</tbody>
</table>

Likewise, if system overload were the problem for which declining sentences have been the solution, one would expect to see an across-the-

310. The figures in Table 14 were derived by dividing the number of criminal cases and drug cases sentenced in each year, as reported in U.S. Sentencing Commission figures, by the number of AUSAs working in each year. The data on number of cases were drawn from the following sources: 1992 ANNUAL REPORT, supra note 5, at app. B; 1993 ANNUAL REPORT, supra note 73, at app. B; 1994 ANNUAL REPORT, supra note 80, at app. B; 1995 ANNUAL REPORT, supra note 32, at app. B; 1996 SOURCEBOOK, supra note 58, at app. B; 1997 SOURCEBOOK, supra note 62, at app. B; 1998 SOURCEBOOK, supra note 64, at app. B; 1999 SOURCEBOOK, supra note 5, at app. B. The data on AUSA numbers were provided by TRAC. E-mail from Dr. Linda Roberge, Assistant Research Professor, Transactional Records Access Clearinghouse (TRAC), Syracuse University, to Michael Heise (July 20, 2001) (on file with authors).
board decrease in sentences for all federal crimes. As we noted in *Rebellion I*, sentence length for immigration and fraud crimes, the second and third most common federal offenses, rose from 1993-1999, as did the length of sentences for tax crimes, burglary, and auto theft.\(^{311}\)

Finally, if the pressure of rising caseloads were forcing prosecutors into making deals, one would expect to see some correlation between judicial caseloads and falling sentences. In a system where the number of cases and the number of prosecutors rise steadily while the number of judges stays static, the crippling bottlenecks ought to occur in the courts, not at the prosecutor's office. Yet judicial caseload seems to have no correlation to drug sentence decreases.

In the end, it continues to seem likely to us that a collective judgment by many front line federal sentencing actors that drug sentences are often longer than necessary has played a role in the continuing decline in drug sentence length. Even if we are wrong, the fact remains that the decline in drug sentences has been largely a product of discretionary choices by judges, prosecutors, defense attorneys, and probation officers. The only unresolved question is about the dominant motives for those choices.

V. THE POLICY IMPLICATIONS OF OUR FINDINGS

If we have gotten the story roughly right, what conclusions ought those who make federal drug policy to draw? We see at least two.

First, many of those who enforce federal drug statutes have behaved as if they think drug sentences resulting from strict application of existing sentencing law are longer than need be. They have passed no such implicit judgment on a variety of other commonly prosecuted offenses. When the people charged with enforcing the law vote with their feet, as it were, for nearly ten years, legislators and sentencing commissioners charged with making the law have, at the very least, an obligation to pay attention. We do not suggest, of course, that judges, prosecutors, and other front line sentencing actors are the sole repositories of wisdom about criminal punishment.\(^{312}\) As individuals, those most intimately involved in criminal sentencing practice, or any other settled legal regime, are not necessarily wiser or more free of parochialism or institutional self-interest than policymakers more removed from the fray. Still, our system invests federal judges, federal prosecutors, the federal criminal defense bar, and federal probation officers with immense collective power based in large measure on the faith

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that these are people of intelligence and good judgment. The emergence of a widely-shared judgment among these trustees of the federal criminal justice system is a fact of which Congress and the Commission must take account in making drug sentencing policy. Thus, our results suggest, in a general way, that Congress and the Commission should consider statutory and/or Guidelines changes to reduce at least some federal drug sentences.

Second, even if we are wrong in our judgment about the collective views of front line sentencing actors, even if one accepts the hypothesis that falling federal drug sentences are driven primarily by workload considerations (or some other reason unrelated to the severity of drug penalties), such a conclusion would itself deal a crippling blow to the raison d'etre of the Federal Sentencing Guidelines. Before the Guidelines, U.S. Attorneys had three basic tools to deal with caseload pressures. The first tool was declination. U.S. Attorney's Offices are relatively small and state authorities have concurrent jurisdiction over most offenses prosecutable in federal court. Therefore, U.S. Attorney's Offices have customarily established declination guidelines that kept federal investigative agencies focused on larger, more characteristically "federal" crimes, and shunted prosecutable but relatively minor cases to state authorities. The second tool was addition of resources. If shifts in demographics or crime patterns caused an enduring shift in the number of federal-quality cases in a district, the Justice Department increased the size of the U.S. Attorney's Office. The third pre-Guidelines case management tool was sentence bargaining—reducing case backlog by reducing the "market price" of a guilty plea.

A good portion of the point of enacting the Guidelines was to eliminate plea bargaining outside the sanctioned limits built into the Guidelines themselves. Unrestricted plea bargaining was thought inimical to a guideline system because it placed in the hands of prosecutors the power to treat similarly situated defendants differently. The Guidelines were supposed to have eliminated sentence bargaining as a tool of prosecutorial case management. The Guidelines' goal of creating a nationally uniform system, in which similarly situated defendants in Maine and Miami, Seattle and San Diego, receive substantially the same sentences, cannot be achieved if local U.S. Attorneys are free to create idiosyncratic local sentencing policies to respond to local conditions.

Our work demonstrates that prosecutors, and the judges they appear before, use their discretion liberally, but irregularly, to reduce drug sentences. Whether they do so because they see drug sentences as too high in a moral sense, or as higher than necessary to achieve maximal deterrence,

313. A classic example occurred in the Southern District of Florida in the 1980s and 1990s. As drug trafficking in the Caribbean region grew exponentially, the Justice Department responded first by sending dozens of temporary detailees to the Miami U.S. Attorney's Office, and then by doubling the size of the office from around one hundred attorneys to over two hundred. Bowman joined the office during the second phase.
or simply as a tool to facilitate rapid case resolution matters very little from the perspective of the architects and custodians of the Federal Sentencing Guidelines. From this vantage point, what matters is that prosecutors and judges have slipped the traces of the Guidelines en masse. Many regularly substitute their personal moral compass, or their pragmatic judgment of what is fitting in a particular case, for the judgment expressed by the guidelines. Many have reverted to local norms and legal folkways, establishing sentencing practices based on Guidelines rules but full of local idiosyncrasy. Some, like the U.S. Attorneys of the Mexican border districts, have consciously seceded from the Guidelines regime, declaring unilaterally that local conditions entitle them to disregard national law.

The stubborn localism of judicial and prosecutorial behavior brings us to the third point. There will doubtless be observers who conclude that there is nothing wrong with the rules governing drug sentencing in the federal courts, that the penalties are set at an appropriately stringent level, commensurate with the threat illegal drugs present to American society. To such observers, the statistical phenomenon we document here will be seen as proof, not of an insupportably draconian legal regime, but of a failure of institutional control. In this view, the legislative judgments of a popularly elected Congress, embodied in statutes and congressionally approved Sentencing Guidelines, have been subverted. The subversion occurred in part because the Justice Department has been unwilling to discipline United States Attorney's Offices which persistently refuse to enforce the law. The judiciary has also played a role. Many judges, moved by considerations of principle or efficiency, have acquiesced in or actively encouraged prosecutorial laxness. And many members of the judiciary have been waging a long quiet battle to regain incrementally the authority over sentencing they lost with the advent of the Guidelines. If one sees the situation this way, the question is not whether or how far federal drug sentences should be reduced, but how to reassert congressional supremacy over sentencing policy by compelling judicial and prosecutorial compliance with a set of laws that judges and prosecutors have long since become used to manipulating.

VI. CONCLUSION

In one sense, both the Articles in this series do no more than put statistical flesh and bone and muscle on what most of us involved in federal drug sentencing have seen in the insular worlds of the districts in which we practice, and suspected to be true of the nation as a whole, for a long time. Federal drug sentences in the era of Guidelines and minimum mandatory sentences are very long and those most directly involved in imposing those sentences have behaved accordingly. By quantifying that behavior, we hope to focus debate on what, if anything, to do about it.

Some may see in the long, discretion-driven, regionally irregular decline
of federal drug sentences the collapse of the Federal Sentencing Guidelines as a coherent national sentencing system. Less apocalyptically, the trends we have described here lead to one of two conclusions. On the one hand, one might conclude that the Guidelines have failed in their primary objective of achieving uniformity and banishing unjustified disparity, and must either be abandoned or their retention justified on some other ground. Alternatively, one can see the story of drug sentences in the past decade as nothing more than a challenge to an evolving system. In this view, the Guidelines need not be abandoned nor their fundamental premises questioned. Rather, the behavior of lawyers and judges sentencing federal drug offenders should be viewed as precisely the sort of feedback that the framers of the Sentencing Reform Act of 1984 imagined would lead to improvements to the Guidelines structure.314 From this perspective, our results call not for despair, but for a healthy, if politically sensitive, re-examination and reform of federal drug sentencing law and practice.
