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Beyond Disparity: Changes in Federal Sentencing After *Booker* and *Gall*?



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The U.S. Sentencing Guidelines (hereafter, Guidelines) are among the most ambitious attempts in history to control sentencing discretion. From 1987 to early 2005, federal judges were mandated, except in certain specified circumstances, to follow the U.S. Sentencing Commission (U.S.S.C.) Guidelines. With the Feeney Amendment to the PROTECT Act of 2003,¹ the U.S. Congress further restricted judicial sentencing discretion under the Guidelines. However, the U.S. Supreme Court, following the logic of the preceding *Blakely v. Washington*² case, ruled in *United States v. Booker* and a joined case, *United States v. Fanfan*,³ (hereafter *Booker*) that in order to be constitutional, the Federal Guidelines must be advisory. This decision rendered the Guidelines advisory rather than mandatory and rendered the future of federal sentencing uncertain.⁴

Recent analyses of federal sentencing before and after *Booker* and *Gall*, such as U.S.S.C. reports⁵ and recent papers by Ulmer, Light, and Kramer,⁶ have focused on the important question of whether unwarranted disparity connected to race, ethnicity, and gender has increased as judges have gained sentencing discretion in the post-*Booker* and post-*Gall* environment. However, many interesting questions about how sentencing and case processing may have changed after *Booker* remain understudied. This article summarizes analyses of pre- and post-*Booker* and pre- and post-*Gall* sentencing outcomes (adjusted for between-district composition differences). We focus on (a) changes in sentencing severity for drug and violent offenses, (b) changes in the production and effects of Guideline-presumptive sentences, (c) changes in case processing factors that affect sentencing, and (d) changes in patterns of Guideline deviations. We argue that federal sentencing data raise questions and imply several key ways in which both sentencing and case processing have changed since *Booker*.

As noted previously, what is known about post-*Booker* sentencing comes from two U.S.S.C. reports, published in 2006 and 2010. The 2006 report showed that the majority of federal cases continued to be sentenced in conformity with the Guidelines, but that the rate of above-range, government-sponsored below-range, and other below-range sentences increased. Multivariate analyses showed

that social status factors were moderately associated with sentence length, but that their effects before and after *Booker* were similar. The report also examined conformity and departures by circuit and district from 2001 to January 2006, concluding that regional sentencing differences have been relatively stable. Overall, the 2006 report notes that sentencing practices changed somewhat in the PROTECT era, but reverted back closer to pre-PROTECT Act sentencing practices after *Booker*.

However, the 2010 report, which included data up to FY 2009, found that race disparity has increased in the later post-*Booker* period. Analyses concluded that disparity affecting Blacks, in particular Black males, has increased since the 2006 report was written. The 2010 report also found that noncitizens are increasingly sentenced more harshly than U.S. citizens, and that gender disparity fluctuated across time periods. Other types of disparity apparently remained stable after *Booker*.

Recent papers by Ulmer and Light, and Ulmer, Light, and Kramer,⁷ have found the following:

- Variation between district courts in sentencing severity has not increased since *Booker* and *Gall*, nor has between-district variation increased in the effects of race, ethnicity, or gender on sentence length. In other words, district courts have not grown farther apart from each other in their sentencing patterns after *Booker* and *Gall*.
- Post-*Booker* and post-*Gall* race disparity in sentence length decreased during the era of the PROTECT Act, but has generally returned to levels comparable to pre-2003 levels.
- Post-*Booker* and post-*Gall* race disparity in sentence length is less than in the pre-*Koon* era.
- African American males' odds of imprisonment have increased significantly after *Gall*.
- More than 40 percent of the sentence-length disparity affecting Black males is accounted for by immigration cases.
- Government-sponsored below-Guideline sentences are a greater site of racial sentencing disparity than judge-initiated departures in the post-*Booker* and post-*Gall* era.

So, far, however, little attention has been paid to other ways in which the post-*Booker* and post-*Gall* environment might have changed case processing and sentencing. Thus, guidance is lacking on such questions as the following:

- Are courts relying on the Guidelines less now than before *Booker* and *Gall*? That is, are the Guidelines less influential in sentencing?
- Have federal prosecutors' practices changed? What clues can be gained from existing sentencing data?
- Have other case processing factors, such as the sentencing impact of trial conviction, or the impact of departures on sentence lengths, changed after *Booker* and *Gall*?
- How has the sentencing of particular types of offenses changed, if at all, since *Booker* and *Gall*?

I. Data and Methods

The sentencing data we use come from the U.S. Sentencing Commission's Standardized Research Files. Consistent with the U.S.S.C. report on the effects of *Booker*, we use four time periods to assess the impact of *Booker*: (1) cases sentenced in the pre-PROTECT Act period, which includes fiscal year 2002 (Oct. 1, 2001–Sept. 20, 2002) and fiscal year 2003 through April 2003⁸; (2) cases sentenced in the post-PROTECT Act period, which includes the second part of fiscal year 2003 and fiscal year 2004 through June 2004, which corresponds with the Supreme Court decision in *Blakely v. Washington*⁹ being handed down June, 24, 2004; (3) cases sentenced in the post-*Booker* period (fiscal years 2006 and 2007); and (4) cases sentenced in the post-*Gall* period (2008–2009).

A. Dependent Variables

Our sentencing analysis examines two dependent variables: (a) length of sentence and (b) the likelihood of receiving a substantial assistance departure and the likelihood of receiving a nonsubstantial assistance downward departure from the Guidelines. We examined the dependent variables for four different time periods: the pre-PROTECT Act, post-PROTECT Act, post-*Booker*, and post-*Gall* periods. Coefficients from the four separate time periods are compared using *z*-scores.¹⁰ The first dependent variable is the sentence length ordered for each offender (capped at 470 months). Because this variable is very positively skewed and regression diagnostics indicated problematic standard errors, we transformed it using the natural log. The second dependent variable is a binary variable, coded 1 if the offender received a downward departure and 0 if not.

B. Independent Variables

The U.S.S.C. data are a rich source of information on federal sentencing and provide detailed information on both the legal characteristics (e.g., offense type, Guideline-recommended sentence) and extralegal characteristics (e.g., offender race or ethnicity, age, gender) of federal criminal cases and defendants. We control for the

Guideline-recommended sentence by including a measure of the presumptive sentence equal to the minimum months of incarceration recommended by the sentencing Guidelines.¹¹ This approach has been shown to be both conceptually and statistically appropriate because it explicitly accounts for the 43-point offense severity level and adjustments to it and, most important, captures any additional sentencing adjustments—such as a trumping mandatory minimum requirement. As with the sentence length variable, we cap the presumptive sentence variable at 470 months, add a constant of 0.1 to all values of 0, and take the natural log to reduce positive skewness.¹² Because the defendant's criminal history still has a large independent effect not fully captured by the presumptive sentence, and because the correlation between these two variables is modest (0.36), we include the defendant's Guideline criminal history score.

We also include the type of offense the defendant was sentenced for, with a set of dummy variables. The offense categories are drug, violent, fraud, firearms, and other offenses, with property offenses serving as the reference category. We further include two case processing characteristics: whether the offender was detained pending sentencing, coded 1 if the offenders was detained and 0 otherwise; and whether the individual was convicted by trial, coded 1 for a trial conviction and 0 otherwise. In our sentence length analyses, we include as predictors dummy variables for whether the defendant received departures of different kinds (coded 1 if they did and 0 otherwise): upward departures, substantial assistance (5K1.1) departures, or nonsubstantial assistance downward departure, with those who did not receive a departure as the reference group.

Gender is captured with a dummy variable (females = 1). Age is controlled as a continuous variable. Race and ethnicity are coded through a series of dummy variables for Black non-Hispanic offenders, Hispanic offenders (of any race), and non-Hispanic offenders of other races, with White non-Hispanic offenders serving as the reference. We also include a dummy variable for citizenship, with noncitizens coded as 1 and U.S. citizens as 0. Education is captured with four separate dummy variables: those with less than a high school degree, those who are high school graduates, and those with some college. Offenders who are college graduates serve as the reference category.

Because previous research has established the importance of variation between districts in caseloads, sentencing severity, and other factors, we wanted to control such inter-district variation in our analyses. Therefore, we estimated fixed effects models, in which we control for each district in which sentences occurred.

II. Results

Table 1 shows descriptive statistics for the key variables of interest.

First, overall mean sentence severity increased after *Booker* and then declined a bit after *Gall*—but, on average,

Table 1
Descriptive Statistics for Select Measures Across Time Periods

Dependent variable	pre-PROTECT	post-PROTECT	post-Booker	post-Gall
Sentence length (months)	59.7	62.6	64.7	62.1
(ln.) Sentence length	3.56	3.61	3.66	3.58
Standard deviation	1.09	1.09	1.06	1.11
Independent variables				
Drug	47.7%	43.4%	42.2%	39.0%
Immigration	17.9%	21.0%	22.9%	26.7%
Violent	4.5%	4.0%	3.7%	3.6%
Fraud	13.6%	12.3%	11.8%	11.4%
Firearms	9.9%	13.2%	13.4%	12.5%
Other offense	4.1%	4.2%	4.7%	5.7%
Upward departure	0.9%	1.0%	1.9%	2.3%
Substantial assistance dep.	16.6%	15.1%	14.4%	13.4%
Downward departure	15.8%	12.4%	23.2%	28.2%
Trial	4.3%	5.5%	5.5%	4.5%
Pre-sentence detention	73.6%	76.7%	79.1%	81.2%
Criminal history	2.57	2.66	2.70	2.72
Presumptive sentence	68.0	69.5	73.9	72.1
Final offense level*	20.6	20.5	21.0	20.5
Number of cases	73,401	58,734	157,685	102,643

*Measure is not included in multivariate regression models. It is displayed for descriptive purposes discussed in text.

sentences are still longer in the post-*Gall* than in the pre-PROTECT era. Post-*Gall* sentences are, on average, about as severe as they were during the pre-PROTECT era. Thus, in the aggregate, sentences have not gotten more lenient in the post-*Booker* eras. Relatedly, courts have partially used their discretion after *Booker* and *Gall* to deviate from the Guidelines, both upward and downward. Upward departures steadily increase across time periods, from 1% of cases in the pre-*Booker* periods to 2.3% of cases after *Gall*. The proportion of substantial assistance departures declines modestly across time periods, from 16.6% in the pre-PROTECT period to 13.4% after *Gall*. Nonsubstantial assistance downward departures decline from 15.8% to 12.4% in the PROTECT period, then increase markedly to 23% after *Booker* and 28% after *Gall*.

Interesting changes happen across time with criminal history and presumptive sentence. Defendants' mean criminal history increases steadily across the time periods, from 2.57 in the pre-PROTECT period to 2.66 in the PROTECT era, and 2.70 after *Booker* and 2.72 after *Gall*. The mean Guideline minimum sentence defendants faced increases notably from about 68 months in the pre-PROTECT era and 69.5 months during the PROTECT period to 73.9 months after *Booker*, and declines slightly after *Gall* to about 72 months. It appears that defendants' aggregate exposure to punishment, as represented by the mean Guideline-presumptive sentences, jumps in the post-*Booker* period and then remains above pre-*Booker* levels after *Gall*.

Table 2 shows fixed effects ordinary least squares models of sentence length (logged) regressed on offender characteristics, case processing factors, offense categories, and Guideline factors for each of the four time periods. In the table, only the variables of interest are shown.

Some key case processing factors also exhibited interesting differences across time. First, notable trial penalties are evident in every time period, a finding that supports prior research on the effects of trial conviction on federal sentencing.¹³ However, these trial penalties are actually significantly smaller in the post-*Booker* period than in either of the two earlier periods (note also that the trial effect is the net of the effect of substantial assistance departures, obstruction of justice, or acceptance of responsibility—which is captured by the Guideline minimum). Trial penalties are slightly larger in the post-*Gall* period, but still not as large as in the pre-PROTECT and PROTECT eras. Thus, defendants who go to trial and lose were apparently penalized less in the post-*Booker* period—federal judges evidently were not inclined to use their new discretion after *Booker* and, to a lesser degree, after *Gall*, to increase the extent to which they penalize trial defendants at sentencing. However, pre-sentence detention has a distinctively greater positive effect on sentence lengths in the post-*Gall* period. Apparently, whether a defendant is detained in custody awaiting sentence is weighed more heavily by courts in the post-*Gall* period, resulting in more severe sentences for such defendants.

Interesting post-*Booker* differences appear in the sentencing of particular offenses. Drug offenses receive substantially shorter sentences in the post-*Booker* and post-*Gall* eras than they did prior to *Booker*. Drug offenses are still sentenced about 26% longer than property offenses after *Booker* and *Gall*, but the effect is significantly smaller than in prior periods, when drug offenders were sentenced to 32% and 34% longer sentences than those accused of property crimes. Violent offenses are also sentenced to significantly and notably shorter sentences in the post-*Booker* period. Violent offenses were

Table 2
Select Effects for Ordinary Least Squares Models of Sentence Length

<i>Independent variables</i>	pre-PROTECT	post-PROTECT	post-Booker	post-Gall
	ln. length	ln. length	ln. length	ln. length
	<i>b</i>	<i>b</i>	<i>b</i>	<i>b</i>
Drug	0.317	0.341	0.258 ^{a,b}	0.264 ^{a,b}
Immigration	0.417	0.130	0.100 ^a	0.112
Violent	0.309	0.320	0.206 ^{a,b}	0.199 ^{a,b}
Fraud	0.016	0.016	0.022	0.039
Firearms	0.145	0.159	0.118 ^b	0.160 ^c
Other offense	0.077	0.108	0.135 ^a	0.171 ^{a,b,c}
Upward departure	0.713	0.776 ^a	0.762 ^a	0.726 ^{b,c}
Substantial assistance dep.	-0.509	-0.488 ^a	-0.532 ^{a,b}	-0.516 ^{b,c}
Other downward departure	-0.470	-0.437 ^a	-0.415 ^{a,b}	-0.428 ^{a,c}
Trial	0.271	0.264	0.233 ^{a,b}	0.257 ^c
Pre-sentence detention	0.194	0.194	0.189	0.218 ^{a,b,c}
Criminal history	0.051	0.049	0.037 ^{a,b}	0.031 ^{a,b,c}
(ln.) Presumptive sentence	0.656	0.644 ^a	0.703 ^{a,b}	0.675 ^{a,b,c}
N	73,401	58,734	157,685	102,643
Adjusted R ²	0.820	0.835	0.842	0.844

BOLD denotes $p < .01$

^a Coefficient is significantly different from pre-PROTECT Act estimate based on two-tailed z test ($p < .05$).

^b Coefficient is significantly different from post-PROTECT Act estimate based on two-tailed z test ($p < .05$).

^c Coefficient is significantly different from post-Booker estimate based on two-tailed z test ($p < .05$).

sentenced to about 31% and 32% longer sentences than property crimes in the pre-Booker periods, but only 21% and 20% longer sentences after Booker and Gall. Thus, drug and violent offenses are sentenced to comparatively shorter sentences (at least relative to other types of offenses) in the post-Booker and post-Gall periods. However, it is worth noting that according to descriptive statistics (not shown), the overall mean sentence for drug offenses in the post-Gall period, 55.7 months, is greater than the mean drug sentence for the pre-PROTECT period, 49.4 months.

In addition, defendants do not appear to be penalized as much for more extensive criminal histories in the post-Booker period. Each increase in the criminal history score was associated with about a 5% increase in sentence length in both pre-Booker periods, but only a 4% increase in the post-Booker period and a 3% increase after Gall. However, downward departures have a comparatively smaller effect on sentence lengths in the post-Booker and post-Gall periods, especially in comparison with the pre-PROTECT era. That is, when judges depart in the post-Booker and post-Gall periods, their departures are significantly smaller in terms of relative sentence length than was the case for the pre-PROTECT era.

Finally, and importantly, Guideline-presumptive sentences are actually more influential on sentence lengths in the post-Booker and post-Gall periods than in the earlier periods. That is, the Guideline-presumptive sentence had a stronger correspondence to, and was more predictive of,

the actual sentence in the post-Booker and post-Gall eras—especially in the post-Booker period, when the effect of presumptive sentence is greatest.

Table 3 presents fixed effects logistic regression models of substantial assistance departures similar to the analyses of sentence length in Table 2.

First, federal prosecutors are roughly equally likely to move for substantial assistance departures for drug cases across time—none of the across-time differences in the substantial assistance departure odds of drug cases are statistically significant. However, violent offenses are substantially less likely to get them in post-Booker and, especially, post-Gall times. Trial defendants are even less likely to obtain substantial assistance departures after Booker and Gall, and they were strongly unlikely to get them in earlier periods. Defendants detained pre-sentence are also especially unlikely to get substantial assistance departures after Booker and, even more so, after Gall. There is a greater tendency after Booker, and especially after Gall, for criminal history to reduce the chances of getting a substantial assistance departure. That is, defendants with more substantial criminal histories are less likely to receive these departures, most notably in the post-Gall period. Although presumptive sentence shows a significantly greater effect on substantial assistance departures after Booker and Gall, substantively this effect is so small that its meaningfulness is questionable.

Table 4 presents fixed effects logistic regression models of nonsubstantial assistance downward departures.

Table 3
Select Effects for Logistic Regression Models of Substantial Assistance Departures

<i>Independent variables</i>	pre-PROTECT	post-PROTECT	post-Booker	post-Gall
	<i>sub. assist. dep.</i>	<i>sub. assist. dep.</i>	<i>sub. assist. dep.</i>	<i>sub. assist. dep.</i>
	<i>b</i>	<i>b</i>	<i>b</i>	<i>b</i>
Drug	1.503	1.594	1.585	1.666
Immigration	0.047	0.207	0.105	-0.070
Violent	0.263	0.342	0.054 ^b	-0.034 ^b
Fraud	0.784	0.989	0.879	0.991
Firearms	0.477	0.682	0.607	0.662
Other offense	0.307	0.424	0.012 ^{a,b}	-0.111 ^b
Trial	-4.430	-4.140	-4.814 ^b	-4.755 ^b
Pre-sentence detention	-0.679	-0.612	-0.691 ^b	-0.722 ^b
Criminal history	-0.068	-0.086	-0.098 ^a	-0.120 ^{b,c}
Presumptive sentence	0.008	0.008	0.009 ^{a,b}	0.009 ^b
N	74,233	61,474	140,907	86,499
-2 log likelihood	62627.6	48089.0	111453.6	6529.6

BOLD denotes $p < .01$

^aCoefficient is significantly different from pre-PROTECT Act estimate based on two-tailed z test ($p < .05$).

^bCoefficient is significantly different from post-PROTECT Act estimate based on two-tailed z test ($p < .05$).

^cCoefficient is significantly different from post-Booker estimate based on two-tailed z test ($p < .05$).

Those convicted by trial were significantly less likely to receive downward departures across all four time periods. However, those convicted by trial had better chances of obtaining a downward departure in the post-Booker and, especially, post-Gall eras. Trial defendants' departure odds ranged from a pre-PROTECT Act 46% less than those for guilty pleas to 35% (after Booker) less than those pleading guilty, and 32% less than those pleading guilty after Gall. In other words, being convicted by trial damaged

defendants' chances of obtaining a downward departure substantially less after Booker and Gall. On the other hand, as with sentence length and substantial assistance departures, pre-sentence detention decreases defendants' odds of obtaining downward departures to a much greater extent after Booker and, especially, after Gall.

The coefficients in Table 4 are a bit deceptive, and would suggest that drug, violent, and firearm offenses have become markedly less likely to receive downward

Table 4
Select Effects for Logistic Regression Models of "Other" Downward Departures

<i>Independent variables</i>	pre-PROTECT	post-PROTECT	post-Booker	post-Gall
	<i>downward dep.</i>	<i>downward dep.</i>	<i>downward dep.</i>	<i>downward dep.</i>
	<i>b</i>	<i>b</i>	<i>b</i>	<i>b</i>
Drug	1.007	0.754 ^a	0.605 ^a	0.656 ^a
Immigration	1.518	1.177 ^a	1.108 ^a	1.020 ^a
Violent	0.998	0.567 ^a	0.410 ^a	0.380 ^a
Fraud	0.655	0.530	0.446 ^a	0.514
Firearms	1.140	0.701 ^a	0.521 ^a	0.574 ^a
Other offense	0.912	0.499 ^a	0.525 ^a	0.705 ^{a,c}
Trial	-0.780	-0.726	-0.433 ^{a,b}	-0.393 ^{a,b}
Pre-sentence detention	-0.592	-0.585	-0.692 ^{a,b}	-0.704 ^{a,b}
Criminal history	0.072	0.078	0.011 ^{a,b}	0.014 ^{a,b}
Presumptive sentence	0.003	0.004	0.004 ^{a,b}	0.004 ^{a,b}
N	72,796	58,298	156,406	104,390
-2 log likelihood	56755.4	38691.9	160901.9	117568.8

BOLD denotes $p < .01$

^aCoefficient is significantly different from pre-PROTECT Act estimate based on two-tailed z test ($p < .05$).

^bCoefficient is significantly different from post-PROTECT Act estimate based on two-tailed z test ($p < .05$).

^cCoefficient is significantly different from post-Booker estimate based on two-tailed z test ($p < .05$).

departures in the post-*Booker* periods. However, note that the reference category is property offenses. It is not that drug offenders are less likely to receive downward departure but that between-offense differences in departures appear to have dampened somewhat. In other words, the differences between drug offenses (and violent offenses) and property offenses in their likelihood of departures are not as large in the more recent time periods. The percentage of drug offenses receiving downward departures has actually increased from the pre-PROTECT era to the post-*Booker* and post-*Gall* periods. Downward departure rates for drug offenses change from 15% in the pre-PROTECT period to 9.4% in the PROTECT era, up to 25% after *Booker* and 20% after *Gall*. The percentage of violent offenses receiving downward departures has also changed substantially, from a pre-PROTECT rate of 14% to a 9% rate after PROTECT, up to a 20% rate after *Booker* and a 25% rate after *Gall*. In comparison, downward departure rates for property offenses changed from a pre-PROTECT era 7% to 6% in the PROTECT period, and then up to 14% after *Booker* and 17% after *Gall*. Thus, each of these offenses have seen increases in overall departure rates but, when controlling for other important predictors, the between-offense differences in departures have grown smaller.

Criminal history exhibits a smaller relationship with downward departures in the post-*Booker* periods than in either of the earlier periods. In the earlier periods, each increase in criminal history increased the odds of downward departure by about 8%. After *Booker*, criminal history exhibits very little relationship to the odds of downward departure. Those with more substantial criminal histories are still more likely to obtain downward departures after *Booker* and *Gall*, but this tendency is much reduced compared with the earlier periods. Exposure to Guideline punishment, as indicated by the presumptive sentence, appears to increase the likelihood of downward departures similarly across all time periods.

III. Survey Data

As part of a larger project, we conducted 314 interviews with federal judges, U.S. Attorneys and Assistant U.S. Attorneys, federally practicing defense attorneys, and federal probation officers in seven geographically dispersed districts varying in size.¹⁴ Invitations to participate in this survey were sent by e-mail and U.S. mail to 800 active federal judges, all federal public defenders' offices, the district coordinators of Criminal Justice Act Panel defense attorneys (who were asked to distribute them to the Panel attorneys), and 89 federal probation offices (where the federal probation officer in charge of pre-sentence reports was instructed to fill out the survey). We received 262 responses from federal judges, 163 responses from federal public defenders, 162 responses from Criminal Justice Act Panel defense attorneys, and 55 responses from federal probation officers, for a total of 642 responses. The response rate for judges was roughly 33%, and for the

defense attorneys overall was about 40%. However, we received valid responses from judges in 81% of the 89 U.S. federal districts (excluding the District of Columbia), valid responses from defense attorneys in 62% of the districts, and valid responses from probation officers in 62% of the districts. The full survey and further details about the survey sampling and data are available from the first author on request.

As Tables 5 and 6 show, this survey suggested both stability and change in plea-agreement practices.

Respondents reported three notable post-*Booker* developments in plea agreements: (a) a 10% increase in the practice of U.S. Attorney's offices requiring defendants to waive their rights of appeal, (b) a 10% increase in the prevalence of including stipulations about relevant conduct and offense-specific behavior and a 2% increase in explicitly specifying the final offense level as part of the plea agreement, and (c) a 12% increase in the frequency with which defense attorneys enter open guilty pleas (pleading guilty without a formal plea agreement). On the one hand, the first and second developments suggest that U.S. Attorney's offices may have been more frequently attempting to structure plea agreements more explicitly as a way to constrain judges' post-*Booker* sentencing discretion, as well as to lessen the chances that Guideline sentences will be revisited on appeal. On the other hand, development (c) suggests that defense attorneys may have been becoming bolder in avoiding negotiations with prosecutors and relying on the sentencing discretion of judges in hopes of obtaining sentences that deviate below the Guidelines. A similar use of open pleas by defense attorneys to circumvent prosecutors and gamble on judicial leniency was found in case processing under Pennsylvania guidelines.¹⁵ Future research should explore how prosecutorial practices have adapted to the post-*Booker* regime.

This survey also provides some suggestive evidence regard judges' views of the Guidelines in the post-*Booker* period, shown in Table 7.

In 2006, after the *Booker/Fanfan* decision, 54% of federal judges surveyed agreed or strongly agreed with the statement "Congress has spoken and I have sworn to uphold what they have done" as a reason for conforming to the Guidelines. Also, 62% of judges surveyed agreed with the statement "I think the Sentencing Commission has done a pretty remarkable job, when you think about all the different crimes and putting sentences to these crimes."

IV. Conclusions

Most research on federal sentencing in the post-*Booker* and post-*Gall* periods has rightly focused on the issue of whether unwarranted disparity has increased in the aftermath of these decisions. A recent U.S.S.C. report points to growing racial disparities after *Gall*, whereas our recent research localizes this increased disparity to the incarceration decision, as well as somewhat to immigration cases,

Table 5
Changes and Stability in Plea Agreement Contents

a. A waiver of the right to appeal by defendant			
Response	pre-Blakely era Percent	post-Booker era Percent	% Change
Never part of plea agreement/rarely	18.8	12.2	-6.6
Sometimes	12.0	8.6	-3.4
Almost always part of plea agreement/usually	69.3	79.3	10.0
b. Specification of the final offense level			
Response	pre-Blakely era Percent	post-Booker era Percent	% Change
Never part of plea agreement/rarely	50.1	47.0	-3.1
Sometimes	14.5	15.9	1.4
Almost always part of plea agreement/usually	35.4	37.1	1.7
c. Stipulations on elements of relevant conduct/offense behavior			
Response	pre-Blakely era Percent	post-Booker era Percent	% Change
Never part of plea agreement/rarely	31.5	24.3	-7.2
Sometimes	29.1	25.9	-3.2
Almost always part of plea agreement/usually	39.4	49.8	10.4
d. Dropping the most serious count in the indictment			
Response	pre-Blakely era Percent	post-Booker era Percent	% Change
Never part of plea agreement/rarely	61.6	61.3	-0.3
Sometimes	26.9	27.5	0.6
Almost always part of plea agreement/usually	11.4	11.2	-0.2
e. A reduction in the number of counts in the indictment			
Response	pre-Blakely era Percent	post-Booker era Percent	% Change
Never part of plea agreement/rarely	12.0	13.3	1.3
Sometimes	19.8	19.7	-0.1
Almost always part of plea agreement/usually	68.2	67.0	-1.2
f. Agreements to exclude any charges for gun violations under 924©			
Response	pre-Blakely era Percent	post-Booker era Percent	% Change
Never part of plea agreement/rarely	67.6	68.7	1.1
Sometimes	23.9	23.6	-0.3
Almost always part of plea agreement/usually	8.5	7.7	-0.8

and also points to more continuity than change in disparity when comparing the *Booker* and *Gall* periods with the pre-PROTECT era. Aside from this important issue, little empirical discussion has centered around other sentencing

changes in the wake of *Booker* and *Gall*. Our findings here focusing on changes in case processing, Guideline-relevant, and departure-related factors in sentencing defy easy characterization into a convenient narrative. Instead, the data

Table 6
How frequently do defense attorneys enter an open plea to the indictment without arriving at a plea agreement with the prosecution?

Recalling pre-Blakely era		
Response	Percent	
Hardly ever/rarely	65.5	
Sometimes	19.5	
Very often/often	15.0	
Characterizing post-Booker era		
Response	Percent	% Change
Hardly ever/rarely	47.9	-17.6
Sometimes	24.8	5.3
Very often/often	27.3	12.3

Table 7
Judge Responses to the Guidelines After Booker

Judge responses: "I think the Sentencing Commission has done a pretty remarkable job, when you think about all the different crimes and putting sentences to these crimes."	
Strongly disagree	7%
Disagree	10%
Neutral	21%
Agree	43%
Strongly agree	19%
Judge responses: "Congress has spoken and I have sworn to uphold what they have done [regarding the Guidelines]."	
Strongly disagree	11%
Disagree	15%
Neutral	20%
Agree	35%
Strongly agree	19%
Total judge responses: 262	

suggest several complexities and paradoxes regarding the post-*Booker* and post-*Gall* eras:

- Average Guideline minimum recommended sentences have increased after *Booker* and *Gall*, as have mean defendant criminal history scores. This increase could be a meaningless fluctuation, or it could signify that (a) U.S. Attorney's offices are prioritizing more severe cases and offenders or (b) U.S. Attorney's offices are producing higher Guidelines through their plea-agreement practices.
- Sentence severity overall has increased, but between-offense differences have been dampened, such that the sentences of drug offenses, for example, are not as widely discrepant from the sentences for property or other offenses.
- The proportion of downward departures has increased, but the size of their impact on sentence lengths has decreased. Also, departure rates for most offenses have increased, but between-offense differences in departures have dampened.
- The proportions of downward and upward departures have increased, but presumptive sentences, as represented by the Guideline range minimums, exhibit a stronger connection to, and are more predictive of, actual sentences after *Booker* and *Gall*. Courts may be sentencing closer to the bottom of the Guideline ranges, and departures may be deviating from Guideline minimums to a lesser degree. What the data are *not* consistent with is a story in which courts and their sentences are increasingly decoupled from the Guidelines' influence. If anything, the Guideline-presumptive sentences are more, not less, correlated with actual sentences given. Thus, the Guidelines continue to strongly structure federal sentencing in the wake of *Booker* and *Gall*.
- Roughly the same proportion of cases are convicted by trial, but the sentencing consequences of trial conviction (trial penalties) have decreased after *Booker* and *Gall* (the exception to this trend is substantial assistance departures). Exercising one's right to trial, and losing, appears to penalize defendants to a slightly lesser extent in terms of sentence lengths. However, trial defendants are notably more likely to receive downward departures than they were in the pre-*Booker* past.
- Defendants detained before sentencing face a greater sentencing disadvantage after *Booker* and *Gall*. Perhaps pre-sentence detention is increasingly used as a discretionary marker of heightened dangerousness or risk by courts, and courts use their new discretion to mete out more severe sentences to such defendants.

Two sets of reasons might explain the continued reliance on Guideline sentence recommendations after *Booker* and *Gall*: (a) a norm setting function of the Guidelines as they have become embedded in the organizational and legal culture of federal court communities and (b) federal prosecutors as a force for Guideline conformity.

First, as Reitz¹⁶ observed, the Guidelines continue to govern federal sentencing in the aftermath of *Booker*—courts must continue to calculate them, and judges must consider them and must provide legally defensible reasons for deviating from them. In this regard, the Federal Guidelines have acquired the legal status of many state sentencing guidelines.¹⁷ Assessments of Pennsylvania's guidelines found that a major reason those guidelines became influential was because they became embedded, taken-for-granted tools in local courts.¹⁸ Perhaps federal district courts have come to rely on the Guidelines to codify and formalize sentencing benchmarks in the form of numerical Guideline scores and sentencing factors, through a process of normative isomorphism.¹⁹ After close to twenty years of sentencing under the Guidelines, perhaps sentencing norms based on the Guidelines have become incorporated into federal district courts' organizational cultures and routine sentencing practices.

Other features of the federal justice system might continue to promote routine reliance on the Guidelines. Perhaps the Guidelines themselves, and the national-level training, guidance, and discourse surrounding them, serve a norm setting function, even after *Booker*. In addition, federal prosecutors likely have remained a force for Guideline conformity. This conformity may have been a potent force for coercive isomorphism²⁰ in the practices of local U.S. Attorney's offices regarding sentencing recommendations in plea agreements after *Booker*. Even currently, Main Justice, as well as local U.S. Attorney's offices, likely still push for conformity to the Guidelines in sentence recommendations they make connected to plea agreements, or even after trials.

Indeed, the slight but notable increase in the severity of Guideline-presumptive sentences might suggest that U.S. Attorney's offices, especially after *Booker*, attempted to use the Guidelines to constrain judges' sentencing options and the severity of their sentences. In the aggregate, federal prosecutors may have attempted to foster more severe Guideline calculations (through their plea agreements and the influence these have on pre-sentence reports) and obtain convictions at higher Guideline exposure than would have been the case before *Booker*—presumably to counterbalance the possibility that judges might use their post-*Booker* and post-*Gall* discretion to sentence more leniently. This tendency is suggested by the more than four-month increase over the PROTECT period in the post-*Booker* mean presumptive sentence, as well as the fact that the mean Guideline-recommended sentence remained higher after *Gall* than in the pre-*Booker* periods.

Thus, we are reminded that, in their implementation, the Guidelines themselves are partially a product of pre-sentencing and even pre-conviction decisions by prosecutors and Federal Probation Offices (in their pre-sentence reports). Offenders' exposure to Guideline punishments is to a great extent (but not totally) a product of prosecutors' charging decisions and the plea-agreement process, in which negotiated stipulations about Guideline-

relevant conduct and offense-specific behavior (which raise or lower the final offense level) are commonplace. Because changes in sentencing schemes affect the distribution of discretion among court actors, the federal prosecutors' decisions and behavior in the charging and plea agreement process likely have changed significantly in the wake of *Booker*, and changed in nonrandom ways. Our descriptive statistics, as well as some of the survey data we have briefly described, suggest these possibilities. Research should continue to monitor sentencing in the wake of the important *Booker* and *Gall* decisions, and attention should be fixed not only on judicial discretion but also on how prosecutorial behavior might change.

Notes

- ¹ Pub. L. No. 108-121, 117 Stat. 650, 667.
- ² *Blakely*, 542 U.S. 296 (2004) (holding that a Washington state sentence, where the judge departed from the sentencing range that was set by the legislature in the state's sentencing statutes based on an aggravated factor that had not been admitted by the defendant or proven to a jury beyond a reasonable doubt, was unconstitutional because it violated the defendant's rights under the Sixth Amendment to the U.S. Constitution).
- ³ *Booker*, 543 U.S. 220 (2005) (holding that the mandatory nature of the Federal Sentencing Guidelines violated the Sixth Amendment of the Constitution, and jointly holding that the Guidelines could be salvaged if they were made effectively advisory as opposed to mandatory).
- ⁴ See Richard Frase, *The Apprendi-Blakely Cases: Sentencing Reform Counter-Revolution?*, 6 CRIMINOLOGY & PUB. POL'Y 403 (2007) (speculating on the impacts of *Blakely* and *Booker* and arguing that the greatest long-term effects of these decisions may be on prosecutorial, legislative, and commission decisions, rather than on sentencing outcomes).
- ⁵ U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2006); U.S. SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS (2010).
- ⁶ Jeffery T. Ulmer & Michael Light, *Federal Case Processing and Sentencing Before and After the Booker/Fanfan Decision: Little Has Changed*, 14 J. GENDER, RACE, & JUST. 143 (2010); Jeffery T. Ulmer, Michael Light, & John Kramer, *Does Increased Judicial Discretion Lead to Increased Disparity? The "Liberation" of Judicial Sentencing Discretion in the Wake of the Booker/Fanfan Decision*, JUST. Q. (forthcoming 2011); Jeffery T. Ulmer, Michael Light, & John Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 CRIMINOLOGY & PUB. POL'Y (forthcoming 2011).
- ⁷ Ulmer & Light; Ulmer, Light, & Kramer, forthcoming, *supra* note 6.
- ⁸ The PROTECT Act was passed in April 2003; seven months of fiscal year 2003 were prior to the effective date of the Act (October 1, 2002–April 30, 2003) and five months were after (May 1, 2003–September 30, 2003).
- ⁹ We remove the period between the *Blakely* and *Booker* decisions to remove any potential *Blakely* effects. Supplementary analysis included all of fiscal year 2004 in the post-PROTECT period and found that federal sentencing after *Blakely* more closely resembles sentencing post-*Booker*. These findings confirmed that *Blakely* did indeed have an effect on federal sentencing, which warrants those effects to be removed in order to accurately test between the four time periods of interest.
- ¹⁰ Raymond Paternoster, Robert Brame, Paul Mazzerolle, & Alex Piquero, *Using the Correct Statistical Test for the Equality of Regression Coefficients*, 36 CRIMINOLOGY 859 (demonstrating that the correct z test uses the following formula: $z = \frac{(b1-b2)}{\sqrt{(SE1)^2+(SE2)^2}}$).
- ¹¹ See Rodney Engen & Randy R. Gainey, *Modeling the Effects of Legally Relevant and Extralegal Factors Under Sentencing Guidelines: The Rules Have Changed*, 38 CRIMINOLOGY 1207; Celesta A. Albonetti, *The Role of Gender and Departures in the Sentencing of Defendants Convicted of a White Collar Offense Under the Federal Sentencing Guidelines*, in 1 SOCIOLOGY OF CRIME, LAW, AND DEVIANCE (vol. 1, Jeffery T. Ulmer ed., 1998).
- ¹² We have added a constant of 0.1 to all zero values for the presumptive sentence variable (but not for the sentence length dependent variable), because taking the log of zero would exclude these values from the analysis. This adjustment is appropriate for the dependent variable because we want to analyze only those offenders who actually received a sentence length. The zeroes are retained in the presumptive sentence variable (by adding 0.1 to all 0 values) because we want to retain those cases where an offender's minimum sentence was zero months but s/he still received a prison sentence.
- ¹³ Jeffery T. Ulmer, James Eisenstein, & Brian Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560 (2010).
- ¹⁴ Ulmer & Light, *supra* note 6.
- ¹⁵ JEFFERY T. ULMER, SOCIAL WORLDS OF SENTENCING (1997).
- ¹⁶ Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005).
- ¹⁷ JOHN H. KRAMER & JEFFERY T. ULMER, SENTENCING GUIDELINES: LESSONS FROM PENNSYLVANIA (2009).
- ¹⁸ Jeffery T. Ulmer & John H. Kramer, *The Use and Transformation of Formal Decision Making Criteria: Sentencing Guidelines, Organizational Contexts, and Case Processing Strategies*, 45 SOC. PROBS. 248 (1998).
- ¹⁹ See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983).
- ²⁰ *Id.*