

# Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines

Frank O. Bowman, III\*

## I. Introduction

By the time this article appears, nearly a decade will have passed since the United States Supreme Court declared the Federal Sentencing Guidelines constitutionally dead, and in its next breath resurrected them in advisory form.<sup>1</sup> From the point of view of the federal bench and bar, and of the academics who earn their daily crust watching lawyers at play, the years since the *Booker* decision have been a turbulent time. The Supreme Court itself has issued more than twenty decisions construing, clarifying, or applying one aspect or another of *Booker* doctrine.<sup>2</sup>

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\* Floyd R. Gibson Missouri Endowed Professor of Law, University of Missouri School of Law. Many thanks to my research assistant, Andrew Peebles, to Ron Weich for his perceptive suggestions, and also to Amy Baron Evans, Sentencing Resource Counsel for the Federal Public and Community Defenders, for providing me with some of the compendious research she and her colleagues perform to assist the federal defense bar.

<sup>1</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>2</sup> *See, e.g.*, *Peugh v. United States*, 133 S. Ct. 2072 (2013) (holding that the *Ex Post Facto* Clause is violated when a defendant is sentenced under Sentencing Guidelines promulgated after he committed his criminal acts and the new version provides a higher sentencing range than the version in place at time of offense); *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (holding that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury); *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012) (holding that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to the imposition of criminal fines); *Dorsey v. United States*, 132 S. Ct. 2321 (2012) (holding that the Fair Sentencing Act’s new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders); *Pepper v. United States*, 131 S. Ct. 1229 (2011) (holding that when defendant’s sentence has been set aside on appeal, district court at resentencing may consider evidence of defendant’s post-sentencing rehabilitation which may support a downward variance from the advisory guidelines range); *United States v. O’Brien*, 560 U.S. 218 (2010) (holding that the fact that a firearm was a machinegun is an element to be proved beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing); *Abbott v. United States*, 131 S. Ct. 18 (2010) (holding that a defendant is subject to the highest mandatory minimum sentence specified for his conduct under 18 U.S.C.S. § 924(c), unless another provision of law directed to such conduct imposes a greater mandatory minimum); *Skilling v. United States*, 130 S. Ct. 2896 (2010) (holding that former corporate executive failed to establish that pretrial publicity prevented him from obtaining a fair trial on federal fraud-related charges, and that the “honest services” fraud proscription in 18 U.S.C.S. § 1346 is limited to bribery and kickbacks); *Dillon v. U.S.*, 130 S. Ct. 2683 (2010) (holding that *Booker* does not apply to 18 U.S.C.S. § 3582(c)(2) proceedings and therefore does not require treating 18 U.S.S.G. § 1B1.10 as advisory); *Spears v. United States*, 555 U.S. 261 (2009) (holding that federal district courts are entitled, in criminal sentencing, to reject and vary categorically from the ratio between quantities of powder cocaine and crack cocaine on the basis of a policy disagreement with Federal Sentencing Guidelines); *Oregon v. Ice*, 555 U.S. 160 (2009) (holding that in light of historical practice and States’ authority over administration of their criminal justice systems, the Sixth Amendment does not inhibit States from assigning to judges the finding of facts necessary to the imposition of consecutive sentences for multiple offenses); *Moore v. United States*, 555 U.S. 1 (2008) (holding that the resentencing of an accused by a federal district court was warranted as the court did not think it had discretion to reject the crack/powder disparity in United States

Federal appellate courts have cited *Booker* more than ten thousand times and federal district courts have published more than eight thousand opinions mentioning *Booker*.<sup>3</sup> Academics have written over 1700 journal articles citing *Booker*, and more than two hundred with *Booker* in the title.<sup>4</sup> From a lawyer's perspective, it is hardly surprising that *Booker* should have generated so much high-voltage controversy. To undertake a conversation about *Booker* is to plunge into an intellectual bouillabaisse in which constitutional theory, criminal sentencing theory, inter-branch rivalries between the executive, judicial, and legislative arms of the federal government, tricky points of statutory interpretation, and pragmatic considerations of crime control, criminal justice administration, and the fate of individual criminal defendants are all bubbling merrily about.<sup>5</sup> Moreover, the transformation of the federal sentencing guidelines from a binding to a purely advisory system has not merely been the source of countless procedural wrangles and the fodder for a long cerebral feast, but has unquestionably altered thousands of individual sentencing outcomes. And yet, from the points of view of federal defendants in the mass and of the system that processes them from arrest to prison gate, perhaps the most surprising fact about *Booker* is just how small an effect it has actually had. This Article examines the tenacity of the Guidelines regime and considers its implications for those who practice in the federal courts and those who aspire to change federal sentencing outcomes.

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Sentencing Guidelines concerning cocaine possession); *Irizarry v. United States*, 553 U.S. 708 (2008) (holding that Rule 32(h) of Federal Rules of Criminal Procedure does not apply to every sentence that was at variance with the recommended Federal Sentencing Guidelines range); *Greenlaw v. United States*, 554 U.S. 237 (2008) (holding that absent a federal government appeal or cross-appeal, a federal court of appeals cannot, on its own initiative, order an increase in a defendant's sentence); *Cunningham v. California*, 549 U.S. 270 (2007) (holding that California's determinate sentencing law violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments); *Kimbrough v. United States*, 552 U.S. 85 (2007) (holding that where drug traffickers dealing in crack cocaine were subject to same criminal sentence as those dealing in 100 times more powder cocaine, cocaine Guidelines are held to be advisory only); *Gall v. United States*, 552 U.S. 38 (2007) (holding that federal courts of appeals are required to review all federal criminal sentences under a deferential abuse-of-discretion standard); *Rita v. United States*, 551 U.S. 338 (2007) (holding that a court of appeals may apply a presumption of reasonableness to a district court sentence within the recommended Federal Sentencing Guidelines); *Shepard v. United States*, 544 U.S. 13 (2005) (holding that a sentencing court, in inquiring under the Armed Career Criminal Act of 18 U.S.C.S. § 924(e), is not permitted to look to police reports or complaint applications).

<sup>3</sup> A Westlaw search for "543 U.S. 220" in the database for federal appellate decisions (CTA) conducted on August 9, 2013, produced a list of more than 10,000 documents. The same search in the database for federal district court opinions produced 8340 documents.

<sup>4</sup> A Westlaw search for "543 U.S. 220" in the database for law journal articles (JLR) conducted on August 9, 2013, produced a list of 1747 articles citing the *Booker* decision and 229 articles with *Booker* in the title.

<sup>5</sup> For one survey of the *Booker* terrain, see Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010) [hereinafter "Bowman, *Debacle*"].

## II. Booker and the Federal Sentencing Guidelines

The twisted tale of *Booker* and its progeny is formally about exposition of the jury trial right in the Sixth Amendment. But the real issue has always been whether the Court would succeed in using the Sixth Amendment lever to destabilize and ultimately topple a federal sentencing regime founded by the Sentencing Reform Act of 1984 and based on an interlocking set of sentencing guidelines and statutory mandatory minimum sentences,<sup>6</sup> a regime widely criticized by the defense bar and many in the judiciary and the academy for being unduly inflexible and unremittingly harsh.<sup>7</sup> Given the ubiquity of this critique and the Supreme Court's evisceration of the Guidelines' legal status, one would have expected that nine years after *Booker* a whole new world would have dawned. After all, in order to maintain the (doubtful) intellectual consistency of its *Booker* holding, the Court has been obliged to declare the Guidelines a hitherto unknown form of non-law.

The fall of the Guidelines began with the Court's 2004 decision in *Blakely v. Washington*<sup>8</sup> which voided the Washington state sentencing guidelines on the ground that they violated the Sixth Amendment right to a jury trial by requiring a judicial finding of a non-element fact as a prerequisite for certain upward adjustments of the guideline range or for sentences above such ranges. This decision placed the validity of the Federal Sentencing Guidelines in grave doubt.<sup>9</sup> A year later, the *Booker* merits majority found the Guidelines unconstitutional,<sup>10</sup> but the *Booker* remedial majority voided only two subsections of the SRA -- 18 U.S.C. § 3553(b)(1), which "requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure),"<sup>11</sup> and 18 U.S.C. § 3742(e), which sets forth standards of review on appeal for sentences imposed under the Guidelines<sup>12</sup> -- and then substituted its own standard of appellate review -- that of

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<sup>6</sup> *Id.* at 418-28 (contending that the federal judiciary's experience with the Federal Sentencing Guidelines drove the Sixth Amendment debate that produced *Blakely* and *Booker*).

<sup>7</sup> See, e.g., KATE STITH AND JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (Chicago 1998).

<sup>8</sup> 542 U.S. 296 (2004).

<sup>9</sup> See, Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004).

<sup>10</sup> *Booker*, 543 U.S. at 244.

<sup>11</sup> *Id.* at 259.

<sup>12</sup> *Id.* at 258-62.

“reasonableness” – for the standard in excised Section 3742(e).<sup>13</sup> Thereafter, in *Rita v. United States*,<sup>14</sup> the Court found that a sentence within a properly calculated guideline range *could not* be treated by *sentencing judges* as presumptively *correct*, but *could*, though it need not, be treated by *appellate courts* as presumptively *reasonable*.<sup>15</sup> Then, in 2007, in *Kimbrough v. United States*<sup>16</sup> and *Gall v. United States*,<sup>17</sup> the Court found that a district court could justify a sentence outside a properly calculated guideline range based on the judge’s disagreement with the policy judgments of the Sentencing Commission undergirding a particular guideline, and that appellate courts could not require district courts to provide justifications for sentences proportional to the extent of difference between the sentence imposed and the guideline range because such a requirement comes “too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”<sup>18</sup>

The upshot of these opinions has been that, although post-*Booker* sentencing judges remain obligated to find all the same facts and apply all the same guidelines rules to determine a legally correct guideline range as they did before *Booker*, they are now effectively empowered to ignore the results of all this effort when imposing the actual sentence. Appellate courts can, in theory, overturn a sentence as “substantively unreasonable,”<sup>19</sup> but such reversals are vanishingly rare.<sup>20</sup> In practical fact, district court judges are now at liberty to adhere to or ignore guideline

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<sup>13</sup> *Id.* at 260-62.

<sup>14</sup> 551 U.S. 338 (2007).

<sup>15</sup> 127 S.Ct. at 2467.

<sup>16</sup> 552 U.S. 85 (2007).

<sup>17</sup> 552 U.S. 38 (2007).

<sup>18</sup> *Id.* at 595.

<sup>19</sup> In *Booker*, 543 U.S. at 262, the Court held that appellate courts should henceforth review federal sentences only for “reasonableness.” In *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456 (2007), Justice Scalia, in concurrence, distinguished between what he characterized as procedural reasonableness review - i.e., review of whether the trial court adhered to the procedures required to find a correct advisory range under the Guidelines - and substantive reasonableness review - review of whether the particular sentence imposed was reasonable based on all the facts and circumstances available to the judge in the sentencing record. *Id.* at 2482-84. Justice Scalia contended that “reasonableness review cannot contain a substantive component at all.” *Id.* at 2476. His view did not command a majority, then or since, but his nomenclature has stuck. See Bowman, *Debauch*, *supra* note 5, at 444-47 (analyzing Justice Scalia’s concurrence).

<sup>20</sup> According to U.S. Sentencing Commission data, substantive reasonableness arguments were made to appellate courts in 1760 cases in 2011, U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 59 (2012), and 1613 cases in 2012, U.S. Sentencing Commission, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 59 (2013). However, the Commission’s figures show that, in each of these years, appellate courts reversed district court sentences for substantive unreasonableness in roughly one percent of the cases in which such arguments were raised on appeal. *Id.* The Commission does not list the exact number of cases in which reversals were secured in a particular year; however, their statistics indicate that, at a maximum, only 16-18 defendants out of the

ranges as the spirit moves them, subject only to the requirement that a sentence outside the range be accompanied by some explanation which (a) is couched in the gloriously inclusive terminology of 18 U.S.C. Section 3553(a),<sup>21</sup> and (b) is not on its face barking mad.<sup>22</sup> For district

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more than 80,000 sentenced each year in federal court, *id.* at tbl. 1, secure reversal based on the substantive unreasonableness of their sentences.

The actual number appears to be even lower. The Sentencing Resource Counsel Project of the Federal Public and Community Defenders maintains a list of all sentences reversed on appeal following the Supreme Court's decision in *Gall v. United States*, 552 U.S. 38 (2007). As of December 2013, they listed only forty-eight cases decided since *Gall* in which an appellate court reversed a sentence based on substantive unreasonableness, which works out to only eight reversals for substantive unreasonableness per year.

Sentence within range reversed as substantively unreasonable: *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Sanders*, 472 F. App'x 376 (6th Cir. 2012); *United States v. Wright*, 426 F. App'x 412 (6th Cir. 2011); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009); *United States v. Paul*, 561 F.3d 970 (9th Cir. 2009).

Sentence outside range reversed as substantively unreasonable on appeal by defendant: *United States v. Ofray-Campos*, 534 F.3d 1 (1st Cir. 2008); *United States v. Esso*, 486 F. App'x 200 (2d Cir. 2012); *United States v. Olhovskiy*, 562 F.3d 530 (3d Cir. 2009); *United States v. Calderon-Minchola*, 351 F. App'x 610 (3d Cir. 2009); *United States v. Chandler*, 732 F.3d 434 (5th Cir. 2013); *United States v. Gerezano-Rosales*, 692 F.3d 393 (5th Cir. 2012); *United States v. Van*, \_\_\_ F. App'x \_\_\_, 2013 WL 5539617 (6th Cir. Oct. 8, 2013); *United States v. Melchor*, 515 F. App'x 444 (6th Cir. 2013); *United States v. Aleo*, 681 F.3d 290 (6th Cir. 2012); *United States v. Walker*, 649 F.3d 511 (6th Cir. 2011); *United States v. Censke*, 449 F. App'x 456 (6th Cir. 2011); *United States v. Worex*, 420 F. App'x 546 (6th Cir. 2011); *United States v. Ortega-Rogel*, 281 F. App'x 471 (6th Cir. 2008); *United States v. Bradley I*, 628 F.3d 394 (7th Cir. 2010); *United States v. Miller*, 601 F.3d 734 (7th Cir. 2010); *United States v. Cruz-Valdivia*, 2013 WL 1789799 (9th Cir. Apr. 29, 2013); *United States v. Lopez*, 343 F. App'x 484 (11th Cir. 2009).

Sentence outside range reversed as substantively unreasonable on appeal by government: *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008); *United States v. Hayes*, 383 F. App'x 204 (3d Cir. 2010); *United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009); *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008); *United States v. Bistline II*, 720 F.3d 631 (6th Cir. June 27, 2013); *United States v. Peppel*, 707 F.3d 627 (6th Cir. 2013); *United States v. Robinson*, 669 F.3d 767 (6th Cir. 2012); *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012); *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010); *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010); *United States v. Harris*, 339 F. App'x 533 (6th Cir. 2009); *United States v. Hunt*, 521 F.3d 636, 650 (6th Cir. 2008); *United States v. Hughes*, 283 F. App'x 345 (6th Cir. 2008); *United States v. [Davis] Omole*, 523 F.3d 691 (7th Cir. 2008); *United States v. Cole*, 721 F.3d 1016 (8th Cir. 2013); *United States v. Kane*, 639 F.3d 1121 (8th Cir. 2011); *United States v. Ressay*, 679 F.3d 1069 (9th Cir. 2012) (*en banc*); *United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009); *United States v. McQueen*, 727 F.3d 1144 (11th Cir. 2013); *United States v. Kuhlman*, 711 F.3d 1321 (11th Cir. 2013); *United States v. Jayyousi [Padilla]*, 657 F.3d 1085 (11th Cir. 2011); *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (*en banc*); *United States v. Livesay*, 587 F.3d 1274 (11th Cir. 2009); *United States v. McVay*, 294 F. App'x 488 (11th Cir. 2008); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008).

<sup>21</sup> Section 3553(a) reads as follows:

**Factors To Be Considered in Imposing a Sentence.** - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

judges, the Guidelines have become the legal equivalent of one of the duller and slower-moving forms of movie zombie – one must take sensible precautions to avoid being bitten, but they are

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- (2) the need for the sentence imposed –
    - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
    - (B) to afford adequate deterrence to criminal conduct;
    - (C) to protect the public from further crimes of the defendant; and
    - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  - (3) the kinds of sentences available;
  - (4) the kinds of sentence and the sentencing range established for –
    - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
      - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
      - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
      - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
    - (5) any pertinent policy statement –
      - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
      - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
    - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
    - (7) the need to provide restitution to any victims of the offense.

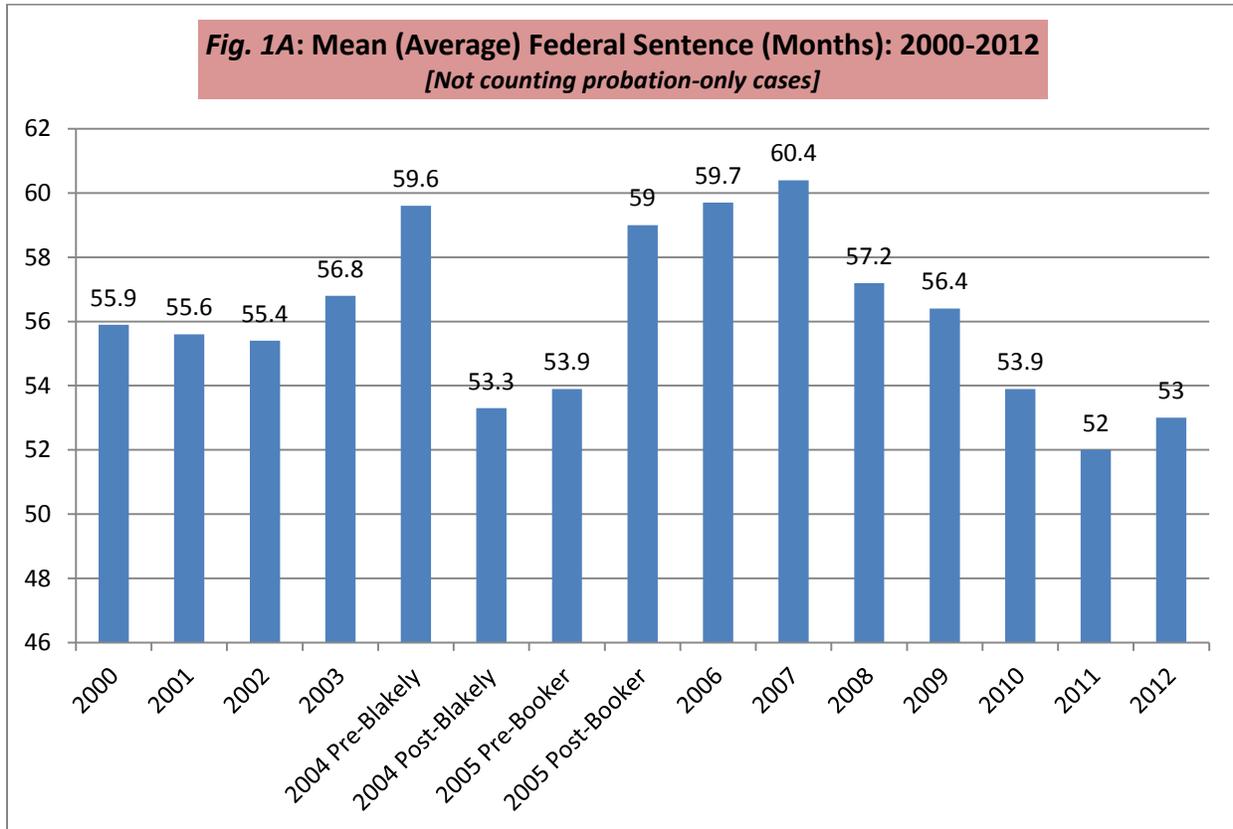
In effect, 3553(a) tells sentencing judges that they are to take into account all of the general factors and theories that are traditionally thought relevant to setting a punishment -- just deserts, deterrence, crime control, rehabilitation, restitution, rough equality of outcomes among similarly situated offenders -- in addition to the particular sentencing range prescribed by application of the Guidelines. Since the *Booker* line voided Section 3553(b), which gave the Guidelines strongly presumptive effect, and decreed that the Guidelines, which were designed to impose order and directionality on this mélange of concepts, may not be given any more weight than any other consideration, the result is that the factors listed in 3553(a) can now, quite plausibly, be enlisted to justify virtually any sentencing outcome.

<sup>22</sup> Formally, the Supreme Court has equated review of a sentence for reasonableness with an abuse of discretion standard. *Rita*, 127 S.Ct. at 2470-71 (Stevens, J., concurring). But given that, as noted above, *supra* note 20, appellate courts now reverse only eight out of the more than 80,000 sentences imposed annually for substantive unreasonableness, it is plain that a sentencing judge must now abuse his discretion to a degree approaching lunacy before appellate intervention is likely.

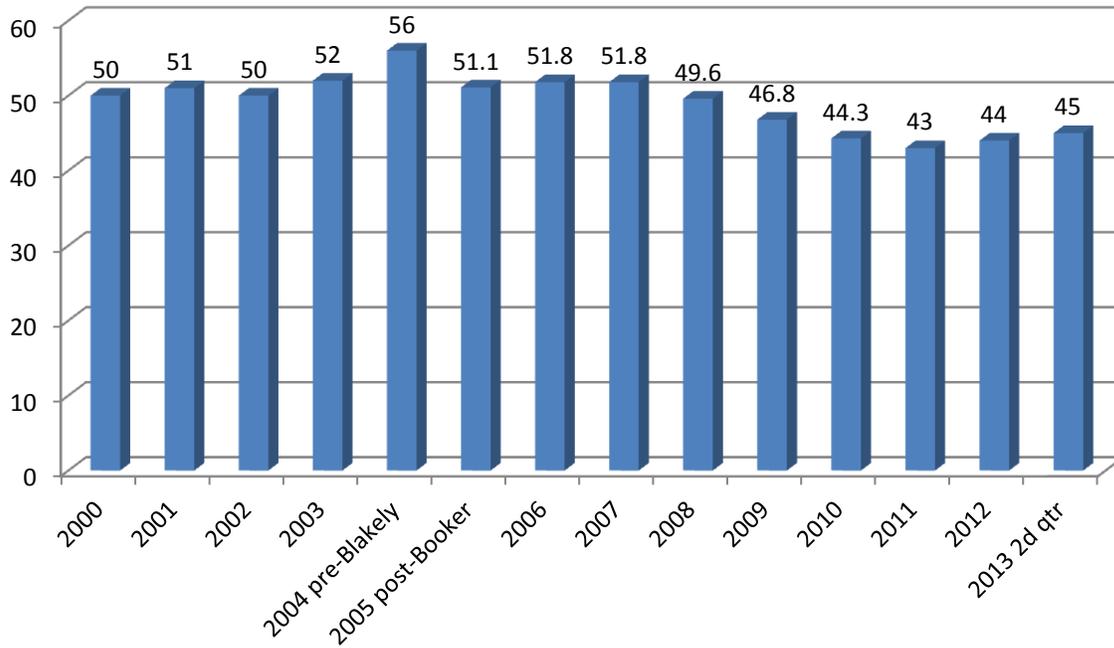
easily outwitted and, when troublesome, can be dispatched to oblivion without legal consequence.

### III. Booker and the Severity Revolution That Wasn't

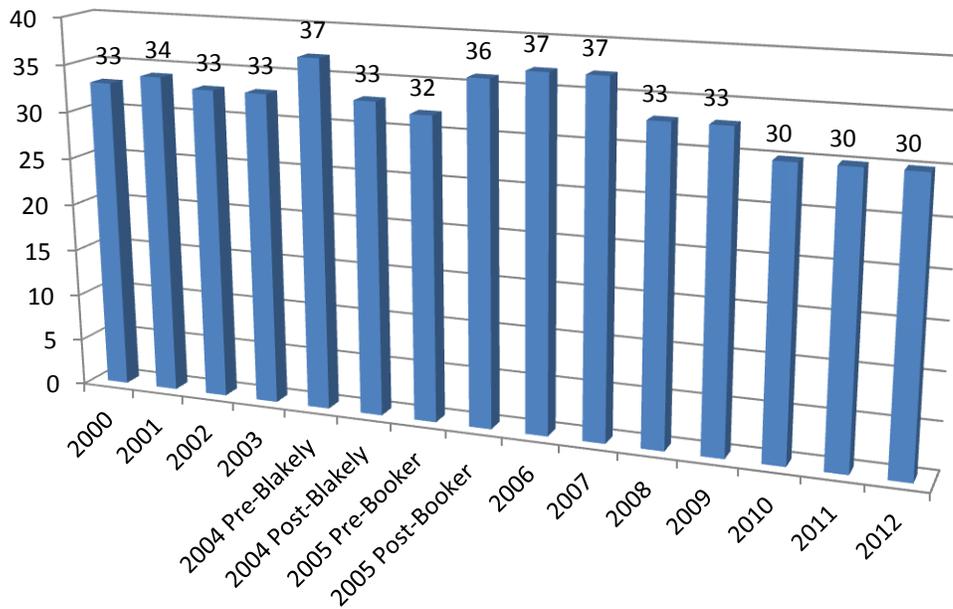
Given the widespread and vocal unhappiness with the harshness of guidelines sentencing rules, one would have expected the declaration that the Guidelines were really and truly advisory to be followed an immediate and sustained decline in the severity of sentences imposed on federal defendants. Yet, while there has certainly been some movement in that direction, careful examination of the underlying statistics reveals that it has been surprisingly limited.



**Fig. 1B: Mean (Average) Sentence Length (Months): 2000-2013**  
*[Counting Probation as Zero Months]*



**Fig. 2: Median Federal Sentence (Months) : 2000-2012**  
*[Not counting probation-only cases]*



As Figures 1A,<sup>23</sup> 1B,<sup>24</sup> and 2<sup>25</sup> illustrate, both the mean (average) and median (most common) federal sentences are now lower than they were before the 2004-2005 period in which *Blakely* and *Booker* were decided. Interestingly, however, mean and median sentence lengths actually increased in 2006 and 2007, beginning their decline only after the December 2007 *Kimbrough* and *Gall* opinions in which the Court made clear that the Guidelines were really and truly advisory. Moreover, while the mean sentence (whether calculated with or without probationary sentences) and the median sentence have dropped by a not inconsiderable seven months below their previous highs, the mean and median federal sentences are still only three to six months lower than they were in the early 2000s, when the outcry against the Guidelines' asserted severity was at fever pitch. And the decline in mean sentence length has now reversed, with a one-month upward tick in 2012 and another in the first half of 2013, while median sentences have remained flat for the last three years (2010-2012). Thus, the trend lines in Figures 1 and 2 already suggest a far more nuanced story than the standard tale in which the Guidelines placed morally outraged judges in an intolerable legal straightjacket from which *Booker* released them to frolic freely in the sunshine of enlightened and merciful discretion – Glory Hallelujah!

On the one hand, both common sense and available statistics suggest that increased judicial sentencing discretion post-*Booker* has produced lower sentences in a large and growing number of cases. Figure 3<sup>26</sup> illustrates the steady post-*Booker* increase in the percentage of cases sentenced outside the applicable guideline range. Given that approximately 98% of all sentences outside the range are imposed below the range,<sup>27</sup> the steady rise in outside-the-range sentences

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<sup>23</sup> The data in Figure 1A is derived from the 2000-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 14 (reporting mean and median length of imprisonment for federal defendants, excluding sentences of probation, home confinement, or other non-prison alternatives).

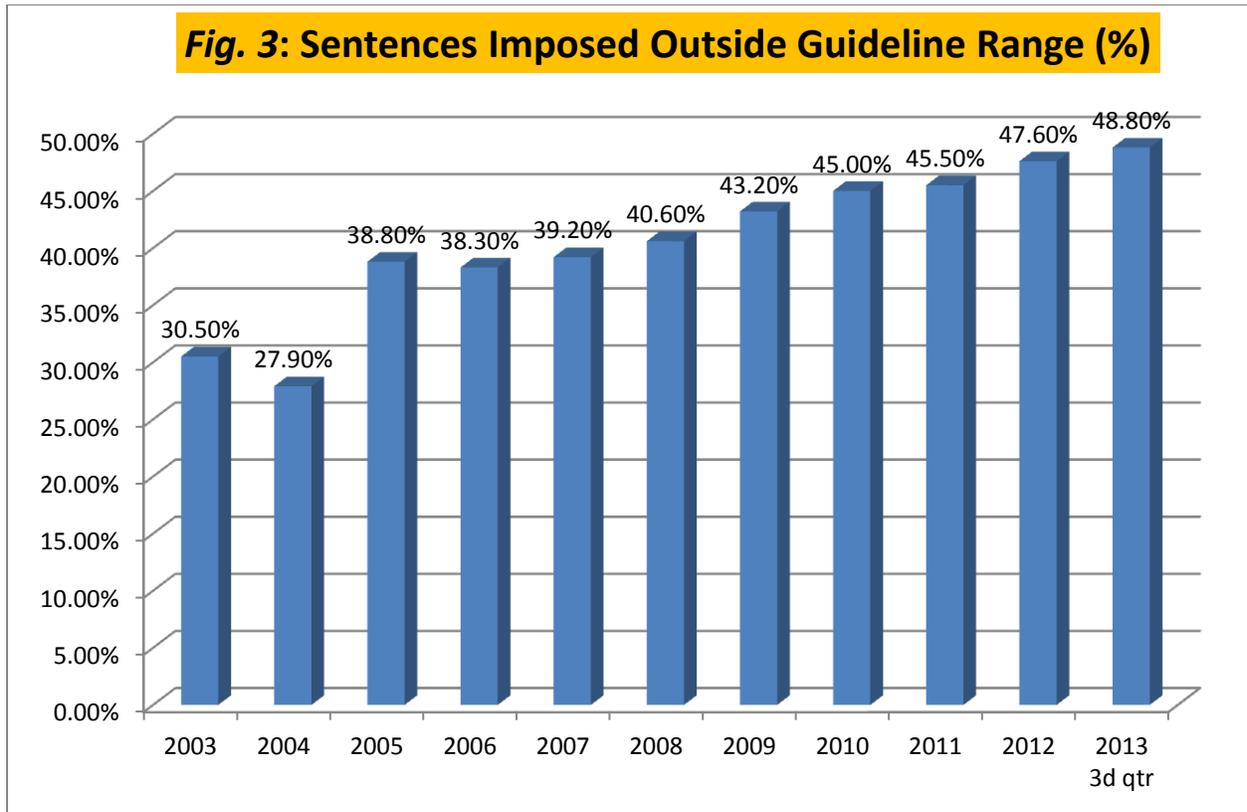
<sup>24</sup> The data in Figure 1B is derived from the 2000-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 13 (reporting mean and median length of sentence for federal defendants, counting sentences of probation as zero months).

<sup>25</sup> Id.

<sup>26</sup> The data in Figure 3 is derived from the 2000-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 26, and U.S. Sentencing Commission, Preliminary Quarterly Data Report, 3d Qtr. Release, tbl. 1 (2013), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_3rd.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_3rd.pdf).

<sup>27</sup> U.S. Sentencing Commission, 2012 Sourcebook of Federal Sentencing Statistics, fig G (2013); U.S. Sentencing Commission, Preliminary Quarterly Data Report, 3d Qtr. Release, tbl. 1 (2013), available at

should be driving down average sentence length. Indeed, as Figures 4A<sup>28</sup> and 4B<sup>29</sup> show, there is an apparent inverse correlation between increased judicial sentencing discretion and sentence severity – the more judges diverge from the guidelines, the lower the average sentence seems to fall.

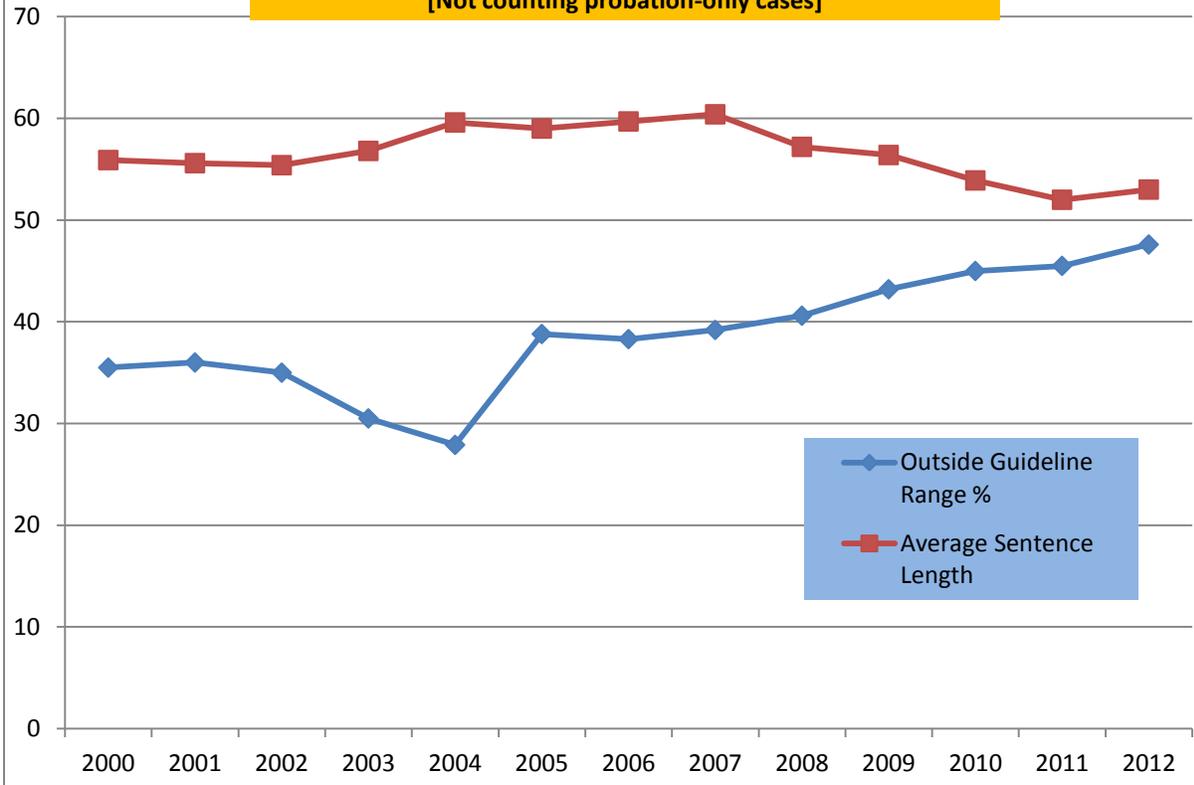


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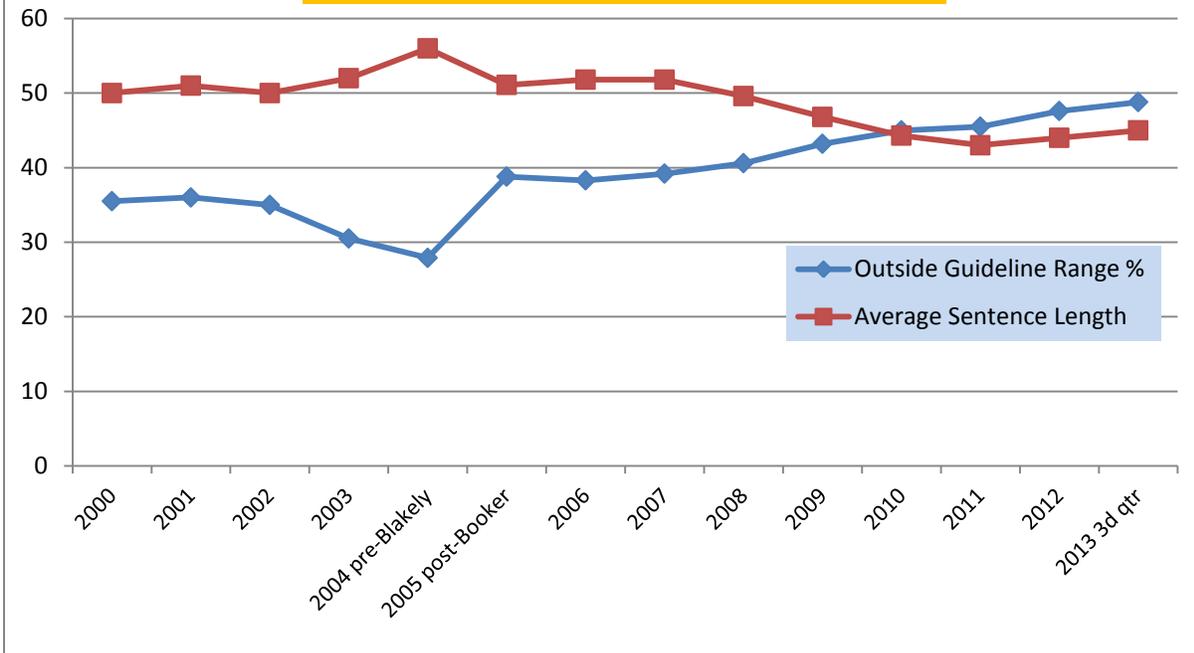
<sup>28</sup> The data in Figure 4A is derived from 2000-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tpls. 14 and 26.

<sup>29</sup> The data in Figure 4B is derived from 2000-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tpls. 13 and 26.

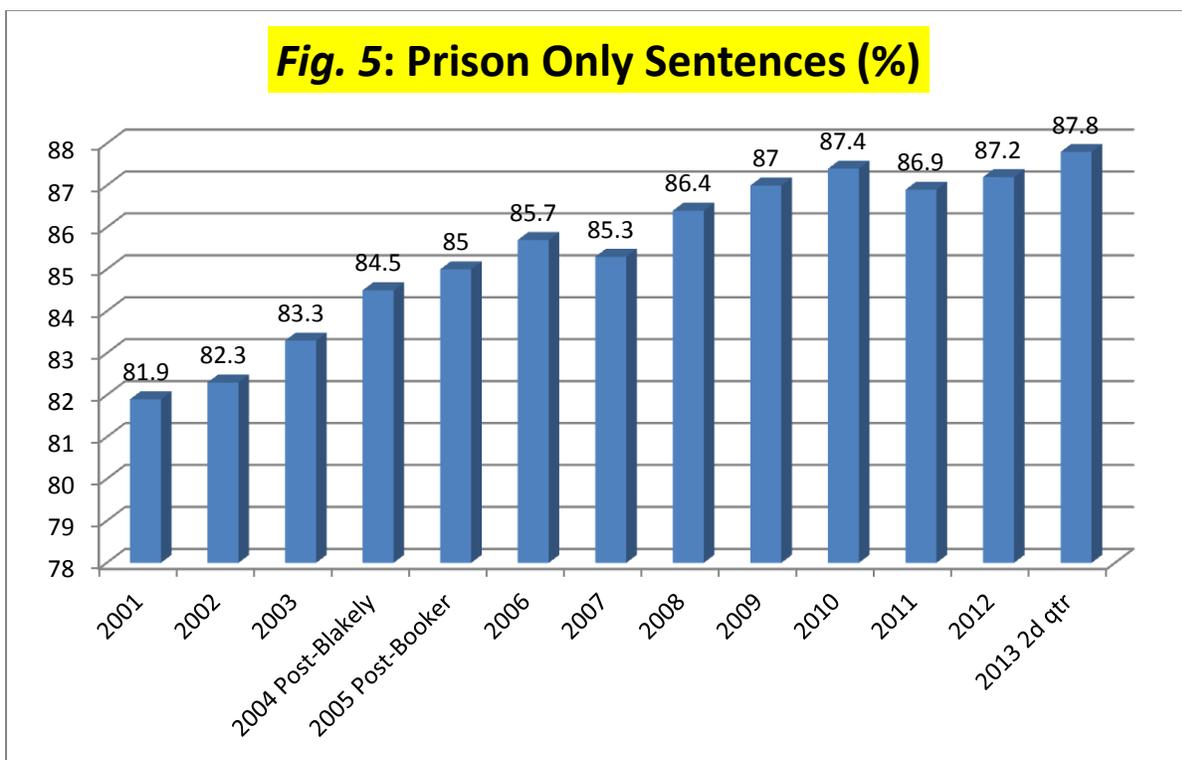
**Fig. 4A: Judicial Discretion vs. Sentence Severity**  
 [Not counting probation-only cases]



**Fig. 4B: Judicial Discretion vs. Sentence Severity**  
 [Counting Probation-Only Cases as Zero Months]



On the other hand, if one looks below the surface of the gross averages, a more complex story immediately emerges. First, given that a common charge against the guidelines regime has been that it produces more prison terms and fewer sentences of probation or mixed sentences combining incarceration with other sanctions, one would have expected that *Booker's* manumission of federal judges would have generated an upwelling of probationary or mixed sentences. In fact, the reverse has been true. As Figure 5<sup>30</sup> shows, the proportion of prison-only sentences has been creeping steadily upward for over a decade and neither *Booker* nor the *Gall/Kimbrough* duo seems to have affected this trend at all.



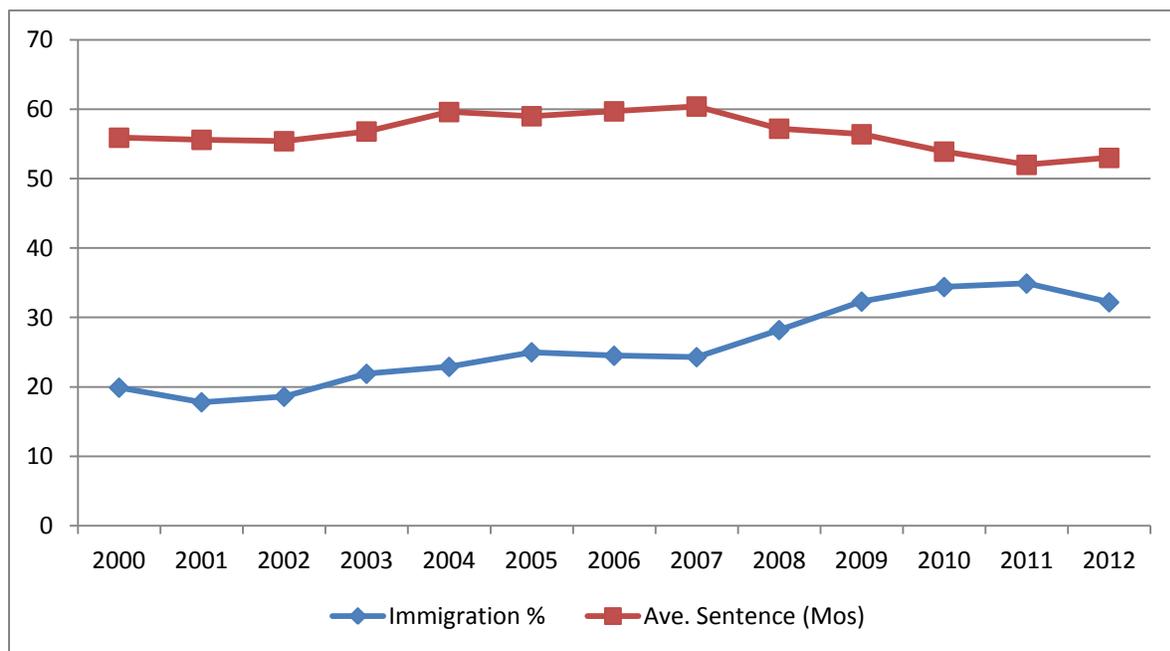
Second, the decline in the average federal sentence is plainly being driven to an important degree by changes in the mix of cases prosecuted in federal courts, as opposed to a general decrease in the sentences of similarly situated defendants. In particular, as Figure 6<sup>31</sup> illustrates,

<sup>30</sup> The data in Figure 5 is derived from 2000-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 16, and U.S. Sentencing Commission, Preliminary Quarterly Data Report, 3d Qtr. Release, tbl. 18 (2013), available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_3rd.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_3rd.pdf).

<sup>31</sup> The data in Figure 6 is drawn from the 2000-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbls. 3 and 14.

the movement of average federal sentences in the post-*Booker* period correlates directly with the percentage of relatively low-sentence immigration cases in the overall population of federal defendants. FY 2008 was the year in which *Kimbrough* and *Gall* took effect and fully liberated federal judges to vary from the guidelines at will. But more importantly it saw the beginning of a huge upsurge in immigration cases, which went from 17,592 or 24.2 percent of all federal cases in 2007<sup>32</sup> to roughly 30,000 or 34.5 percent of all cases in 2011.<sup>33</sup> Given that, in 2011, the average sentence for an immigration case was 16 months—as compared to 70 months for drug trafficking, 83 months for firearms, and 23 months for fraud<sup>34</sup>—the downward pressure exerted by the rising tide of immigration cases on the federal average sentence was immense. And the data for FY 2012 provide a lovely, if brief, indication that the reverse is also true. When the percentage of immigration cases fell from 34.5 percent in 2011 to 31.5 in 2012,<sup>35</sup> the length of the average federal sentence dutifully ticked right back up from 52 to 53 months.<sup>36</sup>

Figure 6: Relation of Average Federal Sentence to Percentage of Immigration Cases



<sup>32</sup> U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, tbl. 3 (2008).

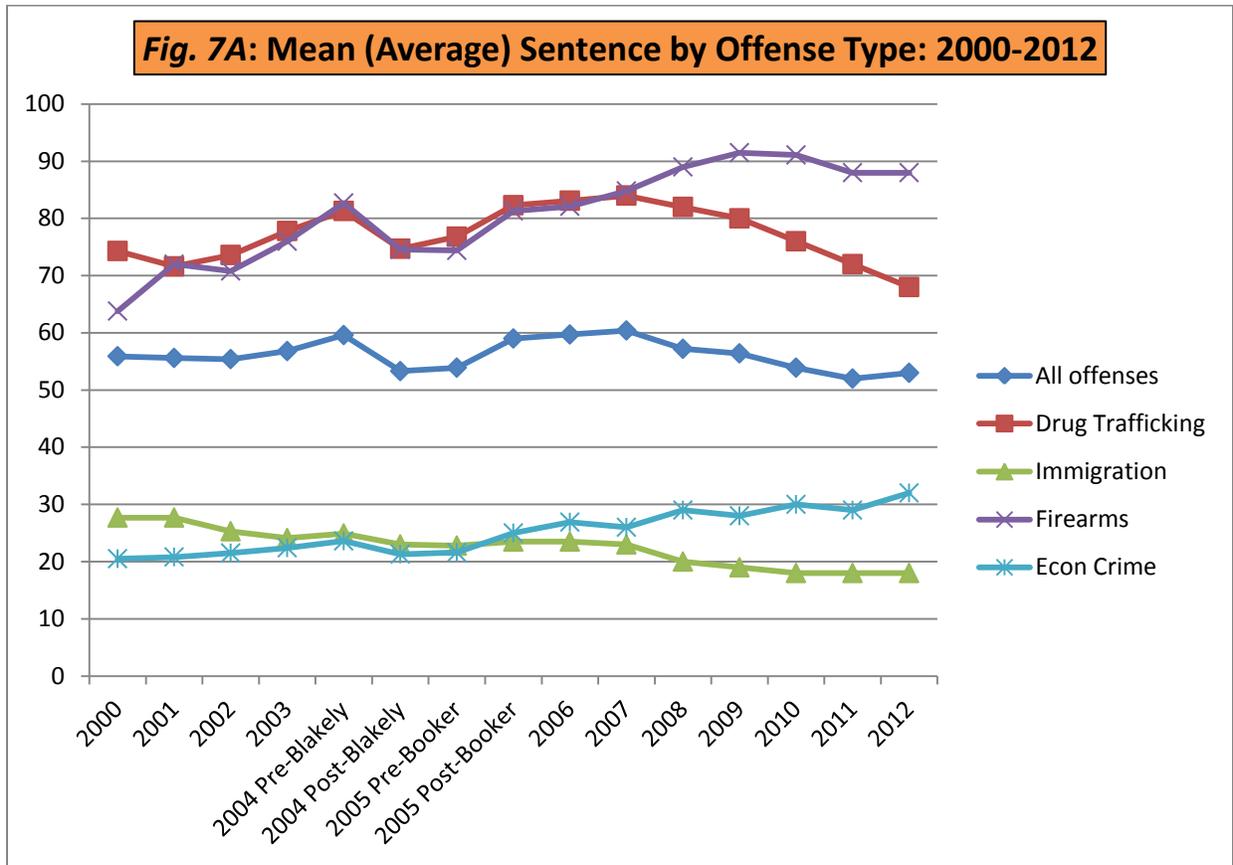
<sup>33</sup> U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, tbl. 3 (2012).

<sup>34</sup> *Id.* at 29, tbl. 13.

<sup>35</sup> U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, tbl. 3 (2013).

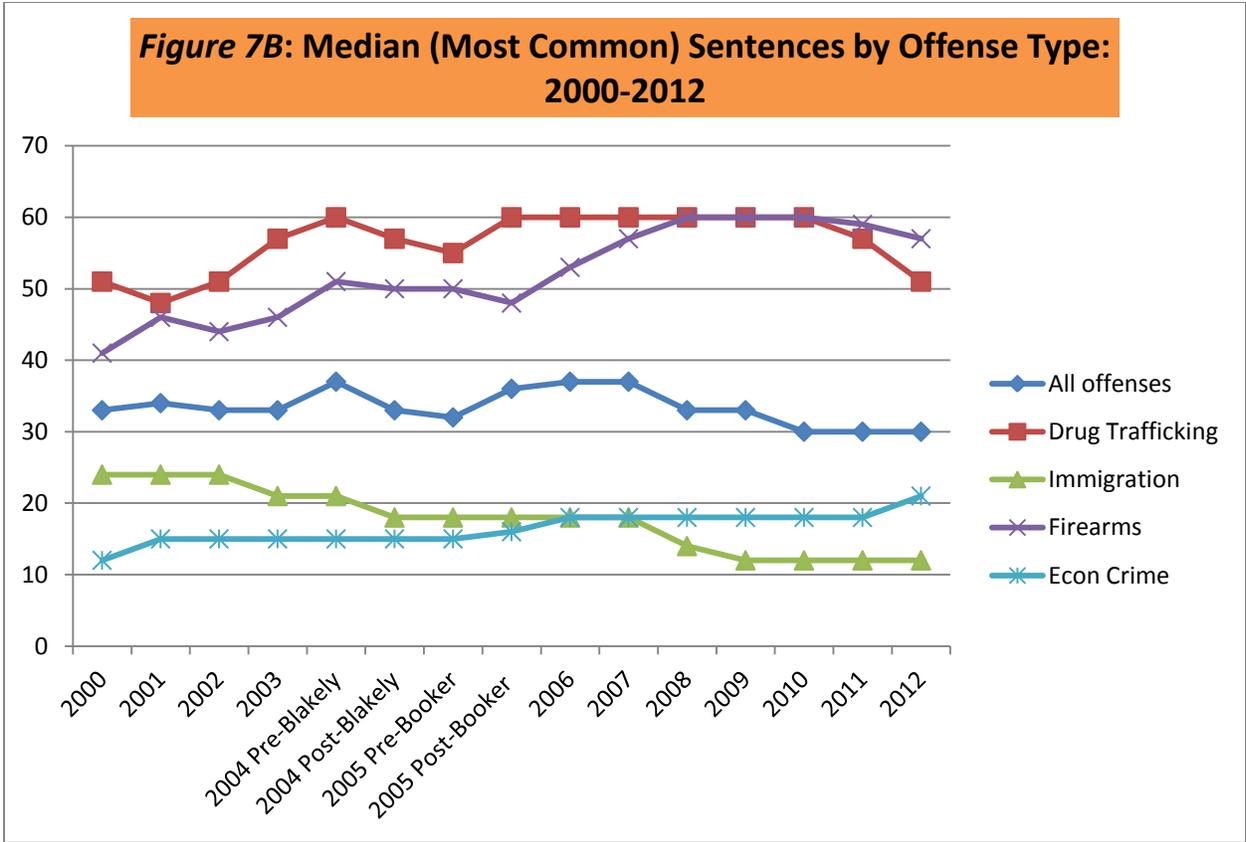
<sup>36</sup> Compare U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30, tbl. 14 (2012), with U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30, tbl. 14 (2013).

Third, and most importantly, there exists direct evidence that, within offense types, defendants sentenced since *Booker* are not faring all that much differently than those sentenced before that supposed earthquake. To begin, it appears that changes in average sentence length are quite specific to offense type. As Figures 7A<sup>37</sup> and 7B<sup>38</sup> show, since 2007, mean and median drug trafficking and immigration sentences have declined, but mean and median sentences for economic crimes and firearms offenses have increased.



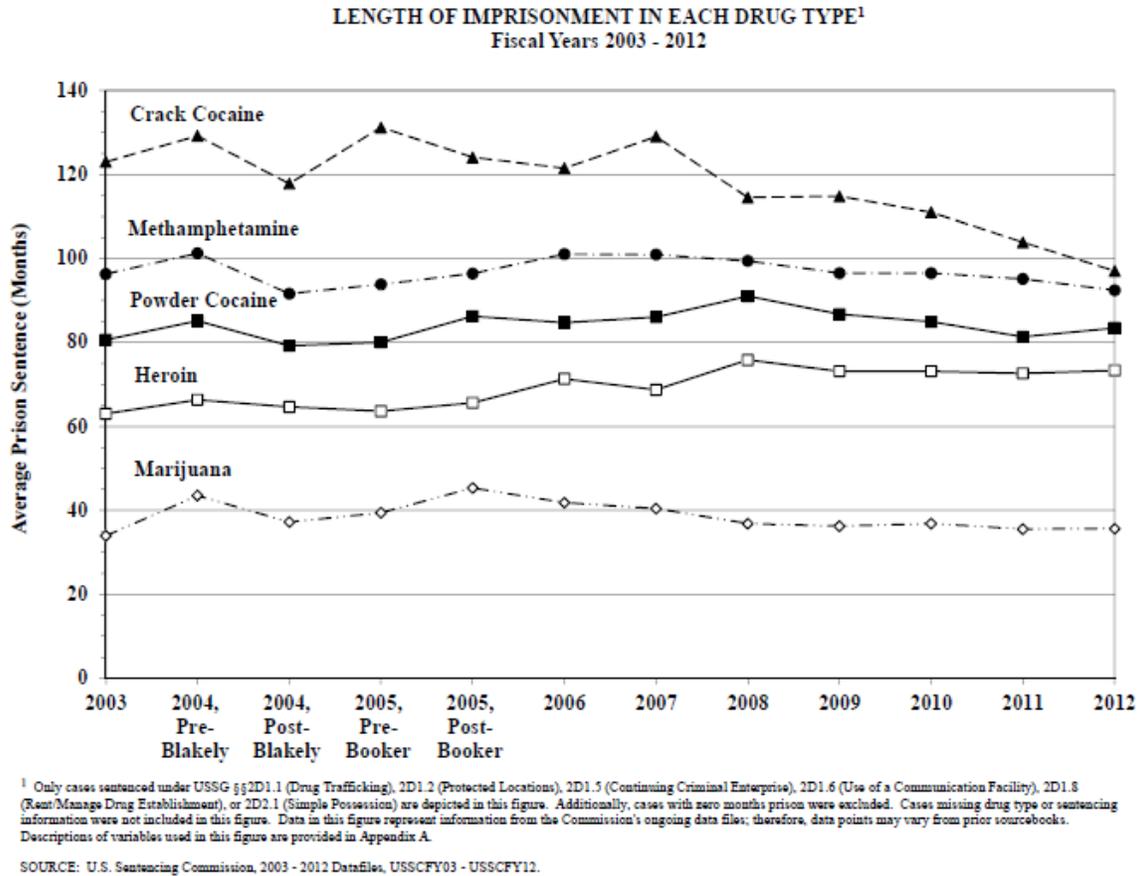
<sup>37</sup> The data in Figure 7A is drawn from the 2007-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 14.

<sup>38</sup> The data in Figure 7B is drawn from the 2007-2012 editions of U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. 14.



The same heterogeneity is observable within general offense types. As shown in Figure 8, the severity trend lines for average drug sentences have varied markedly by drug type.

Figure 8<sup>39</sup>



Indeed, perhaps the most notable thing about drug sentences seven years post-*Booker* is how little they have changed. As indicated in Figure 9 below, a comparison of sentences in 2003, the last full year before the *Blakely-Booker* shake-up, with those in 2012 shows that the mean (average) sentences of powder cocaine, heroin, and marijuana offenders have actually increased in the last decade, as have the median (most common) sentences for heroin and marijuana. Mean sentences for crack cocaine and methamphetamine cases have declined, but the drop for methamphetamine has been only 4.3 months. Median sentences for crack cocaine and methamphetamine fell, albeit by only three months for methamphetamine, but median powder cocaine sentences have held exactly flat at 60 months throughout the era of revived judicial sentencing discretion. In short, the only class of drug offenses that has seen a significant and sustained decline in sentence length over the last decade has been crack cocaine. Not

<sup>39</sup> Figure 8 is a reproduction of Figure L in U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2013).

coincidentally, crack is the only drug type as to which both the applicable guidelines and the governing statute have been amended to reduce the prescribed sentences. The Sentencing Commission reduced guideline sentences for crack effective November 1, 2007<sup>40</sup> and subsequently made those reductions retroactive for offenses occurring before that date.<sup>41</sup> In 2010, Congress passed the Fair Sentencing Act which raised the quantities of crack triggering five and ten-year mandatory sentences,<sup>42</sup> thus reducing average sentences still further. As illustrated in Figure 8, the progression of the thirty-month drop in average crack sentence since 2007 corresponds exactly to the actions of the Commission and Congress. The average cocaine sentence was at near its all-time peak level in 2007, but dropped precipitously in 2008, then leveled off, and then began a renewed decline beginning in 2010.

**Figure 9<sup>43</sup>**

<i>Drug Type</i>	2003 Mean (Average) Sentence	2012 Mean (Average) Sentence	2003 Median (Most Common) Sentence	2012 Median (Most Common) Sentence
Powder Cocaine	80.6	83	60	60
Crack Cocaine	123	97	100	78
Heroin	63	73	46	60
Marijuana	33.9	36	21	24
Methamphetamine	96.3	92	75	72

The stasis in sentence length for drugs other than crack, and the rise in average sentence for heroin and marijuana, could conceivably be the result of government behavior which has offset increasing discretionary lenity by judges. For example, post-*Booker* prosecutors might be bringing cases with ever-rising drug quantities, or insisting on pleas to ever-larger amounts, to offset ever-increasing judicial leniency. But the data will not support that hypothesis. Because the offense level in drug cases is driven almost exclusively by the type and quantity of drug, a

<sup>40</sup> U.S.S.G. App. C, amends. 705, 706, 711.

<sup>41</sup> See *United States v. Brewer*, 520 F.3d 367, 373 (2008)

<sup>42</sup> Pub.L. 111-220

<sup>43</sup> The data in Figure 9 is taken from U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. J (2004), and U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. J (2013).

significant change in prosecutorial charging or plea bargaining practice on quantity should be reflected in the average guideline range for drug cases generally, and more particularly in the average guideline range within cases involving a particular drug type. As Figure 9 indicates, the average (mean) guideline minimum for drug cases has fluctuated slightly from quarter to quarter over the last five years, but the overall trend line is flat to slightly down. The same is true within drug type. From FY 2008 through FY 2012, the average (mean) guideline minimum for methamphetamine, heroin, and marijuana cases has remained almost exactly flat,<sup>44</sup> meaning that the average drug quantity per case within each drug type has stayed uncannily constant.<sup>45</sup>

That being said, the statistical relationship that best illustrates the tenacity of the Guidelines as determinants of actual sentences - both as to federal defendants generally and as to defendants in particular offenses types - is the difference between the average guideline minimum and the average sentence imposed. The guideline minimum/actual sentence differential shows how far the sentencing results produced by the interactions of judges, prosecutors, defense attorneys, and other system actors deviate from the norm prescribed by the Guidelines. Figures 10-14 below chart the guideline minimum/actual sentence differential, quarter by quarter, from the *Gall* and *Kimbrough* decisions in December 2007 through the third

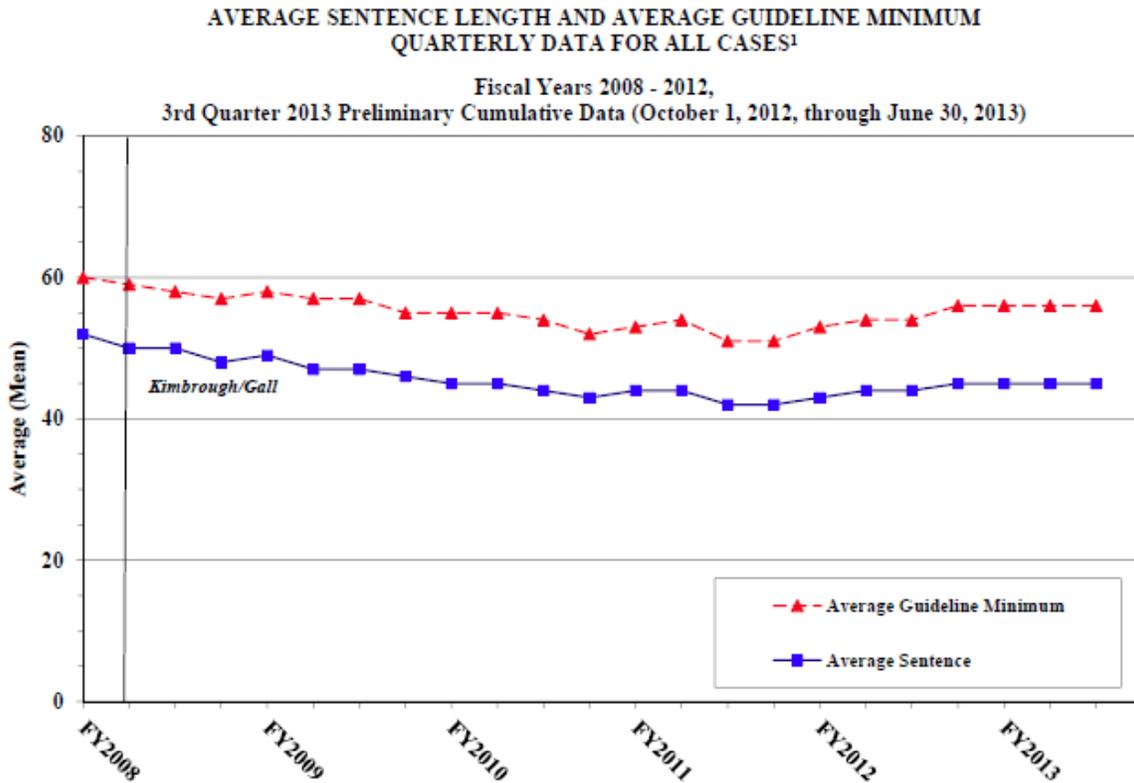
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<sup>44</sup> U.S. Sentencing Commission, Quick Facts About Methamphetamine Trafficking Offenses (2012), available at [http://www.usc.gov/Quick\\_Facts/Quick\\_Facts\\_Methamphetamine\\_Trafficking.pdf](http://www.usc.gov/Quick_Facts/Quick_Facts_Methamphetamine_Trafficking.pdf) (noting that the average guideline minimum for methamphetamine traffickers remained "consistently between 121 and 122 months" from 2008-2012, and that the average sentence imposed "decreased from 98 to 92 months"); U.S. Sentencing Commission, Quick Facts About Heroin Trafficking Offenses (2012), available at [http://www.usc.gov/Quick\\_Facts/Quick\\_Facts\\_Heroin\\_Trafficking.pdf](http://www.usc.gov/Quick_Facts/Quick_Facts_Heroin_Trafficking.pdf) (noting that the average guideline minimum for heroin traffickers remained stable at approximately 90 months from 2008-2012, and that the average sentence imposed "averaged around 69 months during that period"); U.S. Sentencing Commission, Quick Facts About Marijuana Trafficking Offenses (2012), available at [http://www.usc.gov/Quick\\_Facts/Quick\\_Facts\\_Marijuana\\_Trafficking.pdf](http://www.usc.gov/Quick_Facts/Quick_Facts_Marijuana_Trafficking.pdf) (noting that the average guideline minimum for marijuana traffickers was "consistently between 40 and 43 months" from 2008-2012, and that the average sentence imposed "was consistently between 33 and 35 months").

<sup>45</sup> One disconcerting implication of this reality, at least for those who support vigorous criminal law responses to drug trafficking, is that federal anti-drug efforts seem to be having virtually zero effect on the supply side of illegal drug markets. Despite the incarceration of roughly 25,000 new defendants each year in the federal system alone, compare U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 33 (2013) (showing 25,367 persons sentenced for federal drug offenses in FY 2012), with U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 33 (2013) (showing 26,023 persons sentenced for federal drug offenses in FY 2003), the same number of people moving the same quantities of the same drugs are caught by federal agents year after year. Of course, it may be that, absent federal efforts, there would be more people trafficking in more drugs, but even if so, it appears that the effectiveness of federal drug enforcement has reached something close to its irreducible practical limits.

quarter of 2013 for all cases (Figure 10), and for the major subcategories of federal offense: drugs, firearms, alien smuggling, and economic crime cases.

**Figure 10<sup>46</sup>**



<sup>1</sup> Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2008 - 2012 Datafiles, USSCFY08 - USSCFY12, and Preliminary Data from USSCFY13 (October 1, 2012, through June 30, 2013).

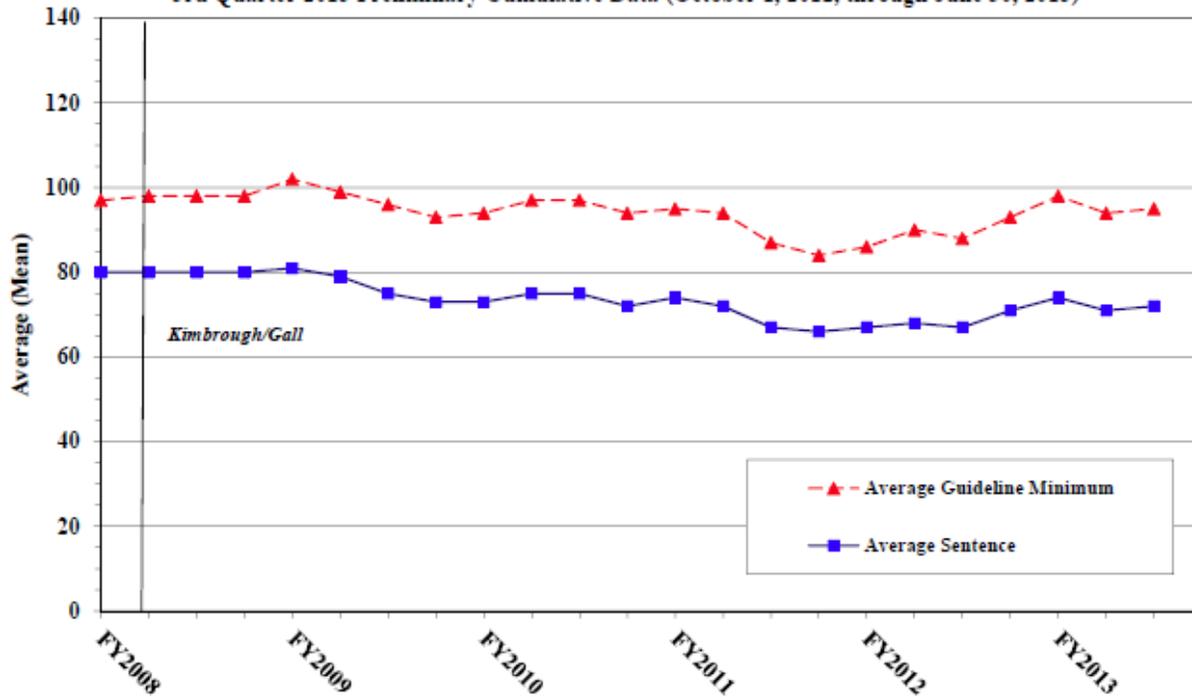
<sup>46</sup> Figure 10 is a reproduction of Figure C in U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT, 3d Qtr. (June 30, 2013) available at [http://www.usc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_3rd.pdf](http://www.usc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_3rd.pdf).

Figure 11<sup>47</sup>

AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM QUARTERLY DATA FOR §2D1.1 OFFENDERS (UNLAWFUL DRUG TRAFFICKING OR MANUFACTURING)<sup>1</sup>

Fiscal Years 2008 - 2012,

3rd Quarter 2013 Preliminary Cumulative Data (October 1, 2012, through June 30, 2013)



<sup>1</sup> Figure includes only cases with a primary sentencing guideline of USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

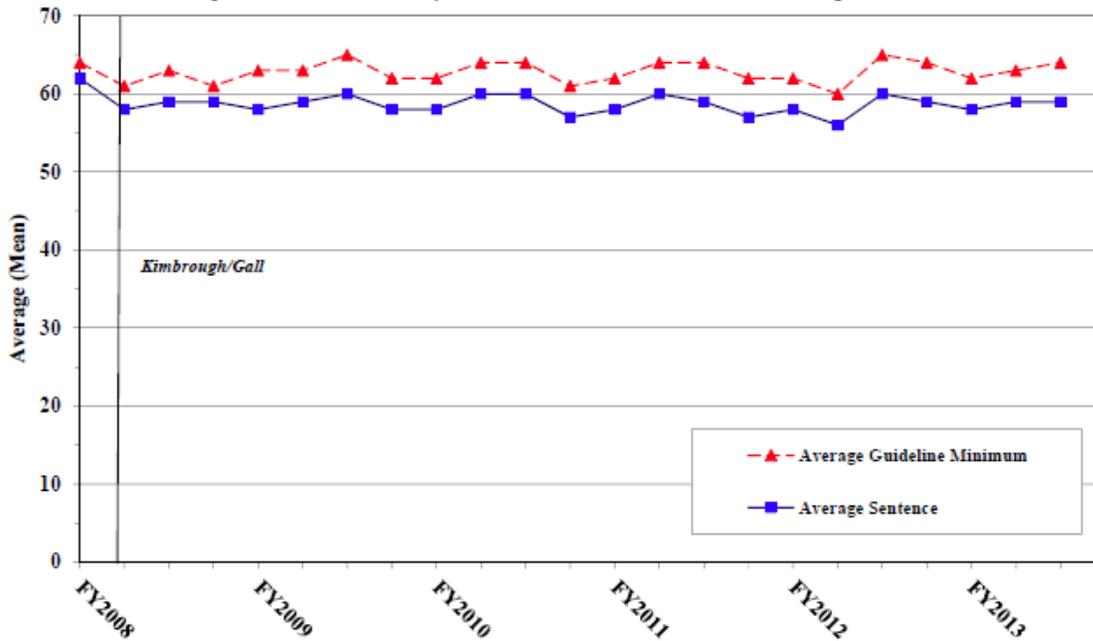
SOURCE: U.S. Sentencing Commission, 2008 - 2012 Datafiles, USSCFY08 - USSCFY12, and Preliminary Data from USSCFY13 (October 1, 2012, through June 30, 2013).

<sup>47</sup> Figure 11 is a reproduction of Figure H in U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT, 3d Qtr. (June 30, 2013) available at [http://www.usc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_3rd.pdf](http://www.usc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_3rd.pdf).

Figure 12<sup>48</sup>

AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM QUARTERLY DATA FOR §2K2.1 OFFENDERS (UNLAWFUL POSSESSION OF OR TRANSACTION IN FIREARMS)<sup>1</sup>

Fiscal Years 2008 - 2012,  
3rd Quarter 2013 Preliminary Cumulative Data (October 1, 2012, through June 30, 2013)

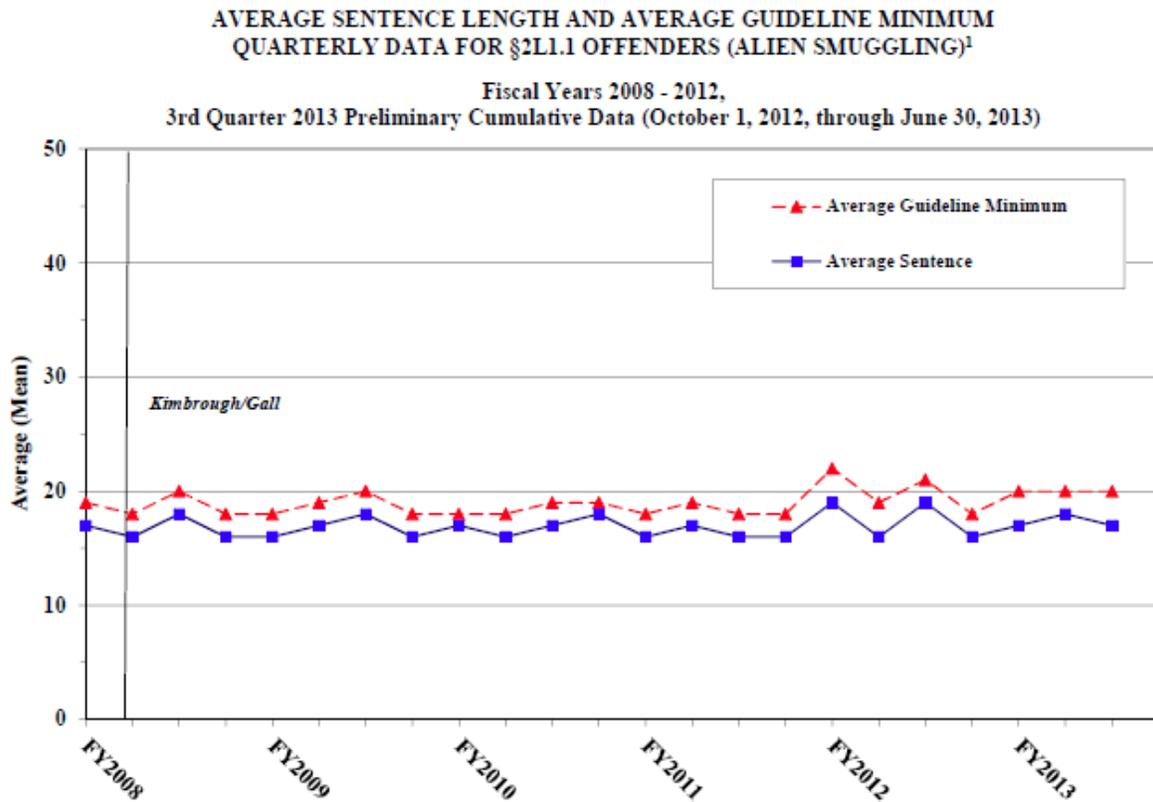


<sup>1</sup> Figure includes only cases with a primary sentencing guideline of USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2008 - 2012 Datafiles, USSCFY08 - USSCFY12, and Preliminary Data from USSCFY13 (October 1, 2012, through June 30, 2013).

<sup>48</sup> Figure 12 is a reproduction of Figure E in U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT, 3d Qtr. (June 30, 2013) available at [http://www.usc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_3rd.pdf](http://www.usc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_3rd.pdf).

Figure 13<sup>49</sup>

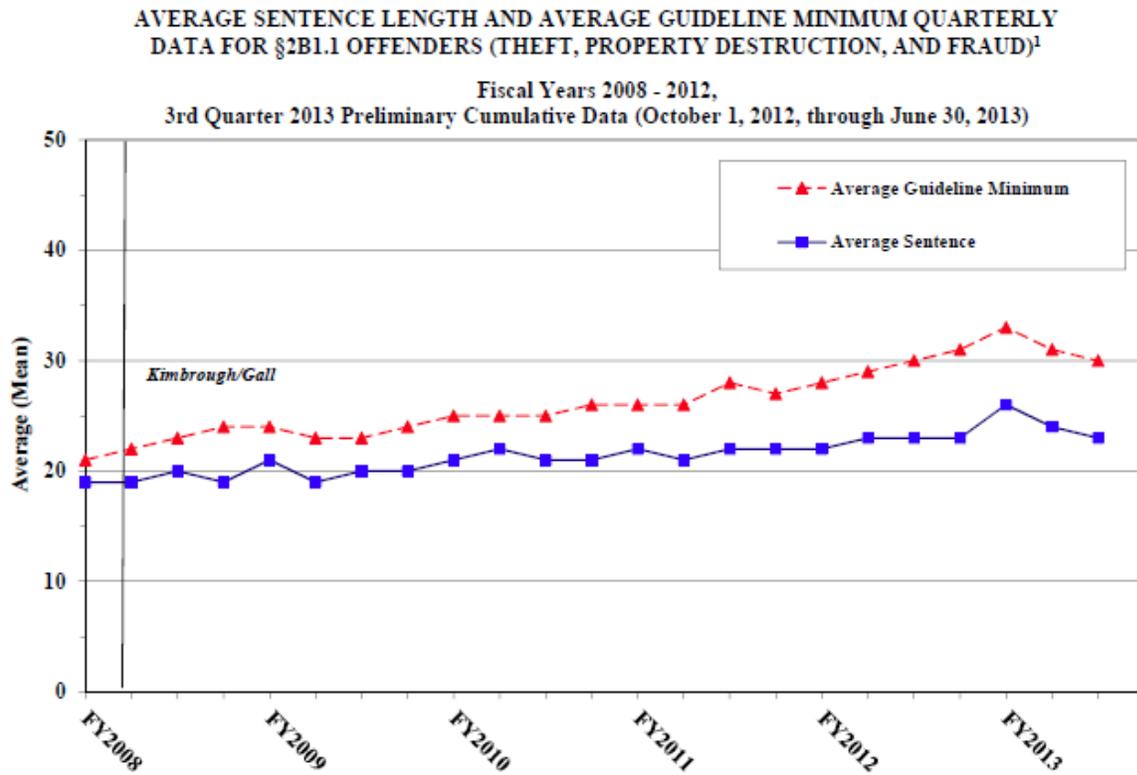


<sup>1</sup> Figure includes only cases with a primary sentencing guideline of USSG §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2008 - 2012 Datafiles, USSCFY08 - USSCFY12, and Preliminary Data from USSCFY13 (October 1, 2012, through June 30, 2013).

<sup>49</sup> Figure 13 is a reproduction of Figure F in U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT, 3d Qtr. (June 30, 2013) available at [http://www.usc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_3rd.pdf](http://www.usc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_3rd.pdf).

Figure 14<sup>50</sup>



<sup>1</sup> Figure includes only cases with a primary sentencing guideline of USSG §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligation of the United States). Additionally, cases with an amendment year prior to 2001 were excluded from this figure because prior to this time fraud cases were reported separately as USSG §2F1.1. Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2008 - 2012 Datafiles, USSCFY08 - USSCFY12, and Preliminary Data from USSCFY13 (October 1, 2012, through June 30, 2013).

Given that judges now operate in an advisory regime in which they have nearly unbounded discretion to embrace or reject guideline sentences, these charts suggest several conclusions. The first is that the judiciary has decidedly not enlisted in a broad-gauge revolt against the severity levels prescribed by the guidelines. Figure 10 shows two things. First, the actual average sentence for all cases is always lower than the average guideline minimum, which is wholly unsurprising because throughout the Guidelines era the majority of sentences imposed

<sup>50</sup> Figure 14 is a reproduction of Figure D in U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT, 3d Qtr. (June 30, 2013) available at [http://www.ussc.gov/Data\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/Quarterly\\_Sentencing\\_Updates/USSC\\_2013\\_Quarter\\_Report\\_3rd.pdf](http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2013_Quarter_Report_3rd.pdf).

within the range have been at the lower end of that range<sup>51</sup> and some significant proportion of all defendants (ranging from about one-quarter in the early years<sup>52</sup> to nearly half in 2012<sup>53</sup>) have always been sentenced below the applicable range. Second, from 2007-2013, the two measurements moved in nearly perfect tandem, with only a very slight broadening of the guideline minimum/actual sentence differential in this period. Figure 11 reveals the same pattern for drug cases, including the same very modest increase in guideline minimum/actual sentence differential. Figures 12 and 13 show the guideline minimums and actual sentences in firearm and immigration cases moving in almost-perfect lockstep, with less of a differential and no increase in differential over time. What is so striking about these figures is that, for three of the four most common case types in federal court, the system seems to be in rough equilibrium, comfortable with imposing sentences at a modest and fairly standard discount from the sentences called for by the guidelines and producing average sentences only fractionally lower than those imposed before *Booker*.

The only anomalous case type is economic crime (Figure 14), in which the average guideline minimum has increased steadily, from under 20 months to over 30 months, while the average sentence imposed has risen only slightly, from about 19 months in FY 2008 to about 23 months in 2013. Simultaneously, the guideline minimum/actual sentence differential for economic crime has roughly quadrupled, from perhaps two months to roughly eight. These figures - and the Sentencing Commission's reaction to them - hold several possible lessons, one encouraging, another less so.

The encouraging lesson stems from the fact that the Commission is acutely aware of the degree of divergence between actual sentences and guideline prescriptions in the economic crime area. In September 2013, the Commission held a symposium in New York to consider the

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<sup>51</sup> See, e.g. U.S. SENTENCING COMMISSION, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 60 fig. H (1998) (showing majority of defendants in every major crime category sentenced within the guideline range were sentenced to the guideline minimum or within the bottom half of the range); U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 86 fig. H (2012) (same).

<sup>52</sup> See, e.g., U.S. SENTENCING COMMISSION, 1993 ANNUAL REPORT 156 (1994) (reporting that in FY 1993, 23.5% of all sentences were downward departures).

<sup>53</sup> U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. N (2013) (reporting that 45.6% of all sentences were imposed below the guideline range).

principle complaints about the primary economic crime guideline, Section 2B1.1,<sup>54</sup> and it is actively studying revisions to that Guideline.<sup>55</sup> If the Commission is successful in crafting and passing amendments that address the *valid* complaints about economic crime sentencing to the satisfaction of the primary stakeholders in the federal sentencing system, that will represent a signature success for one of the often-heard arguments in favor of the post-*Booker* advisory system, namely that allowing judges greater latitude to diverge from the guideline range generates valuable feedback in response to which beneficial changes to the guidelines can be made.

The more troubling aspect of the economic crime story is that some aspects of the judiciary's revolt against these guidelines may be ill-considered. As I have detailed elsewhere, Section 2B1.1 has been repeatedly amended throughout the guidelines period to increase the prescribed sentences for a broad swath of economic crime offenders.<sup>56</sup> This process accelerated markedly when the Sentencing Commission's Economic Crime Package of 2001, which designedly raised sentences for mid-to-high level white collar offenders, was followed by a series of additional increases compelled by congressional directives in the Sarbanes-Oxley Act of 2002. The result was a sentencing structure that prescribes unprecedented multi-decade sentences for the relatively few defendants convicted of crimes that caused losses in the tens or hundreds of millions of dollars - sentences longer than those customarily imposed on bank robbers and even murderers.<sup>57</sup> Indeed, in these very big cases, guidelines calculations routinely produce offense levels that significantly exceed 43, and are therefore, quite literally, off the top of the guidelines chart, on which an offense level of 43 equals life imprisonment.<sup>58</sup> It is thus hardly remarkable that judges would balk at literal application of obviously ill-considered rules for these extraordinary cases. However, the post-Sarbanes-Oxley structure also raised sentences for those outside of the financial criminal elite, but by not nearly so much. For example, in 2012,

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<sup>54</sup> See [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Economic\\_Crimes/20130918-19\\_Symposium/Transcript-of-Symposium-on-Economic-Crime.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Economic_Crimes/20130918-19_Symposium/Transcript-of-Symposium-on-Economic-Crime.pdf).

<sup>55</sup> U.S. Sentencing Commission, Notice of Final Priorities, 2013-14, [http://www.ussc.gov/Legal/Federal\\_Register\\_Notices/20130820\\_FR\\_Final\\_Priorities.pdf](http://www.ussc.gov/Legal/Federal_Register_Notices/20130820_FR_Final_Priorities.pdf).

<sup>56</sup> Frank O. Bowman, III, *Pour Encourage les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. LAW 373, 426-30 (2004).

<sup>57</sup> Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT. REP. 167, 168-69, (2008).

<sup>58</sup> *Id.* at 168; U.S.S.G., Part A (Sentencing Table).

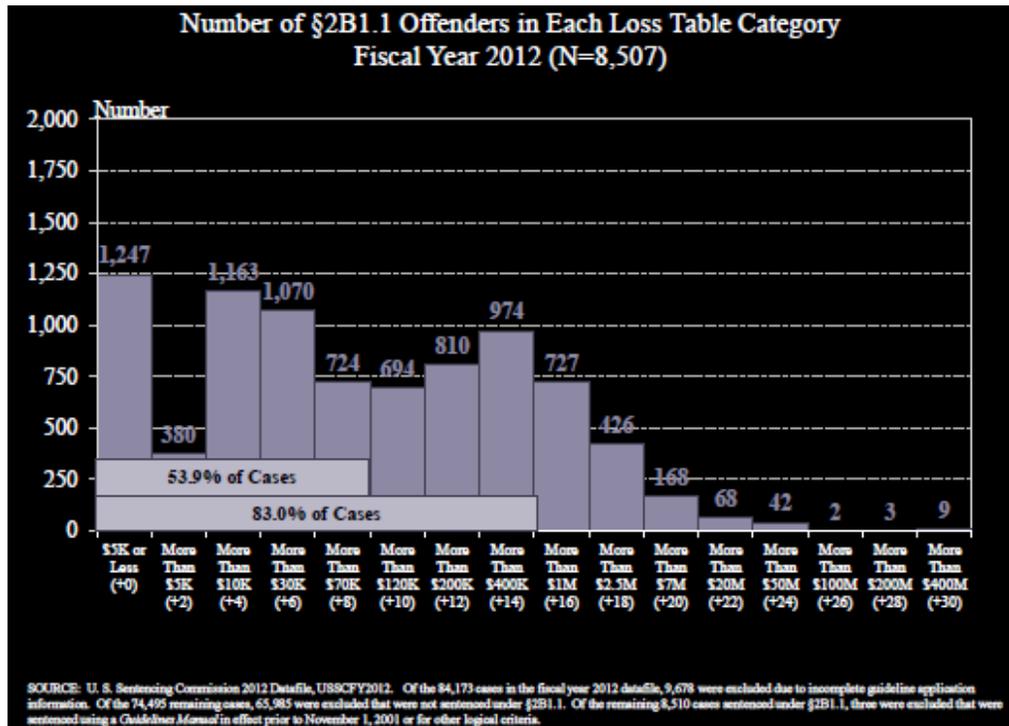
the average guideline minimum for a defendant whose crime caused a loss of between \$400,000 and \$1 million was 41 months, and for losses of \$1 million to \$2.5 million, it was 53 months, or not quite four-and-one-half years.<sup>59</sup> And yet it appears that judges are routinely declining to impose guideline sentences even at these far lower levels. In that regard, consider Figures 15 through 17 below.

Figure 15 shows that 83% of cases sentenced under the fraud guideline involve losses of less than \$1 million, and about 91% involve losses less than \$2.5 million. Figure 16 shows the difference between the minimum guideline sentence and the average imposed sentence for each guideline loss amount category. Figure 17 shows, for each guideline loss category, the proportion of sentences imposed within the range, above the range, below the range because the government recommended that result, or below the range because a judge lowered the sentence absent a government recommendation. Taken together, these charts tell a remarkable story. In sum, beginning at the low end with cases in which at least \$70,000 was stolen and the average guideline minimum was only 21 months, and running up to cases in which the loss ranged from \$1 million to \$2.5 million and the average guideline minimum was 53 months, judges imposed below-range sentences at least 60% of the time. And in one-quarter to one-third of these cases, judges did so on their own initiative and despite the absence of any government suggestion that leniency was warranted. Even in cases where the defendant stole more than \$1 million dollars and the average guideline minimum was only 53 months, judges were willing to impose a guideline sentence in only 34.7% of the cases.

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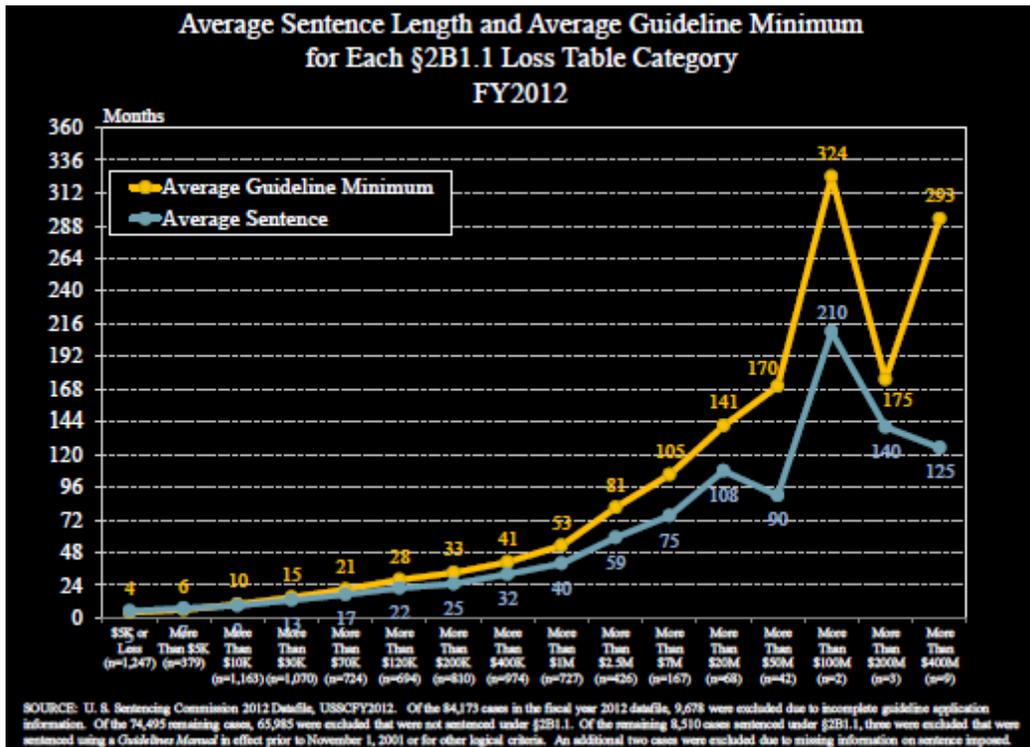
<sup>59</sup> Figure 7, econ crime symposium materials

Figure 15<sup>60</sup>



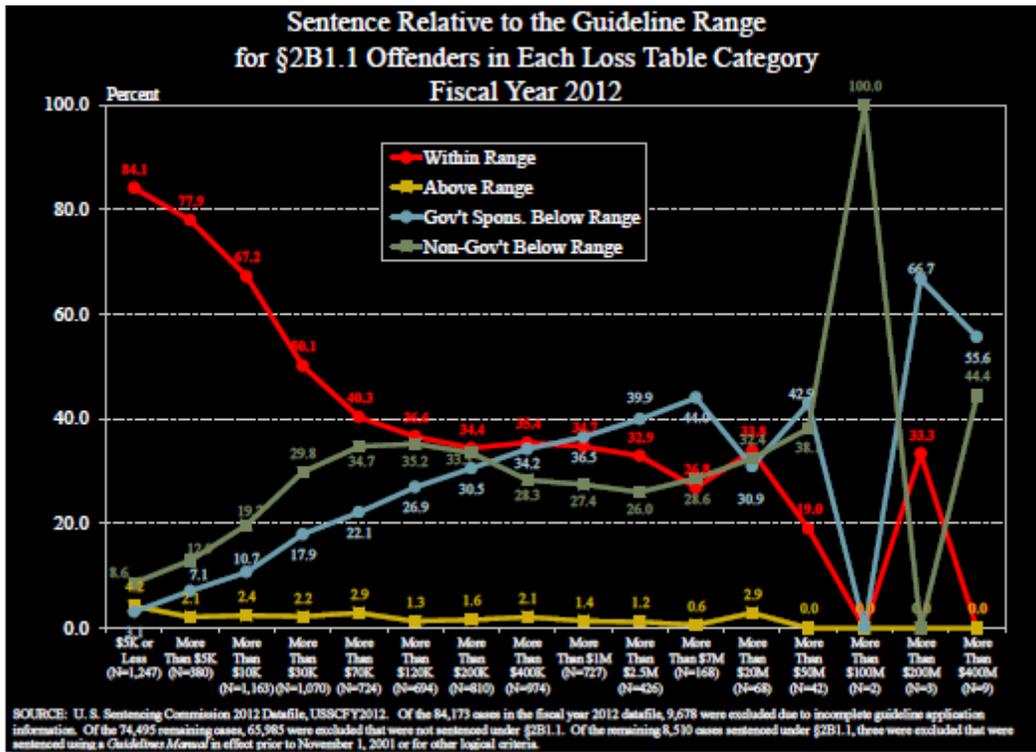
<sup>60</sup> Figure 15 is a reproduction of Figure 6, in econ crime symposium materials

Figure 16<sup>61</sup>



<sup>61</sup> Figure 16 is a reproduction of Figure 7, in econ crime symposium materials

Figure 17<sup>62</sup>

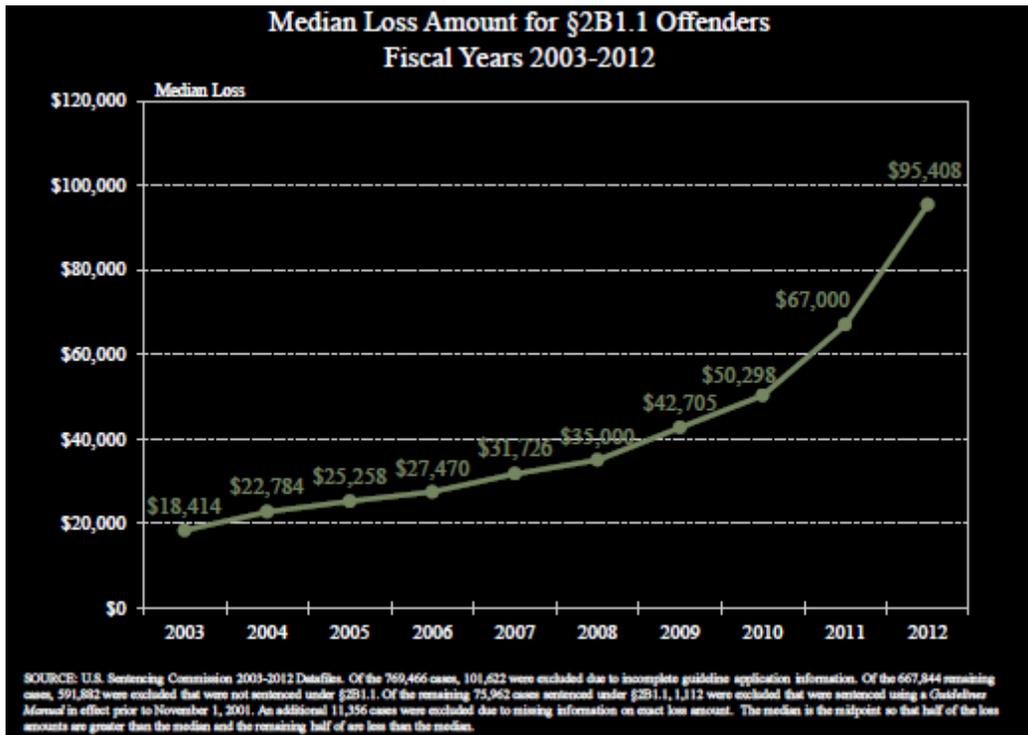


The judges' increasing resistance to imposing guidelines sentences in fraud cases is even more striking when one considers Figure 18, which shows that the seriousness of cases filed by federal prosecutors, at least as measured by loss amount, has more than quadrupled since 2003, from \$18,414 to \$95,408. And in the post-*Booker* period from 2006-2012, the average loss in cases sentenced under 2B1.1 more than tripled, but the mean (average) sentence imposed for fraud cases increased by less than six months, while the median (most common) sentence increased by only two months.<sup>63</sup>

<sup>62</sup> Figure 16 is a reproduction of Figure 8, in econ crime symposium materials

<sup>63</sup> Compare U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 13 (2007) (reporting the mean fraud sentence in 2006 as 18.6 months, and the median fraud as 10 months), with U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 13 (2013) (reporting the mean fraud sentence in 2012 as 24 months, and the median fraud as 12 months).

Figure 18<sup>64</sup>



This is not to suggest that the Guidelines' current sentence prescriptions for fraud cases of the middling to moderately serious variety are set at some Golden Mean from which widespread downward deviation would be irrational. But it is equally hard to characterize current guidelines sentences for this broad middle class of cases as irrationally draconian. As Figure 16 reveals, the Guidelines now prescribe an average minimum sentence of about two years and nine months for someone who steals more than \$200,000 and about four years and five months for someone who steals between \$1 million and \$2.5 million. In any particular case these numbers may be too high or too low, but it seems nearly impossible to deny that, as benchmark averages, they are squarely within the range that a rational administrative agency charged with making national sentencing policy might choose. Yet, as Figure 17 shows, judges are now adhering to these benchmarks only about a third of the time, and, as Figure 14 indicates, their disinclination to conform to the fraud guidelines is growing by the year.

<sup>64</sup> Figure 18 is a reproduction of Figure 2, in econ crime symposium materials

What makes this trend troubling is its uniqueness among major offense types. As demonstrated above, even after *Booker*, judges considering drug, firearm, and immigration cases have, on average, continued to adhere to the Guidelines to a striking degree. Which begs the question of why economic crime should be different. It is difficult to avoid the suspicion that what we are witnessing is a slow resurgence of the "just like me" class bias in fraud cases -- the reluctance of judges to impose serious punishment on people who look like themselves, who come from middle class backgrounds, who are educated and work in professional settings, and who steal with briefcases (now computers) rather than guns.

One of the objectives of the Federal Sentencing Guidelines when first enacted was to reject the then-existing sentencing consensus among federal judges that white collar crime should be punished primarily with probation or, at most, with extremely short periods of confinement.<sup>65</sup> One can fairly argue that the current Guidelines have gone too far in the other direction. But there is also a real danger that in the course of trying to fix the undoubted absurdities embedded in the rules governing the most serious cases the Commission will so far relax the rules for serious offenders of the middling sort that the result will be acquiescence in the perennial tendency of judges to give undue leniency to criminals of their own class. "Feedback" is a fine thing. And feedback from experienced judges is very useful indeed. But in the end, there is nothing magical about the opinions of judges. The Commission does not exist merely to reify judicial preferences in rule form. Rather, it exists to craft rules that take account of the personal, professional, political, and moral judgments of all those - including the society at large - who have a stake in criminal justice.

#### IV. A Caveat on the Effect of Mandatory Minimum Sentences

The statistics discussed so far apparently describe a federal sentencing system in which the post-*Booker* advisory guidelines continue to dominate the process by which sentences are decided and remain remarkably sticky in determining the severity of the sentences actually imposed. However, the Guidelines themselves may not be the whole story. It may be that

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<sup>65</sup> Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7 (1988) ("A pre-Guidelines sentence imposed on [white collar] criminals would likely take the form of straight probationary sentences"); Frank O. Bowman, III, *Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 484 (1998) (discussing the Sentencing Commission's early choice to raise white collar sentences).

statutory mandatory minimum sentences are propping up the absolute level of sentences, and inflating the degree to which judges voluntarily adhere to the now-advisory guidelines. The first point is obvious: if a defendant is subject to a mandatory minimum sentence, the judge must impose it, regardless of whether he or she would prefer a lower one. Given that more than a quarter of all federal defendants are subject to a mandatory minimum sentence,<sup>66</sup> this constraint on judicial discretion may be having a significant statistical effect.

The second point is perhaps a bit less obvious. It arises from fact that sentences judges are obliged to impose due to the presence of a statutory minimum sentence will often look like a sentence imposed in reliance on the advisory guideline. This will be especially true in drug cases because mandatory minimum sentences and the base offense level under the guidelines are both determined by drug quantity and the original Commission set the drug guidelines offense levels to correspond with the sentence lengths required by the mandatory minimum sentencing statutes. Thus, if a quantity X of drug Y triggers a mandatory minimum sentence of 60 months, the guidelines for drug Y are generally structured so that proof of quantity X produces a guideline sentencing range of at least 60 months. In such a case, the judge is bound to impose a sentence of at least 60 months, regardless of his or her views of the "reasonableness" of such a sentence, because *Booker* made the Guidelines advisory but did not void mandatory minimum statutes. Therefore, post-*Booker* there are doubtless a number of cases each year in which the judge imposes the sentence required by a mandatory minimum sentencing statute, a sentence that is within the applicable guideline range and which therefore shows up on statistics as a within-range sentence, but in which, absent the mandatory minimum, the judge would have imposed a lower, non-guidelines sentence.

The constraint imposed by mandatory minimums may soon be relaxed, at least somewhat. On August 12, 2013, Attorney General Eric Holder issued a memorandum changing Department of Justice charging policy with respect to mandatory minimum sentences.<sup>67</sup> The

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<sup>66</sup> U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 120 (2012)(reporting that in FY 2010, "27.2 percent of all cases (19,896 of 73,239 cases) involved a conviction of an offense carrying a mandatory minimum penalty").

<sup>67</sup> Memorandum from Attorney General Eric Holder to United States Attorneys and Assistant Attorney General for the Criminal Division re: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <http://www.justice.gov/oip/docs/ag-memo-department->

memorandum combines a moderation of the Justice Department views on the desirability of mandatory minimum sentences in drug cases with a procedural artifact of the Supreme Court's recent decision in *Alleyne v. United States*<sup>68</sup> to produce a new regime in which line prosecutors are expressly empowered to eliminate mandatory minimum sentences in a potentially significant number of drug cases.

*Alleyne* held that facts such as drug quantity that trigger a mandatory minimum sentence must now be treated as elements of the crime which must be pled in the indictment and proven beyond a reasonable doubt.<sup>69</sup> Before *Alleyne*, if the facts disclosed at sentencing established a drug quantity sufficient to trigger a mandatory minimum, the judge could (indeed was obliged to) find that quantity and to apply the mandatory minimum sentence, regardless of what was pled in the indictment or advocated by the prosecutor. After *Alleyne*, unless the prosecutor alleges the trigger quantity in the indictment and later proves it at trial or secures an admission to it by the defendant as part of a plea, the mandatory minimum cannot be applied. Because a prosecutor can elect not to plead or prove the trigger amount, even in a case where the facts plainly support it, the effect of *Alleyne* is to place the application of mandatory minimum sentences even more completely within the discretionary power of prosecutors.

Some would argue that prosecutors already controlled the application of mandatory minimums before *Alleyne*, since they could, and sometimes did, agree not to produce evidence in support of triggering quantities of drugs. However, prior to the Obama Administration, Justice Department policy was that prosecutors were obliged in all but the most unusual case to charge and accept a plea to nothing less than the “most serious readily provable offense.”<sup>70</sup> And prior to *Alleyne*, the judge was obliged to find the facts regarding mandatory minimums based on the evidence before him regardless of the contents of the pleadings. Now prosecutors can prevent application of a mandatory minimum simply by omitting an allegation of drug quantity from the indictment. This new procedural wrinkle has somewhat less practical reach than first appears because federal mandatory minimum sentence statutes in the drug area almost universally tie

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[policyon-charging-mandatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf](#) [hereinafter “Holder Memo”].

<sup>68</sup> 133 S.Ct. 2151 (2013).

<sup>69</sup> Id. at 2162-63.

<sup>70</sup> See, e.g., Memorandum to All Federal Prosecutors from Attorney General John Ashcroft, Sept. 22, 2003, [http://www.justice.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm).

proof of a triggering drug amount to an increase in both the minimum *and maximum* available sentence. Under the rule of *Blakely v. Washington*, any fact raising the statutory maximum sentence must be pled and proven to a jury or admitted by the defendant.<sup>71</sup> Thus, even before *Alleyne*, prosecutors who wanted a quantity-based drug minimum to apply were obliged to plead and prove the trigger amount because proof of that amount would also raise the statutory maximum.<sup>72</sup> Accordingly, the real news in the Holder memo is not so much that prosecutors have a new discretionary mechanism to eliminate mandatory minimums for particular defendants, but that the Attorney General is encouraging them to use it in a broad, if so-far loosely defined, swathe of drug cases.<sup>73</sup> If line prosecutors across the country take the Attorney General at his word, the number of drug cases with mandatory minimum sentences is likely to drop appreciably and we may be on the verge of finding out whether it has been the stickiness of the Guidelines or the straightjacket of mandatory minimums that has kept judges roughly compliant with guideline norms in narcotics cases.<sup>74</sup>

#### IV. Another Caveat on Disparity

All the observations made so far are grounded in national statistics, which requires a caveat about the incidence and effect of regional and inter-judge disparity. Seven years ago, in

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<sup>71</sup> 542 U.S. 296 (2004).

<sup>72</sup> See, e.g., *United States v. Sheppard*, 219 F.3d 766, 767 (8th Cir. 2000) (“Based upon the Supreme Court’s recent decision in *Apprendi v. New Jersey* . . . we conclude that drug quantity must often be treated as an element under § 841 but that any error was harmless in this case because the indictment charged Sheppard with conspiring to distribute more than 500 grams, and the jury made a special finding of that quantity.”); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000) (overruling Circuit precedent that drug quantity was a sentencing factor that could be found using a preponderance of the evidence standard). See also, Memorandum from David G. Ogden to All Federal Prosecutors 2 (May 1, 2009), <http://www.justice.gov/oip/docs/dag-memo-sentencing-cocaine-offenses.pdf>.

<sup>73</sup> The Holder memo encourages consideration of the following factors:

The defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person; the defendant is not an organizer, leader, manager or supervisor of others within a criminal organization; the defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and the defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions. -- Holder Memo, *supra* note 67, at 2.

<sup>74</sup> This will be doubly the case if any of several bills relaxing the grip of mandatory minimum sentences now pending in the Senate were to receive congressional approval. See, e.g., Families Against Mandatory Minimums, The Paul-Leahy “Justice Safety Valve Act of 2013”: Preventing Lives and Money from Being Lost Down the Drain, <http://famm.org/Repository/Files/Justice%20Safety%20Valve%20Act%20Primer%20FINAL.pdf>.

2006, writing for the first University of Houston symposium on the post-*Booker* world, I examined the available information on the question of whether *Booker* had produced increased sentence disparities between similarly situated defendants in different regions.<sup>75</sup> I concluded that the period since *Booker* was then too short and the evidence too sparse to arrive at any meaningful conclusion,<sup>76</sup> but privately I was moderately confident that the advent of advisory guidelines would in time produce increasing disparities, both between regions and between defendants sentenced by different judges in the same district or region. In truth, the post-*Booker* experience has varied widely depending on one's district. And while there are those who continue to dispute or at least downplay the point, the available data strongly suggests that and that there has indeed been an increase in regional and judge-to-judge disparity. All three points require some amplification.

A. Different districts have had very different post-*Booker* experiences

A focus on national averages necessarily obscures local variation. The post-*Booker* story told by national averages is one of gradual, incremental change toward an equilibrium, somewhat less punitive, but not terribly different than the one that prevailed before anyone conceived that the Sixth Amendment represented a threat to binding guidelines. But in some districts, the federal sentencing experience has changed very markedly. As Figure 19 illustrates,<sup>77</sup> a few districts adhere to the Guidelines as much or even more than they ever did, while in others the rate of guidelines compliance has fallen by 40-50%. Even in the pre-*Booker* era of legally binding guidelines, each federal district always maintained a slightly different equilibrium between strict compliance with the rules and various local accommodations. Since *Booker*, a new and sometimes quite different set of local understandings has arisen. Thus, one must be very cautious in making sweeping national generalizations about the effect of *Booker*.

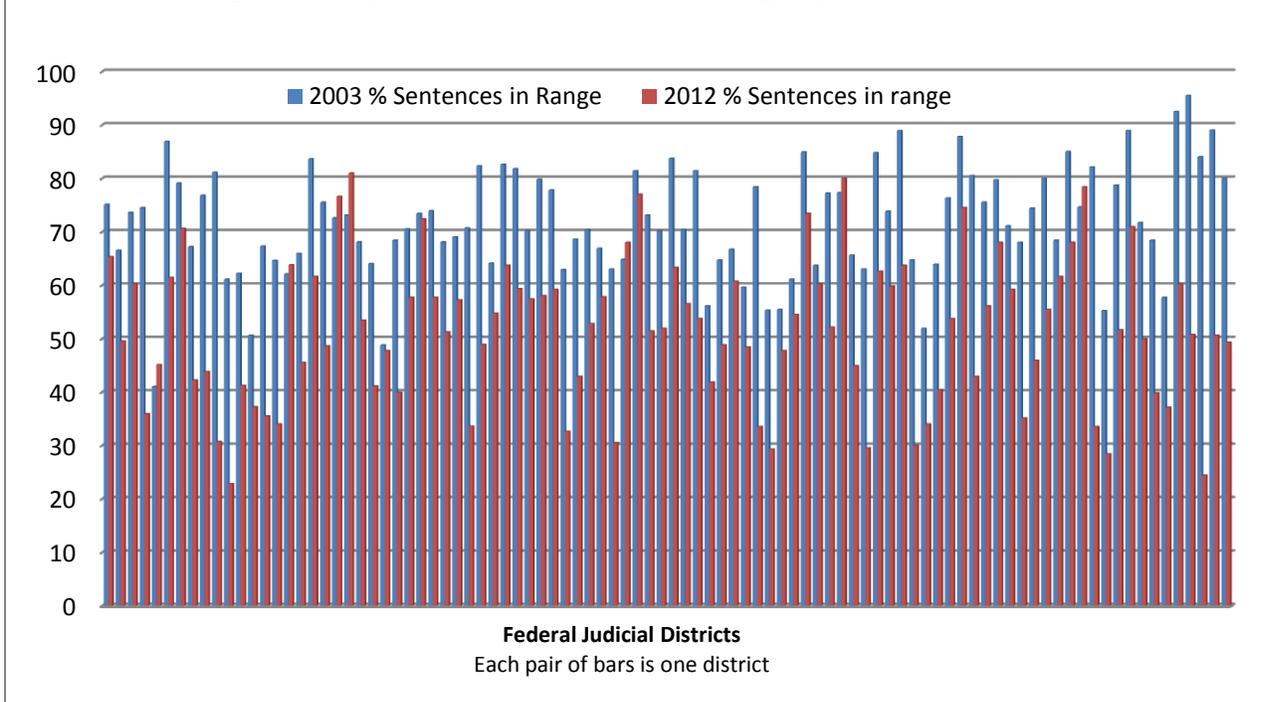
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<sup>75</sup> Frank O. Bowman, III, *The Year of Jubilee ... or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUSTON L.R. 279, 314-18 (2006).

<sup>76</sup> *Id.* at 318.

<sup>77</sup> The data in Figure 19 is drawn from U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS. APP. B (2004), and U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS. APP. B (2013).

**Fig. 19: Comparison of % Sentences in Range by District 2003-2012**



**B. Regional disparity has increased after *Booker***

While there can be no doubt that different districts have responded quite differently to the advent of advisory guidelines, the question of whether the sentencing practices of federal districts have become more or less disparate than they already were before *Booker* defies precise quantification. A host of variables complicate the problem. Differences in geographic and population size, numbers of defendants, numbers of district judges, mix of case types, and the like make cross-district comparison dauntingly complex. Nonetheless, some general conclusions are possible.

First, there is no general consensus among researchers on the question of whether the advent of the Guidelines in 1987 reduced unjustifiable regional sentencing disparities.<sup>78</sup> Second, inter-district disparity appears to have increased since the Guidelines became advisory. I have

<sup>78</sup> U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 96-97 (2004) [hereinafter "U.S. Sentencing Commission, Fifteen Year Report"] (noting that some researchers concluded that the Guidelines reduced regional disparity, some found no evidence of such a reduction, and some found increased regional disparity).

noted this trend on several occasions since 2010,<sup>79</sup> and the Commission's most recent figures seem to confirm that it continues.

What one is trying to determine when assessing inter-district disparity is the degree to which the judges of one district sentence similarly situated defendants differently from the judges of another district. The federal sentencing guidelines were designed to ensure rough parity in sentencing between similarly situated defendants by identifying factors thought important to sentence severity (drug quantity, loss amount, degree of injury to victims, role in the offense, and so forth), assigning numerical values to those factors, and correlating those numerical values to strongly presumptive sentencing ranges. Even conceding the many imperfections in the guidelines scheme, at least one important metric of inter-district disparity is a comparison of the degree to which judges in different districts sentence within the applicable guideline range, i.e., the degree to which they treat defendants the Guidelines view as similar similarly. Throughout the Guidelines era, there has always been a considerable degree of variation among districts in rates of guidelines compliance. Nonetheless, a year-to-year increase or decrease in the degree of inter-district variation is one imperfect, but respectable, measure of increasing or decreasing disparity in the sentencing of similarly situated defendants. This is so because, however much districts may differ from each other at any given moment in size, case type mix, and so forth, those factors will tend to remain relatively stable over time within a single district. Likewise, any significant national trends in case mix or prosecutorial priorities, such as the big increase in immigration prosecutions noted above, will tend to affect many districts and should have relatively little effect on the degree of inter-district disparity in guidelines compliance. In short, a significant increase in the degree of variation in guidelines compliance among districts would suggest, even if standing alone it cannot conclusively prove, an increase in regionally disparate sentencing of similarly situated defendants. The data shows such an increase.

The simplest way to illustrate the trend is by comparing Figures 20A<sup>80</sup> and 20B,<sup>81</sup> which are scatter plots showing the percentage of cases sentenced within range in every federal district

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<sup>79</sup> Frank O. Bowman, III, *Prolegomenon on the Status of the Hopey, Changey Thing in American Criminal Justice*, 23 FED. SENT. REP. 93 (2010); Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT. REP. 356 (2012).

in 2003, the last statistical year before the *Blakely* decision, and 2012, the last statistical year post-*Booker* for which data is available. Put simply, we are seeing an increase in national systemic entropy. As each local system arrives at its own accommodation between guideline rules and local preferences, districts are diverging ever farther from each other and from the pre-*Booker* national norm. The point made visually manifest in these scatter plots can be expressed statistically by noting the standard deviation among all federal districts of the percentage of within-range sentences was 10.28 in 2003 and has jumped to 13.73 in 2012. Figure 21<sup>82</sup> shows graphically that the standard deviation among districts has increased fairly steadily since 2006, the first full statistical year following the *Booker* decision, and that the rate of increase accelerated beginning in FY 2008, after the December 2007 *Gall* and *Kimbrough* decisions affirming the genuinely advisory character of the Guidelines.<sup>83</sup>

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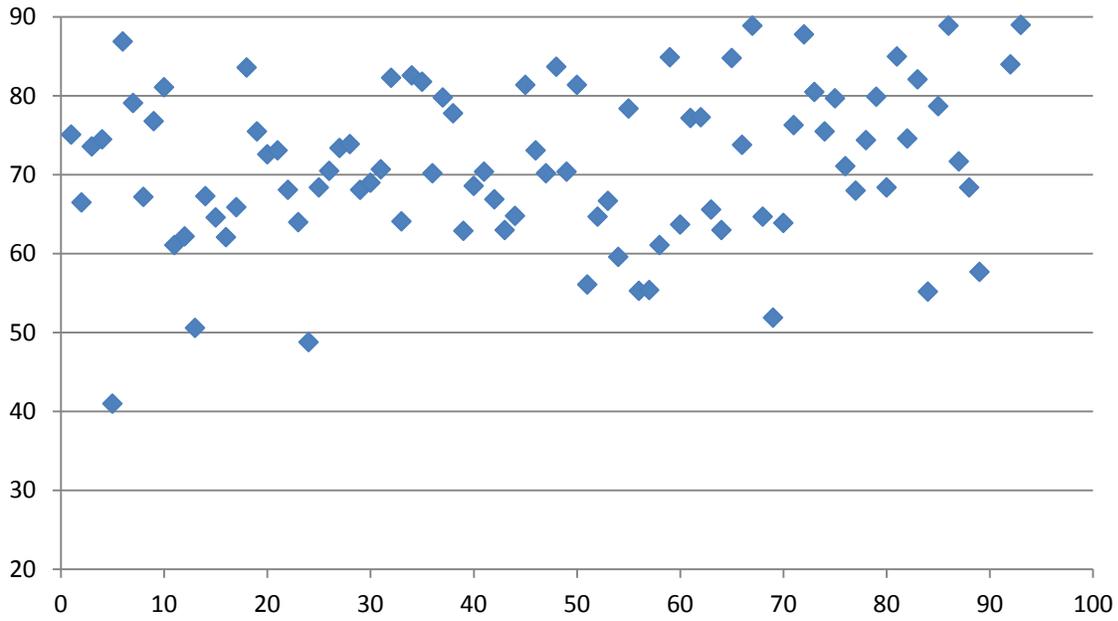
<sup>80</sup> U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS. APP. B (2004).

<sup>81</sup> U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS. APP. B (2013).

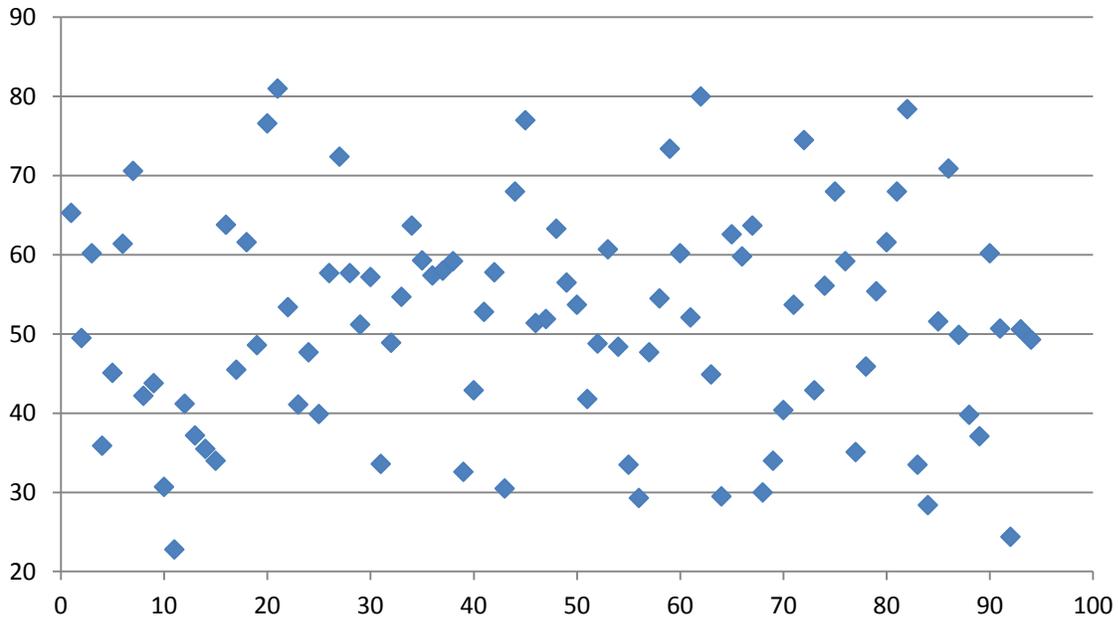
<sup>82</sup> The data in Figure 21 is derived from Appendix B of the U.S. Sentencing Commission's Sourcebook of Federal Sentencing Statistics for the years 2006-2012.

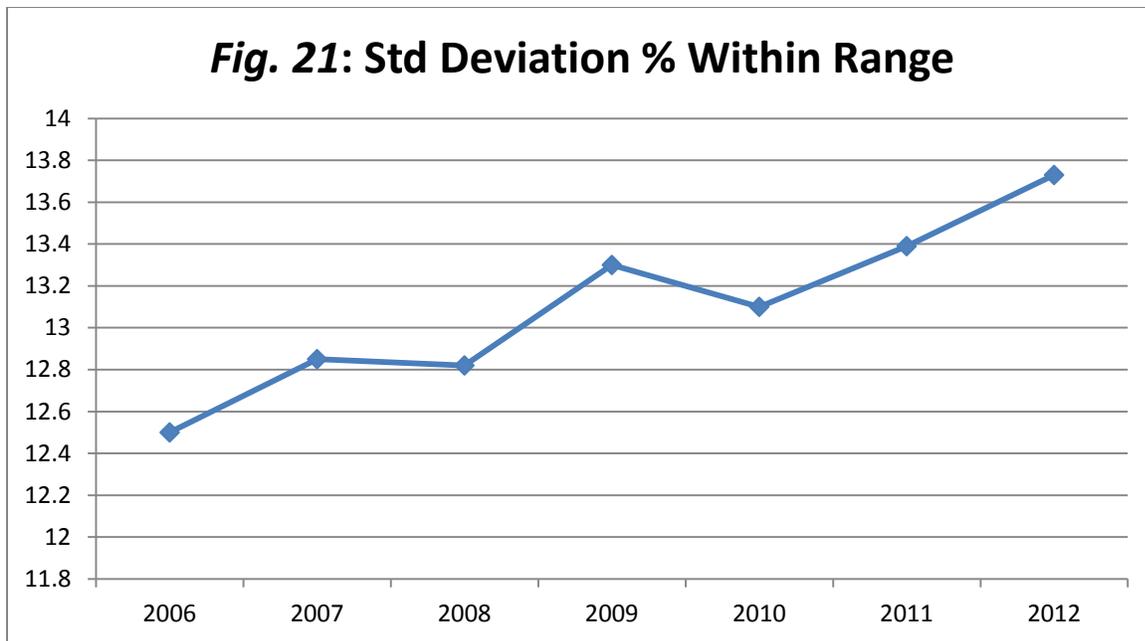
<sup>83</sup> Several studies have suggested that inter-district sentencing disparities have not increased in the post-*Booker* period. See, e.g., Jeffrey T. Ulmer and Michael T. Light, *The Stability of Case Processing and Sentencing Post-Booker*, 14 J. OF GENDER, RACE & JUST. 143 (2010); Jeffrey T. Ulmer, Michael T. Light, and John Kramer, *The 'Liberation' of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?* 28 JUSTICE QUARTERLY 709 (2011). Although these authors perform far more sophisticated analyses than anything attempted here, I confess to finding them unconvincing. The 2010 article utilizes only data through FY 2007, which ended on Sept. 30, 2007, and thus does not examine the behavior of federal judges in the five fiscal years (FY 2008 - FY 2012) after the December 2007 *Gall* and *Kimbrough* decisions in which the Supreme Court made explicit the holding that the Guidelines were truly advisory and that the sentencing decisions of district court judges were to be subject to only cursory substantive review by appellate courts. The 2011 article only considers data through the end of FY 2009, Ulmer, Light and Kramer, *supra*, at 804 n. 1, and actually finds a statistically significant post-*Gall* increase in inter-district disparity, *id.* at 817, but judges it insubstantial. However, we now have four more years of post-*Gall* experience and it would certainly appear that the observations of Ulmer, et al. about the period through FY 2009 were the beginnings of a continuing trend of increased inter-district disparity. Indeed, if my rough measure of increased disparity in the form of increasing standard deviation among district rates of guideline compliance has any validity, it is from 2010-2012 that disparity really begins to increase most notably.

**Fig. 20A: Percent Sentences in Range (FY 2003)**



**Fig. 20B: Percent Sentences in range (FY 2012)**





The next section will summarize the copious evidence of disparate sentencing practices among individual judges. However, it should be emphasized that the gradual, but steady, divergence among the sentencing practices of the districts doubtless reflects not only regional differences in judicial behavior, but differences in the charging and plea bargaining practices of U.S. Attorney's Offices. Indeed, one can predict with reasonable confidence that one effect of the 2013 Holder memo on mandatory minimum sentences will be an increase in regional disparity as different prosecutors adopt different views on who should and should not be subject to mandatory minimum sentences.

C. Inter-judge disparity has also increased since *Booker*

Despite the lack of consensus on whether legally binding guidelines reduced regional disparity, researchers both inside and outside of the U.S. Sentencing Commission concluded that the Guidelines did reduce sentencing disparity between individual judges.<sup>84</sup> One would therefore expect that *Booker's* transformation of the Guidelines from binding to advisory would increase the disparity between sentences imposed by different judges on similarly situated defendants.

<sup>84</sup> U.S. Sentencing Commission, Fifteen Year Report, *supra* note 78, at 97-99 (reviewing studies and concluding that "The sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion"); J.M. Anderson, J.R. Kling & K. Stith, Measuring Interjudge Sentencing Disparity: Before and After Federal Sentencing Guidelines, 42 J.L. & Econ. 271 (1999); P.J. Hofer, K.R. Blackwell & R.B. Ruback, The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity, 90 J. Crim. L. & Criminology 239, (1999).

Although some have tried to dispute or at least downplay the point,<sup>85</sup> the weight of the research is now sufficiently great to preclude serious doubt that advisory guidelines increase sentencing disparities between judges.<sup>86</sup> This is, of course, hardly a surprising outcome. One of the primary objectives of the Guidelines was to cabin the exercise of judicial discretion through the application of mandatory rules and thus lessen the variability of individual judicial decisions. To expect that judges freed of legal constraint would sentence with the same degree of consistency as they did while the constraints were in place is to assume that the presence or absence of binding rules has no effect whatever on human decision-making.

#### D. Does Increasing Disparity Matter?

The real question at the moment is not whether *Booker* has increased the disparity between the sentences imposed on similarly situated federal defendants, because it surely has, but whether that undeniable increase matters very much. I think it should matter to anyone who believes that one important component of a just system of criminal punishment is that similarly situated offenders are treated substantially similarly. Particularly in a national system of uniform laws, an offender's sentence should not be notably dependent on the region in which the crime was committed or the identity of the judge who imposes the sentence. Of course, horizontal equity is not the only important principle of just punishment and one might fairly conclude that the benefits of increased individualization of federal sentencing after *Booker* outweigh the costs flowing from increased disparity.

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<sup>85</sup> See, e.g., Federal Fact Sheet: *The 2012 USSC Booker Report: Inter-Judge Differences in Federal Sentencing* [http://www.fd.org/docs/select-topics/sentencing-resources/fact-sheet-on-sentencing-commission's-booker-report-\(addressing-inter-judge-disparity\).pdf?sfvrsn=4](http://www.fd.org/docs/select-topics/sentencing-resources/fact-sheet-on-sentencing-commission's-booker-report-(addressing-inter-judge-disparity).pdf?sfvrsn=4)

<sup>86</sup> See Crystal S. Yang, *Have Inter-Judge Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, *N.Y.U. L. REV.* \_\_ (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2348140](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348140) (finding that inter-judge disparities have doubled since *Booker*); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, *63 STAN. L. REV.* 1 (2010) (examining the sentencing practices of judges in the District of Massachusetts and concluding that the advent of *Booker* increased inter-judge disparity); U.S. SENTENCING COMMISSION, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 98-104 (2012) (concluding that inter-judge disparity within districts has increased since *Booker*). See also, Transactional Records Access Clearinghouse (TRAC) Report, *Surprising Judge-to-Judge Variations Documented in Federal Sentencing*, <http://tracfed.syr.edu/tracreports/judge/274/> (examining federal sentencing data from FY 2007-FY2011 and finding that "the typical sentence handed down by a federal district court judge can be very different than the typical sentences handed down for similar cases by other judges in that same district"); Paul J. Hofer, *Data, Disparity, and Sentencing Debates: Lessons from the TRAC Report on Inter-Judge Disparity*, *25 FED. SENT. REP.* 37 (2012) ("I believe TRAC's central claim [that different judges impose different sentences on similarly situated defendants to a statistically significant degree] has been established to a reasonable degree of scientific certainty.... Something about sentencing judges often has an effect on the sentences they impose.")

The other way in which increased post-*Booker* disparity matters is that it probably represents the primary political risk to maintenance of the post-*Booker* status quo. At present, there is very little apparent concern among federal political actors about increased judicial sentencing discretion. If anything, trust in the wisdom of sentencing judges has become something of an article of faith on the liberal side of the spectrum and even the most consistent conservative critics of judicial leniency have been notably quiet for some time. But this phase, too, will pass in time. Sooner or later, uncontrolled disparity will again become a rallying cry.

#### V. Some General Conclusions About the Surprisingly Tenacious Sentencing Guidelines

So what general observations can one make about these Guidelines that will not die? Here I will venture only three:

First, an explanatory speculation. The endurance of the Guidelines, but more particularly the degree to which they continue to drive actual sentences, has surprised nearly everyone. It has pleasantly surprised those who liked the old system (primarily the Justice Department and law and order conservatives in Congress) and feared that judges, once free of mandatory guidelines, would in short order be throwing wide the prison gates for significant classes of defendants. It has unpleasantly surprised a good many guideline critics (primarily the defense bar, the academy, and liberal sentencing reformers) who privately assumed the same thing. The cognitive dissonance among guideline critics has been particularly acute because they have been obliged by their preference for the new system over the old and their fear of a politically-driven "Booker fix" to publicly praise post-*Booker* judges for continuing to adhere closely to the guidelines while privately cursing them for the same thing.<sup>87</sup>

Why have the judges stuck to the Guidelines so closely? In retrospect, I suppose the mystery is that any of us expected anything different. Judges are men and women of the law. They naturally look for rules and endeavor to apply them. However badly the Supreme Court may have tangled Sixth Amendment doctrine in *Blakely*, *Booker*, and their misbegotten progeny,

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<sup>87</sup> See Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT. REP. 356 (2012) (discussing "the surpassingly odd spectacle of folks who spent the first two decades of the guidelines era vehemently denouncing the guidelines ... now mounting an impassioned defense of a post-*Booker* system that retains virtually every flaw they previously deplored").

to district judges charged with the everyday work of sentencing federal defendants, the Guidelines still look and feel like "law." Law with some extra elasticity, perhaps, but still law of a recognizable sort which their professional ethos disposes them to follow. Moreover, this particular body of rules gives guidance in the one area in which judges are most likely to feel in need of it. How, after all, does one go about quantifying punishment for crime? Judges faced with the task are acutely aware of the inevitable subjectivity of the exercise and are customarily grateful for standards provided by officially anointed experts, even if they may not always agree with the experts in particular cases. Hence, though I suspect that judges' adherence to the Guidelines will continue to slowly erode, there is no reason to think that the Guidelines will not remain central to sentencing decisions indefinitely.

Second, an admonition to practitioners. The Guidelines still matter. They still matter nearly as much as they did on the day before *Booker* was decided. Practice accordingly. Because if you do not, your client, whether the government or a defendant, will suffer.

Third, a thought for those who believe that the sentences imposed by federal judges are still wrong in some way - too long, too short, too heavy on incarceration, too light on rehabilitation or restorative justice, whatever. The Guidelines still matter. And given the complete dysfunction of the federal legislative branch, no serious alteration of the basic structure of those guidelines is likely at any time in the foreseeable future. Therefore, the path to whatever sentencing salvation you seek is through the United States Sentencing Commission. This is itself a rather surprising conclusion because, among federal sentencing cognoscenti, the sotto voce conventional wisdom for some time past has been that *Booker* and advisory guidelines rendered the Commission a largely irrelevant backwater. As it becomes ever clearer that the Guidelines continue to drive most federal sentences and bid fair to do so for years to come, the Commission has the potential to return to the center of the federal sentencing debate.