

BOOKER CIRCUMVENTION? ADJUDICATION STRATEGIES IN THE ADVISORY SENTENCING GUIDELINES ERA

MONA LYNCH[∞]

ABSTRACT

This article addresses the question of policy circumvention in federal courts by examining how legal actors have differentially adapted their adjudicatory practices after U.S. v. Booker (2005) rendered the federal sentencing guidelines advisory rather than mandatory. By linking two distinct bodies of scholarship—the courts-as-communities scholarship that assesses and explains locale-based variations in criminal court operations and the socio-legal “law and organizations” scholarship that addresses how organizational actors translate and implement top-down legal policy reforms—this article argues that law-as-practiced is always temporally and spatially contingent. Expanding on prior quantitative research that addresses district-specific adaptations to Booker, this article reports on findings from a qualitative study recently conducted by the author of four federal districts. Based on these findings, this article examines within-district changes and between-district variations in: (1) legal actors’ perceptions of whether the Booker policy change impacted local practices and outcomes, and if so, the extent of its impact; (2) how legal strategies and practices have changed at three stages of the criminal process: charging, pre-conviction plea negotiations, and formal sentencing; and (3) interviewees’ perceptions about whether Booker contributed to greater racial or other disparities in case outcomes. Findings indicate that a dynamic, proactive adaptation process is taking place, conditioned by local norms but not fully dictated by those norms. They also make clear that changes in sentencing outcomes in the post-Booker period are not simply the result of liberated judges exercising their discretion, but rather are jointly produced by courtroom workgroup members through both contestation and cooperation. This inquiry is especially timely given both ongoing and proposed changes in federal sentencing policy that aim to maintain severity in punishment, re-impose constraints on legal actors, and threaten to exacerbate racial and ethnic inequalities in the federal criminal system.

I. INTRODUCTION 60

[∞] Professor and Chair, Department of Criminology, Law & Society and Professor, School of Law (by courtesy), University of California, Irvine. This article is based upon work supported by the National Science Foundation under Grant No. #1251700.

II. The Evolution of Federal Sentencing Guidelines.....	63
III. Law as Practiced: Lessons from Social Theory	68
IV. An Empirical Examination of Post- <i>Booker</i> Adaptations	72
A. Study Research Questions, Design, and Setting	72
B. Data Collection and Analysis	76
V. FINDINGS	79
A. General Perceptions of Change Post- <i>Booker</i>	79
B. Processual Mechanics of <i>Booker</i> Adaptation	85
1. Charging as a Sentencing Control Tool	85
2. Negotiating in the Shadow of the Judge	88
3. The (Re-)emergence of Robust, Individualized Sentencing Proceedings	92
C. Consequences for Racial Equality and Justice.....	94
VI. DISCUSSION.....	98
VII. CONCLUSION	102

I.

INTRODUCTION

In 1989, as the U.S. Sentencing Guidelines were first being implemented, legal scholars Stephen Schulhofer and Ilene Nagel traveled to a number of federal district courts to assess whether court actors were faithfully complying with the new guideline mandates.¹ The mandatory guidelines, which aimed for sentencing uniformity across “like” cases, severely constrained judicial discretion through a set of intricate rules for determining sanctions² and sought to limit prosecutors’ discretion in plea bargaining by accounting for the totality of “real offense” characteristics in sentencing calculations.³ Despite these built-in controls, Schulhofer

1. Their data collection process took place over four years, from 1989–1993. See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. L. REV. 1284 (1997) [hereinafter Schulhofer & Nagel, *Plea Negotiations*]; see also Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 SO. CALIF. L. REV. 501 (1992) [hereinafter Nagel & Schulhofer, *A Tale of Three Cities*]; Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989) [hereinafter Schulhofer & Nagel, *Negotiated Pleas*].

2. See generally KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* Ch. 2 (1998).

3. Glenn R. Schmitt, Lou Reedt & Kevin Blackwell, *Why Judges Matter at Sentencing: A Reply to Starr and Rehavi*, 123 YALE L.J. F. 251, 257 (2013) (“[U]nder the modified ‘real offense’ approach in the federal guidelines, a judge must calculate the offense level based not only on charged conduct but also on other ‘relevant conduct.’ This includes unchanged conduct that can increase or decrease a defendant’s culpability. The Commission adopted this approach precisely because it wanted judges to be able to account for prosecutorial charging decisions that failed to represent a

and Nagel found that court actors circumvented the guidelines in a sizable minority of cases, such that the sentences imposed were not in compliance with the guidelines' specifications.⁴ Guideline circumvention was often the product of localized plea negotiation practices and was more prevalent where the guidelines' prescribed sentences were especially out of line with prevailing, pre-guidelines sentencing norms.⁵

Schulhofer and Nagel's findings make sense in light of social science scholarship that calls into question the idealized notion that legal policy can be implemented in a uniform and orthodox manner.⁶ The guidelines regime, which was a top-down policy mandate imposed upon disparate and diverse federal court communities, was incorporated into local legal practice in a multitude of ways that included reconciling the new rules with existing norms and expectations about appropriate outcomes.⁷ Consequently, district-level trial courts were never fully tamed by the new guidelines system, and, indeed, they continued to maintain localized norms for both adjudication practices and outcomes across multiple policy reforms.⁸

This article revisits the question of policy circumvention in federal criminal courts by examining how legal actors have differentially adapted their adjudicatory practices in response to a series of U.S. Supreme Court cases that rendered the guidelines advisory rather than mandatory.⁹ Drawing on interviews conducted as part of a comparative qualitative field study of federal criminal case adjudication, this article examines how different legal actors have strategically maneuvered in the transformed post-*Booker* legal landscape to maintain or enhance

defendant's actual conduct."). "Real offense" sentencing structures aim to capture the actual elements of the criminal offense in the imposed sentence, even if they are not elements of the indicted or convicted charge(s). Such systems are justified as a way to reduce disparities as a function of plea bargaining. See Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550, 1562 (1981).

4. Schulhofer & Nagel, *Plea Negotiations*, *supra* note 1, at 1285 (reporting that federal sentencing guidelines were circumvented in 20-35% of cases).

5. *Id.* at 1302 ("A perceived lack of necessary flexibility has fueled local participants' efforts to circumvent the Guidelines to achieve results more compatible with their conception of justice in the individual cases."); *Id.* at 1309-10.

6. Richard L. Abel, *Law and Society: Project and Practice*, 6 ANN. REV. L. & SOC. SCI. 1, 5 (2010) (describing the classic "gap" studies that examined the disconnects between law on the books and law in action).

7. See Schulhofer & Nagel, *Plea Negotiations*, *supra* note 1 (describing the tension between local actors' conceptions of just outcomes and the prescribed sentences of the guidelines).

8. See Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court*, 48 L. & SOC'Y REV. 411, 430 (2014) (showing that "there are considerable between-district differences as well as relative stability within districts over time in caseload characteristics, adjudication norms, and the metrics of sentence discounts and 'going rates.'"); Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255, 272-73 (2005).

9. See *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

adjudicatory power. The analysis explicitly links two distinct bodies of work: the courts-as-communities scholarship that primarily assesses and explains locale-based variations¹⁰ and the socio-legal “law and organizations” scholarship that addresses how organizational actors translate and respond to top-down legal policy mandates.¹¹ While these two bodies of research have some conceptual overlaps, especially to the degree that they contend with the gap between formal legal policy and on-the-ground practice, they have, with just a few exceptions, developed on parallel tracks.¹²

This article has two overarching goals. First, it argues that formal legal policy is always temporally and spatially contingent, in that its interpretation, translation, and implementation varies as a function of the particular, localized context in which it is applied. In that regard, the problem of disparities in legal processes or outcomes, either over time or across locales, is functionally a core feature of law’s application. Second, in support of this argument, the article empirically illustrates how such variations are produced by identifying the specific strategies used by court actors to get to desired outcomes and the role those strategies play in producing outcome disparity and inequality. Drawing on qualitative, in-depth interviews with federal court actors in four distinct districts, this article examines how the reforms to federal sentencing policy resulting from *Booker*, *Kimbrough*, and *Gall* have been variably translated and absorbed into law-as-practiced. In doing so, it focuses more squarely on legal *processes* than on case *outcomes* to elucidate the mechanisms at work. In other words, it focuses on how frontline legal actors have adapted their case adjudication strategies in order to better interpret and understand any changes in case dispositions that have resulted from formal policy change, including how those changes varied as a function of locale. By highlighting how new policy mandates get absorbed into prevailing local practices in sometimes unexpected ways, the article calls into question expectations of uniform compliance with legal reform.

Part II offers an overview of federal criminal legal policy and its implementation since the 1984 Sentencing Reform Act,¹³ including the transformation of sentencing policy in the ensuing decades. Part III sets out a theoretical framework

10. See, e.g., JAMES EISENSTEIN, ROY B. FLEMMING & PETER F. NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* (1988); JEFFERY T. ULMER, *SOCIAL WORLDS OF SENTENCING: COURT COMMUNITIES UNDER SENTENCING GUIDELINES* (1997).

11. See, e.g., Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999); Garry C. Gray & Susan S. Silbey, *Governing Inside the Organization: Interpreting Regulation and Compliance*, 120 AM. J. SOC. 96 (2014).

12. The courts-as-communities literature from the late 1970s and early 1980s crossed over into socio-legal studies, but it has primarily continued as a distinct line of inquiry in the field of criminology that seeks to understand disparities in criminal sentencing. See generally Jeffery T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 JUST. Q. 1, 8 (2012). The “law and organizations” body of scholarship has developed among sociologically trained socio-legal scholars. See generally Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997).

13. Sentencing Reform Act of 1984, ch. 2, Pub. L. No. 98–473, 98 Stat. 1987 (1984).

for examining the strategies local actors employ to adapt to major legal change. Part IV describes the study, including the methodology and analytic strategy, that produced the empirical evidence in support of the main claims put forth in this article. Part V analyzes the findings and demonstrates how court actors have adapted to the post-*Booker* regime. The findings are presented in three substantive areas: general perceptions of change rendered by the *Booker*, *Gall*, and *Kimbrough* cases; strategies of adaptation to the policy change; and impacts of change on the production of inequality in cases outcomes. Part VI concludes with a discussion of the implications of this analysis for fair and equitable adjudication and sentencing. In doing so, it considers the implications of former Attorney General Sessions' policy preferences for more centralized regulation of adjudicatory discretion by federal prosecutors, as well as the United States Sentencing Commission's ongoing efforts to reinstitute mandatory features to guidelines sentencing.

II.

THE EVOLUTION OF FEDERAL SENTENCING GUIDELINES

The 1984 Sentencing Reform Act (SRA) authorized the establishment of the United States Sentencing Commission, which was directed to develop a set of sentencing guidelines that would “rationalize” sentencing in the federal criminal system by constraining judicial discretion in sentencing.¹⁴ The Commission drafted an intricate and rigid set of mandatory guidelines that was put into effect on November 1, 1987.¹⁵ The ideal of uniformity in criminal case outcomes underpinned the passage of the SRA and was the driving force in the Commission's initial guideline development. It has guided federal criminal justice policy ever since.¹⁶

14. Sentencing Reform Act of 1984, ch. 58, Pub. L. No. 98-473, 98 Stat. 2017 (1984). For a short overview of the Commission, see U.S. SENTENCING COMM'N ANN. REP. ch. 1 (2009). For a detailed history of the political machinations that resulted in this federal legislation, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

15. For a detailed history of the Commission's work, see Mona Lynch & Alyse Bertenthal, *The Calculus of the Record: Criminal History in the Making of U.S. Federal Sentencing Guidelines*, 20 THEORETICAL CRIMINOLOGY 145 (2016); Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167 (2017). The Guidelines have also been supplemented by statutory mandatory minimum and enhancement sentencing schemes passed by Congress on a regular basis since 1984. These provisions generally dictate lengthy minimum prison sentences for some offenses and must be taken into account, when applicable, in determining sentences. For an overview of the general logic and elements of the guidelines and related federal sentencing policy, see Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277 (2005).

16. Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1620 (2012) (discussing the federal system's “obsessive focus on uniformity”); see also Jeffery T. Ulmer, Michael Light & 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 JUST. Q. 799, 800 (2011) (describing how the guidelines “explicitly strove to eliminate ‘unwarranted disparity’ in sentences based on race, gender, ethnicity (i.e., extralegal factors) as well to create more uniformity across federal court jurisdictions.”).

Despite the intentions of Congress and the efforts of the U.S. Sentencing Commission, “extra-legal” sentencing disparities persisted after the implementation of the guidelines. Under the new system, a significant share of discretionary power shifted from judges to prosecutors,¹⁷ as judicial sentencing discretion was constrained by the new mandatory sentencing guidelines and statutes. Charging decisions became highly determinative of ultimate outcomes, and federal prosecutors came to control most of the adjudication process, including “making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range.”¹⁸

At the micro-organizational level, the 1980s’ policy reforms triggered dramatic changes in day-to-day federal criminal legal practice. The shift in power incentivized prosecutors to bring many more criminal matters to federal court, where they could get easy convictions by wielding their enhanced adjudicatory power. The most dramatic charging increases were to drug¹⁹ and immigration²⁰ caseloads, where racial and ethnic minorities quickly came to make up the majority of the defendant pools.²¹ Indeed, as the power to punish became concentrated in the prosecutorial role, the federal defendant pool shifted from majority white to majority non-white.²²

The sentences meted out after the 1980s’ sentencing reform also significantly diverged as a function of defendants’ race. A Commission study indicated that while white and African-American defendants were sentenced to similar sentence lengths in the pre-guidelines federal system, within ten years of the reforms, the average sentence had quadrupled for African-American defendants, while only doubling for white defendants.²³ These disparities were a direct consequence of the guidelines’ design in that the legal factors deemed most punishment-worthy also tended to correlate with the race of the defendant.²⁴ A large body of empirical

17. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 878 (2009).

18. *Id.*

19. For a detailed discussion of changes in drug cases, see MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* Ch. 2 (2016).

20. See Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT’G REP. 311, 311 (2009) (describing “an exploding volume of immigration-related cases” beginning in the mid-1990s due in part to changes in law enforcement practices in regard to immigration crimes).

21. U.S. SENTENCING COMM’N, *FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM* 114 (2004) (pointing out that although the majority of federally sentenced defendants “in the pre-guidelines era were White, minorities dominate the federal criminal docket today.”).

22. LYNCH, *supra* note 19; U.S. SENTENCING COMM’N ANN. REP. 41 (1995).

23. U.S. SENTENCING COMM’N, *FIFTEEN YEARS OF GUIDELINES SENTENCING*, *supra* note 21, at 116.

24. Generally, the lengthy sentencing metrics assigned to drug crimes (relative to other nonviolent offense categories), the differentiation within drug crimes by illicit substance, and the escalation of sentences via criminal history produced greater racial disparities in sentencing than had prevailed pre-guidelines. See *id.* at 131–33 (identifying the sentencing policy governing crack cocaine, as well as the weight given to drug priors under the Guidelines, as major contributors to this disparity).

scholarship has documented various kinds of demographic disparities in formal sentence outcomes under the mandatory guidelines, including as a function of defendants' racial or ethnic identity,²⁵ gender,²⁶ citizenship status,²⁷ and interactions between those factors.²⁸ Empirical scholarship has also documented geographic variations in sentence outcomes for otherwise-similar defendants, despite the Commission's efforts to standardize sentencing across federal jurisdictions.²⁹

Beginning in 2005, the entire landscape of the federal guidelines regime was dramatically transformed. First, in *United States v. Booker*,³⁰ the U.S. Supreme Court ruled that the federal sentencing guidelines as then implemented violated defendants' 6th amendment rights, and it proposed a constitutional remedy of rendering them advisory.³¹ In subsequent decisions, the Court refined this ruling to

25. See Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189 (2002); Brian D. Johnson & Sara Betsinger, *Punishing the "Model Minority": Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 CRIMINOLOGY 1045 (2009); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AM. SOC. REV. 705 (2000).

26. See, e.g., Jill K. Doerner & Stephen Demuth, *Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently?*, 25 CRIM. JUST. POL'Y REV. 242 (2014); Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43 (2006).

27. See, e.g., Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 L. & SOC'Y REV. 789 (1997); Stephen Demuth, *The Effect of Citizenship Status on Sentencing Outcomes in Drug Cases*, 14 FED. SENT'G REP. 271 (2002).

28. See, e.g., Celesta A. Albonetti, *The Joint Conditioning Effect of Defendant's Gender and Ethnicity on Length of Imprisonment under the Federal Sentencing Guidelines for Drug Trafficking/Manufacturing Offenders*, 6 J. GENDER, RACE & JUST. 39 (2002); Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, 27 JUST. Q. 1 (2010); Amy Farrell, *Measuring Judicial and Prosecutorial Discretion: Sex and Race Disparities in Departures from the Federal Sentencing Guidelines*, 6 JUST. RES. & POL'Y 45 (2004); Chandra D. LaFrentz & Cassia Spohn, *Who is Punished More Harshly in Federal Court? The Interaction of Race/Ethnicity, Gender, Age, and Employment Status in the Sentencing of Drug Offenders*, 8 JUST. RES. & POL'Y 25 (2006); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001); Darrell Steffensmeier & Stephen Demuth, *Does Gender Modify the Effects of Race–Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants*, 22 J. QUANTITATIVE CRIMINOLOGY 241 (2006).

29. See Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 JUST. Q. 633 (2002); Cassia Spohn, *Sentencing Decisions in Three U.S. District Courts: Testing the Assumption of Uniformity in the Federal Sentencing Process*, 7 JUST. RES. & POL'Y 1 (2005); Jawjeong Wu & Cassia Spohn, *Interdistrict Disparity in Sentencing in Three U.S. District Courts*, 56 CRIME & DELINQ. 290 (2010).

30. *United States v. Booker*, 543 U.S. 220 (2005).

31. The Court excised the mandatory provisions of the guidelines, rendering them advisory. Specifically, the Court severed and excised “the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure) . . . and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range.” *Id.* at 259 (citation omitted). For a detailed analysis of this case law, see Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631 (2012).

make explicit that judges were free to sentence outside of the guidelines' prescribed range for a variety of reasons, including on the basis of policy disagreements; and it mandated deference by appellate courts to sentencing judges' decisions to depart from the guidelines.³² The potential impact of these decisions was momentous, in that it shifted considerable sentencing discretion back to judges. As a consequence, legal commentators and some practitioners expected that the extreme imbalance of power between the prosecution and defense in plea negotiations would be lessened under advisory guidelines.³³

The *Booker* line of cases has inspired several empirical examinations, particularly regarding its impact on disparities in sentence outcomes. Thus, the primary question driving the "*Booker*-effect" studies has been whether, and to what extent, various kinds of "unwarranted" disparities between sentenced offenders have increased as a consequence of the *Booker* policy changes. The Commission itself has conducted several such studies. In the year immediately following *Booker*, the Commission's analysis suggested that sentencing had not changed dramatically from the immediate pre-*Booker* period.³⁴ In two subsequent analyses, however, the Sentencing Commission inferred from its analysis that there has been an increase, post-*Booker*, in sentence disparity between similar offenders, particularly as a function of defendant's race.³⁵

Several social scientists conducted independent analyses of the Commission's data, finding fewer—and different—issues around unwarranted disparities than

32. See, e.g., *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).

33. See, e.g., Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775 (2008) (predicting that the *Booker* line of cases would "move the balance of plea bargaining power back toward criminal defendants").

34. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 46 (2006) (reporting that the majority of sentences were still in "conformance" with the sentencing guidelines and that sentencing severity had not changed substantially). Findings from these analyses were also published in several academic articles. See, e.g., Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425 (2006); Paul J. Hofer, *United States v. Booker as a Natural Experiment: Using Empirical Research to Inform the Federal Sentencing Policy Debate*, 6 CRIMINOLOGY & PUB. POL'Y 433 (2007).

35. U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS (2010); U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2012). Some scholars questioned several of the methodological choices made in the 2010 study, including that the analysis amalgamated offense types within several broad categories, thereby distorting how disparities played out and that the dependent sentencing variable conflated two distinct decisions: whether a prison sentence was to be imposed or not and the length of an imposed prison sentence. See Jeffery T. Ulmer, Michael T. Light & John H. Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision*, 10 CRIMINOLOGY & PUB. POL'Y 1077 (2011). Moreover, the analysis included no district level variables, thereby not accounting for the well-documented district level differences that have existed throughout the guidelines era. The 2012 analysis controlled for offense type and geography and was viewed as an "improvement" in terms of methodology. Jeffery T. Ulmer & Michael Light, *The 2012 U.S.S.C. Booker Report's Characterization of the Penn State Studies: Setting the Record Straight*, 25 FED. SENT'G REP. 290, 290 (2012).

those found by the Commission. For instance, Jeffery Ulmer and his colleagues analyzed the *Booker/Gall* effects using a series of multi-level regression models that added relevant district-level variables.³⁶ Generally, their findings indicated that post-*Booker* racial disparities were equal to or less than those observed during the period prior to the 2003 PROTECT Act,³⁷ with the one notable exception that non-white defendants' rate of incarceration increased relative to white defendants after the 2007 *Gall* decision.³⁸

Some researchers' analyses indicated that the locus of increased racial disparities post-*Booker* may have been due to "prosecutorial discretion, as opposed to judicial discretion."³⁹ Following *Booker*, prosecutors altered their practices in arenas where they still maintained discretionary power, such as charging decisions. Legal scholars Joshua Fischman and Max Schanzenbach more directly tested the source of observed racial disparities in sentence outcomes over time by specifying various discretionary decisions (the application of mandatory minimums, departures, safety valve use) as dependent variables.⁴⁰ Their analyses suggested that increased disparities in sentence length between Black and white defendants was due to prosecutors' expanded use of mandatory minimum statutes after *Booker*, which set a floor on judicial sentencing discretion. Conversely, their findings on the impact of *Booker* and *Gall* "suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing."⁴¹ Along

36. Ulmer, Light & Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision*, *supra* note 35; Ulmer, Light & Kramer, *The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision*, *supra* note 16.

37. The Feeney Amendment of the 2003 PROTECT Act further restricted judges' ability to depart downward from the guidelines and substituted *de novo* appellate review for the abuse-of-discretion standard that was in place. See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 296–302 (2004).

38. Ulmer, Light & Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision*, *supra* note 35, at 1100 (concluding that "racial and gender sentence-length disparities are less today, under advisory Guidelines, than they were when the Guidelines were arguably their most rigid and constraining."); *Id.* at 1108 (concluding there is an "unexplained increase in Black males' odds of imprisonment, post-*Gall* . . ."); see also, Ulmer, Light & Kramer, *The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision*, *supra* note 16, at 802.

39. Ulmer, Light & Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision*, *supra* note 35, at 1102.

40. Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 739 (2012); see also Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013).

41. Fischman & Schanzenbach, *supra* note 40, at 729. Ryan Scott also empirically examined the impacts of *Booker* and *Kimbrough/Gall* on sentencing disparity, finding that the cases did not incite a sentencing revolution, but rather resulted in a slow but steady pattern of departure over time. Scott conducted a case study in the District of Massachusetts of inter-judge sentencing disparity as a function of the policy interventions (the PROTECT Act, and the *Booker* and *Gall* decisions) and found a steady increase in inter-judge disparity over time, indicating that the manifestation of legal change is occurring but is more gradual than was expected. Ryan W. Scott, *The Effects of Booker on Inter-Judge Sentencing Disparity*, 22 FED. SENT'G REP. 102 (2009).

similar lines, legal scholar Crystal Yang found that while judicial decision-making partially accounted for increased racial disparities post-*Booker*, prosecutorial use of mandatory minimums also contributed to those disparities.⁴²

III.

LAW AS PRACTICED: LESSONS FROM SOCIAL THEORY

The guidelines' shortcomings in taming different kinds of sentencing disparities point to the conceptual problem with how the law was imagined by the Commission and other policy-makers. The guidelines approached sentencing policy problems as if there was a way to legislate "uniformity" in outcomes across a very large, complex, and culturally diverse set of federal districts. A long line of scholarship, both specific to criminal sentencing and broadly applied to a number of other fields, raises questions about such assumptions. Indeed, at the core of much socio-legal scholarship is an understanding of the law as something that is always interpreted, understood, applied, and experienced in multiple, contested, and often competing ways. To that end, empirical socio-legal scholarship has moved beyond simply measuring the gap between "law-on-the-books" and "law-in-action,"⁴³ focusing instead on the translation process between formal law and its implementation in practice.⁴⁴

Of particular relevance here is research on law and organizations that examines how law and policy get reshaped by "front-line" criminal legal workers in a number of settings. For instance, Candace McCoy's now-classic study of legal practices following the passage of a proposition that "banned" plea bargaining in felony cases in California found that in response to the change in law, plea negotiations simply moved to an earlier stage of process, prior to the formal felony charging stage.⁴⁵ This policy in no way accomplished its goal of abolishing plea bargaining in felony cases. Instead, by creating pressure to plea bargain earlier, it increased prosecutorial power in plea negotiations.⁴⁶ The central role of front-line actors' translation processes in determining how policy change is interpreted,

42. Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75 (2015) (discussing how both judicial discretion and prosecutorial discretion related to mandatory minimums lead to disparities).

43. See Lynch & Omori, *supra* note 8, at 416 (arguing that "the question of whether there is a gap between 'law on the books' and 'law in action' has long ago been asked and answered; more fruitful questions interrogate the specificities of translating formal law into practice.") (citation omitted); Andres F. Rengifo, Don Stemen & Ethan Amidon, *When Policy Comes to Town: Discourses and Dilemmas of Implementation of a Statewide Reentry Policy in Kansas*, 55 CRIMINOLOGY 603, 604 (2017) ("[S]cholars examining the creation and execution of formal policy have consistently documented a disconnect between 'law on the books' and 'law in action' that gets amplified during times of reorganization").

44. *Id.* See generally Anjuli Verma, *The Law-Before: Legacies and Gaps in Penal Reform*, 49 L. & SOC'Y REV. 847, 854–55 (2015).

45. CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA (1993).

46. *Id.* at 155 (discussing how prosecutorial power was "augmented," especially in cases where defendants had prior convictions, by bargaining at the early stages of process).

absorbed, and acted upon has also been highlighted in more recent work on legal policy changes to parole and reentry,⁴⁷ policing,⁴⁸ immigration enforcement,⁴⁹ and felony sentencing policy.⁵⁰

Specific to federal courts, the Schulhofer and Nagel studies detailed how the initial top-down imposition of the guidelines regime was resisted on the ground by legal actors.⁵¹ The researchers reviewed case files and conducted interviews with prosecutors, judges, defense attorneys and probation officers in selected districts and found that the guidelines were circumvented in 20-35% of the cases they studied.⁵² They identified several distinct plea negotiation strategies that seemed to account for the circumvention across districts. In particular, U.S. Attorneys were able to control how offense level scores⁵³ were ultimately calculated through the specific terms of a plea, thus circumventing the “real offense” intent of the guidelines.⁵⁴ Notably, circumvention occurred most frequently in drug and gun cases, where the guideline calculations were most out of sync with pre-guidelines’ prevailing norms.⁵⁵

47. See generally Rengifo, Stemen & Amidon, *supra* note 43 (illustrating how policy implementation was mediated by correctional actors’ positionality and sense-making); Danielle S. Rudes, *Getting Technical: Parole Officers’ Continued Use of Technical Violations Under California’s Parole Reform Agenda*, 35 J. CRIME & JUST. 249 (2012) (illustrating how agents resisted reforms that aimed to decrease the use of parole violations to manage and control parolees).

48. See generally Ryken Grattet & Valerie Jenness, *Transforming Symbolic Law into Organizational Action: Hate Crime Policy and Law Enforcement Practice*, 87 SOC. FORCES 501 (2008) (finding that where police are more integrated within the community, they are more likely to have instituted operational hate crime policies and be responsive to the problem of hate crime in the community); Hazel Kemshall & Mike Maguire, *Public Protection, Partnership and Risk Penalty: The Multi-Agency Risk Management of Sexual and Violent Offenders*, 3 PUNISHMENT & SOC’Y 337 (2001) (demonstrating that police, in particular, resisted the use of risk assessment tools to manage those in the community with previous sex offense and violence convictions, and instead used more traditional law enforcement techniques).

49. See generally Mona Lynch, *(Im)migrating Penal Excess: Sheriff Joe Arpaio and the Case of Maricopa County, Arizona*, in EXTREME PUNISHMENT: COMPARATIVE STUDIES IN DETENTION, INCARCERATION AND SOLITARY CONFINEMENT 68-69 (Keramet Reiter & Alexa Koenig eds., 2015) (finding that federal immigration law and policy were transformed on the ground by local law enforcement who entered into 287(g) agreements, such that it became a powerful weapon used to the expand jurisdiction and reach of patrol officers).

50. See generally Verma, *supra* note 44 (finding that the translation of California’s sentencing realignment law into policy at the county level was influenced by criminal system actors’ localized interpretation of the law’s mandates, partly as a function of local historical sentencing practices).

51. Nagel & Schulhofer, *A Tale of Three Cities*, *supra* note 1; Schulhofer & Nagel, *Plea Negotiations*, *supra* note 1; Schulhofer & Nagel, *Negotiated Pleas*, *supra* note 1.

52. Schulhofer & Nagel, *Plea Negotiations*, *supra* note 1, at 1285.

53. “Offense level” represents one of the two numbers calculated to determine sentence guidelines in the federal guidelines system (the other is a criminal history score). It includes values for offense(s) of conviction as well as all “relevant conduct” related to the offense and defendant including elements not contained in the conviction offense, and as defined by the Commission in the Guidelines Manual. See Charles Doyle, *How the Federal Sentencing Guidelines Work: An Overview*, CONG. RESEARCH SERV. (July 2, 2015), <https://fas.org/sgp/crs/misc/R41696.pdf> [<https://perma.cc/3578-TKM3>].

54. Schulhofer & Nagel, *Plea Negotiations*, *supra* note 1.

55. *Id.* at 1309–10.

Subsequent research conducted during the mandatory guidelines period confirmed these findings, identifying prosecutorial discretion as a causal locus of variance.⁵⁶ Because judges had limited ability to deviate from calculated sentence ranges, decisions made at earlier stages of the process—which are largely controlled by prosecutors and hidden from scrutiny—became more determinative of sentence outcome. Indeed, empirical scholarship has confirmed that prosecutor-controlled activities, such as charging decision-making and negotiated reductions for substantial assistance, played a significant role in sentencing disparities in the mandatory guidelines period.⁵⁷

The multi-stage translational process from formal policy to actual practice also opens up the possibility of significant variation in practices and outcomes across locales. This then intersects with insights derived from the courts-as-communities theoretical perspective. James Eisenstein, Roy Flemming and Peter Nardulli devised the “courts-as-communities” metaphor after conducting a comparative field study in nine criminal courts located in three different states.⁵⁸ The work of Eisenstein, Flemming, and Nardulli captures the enduring relations, interdependencies, and norms that develop among organizational actors in a given court, and it reveals that clear differences in procedures and outcomes exist between different courts even under the same state penal code. The “local legal culture”⁵⁹ that helps account for these effects is often infused with locally or regionally specific cultural tropes, frames, and ideals about blameworthiness, culpability, and redeemability that shape how law is put into action.⁶⁰ These can include race- and ethnicity-based ideologies and stereotypes that shape the deployment of criminal law on the ground.⁶¹ To that end, the courts-as-communities scholarship has documented the importance of localized norms, mores, and scripts in both meaning-making and strategic action.⁶² It also helps explain the relative stability of the local

56. Brian D. Johnson, Jeffery T. Ulmer & John H. Kramer, *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008).

57. *Id.*; see also Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charging Decisions in U.S. Federal District Courts*, 27 JUST. Q. 394, 421 (2010) (finding that women received more charge reductions than otherwise-similar men, and that minority defendants were disadvantaged relative to whites in weapons cases); Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813 (2009).

58. EISENSTEIN, FLEMMING & NARDULLI, *supra* note 10, at 28.

59. Thomas W. Church Jr., *Examining Local Legal Culture*, 10 L. & SOC. INQUIRY 449 (1985).

60. Mona Lynch, *Mass Incarceration, Legal Change, and Locale: Understanding and Remediating American Penal Overindulgence*, 10 CRIMINOLOGY & PUB. POL’Y 671 (2011). For a general sociological theory of culture, see Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986).

61. See generally Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); Mona Lynch & Marisa Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality*, 52 L. & SOC’Y REV. 773 (2018).

62. Meaning-making in this context refers to the process by which organizational actors interpret social phenomena, including crime and its predicates. As Ann Swidler explicates, such cultural forces form the unspoken “common sense” understanding of phenomena that fuel the interpretation

courtroom “workgroup,” which develops, maintains, and transmits those norms, and which accounts for some of the between-locale variation that has been observed within legal jurisdictions.⁶³

A number of scholars have applied these insights to analyses of federal court practices under mandatory guidelines. For instance, using qualitative field interviews conducted before *Booker*, sociologist Jeffery Ulmer uncovered how local legal cultures within federal court communities shaped case outcomes, finding that despite the intent of the guidelines to provide uniformity across disparate districts, “court community actors interpret guidelines and other federal criminal justice policies differently, and use and transform these in a variety of ways.”⁶⁴ Thus, he suggests that the guidelines had a strong influence in structuring the parameters of plea negotiations and adjudication strategies, but that the meanings and values assigned to the components of that structure varied by local district.⁶⁵ Johnson, Ulmer, and Kramer also found that the guidelines were sidestepped in a manner that likely served local needs and prerogatives and that fit with local organizational norms.⁶⁶ Thus, they concluded that sentence outcome variations for similar defendants was substantially due to the structure and process of plea bargain negotiations under the specific constraints of the guidelines, but sentencing was nonetheless localized as a function of both organizational and ideological factors.⁶⁷ These insights would seem to help explain the significant between-district variance found by Nagel and Schulhofer as to both the frequency and extent of deviations from the guidelines.⁶⁸

This body of work also uncovers how the more opaque processes that precede formal sentencing shape case outcomes. To that end, a growing body of research highlights the important role that localized federal case selection plays in shaping ultimate sentencing outcomes as well. In a comparative field study of three districts, I found considerable variations in what kinds of drug cases were charged in federal court, where two of the U.S. Attorneys’ offices brought charges against very low-level street dealers, and the third almost exclusively pursued large-scale

process under normal circumstances and can serve as the “cultural toolkit” for responding to unsettled conditions of change. Swidler, *supra* note 60, at 278–79; see also Rhys Hester, *Judicial Rotation as Centripetal Force: Sentencing in the Court Communities of South Carolina*, 55 CRIMINOLOGY 205, 205–06 (2017); Ulmer, *supra* note 8 (detailing specific features of courts-as-communities).

63. See Hester, *supra* note 62, at 227 (discussing the ways in which courtroom workgroups enforce their norms when new actors enter the group).

64. Ulmer, *supra* note 8, at 272.

65. *Id.* at 264 (delineating differences on key adjudication factors by districts).

66. Johnson, Ulmer & Kramer, *supra* note 56, at 767–78.

67. *Id.* at 768 (discussing how both caseload pressure and local political ideology shape outcomes); see also Byungbae Kim, Cassia Spohn & E. C. Hedberg, *Federal Sentencing as a Complex Collaborative Process: Judges, Prosecutors, Judge–Prosecutor Dyads, and Disparity in Sentencing*, 53 CRIMINOLOGY 597 (2015) (discussing how relations between legal actors vary as a function of locale and the impact of this variance on sentence outcomes).

68. Nagel & Schulhofer, *A Tale of Three Cities*, *supra* note 1, at 526, 534, 553; Schulhofer & Nagel, *Plea Negotiations*, *supra* note 1, at 1292.

traffickers.⁶⁹ Lisa Miller and James Eisenstein further illustrate how the nature of cases that get pursued by U.S. Attorneys are in part a product of a host of hidden discretionary factors at the local level. In their case study, guns-and-drugs cases frequently began as state court cases, and the threat of charging federally was used to obtain information and/or secure guilty pleas.⁷⁰ Those who declined risked being charged in federal court.⁷¹

In a previous quantitative examination of the *Booker* impacts over time and across districts, Marisa Omori and I explicitly linked the courts-as-communities and law-and-organizations literature by assessing both within- and between-district variations over time in drug case adjudication.⁷² We found that districts maintained considerable stability in sentencing outcomes over time and across policy periods while consistently varying from one another. This suggests that local (district-level) legal culture is both enduring and important to case processing, and that it is generally unaffected by top-down policy changes like the *Booker* decision.⁷³ However, while districts tended to look like themselves over time, the mechanisms used to maintain that stasis changed as a function of the policy period, suggesting that actors within the districts adapt their procedural and strategic practices to meet the demands of policy mandates while maintaining their local case norms for actual sentence outcomes.⁷⁴

The present study builds upon this work to more directly examine how and why local legal practice varies in the federal criminal system, including in response to formal policy change. Because courtroom actors assigned to any given case—judges, prosecutors, defense attorneys, and pretrial probation officers—are not coded in the available federal data sets, this study aimed to explore how legal actors in distinct locales appear—individually and collectively—to shape case outcomes. More fundamentally, it examines how actors understand and categorize cases, including how they perceive their own role in producing case outcomes.

IV.

AN EMPIRICAL EXAMINATION OF POST-*BOOKER* ADAPTATIONS

A. Study Research Questions, Design, and Setting

The present study seeks to answer four interrelated questions: How have prosecutors and defense attorneys negotiated in light of increased judicial sentencing

69. LYNCH, *supra* note 19, at 38.

70. Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 L. & SOC. INQUIRY 239, 255–57 (2005). Lynch also found that these kinds of multi-jurisdictional partnerships mattered in some places but not others. LYNCH, *supra* note 19, at 42–43, 70.

71. Miller & Eisenstein, *supra* note 70.

72. Lynch & Omori, *supra* note 8, at 429–38.

73. *Id.* at 430–31.

74. *Id.* at 439.

autonomy post-*Booker*? How have the “courtroom workgroup”⁷⁵ dynamics and power relations changed in light of shifts in discretion? Have local district-level courts and court actors adapted to the *Booker* reforms differently as a function of local legal culture? What are the consequences for equality and justice? To answer these questions, I conducted comparative qualitative field research in four purposively selected federal districts to examine the interplay between localized norms and imperatives in how laws are implemented and the larger legal structure in which local courts are situated.

The qualitative field research was specifically designed to complement the quantitative work described in the previous section⁷⁶ by exploring process-related phenomena that are either not at all captured or not easily examined through official data sources.⁷⁷ In response to this gap, this field research project was designed to examine how the behaviors of legal actors in distinct locales individually and collectively shape case outcomes in the wake of top-down policy changes. I also aimed to tease out some of the complexities of changing policy and practice that are co-occurring with *Booker*-related and other policy reforms. There are multiple moving parts both within the federal criminal system and in the larger social, political, and governmental realms that can potentially shape sentence outcomes, rendering it difficult, if not impossible, to isolate the impact of specific legal changes by examining quantitative models.⁷⁸

Other policy changes have been in play in recent years, as well. In terms of legislative change, the Fair Sentencing Act of 2010, which decreased mandatory

75. See generally JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 21–22 (1977) (describing authority relationships in the courtroom workgroup).

76. See Lynch & Omori, *supra* note 8 (analyzing sentencing data).

77. For example, one of the key omissions from the official, publicly available outcome data available through the Sentencing Commission is individual court actor data. The judges, prosecutors, defense attorneys, defendants and pretrial probation officers who are attached to any given case are not coded in the available federal data sets. Therefore, it is difficult to directly determine from the publicly available Commission datasets if judges, prosecutors, or defense attorneys are behaving differently in the wake of *Booker*, and/or whether those workgroup members’ relative influence on sentence outcome has changed. See U.S. SENTENCING COMM’N, PUBLIC ACCESS TO SENTENCING COMMISSION DOCUMENTS AND DATA 5 (Aug. 2018), https://www.ussc.gov/sites/default/files/pdf/about/policies/20180814_Public_Access_Documents_Data.pdf [https://perma.cc/BMT4-VEFW] (describing agreement with U.S. Courts that prohibits release of “information that will identify an individual defendant or any other person identified in the sentencing information” without express permission of the court).

78. For example, executive administration personnel changes have regularly occurred within the main Department of Justice, district-level U.S. Attorney’s Offices, and the federal bench, which directly impact federal case processing in a number of ways, both formally and informally. See Amy Farrell & Geoff Ward, *Examining District Variation in Sentencing in the Post-Booker Period*, 23 FED. SENT’G REP. 318, 323 (2011) (finding that sentences for white and Black defendants are more equal in courts where prosecutors are demographically representative of the population); Geoff Ward, Amy Farrell & Danielle Rousseau, *Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court Organizations*, 43 L. & SOC’Y REV. 757, 787–90 (2009) (finding that racial composition of prosecutors impacts sentencing disparities for Black and white defendants).

minimum penalties in crack cocaine cases, directly impacted sentence outcomes, and may well have influenced how attorneys negotiate crack cases.⁷⁹ Similarly, the recently-signed FIRST STEP Act of 2018, which includes a multi-pronged approach to sentencing reform, is likely to further influence how actors in the criminal legal system negotiate sentences.⁸⁰ Changes in DOJ policy also have the potential to reshape criminal case processes and outcomes. For instance, in May 2010, Attorney General Eric Holder issued a memo giving individual US Attorney's offices more discretion on charging and bargaining.⁸¹ The Holder memo reflected a significant change from the DOJ policy that had been in place since the 2003 "Ashcroft memo," requiring U.S. Attorneys to pursue the most serious charges that are readily provable and seek the maximum possible sentence allowed.⁸² That predecessor policy also limited local U.S. Attorneys' autonomy in plea bargaining by severely constraining terms of negotiated settlements.⁸³

The research presented here was designed to examine remaining questions about how federal criminal adjudication and sentencing work in practice, and specifically those about the translation of legal policy change from pronouncement to practice. It aims to provide a fuller, more contextualized picture of how cases are negotiated and sentenced during a period of policy transformation.

I purposively selected the four districts in my sample to differ from each other on several key dimensions: Overall size; size of criminal caseload; size of drug trafficking caseload;⁸⁴ demonstrated rate and type of sentence outcome variations

79. The Fair Sentencing Act reduced the so-called "100–1" powder-crack cocaine quantity disparity to trigger the same mandatory sentence to 18–1, and mandatory minimums for simple possession of crack were eliminated. Fair Sentencing Act of 2010, Pub. L. No. 111–220, §§ 2, 3, 124 Stat. 2372 (2010).

80. See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/5A8R-T35S>].

81. Memorandum from Att'y Gen. Eric H. Holder, Jr. to All Federal Prosecutors (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [<https://perma.cc/CA5T-T7FL>].

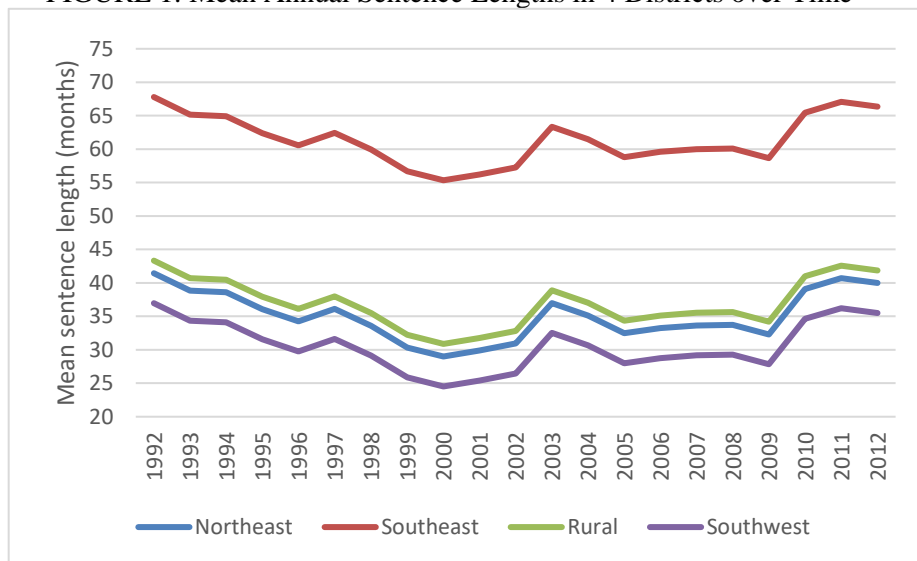
82. Memorandum from Att'y Gen. John Ashcroft to All Federal Prosecutors (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm [<https://perma.cc/NUM7-2QEJ>]. The Ashcroft memo used the word "requires" in regard to charging the most serious, provable offense, whereas the Holder memo uses "should ordinarily charge the most serious offense," and qualifies this directive to stress individualized assessment of the case and defendant. *Id.*

83. *Id.* at § 2 (specifying "policy concerning plea agreements"); see Curt Anderson, *Ashcroft Order Limits*, ASSOCIATED PRESS (Sept. 22, 2003); cf. Michael S. Nachmanoff & Amy Baron-Evans, Booker, *Five Years Out: Mandatory Minimum Sentences and Department of Justice Charging Policies Continue to Distort the Federal Sentencing Process*, 22 FED. SENT'G REP. 96 (2009) (providing analysis from a defense attorney perspective).

84. I was interested in examining drug cases for several reasons. First, federal drug cases have engendered the greatest policy debate since the inception of the guidelines, and they are a major category of primary sentenced offenses. While the number of immigration offense cases have closed the gap on drug trafficking cases since 2009, drug trafficking remains a large and important component of the federal criminal caseload. In addition, the major Supreme Court cases that transformed the guidelines' regime—*Booker*, *Gall* and *Kimbrough*—all involved drug trafficking convictions, so the decisions address issues underlying the sentencing of drug trafficking offenders. Second, the

post-*Kimbrough/Gall*; and geographic location. The selected sites included one district in the Northeast region of the U.S. that is made up of both urban and rural communities and where sentences are typically more lenient than the national average. I refer to this district as Northeast district.⁸⁵ My second district, Southeast district, is more punitive relative to the national average, especially in sentencing on drug trafficking cases. My third district is Rural district, which has a very small and more variable (over time) criminal caseload. My final district, Southwest district, is situated along the U.S.-Mexico border and has among the largest criminal caseloads in the nation with the majority of cases involving immigration and/or drug offenses.

FIGURE 1: Mean Annual Sentence Lengths in 4 Districts over Time⁸⁶



sentencing policy changes mandated by those Supreme Court decisions affect those cases subject to the Guidelines but leave the mandatory minimums intact. Because a significant subset of drug trafficking offenses is also subject to mandatory minimum statutes, I was able to disentangle the complexities of sentencing in drug cases that are subject to mandatory minimums *as well as* the Guidelines by exploring how exposure to mandatory minimums shapes plea negotiations and final sentences in the post-*Booker* period. Third, the federal drug trafficking caseload is arguably the most discretionary of the criminal caseloads in the federal system. There are state and territorial laws that also prohibit such trafficking, so the federal government can, and in most cases does, leave the prosecution of drug trafficking cases to states. As such, federal drug cases provide an especially clear window into the role of discretion in legal processing and can provide insight into whether, why, and how factors such as defendant demographics shape case selection, negotiations, and outcomes.

85. As per my agreement with the defenders' offices and as required by my university's Institutional Review Board, which assesses human research to ensure it meets ethical and safety standards, I use pseudonyms for each district name, as well as all of the attorneys, judges, defendants, and others, to protect participants' privacy.

86. I use an amalgamated dataset of federal sentencing outcomes from 1992–2012 that I have used in prior research on the impact of legal change on federal sentencing outcomes. *See* Lynch & Omori, *supra* note 8. The data are collected, cleaned, and coded by the United States Sentencing

Sentencing in these four districts has produced an interesting pattern that suggests the importance of both local norms and national-level factors in shaping sentence outcomes. As Figure 1 illustrates, each of the four districts vacillated in sentence length (controlling across the four districts for offense level and criminal history) at similar points in time and to a similar degree over time,⁸⁷ but with clear distinctions between districts. In particular, Southeast district demonstrates much more punitive sentencing outcomes than the other three districts in my study. The mean sentence for defendants in Southeast was about 31 months longer than in Southwest, which consistently had the shortest mean sentence of the four districts.

B. Data Collection and Analysis

My initial access to the data analyzed in this study came through district-level federal defenders' offices with the assistance of the Sentencing Resource Counsel, which serves as an expert litigation, research, and policy analysis body for the myriad of federal defenders' offices that represent clients in US district courts.⁸⁸ I also gained access to data through federal defenders' offices, which provide representation to indigent clients in their respective districts.⁸⁹ Because criminal case adjudication is primarily achieved through the plea negotiation process, access to attorneys whose negotiations primarily occur outside of open court was optimal for achieving this study's goals.⁹⁰

Commission and include information pertaining to every criminal defendant sentenced in federal court, other than those convicted of petty misdemeanors. This dataset is among the most extensive and complete sentencing databases available on American criminal courts and includes a wealth of case-related and defendant-related variables. This figure represents the mean sentence, annually, in each of the four districts in my study as calculated using Analysis of Variance (ANOVA), specifying year, district, year x district, while controlling for final offense level and criminal history category. ANOVA is a statistical analysis technique that is used to test hypotheses about differences between groups and that allows for control of other variables in testing.

87. Within each district, annual mean sentences range a total 12.5 months over the 20-year period of 1992–2012 and follow the same ebbs and peaks in annual sentence length that seem to coincide with key legal policy changes.

88. See *Resources*, SENTENCING RES. COUNSEL PROJECT OF THE FED. PUB. & CMTY. DEFS., <http://www.src-project.org/resources> [<https://perma.cc/S6CZ-3WV5>].

89. These offices proved useful both for strategic reasons and due to their willingness to accommodate me. The offices also typically manage the training for panel attorneys who are appointed to represent indigent defendants in certain cases. An alternate approach would have been to gain primary access through district-level U.S. Attorneys' offices, but access to those offices for observational field research is notoriously difficult, and I was denied that direct access when I approached multiple U.S. Attorney's offices. See Mona Lynch, *Expanding the Empirical Picture of Federal Sentencing: An Invitation*, 23 FED. SENT'G REP. 313 (2011). The difficulty of gaining access to prosecutors' offices in general—and the resulting inability of researchers to fully analyze the prosecutorial role—has been the subject of much commentary and lament. See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017); Shermer & Johnson, *supra* note 57, at 396.

90. This access also allowed for a contextually rich account of criminal defense work to be included within the analysis of how cases are dealt with in the federal system. Accounts of criminal defense lawyering are largely absent in the contemporary empirical federal sentencing literature and are relatively sparse in state court literature. The most sustained empirical analyses are by Debra Emmelman. See Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining*:

Once I gained access and began to spend time in each district, I developed contacts with other court actors and sought formal and informal interviews with them. I collected multiple forms of qualitative data: extensive field notes of observations of court proceedings (particularly change of plea hearings and sentencing hearings); case file materials such as charging documents, plea agreements, sentencing memoranda; observational notes related to less formal case-related activities; and in-depth interview data. The field research, including the interviews, took place over multiple visits to each site between December 2012 and July 2014.

The interviews constitute my primary data source for this study. Although many criminal court studies that use qualitative interviews focus on judges,⁹¹ I prioritized interviewing attorneys because they are the primary parties involved in constructing parameters of plea agreements, including the use of binding pleas and other legal tools to constrain post-*Booker* judicial discretion. There is substantial evidence that adaptations to and circumventions around *Booker* also occur outside of judges' orbits via prosecutors' charging decisions and plea negotiation strategies.⁹² Further, unlike in many state court systems, judges in federal court are precluded from participating in the plea-bargaining process, a prohibition that is strictly enforced in the federal system.⁹³

The formal interviews were structured to cover four broad areas of interest: 1) The norms of case processing and negotiation outside of court, both generally and specific to drug trafficking cases; 2) the working relationship between attorneys, pretrial probation officers, and sentencing judges, and complications posed by each set of courtroom actors, as well as by codefendants and their counsel, in the adjudication process; 3) perceptions about disparities in sentencing patterns, the meaning of "uniformity" in sentencing, and broader justice challenges that face the federal criminal system; and 4) the changing nature of case negotiations over time and the relative influence of different kinds of legal, political, and organizational change. Those interviewees who had worked in the system long enough to

The Interpretive Procedures of Court-Appointed Attorneys, 22 L. & SOC. INQUIRY 927 (1997); see also Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement as a Process of Recursive Decisionmaking*, 30 L. & SOC'Y REV. 335 (1996). Both Nicole Van Cleve and Issa Kohler-Hausmann include defense work in their analyses, although it is not the exclusive focus. See NICOLE G. VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016); Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351 (2013).

91. E.g., Matthew Clair, & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 337 (2016); Hester, *supra* note 62; John H. Kramer & Jeffery T. Ulmer, *Downward Departures for Serious Violent Offenders: Local Court "Corrections" to Pennsylvania's Sentencing Guidelines*, 40 CRIMINOLOGY 897, 906 (2002).

92. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1087 (2006); Lynch & Omori, *supra* note 8, at 439.

93. This proscription is delineated in Rule 11 of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 11(c)(1). As Daniel McConkie notes, appellate courts "have interpreted the injunction against judicial participation in plea negotiations very strictly." Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 72 (2015).

span the pre- and post-*Booker* periods were also asked a specific set of questions about the impact of the legal policy change.

I formally or informally interviewed 75 people in total, including federal defenders, panel defense attorneys, and privately retained defense counsel, active and former prosecutors, judges, and several federal law enforcement agents. Interview lengths ranged from about 30 minutes to more than two-and-a-half hours, with a mean length of just over an hour. In the case of a subset of interviewees, I conducted follow-up interviews subsequent to a DOJ policy change directing U.S. Attorneys to refrain from seeking mandatory minimums in low-level drug cases.⁹⁴ To examine how local actors responded to *Booker*, my primary source of data for this analysis is my interview data with defense attorneys, supplemented by interviews with several prosecutors and judges. Thirty-seven of my interviewees worked in the federal criminal system at the time of the *Booker* decision, so these interviewees were asked a series of questions about how case adjudication happened both before and after the guidelines were rendered advisory. I draw on these data to explicate how this policy change took shape on the ground, and I supplement the analysis with observations and case data to illustrate how specified strategies work.

The subset of transcribed interviews with the thirty-seven longtime legal actors totaled 919 single-spaced pages. My interview coding scheme was primarily theoretically driven but included an inductive component as well. First, because I had constructed the set of questions about *Booker*'s effect to specifically explore how on-the-ground legal actors had responded to the decision, I developed a theoretically-derived coding scheme to capture how interviewees characterized the degree of change, the kinds of changes that were brought about by the ruling in *Booker* and subsequent cases, and whether and how those changes impacted racial and other disparities. I coded responses to this set of questions to identify differences across jurisdiction and sub-jurisdiction (divisions within districts). I coded on several major potential changes, including general impressions about changes to roles of various actors and the impact on the balance of discretionary power; specific changes to charging, plea negotiation, and formal sentencing; and the effects of other co-occurring changes to policy or practice.

I then took a more inductive approach, using a multi-stage process that started with open coding to capture more spontaneous utterances about policy change that occurred outside of the interview section that directly addressed the *Booker* effects. In most cases, those more spontaneous comments fit within the major coding categories that I had theoretically derived. For open coding, I first read the entirety of the transcribed set of interviews. I then coded for every distinct utterance or

94. Memorandum from Att'y Gen. Eric H. Holder, Jr. to All Federal Prosecutors, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/3YPK-NJJU>].

statement that touched upon how formal policy changes were perceived and/or dealt with. These included but were not limited to *Booker*-related impacts so that I could establish relative impact of different proximate and distal changes to legal practice, as perceived by interviewees.

V.

FINDINGS

In this Part, I detail how *Booker*, *Rita*, *Kimbrough*, and *Gall* shaped adjudication practices and outcomes, as perceived and reported by legal actors in my sample districts. I first address the general perceptions regarding whether the *Booker* policy change impacted local practices and outcomes, and if so, the strength of its impact. I then delineate how legal strategies and practices have reportedly changed at three stages of the criminal process: charging, pre-conviction plea negotiations, and formal sentencing. Finally, I specifically detail interviewees' perceptions about whether *Booker* contributed to greater racial or other disparities in case outcomes. In each set of analyses, I highlight between-district variations, as well as within-district changes.

A. General Perceptions of Change Post-Booker

In three of my districts, Rural, Northeast, and Southwest, the *Booker* effect was characterized as more gradual than immediate. In two of those—Rural and Northeast—this was described by several interviewees as due in part to how circuit courts were interpreting *Booker*'s scope in its aftermath. Generally, in the wake of *Booker*, legal analysts assumed that the guidelines would remain largely binding, even if they were now ostensibly “advisory.”⁹⁵ Indeed, early rulings in a number of Circuits treated sentences that adhered to the now-advisory guidelines as inherently reasonable, while viewing non-guideline sentences more suspiciously.⁹⁶ Interviewees reported that this, in turn, kept trial court judges from diverging too far

95. *E.g.*, Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 169–70 (2005) (predicting marginal changes in judicial freedom such that “*Booker*-ized Federal Guidelines” will function like the most presumptive of state guidelines systems); Gilles R. Bissonette, *Consulting the Federal Sentencing Guidelines After Booker*, 53 UCLA L. REV. 1497, 1500 (2005) (arguing that the return of judicial discretion via *Booker* was “not a foregone conclusion.”).

96. *See, e.g.*, *United States v. Newsom*, 428 F.3d 685 (7th Cir. 2005) (affirming a within-guidelines sentence, in part because within-guidelines sentences are presumptively reasonable); *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) (overturning a below-guidelines sentence on the grounds that “extraordinary reduction must be supported by extraordinary circumstances”); *United States v. Green*, 436 F. 3d 449 (4th Cir. 2006) (overturning below-guidelines sentence, citing presumptive reasonableness of within-guidelines sentences, while holding outside-guidelines sentences to a higher standard of review on reasonableness).

from the guidelines prior to the pronouncements in *Kimbrough*⁹⁷ and *Gall*.⁹⁸ The conservative reading of *Booker* by appellate courts in those early years also seemed to amplify uneasiness among judges about how radical departures might be perceived on appeal. A defense attorney interviewee who had practiced in Northeast for decades described the chilling effect of those early *Booker* interpretations:

After *Booker*, there was this period where I think really no one was sure what to do. The judges, even really liberal judges like Judge Henry,⁹⁹ were really worried that if they were too good on the sentencing, it would swing back to mandatory guidelines, and they kind of felt like the greater good was to really stick to the guidelines as often as you could.

Prosecutors in Northeast also reportedly worked to maintain the hegemony of the guidelines in the first few years after the *Booker* decision. Through the Bush administration's tenure, the policy of the local U.S. Attorney's office was to forcefully advocate for within-guidelines sentences. As one federal defender shared: "They just refused to acknowledge that *Booker* existed. They still were saying, 'You shouldn't ask for a below-guideline sentence unless it's an extraordinary case.' Well, that's not the law anymore." Nonetheless, up until the 2007 *Gall* decision mandating deference to judges' sentencing decisions, interviewees in Northeast reported that prosecutors in this region continued to threaten to appeal below-guidelines sentences, as they had regularly done pre-*Booker*, which consequently kept judges from diverging too radically from the guidelines.

One of the judges I interviewed in Northeast did choose to exercise expanded discretion after *Booker*, and began imposing below-guidelines sentences on some drug defendants in particular. One of those below-guidelines sentences, imposed on a defendant convicted of trafficking who was subject to the "career offender" guidelines,¹⁰⁰ was appealed by the government since this circuit was hewing to a conservative reading of *Booker*. By the time the Circuit Court opinion came down, *Gall* had just been decided and the "circuit threw in the towel and said [the

97. *Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (holding that a court may take into account the disparity in the guidelines' treatment of crack and powder cocaine when choosing to impose a below-guidelines sentence).

98. *Gall v. United States*, 552 U.S. 38, 46 (2007) (holding that abuse-of-discretion standard applies to appellate review of sentencing decisions).

99. This is a pseudonym as are all names of legal actors used in the data presentation.

100. This is specified in U.S. Sentencing Guidelines §4B1.1:

Career Offenders are persons who commit a crime of violence or drug trafficking crime after two prior felony convictions for those crimes. To implement the provisions of 28 U.S.C. § 994(h), the sentencing guidelines assign all career offenders to Criminal History Category VI and to offense levels based on the statutory maximum penalty of the offense of conviction.

U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY17.pdf [<https://perma.cc/WG5Q-QK8G>].

guidelines] really are advisory.”¹⁰¹ He characterized the Circuit Court as being somewhat paternalistic over the course of the guidelines’ regime, concerned that district court judges were “too emotional, and unable, in a dispassionate way, to impose the sentences that Congress really required them to impose.” That kind of stance was definitively shut down by *Gall*.

Similarly, a defense attorney in Rural district related that judges also policed themselves after an initial burst of sentencing freedom, out of concern for uniformity in sentencing and for the chaos that might ensue without anchoring to the guidelines. He told me that *Booker* “made a big difference right away when it happened, and the judges realized they could do what they wanted to do. Then they sort of pulled back, I think, because they wanted to be responsible. They wanted to be uniform.” One of his clients who was sentenced right after the *Booker* decision received home detention for a fraud conviction in which the advisory guideline minimum was 36 months. After the sentencing, he said, the judge “looked green” when one of his judicial colleagues congratulated the defense attorney for getting such a lenient sentence for his client.

In these districts, formal law thus played a primary constraining role that had reverberating effects on judges’ comfort level in departing from the guidelines. First, appellate court interpretations of *Booker* shaped judges’ approaches to sentencing as well as prosecutors’ approaches to appeals. The 2007 decisions in *Rita*, *Gall*, and *Kimbrough* then changed those dynamics by making clear to trial courts that sentences within the guidelines were no longer to be blindly accepted as appropriate. Yet the formal law was not the singular causal force in tempering changes to both practices and outcomes post-*Booker*. As a federal defender in Rural characterized it for me, it took time for advisory guideline sentencing to become the new normal. It was the temporal distancing from the momentous cases that had facilitated change, leading to incremental liberation from the guidelines’ dictates. By the time I was conducting the bulk of my fieldwork, eight years after the *Booker* decision, sentencing in both these districts had been transformed such that the guidelines were truly advisory and sentencing hearings were generally robust affairs where the defendant was individualized in multi-dimensional ways.

In Southwest District, in contrast to Northeast and Rural, local norms about how cases were resolved served as the strongest force in muting the *Booker* effect, acting as a brake on dramatic post-*Booker* change. The courts in this district, especially in the division that deals with the bulk of border-related cases, have managed high drug and immigration caseloads since well before *Booker* and had developed routinized norms around charging, plea offers, and “going rates” for sentence terms that proved somewhat impervious to the *Booker* policy change. This caseload pressure and the consequent routinization minimized the extent to which new, post-*Booker* opportunities for individualization and expanded

101. The Circuit issued an opinion that relied upon *Gall* to affirm the sentence, even though it substantially deviated from the guidelines’ range. The case referenced is not cited to protect the confidentiality of interviewed parties.

mitigation actually reconfigured practices. In addition, the bulk of defendants in the border-related cases are undocumented immigrants from Mexico and Central America, whose life circumstances are typically very dire and whose troubles came to appear indistinguishable from one another through the crush of cases. As a defense attorney I interviewed explained to me:

There's only so many times [the judges] can hear about the person who lives in the cardboard shack with a tin roof before they're not really moved anymore. You have a visiting judge and their heart might be breaking because they don't hear that every day. But it's hard for the [local] judges to recognize that in your individual case.

In this district, some of the routinization was also formalized in immigration and drug “fast-track” programs that are closely tied to the guidelines, and involve large offense-level reductions built in for those who plead guilty quickly.¹⁰² Paradoxically, then, even though the sentences meted out in this district are much lower than they would be for cases with comparable facts in other districts, sentences continued to be relatively guidelines-centric here even after *Booker*, as the fast-track programs did not individualize sentence reductions, but simply took off a pre-determined number of offense levels for defendants who accepted those plea offers. Indeed, this district maintained a strong post-*Booker* allegiance to the guidelines, both materially and ideologically. This attachment was made evident in every courtroom I visited in the district, where the “sentencing table” that determines guideline sentences was on colorful display. In some courtrooms, a 9” x12” laminated color copy was taped over the computer monitor that sat on the defendant’s dais or defense table; in others, it was blown up to full poster size, laminated, mounted, and propped on an easel facing out to the defendant and the audience. In my observations of sentencing proceedings, the majority of judges worked to justify sentences through guidelines’ provisions as much as possible. As one attorney put it, “we all joke here that it just seems like the judges are still married to the guidelines. It’s a hard thing for them to break.” Indeed, a judge in the same district shared that she “just loves the guidelines,” since they provide structure to allow for efficient sentencing.

Generally, this district’s practices are consistent with quantitative research suggesting that high-volume districts exhibit more enduring norms in case outcomes.¹⁰³ In Southwest, the agreed-upon norms around plea negotiations and semi-standardized going rates, as well as the interdependencies between the different court actors, muted *Booker*’s impact. In response to a question about the

102. A “fast-track” program in the federal system is an early disposition program that allows “a federal prosecutor to offer a below-Guidelines sentence in exchange for a defendant’s prompt guilty plea and waiver of certain pretrial and post-conviction rights.” Gorman, *supra* note 20, at 311. Routinization has also been formalized by “mixed-complaint” charging schemes that offer misdemeanor convictions for those willing to forgo individualized procedure on felony charges and plead guilty immediately in certain drug and immigration cases.

103. See, e.g., Lynch & Omori, *supra* note 8, at 431.

routinized sentences in the district, an attorney who had practiced in Southwest for more than 25 years explained it in just those terms: “I think we’re all pretty goal oriented. Because of the volume, no one has the luxury of being a complete jerk. Because all it takes is for one party to dig in and the whole system comes crashing down.” In this context, the guidelines continue to formally structure those norms, even post-*Booker*, by both providing an easy rubric from which to deviate and to offer a sense of uniformity and fairness in outcomes.

In Southeast District, interviewees reported that post-*Booker* change was even subtler. Particularly in the two southern divisions of the district, judges continued to hand down within-guideline sentences in most cases even years after *Booker*.¹⁰⁴ Unlike in Southwest District, however, little has been done to mitigate the harshness of guideline sentences in this district, either formally or informally. Indeed, the probation officers responsible for calculating the guidelines have taken a very pro-law-enforcement stance in this district, by which they proactively seek out evidence of “relevant conduct” that increases calculated offense levels.¹⁰⁵ A long-time federal defender in one of the district’s two southern divisions that have remained especially guideline-bound described the hope then disappointment that came with the *Booker* decision:

After *Booker* everyone got really re-energized, it was very exciting that all of a sudden we were really going to go to individualized sentencing, and you know, variances were possible. You didn’t have to fit exactly into a departure category on the guidelines, and there was going to be a lot more leniency in sentencing. I think the reality is that it hasn’t done anything. I shouldn’t be so cynical. Has it done anything? Yes, it has. I mean, it gives us more of an opportunity to present our client as a human being... But at least in this district, I think that there’s still a kind of presumption by our judges that the guidelines are reasonable.

Another defender in this district, working in its southern-most division, expressed her envy over post-*Booker* norms in other districts: “I read a lot about successes that other people have had in other parts of the country, and I think, ‘Boy, it would be nice if we could get those kinds of judges here.’ But, like I said, the judges [here] like the guidelines.” The commitment to the guidelines also continues to be actively reinforced by the U.S. Attorneys in this district. Even eight years out from the *Booker* decision, a prosecutor told me that his office “has a policy of asking that the court to impose the guidelines.” He shared a view of the guidelines that was also articulated by many judges in the district, which was that “the guidelines, in the absence of extraordinary circumstances, are the appropriate range.” Defense attorneys in the district explained that they have little success

104. See LYNCH, *supra* note 19, for details on sentencing norms at the time of the field study.

105. *Id.* at 78.

when arguing for more lenient sentences as the guidelines remain the overriding norm here.

This is not to say that no changes occurred in Southeast District after *Booker*. In the northernmost division in the district, defense attorneys reported more frequent below-guidelines sentences for their clients. Interviewees also described some individual differences between judges in the other divisions as to the types of defendants that might pull on their heartstrings or where the judge felt the guidelines were too punitive for the offense. For some, it might be child pornography where the guideline sentences are typically extremely long; for others, it was low-level fraud where the relevant conduct formula could result in high guidelines sentences. These individual differences went both ways such that, for instance, one judge was characterized by a defense attorney as being exceptionally harsh on defendants who were undocumented immigrants, but the judge had grown increasingly sympathetic over time to low-level drug defendants who were citizens.

And, as was the case in all of the districts, defense attorneys throughout this district appreciated the expanded opportunity for “humanizing” defendants in drafting sentencing memoranda and in making arguments at sentencing hearings, even if the sentences did not reflect much individualized adjustment. In fact, this expanded opportunity was the change most consistently reported across all my interviews. Because the set of cases that transformed the federal sentencing regime elevated the importance of individualized consideration of statutory sentencing factors,¹⁰⁶ attorneys were able to make much more robust, tailored sentencing arguments. This functioned to enhance their reported professional satisfaction even where the impacts at sentencing were modest or indiscernible.

Even prosecutors expressed support for individualized sentencing consideration. As a prosecutor in Southeast shared with me:

I think *Booker* was the right decision. You can't cookie cutter it, I mean, the guidelines are a very important starting point. But when those guidelines are mandatory, they can't think of every possible variation to justify departure from them... I think if you don't trust your judges to do the right thing, why the hell did you put them on the bench?

In fact, the post-*Booker* benefits work on both sides of the adversarial process. I observed several prosecutors, including the one quoted directly above, successfully use an individualized argument to make the case that the appropriate sentence should be *above* the guidelines.

106. See 18 U.S.C. § 3553(a) (2012). This section of the code specifies what must be considered at sentencing as well as the purposes of sentencing. Under 18 U.S.C. § 3553(a)(1), courts are directed to consider “the nature and circumstance of the offense and the history and characteristics of the defendant.” *Booker* held that while the guideline sentence should be calculated, courts are also permitted to consider individualized factors, particularly as allowable under 18 U.S.C. § 3553(a)(1) and tailor sentences accordingly. *Gall*, *Rita*, and *Kimbrough* underscored the importance of considering individualized 3553(a) factors in determining sentences.

B. Processual Mechanics of Booker Adaptation

1. Charging as a Sentencing Control Tool

Consistent with quantitative analyses that suggest prosecutors may have relied more on mandatory minimum-eligible charges post-*Booker*,¹⁰⁷ attorneys from across my sample districts shared stories about how the mandatory minimum statutes were used strategically after *Booker*. A common account had to do with how child pornography cases were managed by prosecutors. Under the federal statutory code, the same basic conduct can almost always be charged as either “possession” of child pornography or “receipt” of child pornography.¹⁰⁸ Possession is not subject to a mandatory minimum; receipt is.¹⁰⁹ Once *Booker* liberated judges from the mandatory guidelines, below-guidelines sentences for defendants convicted of possession of child pornography proliferated.¹¹⁰ Available evidence indicated that a large share of judges felt that the guideline sentences in these cases were too severe.¹¹¹

Interviewees report that, in response to this trend, prosecutors began to charge receipt instead of possession as a strategy to rein in those departures or threatened to do so in order to obtain a binding plea deal. Defense attorneys in several districts shared stories, such as the following, of the “receipt” mandatory minimum being leveraged against their clients post-*Booker*:

Child porn’s a good example—where we’ve been able to get the prosecutor not to charge someone with receiving as opposed to possessing which, factually, is the same exact thing. One doesn’t carry a mandatory sentence. One carries a five-year mandatory minimum sentence. There’ve been occasions where we were able to get the judge to impose a sentence of no jail or a very short period of jail, and the prosecutors have said, ‘well, we can’t charge just possession anymore because we can’t trust the judges to give a high enough sentence.’ So therefore, I’ve literally had prosecutors say to me, ‘Because of the sentence that you got for

107. *E.g.*, Fischman & Schanzenbach, *supra* note 40; Lynch & Omori, *supra* note 8.

108. *See, e.g.*, Stephen L. Bacon, *A Distinction Without a Difference: Receipt and Possession of Child Pornography and the Double Jeopardy Problem*, 65 U. MIAMI L. REV. 1027, 1030 (2011).

109. *See* 18 U.S.C. § 2252(a)(2) (2012) (defining “receipt”); *Id.* § 2252(b)(1) (specifying a five-year mandatory minimum for that section); *Id.* § 2252(a)(4) (defining “possession”); *Id.* § 2252(b)(2) (specifying a ten-year *maximum* for that section).

110. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 317 (2012) (reporting that in “fiscal year 2004, within range sentences were imposed in 83.2 percent of cases of offenders sentenced under the non-production guidelines. By fiscal year 2011, within range sentences were imposed in only 32.7 percent of such cases”).

111. *Id.* at 7 (citing highest departure rates of all offense categories); Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 L. & CONTEMP. PROBS. 27, 38 (2013).

Mr. Jones, in this case I cannot charge Mr. Smith with just possession. I have to have the mandatory minimum.'

In Northeast, a defender related that the receipt charge was increasingly used once judges got back their discretion to vary from the guidelines and began handing out shorter sentences in child pornography cases, stating that: "prosecutors have used a five-year mandatory minimum to force judges to do the mandatory or to force an agreement [with the defense] for a disposition that would be higher than what it would be otherwise." A judge in Northeast who had gone on senior status told me that he would not take the child pornography cases any longer because, "as bad as those crimes are, I think the U.S. Attorney's office is often way too aggressive." He specifically objected to the practice of using the "receipt" charge as a way to force himself and other judges to impose five-year mandatory minimums in these cases. In Southeast district, too, prosecutors regularly filed the receipt charges in child pornography cases to set the five-year mandatory minimum as a sentencing floor, even in the face of pushback from judges. This strategy, however, was not mentioned in either Rural or Southwest District interviews.¹¹²

In Northeast, mandatory minimums were also manipulated at the charging stage in post-*Booker* drug cases. The strategies deployed were varied. "Sentencing entrapment"¹¹³ was used pre-indictment, whereby law enforcement, often in consultation with Assistant U.S. Attorneys, ran stings designed to cross mandatory minimum thresholds for given drugs. One attorney referred to this as "walking up" drug amounts by setting up multiple buy-busts so that the requisite weight could be alleged in the charging document. The mandatories not only introduced a floor on sentences available to the judge, they also put pressure on the defendant to comply with the prosecutors' demands in plea negotiations. A defender in Southeast district described one of his cases where this happened:

I had a case where, you know, they just kept doing deals, kept doing deals, relatively small deals for months and, you know, the client was like, 'Why do they do that? Why didn't they just stop?' You know? And, it's so obvious, so they can get up to the mandatory minimums so they can use that as the hammer to make you plead and cooperate.

A second "sentencing entrapment" scheme was used frequently in Northeast, whereby law enforcement set up small buy-bust deals near protected zones, such as schools and parks, so as to trigger a mandatory minimum of at least one year, depending upon the defendant's record. A prosecutor who regularly partnered with local law enforcement on this strategy shared that he used this to ensure that defendants identified by local police as "trouble" would have an adequate "time-

112. Southwest prosecutes very few of these cases. Some years, there are no convictions for child pornography in this district.

113. For a definition and overview of "sentencing entrapment," see Daniel L. Abelson, *Sentencing Entrapment: An Overview and Analysis*, 86 MARQ. L. REV. 773, 780 (2003).

out” from the community. While these minimums were not long, most ensnared in these stings were involved in minor hand-to-hand drug sales, and judges would likely otherwise have only imposed a sentence of several months, if any time at all.

Two particular mandatory enhancement charges were also used to lock in sentencing floors or otherwise steer sentencing: the gun possession enhancement in drug trafficking cases, which adds a minimum of five years to the sentence, and the drug prior enhancement that, at minimum, doubles the base mandatory minimum. The drug prior enhancement, known colloquially as the “851”¹¹⁴ was not always filed from the outset, but was regularly used as a threat to obtain guilty pleas. Under some conditions, however, prosecutors did file the 851 at the outset to constrain judges. For instance, it was sometimes used in conjunction with other criminal history-based sentencing hammers, as a defender in Northeast District explained to me. If a person was career guidelines-eligible,¹¹⁵ but not facing a mandatory minimum, an 851 filing would push the advisory sentence even higher than the career offender guideline alone, since the 851 also increases the statutory maximum. This then would psychologically “anchor”¹¹⁶ any proposed sentence to a much higher guideline. A defender in Northeast gave me an example from one of her ongoing drug cases:

The guy sold .29 grams of crack cocaine. If he were not a career offender, his guidelines range would still be incredibly high [because of his criminal history and relevant conduct]. Like five years. But because he has prior drug trafficking offenses, his guideline range as a career offender is up around twelve or fourteen years. The prosecutor filed an 851. There’s no mandatory minimum to double, but on the career offender grid that jacks him up to like eighteen years.

She related that this mattered since the guidelines “still exert this gravitational pull” on sentences even if they are now advisory. Similarly, a prosecutor in Southeast District shared that she will also use the 851 in non-mandatory-minimum cases to push up the career offender guidelines to help boost the pronounced

114. Named in reference to 21 U.S.C. § 851 (2012), which was authorized by a provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, ironically to temper automatic criminal history-related enhancements associated with the “Boggs Act” drug mandatory minimums authorized in the since-rescinded Narcotic Control Act of 1956, Pub. L. No. 84-728, tit. I, § 103, 70 Stat. 651 (1956), which required prosecutors to file an information indicating that they were seeking such enhancements and provide evidence of the prior conviction.

115. See *supra* note 100 for definition. The career offender guideline increases sentences by very large magnitudes, well above a typical sentencing enhancement in the guidelines, since it increases both the Offense Level and Criminal History Category on the guidelines grid. See generally Amy Baron-Evans, Jennifer Coffin & Sara Silva, *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39 (2010).

116. For a definition of “anchoring,” see Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014).

sentence. Another prosecutor in this district described how the 851 was used to prevent judges from departing from guidelines now that they are advisory rather than mandatory. In his view, this was a common practice used by prosecutors to constrain post-*Booker* judicial discretion:

In an effort to maintain some discipline in the sentencing process, we do file more enhancements. I don't think there's any question, if you were able to do a study—how often an 851 enhancement was filed before *Booker* and how often they're being filed now in 2013. . . . You see more of them filed because in the absence of mandatory guidelines regime, the judge has enormous discretion to sentence a defendant between the mandatory minimum and the maximum. And sometimes, if we think that a case is serious enough based on the drug quantity, other aggravating factors in the case, or the defendant's serious criminal record, we think that, you know, a harsher sentence is justified, at least from the outset.

2. *Negotiating in the Shadow of the Judge*

The most significant reported adaptation to the *Booker* line of cases has been in the nature of plea negotiations. Specifically, those negotiations now take place in the looming shadow of the assigned judge, rather than in the shadow of the guidelines. In Rural, this reshaped the very elements of bargaining fodder. Prior to *Booker*, negotiations were often centered around how to reduce the guidelines through prosecutor-authorized departures, since criteria for judicial departures were so narrow. In drug cases especially, prosecutors used the 5K “substantial assistance” departure¹¹⁷ as that mechanism and were sometimes willing to grant a “pity 5K” to sympathetic defendants even in the absence of usable information.¹¹⁸ Since *Booker*, that negotiation is bypassed by many more defendants, thereby decreasing the number of cases that included substantial assistance as a plea term, since with advisory guidelines, judges have much more freedom to depart without endorsement from the prosecutor. Commission data indicate that the percentage of defendants receiving a substantial assistance departure in this district decreased from 20% in the Pre-*Booker* period to 10% post-*Booker*.¹¹⁹ As one interviewee explained:

After *Booker*, we didn't need that kind of help anymore. . . . We'd do everything we were doing before in terms of helping our clients get into treatment, continuing the plea and sentencing to get

117. A “5K” is a colloquialism for the U.S. Sentencing Guidelines provision §5K1.1, which authorizes a downward departure from a sentence based on a motion from the government for substantial assistance to authorities.

118. This tactic was also observed by Schulhofer & Nagel, *Plea Negotiations*, *supra* note 1, at 1293.

119. These statistics were calculated by the author using an amalgamated dataset of federally-sentenced cases as described in *supra* note 86.

them back on their feet. Then we could go into the court and argue that the client was rehabilitated and very often, the judges would go along with that and help them get a lower sentence even without having proffered or having given information.

More typically, however, it was the shadow of the individual judge that structured negotiations across the districts. If the judge was perceived to be defendant-friendly, given the case facts, plea offers typically improved for defendants, whereas if the judge was more guidelines-centric or government-friendly in sentencing, the terms were less favorable. This was both a within-district and between-district phenomenon, such that plea terms post-*Booker* were described as much better overall for defendants in Northeast whereas they hardly changed in Southeast. In Northeast, only one outlier judge remained faithful to the guidelines. As one defender put it, when assigned a case with that judge, “You advise your client. ‘You’re unlucky.’” Otherwise, judges in Northeast were perceived as generally being defendant-friendly. In Rural, judges were categorized in terms of case types (i.e., guns, drugs, child pornography) in regard to whether they were or were not sympathetic to the defendant, but interviewees did not report great variances between the few judges in the district. Generally, judges were perceived as willing to give sentences below the guidelines to some degree, but were not wholly unmoored from the pull of the guidelines.

In Southeast, defendant-friendly judges were mainly concentrated in the northern division of the district, and so much of the post-*Booker* variance stemmed from inter-divisional differences. In the two southern divisions, plea agreements typically locked both sides into arguing for a sentence within the guidelines range. The defense went along with such modest “deals” because *Booker* could be a double-edged sword in these divisions. It could potentially mean increased opportunity for receiving a sentence below the guidelines, but it also increased the risk of getting an above-guidelines sentence. A defender described an ongoing case where her client had a substantial prior record and was caught on tape in several hand-to-hand sales of crack, where she thought the judge in question might consider an above-guidelines sentence. She advised her client, “‘You really ought to consider seeking a plea agreement with this case before Judge Brennan.... You ought to be considering your above-guideline exposure.’” Her calculus was that given the judge and the profile of this client, he was vulnerable to a much longer sentence without mandatory guidelines.

It just seemed to me no matter what I argued, there would be a pretty good argument the prosecution could put up—‘this guy hasn’t gotten the message after 12 years of juvenile and adult justice that he can’t keep running around with guns, can’t keep dealing drugs’.... That’s the client you go holy cow, they could easily justify 5 or 6 years more than guidelines. At the end of the day, [the client] agreed with me. So we did this plea agreement that generally—especially post-*Booker*—I hated entering into.

Southwest had a peculiar complication on this spectrum, which was that the district hosted many visiting judges from other districts, who brought very different norms about appropriate sentence lengths for given kinds of cases. One defender described it as:

a horrible luck of the draw problem. . . . Every now and again, there's just a wonderful judge who comes in, and it's like, "oh my God, this is the greatest thing ever!" And then there are other judges who are going to be worse than any judge you have in the district.

Some attorneys tried to manage this uncertainty by researching the visiting judge to figure out the best strategy in light of the assignment; others reported opting to face unknown judges without gathering background information, given time constraints and an inability to change the assignment.

Mandatory minimums and enhancements also played a significant role in plea negotiations. In Southeast, even where the judges were very faithful to the guidelines, certain judicial assignments affected prosecutors' willingness to negotiate on mandatories. A federal defender shared:

If the case is assigned to Judge Ralph or Judge Samson, that sometimes will affect the plea offers they make. They're not going to be so quick to deal away a mandatory minimum or a 924(c) [5-year gun enhancement] because they're afraid that those two judges, in particular, will sentence below the guidelines. So, they want to handcuff them. And you see that in the plea offers.

In Northeast District, the mandatory minimum receipt charge in child pornography cases was as likely to be used as a bargaining tool that never formally made it into the record as it was to be actually charged in order to lock in judges. That is, prosecutors negotiated binding plea agreements with the defense on child pornography possession charges that locked in a sentencing floor below the "receipt" mandatory minimum but above what they feared a particular judge would impose. Judges could reject the binding agreement, but to do so would do away with the guilty plea, so very few judges opted to reject such deals.

A Northeast judge who regularly sentences below the guidelines across case type shared how these kinds of binding pleas had become a regular strategy used to contain his discretion across all kinds of case types:

I'm only speculating, but I'm guessing part of the reason that I get C pleas [binding pleas] is because I have a reputation for varying downward more than many other judges I think the U.S. Attorneys here now know that if there was ever a chance *pre-Booker* of getting one of my sentences tipped [reversed], it's virtually non-existent now because I'm very careful to state my reasons on the record and to cite 3553(a) and how my sentence keys in with those factors. So if I'm going to vary, they're going to be stuck with the variance. So I get C pleas fairly regularly. I think

it's because the U.S. Attorney would rather sit down with the defendant and work out something that both sides can more or less live with than take a chance that I would be even more generous than what the C plea would come to.

Perhaps the most interesting strategy to emerge from the evolving adversarial tussle over sentencing in the post-*Booker* world has been the rejection of plea bargaining altogether. This defense strategy had become increasingly common in Northeast by the time I was in the field, especially in drug cases that fall under the "career offender" guideline. A defender in Northeast described these kinds of cases as ripe for pleading "straight up"¹²⁰ and making the sentencing pitch to the judge, while preserving appellate rights that would otherwise have to be waived in a plea agreement. These cases typically involved small amounts of drugs, but were charged federally because of the defendant's career offender exposure. The Northeast defender noted:

You can try to negotiate something, but it's usually not anything awesome. It's like maybe you can get them down [from 15 years] to like eight or something like that. And a lot of times if you draw the right judge, a lot of the judges over there don't like those cases because they're not federal drug cases. You know, they don't think that they're important enough for their court. So it seems like sometimes you're better off without a plea agreement because this judge is going to treat your client better than the prosecutor's office ever would.

This strategy essentially blunted the prosecutor's power to steer sentencing outcomes. A defender in Rural, where pleading straight up was also used with more frequency, described the adaptation that had happened around this strategy:

Prosecutors started being kind of offended when we would just file an acknowledgment waiver of rights form¹²¹ like somehow we were doing an end run around them. But over time I think they realized, less work for them, less paperwork, less approvals they have to get, and they started suggesting [pleading straight up].

In Southwest, attorneys in the border division of the federal defender's office also began to plead straight up with more frequency to get out from the constraints of the binding pleas that were the norm. Under the prevailing practice, plea agreements prevented defense attorneys from arguing for sentences below an agreed-upon floor, while also limiting prosecutors from arguing for a sentence above an agreed-upon ceiling. Once pleading straight up became a more regular practice,

120. Pleading "straight up" means that the defendant pleads guilty to the charges as they are presented in the charging document, without entering into any plea agreement with the government. While the defendant does not get any advantages of negotiated terms as to elements controlled by the prosecutor, such as a say in the final charges of conviction, she typically retains more rights to challenge the guidelines, argue for sentencing outcomes, and appeal the sentence.

121. This form announced that the defendant planned to plead straight up to the indictment.

the local U.S. Attorney's office altered their standard plea agreements to allow the defense to argue below the stipulated sentencing range. In this sense, pleading straight up functioned as an organizational-level pressure tactic on the prosecutor's office to improve plea offers for defendants.

Needless to say, pleading straight up in Southeast district was not generally strategic from a defense standpoint. It might be necessary if the plea agreement required providing cooperation—which most agreements required in drug cases in two of the divisions—and the defendant was unwilling to become an informant. But generally speaking, the perceived wisdom was that the client would under almost all circumstances be worse off without a plea agreement.

3. *The (Re-)emergence of Robust, Individualized Sentencing Proceedings*

The strategy of pleading straight up was closely connected to the most significant change to formal sentencing strategy for the defense in the post-*Booker* era, which was the ability to put forth a robust mitigation argument for sentencing based on individualized factors under 18 U.S.C. § 3553(a)(1).¹²² Especially in cases that were pled straight up, defense attorneys were more inclined to challenge sentencing guideline calculations, and they typically put forth an array of defendant-related evidence relevant to sentencing. As noted previously, attorneys in all of the sampled districts cited this expanded opportunity as an important and welcome change, and it shaped how they approached the sentencing phase of adjudication. It is precisely because of this *Booker* development that defendants are more likely to plead straight up. Even under plea agreements, however, advocacy strategy at sentencing changed, especially for the defense. As a federal defender characterized it, “there are more cards to play. There’s actually a job to do when we can actually advocate for something less than the guidelines.”

As might be expected, “the shadow of the judge” also loomed at sentencing post-*Booker*, so attorneys reported crafting their pitches in light of what they felt judges would respond to most favorably, rather than trying to win them over with arguments that challenged the judge’s worldview. One Northeast defender shared that this was his general working philosophy:

It doesn’t pay for a federal defender to try to change a judge’s perspective rather than sort of tailoring your pitch to what you think might have a chance of reaching him. So you don’t spend four weeks. . . developing some argument that’s not going to go anywhere with a particular judge.

In Southwest, the visiting judges posed a different “shadow of the judge” challenge at sentencing, since attorneys had much less information about a given judge’s proclivities. The visiting judges were also seen as contributing to the

122. Under 18 U.S.C. § 3553(a)(1), courts are directed to consider “the nature and circumstance of the offense and the history and characteristics of the defendant.” This provision has opened up the range of individual circumstances that can be argued as relevant to determining the appropriate sentence.

problem of within-district sentencing disparity, ultimately impacting the overall quality of justice in the district. As one longtime defender shared, “we’re seeing more disparity than ever because of [visiting judges]. Because they’re all coming from far away from any border, and they’re bringing these cultural norms with them that are so different from ours. They really bollocks up the system.”

The “shadow of the judge” also influenced how attorneys calibrated their “ask” at sentencing, which indirectly contributed to between-judge disparities. Particularly in Southeast, defenders going in front of some judges worried about the delegitimizing effects of asking for too much of a reduction. Several defenders also expressed reticence about litigating issues at sentencing for fear of angering the judge. Generally, I observed that in Southeast, defense attorneys’ “asks” were indeed much more modest than in the other districts in my study. This was an ongoing debate in one of the federal defenders’ offices, as described by one of my interviewees:

Some people will say the problem with a particular judge is you turn him off completely if he thinks oh, you’ve asked for the moon... There are different schools of thought. Some lawyers, their instinct is “I’m going to shoot for the moon all the time.” I’m not going to say that’s unjustifiable. If that’s your approach, so be it. Then there are some, who, if anything, bite off a little bit less than all they could chew.

This legitimacy concern also impacted prosecutors, especially in districts other than Southeast, where downward departures and variances had become relatively common at sentencing. For instance, as previously noted, for several years post-*Booker* the prosecutorial norm in Northeast was to ask for within-guidelines sentences as a matter of routine. The policy to uniformly seek guideline sentences persisted until the U.S. Attorney in the district was replaced by an appointee of President Obama in 2009. While initially this prosecutorial stance seemed to keep judges from varying too dramatically, its power eroded over time. According to one attorney, prosecutors “lost a lot of credibility during [the previous administration] because they were required to make these recommendations that nobody in a million years thought were going to be followed.” After the local U.S. Attorney change, prosecutors were given more freedom to recommend below-guidelines sentences, which had the effect of making them “relevant” again at sentencing.

A defender in Rural also described how some prosecutors will try a generic policy argument to justify the recommendation: “‘Judge, these are the guidelines,’ they’ll say, ‘A lot of very smart people spent a lot of time coming up with these guidelines, so you’re supposed to follow them.’ But that really falls on deaf ears.” Even in Southwest, where sentencing was much more routinized and driven by standardized, binding pleas, at least one defender mentioned that he felt he gained an edge by making an individualized argument, especially when the other side made no effort to justify the government’s sentence recommendation. Conversely, in the southern divisions of Southeast, the within-guideline arguments made by

prosecutors were generally treated presumptively legitimate, given the convergence with the general judicial outlook. And, according to several attorneys, judges here had become savvy about what “magic words” had to be spoken for the record to justify their inflexible allegiance to the guidelines. In my observations, the most common set of magic words was taken directly from the statute, that the sentence would be “sufficient, but not greater than necessary” in order to “promote respect for the law... and afford adequate deterrence.”¹²³

C. Consequences for Racial Equality and Justice

As previously noted, the U.S. Sentencing Commission’s research has suggested that the *Booker* policy change that rendered the guidelines advisory may be associated with increased sentencing disparities as a function of race.¹²⁴ Independent, quantitative research disputes that assessment.¹²⁵ My interviews also call into question whether *Booker* had a negative impact on racial equality in sentencing outcomes. Each interview included a set of questions assessing respondents’ perceptions of how *Booker* and other legal policy changes impacted the quality of justice, including in regard to racial equality and disparities in outcomes. Across the districts, prosecutorial enforcement priorities and case selection were perceived as the discretionary decision points that produced the most inequality as a function of race, ethnicity, and class. This transcended policy changes, including the change from mandatory to advisory guidelines.

In Rural district, which is overwhelmingly white in population, race and outsider status converged at the point of entry into the federal system. When asked about whether he thought *Booker* had impacted sentence disparities, a long-time defense attorney in the district described the issue as a matter of case selection and sorting between state and federal jurisdictions. He shared:

I’ve always felt ever since I’ve gotten here, pre-*Booker*, post-*Booker*, that if you come to Rural from some other place, if you’re Black or Hispanic, if you get caught selling drugs you’re going to end up in federal court and you’re going to end up in federal prison. You know, much more so than if you’re a white local.

Similarly, in Northeast and Southeast districts, longstanding, proactive law enforcement practices, especially those involving partnerships with local police,

123. 18 U.S.C. § 3553(a) (2012).

124. See U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES, *supra* note 35, at 23; U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, *supra* note 35, at 108–10; Schmitt, Reedt & Blackwell, *supra* note 3, at 253.

125. See Fischman & Schanzenbach, *supra* note 40, at 761 (reporting that their “findings suggest that [post-*Booker*] judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing”); Starr & Rehavi, *supra* note 40, at 78; Ulmer, Light & Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision*, *supra* note 35, at 1102; Ulmer, Light & Kramer, *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision*, *supra* note 16, at 800.

were seen as geographically targeted in poorer, non-white neighborhoods in a manner that ensured over-representation of young minority men. Then, among those caught up in the dragnets, an individualized sorting at the charging stage exacerbated the disparities. As described by one federal defender:

The decision to bring a guy in this court or not bring him in this court is one that is made by prosecutors, and *that* decision is ultimately the decision that generates the greatest disparity because if the person stayed in state court their sentence would X. Now they come to federal court, it's gonna be X plus.

That sorting was generally done based on either career-offender-eligible or 851-eligible criminal history—primarily drug-related priors—which was itself racially stratified due to the over-policing of those same neighborhoods.¹²⁶

Defense attorneys, in particular, consistently mentioned this as an overwhelming justice problem in these districts that skewed the population of defendants from the start. In Northeast, for instance, a long-time federal defender expressed bitterness at the Commission for its concern over sentencing disparity under the post-*Booker* advisory guidelines, when he saw the core issue as racially- and spatially-targeted case selection: “It is really special to hear the Commission concerned about racial disparity in sentencing when the racially significant fact is the one that brought a particular defendant to the courthouse for prosecution and not a different one.”

In the southern divisions of Southeast, several defenders made the point that sentencing disparities could not be observed since, at least among drug defendants, almost all were African-American. As one responded to my question about sentencing disparities, post-*Booker*, “as much as I hate to say it, a lot of our clients are minority. You know, we don’t get a lot of white kids in [federal court] dealing drugs. Most of our drug cases are Black kids from the projects.” The extreme disproportionality in who was prosecuted made the question of whether *Booker* impacted sentencing disparities somewhat moot, in the view of many defenders in this district. For instance, one defender struggled with the question, telling me: “I think that’s a little tough question to answer because, for the most part, all I see are African-American people.” Another Southeast defense attorney put it even more bluntly: “I might see racial disparities if they prosecuted any white people here, but they’re not prosecuting white people.” This point was echoed by a half-dozen defenders in this district.

In Southwest, it was the blanket border enforcement policies that caught up thousands of mainly Latinx defendants that partly mooted the question of racial disparities at sentencing. As one defender put it:

Go to federal court today at three o’clock when they bring in the new arrests, and look at the folks who are sitting there in chains, and count the white people. You won’t find any. You’ll find

126. LYNCH, *supra* note 19, at 120–21.

maybe one or two on a given day. It's mostly brown people. And a few Black people. And very, very little white people. Is that because white people aren't committing the crimes? No. The enforcement priorities, at least here, are border, border, border and drugs, drugs, drugs, and illegal this and illegal that.

This, too, made the question about later-stage disparity under advisory guidelines a difficult one. As one federal defender responded, "It's hard to answer the question because the bulk of our defendants are people of color. I don't know how we're injecting more racial disparity into that when we already have so much. I think the sample is completely skewed." Moreover, in *Southwest*, citizenship status intersected with ethnicity in a manner that indirectly produced sentence disparities in some cases. Specifically, defendants who were citizens were often eligible for pretrial release, which afforded them the opportunity to participate in work, school, and/or rehabilitation programs, which could translate into a reduced sentence based on success on release. Because most white defendants are citizens, they could disproportionately benefit from this structural benefit, whereas most of those ineligible due to immigration status were Latinx. This extended to the types of sentences that were even available after conviction. As one attorney explained, "There's an inequity that actually comes out of the fortuity of citizenship . . . If a person has got status, then they actually have the ability to have treatment and they have the ability to get something different [at sentencing], other than a sentence of incarceration."

Conversely, both prosecutors and defense attorneys in all four districts perceived judges to be very concerned about demographics in sentencing, post-*Booker*, so had not observed systemic problems with disparities at the formal sentencing stage. One defense attorney suggested that since defendants can be more individualized, factors such as race, ethnicity, class, and gender could have more variable effects:

It does play both ways. I think, however, when it comes to the impact of *Booker*, and *Blakely*, and *Kimbrough*, the clear answer is that the greater discretion among judges has, generally, almost entirely in my experience, resulted in lower sentences, across the board. They've had a uniform ability to say, "This book is too harsh." As a general matter, this sentencing guideline book does not provide an appropriate sentence in this case, across the board for white, Black, purple defendants, and judges are able to take into account other things and give a sentence that is below the guidelines.

The one exception was the case of women, who were generally viewed as being able to get more favorable sentences from judges, relative to men. This also intersected with race, in that white women were seen as especially likely to receive leniency throughout the system, including at sentencing. One Southeast defender

shared that while he felt law enforcement accounted for the bulk of racial inequality in the district, white women might also benefit at sentencing.

I think there are times when we have felt if we had a white, female client, they're going to have a better shot at getting a lower sentence than, certainly, an African American male, and certainly in a drug case. But, I think the bigger issues that I see come, come into play before the court is ever involved. . . in the charging, pre-charging.

A prosecutor in the district concurred, but suggested that women generally had less culpability and more mitigating circumstances, so this disparity was justified:

There definitely are gender differences but not unwarranted gender differences. When I get a woman drug dealer in here, she almost always has no prior criminal history. Almost always. All but one that I can remember, were employed, they had legitimate employment, and had an employment history, which is an element or a factor in determining future deterrence and promoting respect for the law. They had jobs! They were still dealing, usually because they were trying to impress their boyfriends, who had no prior employment history. No legitimate income whatsoever. The women, not only do they have jobs but there may be a child, sometimes a child, sometimes not, who they are supporting themselves, and not receiving support from anybody else.

Generally, respondents recognized the inherent tension between individualized sentencing and its benefit for justice and the more formulaic approach to uniformity via guidelines-adherence across defendants, judges, and jurisdictions, as espoused by the Commission.¹²⁷ A judge in Northeast articulated this tension, describing the kind of individualized consideration he gave at sentencing, and how he assessed the problem of sentencing disparity:

I am much more concerned with uniformity as to me. I don't want to have a defendant come before me who did exactly the same thing as the defendant last week who gets a much different sentence from the one that I'm giving today. So I'm trying to keep myself honest in that sense. So I don't find myself feeling more sympathetic towards somebody who is more middle class. Or

127. The challenge here is that uniformity is ostensibly achieved under the guidelines by defining a constrained set of relevant sentencing factors, primarily criminal history and offense-related conduct. This is supposed to ensure that similar sentences are imposed on similarly culpable defendants. This approach—by design—excludes the kinds of uniquely individual factors authorized under 18 U.S.C. § 3553(a)(1), especially as allowed under *Booker* and subsequent cases. In essence, the guidelines define sentence equity only in terms of defendants' past and present criminal behavior, whereas 3553(a) opens up the possibility that other life circumstances may be relevant to what is a fair and equitable sentence. See generally Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2005).

particularly anti-pathetic towards somebody who is more middle class. Or somebody whose background makes them more articulate or engaging versus somebody who is not articulate and engaging. If I'm going to sentence somebody for, let's say, a crack cocaine case, I don't go and look for the statistics to say what is the average sentence for a crack cocaine case nationally? Or what is the average sentence for a crack cocaine case in [this district]? I'm sorry, I just don't do that. Maybe I ought to. But I don't. I'm very intent on trying to reduce disparities as between the people I sentence. But I don't think very much about how other judges sentence people.

Indeed, the majority of defenders, prosecutors, and judges who I interviewed expressed the view that robust, individualized sentencing that humanized and particularized defendants offered more fairness and a higher quality of justice than did the strict adherence to the guidelines. This came from a key perceived benefit of advisory sentencing: That it allows for the recognition of qualitative differences between defendants in a way that the formulaic approach of the guidelines does not, since the guidelines, by design, do not take into consideration many factors that court actors see as relevant to the sentencing decision. As one respondent put it, "in the guidelines, the only individualized factor that they take into account is criminal history" which in itself contributes to racial disparities.

VI. DISCUSSION

The findings detailed in Part V confirm that the on-the-ground implementation of the legal policy mandates of *Booker*, et al. was neither wholly orthodox, nor invariant across time and place. Rather, they suggest active and varied adaptation processes by legal actors, involving both contestation and negotiation as a function of numerous proximate and distal factors. This study therefore offers insights for both courts-as-communities scholarship and the law and organizations literature by jointly teasing out the within- and between-locale impacts of major policy change. Taken together, the findings point to a dynamic, proactive adaptation process that is conditioned by local norms even if not fully dictated by those norms.

Consistent with the court-as-communities perspective, I observed significant differences between districts as to the relative impact of *Booker* on how cases were adjudicated. Many of these differences were processual, in that districts varied in some adaptation strategies. But they were also substantive, in that between-district differences in sentence outcomes grew larger as a result of divergent sentencing norms. These differences appeared to be conditioned by the "law-before"—the legacy practices and structures existing in a given locale that "successively shape how local actors translate today's law-on-the-books into tomorrow's law-in-

action.”¹²⁸ Legal actors in this study relied upon longstanding localized norms, understandings, and routines to interpret and respond to *Booker*.

Nevertheless, some adaptations transcended locale. Defense attorneys in all locales were motivated to improve outcomes for their clients, so they used the new *Booker*-inspired sentencing tools to actively pursue below-guideline sentences. On the other side, in every district, prosecutors deployed several key methods to maintain some control over sentencing outcomes, most notably through threats or filing of mandatory minimum charges and/or through binding plea agreements. On both sides of the adversarial system, *how* they used these tools varied (sometimes considerably) by locale, but the fact of their use cut across all districts.

This, then, speaks to the law-and-organizations literature, which explicates the translational process of formal legal policy to law-as-practiced. Consistent with a significant body of work that examines how front-line organizational actors maneuver their discretionary power in response to policy change,¹²⁹ the legal actors interviewed here were strategic in their responses to the new landscape. Prosecutors sought to maintain the level of control they had in crafting preferred sentence outcomes, while defenders actively worked to challenge that control, especially where judges were viewed as defense-friendly. The particular strategies employed varied as a joint function of case type, case facts, and judicial assignment as embedded in local legal norms.

But just as legal actors strategically responded to the mandatory guidelines when they were originally imposed, including by circumventing the mandated sentences, the legal actors in my study were active in appropriating *Booker*'s dictates to serve their adversarial interests. Indeed, the interviews indicated another kind of “circumvention” of *Booker* as the “shadow of the judge” loomed larger and posed new uncertainties about ultimate outcomes. Strategies deployed—primarily (but not exclusively) by prosecutors—to “discipline” or “handcuff” judges in the post-*Booker* sentencing world functioned to circumvent the case law that returned significant sentencing discretion to judges. Indeed, judicial discretion remains more constrained than what might be predicted—to different degrees and via different strategies—depending upon the who, what, and where of any given case.

Consistent with Rengifo, Stemen, and Amidon's observations about on-the-ground policy reform, the response to *Booker*-mandated reforms was not “a monotonic process shaped by dichotomies of staff support and resistance, protocol fidelity and circumvention, or reform success and failure.”¹³⁰ Rather, the response was a dynamic and evolving process shaped by structured social relations. These findings make clear that changes in sentencing outcomes in the post-*Booker* period are not simply the result of liberated judges exercising their discretion. Sentence

128. Verma, *supra* note 44, at 857.

129. See, e.g., MCCOY, *supra* note 45; Rengifo, Stemen & Amidon, *supra* note 43; Rudes, *supra* note 47.

130. Rengifo, Stemen & Amidon, *supra* note 43, at 605.

outcomes remain “joint acts,”¹³¹ produced by strategic actors operating within an adversarial system.

These findings suggest that judges do not appear to be independently producing “unwarranted disparities” in the wake of the *Booker* line of holdings. Instead, the loosening of the guidelines’ hold over final sentences has set into motion a number of changes to legal practice, from case selection, to charging strategy, to sentencing advocacy by attorneys. Therefore, it is inappropriate to pin responsibility upon any one stage of process or single category of actor for geographic or demographic disparities that have increased post-*Booker*, if they have indeed increased.¹³² Moreover, based on the interviews I conducted, it appears that those legal actors adjudicating federal cases on the ground do not experience increased judicial sentencing as a problematic source of inequality or injustice. And, in fact, there were several notable ways that post-*Booker* judicial discretion mitigated racial harms. In Northeast, for instance, the practice of pleading “straight up” allowed for relief in some types of cases, such as career offender cases, that have consistently over-punished African-Americans both in the Northeast District and nationally.¹³³ More broadly, to the extent judges can depart from the guidelines (i.e., they are not constrained by statutory minimums or maximums), the trend in sentence length has been downward, not upward, especially in drug cases and child pornography cases. This indicates that the actors who actually negotiate and impose sentences on individual defendants can serve as a corrective for the overly-punitive formulae that determine guideline sentences, and when given the freedom to vary from the prescribed guidelines, sentences follow a trend toward leniency rather than punitiveness.¹³⁴

Conversely, in all of the districts in my study, defense attorneys in particular perceived entry into the system via targeted law enforcement priorities and prosecutorial filing decision-making as the most critical discretionary stage for producing racial and ethnic inequality, a problem that may have worsened through

131. Ulmer, *supra* note 12, at 8.

132. The debate between Starr & Rehavi, *supra* note 40, and Schmitt, Reedt & Blackwell, *supra* note 3 is but one indicator of the unsettled nature of this empirical question. See also Paul J. Hofer, *Review of DOJ-Commissioned Report: Racial Disparity in Post-Booker Sentencing*, 28 FED. SENT’G REP. 196 (2016).

133. See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 21, at 133–34 (noting the racially disproportionate impact of the career offender guideline); LYNCH, *supra* note 19, at ch. 3 (discussing the disproportionate use of the career offender guideline in the Northeast district); Baron-Evans & Stith, *supra* note 31, at 1688 (noting the role of *Booker* in remediating the racially disproportionate impact of the career offender guideline).

134. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 110, at 317 (showing high rates of below-guidelines sentences especially after *Booker*); Lynch & Omori, *supra* note 8, at 439–40 (discussing the gap between prescribed guideline sentences and actual imposed sentences in drug cases, especially under conditions of increased judicial discretion). Baron-Evans & Stith, *supra* note 31, at 1741–42 (discussing judges’ post-*Booker* sentences as an effective “feedback mechanism” to the Commission in regard to appropriate sentences).

prosecutorial response to *Booker*.¹³⁵ It stands to reason that the largely unregulated case-selection process accounts for the extreme racial disproportionality in some federal criminal caseloads. Institutional theories of racism postulate that biased action is most easily produced in those organizational spaces “where institutional actors have the most decision-making autonomy and the least oversight.”¹³⁶ In the federal criminal court context, the most discretionary power in the post-*Booker* era continues to rest with prosecutors in their early-stage decision-making, where it is at its least transparent. This power includes the decision to bring charges, the content of the charges, and the terms of plea offers, including reductions for providing information to the government (“substantial assistance”) or sentence enhancements based on criminal history or elements of the offense. As these interviews indicated, all of these pre-sentencing processes were adapted in various ways once judges were given more sentencing autonomy after *Booker*.

This study has some limitations that leave open a number of questions about the *Booker* impact. Most significantly, the interviews were conducted eight to nine years after the *Booker* decision was announced, so the interviewees were reconstructing memories that inevitably were tinged by the intervening years of practice.¹³⁷ The data also reflected individual perceptions of transformations and are thus shaped by individual differences in cognitions and experiences. Finally, qualitative studies such as this typically rely on small, purposively selected samples that make generalization impossible. Therefore, the findings I report are better read for the insights they provide about the range of potential adaptation strategies that have arisen post-*Booker* rather than as a picture of the national landscape of post-*Booker* legal practice. Nonetheless, the findings are consistent with those of studies that have used alternate data sources and modes of analysis, particularly those that have uncovered the important role of mandatory minimums and the endurance of district-level contextual factors, and those that examine pre-sentencing stages of adjudication for uncovering the production of disparities.¹³⁸

135. The interview data presented in Part V.B.1 provide support for this. See also Fischman & Schanzenbach, *supra* note 40; Starr & Rehavi, *supra* note 40.

136. Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 115 (2013).

137. The conditions for recall are very favorable here, however, in that the legal change was highly salient, it continued to shape respondents’ professional work, and the interviews were conducted face-to-face and sought information not subject to telescoping. See generally Shirley Dex, *The Reliability of Recall Data: A Literature Review*, 49 BULL. SOC. METHODOLOGY 58, 61, 74–75 (1995).

138. E.g., Fischman & Schanzenbach, *supra* note 40 (finding that the increase in racial disparities is due primarily to the increase of mandatory minimums); Lynch & Omori, *supra* note 8 (noting mandatory minimums and district-specific practices as important factors in sentencing disparities); Lynch & Omori, *Crack as Proxy: Aggressive Federal Drug Prosecutions and the Production of Black-White Racial Inequality*, 52 L. & SOC’Y REV. 773 (2018); Ulmer, Light & Kramer, *Racial Disparity in the Wake of the Booker/Fanfan Decision*, *supra* note 35, at 1102, 1108–09 (finding disparities to result from prosecutorial discretion in charging as much as, or more, than judicial discretion); Ulmer, Light & Kramer, *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision*, *supra* note 16, at 800, 830 (finding little evidence of increased sentencing disparities post-*Booker*).

My interviewees also described a number of other forces that have reshaped adjudication practices in federal court, some of which were characterized as equally significant as or more significant than *Booker*. Some of these were local, such as changes in personnel within the courtroom workgroup or in office leadership and changes in caseload dynamics. Others were national, including changing policies under President Obama's Department of Justice in regard to the use of mandatory minimums,¹³⁹ and legislation enacted in Congress such as the Fair Sentencing Act (FSA) in 2010.¹⁴⁰ In that regard, many defense attorneys in Southeast District in particular spontaneously mentioned the positive effect of the FSA for racial justice, specifically in that prosecutors brought far fewer crack cases after its passage.¹⁴¹ This district had been a national leader in prosecuting crack in the 1990s and early 2000s, so this change was viewed as a welcome relief from prevalent racially disproportionate and excessively punitive practices.

VII. CONCLUSION

Multiple local and distal factors impacted how law is practiced in each of the districts in my study, serving as a reminder that scholars seeking to explain changing legal practices need to be attuned to both large and small forces at play in any given organizational context. To that end, this study suggests that the seemingly unending efforts of legal policy-makers like the United States Sentencing Commission to try to fully regulate complex socio-legal fields are a losing proposition. Nonetheless, such efforts continue, posing new risks to substantive justice in the federal system. In the ongoing battle over what federal sentencing should look like, two formidable forces have pushed back on both the individualized procedures authorized by *Booker* and the subsequent taming of some punishments (particularly in drug cases) that has attended post-*Booker* sentencing practices.

The first force is the U.S. Sentencing Commission itself, which has advocated on several occasions for a return to binding guidelines.¹⁴² This ongoing effort by the Commission, across executive branch administrations, has partially relied upon the claim that judicial discretion under advisory guidelines contributes to unwarranted racial disparities.¹⁴³ Judge William Sessions, who served as vice-

139. Holder, *supra* note 94.

140. Fair Sentencing Act of 2010, Pub. L. No. 111–220, §§ 2, 3, 124 Stat. 2372 (2010).

141. Both defense attorneys and prosecutors mentioned a tapering of small crack cases in the district, attributing the change to less reliance on federal-local task forces that targeted low-level dealers. This was also linked to the changed crack guidelines and mandatory minimums. Several interviewees mentioned that under FSA, crossing the new mandatory minimum thresholds (of 28 grams for 5 years and 280 grams for 10 years) was more difficult, changing the calculus when targeting low-level dealers. See Mona Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, 35 JUST. Q. 1309 (2018).

142. See Baron-Evans & Stith, *supra* note 31, at 1681–1712 (discussing the Commission's efforts to institute a *Booker* “fix” and its flawed logic).

143. *Id.* at 1685–86.

chair then chair of the Commission, proposed a simplified presumptive guidelines scheme as the “fix” to *Booker* at the end of his term.¹⁴⁴ This proposed reform would widen guideline ranges, but was also designed to cabin judges’ ability to impose sentences outside of those ranges. In 2012, under the new Chair, the Commission proposed a scheme that would give the guidelines “substantial weight” in sentencing determinations, in part by altering appellate standards for assessing imposed sentences.¹⁴⁵ Most recently, the acting chair of the Commission, Judge William Pryor, has called for a “presumptive” system “of enforceable guidelines in which judges adhere to sentencing ranges absent substantial and compelling reasons to depart from them.”¹⁴⁶ The Commission’s effort in this regard, however, will require the cooperation of Congress, a tall order at present given the dysfunctionality in that legislative body.

The second force comes from the policies put in place by the former Attorney General Jeff Sessions¹⁴⁷ and the Department of Justice, and represents a much more direct and immediate attack on post-*Booker* sentencing norms and practices. It also presents an especially potent threat to racial equality in the federal system through its stated law enforcement priorities. Sessions brought to the Attorney General position a reputation as a long-time proponent of law-and-order policy approaches, first as U.S. Attorney of the Southern District of Alabama, and more recently, as a U.S. Senator.¹⁴⁸ As U.S. Attorney of the Southern District of Alabama in the 1980s and early 1990s, Sessions was notably aggressive in

144. William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, 2012 WIS. L. REV. 85 (2012).

145. See Baron-Evans & Stith, *supra* note 31, at 1730–31 (noting that the proposal would essentially fly in the face of the rulings in *Booker*, *Kimbrough*, and *Gall* to “(1) apply a ‘presumption of reasonableness’ to within-guideline sentences, (2) demand a ‘greater justification’ of the district court the further the sentence imposed is from the guideline range, and (3) apply a ‘heightened standard of review’ to sentences that result from a policy disagreement with the Commission”).

146. William H. Pryor Jr., *Returning to Marvin Frankel’s First Principals in Federal Sentencing*, 29 FED. SENT’G REP. 95, 98 (2017). Pryor would also beef up the role of appellate review to ensure compliance. See *id.* at 99. If Trump’s 2018 nominees to the Commission get confirmed, there is a strong likelihood that these efforts will also include maintaining or even increasing the most draconian of guideline sentence lengths. Two of those nominees, Judge Henry Hudson (Eastern District of Virginia) and William Otis are unabashed crime warriors. See Samantha Michaels, “I Live to Put People in Jail”: Here are Trump’s Nominees for the U.S. Sentencing Commission, MOTHER JONES (Mar. 1, 2018, 4:46 PM), <https://www.motherjones.com/crime-justice/2018/03/i-live-to-put-people-in-jail-here-are-trumps-nominees-for-the-us-sentencing-commission/> [https://perma.cc/7CXG-GE7H].

147. Attorney General Sessions resigned under pressure from the President on November 7, 2018, however his policies still stand at the time of this writing. See Letter from Att’y Gen. Jeff Sessions to President Donald Trump (Nov. 7, 2018, 3:48PM), in LAWFARE, <https://www.lawfareblog.com/document-attorney-general-jeff-sessions-resignation-letter> [https://perma.cc/BTF9-2JWR].

148. See AMES C. GRAWERT, ANALYSIS: JEFF SESSIONS’S RECORD OF CRIMINAL JUSTICE, BRENNAN CTR. FOR JUST. (2017), <https://www.brennancenter.org/sites/default/files/analysis/SenatorJeffSessionsRecordonCriminalJustice.pdf> [https://perma.cc/7GN3-MNVK].

prosecuting drug crime.¹⁴⁹ Decades later, as a senator, Sessions actively opposed multiple, bi-partisan sentencing reform bills that have been proposed in recent years, calling instead for more aggressive federal prosecution of drugs, guns, and immigration crimes, and voicing his belief in using criminal law to its fullest extent as a solution to complex social problems.¹⁵⁰

He has also been staunchly anti-immigration over the course of his career, consistently opposing congressional immigration reform and frequently conflating unauthorized immigration with violence and drug crime, both in rhetoric and policy proposals.¹⁵¹ More generally, he has a long, varied, and well-documented history as a public servant of racial insensitivity and racial subjugation.¹⁵²

After taking his post as Attorney General, Sessions quickly turned his ideological commitments and criminal justice policy preferences into concrete directives. In March 2017, he announced a new “crime reduction” task force and directed federal prosecutors to prioritize “illegal immigration and violent crime, such as drug trafficking, gang violence and gun crimes.”¹⁵³ Then, in May 2017, he issued a memorandum that laid out an agenda to return to punitive adjudication practices.¹⁵⁴ Eleven months later, Sessions announced a “zero-tolerance” policy on illegal entry, requiring prosecutors in border districts to file criminal charges

149. *Id.* at 3.

During the 12 years that Sen. Sessions served as U.S. Attorney for the Southern District of Alabama, federal data suggest that he shifted resources toward drug offenses, but away from prosecuting violent crimes. Drug cases made up more than 40 percent of his office’s convictions, and just 20 percent of convictions for other U.S. Attorneys in Alabama. Sen. Sessions’s office also obtained harsher sentences in drug cases.

150. *See id.* at 2. While he did support reducing the crack-powder disparity, as ultimately realized in the Fair Sentencing Act, Sessions was one of three senators who actively worked to derail the bipartisan sentencing reform efforts that took place in 2014-2016. *See also* Michael Doyle, Anna Douglas & William Douglas, *Attorney General Nominee Jeff Sessions Wants to Hold the Line on Legal Immigration, Too*, MCCLATCHY DC BUREAU (Nov. 18, 2016), <https://www.mcclatchydc.com/news/politics-government/white-house/article115714488.html> [<https://perma.cc/G4DF-4KFM>].

151. *See, e.g.*, Seung Min Kim & Josh Gerstein, *What Jeff Sessions Thinks About Immigration, Police and Terrorism*, POLITICO (Jan. 10, 2017, 5:13 AM), <https://www.politico.com/story/2017/01/jeff-sessions-views-attorney-general-233383> [<https://perma.cc/A93J-VBEZ>]; Doyle, Douglas & Douglas, *supra* note 150.

152. *See* Nancy Scheper-Hughes, *Another Country? Racial Hatred in the Time of Trump: A Time for Historical Reckoning*, HAU: J. ETHNOGRAPHIC THEORY, Spring 2017, at 452 (noting various ways in which Sessions has supported white supremacy or failed to fully investigate civil rights violations and lynchings).

153. Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Attorney General Sessions Directs Federal Prosecutors to Target Most Significant Violent Offenders (Mar. 8, 2017), in JUSTICE NEWS, <https://www.justice.gov/opa/pr/attorney-general-sessions-directs-federal-prosecutors-target-most-significant-violent> [<https://perma.cc/6VBE-SF27>].

154. *See* Memorandum from Att’y Gen. Jeff Sessions to All Federal Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/7WQP-6NUZ>].

against all those suspected of attempted or completed undocumented entry into the U.S.¹⁵⁵

The May 2017 memorandum, in particular, promotes highly-punitive uniformity, in part by returning to Bush-era policy that aims to regulate district-level prosecutors from Washington D.C.¹⁵⁶ First, it directs federal prosecutors to charge and seek convictions on “the most serious, readily provable offense.”¹⁵⁷ This includes maximizing the potential punishment exposure in every case that U.S. Attorneys bring and requires supervisory approval to deviate from this directive. The memo also directs that mandatory minimums should be sought in all eligible cases, with exceptions requiring supervisory approval.¹⁵⁸ The 2017 policy also undercuts more individually tailored sentencing, as authorized by *Booker*, by directing prosecutors to seek within-guidelines sentences in all cases, unless granted supervisory approval to do otherwise.¹⁵⁹ In addition, the memo rescinds a 2014 Holder policy that barred prosecutors from using threats of mandatory sentencing enhancements to compel guilty pleas from defendants.¹⁶⁰

Taken together, these policies and directives will likely dramatically alter caseload characteristics, including demographic characteristics, as well as prosecutorial practices and case outcomes. Given the re-prioritization of criminal categories in which non-white defendants are consistently over-represented in federal caseloads, such as drug, gun, and immigration caseloads, and the de-emphasis on white collar and financial crime, we should expect to see an increase in non-white defendants across all caseloads at the district-level. And because prosecutors have less flexibility in negotiating pleas in cases, as they are expected to seek the harshest possible sentences,¹⁶¹ including all available mandatory minimum sentencing provisions, sentences in drug, immigration, and gun cases should significantly increase, relative to those meted out during the Holder-Lynch era. Finally, the question looms as to whether reform efforts aimed at rolling back punitive policies, as represented by the Holder directives, were more likely to be subverted than those that increase the power to punish, as the current Department of Justice directives

155. Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, The Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), in JUSTICE NEWS, <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/3FPN-47YR>].

156. Sessions, *supra* note 154. Specifically, it mimics Bush-era policy under the Ashcroft memo. See Ashcroft, *supra* note 82.

157. Sessions, *supra* note 154. This language is identical to that used in the Ashcroft memo.

158. *Id.* at 1.

159. *Id.* at 1 (“In most cases, recommending a sentence within the advisory guideline range will be appropriate. Recommendations for sentencing departures or variances require supervisory approval, and the reasoning must be documented in the file.”).

160. *Id.* at 2 (referencing the 2014 policy regarding enhancements in plea negotiations and the 2013 mandatory minimum policy as examples of policies inconsistent with the directives laid out in the memorandum).

161. *Id.*

seem to do. Given the nature of the power to punish,¹⁶² it seems likely that line prosecutors will be more amenable to policy directives that enhance rather than restrict their use of punitive tools.

Given the time lags that attend case processing in the federal criminal system, it is still too early to fully assess how these changing prosecutorial practices have impacted case characteristics and outcomes. Yet, we are starting to get glimpses of how the federal criminal system is operating under the current policies. The indications are that the new tough-on-crime policies are indeed over-targeting non-whites. Along the Southwest border, for instance, the zero-tolerance prosecutorial policy in regard to undocumented immigrants appears to have had the perverse effect of decreasing serious crime prosecutions,¹⁶³ including of the very kinds of offenses that Sessions had publicly declared to be priorities,¹⁶⁴ such as large-scale drug trafficking.¹⁶⁵ Likewise, the Sessions' policy commitment to prosecuting gun crimes appears to have disproportionately targeted low-level, nonviolent gun law violators, the majority of whom are African-American.¹⁶⁶ In these prosecutions, defendants typically face much more punitive sanctions in federal court than they would in state court.

Finally, the specter of racial bifurcation in responses to the full-blown opioid epidemic looms especially large. In March 2018, the Attorney General issued a memorandum encouraging prosecutors to seek the federal death penalty for eligible drug dealers, where legally authorized and appropriate, as a tool to address the "opioid epidemic."¹⁶⁷ The memo was in response to a public speech by the President, made in New Hampshire,¹⁶⁸ in which he rolled out a set of policy proposals

162. LYNCH, *supra* note 19, at 5 (describing the way criminal law is one of the many ways the government exercises its power to punish).

163. See, e.g., Maya Srikrishnan, *Under Zero Tolerance, Illegal Border-Crossers Can Be Treated More Harshly Than Their Smugglers*, VOICE OF SAN DIEGO (Sept. 4, 2018), <https://www.voiceofsandiego.org/topics/news/under-zero-tolerance-illegal-border-crossers-can-be-treated-more-harshly-than-their-smugglers> [<https://perma.cc/DG4X-E374>] (describing the "perverse" situation in Southern District of California, where "prosecutors [are] prioritizing illegal entry misdemeanors over felony charges under zero tolerance").

164. See U.S. Dep't of Justice, *supra* note 153.

165. USA Today conducted a review of court dockets and DOJ records, finding that prosecution of cases involving drug smuggling across the border plummeted as minor immigration cases surged. See Brad Heath, *As Feds Focused on Detaining Kids, Border Drug Prosecutions Plummeted*, USA TODAY (Oct. 10, 2018, 2:45 AM), <https://www.usatoday.com/story/news/investigations/2018/10/10/border-drug-trafficking-prosecutions-plunged-zero-tolerance/1521128002> [<https://perma.cc/9HEA-ESG7>].

166. George Joseph, *Jeff Sessions' Gun Prosecution Machine Goes After Many Black Nonviolent Offenders*, SLATE (Nov. 21, 2018, 9:00 AM), <https://slate.com/news-and-politics/2018/11/jeff-sessions-gun-prosecutions.html> [<https://perma.cc/XP82-7JQL>] (presenting data of increased prosecutions of low-level illegal gun possession defendants, 53% of whom are African-American).

167. Memorandum from Att'y Gen. Jeff Sessions to U.S. Attorneys, *Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions* (Mar. 20, 2018), <https://www.justice.gov/file/1045036/download> [<https://perma.cc/4WSN-CW4P>].

168. New Hampshire is 91% non-Hispanic white in population and has been among the hardest hit states in terms of opioid addiction and overdoses. As Jelani Cobb points out, this call for the death penalty is a well-established racial dog-whistle. Jelani Cobb, *Trump's Talk of Executing Drug*

to deal with the opioid crisis. With Attorney General Sessions in the audience, the President narratively linked the overdose deaths of New Hampshire residents to immigrants in “sanctuary cities,” and then called out neighboring city Lawrence, Massachusetts, whose population is 83% non-white,¹⁶⁹ as one such city sending “MS-13 gang members”¹⁷⁰ with the deadly opioid, fentanyl, to New Hampshire. It was these kinds of dealers, he implied, that should get the death penalty.¹⁷¹

These anecdotal glimpses of the new regime seem to portend the return to the plainly discriminatory, exceptionally punitive practices that characterized the worst of the late-20th century “war on crime.” However, as previous research has demonstrated¹⁷² and the research findings presented in this article make clear, this renewed war will be waged with different intensities and distinct contours as a function of local legal norms and social relations. Given the effort to closely regulate charging and plea processes, however, local-level discretion will likely become even more concentrated at the case-selection stage, which in turn will create even larger disparities between districts as to who is brought to federal court for prosecution and how they are treated once there.

Dealers Reflects His Worst Instincts, NEW YORKER (Mar. 23, 2018), <https://www.newyorker.com/news/daily-comment/trumps-talk-of-executing-drug-dealers-reflects-his-worst-instincts> [https://perma.cc/57GU-FGA3].

169. *Quick Facts: Lawrence City, MA*, U.S. CENSUS BUREAU, <https://www.census.gov/quick-facts/lawrencecitymassachusetts> [https://perma.cc/B5LS-BY6L].

170. Allison DeAngelis, *Lawrence Target of Trump’s Opioid Speech*, EAGLE TRIBUNE (Mar. 19, 2018), https://www.eagletribune.com/news/haverhill/lawrence-target-of-trump-s-opioid-speech/article_f25eda57-4fc2-5582-866d-f036cf0ac008.html [https://perma.cc/3ALC-UWRB].

171. *Remarks by President Trump on Combatting the Opioid Crisis*, WHITEHOUSE.GOV (Mar. 19, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-combatting-opioid-crisis/> [https://perma.cc/E4HM-KPHJ].

172. *Supra* notes 56–62.