

THE IMPACT OF THE FEDERAL SENTENCING GUIDELINES AND REFORM: A COMPARATIVE ANALYSIS*

LYDIA BRASHEAR TIEDE

*In this article, application of the United States Sentencing Guidelines among district court judges adjudicating substantially similar drug cases is compared. When district court judges use the Guidelines, either applying ranges from the sentencing table or explicitly departing from them, average sentences and sentence variation among the circuits analyzed are very similar. However, rates of departure from the Guidelines by district court judges in some circuits vary significantly. Further, district court judges in the circuits analyzed reacted differently than judges nationwide to three significant legal events: the PROTECT Act (2003) (limiting judicial discretion), *Blakely v. Washington* (2004), and *United States v. Booker* (2005) (expanding judicial discretion). This analysis suggests that long-existing federal Sentencing Guideline schemes, whether mandatory or advisory, reduce disparities in sentences when judges apply the Guideline ranges, but not disparities associated with the choice of whether to apply those ranges.*

By establishing federal Sentencing Guidelines as part of the Sentencing Reform Act (SRA) of 1984 (Title II of the Comprehensive Control Act of 1984), Congress limited judges' sentencing discretion in an attempt to reduce the disparity of sentences across regions for similarly situated defendants convicted of the same crime.¹ Subsequent reforms in the form of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 (the PROTECT Act) further reduced judges' sentencing discretion until the U.S. Supreme Court found that the Guidelines were unconstitutional in *United States v. Booker* (2005). In this article, application of the Guidelines and of the reform of these Guidelines by district court judges in select circuits is compared to ascertain whether limiting sentencing discretion reduces disparity of case outcomes.

DISPARITY AMONG JUDGES

In the federal sentencing arena, the United States Sentencing Commission (USSC), as well as several scholars, found that the Sentencing Guidelines reduced sentencing disparity as compared with pre-guideline sentencing² (USSC, 1991, 2004b:95-97;

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Karle and Sager, 1991; GAO 1991; Anderson, Kling, and Stith, 1999; Waldfoegel, 1991, 1998). Although acknowledging that disparity had been reduced with the introduction of the Guidelines, many have written how disparity persisted even under the federal Guideline regime (e.g., Miller, 2002; Heaney, 1991; Hofer et al., 1999; Albonetti, 1997; Everett and Wojkiewicz, 2002; Kautt, 2002; Kautt and Spohn, 2002). Despite the differences in these findings, the USSC in its fifteen-year report insisted that findings using the newer approach of hierarchical models (USSC, 2004a:101 and Appendix D) indicated “relatively minor inter-judge and regional disparity not explained by case differences.”

While disparity often is acknowledged to exist, some scholars focus on the source of disparity rather than its magnitude. Many, including the USSC, believe that disparity is due to pre-sentencing differences in prosecutors’ charging and pleading practices (USSC, 2004a; Bibas, 2005); the availability of certain types of defense attorneys (Berman, 2002); caseloads (Braniff, 1993); and local case-processing practices (Ulmer, 2005). Still others believe disparity is primarily due to gender, race, and ethnicity (Mustard, 2001; Free, 1997; Pasko, 2002). Finally, disparity often corresponds to region where district court judges are located (USSC, 1995, 1996). This article focuses on regional disparity.

The purpose of this article is to analyze specifically whether there is disparity in how legal constraints, in the form of legislation or higher-court mandates that alter the amount of discretion that judges may exercise, are applied by district court judges. The present study examines one specific crime, matched by case facts, and employs a method similar to that used by the USSC in 1991, but subsequently abandoned.³ First, there is an examination of how average sentences between 1999 and 2006 vary depending on whether judges choose to apply limited Guideline ranges found in the sentencing table or depart from them. For this part of the analysis, average sentences and variance of sentences for one identical drug crime nationally are compared with sentences and variance in the circuits. Variance of sentences is a measure of how widely individual district court judges’ sentences vary from each other. It is measured by the standard deviation or square root of the variance defined as the spread of the possible sentences around the average of all sentences.

Second, whether sentencing reform, changing the amount of discretion that judges apply in individual cases, affected decision makers differently depending on

¹ Anecdotal and empirical studies before enactment of the guidelines established that judges treated federal defendants differently depending on characteristics of defendants, such as race, as well as the inclinations of individual judges (Frankel, 1972; see USSC, 2003 for the legislative history of the SRA).

² It should be noted that in the USSC’s 1991 report, the USSC only examined small samples of the following four crimes: bank robbery, embezzlement, and heroin and cocaine offenses. While the USSC generally found that sentence length increased and sentence variance decreased after federal Guideline implementation, it found that for bank robbery the median sentence imposed and time served were actually lower after the Guidelines were implemented.

³ The USSC’s 1991 report examined pre- and post-Guideline sentences by analyzing four simple crimes of defendants with no criminal history matched by fact-pattern attributes. As with the method employed in this article, the USSC in 1991 controls for case facts to determine the impact of the law precisely.

their location within the individual circuits is tested. For this analysis, the focus is on the effects of three changes to the Guidelines that directly altered the amount of discretion that judges could exercise in sentencing cases: 1) the PROTECT Act, in which Congress restricted the ability of judges and prosecutors to use departures; 2) *Blakely v. Washington* (2004), in which the Supreme Court found that the Washington state guideline system was unconstitutional; and 3) *United States v. Booker* (2005), in which the Supreme Court found the federal Guideline system unconstitutional and converted the Guidelines from mandatory to advisory constraints on judges' sentencing discretion. The PROTECT Act limited judicial discretion, while the two Supreme Court cases expanded it.

THE UNITED STATES SENTENCING GUIDELINES AND REFORM

It is useful to begin by understanding the general Sentencing Guideline scheme. In 1984, in the Sentencing Reform Act (SRA), legislators adopted federal Sentencing Guidelines—implemented nationwide in 1989—to curb a myriad of ills said to be caused by judges who were thought to have had unlimited discretion earlier. One of the predominant objectives of the Guidelines was to curb abuses arising from disparity in sentencing outcomes for similarly situated defendants. The other two objectives were “honesty in sentencing” and “proportionality” (USSC Guideline Manual §1A.1(A)(3)). The introduction to the Guidelines provided the following policy statement, “Congress sought reasonable *uniformity* in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar conduct by similar offenders” (USSC §1A1.1(A)(3)).

To deal with sentencing disparity, the USSC created a Guideline system that required judges to use a sentencing table and to sentence defendants within a range of possible sentences based on the offense type and level and the defendants' criminal history. Congress and the USSC intended judges to depart from these Guideline ranges only in very limited situations when an aggravating or mitigating circumstance was not included in the original Guidelines (USSC, 2003:Appendix B). The Sentencing Guideline system was left virtually intact, until major reforms were instituted in 2003 and again in 2004/2005. These legal changes dramatically affected the amount of discretion that judges could exercise in particular cases.

The PROTECT Act/Feeney Amendment: Legislation Restricting Judicial Discretion.

The first major change to the Guideline system occurred in 2003 when Congress passed the PROTECT Act and its Feeney Amendment out of a growing concern that judges and prosecutors had increasingly been using departures from sentencing-table ranges to avoid the Guidelines' sentencing mandates, especially in cases along the southwestern border and in cases involving child exploitation (USSC, 2003; see Schantzenbach, 2005). Further, in enacting this law, Congress also voiced concern that prosecutors were using departures and case facts as bargaining chips to get the sentences that they wanted in blatant disregard of Congress's intent in enacting the Sentencing Guidelines (USSC, 2003).

In general terms, the PROTECT Act, along with the Feeney Amendment, limited judicial discretion in two main ways—by reducing the number of statutory reasons that judges could depart from Guideline ranges and by establishing more-rigorous monitoring mechanisms for overseeing district courts' decisions by changing the appellate standard of review for district court judges' decisions from reasonableness and due deference to *de novo*. Further, the PROTECT Act required that the then attorney general, John Ashcroft, direct assistant U.S. attorneys affirmatively to oppose sentencing adjustments and downward departures and to establish a system whereby attorneys would report to Congress on individual federal judges whose sentences were not within the spirit of the Guidelines (Ashcroft 2003a, b).

Blakely and Booker: Supreme Court Cases Augmenting Judicial Discretion. While the PROTECT Act limited judicial discretion, recent Supreme Court decisions in 2004 and 2005 expanded judicial discretion, a trend that has been continued through 2007. The mandatory nature of the Guidelines was first called into question in *Blakely v. Washington* (2004), which challenged the Washington State sentencing-guideline scheme. The Supreme Court in *Blakely* explicitly stated that its decision was based on the application of the prior rule it had enunciated in *Apprendi v. New Jersey* (2000), which was that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury or proven beyond a reasonable doubt” (at 490).

While *Blakely* involved a state rather than a federal guideline scheme, it affected the application of the federal guidelines because the Court's dissenters questioned, but did not decide, the issue of whether the federal guidelines, similar to the Washington guidelines, were constitutional. Although *Blakely* did not challenge the federal guidelines, after this decision, many federal district court judges issued sentences holding that the federal guidelines were unconstitutional although never rendered so in *Blakely* itself (see USSC, 2004b).

Six months after *Blakely*, in *United States v. Booker* (2005), the Supreme Court decided that the Sixth Amendment right to a jury trial also applied to cases involving the federal sentencing guidelines. It was no coincidence that *Booker* was decided six months after the *Blakely* decision. After lower courts' reaction to this decision, Congress and the executive requested the Supreme Court to expedite a decision on the constitutionality of the federal Guidelines (Lynch, 2005:223; Denniston 2004:A14). In their decision in *Booker*, the justices affirmed that *Blakely* did indeed apply to the federal guidelines, and they reaffirmed the *Apprendi* rule that any additional facts supporting a sentence greater than the federal Guideline maximum must be admitted by defendant in a plea agreement or proved to a jury beyond a reasonable doubt.

While a 5-4 decision of Supreme Court justices in *Booker* held that the Guidelines violated the Sixth Amendment right to a jury trial, this did not result in the abolition of the federal Guideline system. Instead, in a separate opinion, Justices Breyer, Rehnquist, O'Connor, Kennedy, and Ginsburg reasoned that severing the sec-

tion of the Guidelines rendering them mandatory would remedy the situation. As a result, *Booker* converted the federal guidelines from mandatory constraints on judicial discretion to purely advisory ones. In *Booker's* wake, district court judges were instructed to use now advisory sentencing Guidelines as one factor of many to consider when determining the appropriateness of a sentence. As a result, after *Booker*, judges use what are known as section 3553(a) factors to determine reasonable sentences based on specific case or defendant circumstances. 18 U.S.C. §3553(a). Further, the Supreme Court mandated a "reasonableness" standard for appellate review of district court sentences.

METHODOLOGY, DATA, AND RESULTS

To test whether the Guideline scheme as a whole constrains judges, cases with substantially similar fact patterns were analyzed to see how case decisions differ depending on whether a judge applied Guideline ranges found in the sentencing table or departed from them based on the judges' own discretion. An analysis of substantial assistance and other government departures is not included as these are prosecutor- rather than judge-driven departures. Whether sentence length, variance, and departure rates changed for these similar cases before and after the PROTECT Act and *Blakely/Booker* is also analyzed.

To examine the effect of the legal constraints and reform, case facts are matched and thus controlled to test specifically for the effect of the Guideline scheme and its reform on sentencing outcomes. The drug-trafficking crime used for this analysis involves a single conviction of the transportation of one of four drugs (cocaine, heroin, marijuana, and methamphetamine).⁴ The sentencing-table range for this particular offense is 70 to 87 months of prison. The Appendix describes the exact fact pattern that was chosen for this analysis. Fact-pattern selection was determined by the simplicity of case facts and prevalence of available data for statistical analysis. The cases with this fact pattern are further subdivided into two groups defined by whether the judge explicitly applied (group #1) or explicitly departed from (group #2) the sentencing ranges, both warranted by the Sentencing Guidelines.

The two groups of cases analyzed are derived from federal sentencing cases, using databases created by the USSC from 1999 to 2006.⁵ A total of 1,112 drug-distribution cases out of nearly half a million district court cases were analyzed; 967 cases had the fact pattern described as group #1, and 145 cases involved facts described in group #2. Nationwide sentencing averages and variance are compared with these same measures in the circuits in cases where district court judges apply the Guideline ranges

⁴ Under the Guideline section analyzed the drug amounts are as follows: heroin (700 G to < 1 KG), cocaine (3.5 KG to < 5 KG), methamphetamine (350 G to < 500 G), and marijuana (700 KG to < 1,000 KG). These amounts have not changed between 1998 and 2006, the period studied. (See 1998 to 2006, USSC Guideline Manuals, §2D1.1. Available at <http://www.ussc.gov/guidelin.htm>.)

⁵ The databases are deposited with the Inter-University Consortium of Political and Social Research (ICPSR), Monitoring Federal Criminal Sentences, ICPSR Study Numbers 3106, 3496, 3497, 4110, 4290, 4630, 4633, and 20120 and can be found at <http://www.icpsr.umich.edu/NACJD/>.

and in cases where they choose to depart. In certain instances where judges depart from the Guideline ranges, the circuit average should be viewed with caution due to the small number of observations. In the section on Guideline reform, sentence length, standard deviation, and departure rates are compared after the reforms.

Guideline Scheme Effects. Previous research established that nationwide whether judges apply the Guideline ranges or depart has dramatic effects on both sentence length and disparity (Tiede, 2007, 2009). Judges sentence defendants to higher sentences with less variance when they apply the Guideline ranges (Tiede, 2007, 2008). Sentences are lower and have more variance when judges depart from these ranges. These results as to sentence length are similar in all of the circuits analyzed (see Table 1). When judges apply the guidelines in these circuits, their sentence average is almost identical to the nationwide average of 71.49 months in prison. When judges choose to depart, the sentence average of these cases, like the national average, is lower than judges who do not depart, but average sentences for departure cases vary from the national average of 49.24 months in prison depending on the circuit where the case was heard.

As far as variance, the range of sentencing choices is narrower or less diverse when judges apply Guideline-table ranges than when judges decide to depart, although they use departures less frequently. Nationwide the standard deviation for departure cases is 16.36. Among the circuits, the variance of departure decisions is more pronounced in some of the circuits than others. The lowest variances of departure cases occurred in the First, Third, Sixth, and Ninth circuits, but only the Ninth Circuit (standard deviation = 9.74) had a significant number of observations for departure cases to provide a meaningful comparison. The greatest variance among departure decisions occurred in the Eleventh Circuit (standard deviation = 23.05). This suggests that when district court judges in the Ninth Circuit depart, inter-judge disparity is less pronounced than in the other circuits where sufficient data was available to make the comparison.

Guideline Reform Effects. The direct impact of the PROTECT Act and the Supreme Court decisions in *Blakely* and *Booker* on sentence length, disparity, and departure rates also was examined. Earlier research on the effect of the legal changes on sentence length nationwide (Tiede, 2009) isolated the effect of the PROTECT Act by including all cases before the PROTECT Act and before *Blakely*. In this prior research, the PROTECT Act had no statistically significant effect on the sentence length; however, the judges' decision to depart or not, embedded in the original Guideline scheme discussed at the beginning of this article, significantly altered sentence length. A test of the effect of all three legal changes using all of the data further indicated that the changes in the law had no significant effect on sentence length, but again, judges' choices to depart from the Guidelines did.

Individual regressions of sentence length on legal changes and decisions to depart in each circuit confirmed nationwide results in almost all cases. Table 2 shows the regression equations used and the significant coefficients for decisions to depart.

Table 1
Sentence Average and Variance by Circuit (1999-2006)

Treatment Guideline Application	Sentence Average (standard deviation)						
	1st Circuit	2nd Circuit	3rd Circuit	4th Circuit	5th Circuit	6th Circuit	7th Circuit
<i>Guidelines</i>	72.24 (5.21)	71.04 (2.97)	73.63 (5.54)	71.36 (3.89)	71.69 (3.92)	72.70 (5.15)	71.20 (3.63)
N =	25	56	16	94	256	50	60
<i>No Guidelines</i>	0 (0.00)	46.04 (19.62)	57.00 (7.94)	54.87 (14.55)	48.13 (17.84)	51.33 (10.31)	38.50 (19.47)
N =	0	17	3	15	25	6	4

	8th Circuit	9th Circuit	10th Circuit	11th Circuit	All Circuits
<i>Guidelines</i>	71.27 (3.80)	71.52 (4.24)	71.82 (4.76)	70.71 (2.65)	71.49 (3.92)
N =	139	79	56	129	967
<i>No Guidelines</i>	38.54 (19.08)	51.38 (9.74)	51.29 (14.21)	52.86 (23.05)	49.24 (16.36)
N =	12	39	7	14	145

Note: Sentences are average sentences in months in prison.

The coefficients show the average number of months that district court judges in a particular circuit will reduce a defendant's sentence when they decide to depart. Using cases that occurred before *Blakely*, judges' decisions to depart reduced sentence length from 4.67 months in prison in the Eighth Circuit to 17.48 months in the Eleventh Circuit. Using all cases to test all legal changes through 2006, judges' decisions to depart reduced sentence length from 8.58 months in prison in the Fourth Circuit to 16.02 months in the Eighth Circuit. Decisions to depart had no effect on sentence length in the First Circuit at any time and in the Third Circuit in pre-*Blakely* decisions.

While simple regression analysis did not yield any effects of the legal reform on sentence length when a control for departure was included, using analysis of variance (or ANOVA) showed that some of the district courts operating in some of the circuits reacted differently to the legal changes depending on the time frame analyzed. ANOVA analysis tests whether differences between groups exceed variation within groups. For this part of the analysis, the sentence length for all (guideline and departure cases) was analyzed nationwide and by circuit for the following two time periods: 1) pre-PROTECT Act and 2) post-*Blakely*. There was an insufficient number of

Table 2
Significant Coefficients on Decisions to Depart in Months in Prison

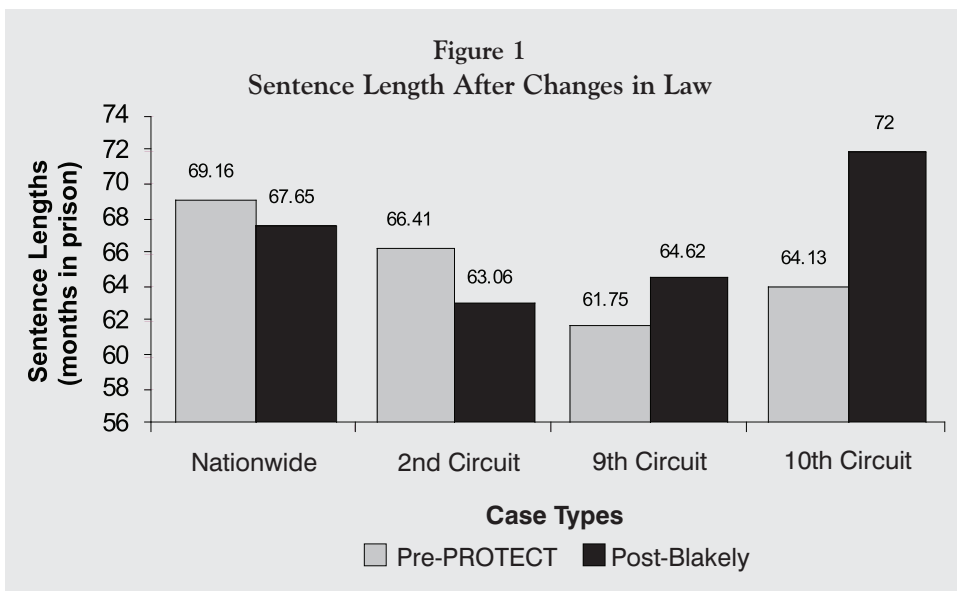
Sentence Length =

Circuit	$\beta_0 + \beta_1 \text{ PROTECT} + \beta_2 \text{ Depart} + \epsilon$	$\beta_0 + \beta_1 \text{ PROTECT} + \beta_2 \text{ Blakely} + \beta_3 \text{ Booker} + \beta_4 \text{ Depart} + \epsilon$
	PROTECT Act	All Legal Changes
1st	-	-
2nd	-16.11* (1.99)	-12.44* (1.45)
3rd	-	-10.83 (7.84)
4th	-12.79* (1.18)	-8.58* (0.98)
5th	-14.92* (0.87)	-11.76* (0.70)
6th	-12.92* (2.41)	-10.98* (1.49)
7th	-9.50* (2.34)	-15.53* (1.63)
8th	-4.67 (1.46)	-16.02* (1.02)
9th	-12.33* (2.05)	-9.55* (0.70)
10th	-11.56* (1.77)	-10.81* (1.38)
11th	-17.48* (1.05)	-9.22* (1.16)

Note: The regression equations also included year dummy variables. The only coefficient reported is for the departure variable. Coefficients in bold are significant at $p < 0.05$, coefficients in bold with an asterisk (*) are significant at $p < 0.00$. The full regression results are available upon request to the author.

observations to analyze court variation between the PROTECT Act and *Blakely*. Further, the *Blakely* decision, rather than *Booker*, was used for the cutoff because the two cases occurred very close together, and many district court judges changed their behavior after *Blakely*, anticipating that the Guidelines would ultimately be found unconstitutional.

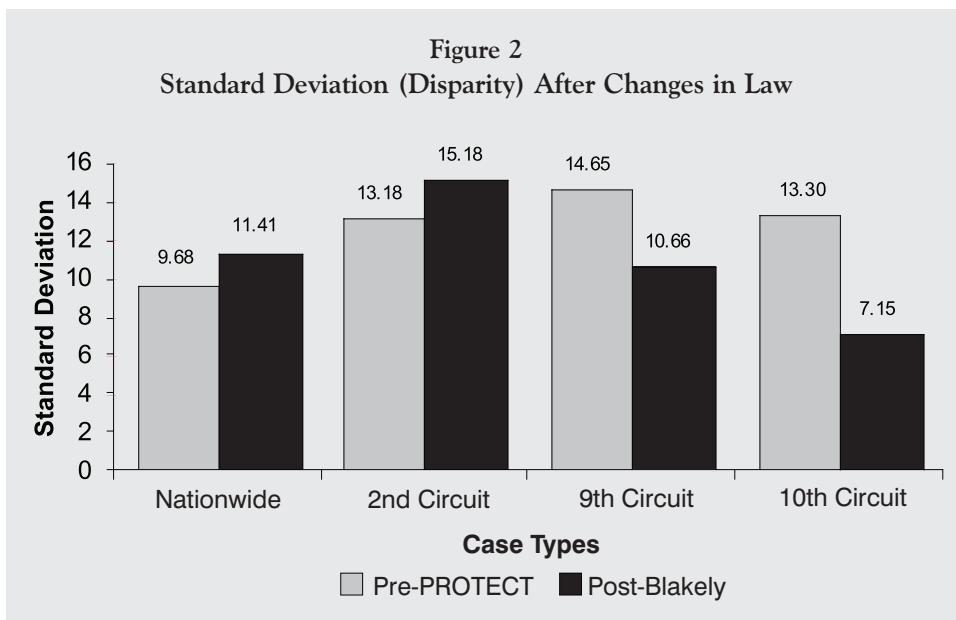
The ANOVA analyses for the two time periods referenced above test the simple hypothesis of whether district court judges in one particular circuit were behaving significantly different than in the other circuits. For the pre-PROTECT Act period, contrasting one circuit to all others indicated that the Ninth and Tenth circuits were significantly different than the remaining circuits. After *Blakely*, the ANOVA showed



that decisions occurring in the Second, Ninth, and Tenth circuits were significantly different than the rest.

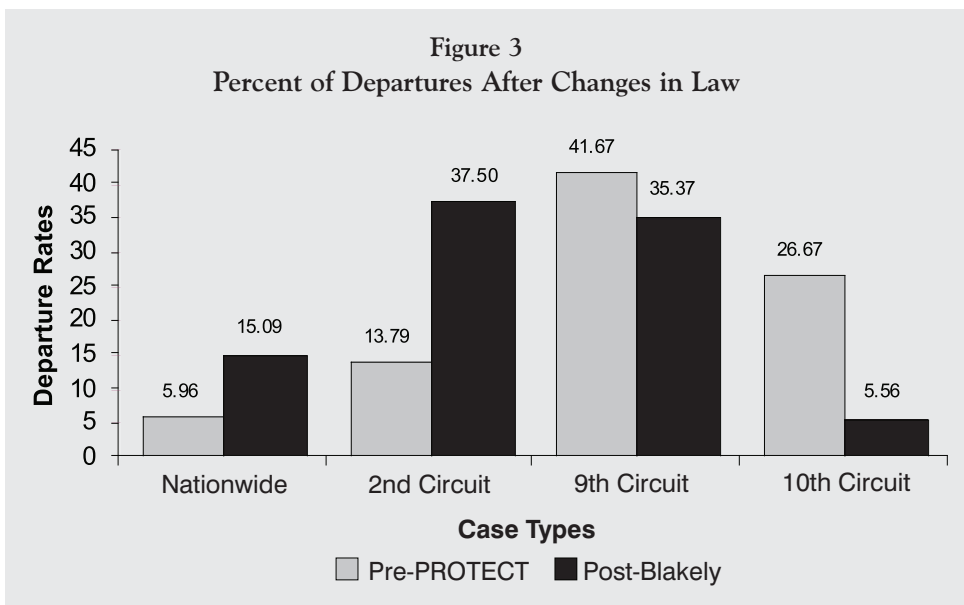
Figure 1 compares the Second, Ninth and Tenth circuits to all other circuits. The other circuits referred to as “nationwide” provide the measurement of interest for all the circuits excluding the Second, Ninth, and Tenth circuits. Before the PROTECT Act, the average sentences in the Second, Ninth, and Tenth circuits were lower than the average of the other circuits nationwide, which was 69.16, only slightly below the Guideline minimum for this particular crime (see Figure 1). In response to *Blakely/Booker*, which increased judicial discretion, sentences nationwide and in the Second Circuit decreased as compared to pre-PROTECT Act sentences in these locations. However, *Blakely/Booker* resulted in an increase in sentence length in the Ninth and Tenth circuits compared to pre-PROTECT period sentences although post-*Blakely* sentences in the Ninth Circuit were still lower than those in all other circuits, except the Tenth Circuit, before the PROTECT Act.

What effect did legal reforms have on disparity of decisions? Nationwide and in the Second Circuit, the disparity of district court judges’ decisions increased with the greater discretion afforded by *Blakely/Booker* (see Figure 2). Judges, however, appear to act differently in the Ninth and Tenth circuits in respect to disparity of decisions if we look at Guideline and departure cases together. Before the three major reforms, disparity of sentences was higher in the Ninth and Tenth circuits than the other circuits examined. After *Blakely*, unlike the trends in other circuits, disparity actually decreased in the Ninth and Tenth circuits from pre-PROTECT levels. Although a comparison of the period before *Blakely* is not included, this suggests that as far as disparity of decisions, the district court judges in the Ninth and Tenth circuits are less



responsive to Supreme Court mandates than other district court judges. These results, again confined to the particular fact pattern, suggest that judges in the Ninth and Tenth circuits may be more independent and less responsive to legal reform when it affects their ability to choose sentences on a case-by-case basis. Although not tested in this study, possible explanations for these circuits' lack of responsiveness may be due to case type and caseloads and the interaction between the district courts and court of appeals and the court of appeals and the Supreme Court in these circuits.

Finally, the effect of the legal changes on departure rates was compared with departure rate defined simply as the percentage of cases where judges depart out of all cases. Judges nationwide departed from the guidelines about 5.96 percent before the PROTECT Act and 15.09 percent after *Blakely/Booker* (see Figure 3). The increase in departure rates after the Supreme Court's decisions seems an unsurprising response to *Blakely/Booker* as judges were given more discretion to decide cases in the ways they saw fit without the strictures of the sentencing tables. The trend in departure rates was replicated in the Second Circuit, but at a much higher rate. Judges in the Second Circuit departed 13.79 percent of the time before the PROTECT Act and 37.50 percent of the time after *Blakely/Booker*, which was more than two times higher than the departure rate nationwide. As with disparity, the Ninth and Tenth circuits acted differently than the other circuits. In both the Ninth and Tenth circuits, departure rates before the PROTECT Act were significantly higher than rates in other circuits, with the Ninth Circuit departing 41.67 percent of the time before the PROTECT Act. After *Blakely/Booker*, the Ninth and Tenth circuits again acted differently by decreasing rather than increasing departure rates after *Blakely* as compared to the



pre-PROTECT Act rates: while the Ninth Circuit still departed over 35.37 percent of the time, the Tenth Circuit reduced departure rates to 5.56 percent.

DISCUSSION AND IMPLICATIONS

The purpose of this study has been to determine how legal regulation affects sentence length, variance, and departure rates for drug cases with similar fact patterns. As stated at the outset, the results are limited to the case facts analyzed and the number of observations for each time period and each circuit. Future studies using this data will include an analysis of more crimes with different fact patterns.

What do the results really tell us about the effectiveness of legal regulation in curbing disparity of outcomes? The analysis shows that legal regulation has an enormous impact on disparity of sentencing outcomes. When judges are constrained by Sentencing Guideline table ranges, sentences are longer and defendants are more likely to be treated similarly than when they depart. This result occurred both nationally and by circuit.

The dramatic changes in Guideline laws, however, do not seem to affect sentence length significantly for the cases analyzed *within* the Guideline table ranges or departure groups (i.e., when a control for judges' decisions to depart is included). Despite what were thought to be the two most dramatic changes in the federal Sentencing Guideline system since its inception, the PROTECT Act and *Blakely/Booker*, these changes seem to have had little effect on sentences within each of the two groups. As a result, sentence length is driven most significantly by the decision to depart. Congress's attempt to limit departures and the Supreme Court's deci-

sion to render the Guidelines advisory rather than mandatory did not alter sentence length *within* the Guideline and departure categories, at least not immediately. This suggests that Guideline application is path dependent. Judges who had been trained in the federal Guidelines when they were mandatory continued to apply them in the same way, even after they were transformed into being only advisory constraints on judges' discretion. As a result, disparity of sentences may be linked to the time judges serve on the bench and the relationship between the timing of the judges' appointment and the legal reform.

Although within categories changes of legal regulations did not affect sentence length, the legal changes did have significant impact on departure rates and sentencing disparity when the decision to depart is not considered independently. Before the PROTECT Act and again after *Blakely/Booker*, disparity in judges' decisions and departure rates varied by circuit, showing that the Guidelines were unable to eliminate disparity in all areas. Further, legal changes affected disparity and departure rates in circuits in different ways. The Supreme Court decisions in *Blakely/Booker* increasing judicial discretion led to higher departure rates and more disparity in most circuits. Sentencing in judicial districts in the Ninth and Tenth circuits runs counter to this trend with disparity and departure rates actually decreasing from the pre-PROTECT Act rates when discretion was augmented.

Finally, this study has largely, but not completely, confirmed studies (USSC, 2004a, 2006a and b) regarding the effect of the Guidelines and reforms to those Guidelines on sentence length and departure rates nationally and regionally. While the USSC's conclusions are instrumental to sentencing policy, it should be noted that the USSC employs a method that is significantly different than the one presented here. The USSC's conclusions are based on statistics of crimes that while generally of the same type have very different fact patterns. In other words, the USSC analyzes sentence length, departure rates, and disparity by grouping all crimes of a certain type together (such as drug crimes) without controlling for individual differences in fact patterns. In contrast, the present study attempts to control for case facts to determine the specific effect of the law on sentencing outcomes—that is, to match case facts to establish a valid comparison of case outcomes. While the conclusions presented are limited to the fact pattern analyzed, the method used seems more appropriate for testing how laws affect case outcomes.

This study has, however, called into question findings in the USSC's fifteen-year analysis, which claims that there is "relatively minor inter-judge and regional disparity not explained by case differences" (USSC, 2004a:101). This USSC finding is based on the belief that hierarchical models are better than other models for analyzing disparity. However, a specific fact-pattern-matching model is more precise than the hierarchical models used by the USSC and certainly refutes a finding that there is little regional or inter-judge disparity not explained by case differences. In the present study, case differences were precisely controlled for and regional and inter-judge disparity

appeared for sentence length, variance, and departure rates. As a result, the method employed here has led to the conclusion that persistent regional disparity does exist and is not due primarily to differences in case facts.

* * *

Regulation that limits judicial discretion results in higher sentences and less disparity in outcomes. Judges who use the Guideline tables sentence defendants more severely, but the disparity of sentencing outcomes across a nationwide or circuit population is smaller than when compared with cases where judges choose to depart. This trend is consistent for judges in the individual circuits and nationwide.

Changes to the Guideline scheme as a whole do not affect sentence length or disparity *within* either the Guideline range or departure groups when analyzed separately. However, when we look at sentence length for all cases together, the Ninth Circuit generally has lower sentences because district court judges there depart downward more. Further, changes in the Guideline scheme do affect rates of departure and disparity, but the effect of the changes varies by circuit. As a result, this analysis suggests that reform to the long-standing federal Sentencing Guidelines scheme does not reduce disparities associated with the choice of whether to apply the Guideline ranges or not. **jsj**

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APPENDIX

METHODOLOGY FOR FINDING CASES WITH IDENTICAL FACTS

To test how the Guidelines affect case outcomes, one drug crime with the same fact pattern is analyzed. All of the cases involve identical single convictions after guilty pleas of conspiracy to transport certain controlled substances under 21 USC §841(a)(1) and falling under Sentencing Guideline §2D1.1. All of the cases involved one of four possible drugs, namely, cocaine, heroin, marijuana, and methamphetamine, and carried a statutory minimum of ten years (21 USC §841(a)(1)). Despite the statutory minimum, the judge applied a safety-valve provision allowing him or her to sentence defendants below this minimum (18 USC §3553(f); Guideline Manual §5C1.2). In all of the cases, defendants had a level-one criminal history. Additionally, the defendants in all of these cases accepted responsibility for their crimes such that the original base-offense level was reduced by three points. Furthermore, there was no adjustment in the sentence due to the defendants' role in the offense. The Sentencing Guideline table range for this crime was 70 to 87 months in prison. For the case fact pattern analyzed, one group of cases included cases in which judges chose not to depart from the Guideline ranges appearing in the sentencing table. The other group included those where judges chose to depart from the guideline ranges.

