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Ryan W. Scott

Indiana University Maurer School of Law, ryanscot@indiana.edu

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The Effects of *Booker* on Inter-Judge Sentencing Disparity



RYAN W. SCOTT*

Associate
Professor, Indiana
University Maurer
School of Law,
Bloomington

I. Introduction

Five years after *United States v. Booker* (543 U.S. 220, 2005) rendered the federal sentencing guidelines “effectively advisory,” concern is growing among some commentators about a surge in inter-judge sentencing disparity in the federal system.¹ At its regional hearings in 2009, the United States Sentencing Commission has received anecdotal reports, especially from prosecutors, of increasingly sharp differences between judges.² Attorney General Eric Holder has called for an assessment of whether post-*Booker* sentencing practices “show an increase in unwarranted sentencing disparities” based on “differences in judicial philosophy among judges working in the same courthouse.”³

Not all forms of disparity in sentencing are a cause for concern,⁴ but *inter-judge* disparity is widely recognized as unwarranted. A central purpose of the Sentencing Reform Act of 1984 was to reduce disparity driven by individual judges’ philosophies, preferences, and biases. Congress was convinced that similarly situated offenders were receiving widely variable sentences depending on which judge happened to be assigned to the case.⁵ Mandatory sentencing guidelines, applicable to all judges and all offenders, were supposed to address that problem. Strong evidence supports the conclusion that the federal guidelines, despite their well-documented shortcomings, succeeded in reducing judge-to-judge sentencing disparity.⁶

Does *Booker* mark a step backward in Congress’s effort to promote consistency between judges? Acquiring anything more than anecdotal evidence is difficult because the Sentencing Commission does not disclose the identity of the sentencing judge in its publicly available data and reports. The Commission states, for example, that the nationwide rate of below-range sentencing has increased since *Booker*, from 8.6% in FY 2003 and 5.5% under the PROTECT Act in FY 2004, to 12.0% in FY 2005 after *Booker* and 15.9% in FY 2009.⁷ But the Commission does not report how *individual judges* are imposing sentences, and that policy frustrates efforts to measure the performance of the Guidelines against one of Congress’s principal objectives.

II. The Boston Study

Fortunately, one district court—the U.S. District Court for the District of Massachusetts—has adopted a unique policy making the Statement of Reasons for almost all sentences available to the public.⁸ Using information from those documents in conjunction with the Commission’s data, as well as a case-matching technique pioneered by Max Schanzenbach and Emerson Tiller,⁹ I have compiled a data set of more than 2,200 sentences from 2002 to 2008 by a core group of judges in Boston who served continuously throughout that period.¹⁰ Although a single district court is not necessarily representative of the nation as a whole, and the judges of the District of Massachusetts share a special interest and expertise in sentencing issues,¹¹ the Boston data offer an unprecedented look at post-*Booker* sentencing patterns. They reveal how individual judges, working alongside one another and drawing from a common case pool, have responded to a series of extraordinary changes in federal sentencing law.

To facilitate comparisons between pre- and post-*Booker* sentencing, I divided the sentences into five time periods:

1. Mandatory Guidelines: October 1, 2001–April 30, 2003 (approximately 19 months)
2. PROTECT Act: May 1, 2003–June 23, 2004 (approximately 14 months)
3. Post-*Booker* I: January 12, 2005–June 30, 2006 (approximately 18 months)
4. Post-*Booker* II: July 1, 2006–December 9, 2007 (approximately 17 months)
5. *Kimbrough/Gall*: December 10, 2007–September 30, 2008 (approximately 10 months)

These periods track the key statutory changes and Supreme Court decisions between October 2001 and September 2008, and include about 10 months of data since the Supreme Court’s decisions in *Kimbrough* and *Gall* in December 2007.¹² To ensure a fair comparison between judges, the study was limited to cases from the Boston division, where more than a dozen judges draw from a common case pool using a random case-distribution

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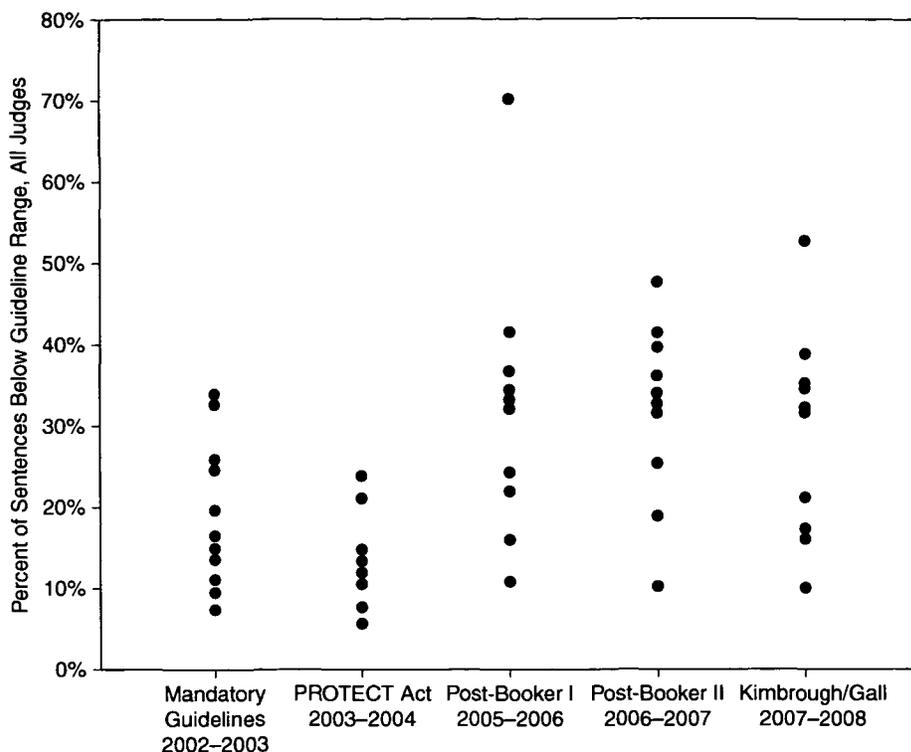


Figure 1: Distribution of Below-Range Sentencing Rates

deck.¹³ Sentences by judges who did not carry a sufficient case load during any two-year period were excluded.¹⁴

III. A First Look at Post-Booker Guideline Sentencing

The preliminary evidence from Boston reinforces what has been reported anecdotally in district courts throughout the country: Sharp and growing differences are apparent in guideline sentencing patterns between judges in the same courthouse. With some judges sentencing below the guideline range far more frequently than their colleagues, a defendant's odds of receiving a downward departure or variance increasingly depend on which judge happens to draw the case.

Figure 1 shows the distribution of average rates of below-guideline sentencing among Boston judges, arranged by time period. Each dot represents the average for a single judge during that period.

After a contraction under the PROTECT Act, the distribution in rates of below-range sentencing widened beyond pre-Booker levels and has continued to grow. Since Booker, some judges in Boston continue to sentence below the guideline range as low as 10% of the time, whereas others are sentencing below the guideline range more than 40% or even 50% of the time. One senior judge sentenced below the guideline range a remarkable 71% of the time during the eighteen months after Booker, more than six times the rate of one of his colleagues.¹⁵

The data from Boston also allow a first look at how individual judges' sentencing patterns under the Guidelines have changed since Booker. Figure 2 shows changes

in the average rate of below-range sentencing for all Boston judges combined.

The average stood at 18.4% under the mandatory guidelines, fell to 13.3% under the PROTECT Act, and jumped to about 30% in all three periods after Booker. But aggregated figures such as these, like the Commission's

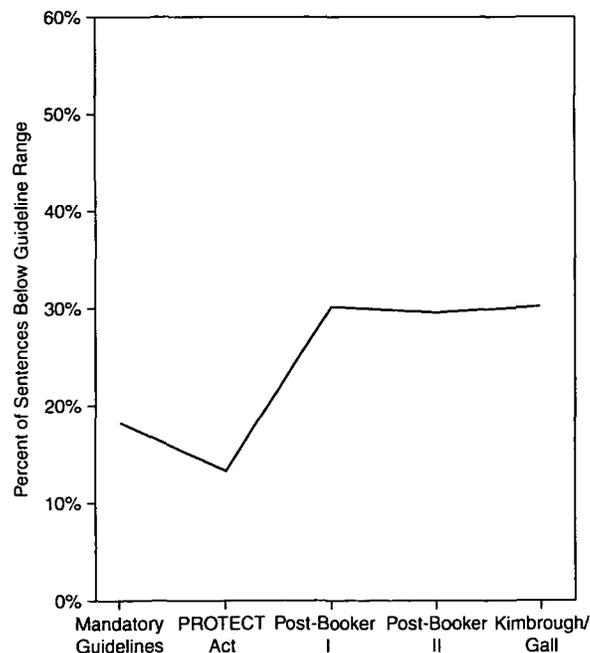


Figure 2: Average Below-Range Sentencing Rates, All Judges

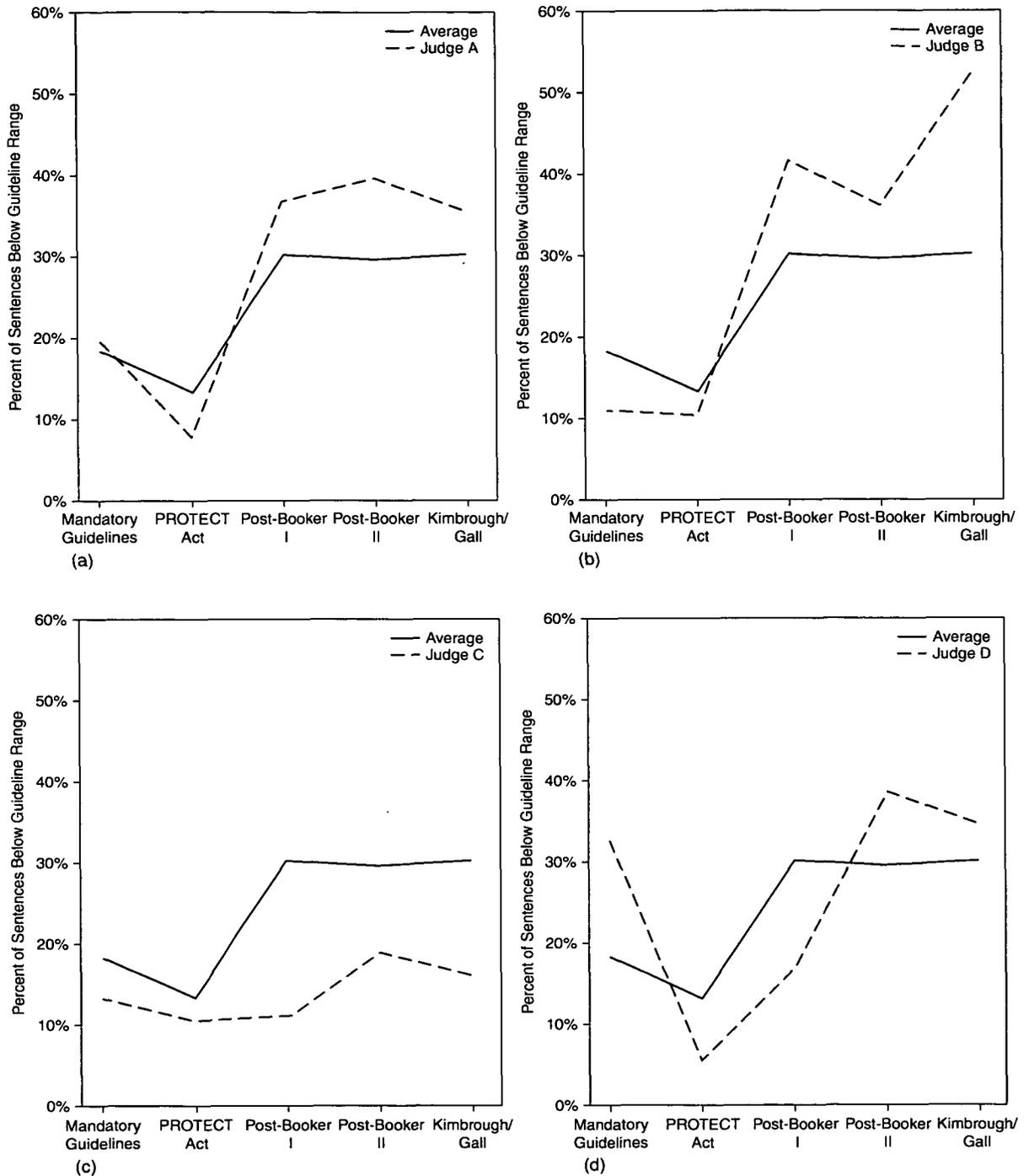


Figure 3: (a) Guideline Sentencing, Judge A; (b) Guideline Sentencing, Judge B; (c) Guideline Sentencing, Judge C; and (d) Guideline Sentencing, Judge D

reports, mask significant variation in how individual judges have responded to the decision.

Figures 3a through 3d overlay the sentencing patterns of four Boston judges (Judges A, B, C, and D) with the average pattern to illustrate how individual judges' responses to *Booker* may differ from the average, as well as from the responses of the other judges.

Sentences by Judge A roughly fit the average guideline sentencing pattern for all Boston judges, with a noticeable

decline in below-range sentences under the PROTECT Act, followed by an even larger increase after *Booker*. By contrast, each of the other judges' sentencing patterns fits a distinctive shape, typical of others in the data set:

- Sentences by Judge B fit a "free at last"¹⁶ pattern: a low rate of below-range sentencing in the two pre-*Booker* periods (11.1% and 10.5%) and a much higher rate in the three post-*Booker* periods (40.0%,

37.5%, and 52.8%). Judge B's rate of below-range sentencing more than quadrupled after *Booker*.¹⁷

- Sentences by Judge C fit a "business as usual" pattern, with very little change between periods. Judge C's rate of below-range sentencing moved less than one-half of one percent between the PROTECT Act and the first 18 months after *Booker*, from 10.5% to 10.0%, and also remained relatively stable in the Mandatory Guidelines (13.3%), Post-*Booker* II (19.1%), and *Kimbrough/Gall* (16.1%) periods.¹⁸
- Sentences by Judge D fit a "return to form" pattern, in which *Booker* effectively nullified the effects of the PROTECT Act. Judge D's rate of below-range sentencing stood at 32.7% in the Mandatory Guidelines period, but plummeted to 5.6% under the PROTECT Act. After slowly increasing to 17.0% in the eighteen months after *Booker*, Judge D's rate returned to 38.6% and 34.6% in the two most recent periods.

The sharp differences between the "free at last," "business as usual," and "return to form" patterns in Boston suggest fundamental disagreements between judges about the guidelines. Plus, they tend to confirm reports from prosecutors that inter-judge disparity in guideline sentencing has become more acute since *Booker*.

IV. Implications

What explains the growing split between judges in guideline sentencing? The raw data do not provide answers, but two explanations seem plausible. First, now that the Guidelines are advisory, some judges may *actually agree* with the recommended guideline sentence more often than their colleagues. Although many judges have criticized the Guidelines for their severity, surveys of district court judges have long reported sharp divisions, with a substantial contingent responding that the Guidelines effectively achieve the purposes of sentencing in 18 U.S.C. § 3553(a).¹⁹ *Booker* has allowed those differences of opinion to drive sentencing outcomes more frequently.

Second, some judges may be persuaded to impose within-guideline sentences for institutional reasons: deference to the Commission as an expert body, a belief that the Guidelines carry special empirical and democratic legitimacy, or a commitment to the project of inter-judge sentencing uniformity.²⁰ Others, by contrast, may have serious institutional doubts about the Commission and the process by which it formulated the Guidelines, and therefore more readily disregard its advice. These explanations undoubtedly interact. Confronted with a case for which the advisory guideline sentence seems a little too high, but not grossly unjust, a judge's assessment of the institutional strengths of the Guidelines and the Commission may tip the scales.

To be sure, inter-judge disparity is but one consideration among many in evaluating the federal sentencing system. It is entirely possible that *Booker* has, on balance, produced more just sentences by allowing judges greater

flexibility and authorizing them to reject unsound guidelines, despite the corresponding increase in inter-judge disparity. And plenty of other federal sentencing priorities deserve attention on the fifth anniversary of *Booker*, including the elimination of the 100:1 crack-to-powder ratio in drug sentencing, reevaluation of the wisdom of mandatory minimum sentences, and investigation of unwarranted disparity created by prosecutorial charging and bargaining practices.²¹

Nonetheless, reducing inter-judge sentencing disparity was one of Congress's primary goals in the Sentencing Reform Act, and evidence of backsliding ought to be taken seriously. No offender should spend years in jail, and no crime victim should be denied a full measure of justice, solely because of the judge assigned to the case. Based on a first look at guideline sentencing patterns since *Booker*, the Boston study offers preliminary evidence that concerns about an increase in inter-judge sentencing disparity are well-founded.

Notes

* Many thanks to the judges of the United States District Court for the District of Massachusetts for adopting the public-access policy that made this research possible. Thanks in particular to two judges of that court, Nancy Gertner and William Young, for their assistance and encouragement, and to Paul Hofer for valuable comments at every stage of the project. For a full manuscript discussing the findings of this study, see Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, available at <http://ssrn.com/abstract=1446744>.

¹ Amir Efrati, *Looser Rules on Sentencing Stir Concerns About Equity*, WALL ST. J., Nov. 5, 2009, at A15.

² See, e.g., Patrick J. Fitzgerald, Testimony before the U.S. Sentencing Commission Regional Hearing in Chicago, Illinois, at 3 (Sept. 10, 2009); Karin J. Immergut, Testimony before the U.S. Sentencing Commission Regional Hearing in Palo Alto, California, at 12 (May 27, 2009); Benton J. Campbell, Testimony before the U.S. Sentencing Commission Regional Hearing in New York, New York, at 8 (July 9, 2009); David Gaouette, Testimony before the U.S. Sentencing Commission Regional Hearing in Denver, Colorado, at 2 (Oct. 20, 2009).

³ Eric Holder, Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium on "Rethinking Federal Sentencing Policy 25th Anniversary of the Sentencing Reform Act," June 24, 2009, at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0906241.html>.

⁴ Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 749-50 (2006); Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U.L. REV. 1336, 1337 (1997); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

⁵ See S. Rep. No. 98-225, at 38 (1984) (lamenting that "each judge is left to apply his own notions of the purposes of sentencing" and, "[a]s a result, every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances").

⁶ James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 303 (1999) (concluding that "Congress

successfully achieved [its] goal” of “reducing interjudge nominal sentencing disparity”); Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 287 (1999) (finding that the strength of the relationship between the identity of the judge and the length of criminal sentences fell “almost by half under the guidelines,” and concluding that the guidelines had achieved at least “modest success” in reducing inter-judge disparity).

- ⁷ U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING App. E-1 (Mar. 2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf [hereinafter FINAL REPORT]; U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2004–2005, Fig. G (2004), Table N (2005); U.S. SENTENCING COMMISSION, PRELIMINARY QUARTERLY DATA REPORT, 4TH QUARTER 2009, Table 1 (2009). “Below-range sentencing” excludes government-sponsored below-range sentences, but in post-*Booker* periods combines downward guideline departures with downward *Booker* variances.
- ⁸ United States v. Green, 346 F. Supp. 2d 259, 278 n.66 (D. Mass. 2004) (Young, C.J.) (citing Minutes of the Court Meeting (D. Mass.), Sept. 4, 2001, at 4).
- ⁹ Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 729–30 (2008).
- ¹⁰ The judges included in the study had to satisfy minimum caseload requirements and draw from a common case pool using a random case-selection mechanism. For a complete description of the data collection and case matching method, see Scott, *supra* note 1, manuscript at 22–37.
- ¹¹ These judges include Nancy Gertner, William Young, and Patti Saris, all of whom have written scholarly articles and opinions on sentencing law and policy.
- ¹² The Commission has not yet released data files for FY 2009, so the most recent sentences included in this study were decided on September 30, 2008.
- ¹³ See D. Mass. Local Rule 40.1(B)(3), (C) (establishing separate random case-distribution systems for each division).
- ¹⁴ Specifically, in any period when a judge was on pace to impose fewer than 25 sentences over two years, that judge’s sentences were excluded. In the full version of this study, I relied principally on a core group of judges who carried a sufficient caseload during all five periods. See Scott, *supra* note 1, manuscript at 31. The guideline sentencing data reported here include an expanded set of sentences by judges who carried a sufficient caseload in at least two periods. Provided they met the minimum caseload requirements, senior judges were not automatically excluded.
- ¹⁵ I have elected to identify judges by letter (A–J for the ten judges with the highest caseloads), rather than by name, because concerns about inter-judge disparity do not assign blame to particular judges, but instead focus on the existence of persistent differences between judges. I also hope to encourage courts and the Sentencing Commission to release judge-identifying information, to promote greater transparency.
- ¹⁶ See Hon. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 579 (2005) (using the phrase “free at last” to describe the reaction to *Booker* among some district court judges).
- ¹⁷ Sentences by three other judges on the court also fit this pattern. See Scott, *supra* note *, manuscript at 43 n.269.
- ¹⁸ Sentences by two other judges on the court fit a similar pattern. See Scott, *supra* note *, manuscript at 43 n.270.
- ¹⁹ See LINDA DRAZGA MAXFIELD, FINAL REPORT ON SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES 24 (Feb. 2003), available at <http://www.ussc.gov/judsurv/jschap2.pdf> (reporting that, on a scale of 1 to 6, 38.4% of district court judges gave the Guidelines a 5 or 6, compared with 22.9% who gave them a 1 or 2).
- ²⁰ A 1996 survey by the Federal Judicial Center reported that more than 25% of district court judges believe mandatory sentencing guidelines are necessary. Molly Treadway Johnson & Scott A. Gilbert, THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY 3 (1997).
- ²¹ Those subjects, among others, are the focus of Attorney General Holder’s department-wide Sentencing and Corrections Working Group. Holder, *supra* note 3.