Booker's Ironies

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BOOKER’S IRONIES

Ryan W. Scott*

INTRODUCTION

In January 2005, when the Supreme Court issued its highly anticipated decision in United States v. Booker,1 few observers were surprised by the Court’s constitutional decision. By a 5-4 margin, the same Justices who had found constitutional defects in state determinate sentencing schemes in Apprendi v. New Jersey2 and Blakely v. Washington3 concluded that the United States Sentencing Guidelines (“Guidelines”) violated the Sixth Amendment right to a jury trial by allowing a judge to find certain aggravating facts that increased an offender’s sentence.4

By a different 5-4 majority, however, the Court selected a surprising remedy for that constitutional defect. The Court rendered the Guidelines “effectively advisory,” striking down statutory provisions that made the Guidelines binding on judges.5 That remedy was unexpected: neither the respondents, nor the government, nor members of Congress,6 nor any other amici curiae had suggested it.7

Booker rocked the federal criminal justice system, generating furious speculation about its long-term effects. Critics of the Guidelines hailed the

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* Professor, Indiana University Maurer School of Law, Bloomington.
4. Booker, 543 U.S. at 243-44 (Stevens, J., majority opinion).
5. Id. at 245 (Breyer, J., majority opinion).
7. Justice Breyer first floated the possibility of advisory guidelines at oral argument, asking then-Acting Solicitor General Paul Clement “what would be wrong with” altering Section 3553(b)(1) to make the Guidelines advisory in all cases? Transcript of Oral Argument, United States v. Booker, 543 U.S. 220 (2005) (Nos. 04-104, 04-105), 2004 WL 2331491, at *44. The pre-Booker proposal that came closest to the Court’s remedial decision was Albert Alschuler’s suggestion to “reinterpret[]” Section 3553(b)(1) to make the Guidelines “presumptive” instead of mandatory. Albert W. Alschuler, To Sever or Not to Sever? Why Blakely Requires Action By Congress, 17 FED. SENT’G REP. 11, 16 (2004).
decision as a surprise death blow to a system they reviled.\textsuperscript{8} Judges who had chafed at the Guidelines' mandatory and inflexible rules saw the decision as "a sort of Emancipation Proclamation."\textsuperscript{9} The defense bar was "ecstatic."\textsuperscript{10} Supporters of the Guidelines in Congress and the Department of Justice, on the other hand, issued dire warnings of "wildly divergent" sentencing outcomes\textsuperscript{11} and a return to "pre-guideline chaos."\textsuperscript{12} Several newspaper editorials reacted more cautiously, suggesting that the Court "may have stumbled into a reasonable compromise" and urging a wait-and-see approach.\textsuperscript{13} Scholars hoped the decision and its aftermath would afford an opportunity to fix the federal sentencing system's flaws.\textsuperscript{14} But for better or worse, many observers saw the decision as "the end of federal criminal sentencing as we know it."\textsuperscript{15}

One immediately apparent feature of the Booker remedy, however, was a basic irony. According to the Court, the mandatory guidelines were unconstitutional because they deprived offenders of their Sixth Amendment right to trial by jury.\textsuperscript{6} Yet rendering the Guidelines advisory did not enhance the role of juries at sentencing. To the contrary, in the advisory system, judicial fact


\textsuperscript{15} Etienne, supra note 10, at 743. \textit{See also Steven G. Kalar et al., A Booker Advisory: Into the Breyer Patch}, \textit{Champion (NAT'L ASS'N CRIMINAL DEF. LAWYERS)}, Mar. 2005, at 8 (calling Booker the "culminating[ion]" of "the sentencing revolution begun ... in \textit{Apprendi}"); Craig Green, Booker and Fanfan: \textit{The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines}, 93 \textit{GEO. L.J.} 395, 395 (2005).

\textsuperscript{16} United States v. Booker, 543 U.S. 220, 244-45 (2005) (Stevens, J., majority opinion).
finding and discretion play an even more prominent role in sentencing decisions. How could a constitutional holding that judges exercised too much discretion morph into a remedial holding that judges should enjoy even greater discretion?  

Eleven years later, Booker’s ironies have grown even deeper, calling into question important premises of the Court’s remedial opinion. This Article, drawing on trends in federal sentencing outcomes and a growing body of empirical research, reevaluates the winners and losers under the advisory guidelines’ regime. In doing so, it highlights two fresh ironies in Booker that have become apparent only after more than a decade of experience.

First, the class of offenders most harmed by Booker is precisely the class of offenders whose constitutional rights were being violated under the mandatory guidelines. Under the advisory guidelines, offenders with credible mitigating facts have emerged as clear winners: average sentence length has declined, while below-range sentences have tripled in frequency. Yet over the same period, the rate of above-range sentencing has likewise tripled, meaning that offenders with credible aggravating facts find themselves worse off, both at sentencing and during plea negotiations that take place in its shadow. Meanwhile, the Court has exacerbated that effect by stripping defendants with aggravating facts of the procedural right to pre-hearing notice of a possible above-range sentence. That result is ironic because the Sixth Amendment right to jury fact finding at issue in Booker concerns only aggravating facts, not mitigating facts. The Constitution, in other words, has nothing to do with the most important consequences of Booker.

Second, contrary to the Court’s insistence that advisory guidelines would best vindicate Congress’s intent, it has become clear in the last decade that the Booker remedy marks a setback for Congress’s key goals. The Sentencing Reform Act was animated by concerns about unwarranted disparity in sentencing decisions, especially inter-judge disparity and racial disparities. Yet a substantial body of empirical research confirms that inter-judge sentencing disparity has increased under the advisory guidelines, with numerous studies finding an increase in the “judge effect.” At the same time, a number of researchers have found that racial disparity in sentencing outcomes has increased.

17. See, e.g., Booker, 543 U.S. at 304 (Scalia, J., dissenting) (calling the majority’s choice of remedy “wonderfully ironic”); Michael W. McConnell, The Booker Mess, 83 Denver U. L. Rev. 665, 677 (2006) (remarketing that a holding that judges exercised too much discretion “was transmogrified, as if alchemically, into a holding that [sentencing judges] should have more discretion”); Dianne E. Courselle, Slouching Toward Booker and Beyond: The Court Embraces and Rejects the Role of Juries at Sentencing, 37 McGeorge L. Rev. 513, 513 (2006) (calling this “[a] great irony” of the Booker decision); Tony Mauro, Supreme Court: Sentencing Guidelines Advisory, Not Mandatory, LEGAL TIMES, Jan. 13, 2005.

18. See infra notes 64-65 and accompanying text.
19. See infra Figure 3, notes 80-81 and accompanying text.
20. See infra Figure 5 and accompanying text.
22. See infra notes 28-30 and accompanying text.
23. See infra notes 122-136 and accompanying text.
since Booker. That conclusion is contested, but there is good reason for concern that racial disparities have worsened under the advisory guidelines. Those developments suggest that Booker’s remedial opinion may have accomplished the opposite of its stated objective.

This Article proceeds in three parts. Part I ("Booker’s Background") briefly summarizes the constitutional and remedial opinions in Booker, taking note of some of the immediately obvious ironies of the remedial opinion. Readers familiar with the decision and its aftermath should feel free to skip ahead. Part II ("Booker’s Casualties") and Part III ("The Booker Backslide") set out the newly apparent ironies described above. The Conclusion ("Booker’s Bargain") acknowledges that some commentators will find these ironies of the Booker remedy untroubling in light of the decision’s other consequences, but urges that they be incorporated into critical assessments of the decision and its legacy.

I. BOOKER’S BACKGROUND

A. The Sentencing Reform Act and the Guidelines

Understanding Booker and its effects requires a brief survey of federal sentencing practice under the Sentencing Reform Act of 1984 and the U.S. Sentencing Guidelines. Throughout most of the twentieth century, criminal sentencing in the federal system was “indeterminate,” with judges and parole boards exercising essentially unfettered discretion in choosing the form and length of sentences within broad statutory ranges. In the 1970s and 1980s, however, indeterminate sentencing came under fire from an unusual coalition of progressive reformers and tough-on-crime conservatives. Unchecked judicial discretion, they argued, produced unwarranted disparities between similar offenders who had committed similar offenses. The “first and foremost” goal of sentencing reform was the reduction of such unwarranted disparity.

Two forms of unwarranted disparity were sources of particular concern. First, Congress sought to reduce “inter-judge disparity,” differences in sentencing outcomes caused by the judge rather than by legitimate differences between offenses and offenders. Troubled by research suggesting that judges presented with identical case facts would impose widely divergent sentences, reformers sought to promote consistency among judges in the same courtroom and nationwide. Second, concerned that race discrimination played a subterranean

24. See infra notes 139-147 and accompanying text.
27. Kenneth R. Feinberg, Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission, 28 WAKE FOREST L. REV. 291, 295-96 (1993) ("Quite frankly, all other considerations were secondary."). See also 18 U.S.C. § 3553(a)(6) (2012) (directing judges at sentencing "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").
28. Scott, supra note 25, at 7 & n.25 (summarizing research).
role in sentencing decisions, Congress sought to reduce racial disparities in sentencing outcomes.\(^29\) To accomplish those goals, the Sentencing Reform Act of 1984 created the United States Sentencing Commission and charged it with promulgating a set of sentencing guidelines that would bring "consisten[cy]" and "fairness" to federal sentencing.\(^30\)

The operation of the Guidelines is lamentably complex, but a few key features were essential to the Court’s decision in Booker. For almost all felony convictions, the Guidelines specify a fairly narrow sentencing range, expressed as a number of months of imprisonment (such as 24-30 months).\(^31\) That sentencing range depends on factual findings about the characteristics of the offense and the offender. Both Congress and the Commission directed that sentencing judges should make those findings,\(^32\) consistent with judges’ longstanding freedom to determine and take into account any facts they deemed relevant at sentencing.\(^33\)

Once the guideline range was determined, however, the Guidelines (as originally designed) left sentencing judges very little discretion. The Act specified that the court “shall impose a sentence of the kind, and within the range” established under the Guidelines, except in a few narrow and limited circumstances.\(^34\) Before imposing a sentence outside the guideline range, known as a “departure,” the Court was required to make further factual findings,\(^35\) and the sentence was subject to de novo review on appeal.\(^36\) For that reason, the pre-Booker Guidelines were frequently described as “mandatory”; in all but rare circumstances, judges were strictly bound by the upper and lower limits of the guideline range.

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29. Stith & Koh, supra note 26, at 227, 287 (noting that Senator Kennedy shepherded sentencing reform through Congress based on his “clear conviction” that “judicial discretion worked to the disadvantage of those already disadvantaged by birth and social condition”).


31. The heart of the Guidelines is a sentencing table, or “grid.” See U.S. SENTENCING GUIDELINES MANUAL 404 tbl. (U.S. SENTENCING COMM’N 2015) [hereinafter 2015 GUIDELINES MANUAL]. The rows of the table correspond to the offense level, while the columns correspond to the criminal history category.

32. See 18 U.S.C. § 3553(a) (directing “the court” to consider various factual issues and to impose sentence); 2015 GUIDELINES MANUAL, supra note 31, § 1B1.1(a) (directing “the court” to determine the guideline sentencing range).


34. 18 U.S.C. § 3553(b)(1) (excised by the Court in Booker); Booker, 543 U.S. at 234-35 (2005) (Stevens, J., majority opinion).

35. See 18 U.S.C. § 3553(b)(1) (authorizing departures only when “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines”); 2015 GUIDELINES MANUAL, supra note 31, § 5K2.0 (listing specific factual circumstances in which departures may be warranted).

36. 18 U.S.C. § 3742(e) (excised by the Court in Booker).
B. Booker’s Constitutional Holding

Twenty years later in Booker, a splintered Supreme Court partially invalidated that structure. Two different 5-4 majority opinions were needed to resolve the case, the first concluding that the Guidelines violated the Constitution, and the second announcing a remedy for that violation.

In the constitutional opinion, the Court held that the mandatory guidelines structure violated the Sixth Amendment right to trial by jury.\textsuperscript{37} The constitutional defect related to the process for finding aggravating facts, and respondent Freddie Booker’s case provides a useful illustration. Based on the evidence introduced at trial, Booker faced a guideline sentencing range of 210-262 months of imprisonment.\textsuperscript{38} At sentencing, however, the judge made factual findings about drug quantity and obstruction of justice that increased the guideline range to 360 months to life imprisonment. The Court ultimately imposed the guideline minimum sentence of 360 months.\textsuperscript{39} That result violated the Sixth Amendment, the Court held,\textsuperscript{40} under a rule first announced in Apprendi v. New Jersey\textsuperscript{41}: any fact (other than a prior conviction) that increases the penalty for a crime above the level authorized by the jury verdict or guilty plea “must be submitted to a jury, and proved beyond a reasonable doubt.”\textsuperscript{42}

Despite its reputation, Booker’s constitutional holding was fairly narrow. The Sixth Amendment rule announced in Apprendi and applied in Booker is asymmetrical, triggered only by factual findings that “increase” an offender’s sentence.\textsuperscript{43} It therefore applies only to aggravating facts, leaving judges free to find by a preponderance of the evidence any mitigating facts that decrease an offender’s sentence.\textsuperscript{44} Indeed, at the time Booker was announced, the Sixth Amendment rule was even narrower, triggered only when the sentence imposed ultimately exceeded the maximum authorized by the jury verdict or guilty plea.\textsuperscript{45} As a result, most sentences imposed under the Guidelines raised no Sixth Amendment issue.
Amendment concerns at all, and in the remainder of cases, judicial fact finding was permissible for any mitigating circumstances.

Accordingly, in their arguments on the remedial issue, the parties in Booker proposed fairly narrow changes to fix the constitutional problem. Both respondents urged the Court to grant offenders a right to jury fact finding with respect to any fact that would increase the sentence in a manner that violates the Sixth Amendment. The United States advanced a similar proposal, urging that the Court declare the Guidelines “inapplicable” to the small set of cases involving judicial fact finding that violates the Constitution. Consistent with those suggestions, four Justices voted to solve the constitutional problem by granting offenders a right to jury fact finding at sentencing whenever—but only whenever—the Sixth Amendment required it.

C. Booker’s Remedial Holding

In a surprise move, however, the Court rejected those options and instead declared the Guidelines advisory in their entirety. In its remedial opinion, the Court struck down two statutory provisions, one that made the guideline range binding on sentencing judges and another that governed the standard of review for sentencing appeals. The result, the Court explained, was that the Guidelines would become “effectively advisory,” and appellate courts would review sentences for “reasonableness.” Neither the respondents, nor the government, nor members of Congress, nor any other amici curiae had suggested that course of action.

46. *Booker*, 543 U.S. at 275-76 (Stevens, J., dissenting in part); id. at 248 (Breyer, J., majority opinion). Estimates differed as to the exact percentage of cases in which judicial fact finding under the Guidelines resulted in a Sixth Amendment violation. One Sentencing Commission report, later lodged with the Supreme Court, estimated said that up to 65% of cases involved unconstitutional fact finding. Memorandum from Lou Reedt to Tim McGrath (July 20, 2004), at 3 [hereinafter Reedt Memorandum]. But the report acknowledged that “it is likely that far fewer cases will actually be affected” due to limitations in the data collected by the Commission. *Id.* at 3-5.

47. *Booker*, 543 U.S. at 267 (Breyer, J., majority opinion). Fanfan also urged, in the alternative, that all judicial fact finding at sentencing be abolished and replaced by jury fact finding. *Id.*

48. *Id.* at 265-66 (Breyer, J., majority opinion).

49. *Id.* at 284-85 (Stevens, J., dissenting in part) (“I would simply allow the Government to … prove any fact that is required to increase a defendant’s sentence under the Guidelines to a jury beyond a reasonable doubt.”); *id.* at 313 (Thomas, J., dissenting in part) (agreeing with Justice Stevens’s proposed remedy, but on alternative grounds).

50. *Booker*, 543 U.S. at 258-61 (Breyer, J., majority opinion) (excising 18 U.S.C. § 3553(b)(1) and § 3742(e)).


52. See Brief for Senators, *supra* note 6, at *21-25 (discouraging the Court from adopting different rules for fact finding that adjusts the offense level “down, but not up,” but not suggesting a system of advisory guidelines).

53. Justice Breyer first floated the possibility of advisory guidelines at oral argument, asking then-Acting Solicitor General Paul Clement “what would be wrong with” altering Section 3553(b)(1) to make the Guidelines advisory in all cases. See Transcript of Oral Argument, *supra* note 7, at *44.
As all members of the Court recognized, advisory guidelines solved the Sixth Amendment problem. But the Court’s chosen remedy was remarkable in its breadth, changing the sentencing process for every offender in every case. By altering the underlying statutes “across the board,” the Court went well beyond the narrow class of offenders whose sentences actually violated the Sixth Amendment. That choice was no accident. The Court readily acknowledged that its remedy exceeded the scope of the underlying constitutional violation, curtly stating that it refused to select a remedy based on “simple numbers.”

Instead, the remedial majority anchored its decision in congressional intent, concluding that jury fact finding of any kind was incompatible with the text, history, and purposes of the Sentencing Reform Act of 1984. For several reasons, the remedial majority explained, advisory guidelines would best comport with Congress’s “basic statutory goal” to “diminish[] sentencing disparity.” It would retain judges as the sole factfinders at sentencing, while also preserving so-called “real offense” sentencing based on offenders’ actual conduct whether or not charged or proven at trial. In addition, the Court noted, advisory guidelines would avoid the “asymmetry” of a system that made it “more difficult to adjust sentences upward than to adjust them downward.”

The remedial opinion in Booker left many questions unanswered, especially about the scope of sentencing judges’ discretion to sentence outside the guideline range and the standard of appellate review of sentences for “reasonableness.” It took nearly two years for the Court to clarify in Gall v. United States that courts of appeals should review sentences under a highly deferential “abuse of discretion” standard. Appellate courts have taken that directive to heart. Since Gall, courts of appeals rarely vacate sentences on substantive reasonableness grounds.

54. Booker, 543 U.S. at 233 (recognizing that “merely advisory provisions” setting a guideline maximum would not implicate the Sixth Amendment); id. at 259 (Breyer, J., majority opinion).
55. Id. at 263.
56. Id. at 248 (Breyer, J., majority opinion).
57. Booker, 543 U.S. at 246-49 (Breyer, J., majority opinion).
58. Id. at 250 (Breyer, J., majority opinion).
59. Id. at 296 (Stevens, J., dissenting in part).
60. Id. at 257-58 (Breyer, J., majority opinion).
61. United States v. Booker, 543 U.S. 220, 292 (2005) (Stevens, J., dissenting in part) (arguing that “Congress has already considered and overwhelmingly rejected the system [the Court] enacts today,” expressing “both an unmistakable preference for the certainty of a binding regime and a deep suspicion of judges’ ability to reduce disparities in federal sentencing”); id. at 303 (Scalia, J., dissenting in part) (“No headline describing the Sentencing Reform Act ... would have read ‘Congress reaffirms judge-based sentencing’ rather than ‘Congress prescribes standardized sentences.’”).
63. U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 105-06 (2012) [hereinafter 2012 BOOKER REPORT].
II. Booker's Casualties

Eleven years of experience have only compounded the ironies of the Booker remedial opinion. An evaluation of trends in federal sentencing since 2005 reveals that, on balance, offenders face less severe outcomes under the advisory guidelines. Yet the decision has not benefited everyone. Ironically, the offenders most harmed by Booker are the same offenders whose constitutional rights had been violated under the mandatory guidelines.

A. Winners under the Advisory Guidelines

For offenders as a whole, sentencing outcomes have improved at least modestly in the post-Booker system. As Figure 1 shows, the average length of prison sentences in the federal system has fallen since 2005.64

Figure 1: Average Sentence Length
FY 2003-2015

64. Data for this and subsequent figures were derived from the Commission’s annual Sourcebook of Federal Sentencing Statistics for each fiscal year (FY). See, e.g., U.S. SENTENCING COMM’N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2015) [hereinafter 2014 SOURCEBOOK]. When calculating the average length of prison sentences, the Commission codes a sentence of probation as zero months of imprisonment. Id. at tbl.13 n.1. Consistent with the Commission’s ordinary approach, FY 2004 excludes sentences imposed after June 24, 2004, when the Supreme Court decided Blakely. Similarly, FY 2005 excludes sentences imposed before January 12, 2005, when the Court decided Booker. Fiscal year 2015 is the most recent for which final data are available. See U.S. SENTENCING COMM’N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2016) [hereinafter 2015 SOURCEBOOK].
Offenders received an average sentence of 50.1 months before the *Booker* decision in 2004. Average sentence length continued to increase slightly in the period of uncertainty that followed, reaching 51.8 months in 2006 and 2007. But in the wake of *Gall*, it quickly reversed course and had fallen to 44.3 months by 2010. Since then, average sentence length has hovered around that level, with average sentence length of 44.0 months in 2014 and 2015. The change is not as revolutionary as many observers expected, and scholars have advanced a number of theories to explain the relative durability of the advisory guidelines.65 Yet the difference is real: federal courts today impose sentences on average 11.8% lower than before *Booker*.

It is hazardous, however, to attribute trends in average sentence length over the last decade to *Booker*, given the enormous number and variety of other factors that contribute to sentence severity.66 To illustrate the problem, Figure 2 displays trends in average sentence length across the four largest categories of federal criminal offenses: drug trafficking, immigration, fraud, and firearms.

**Figure 2: Average Sentence Length, by Offense Type**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Drug Trafficking</th>
<th>Immigration</th>
<th>Fraud</th>
<th>Firearms</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>80.0</td>
<td>20.0</td>
<td>30.0</td>
<td>60.0</td>
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<tr>
<td>2004</td>
<td>75.0</td>
<td>15.0</td>
<td>25.0</td>
<td>55.0</td>
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<tr>
<td>2005</td>
<td>70.0</td>
<td>10.0</td>
<td>20.0</td>
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<tr>
<td>2006</td>
<td>65.0</td>
<td>5.0</td>
<td>15.0</td>
<td>45.0</td>
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<tr>
<td>2007</td>
<td>60.0</td>
<td>0.0</td>
<td>10.0</td>
<td>40.0</td>
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<tr>
<td>2008</td>
<td>55.0</td>
<td>5.0</td>
<td>10.0</td>
<td>35.0</td>
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<tr>
<td>2009</td>
<td>50.0</td>
<td>10.0</td>
<td>5.0</td>
<td>30.0</td>
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<tr>
<td>2010</td>
<td>45.0</td>
<td>15.0</td>
<td>5.0</td>
<td>25.0</td>
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<tr>
<td>2011</td>
<td>40.0</td>
<td>20.0</td>
<td>10.0</td>
<td>20.0</td>
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<tr>
<td>2012</td>
<td>35.0</td>
<td>25.0</td>
<td>15.0</td>
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<td>2013</td>
<td>30.0</td>
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<td>2014</td>
<td>25.0</td>
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<td>2015</td>
<td>20.0</td>
<td>40.0</td>
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Sentences for drug trafficking have decreased substantially in the last decade, and *Booker* could be a driving force behind the change. Average sentence length for drug trafficking offenses stood at 81.3 months in 2004 before

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the decision and actually increased slightly to 83.2 months by 2007.67 After Gall made clear the extent of judges’ discretion under the advisory guidelines, however, drug trafficking sentences plunged, reaching 70.0 months by 2011 and sliding to 67.0 months by 2015.68 That marks a 17.6% decline in the length of drug trafficking sentences, which now stand at their lowest levels since at least 1996.69 Survey data indicate that roughly one-third of federal district judges consider the drug trafficking guidelines too severe,70 suggesting that Booker may indeed have played a role in the trend.71

For two other categories of offenses, on the other hand, legal developments unrelated to Booker make it almost impossible to disentangle the effects of the decision. For immigration offenses, average sentence length has fallen from 23.9 months in 2004 to 15.0 months in 2015, a decline of more than one-third.72 But that change primarily reflects the Department of Justice’s decisions over the last decade to expand and formalize Early Disposition Programs, which offer immigration offenders significant sentence reductions.73 At the same time, the volume of immigration cases surged in the decade following Booker, expanding from 22.5% of convictions in 2004 to 31.5% of convictions in 2012.74 Because immigration offenses carry average sentences less severe than other offenses, overall average sentence length has declined as the immigration docket has grown.75 Conversely, in fraud cases, average sentence length has steadily

70. U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.8 (2010) (reporting that roughly one-third of district judges consider the guideline range generally “too high” for drug trafficking offenses, and that the figure is 70% for crack cocaine cases).
71. The most high-profile change to drug sentencing since Booker is the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), which narrowed the ratio between quantities of crack and powder cocaine that trigger statutory and guideline punishment levels. But the Act cannot explain much of the decline in average sentences for drug trafficking, both because the trend was apparent before its enactment and because crack cocaine accounts for just 8.2% of new sentences for drug trafficking offenses. See 2015 SOURCEBOOK, supra note 64, at fig.A.
73. 2012 BOOKER REPORT, supra note 63, at 59 (noting that amendments to the guidelines also contributed to the decline in average sentence length in immigration cases). See also Memorandum of James M. Cole to All United States Attorneys, Jan. 31, 2012, at 3-4 (setting out Department of Justice policy on Early Disposition or “Fast-Track” Programs), available at http://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf.
75. Bowman, supra note 66, at 366 & n.22. Growth in the immigration docket cannot, however, fully explain the decline in average sentence length in the federal system. Even
increased since *Booker*, from 16.0 months in 2004 to 27.0 months in 2015.\textsuperscript{76} The Commission, however, attributes that trend not to *Booker*, but rather to substantive amendments to the guidelines and changes in criminal behavior, such as an increase in loss amounts in fraud cases.\textsuperscript{77}

Those cross-cutting trends illustrate the difficulty in making general pronouncements about *Booker*'s effects in a system as large and complex as the federal criminal justice system. Sentencing outcomes are shaped by a host of factors unrelated to the advisory guidelines, including amendments to substantive law, changes in patterns of criminal behavior, and shifting prosecutorial priorities. That makes it difficult to isolate the effects of *Booker*.

Nonetheless, there is one category of offenders that is unambiguously better off under the advisory guidelines: offenders with credible mitigating facts. Under the mandatory Guidelines, except in rare cases, sentencing courts lacked authority to enter any sentence below the guideline minimum.\textsuperscript{78} *Booker* abolished that restriction, empowering judges to sentence below the guideline range whenever they wish, subject only to a deferential "abuse of discretion" review.\textsuperscript{79}

In the 11 years since *Booker*, courts have exercised that power liberally, to the benefit of offenders with plausible mitigating circumstances. As Figure 3 shows, the rate of below-range sentencing has increased dramatically.

**Figure 3: Rate of Below-Range Sentencing**

**FY 2003-2015**

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<td><strong>Total</strong></td>
<td>0%</td>
<td>10%</td>
<td>20%</td>
<td>30%</td>
<td>40%</td>
<td>50%</td>
<td>60%</td>
<td>70%</td>
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<td>90%</td>
<td>95%</td>
<td>100%</td>
<td>100%</td>
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<td><strong>Booker</strong></td>
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excluding immigration offenses, average sentence length has fallen from 68.0 months in 2004 before *Booker*, to 56.1 months in 2015. See *supra* Figure 2.

\textsuperscript{76} See 2004 *SOURCEBOOK*, *supra* note 67, at tbl.13; 2015 *SOURCEBOOK*, *supra* note 64, at tbl.13.

\textsuperscript{77} 2012 *BOOKER REPORT*, *supra* note 63, at 59.

\textsuperscript{78} See *supra* notes 34-36 and accompanying text.

\textsuperscript{79} See *supra* notes 62-63 and accompanying text.
On the eve of Booker, judges initiated a sentence below the guideline range in just 5.2% of cases.\textsuperscript{80} That rate more than doubled in the immediate aftermath of the decision, hovering at 12.0% or 13.0% until 2007. Since Gall, that trend has accelerated, with the rate of judge-initiated, below-range sentencing reaching 21.3% in 2015, more than triple its pre-Booker levels.\textsuperscript{81} That trend mirrors the increase in overall below-range sentencing since 2005, including below-range sentences sponsored by the government. The rate of below-range sentencing stood at 27.1% in 2004 but has climbed to 50.6% as of 2015.\textsuperscript{82} That is a major milestone: most sentences in the federal system now fall below the guideline range, compared with roughly one-quarter before Booker.

As noted above, for immigration and fraud offenses, it is difficult to disentangle the effects of Booker from changes in charging practices, substantive law, and patterns of criminal behavior in the last ten years.\textsuperscript{83} Other offense types, therefore, offer a cleaner picture of the effects of Booker with fewer interfering variables. Figure 4 shows the rate of judge-initiated, below-range sentencing, limited to drug trafficking and firearms offenses.\textsuperscript{84}

\textbf{Figure 4: Rate of Below-Range Sentencing, by Offense Type FY 2003-2015}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure4}
\caption{Rate of Below-Range Sentencing, by Offense Type FY 2003-2015}
\end{figure}

\begin{itemize}
\item \textsuperscript{80} 2004 \textsc{sourcebook}, \textit{supra} note 67, at tbl.27A.
\item \textsuperscript{81} 2015 \textsc{sourcebook}, \textit{supra} note 64, at tbl.N.
\item \textsuperscript{82} \textit{Id}.
\item \textsuperscript{83} \textit{See supra} notes 73-77 and accompanying text.
\item \textsuperscript{84} Data are derived from Table N in the Commission’s annual \textit{Sourcebook of Federal Sentencing Statistics}. \textit{See 2014 \textsc{sourcebook}, supra} note 64, at tbl.N.
\end{itemize}
For drug trafficking and firearms cases, the trends in below-range sentencing since *Booker* are substantial and strikingly parallel. Both began with low rates before *Booker* (4.4% and 6.0%), which spiked in the immediate aftermath of the decision (13.0% and 14.6%) and continued to climb after *Gall* to more than triple their pre-*Booker* levels by 2015 (22.5% and 20.0%).

Some scholars have downplayed the significance of the trend, suggesting that the number of below-range sentences may have increased, but the size of departures below the range has decreased. That claim has been disproved. Both in absolute and relative terms, the extent of departures below the guideline range remains just as large under *Booker* and *Gall* (21 months, or 40.7% below the guideline minimum) as before the decisions (17 months, or 40.0% below the guideline minimum).

The upshot is that offenders with credible mitigating facts have fared far better under the advisory guidelines. The vast majority of judge-initiated, below-range sentences imposed today would have been legally impermissible before *Booker*. As a rough estimate, perhaps 13.9% of offenders who received a judge-initiated, below-range sentence in 2015 would have received a guideline sentence in 2004. That equates to around 10,000 offenders receiving lower sentences each year.

B. Losers under the Advisory Guidelines

Not all offenders, however, have benefited from *Booker*. To the contrary, another group of offenders is unambiguously worse off under the advisory guidelines: offenders with credible aggravating facts. The change is evident not only in sentencing outcomes, which have worsened, but also in changes that have made the sentencing process more hazardous for offenders with plausible aggravating circumstances.

1. Sentencing Outcomes

Just as rates of below-range sentencing have increased since *Booker*, rates of above-range sentencing have increased as well. As shown in Figure 5, the rate of above-range sentencing for offenders has more than tripled since 2005.

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85. See 2004 SOURCEBOOK, supra note 67, at tbl.27A.
86. See Tokson, supra note 65, at 948 (citing the Commission’s 2006 report on the effects of *Booker*).
87. 2012 BOOKER REPORT, supra note 63, at 92. Also outdated is the contention that “[f]or every year since *Booker*, the vast majority of sentences have continued to fall within the Guidelines range.” Tokson, supra note 65, at 948. In both 2014 and 2015, most sentences fell outside the guideline range. See 2014 SOURCEBOOK, supra note 64, at tbl.N (reporting 46.0% of sentences within the guideline range); 2015 SOURCEBOOK, supra note 64, at tbl.N (reporting 47.3% of sentences within the guideline range).
88. Compare 2015 SOURCEBOOK, supra note 64, at tbl.N (reporting that only 2.2% of sentences were non-government sponsored downward departures not based on *Booker*, leaving 19.1% based at least in part on *Booker*), with 2004 SOURCEBOOK, supra note 67, at tbl.N (pre-Blakely data) (reporting 5.2% of sentences were downward departures).
Before *Booker*, in 2004, judges imposed upward departures in a tiny fraction of cases, less than 0.8%. After *Booker*, however, the percentage of sentences above the guideline range doubled to 1.6%, and in the wake of *Gall* it has continued to climb to 2.2%. The trend is even clearer for firearms and drug trafficking offenses, where the effects of *Booker* should be most evident. For firearms offenses, above-range sentencing stood at 1.3% before *Booker*, but quickly doubled to 2.5% by 2007, before surging to 5.0% by 2015, triple its pre-*Booker* levels. For drug trafficking offenses, above-range sentences were vanishingly rare before *Booker*, imposed in just 0.2% of cases. But the rate leapt to 0.7% by 2006 and has climbed to 1.4% of cases by 2015, an increase of nearly 700%.

Scholars and commentators have almost entirely ignored the increase in above-range sentencing, despite extensive discussions of the increase in below-

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89. See U.S. SENTENCING COMM’N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.27 (2006) [hereinafter 2005 SOURCEBOOK] (post-*Booker* data); 2015 SOURCEBOOK, supra note 64, at tbl.N.

90. See supra notes 73-77 and accompanying text.

91. See 2004 SOURCEBOOK, supra note 67, at tbl.27 (pre-Blakely data); 2007 SOURCEBOOK, supra note 67, at tbl.27; 2015 SOURCEBOOK, supra note 64, at tbl.27.

92. See 2004 SOURCEBOOK, supra note 67, at tbl.27 (pre-Blakely data).

93. See supra note 64, at tbl.27 (pre-Blakely data).

94. See 2006 SOURCEBOOK, supra note 67, at tbl.27; 2015 SOURCEBOOK, supra note 64, at tbl.27.
range sentencing.\textsuperscript{95} Consider a few possible explanations—one practical, one cynical, and one substantive—for that omission.

One possibility is practical: sentences above the guideline range have tripled in frequency, but they remain rare. The rate of above-range sentencing was very low before \textit{Booker} (under 0.8\%) and remains low today (just above 2.2\%).\textsuperscript{96} That is not to say the number of above-range sentences is trivial. In 2015, more than 1,000 offenders received above-range sentences that would have been impermissible before \textit{Booker},\textsuperscript{97} and because their above-range sentences are especially long, they account for a disproportionate share of the federal prison population. Still, below-range sentences outnumber above-range sentences by a 10-to-1 margin,\textsuperscript{98} and commentators naturally focus on trends that affect a larger segment of offenders.

Another possibility is cynical: offenders with credible aggravating facts tend to elicit little sympathy. Common grounds for an upward departure include an extensive criminal history, additional uncharged criminal conduct, acts causing serious injuries or death, and the like,\textsuperscript{99} and judges likely reserve above-range sentences for offenders they consider the “worst of the worst.” Unlike offenders with credible cases for mitigation, who can count on support from progressive scholars and reformers, offenders with serious aggravating facts have few advocates.

A final possibility, however, is more substantive. Scholars may have mistakenly assumed that judges universally consider the Guidelines too severe and will therefore exercise their discretion under \textit{Booker} entirely in one direction.\textsuperscript{100} In fact, judges’ views of the Sentencing Guidelines have always been divided, with a substantial contingent of judges expressing agreement with the most controversial guidelines or even finding them too lenient.\textsuperscript{101} The fact that above-range sentencing has tripled since \textit{Booker} thus reveals an underappreciated function of the mandatory guidelines. For an enormous number of offenders, the mandatory guidelines forced judges to impose sentences they considered too severe. Yet for a smaller group of offenders, the mandatory guidelines forced judges to impose sentences they considered too lenient. The \textit{Booker} remedy empowered judges to follow their conscience as to both groups.


\textsuperscript{96} See \textit{supra} notes 89-90 and accompanying text.

\textsuperscript{97} See \textit{2015 SOURCEBOOK}, \textit{supra} note 64, at tbl.N.

\textsuperscript{98} See \textit{id.} (reporting 14,514 judge-initiated below-range sentences, compared with 1,506 above-range sentences).

\textsuperscript{99} See, e.g., \textit{2015 GUIDELINES MANUAL}, \textit{supra} note 31, § 5K2.1 (offenses resulting in death); \textit{id.} § 5K2.3 (causing extreme psychological injury); \textit{id.} § 5K2.8 (extreme conduct “unusually heinous, cruel, brutal, or degrading to the victim”).

\textsuperscript{100} See Scott, \textit{supra} note 25, at 47-48 (noting the widespread belief that “everybody loves to hate the Federal Sentencing Guidelines”).

\textsuperscript{101} See \textit{id.} at 48-50 (summarizing the results of Sentencing Commission surveys of district judges).
2. **Sentencing Process**

As sentencing outcomes have worsened, the sentencing process also has become more challenging for offenders with credible aggravating facts. Because above-range sentences have become more prevalent, the plea bargaining position of those offenders has weakened. At the same time, the Court has extended the logic of *Booker* to strip offenders with aggravating facts of a valuable notice requirement.

First, *Booker* has weakened the plea bargaining position of offenders with credible aggravating facts. Under the advisory guidelines, judges have greater discretion to impose above-range sentences, and their sentences are almost never reversed on appeal. As noted above, judges have not hesitated to exercise that discretion, with the rate of above-range sentencing tripling since *Booker*. As a result, defendants with credible aggravating circumstances face far greater risks at sentencing—and everybody knows it, including prosecutors and defense counsel.

That dynamic necessarily affects plea negotiations, which take place in the shadow of the sentencing hearing. Defendants are risk-averse and understandably anxious about a sentence above the guideline range. To obtain the same results they would have secured under the mandatory Guidelines, defendants must now make greater concessions to the prosecution. At the margins, offenders with serious aggravating facts thus have less leverage to secure the dismissal of charges, to engage in “fact bargaining” over the profile of facts presented at sentencing, and to extract favorable sentence recommendations from the government. Those effects are difficult to measure, since sentencing data treat charges and facts as inputs rather than outputs. But in a system where more than 97% of convictions result from a guilty plea rather than trial, ripple effects on the plea bargaining process are important.

Second, offenders with credible aggravating facts have been stripped of a useful notice protection they enjoyed under the advisory guidelines. In 1991, citing due process concerns, the Supreme Court held in *Burns v. United States* that criminal defendants were entitled to prior notice of a possible upward departure. Notice was essential, the Court reasoned, to enable defense counsel to prepare effectively for the sentencing hearing, given that an upward departure could rest on any number of factual grounds not adequately taken into account by the Commission. The Court therefore announced a rule, later codified as Rule 32(h) of the Federal Rules of Criminal Procedure, that a criminal defendant is

102. See *supra* notes 62-63 and accompanying text.

103. See *supra* Figure 5 and accompanying text.


105. See 2015 SOURCEBOOK, *supra* note 64, at tbl.11 (reporting that 97.1% of federal sentences resulted from guilty pleas in 2015).

entitled to advance notice of any possible upward departure not identified in the presentence report or a party’s submissions.

After Booker rendered the Guidelines advisory, however, the Court repudiated that protection. In Irizarry v. United States, the Court held by a 5–4 margin that in light of the Booker remedial opinion, advance notice of a possible above-range sentence was no longer required. It reasoned that Booker had eliminated “any expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable guideline range.” The same feature of the Guidelines that triggered the Sixth Amendment defect in Booker—the “expectation” of a sentence no higher than the guideline range without further fact finding—also was the source of the entitlement to notice recognized in Burns. Rendering the Guidelines advisory in Booker had neatly solved both constitutional problems.

The Court also considered it unnecessary and inefficient for a sentencing court to provide offenders with advance notice of the grounds for a possible upward departure. Under the advisory guidelines, after all, there is no limit to the number of reasons a judge might impose a sentence above the guideline range. In essence, Booker itself puts everyone on notice of every possible sentence in every case.

As a practical matter, however, advance notice of the specific grounds for an above-range sentence is quite valuable to defense counsel. Indeed, the Court’s reasoning seems exactly backward in light of Burns. The fact that the grounds for a possible above-range sentence have multiplied exponentially makes a notice requirement more important, not less. Although only a small segment of offenders would benefit from a broader notice requirement, the Court’s unwillingness to recognize one reinforces that Booker has made the sentencing process more challenging for offenders with credible aggravating facts.

C. Booker’s Deepening Irony

The starkly different results for offenders with aggravating and mitigating circumstances reveal a deepening irony of the Booker remedy. At the time of the decision, the primary criticism of the remedial opinion was that it went further than necessary. In dissent, Justice Stevens blasted the majority for the “extraordinary overbreadth” of its “unprecedented” remedy. Rendering the Guidelines advisory in toto went too far, he argued, by conferring a windfall on


108. Id. at 713.


110. Id. at 144-47.

111. Booker, 543 U.S. at 274 (Stevens, J., dissenting).
the majority of defendants who had not suffered any constitutional injury. \(^{112}\) On that view, Booker might be compared to Miranda v. Arizona, \(^{113}\) another decision criticized on the ground that its remedy—"prophylactic rules" about warnings for the custodial interrogation of suspects—conferr

But Booker is even more peculiar because, by its terms, the remedy extends a benefit only to offenders who had not suffered any constitutional violation. The fact finding process for aggravating circumstances, after all, remains exactly the same under the advisory guidelines: the sentencing judge must make all determinations, and only by a preponderance of the evidence. The experience of respondent Freddie Booker on remand offers a powerful illustration. Booker's Sixth Amendment rights had been violated, and he demanded a jury trial concerning the quantity of drugs for which he was responsible. The Court gave him advisory guidelines instead. On resentencing, the judge was tasked with making the same findings, based on the same evidence, under the same evidentiary standards. To the surprise of no one, the judge entered the same sentence. \(^{115}\)

Eleven years of experience under the advisory guidelines reveal that the irony of the Booker remedy has grown deeper. Not only have offenders with credible aggravating facts received no tangible benefit from the advisory guidelines, but also their position has actually worsened. The class of offenders whose constitutional rights were trampled under the advisory guidelines face more severe sentencing outcomes and a more challenging sentencing process, under a system designed by the Court for their benefit. Instead, the primary beneficiaries of the new system are offenders with credible mitigating facts, who find it easier to obtain a below-range sentence. That is a remarkable outcome, considering that the Sixth Amendment violation in Booker was unrelated to mitigating facts. \(^{116}\) More than a decade later, the most important consequences of Booker have nothing to do with the Constitution.

\(^{112}\) Id. at 275-76, 278-79 (Stevens, J., dissenting) (citing the testimony of the Commission before congressional hearings on the implications of Blakely).


\(^{114}\) See, e.g., Michigan v. Payne, 412 U.S. 47, 53 (1973) ("It is an inherent attribute of prophylactic constitutional rules, such as those established in Miranda and Pearce, that their retrospective application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation."); Joseph D. Grano, Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer, 55 U. CHI. L. REV. 174, 176-77 (1988) (criticizing the legitimacy of a constitutional prophylactic "court-created rule[s] that can be violated without violating the Constitution itself"). The Court blunted those criticisms in Dickerson v. United States by holding that the rules announced in Miranda were in fact constitutionally compelled. 530 U.S. 428, 439-41 (2000).

\(^{115}\) United States v. Booker, 149 F. App'x 517, 518 (7th Cir. 2005).

\(^{116}\) See supra notes 43-44 and accompanying text.
III. THE BOOKER BACKSLIDE

In another ironic development, the Booker remedial opinion has coincided with a setback for Congress's key objectives in the Sentencing Reform Act. A growing body of empirical research has found post-Booker increases in inter-judge disparity and racial disparity, two forms of unwarranted disparity Congress sought to reduce through the Guidelines. Those developments are in tension with the remedial opinion's contention that advisory guidelines would best vindicate Congress's intent.\(^{117}\)

A. Inter-Judge Disparity

Among Congress's primary objectives in the Sentencing Reform Act was the reduction of inter-judge disparity, differences in sentencing outcomes driven not by characteristics of the offense or offender but by the identity of the sentencing judge.\(^{118}\) Troubled by research indicating that judges sometimes reached widely disparate conclusions about identical case facts, Congress hoped that the Sentencing Reform Act would promote consistency and minimize the effects of individual judges' philosophy, personality, or biases.

On that score, the mandatory guidelines achieved some measure of success. Two large-scale studies of federal sentences in the mid-1990s concluded that inter-judge sentencing disparity had decreased, using a "natural experiment" method that compared levels of disparity before and after the promulgation of the Guidelines. Using data from district courts that use a random case distribution system, one study found that the estimated expected difference between the average sentences of any two judges in 1986-1987 was 16% to 18%, but under the mandatory guidelines in 1988-1993, the difference had fallen to 8% to 13%.\(^{119}\) Another study focusing on cities where judges receive a random distribution of cases found that the identity of the judge explained 1.24% of variation in sentences in 1994-1995, compared with 2.32% in 1984-1985, a reduction "almost by half under the guidelines."\(^{120}\) Although the improvement was modest, the authors concluded that "Congress successfully achieved [its] goal" of reducing inter-judge disparity under the Guidelines.\(^{121}\)

According to a series of recent studies, however, inter-judge disparity has increased in the years since Booker. My own study of sentencing in a single district court offered a first look at the problem, again using a natural experiment

\(^{117}\) See supra notes 57-61 and accompanying text.
\(^{118}\) See supra note 28 and accompanying text.
\(^{121}\) Anderson et al., supra note 119, at 303.
method. It found that the percentage of variance in sentence length explained by the identity of the judge had nearly doubled, from 3.1% before Booker in 2002-2004 to 6.1% after Gall and Kimbrough in 2007-2008. It also analyzed the below-range sentences of individual judges before and after Booker, noting that some followed a “free at last” pattern, while others followed a “business as usual” or “return to form” pattern.

Subsequent research has confirmed that finding on a nationwide scale. The best study, by Crystal Yang, compiled an impressive dataset of sentences from 2000 to 2009 by linking sentencing records from the Sentencing Commission, case records from the Transactional Records Access Clearinghouse (TRAC), and judge data from the Federal Judicial Center. Testing for random case assignment yielded a sample of more than 158,000 cases from 156 courthouses in 74 federal district courts. Using an analysis of variance methodology, Yang calculated the standard deviation of judge effects on sentence length, after controlling for offense and offender characteristics, in four time periods before and after Booker. She found that offenders randomly assigned to a one-standard-deviation harsher judge received an average sentence 2.5 months longer before Booker, but the difference jumped to 4.8 months immediately after Booker and grew to 5.9 months after Kimbrough and Gall. Similarly, offenders randomly assigned to a one-standard-deviation more lenient judge were 4.1% more likely to receive a judge-initiated below-range sentence in the period before Booker but 6.9% more likely after Booker. The study also concluded that the application of mandatory minimums may be a large contributor to inter-judge disparity, finding larger “judge effects” in cases not subject to a mandatory minimum after Booker.

The Sentencing Commission’s own research reinforces those findings. For each federal district, the Commission has analyzed the “spread” between the judges on the court with the highest and lowest levels of judge-initiated, below-range sentencing. In two-thirds of districts, its analysis found, the spread was smallest in the period before Booker and largest in the period following Gall, indicating that “sentencing outcomes increasingly depend upon the judge to whom the case is assigned.”

122. Scott, supra note 25, at 24-25. The study focused on the District of Massachusetts because at the time it was the only federal court in the nation to disclose key sentencing documents to the public, allowing an analysis of individual judges’ sentences.
123. Id. at 33-34 (finding as well that the trend was particularly evident in cases not subject to a mandatory minimum).
124. Id. at 35-37.
126. Id. at 1299-1300.
127. Id. at 1304-05.
128. Id. at 1307 & tbl.1.
129. Id. at 1310-11 & tbl.3.
130. Id. at 1324-25 & tbl.9.
131. 2012 BOOKER REPORT, supra note 63, at 98-104.
132. Id. at 104.
Most recently, a team of researchers released a Bureau of Justice Statistics ("BJS") working paper addressing a range of disparity questions based on sentencing data from 2005-2012.\footnote{See generally William Rhodes et al., Federal Sentencing Disparity: 2005-2012 (2015), available at http://www.bjs.gov/content/pub/pdf/fsd0512.pdf.} Although the study relies entirely on post-
Booker data and does not purport to evaluate the effects of the decision, it covers the period before and after Gall, when the Court clarified judges’ sentencing discretion is subject to deferential, abuse-of-discretion review.\footnote{Id. at 2 & n.1, 5-6.} For virtually all offenses, the BJS paper found a statistically significant trend toward higher dispersion in sentencing outcomes in the eight years following Booker, meaning that “similarly situated offenders convicted of similar crimes are increasingly sentenced differently.”\footnote{Id. at 57-58.} That finding tends to reinforce the earlier research, which frequently reported that increases in inter-judge disparity accelerated after Gall.\footnote{See Scott, supra note 25, at 33-37; Yang, supra note 125, at 1307; 2012 Booker Report, supra note 63, at 104.} None of these studies conclusively proves a causal relationship between Booker and a subsequent increase in inter-judge disparity. Yet collectively, they offer something close to a consensus that increasing inter-judge disparity has followed on the heels of the switch to advisory guidelines. That represents a setback with respect to one of Congress’s central goals.

B. Race Disparity

Disparity between offenders of different race, and in particular more severe sentencing of African-American offenders, is another form of unwarranted disparity targeted by the Sentencing Reform Act.\footnote{See supra note 29 and accompanying text.} Congress hoped that a set of mandatory sentencing guidelines would eliminate conscious or unconscious bias in the sentencing process by focusing judges’ attention on a standard set of legitimate offense and offender characteristics. The switch to advisory guidelines in Booker, however, has prompted renewed concern about race disparity in federal sentencing.\footnote{See Ryan W. Scott, Race Disparity under Advisory Guidelines: Dueling Assessments and Potential Responses, 10 Criminology & Pub. Pol’y 1129, 1129 (2011) (summarizing the earliest empirical studies to grapple with trends in race disparity after Booker).} No consensus has emerged among scholars who have examined trends in race disparity under the advisory guidelines. But four major studies by the Sentencing Commission,\footnote{See generally 2012 Booker Report, supra note 63.} Crystal Yang,\footnote{Crystal Yang, Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing, 44 J. Legal Stud. 75 (2015).} Joshua Fischman and Max...
Schanzenbach, and the team commissioned by the BJS each have found that race disparities have increased in the wake of Booker. The studies differ in their methodological details and in their assessments of the relationship between judicial discretion, prosecutorial behavior, and race disparity. But they broadly agree that racial disparities have increased in the aftermath of Booker, especially after the extent of judges' sentencing discretion became clear in Gall.

The Sentencing Commission's Booker Report includes results of a multivariate regression analysis that compares the effects of race on sentence length across time periods. The Commission concluded that, after controlling for offense and offender characteristics including the guideline sentencing range, sentences for black male offenders exceeded sentences for white male offenders by 5.5% in the period before Booker, but the difference had grown to 15.2% in the first years after Booker and to 19.5% in the years following Gall. Yang's study likewise found an increase in race disparity after Booker, albeit a more modest one. Again using regression models that control for various offense and offender characteristics, the study found that, after Gall, black offenders received sentences 1.9 months longer than those of white offenders, representing a 75% increase in the size of the racial cap in sentence length. Fischman and Schanzenbach reached a similar conclusion, finding post-Gall increases in race disparity in sentence length, offense levels, and downward departure rates.

The BJS study, which focused exclusively on changes in racial disparity after Booker from 2005 to 2012, found that by the end of the period studied, black male offenders received sentences 1.9 months longer than those of white offenders, representing a 75% increase in the size of the racial cap in sentence length. Sentences have become more lenient for all offenders during the 2005-2012 period, the researchers found, but race disparity has increased because black offenders have not benefited from that lenience to the same extent as white offenders.

Although all four studies find evidence of increased in race disparity after Booker, several of the authors caution that the problem may not be judicial discretion, but prosecutorial charging decisions, and in particular the use of mandatory minimum sentences. Noting that black offenders are more likely to face mandatory minimums than white offenders, and that the gap widened after Booker, Yang concludes that "prosecutorial charging is likely a substantial contributor to recent increases in racial disparities." Fischman and Schanzenbach go further, finding that "most of the post-[Gall] increase in [race]

142. See generally RHODES ET AL., supra note 133.
143. 2012 BOOKER REPORT, supra note 63, at 108.
144. Yang, supra note 140, at 92-93.
145. Fischman & Schanzenbach, supra note 141, at 750-53 & tbl.5. The study focused on "more serious crime categories," and thus excluded all immigration and fraud cases. See id. at 741.
146. RHODES ET AL., supra note 133, at 41.
147. Id. at 40-41.
148. Yang, supra note 140, at 78.
disparity ... is due to the increased relevance of statutory minimums under a system of advisory Guidelines."¹⁴⁹ They suggest that "judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing," and urge policymakers to focus their attention on mandatory minimums instead.¹⁵⁰ Along the same lines, Paul Hofer has criticized the BJS study for overstating the effects of judicial discretion while underestimating the influence of mandatory minimums.¹⁵¹ In his view, Booker merely "revealed the discriminatory effects of mandatory minimums and prosecutorial discretion that had been there all along."¹⁵²

Understanding the role that prosecutorial decisions and mandatory minimums play in driving race discrimination is essential. It is misleading, however, to frame judicial discretion and mandatory minimums as competing explanations for the increase in race disparity that the studies have identified. Prosecutors' charging decisions are not made in a vacuum, and any changes since Booker may be responses to judicial discretion.¹⁵³ The shift to advisory guidelines weakened prosecutors' control over sentencing outcomes, and it should come as no surprise if they fight back using the tools they have available. Indeed, some prosecutors have acknowledged that they select charges with mandatory minimum sentences more frequently after Booker to prevent judges from imposing sentences they consider too lenient.¹⁵⁴ It is entirely possible that greater judicial discretion has prompted the changes in charging decisions that, in turn, have increased race disparity. They can be mutually reinforcing, rather than mutually exclusive, explanations.

To be sure, not all researchers agree that race disparity has increased since Booker. Standing athwart the other studies is a competing analysis by Sonja Starr and Marit Rehavi,¹⁵⁵ finding, based on data through 2009, that unexplained race disparity has not increased since Booker and may have even decreased.¹⁵⁶ Their study is a tour-de-force attack on the kind of regression analysis performed by other researchers, especially the Sentencing Commission,¹⁵⁷ and marks a major step forward for the empirical investigation of sentencing disparities. Nonetheless, it does not dispel concerns about changes in racial disparity under

¹⁴⁹. Fischman & Schanzenbach, supra note 141, at 757.
¹⁵⁰. Id. at 761.
¹⁵². Id. at 199.
¹⁵³. Yang, supra note 140, at 104-05 (noting that "prosecutors may strategically respond to increased judicial discretion after Booker if they want to bind judges from departing downward").
¹⁵⁴. Id.
¹⁵⁶. Id. at 45-46.
Booker. A detailed assessment is beyond the scope of this Article, but three key methodological choices divide the Starr and Rehavi study from the others.

First, Starr and Rehavi criticize studies of sentence disparity that evaluate the sentencing stage in isolation, without taking into account earlier sources of disparity like prosecutorial actions (charging, bargaining, and other decisions). They take a broader approach that supplements the Commission’s sentencing data with information from other agencies, including arrest files from the U.S. Marshals Service and case files from the Executive Office for U.S. Attorneys. Conceptually, incorporating the decisions of prosecutors into the analysis of race disparity offers obvious advantages and better reflects theoretical work on “hydraulic discretion” in sentencing. They deserve credit for assembling a unique and impressive dataset. Previous studies, including my own, are indeed hampered by the lack of data about earlier prosecutorial decisions.

Second, Starr and Rehavi criticize studies of race disparity that use the guideline range, or closely related values like offense level and criminal history score, as control variables in regression models. They correctly note that those values are shaped by charging, bargaining, and judicial fact finding processes that may themselves produce race disparities, which the studies fail to capture. The guideline range incorporates a wide range of factual findings, but only in a blunt and indirect manner. Starr and Rehavi, therefore, exclude those variables, measuring offense seriousness instead only by reference to the arrest offense and charge severity, along with an indicator of a mandatory minimum.

The superiority of that approach depends, however, on the richness of factual information available at the arrest and charging stage. Starr and Rehavi downplay the offense information that their dataset lacks, but the omissions sound quite serious. Drug quantities, the amount of loss in fraud cases, and the offender’s role in group offenses are crucial measures of offense severity in the largest categories of federal offenses. Failing to control for those variables risks missing an important source of race disparity, and the calculated guideline range—however clumsily and belatedly—takes them into account. The BJS study also questioned Starr and Rehavi’s reliance on U.S. Marshals Service charge records, which the authors deemed too vague to serve as a basis for an analysis of disparity.

Third, Starr and Rehavi fault other researchers for drawing a causal inference about the effects of Booker based on a comparison of race disparity across time periods. They correctly observe that many other changes in the complex federal criminal justice system may contribute to race disparity across a

159. Id. at 24.
160. See Scott, supra note 25, at 42 (acknowledging this limitation).
162. Id. at 17.
163. Id. at 24-25.
164. Id. at 32-33.
165. RHODES ET AL., supra note 133, at 10 n.8.
166. Starr & Rehavi, supra note 155, at 49-52.
period of years, making it hazardous to attribute any trends to Booker. Accordingly, they focus their attention on evidence of “immediate sharp changes” within “a couple of months” after Booker. Their premise is that Booker acted as a sudden shock to the sentencing system, and if judges were inclined to use their discretion in ways that exacerbate race disparity, some evidence of that behavior should have been immediately obvious.

That view, however, is unduly pessimistic. “Natural experiments” that draw comparisons across time periods must be interpreted with caution, as there is no control group of federal courts in which the Guidelines remained mandatory. Clever researchers, however, can help to address those concerns by anticipating and correcting for known sources of potential interference. Moreover, an insistence upon an “immediate sharp change[]” in disparity is particularly misguided when examining the effects of Booker, a decision that initially left many questions about the extent of judges’ discretion unanswered. For example, it was not until Gall—nearly three years after Booker—that the Court finally sorted out the basic features of appellate review, and made clear that sentencing judges enjoyed broad discretion. Starr and Rehavi’s approach risks missing effects of Booker that operated as a slow burn, rather than a sudden shock.

Accordingly, there is at least reason for concern that race disparity, like inter-judge disparity, has worsened in the wake of Booker. Because concerns about unwarranted disparity were the driving force behind the Sentencing Reform Act, it is ironic that the remedial opinion in Booker defended the switch to advisory guidelines as a way to honor Congress’s intent.

CONCLUSION: BOOKER’S BARGAIN

This Article has highlighted mounting ironies in Booker’s choice of remedy, explaining how the results produced by the system of advisory guidelines are in tension with the remedial opinion’s stated purposes. The Court found a constitutional violation affecting offenders deprived of their right to jury fact finding for potential aggravating facts. Yet that class of offenders is worse off under the advisory guidelines, while the remedial opinion has benefited offenders with strong cases in mitigation that had suffered no constitutional violation. The Court defended its choice of remedy as a means of advancing Congress’s intent to reduce unwarranted sentencing disparity. Yet by two key measures, inter-judge disparity and race disparity, Booker appears to mark a setback for that goal.

Both of those arguments, it must be acknowledged, are intrinsic criticisms of the Booker remedy. No doubt most scholars and commentators evaluating

167. Id. at 52-53.
168. The Yang study, for example, uses data about the arrest offense—derived from the same sources used by Starr and Rehavi—to test the robustness of comparisons across periods. See Yang, supra note 140, at 97-98.
169. See supra notes 8-15 and accompanying text.
170. See Schmidt et al., supra note 157, at 269-70.
Booker after 11 years under the advisory guidelines are more concerned with extrinsic considerations. Have federal sentences grown more just and effective, or less? How has institutional power shifted among judges, prosecutors, defendants, and the Sentencing Commission? And are the changes desirable? Is the system today more practical, efficient, and comprehensible? Or has it grown even more cumbersome and complex? Answers to those questions, rather than tensions in the opinion's internal logic, will inform most critical assessments of the advisory guidelines.

Nonetheless, the ironies of the remedial opinion ought to affect Booker's legacy. This will not be the last case in which a closely divided Court confronts a difficult remedial question, uncertain of the consequences of its selection. At the time Booker was decided, the Court rested its choice of remedies in large part on judgments—perhaps misjudgments—about the implications for offenders and for Congress's intended goals. Reconsidering Booker's bargain with the benefit of hindsight may help sharpen the Court's discussion the next time.