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UNIVERSITY OF CALIFORNIA, SAN DIEGO

The Politics of Criminal Law Reform:  
A Comparative Analysis of Lower Court Decision-Making

A Dissertation submitted in partial satisfaction of the  
Requirements for the degree Doctor of Philosophy

in

Political Science

by

Lydia Brashear Tiede

Committee in charge:

Professor Mathew McCubbins, Chair  
Professor Gary Cox  
Professor Stephan Haggard  
Professor Daniel Rodriguez  
Professor Joel Watson

2008

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Chair

University of California, San Diego

2008

## DEDICATION

To David,  
For believing in me. Without you, this would not have been possible.

To Natalie,  
For making me stop to smell the roses.

## EPIGRAPH

Science is a very human form of knowledge. We are always at the brink of the known, we always feel forward for what is to be hoped. Every judgment in science stands on the edge of error, and is personal. Science is a tribute to what we can know although we are fallible.

*Jacob Bronowski*  
From *The Ascent of Man*

...

Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is The Law.

Yet law-abiding scholars write:  
Law is neither wrong nor right,  
Law is only crimes  
Punished by places and by times,  
Anytime, anywhere,  
Law is Good-morning and Good-night.

Others say, Law is our Fate;  
Others say, Law is our State;  
Others say, others say  
Law is no more,  
Law has gone away.

...

-WH Auden  
From *Law Like Love*

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## FIELDS OF STUDY

Major Fields: Comparative and American Politics

Focus Area: Judicial Politics

ABSTRACT OF THE DISSERTATION

The Politics of Criminal Law Reform:  
A Comparative Analysis of Lower Court Decision-Making

by

Lydia Brashear Tiede

Doctor of Philosophy in Political Science

University of California, San Diego, 2008

Professor Mathew McCubbins, Chair

This dissertation includes an analysis of sentencing reform in the United States federal system and England and Wales as well as an analysis of more general criminal law reform in Chile which converted its criminal process from one that was predominantly inquisitorial to one that is more adversarial in nature. By focusing on the effect of select instances of criminal law reform on lower court decision-making, the dissertation includes an analysis of whether lower courts are responsive to legislation and higher court mandates and whether the intent behind criminal law reforms was achieved or whether the reform resulted in unintended consequences.

The dissertation includes empirical analyses of how lower court judges respond to limitations or expansion of their discretion imposed by the legislature and sometimes higher courts. In the U.S. federal example, case level data as well as opinions of judges from surveys conducted in 1991 and 2008 are analyzed. The analysis of sentencing reform in England and Wales relies on a content analysis of the reform, interviews with judges and sentencing officials, and statistical information on various prison populations from 1983 to 2007. In the case of Chile, the effect of reform on lower court judges is tested using data about rates of convictions, acquittals, and case processing times in lower courts.

Although focused on criminal law reform, the dissertation describes the relationship between some higher law-making body (the principal) and lower courts (the agents). The principal-agent framework is used to explain why higher law-making bodies delegate to lower courts in the first place and to explain the risks involved in delegating discretion to lower court judges whose preferences may differ from the higher law-making bodies.

Finally, the dissertation explores the political nature of criminal law reforms by comparing the political motivations behind reform with the actual consequences of such reform. Often political objectives, such as appearing tough on crime and reducing prison populations, are mutually exclusive. As a result, the political nature of criminal law reform prevents legislators from creating cogent or effective criminal law policy. Further, in reducing judicial discretion, a cornerstone of much of the reform analyzed here, legislators are discounting and weakening their most experienced and effective agents in the battle against crime.

## **Introduction:**

### **The Politics of Criminal Law Reform**

Criminal law reform is a manifestation of the constant battle waged between politicians who want to appear tough on crime and judges who want to act independently to apply their expertise and judgment in adjudicating criminal cases. Politicians worldwide are concerned about what voters think and this electoral connection makes them especially interested in the public's opinion on issues concerning law, order, and security. As a result, legislators enact and amend criminal laws and procedures at a constant pace in the hope of constraining judges deemed to be too soft on crime and a judicial branch deemed to be too independent. Sometimes, higher courts assert themselves in the reform process by ruling legislation unconstitutional or directing lower courts regarding interpretation of the law.

This dissertation shall analyze select instances of criminal law reform to ascertain how lower courts make decisions when constrained by higher law-making and interpreting bodies. In doing so, I ask can legislators really control judicial discretion and if so, should they? The dissertation also shall analyze whether the intent behind the various reforms was achieved. In other words, do criminal law reforms achieve their intended purpose or do they result in unintended consequences? These questions are answered by analyzing how law and legal reform affect both lower court decision-making in particular cases and larger societal concerns such as conviction and incarceration rates. This research is focused on lower courts as these courts hear the vast majority of cases affecting individual defendants worldwide and are most often the target of criminal law

reforms. Further, despite the intense scholarly focus on higher court decision-making, it is not necessarily illustrative of the majority of judicial decision-making in America (Shapiro 1964) or internationally. For example, the U.S. Supreme Court reviews about eighty-five cases per year (O'Brien 2003) in comparison with federal district courts which hear hundreds of thousands of cases each year.<sup>1</sup> Dwarfing the Supreme Court and federal district court case load, state courts received approximately 100 million case filings in 2003 (The National Center for State Courts 2005). The same holds true in other countries where the vast majority of all cases are heard by lower courts, not intermediate appeals courts, supreme courts or constitutional courts.

This dissertation, although focused on criminal law reform in lower courts, also implicates the strategic interaction between some higher law making body (legislature, supreme courts) and the lower courts. Indeed, the dissertation seeks to explain why higher law making bodies delegate to lower courts at all and what risks are attached to such delegation.

The dissertation proceeds with separate case studies showing specific examples of legislative or higher court action to constrain lower court discretion in criminal cases in the United States, the United Kingdom, and Chile. Besides the reliance on empirical data, the dissertation is based on thirty-seven formal interviews completed in 2007 and 2008 as well as survey results. I interviewed fourteen federal district court judges, eight judges and lawyers in Chile, and fifteen judges, magistrates, and sentencing officials in the United Kingdom. The interviews lasted from thirty minutes to two and half-hours

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<sup>1</sup> Approximately 281,338 civil cases were filed in federal courts and 93,000 criminal cases in 2004 (U.S Courts 2008).

with an average interview time of one hour. The dissertation is also based on my observations of criminal cases in all these countries.

### **Case studies**

Criminal law reform is extremely political and reactive. When legislators perceive that the judicial branch as a whole or individual judges are acting counter to the political objectives of the day, then they enact legislation that constrains judicial agents. While legislative supremacy is mandated in all three countries studied, judges would like to believe that they are able to exercise their own expertise and discretion when it comes to making decisions on individual cases. This dissertation explores how and when legislatures and sometimes higher courts may decide to constrain the discretion of lower courts as agents as a means of controlling individual judges and the judicial branch as a whole and it analyzes how judges, applying legal constraints mandated by the legislature, attempt to act independently albeit in a dependent judiciary (See Ferejohn 1999).

To explore the interaction between higher law making bodies and lower courts, the first chapter describes the actors involved in law making and law application. The chapter reviews the preferences of the various actors and also reviews the literature on principal agent relationships and the strategic interaction between political bodies. The principal agent framework is then used in varying degrees throughout the dissertation in order to understand how lower courts make decisions under various constraints imposed by principals.

While the first chapter describes the dynamic nature of judicial discretion, chapter two provides an analysis of legislative constraints on judicial discretion in the federal district courts in criminal sentencing cases. In the American case, judges initially were

thought to have too much discretion resulting in disparity in case outcomes for similarly situated defendants. To counter this, politicians severely limited this discretion by creating the United States Sentencing Commission to draft *mandatory* U.S. Sentencing Guidelines that constrained judges' ability to fashion sentences based on the judges' own expertise or "gut feeling." The political objectives behind these guidelines were threefold: honesty in sentencing, proportional sentences, and the reduction of sentencing disparity (USSC 2002). The federal sentencing guidelines, until recently, were thought to be some of the most rigid and constraining in the world.

Two decades after this reform, the judiciary pushed back, and the strictures of the guideline system were loosened as a result of the U.S. Supreme Court's decision in *United States v. Booker* (2005) that rendered the mandatory guidelines unconstitutional and converted them proactively to *advisory* constraints on judicial decision-making. More recent Supreme Court decisions in *Kimborough v. U.S.* (2007) and *Gall v. U.S.* (2007) have further increased discretion for district court judges hearing sentencing cases by defining what is considered a reasonable sentence under *Booker*. Although not within the scope of this dissertation, sentencing guideline enactment and reform in the states has followed a similar path.

The analysis in chapter two focuses on the specific effect of the guidelines on federal district court decision-making from fiscal years 1999 to 2005 and analyzes the effect of two legislative acts that limit judicial discretion (the Sentencing Reform Act of 1984 and the PROTECT Act of 2003) and two Supreme Court cases that increase discretion (*Blakely v. Washington* (2004), *U.S. v. Booker* (2005)). Significant differences in sentences exist depending on whether or not judges applied fixed

sentencing ranges or departed from them. Cases where judges applied guideline ranges have higher sentences with less variance across outcomes as compared to cases where judges departed from the fixed ranges. Changes in the sentencing laws (the PROTECT Act, *Blakely*, and *Booker*) have had mixed effects. While laws increasing or decreasing judicial discretion have no effect on sentence length or variance *within* certain categories of cases, the reforms affect departure rates and disparity of decisions. In some judicial circuits, the responses to changes in the law are more pronounced.

While chapter two provides an empirical analysis of sentencing laws and reform, chapter three is more qualitative in nature. Despite much conjecture, little is known about opinions of lower court judges regarding directions provided to them by legislators or the Supreme Court. As a result, chapter three summarizes and analyzes the results of interviews of U.S. federal district court judges as well as results from a nationwide mail survey to determine judicial opinions regarding the U.S. sentencing system and recent reforms. The questions, copied from a 1991 survey conducted by the United States Sentencing Commission (USSC), provide the basis for comparing judicial opinions compiled by the USSC in 1991 with opinions I compiled in 2007 and 2008. Generally, judges are adamantly opposed to legislative interference in judicial discretion, but still seem to apply the law as Congress intended. If given an opportunity, judges, however, will exert as much of their own discretion when issuing a sentence as possible. There is some variation in judicial responses depending on the time frame of the survey, the judges' experience on the bench, and the party of the nominating president.

Chapter four and five include an analysis of criminal law reforms targeting lower courts in two non-American jurisdictions. Legislatures and courts worldwide are

increasingly adopting American structures and procedures in criminal law, including adopting American models of legislative involvement in limiting judicial discretion.

While there is a trend in adopting American standards in other legal systems, each jurisdiction diverges from American practices and adopts those that are most appropriate for that country's own legal tradition.

Chapter four considers England and Wales' recent adoption and consideration of sentencing reforms that are similar, but by no means identical, to those reforms introduced in the United States in the 1970s and 1980s. Over time, however, as the judicial branch has become more active and Parliamentary sovereignty has decreased, Parliament has responded to the public outcry against crime by enacting legislation that constrains lower court discretion to a previously unheard of level. This chapter explores how judges deal with constant criminal law reforms reducing their discretion. This chapter also explores whether England and Wales' adoption of judicial sentencing constraints contributed to the exploding growth of its prison population.

Chapter five provides an analysis of more general law reforms in Chile which go beyond sentencing reform. Judicial discretion in criminal cases in Chile was not limited by enacting precise criminal sentencing ranges, but rather in the enactment of laws that limit the power and jurisdiction of judges more generally. In Chile, through reforms, legislators moved Chile's criminal law system closer to that existing in the United States. Chile, like seventeen other Latin American countries, converted its criminal law system from inquisitorial to adversarial. This conversion drastically limits the authority of judges by eliminating their pre-reform powers to investigate and charge defendants. While it may be too early to say whether further constraints will be put on judicial

discretion, it is possible that as incarceration rates begin to soar that politicians will try to further constrain how and what judges do. The Chilean legislature's choice to convert its criminal law process from inquisitorial to adversarial has had few effects on the behavior of the police and courts. What limited effects the reform has had are more pronounced in highly urban areas or areas with large indigenous populations.

\*\*\*

This dissertation provides separate case studies of criminal law reforms in the United States federal system, England and Wales, and Chile. Table 1 provides a general description of these judiciaries, the reforms analyzed, and their intended effect on lower court discretion. While the laws and institutional context for each country are different and therefore not completely comparable, the cases in this study provide evidence of the political and often strategic forces driving both criminal law reform and the enactment of constraints limiting judicial discretion in the lower courts. The conclusion will include an analysis of how criminal law reform of lower court decision-making is a way for politicians to control the judicial branch as a whole. However, as will be explored, some of the reform has limited impact and unintended consequences. The conclusion also will suggest avenues for future comparative research on criminal law reforms and outline a program for completing empirical analysis of criminal law reforms in other jurisdictions using case outcome data for Pennsylvania described in Appendix A.

**Table I.1. Judiciaries and laws examined.**

	<b>UNITED STATES</b>	<b>ENGLAND &amp; WALES</b>	<b>CHILE</b>
<b>JUDICIAL INDEPENDENCE</b>	Judiciary independent branch	Judiciary independent branch in 2009	Judiciary independent branch
<b>FEDERAL OR UNITARY SYSTEM</b>	Federal	Unitary (except for Scotland's judiciary and some devolved powers)	Unitary
<b>LEGAL ORIGIN</b>	Common law	Common law	Civil law
<b>INDEPENDENT SENTENCING AGENCY</b>	Yes Part of judicial branch	Yes Part of executive branch/independent	No
<b>SCOPE OF REFORM ANALYZED (LOWER COURT DISCRETION INCREASED (+) OR DECREASED (-) BY RELEVANT EVENT)</b>	<i>Legislature:</i> Sentencing Reform Act of 1984 (-)  PROTECT Act (2003) (-)  <i>Supreme Court:</i> Blakely v. Washington (2004) (+)  United States v. Booker (2005) (+)	<i>Legislature:</i> Criminal Justice Act of 1991 (-)  Power of Criminal Courts (Sentencing) Act (2000) (-)  Criminal Justice Act of 2003 (-)  Constitutional Reform 2005 (?)	<i>Legislature:</i> Criminal Law Reform (several pieces of legislation) 1999-2000 (-)

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- United States v. Kimborough*, 552 U.S. \_\_\_\_ (2007).

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# Chapter 1

## Towards a Theory of Lower Court Decision-Making

Lower courts hear the vast majority of all cases in any given country. As a result, these courts significantly impact how law is applied and perceived in society. Despite significant power over the fate of private litigants and criminal defendants, lower court judges do not operate as free agents. Rather, they face several constraints imposed upon them by other institutions involved in making and interpreting the law. As the lower echelon of the judicial branch, lower courts serve multiple principles who voice their preferences in laws or legal interpretation. Thus, lower courts are subject to the will of other political actors including the executive, legislature, and upper courts of the judicial branch, such as supreme courts or higher appeals courts. In order to understand how lower courts make decisions under constraints imposed by other political actors, it is useful to model lower courts' relationship to these other institutions using a principal-agent framework.

As in any principal agent relationship, principals delegate in order to save the costs inherent in doing the delegated job themselves. In the case of court decisions, besides lacking the expertise, it would be too costly for legislators or higher courts to hear individual cases at the trial level. As a result, principals in the form of legislatures and higher courts delegate to lower court judges to avoid transaction costs of doing the job themselves and to take advantage of the special expertise that lower court judges have in hearing individual cases. Despite the practicality of delegating authority to lower courts,

delegation is not costless. Indeed, principals must ensure that lower court agents do what they are requested to do. This may be especially challenging when lower courts and higher law making authorities have different preferences as to the outcomes of cases. As will be seen in the case studies, legislators tend to delegate more authority to agents in areas of little political concern. In contrast, they delegate less authority and constrain agents more when they are concerned about specific policy areas and re-election.

A significant amount of the literature on principal-agent relationships has come from the fields of economics and political science. The political science literature generally focuses on the relationships between the three branches of government and sometimes on the hierarchical relationship between lower courts and higher courts. Despite this literature, few scholars have explored the specific preferences of lower courts that may vary by region, court, or individual judge. Further, few have explored how lower courts respond to more than one principal, such as supreme courts and the legislature or supreme courts and intermediate courts. Finally, most of the principal-agent literature has been based on the exceptional case of the American federal system, and little work has extended to judiciaries and lower courts in nations with political systems vastly different than the United States.

This chapter explores the existing literature on the principal-agent framework. It also explores the actors and their preferences in games between lower courts and higher law-making bodies. Although the chapter does not present a formal model, it suggests broadly the preferences and strategic incentives of the various actors and their reactions to legal reform. The principal-agent analogy is used throughout the dissertation, but in

varying degrees depending on the available data and level of analysis. Indeed, in the chapter on federal courts, the principal-agent model is explored more fully as there is case level data available and information that can be aggregated at the regional and court level. The principal-agent analogy is suggested in the case studies on England and Wales and Chile, but is used less extensively as case level data was unavailable.

In order to provide a rudimentary theory of lower court decision-making, this chapter first describes the general principal-agent literature in economics and political science, explaining why principals delegate in the first place as well as the costs attached to such delegation. The second part describes the principal-agent literature that specifically includes courts as actors in the game. Finally, the third part describes the actors, their preferences, and interactions.

## **1.1. The principal-agent relationship.**

### **1.1.1. Why delegate?**

Relationships between lower courts and higher law-making bodies are relationships involving delegation of authority. A useful approach to understanding delegation of authority is through the use of a principal-agent framework. Such an approach has been advocated by Moe (1985), McCubbins and Page (1985), and Epstein and O'Halloran (1999), among others. Principals delegate to agents for a variety of reasons. In the business world, owners of production delegate to entrepreneurs or managers who have property rights in the business they are overseeing (Alchian and Demsetz 1972) or in the case of corporations, to managers who do not have any vested rights in the entity they manage (Fama 1980), in order to avoid excessive transaction

costs involved with contracting between owners and individual workers. As in the business world, elected politicians acting as principals delegate their authority to other elected officials or to non-elected agents for a variety of reasons, the most obvious being that politicians do not have the time, resources, or knowledge to perform tasks requiring a high degree of specialization. Thus, in the political world, delegation reduces transaction costs (Epstein and O'Halloran 1999).

Principals also delegate to agents to solve collective action problems such as the prisoner's dilemma in which individuals "seeking to maximize their self-interest have incentives to behave in ways that are inimical to the interests of the community as a whole" (Kiewiet and McCubbins 1991: 22, citing Hardin 1968). Delegation also solves problems associated with the provision of public goods and free riding, coordination, and social choice instability. Under the principal-agent approach in general, principals provide more discretion to agents when they have more certainty about the outcomes of bureaucratic actions and when there is less conflict between agents and principals. Conversely, when there is more uncertainty and more potential and real conflicts between principals and agents, principals delegate less discretion to agents.

The variability of discretion delegated from principal law makers to agents in courts and bureaucracies is best seen by comparing delegation under unified and divided government in presidential systems and under minority government in parliamentary systems. Epstein and O'Halloran (1999) show that under divided government or minority government, principals will delegate less to bureaucrats providing them with less discretion. Under unified government, principals will delegate more to bureaucrats

because both the executive and legislature share common preferences. Similarly, for courts, McNollgast (2006) show that under divided government, one chamber of the legislature or the executive branch will protect judicial independence by vetoing or threatening to veto legislative actions that would overturn court decisions favoring one chamber or the executive over another. Under unified government, judicial independence is weakened as the executive and legislators can coordinate on governmental changes that may undermine this independence.

### **1.1.2. Problems with delegation.**

While delegation from principal to agent is supposed to solve collective action problems and problems related to scarce resources of principals, it brings with it a host of additional problems (mentioned above) such as agency losses incurred when agents put their own self interests ahead of those of their principals and agency costs incurred to monitor agents. Kiewiet and McCubbins (1991) specifically note that delegation involves problems related to hidden information, hidden action, and shirking by agents. Expertise by agents in certain fields leads to hidden information that provides agents with leverage over their principals (Moe 1985). Tullock (1965) shows how misinformation can flow through the hierarchy of many organizations. Additionally, when there are multiple agents and principals, the desires of principals and the incentives of agents to shirk become more complicated. Kiewiet and McCubbins also suggest that delegation presents a Madisonian dilemma in which agents who acquire resources from principals later use these same resources against the interests of the principal. More generally, principals and agents have “inherent goal conflict” (Meier and Krause 2003).

The reason that delegation may result in a host of problems is that agents and principals do not generally have the same preferences. As a result, despite the delegation of authority and hope by principals that agents will be loyal, agents may seek to pursue divergent interests and preferences. To do this, they may pursue goals that are unrelated to those of the principal and then try to hide the divergence of their preferences from the principal to avoid being caught and ultimately having their delegated authority terminated by principals.

### **1.1.3. Methods of minimizing problems inherent in delegation.**

In order to establish that delegation is a worthwhile endeavor, and thus logical, many scholars show that there are a host of cost efficient mechanisms for controlling self-interested agents. Most of the literature on controlling agents has dealt with monitoring and sanctioning bureaucrats when they engage in activity which is beyond lawmakers' intent. In certain instances, models regarding delegation to bureaucratic agencies apply well to lower courts.

The first way of sanctioning and monitoring both courts and bureaucracies is to write new laws when judges and bureaucrats overstep their authority. Furthermore, there are many instances in United States' history in which Congress has passed new laws as an effective means of controlling judges and bureaucrats who appear to be overstepping their power or acting in a way counter to that intended by the legislature. Using new legislation as a means for controlling judges and bureaucrats, however, is quite costly (McNollgast 1987). Not only does writing new legislation require coordination among the various political branches and actors, but it "creates the additional problem that it can

reopen long settled, but still contentious, aspects of policy that are unrelated to the compliance problem” (p. 252). Therefore, legislation as an *ex post* control mechanism is usually too costly and onerous to use as an effective means of control.

Second, bureaucrats may be monitored and controlled through the use of employment contracts which can be structured such that an agent’s compensation exceeds his opportunity costs (Kiewiet and McCubbins 1991; Alchian and Demsetz 1972). Employment contracts also may include probationary periods and profit sharing arrangements. Although, an employment contract is one method for controlling agents in the business world, it has less leverage in the political world. For example, in the case of Congress, it is difficult for party leaders to sanction their members because they have no control over the employment contracts of other congressmen. Further, the incentives in these contracts seem inappropriate for a political analysis of judges with life terms.

Third, screening and selection of agents may provide another means for overcoming agency problems discussed above. According to Kiewiet and McCubbins (1991), party leaders can help shape legislative outcomes by choosing leaders whose “preferences are as representative as possible to the caucus as a whole” (p. 48). In the bureaucratic context, screening candidates is often a useful tactic. Increasing demands and limited institutional capacity have led modern presidents, exemplified by Nixon and Reagan, to increasingly co-opt bureaucracies by appointing individuals who have ideologies aligned with themselves (Moe 1984). Although presidential screening and selection may provide a powerful means of controlling the bureaucracy, Hecl (1977) shows that this often backfires because modern presidents make thousands of

appointments to agencies and often these individuals are strangers to the president and, due to their short time horizons in office, appointees often find themselves aligned with the positions of the agencies in which they work rather than those of the president which appointed them. Although screening and selection is discussed mostly as a means of controlling the bureaucracy, such methods also provide useful means for controlling judiciaries. Presidents and legislators are cautious about judicial appointments because it is thought that judges with similar viewpoints to principals appointing them are more likely to act as faithful agents. Federal judicial appointments are especially contentious not only because judges have life appointments but also because they have the power to decide cases involving sensitive social and political issues.

Fourth, monitoring and reporting requirements may overcome problems of hidden information and hidden action. However, such requirements are extremely costly leading some scholars to argue that Congress has abdicated authority to others because it can not effectively or cheaply monitor its agents. McCubbins and Schwartz (1984) (see also Epstein and O'Halloran 1999: 73), however, refute this by showing that Congress has two monitoring mechanisms available to it. While Congress may employ the relatively costly mechanism of police patrols by conducting Congressional investigations into the work of bureaucracies, it has a far less costly method available. Fire alarms are sounded when everyday citizens bring their complaints against agencies. A large number of complaints or especially severe complaints against bureaucracies signal to Congress that there is a problem. However, the fire alarm monitoring method is virtually costless to Congress because it depends on citizens financing their own complaints privately or

through the use of special interest advocates. While the police patrol/fire alarm model may be effective for monitoring bureaucracies, it is less helpful for analyzing delegation from party caucus leaders to committee leaders because any attempts to monitor committee leaders may result in undermining their authority in public thus making it difficult for the party to credibly commit to specific policy issues. For the public, the party needs to appear unified and not divided on policy issues.

The police patrol/fire alarm mechanisms also are less applicable to courts. Because of the function and powers of judges, Congress does not conduct congressional investigations of individual judges' actions. Because judges are only removable for extreme cases of misconduct, Congress has no police patrol mechanisms to conduct hearings against judges based on their decision-making in particular cases. Fire alarms also are less applicable to courts than bureaucracies. While citizens can voice complaints about lower level court decisions through appeals to higher level courts, they are limited in their ability to have their complaints adjudicated due to the inability of the Supreme Court to consider a large number of cases (but see Songer, Segal and Cameron 1994, claiming that citizen appeals from lower court decisions to higher courts do provide a fire alarm mechanism of control). Furthermore, except for impeachment, there are no further avenues for citizens to complain about the decisions of federal judges. Because fire alarm and police patrol mechanisms are less available for monitoring courts, monitoring and reporting requirements will remain costly and thus for the most part unavailable to Congress.

Institutional checks provide a fifth method for overcoming agency losses. According to Kiewiet and McCubbins, “institutional checks require that when authority has been delegated to an agent, there is at least one other agent with the authority to veto or block the actions of that agent” (p. 35). Institutional checks are similar to the signaling or reputation model proposed by Ferejohn and Shipan (1989). Ferejohn and Shipan (1989), who discuss the principal agent relationship in context of Congress’ delegation of authority to the Federal Communications Commission (FCC), suggest that Congress need not explicitly punish bureaucrats when they seek policies that are not in accordance with Congress, but rather can threaten to punish bureaucrats by suggesting legislation which is counter to that proposed by the bureaucrats. As seen by their study of FCC access charges, by simply proposing rather than enacting legislation, Congress was able to ensure that the bureaucracy issued regulations which were closer to Congress’ rather than bureaucrats’ preferences. Similarly, Congress can threaten to punish judges by suggesting legislation which is counter to the rulings of federal judges. In this way, Congressional action provides an important check on judicial decision-making.

Although rarely discussed in the literature, another area which affects judicial and bureaucratic autonomy and discretion is political control over the discipline and removal of bureaucrats and judges. Again, there is a wide variation in who can discipline and remove bureaucrats and judges. Removal of bureaucrats depends on whether the agency exists in a parliamentary or presidential regime and the type of agency. Removal of judges depends on whether the legislature, courts or some other institution is responsible

for discipline and removal of judges. In the United States, Congress can impeach, convict, and remove federal judges. Although rarely done, the House has in fact impeached thirteen federal judges and the Senate has convicted and removed seven (Abraham, 2002). As in selection methods and tenure length, there is a wide variety of methods for disciplining state court judges including impeachment, address by the state legislature, judicial board review, and recall elections (Hanssen, 1999). Although judicial discipline and removal are rarely studied empirically, an argument similar to that for judicial selection could be made, in which removal processes involving more than one branch of government make judges more independent.

## **1.2. Extending principal agents to courts**

A number of scholars model court behavior as a game between principals and agents. These principal-agent models explain the amount of discretion that principals, such as the legislature or higher courts, are willing to delegate to lower courts or bureaucratic agents. Further, problems associated with delegation, such as agency loss and shirking, help to explain how judicial agents may avoid constraints placed on them by their principals in certain circumstances.

In the judicial politics literature, principal-agent models have generally only described, in varying degrees, the relationships among the following actors: Congress, the Supreme Court, the legislature, the President, and administrative agencies. Lower courts are rarely introduced into the standard models. Many of the principal-agent models used to describe the Supreme Court, arose from the “setter model” established by Romer and Rosenthal (1978) describing how principals react to offers

made by agents to change the status quo. Building on this model, Ferejohn and Shipan (1990) model agency policy-making with the presence of judicial review. These scholars find that, “the effect of judicial review of agency decisions increases as the ideal point of the court shifts away from the agency and toward the median member of the chamber” enacting the legislation. In general, judicial review has the effect of leaving agency policy unchanged or shifting it toward the chamber median. In a further model, Ferejohn and Shipan (1990) find that judicial review weakens the effect of a presidential veto, but only if the Supreme Court’s preferences are sufficiently similar to the median congressmen. A presidential veto, on the other hand, only has a strong impact when the Supreme Court’s preferences are similar to those of the agency. These authors conclude that statutory judicial review operates as a “democratic device” which induces agencies to be more responsive to congressional preferences.

Building on Ferejohn and Shipan’s model, Gely and Spiller (1990), change the sequence of Ferejohn and Shipan’s game by starting with an agreement among Congress, the President, and an administrative agency who either agree to maintain the status quo or change a policy. The Supreme Court then either accepts the policy or pays a cost to reinterpret the law creating a new policy. In this model, the Supreme Court has the advantage of the last move. Gely and Spiller model the Supreme Court as a politically motivated actor that undertakes decisions, not based on traditional rules of legal precedent, but rather in response to electoral results which lead to changes in the composition of Congress or the Presidency. In further work, Gely and Spiller (1990) extend their previous model regarding statutory decisions to constitutional decisions. In

this model, the Supreme Court also follows the desires of the electorate, but the extent and speed of the Court's response is based on the extent that Congress and the state legislatures are unified as well as the Court's own ideological composition.

Iarycower, Spiller, and Tommasi (2002) have modeled the separation of powers in what they call unstable political environments using models similar to those described above. These authors see Argentine Supreme Court justices as strategic actors. In their model, nature draws some specific legislation. In response, the Court reviews the constitutionality of the legislation and either upholds it or finds it unconstitutional. The Argentine president then can choose to punish the court (by expanding the judiciary or replacing judges) or the president can do nothing. If the President punishes the court, he then will implement new legislation. According to Iarycower, Spiller and Tommasi, the President can only punish the Court if he has strong support from Congress.

Political actors also use structure and process as ways to control both the bureaucracy and courts. Structure refers to the way in which political actors organize courts. Process on the other hand refers to procedures found in laws and statutes which specifically instruct judges on how to act. Scholars insist that lawmakers organize institutions and draft statutes in such a way as to provide judges with the level of discretion they believe befits both the institution and the policy issue being reviewed.

One way for politicians to control judges and influence judicial decision-making is to alter the size of the judiciary. This may be done in several ways. Politicians may increase the number of judges in particular courts such as the country's supreme court or a particular federal court. Politicians also may increase the number of lower federal

courts. By increasing the number of lower federal courts, politicians create a monitoring and agency problem for supreme courts which oversee these lower courts (McNollgast 1995, 2005).

In Latin America, increasing the size of the judiciary is a tool used by politicians to affect legal doctrine. Magaloni (2003) and Iaryczower, Spiller and Tommasi (2002) look at how politicians control the courts by changing the number of judges found in a country's supreme court. Magaloni shows that the Mexican Supreme court fluctuated in size from eleven to twenty-six judges and back to eleven between 1917 and 1994. According to Magaloni, a "larger Court means a weaker body" (p. 285). Similarly, Iaryczower, Spiller and Tommasi (2002), in their study of the Argentina Supreme Court, theorize that changing the size of the court affects "the court's median voter position and potentially the Court's final decision" (702).

McNollgast (1995, 2005) show that politicians change the structure of federal courts as a means of controlling these courts. However, unlike, Magaloni and Iaryczower, Spiller, and Tommasi, McNollgast look at size from the perspective of the number of federal courts rather than the number of judges in the Supreme Court. The McNollgast models are based on an understanding that the American Supreme Court is limited in the number of cases it can review each year. The Supreme Court decides only about one percent of all the cases arriving on its docket each year (O'Brien 2003). As a result, by choosing to review some federal cases, but not all, the Supreme Court chooses which issues and judicial doctrine to influence. Knowing these limitations on Supreme Court review, McNollgast (1995) suggest that politicians expand the federal judiciary in

order to force the Supreme Court to alter doctrine in a way preferred by political officials. According to McNollgast, when politicians increase the number of lower courts and these courts have “ideal points” outside those of the Supreme Court, the Supreme Court is forced to expand the range of decisions it finds acceptable. McNollgast (1995) state:

[T]he Supreme Court will expand the range of lower court decisions that it finds acceptable when faced with substantial noncompliance by the lower courts. By expanding the latitude allowed under its precedents, the Court both cajoles some lower bench jurists to abide by the new precedents and isolates those who do not. The Court can then focus its attention on the most egregiously nonconforming lower courts’ decisions, and on the issues it most cares about (p. 1634).

In a more recent article, McNollgast (2006), expand their explanation by focusing on conditions for judicial independence. McNollgast describe a model for understanding the strategic interaction between courts and politicians by reviewing the actions of two main actors. The first actor is the Supreme Court which picks a legal doctrine on a policy dimension to adjudicate. The second actor is the agents of the Supreme Court namely lower courts, executive agencies, and state and local governments which are the subject of the Court’s order. In the first stage of the McNollgast model, the Court chooses a doctrine by setting a range of acceptable decisions around its ideal policy. In the second stage of the game, agents make strategic decisions to ensure that the Supreme Court’s final outcome is close to their ideal points. In the third stage of the game, the Court chooses a specific number of cases to be reviewed. From this game, McNollgast find that *stare decisis* is a “self-enforcing equilibrium in strategic interaction for the Supreme Court and lower courts” and that the greater the potential for non-compliance by lower courts, the more “lax is judicial doctrine” (p. 12).

Politicians further use process as well as structure to control courts. Through specific language found in statutes, lawmakers dictate what type of process judges should use in making decisions on a wide range of issues. For example, politicians determine how judges make decisions on certain policies by including language in statutes which explicitly states the standards for review the judges must employ when deciding cases and by stating what types of administrative decisions they may review. Control through statutory language is especially noteworthy in the area of administrative law in which lawmakers state specifically how much discretion judges have to review decisions of administrative agencies. Huber and Shipan (2002) argue that short statutes provide judges with fewer instructions regarding their decision-making and thus allow judges to use their own individual discretion. According to these authors, longer statutes provide more detailed instructions about how judges should act and thus curtail judges' discretion. Although Huber and Shipan's assumption that long statutes limit discretion while short statutes extend discretion is falsifiable, they do show that politicians may exert control on judges by the instructions placed in statutes about the process which judges should use when reviewing certain types of cases.

A new area of scholarship has arisen concerning statutory interpretation by courts. In this literature, scholars show that statutes are a form of communication between legislators and courts (Boudreau, Lupia, McCubbins, and Rodriguez 2005). To correctly interpret the meaning of statutes, courts should avoid judicial activism and interpret statutes in accordance with the intent of the legislator. Focus on the intent of the legislature is based on the principal of legislative supremacy found in Article I, section 7

of the U.S. Constitution, but is problematic due to the difficulty of discovering this intent. McNollgast (1992) urge the use of canons of statutory interpretation which direct judges to use some, but not all legislative history to interpret statutes. Lupia and McCubbins (2004) show that statements of the floor manager are more trustworthy than other legislative statements and therefore constitute a proper source of legislative history to use in decisions involving statutory interpretation. On the other hand, using improper legislative history may lead to outcomes that are not in line with the will of the legislators as was the case in the enactment of the Civil Rights Act of 1964 (Rodriguez and Weingast 2003).

Several scholars alternatively have focused on the hierarchical relationship between lower courts and higher courts in which the higher courts are principals to lower court agents. Songer, Segal, and Cameron (1994) find that the Supreme Court controls the discretion of circuit court judges due to its position in this hierarchical relationship. These scholars find that in search and seizure cases, the courts of appeal are highly congruent (ie. follow Supreme Court policy) and responsive (ie. change policy when Supreme Court changes). However, in ambiguous situations, these same courts of appeal shirk by choosing to interpret the law differently than the Supreme Court. Songer, Segal, and Cameron conclude that the court of appeals is prevented from excessive shirking as a result of litigants who sound fire alarms when the court of appeals' interpretation diverges too greatly from the Supreme Court.

The majority of principal agent models which include courts as actors predominantly focus on the exceptional case of the American federal system and almost

exclusively on the Supreme Court. Lower courts are sometimes viewed as agents of either the legislature or the Supreme Court, but their preferences and utility functions are rarely examined. Further, there is no acknowledgement that lower court judges' preferences may vary depending on their geographic location. While the principal-agent models are a useful mechanism for understanding how lower courts operate under constraints, the literature on American Courts has offered few insights into principal-agent relationships involving courts in other countries. With the exception of Iarycower, Spiller and Tommasi (2002), few scholars have applied the insights of the American models to other countries and few have included lower courts in the non-American context. Finally, where the principal-agent models in the judicial politics literature provide insight into the strategic action of the three main branches of government, they fail to include an analysis of agents with multiple principals, such as lower courts which are the agents of Congress, the President, and higher level courts.

### **1.3. Interactions involving lower courts and higher law-making bodies.**

The principal agent model is a useful framework for understanding lower court decision-making under legislative or higher court constraints if it can be extended to describe the relationship between higher courts and lower courts in a more general manner to lower courts world wide. This section includes a description of the actors presented in this dissertation, their strategies and what kind of interactions may arise among various actors. The description is general to account for the variation in the institutional relationships in a wide variety of countries.

*The Players.*

The first player in any game involving lower courts is the executive who has several roles that vary by country. In general, the executive is involved in some way in selecting and appointing judges and is also involved in affirming or vetoing laws established by the legislature. In some countries, especially those in Latin America, executives also have strong decree powers allowing them to pass laws without the legislator. The role of the executive varies depending on whether he or she is governing under divided or unified government. The preferences of the executive depend on his or her possibility of re-election and his or her desires to strengthen party objectives.

Despite the varying role of the executive, the legislature as an actor is the main body enacting laws. In some instances, the legislature can overrule decisions of the Supreme Court by agreeing to pass new legislation. Legislators may, in some situations, overrule executive vetoes. Legislators also have varied involvement in judicial selection. In some countries, legislators confirm executive choices informally or by a constitutional majority (ie. Chile), while in other countries, legislators select judges directly (ie. Costa Rica).

The third actor in any interaction with the lower courts is supreme courts. These courts can overturn legislation passed by the legislature and also can monitor and punish lower courts for their decisions. In some countries, supreme courts are directly involved with selecting, disciplining, and removing judges both in intermediate courts of appeals and lower courts (ie. Chile). Supreme Court preferences may vary from lower courts, as supreme courts reach decisions in a collegial manner and for some scholars, the

individual ideology, rather than the law itself determines the preferences of supreme court judges (Segal and Spaeth 2002).

The fourth actor involved in interactions with lower courts is the intermediate courts of appeal. Like supreme courts, courts of appeal often decide cases in a collegial manner. Depending on the composition of any given panel, court of appeals may have very different preferences than either lower courts or supreme courts. Further, as intermediate judges are often recruited from lower court judges or the bar in specific regions, the preferences of these judges may depend significantly on regional and local concerns.

Lower courts are the final actor in a game of judicial decision-making and lower court judges have more trial and case experience than courts at higher levels due to the volume of cases that lower courts hear that far exceeds the volume of cases in higher courts. Lower courts' and lower court judges' preferences are largely unknown, but they may vary from those of any other actors discussed here based on the background and experience of the judge, local conditions affecting case facts and case loads, years on the bench, and possibly the influence of political parties of the principals involved in appointing the judge.

### *Interactions.*

The two main interactions analyzed in this dissertation involve first the interaction between the legislature and lower courts and second the interaction between the lower courts and higher courts. In the interaction between the lower courts and the legislature, the lower courts serve as agents of the legislature to carry out the law as intended. In

reaction to the manner in which the agents perform, the legislature may decide to constrain the lower courts or expand their discretion. The legislature's decision to act is political and depends on individual legislators' objectives of pleasing their constituencies and being re-elected as well as to achieving partisan objectives. In the case studies analyzed in this dissertation, legislatures increasingly constrained lower court judges to appear tough on crime and increase their chances of re-election. Once the legislature has constrained the lower courts, the lower courts which may have preferences different than those of the legislature must carry out the legislative mandate. However, as in any delegation, issues of agency shirking and hidden information inform the relationship. When agents don't act accordingly to the legislative will, then the legislature has two possible strategies: do nothing or further constrain the lower courts. The choice depends on the political salience of the issue and pivotal legislators' individual preferences.

In this dissertation, the interaction between legislators and lower courts is the main relationship analyzed. In all three case studies, for political reasons, legislators want to appear tough on crime. Some politicians additionally want to reduce the disparity associated with similarly situated defendants receiving different sentences depending on where the case is decided. In all cases, it is assumed that judges are too soft on crime. To achieve either of the legislators' objectives, legislators constrain the discretion of judicial agents to force them to issue higher sentences, to issue more similar sentences for similar defendants or both. The constraints that legislators impose vary from suggesting what judges should generally do to formally requiring them to render

specific decisions as a result of specific case facts. As will be seen from the federal case study, legislators may constrain all judges in order to get some shirking agents to comply.

In reaction to legislative constraints, lower courts follow legislative mandates or shirk depending on their individual preferences, which may vary among judges. When constraints are mandatory, lower court judges have less room to maneuver without facing appeals from the parties to the criminal action. However, where there are opportunities to shirk or hide information from principals, lower court judges with differing preferences will pursue these opportunities. Although not pursued in this dissertation, the degree to which lower courts and legislators interact may depend on the historic relationship between the two actors and the level of democratic development.

The second interaction studied in this dissertation, but analyzed only in Chapter two involves the relationship between the Supreme Court and the lower courts. Depending on a countries' constitutional structure, supreme courts have varying degrees of influence over lower courts. In some countries, like the United States, the Supreme Court attempts to monitor lower courts by hearing appeals. However, as suggested by McNollgast (1995, 2006), the Supreme Court is unable to effectively monitor all lower courts due to the sheer volume of cases. In some countries, higher courts, such as those in Chile, have the additional powers of assisting in the selection of lower court judges as well as ranking lower courts yearly to determine judges' individual professional prospects.

As in the interaction with the legislature, lower court agents act first by deciding cases based on the facts of the case as well as the law established by the legislature and

the Supreme Court. If litigants are unhappy with the decision, they appeal it to intermediate appeals courts and when there is enough conflict among regional appeals courts or a case is of special interest, supreme courts will decide the issue. The decision made by supreme courts then must be followed by lower courts, although its value as precedent depends on whether the country has a strong common law or civil law origin. In reaction to supreme courts' decisions, judges in lower courts must attempt to apply the standards established by the supreme courts. Arguably if legislatures disagree with supreme courts' decisions affecting lower courts, legislatures could additionally issue further legislative mandates for the lower courts to follow.

Although the principal-agent model fairly describes the interactions between lower courts and some higher law making bodies, these higher bodies have no way to punish lower courts for non-compliance. While legislators can attempt to control lower courts further by drafting more constraining legislation, there is no way to punish judges at the individual level in countries with judicial life tenure. Likewise, while the Supreme Court and courts of appeal may reverse lower court judges, for many judges this is not a real punishment or sanction that changes their behavior. Although not discussed in full in this dissertation, the fact that lower courts can not be meaningfully punished for non-compliance of higher court or legislative mandates calls into question whether these higher law making mandates, especially those labeled mandatory, are real constraints on lower court agents.

**Conclusion.**

This chapter has provided a survey of the literature on principals and agents and described the main actors in the interactions between the legislator and lower courts and between higher courts and lower courts. This chapter, although not providing a formal model, has suggested the strategies that actors may take when judicial agents are constrained and emphasized that various actors at various times have preferences that are not aligned. Although not complete, the principal-agent model provides a useful framework for analyzing the effects of criminal law reform on lower court judges.

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## Chapter 2

# Regulating Judicial Discretion in American Federal District Courts

Does limiting or expanding judicial discretion in federal sentencing cases affect case outcomes? Does it matter whether these restrictions are mandatory or purely advisory? Such questions are part of the larger debate concerning what factors specifically influence judicial decision-makers. The purpose of this chapter is to move the debate toward a specific analysis of the effects of legal regulation on case decisions. This analysis will focus on whether the United States Sentencing Guideline scheme effectively constrained judges when sentencing defendants for federal drug crimes from fiscal years 1999 to 2005. This analysis also will focus on how significant and recent changes in the guideline scheme mandated by Congress and the U.S. Supreme Court affected case outcomes, departure rates, and disparity.

### **2.1. Lower court decision-making.**

Many scholars debate what influences lower court decision-making. Much of the literature on lower court behavior is derived from models used to study the Supreme Court. The vast majority of lower court literature focuses on the interaction between the lower courts and some other political body.<sup>1</sup> Some rational choice scholars focus on the interaction between Congress and lower courts. For these scholars, Congress uses court

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<sup>1</sup> Scholars have even applied attitudinal models to lower court decision-making (Goldman 1966; Ulmer 1962; Goldman and Jahnige, 1985; Carp and Rowland 1983).

size as a means for controlling lower court agents (DeFigueiredo & Tiller 1996) or the Supreme Court (McCubbins, Noll & Weingast 1995).

Other scholars focus on the strategic behavior between lower courts and other higher appellate courts (Romans 1974; Baum 1980; Gruhl 1980; Johnson 1987; Songer 1987; Songer & Sheehan 1990; Songer & Haire 1992; Songer, Segal and Cameron 1994; Benesh 2002) and some even attempt to explain lower court behavior reflecting a fear of reversal by a higher court (Caminker 1994; Elder 1987; Hansen, Johnson & Unah 1995). Klein and Hume (2003), citing a long list of authors who argue that “lower court judges tend to follow specific higher court precedents,”<sup>2</sup> question whether a lower court judge’s fear of reversal is what drives compliance. These authors alternatively suggest that lower court compliance is derived from shortcuts for coping with increased case loads and the desire “to reach legally sound decisions” (at 602; see also Hettinger, Linnquist & Martinek (2006) asserting that Court of Appeals judges do not make decisions based on their fear of reversal from the Supreme Court).<sup>3</sup>

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<sup>2</sup> For this proposition, Klein and Hume (2003: 579) cite the following authors: Songer Segal & Cameron (1994); Romans (1974); Baum (1980); Gruhl (1980); Johnson (1987); Songer (1987); Songer & Sheehan (1990); Songer & Haire (1992); Benesh (2002).

<sup>3</sup> As to what factors might impact lower court compliance, Johnson (1987) suggests three: the original case characteristics such as persuasiveness (see also Wasby 1973; Johnson 1967); additional cases by the Supreme Court in a particular area; and, similarities between cases faced by the lower courts and the Supreme Court. Johnson suggests that lower courts comply with Supreme Court cases, based on varying degrees of the above three alternatives.

Law and case facts also influence judges' decisions (Emmert 1992). Politicians often use specific statutory language to dictate the parameters of judicial discretion. Indeed, legislators determine how judges make decisions in certain types of cases by including language in statutes that explicitly states the standards for review that judges must employ when deciding cases and the types of administrative decisions they may review. To this end, McCubbins et al. (1987, 1989) argue that legislatures use process and procedural constraints in legislation to control agencies and agents. As a result, political officials may limit the amount of discretion they want to delegate to federal judges by stating so in the four corners of a statute or legal regulation.

This chapter explores the principal agent relationship between higher law making bodies, specifically the legislature and the Supreme Court, and lower courts. In this chapter, lower courts serve as agents for two principals, the legislature and the Supreme Court. However, the preferences of lower courts not only differ from those of the principals, but also differ among different judicial circuits and districts. As a result, the higher law making bodies are conducting twelve different games with the circuits and ninety-four different games, if all judicial districts are considered. Lower courts in districts and circuits not only do not often share the preferences of the principals, but lower court preferences differ by court location within districts and circuits. Lower court agents in some regions shirk or hide information more than in other areas. Despite the fact that lower courts' loyalty varies by region, Congress responds enacting only one piece of national legislation. In other words, Congress targets disloyal agents in some courts by enacting a national policy that affects all agents. Consequentially, courts in the different regions respond to legislation in different ways.

This chapter tests how the U.S. Sentencing Guidelines (hereinafter the Guidelines), as an example of legislation that specifies the amount of discretion that judges may exercise, affect judges' decisions in specific cases. This is done in two ways. First, sentencing cases with identical fact patterns where guideline sentencing ranges are applied are compared to cases where guidelines are not applied. Second, *changes* in the sentencing guideline scheme that restricted or expanded discretion are analyzed. For this part of the analysis, the following changes to the guidelines are tested: (1) The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 along with the controversial Feeney Amendment [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 legal changes provide a way to analyze how the lower courts react to two different principals and provide a forum for analyzing whether criminal law reform was a reaction to behavior exhibited by several district courts, rather than all district courts.

## 2.2. The United States Sentencing Guidelines: A test case.

Prior to the guideline system, judges had unfettered discretion to determine criminal sentences and parole boards were largely unconstrained in their ability to reduce these sentences by freeing defendants from prison after only serving part of their sentences. While this system had certain advantages allowing judges to fashion sentences based on defendants' education, work experience, age and likelihood of committing other crimes,<sup>4</sup> many were concerned with the disparate treatment of similarly situated defendants across the nation. This concern, exhibited in the 1950s and 1960s, manifested itself in Congressional debates concerning the federal criminal code and sentencing disparity (USSC 2003; Wilkins, Newton & Steer 1991). This in turn led, in 1975, to the introduction of substantial sentencing reform legislation by Senator Edward Kennedy.

After significant bipartisan efforts, as part of the Sentencing Reform Act of 1984, Congress finally enacted the concept of sentencing guidelines and established the United States Sentencing Commission (hereinafter USSC), an independent agency of the judicial branch. The guidelines, however, did not become effective until 1989 when the Supreme Court found that the USSC and the guidelines were constitutional. In *Mistretta v. United States* (1989), 488 U.S. 361, the Supreme Court held that in establishing the USSC and

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<sup>4</sup> During an interview, one senior status district court judge, who had served both prior to and after the enactment of the federal guidelines, stated he had enjoyed the flexibility of the pre- guideline system allowing him to give young defendants suspended sentences after serving one or two days in county jail so as to dissuade them from committing further crimes. (Interview with senior status District Court judge, May 9, 2007).

allowing it to create sentencing guidelines, Congress had violated neither the doctrines of separation of power nor non-delegation.<sup>5</sup>

In enacting guidelines and amendments, the USSC and the legislature were given almost exclusive authority in determining how judges make decisions for certain types of federal criminal cases. Pursuant to the United States Code, amendments to the guidelines suggested by the USSC become enforceable if Congress does not affirmatively overturn them within a 180 day waiting period.<sup>6</sup> The guidelines enacted by the USSC state specifically how much discretion judges can exercise depending on the fact pattern of particular cases and the role that prosecutors take in advocating guideline departures. It is the purpose of this paper to analyze how effective these legal rules and changes to them were in constraining judges' discretion.

The guidelines and their amendments were applied to approximately 800,000 federal criminal cases between 1989 and 2005,<sup>7</sup> when the Supreme Court in *United States v. Booker*, 125 S.Ct. 738 (2005), found that the guidelines were unconstitutional and rendered their further use to be only advisory, rather than mandatory constraints on district court judges. Until the *Booker* decision, the USSC and Congress specifically chose to limit federal judges' discretion by mandating that judges sentence defendants to specific amounts of time in prison which fall within certain ranges of possible sentences.

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<sup>5</sup> *Mistretta v. United States* (1989), 488 U.S. 361. *Mistretta* was an 8 to 1 decision with Scalia dissenting.

<sup>6</sup> See 28 USC § 994(p).

<sup>7</sup> United States Sentencing Commission, An Overview of the U.S. Sentencing Commission. Available at [www.ussc.gov/general/USSCoverview-2005.pdf](http://www.ussc.gov/general/USSCoverview-2005.pdf).

Although the guidelines limited district court discretion, they also limited the ability of circuit courts to review district court sentences. Most sentences are reached by plea bargains (studied exclusively in this paper) and in most cases defendants waive their rights to appeal to a higher court in the plea bargain itself.

Specifically, lower district court judges determine criminal sentences by using the USSC's sentencing table.<sup>8</sup> The table has two axes: a horizontal axis which determines a defendant's criminal history category and a vertical axis which classifies the severity of a defendant's offense. To determine the sentence of any offense under the guidelines, judges first must determine a defendant's criminal history category. Second, lower court judges must determine the offense level ranging from 1 to 43. The guidelines categorize crimes by type and the offense level is based on whether the crime involved certain

<sup>8</sup> **Table 2.1. Partial depiction of sentencing table in months of imprisonment.**

	<b>Criminal History Category (Criminal History Points)</b>						
	<b>Offense Level</b>	<b>I (0-1)</b>	<b>II (2-3)</b>	<b>III (4,5,6)</b>	<b>IV (7,8,9)</b>	<b>V (10,11, 12)</b>	<b>VI (13 or more)</b>
<b>Zone A</b>	<b>1</b>	0-6	0-6	0-6	0-6	0-6	0-6
	<b>2</b>	0-6	0-6	0-6	0-6	0-6	1-7
<b>Zone B</b>	.	.	.	.	.	.	.
<b>Zone C</b>	<b>27</b>	70-87	78-97	87-108	100-125	120-150	130-162
	<b>28</b>	78-97	78-108	97-121	110-137	130-162	140-185
	<b>29</b>	87-108	97-108	108-135	121-151	140-175	151-188
	<b>30</b>	97-121	108-135	121-151	135-168	151-188	168-210
	<b>31</b>	108-135	121-151	135-168	151-188	168-210	188-235
...	<b>32</b>	121-151	135-168	151-188	168-210	188-235	210-262
<b>Zone D</b>	<b>43</b>	life	Life	life	life	life	Life

Source: USSC.

additional factors, such as the presence of a firearm or a victim. The offense level may be further altered depending on defendant's role in the crime and his acceptance of responsibility.

Once these two determinations have been made, the judge is required to sentence a defendant to a number of months in prison that fall within the sentencing range determined by the intersection of the criminal history and offense level axes of the sentencing table. The discretion delegated to judges for sentencing decisions on particular crimes ranges from sentencing decisions that may vary by as little as six months (ie. 0 to 6 months or 24 to 30 months) to those that may vary by as much as the length of time between 360 months (30 years) to a defendant's natural life. In this way, discretion to sentence is "cabined within a grid of sentencing ranges established by the guidelines" (Campbell and Bemporad 2006: 2) and the legislature upon the recommendation of the USSC determines this range specifically. Furthermore, when particular offenses have statutory minimum or maximum sentences, the statutory limit is generally controlling. However, in certain instances, judges may apply a "safety valve" provision that allows them to sentence below the statutory minimum. Cases in which judges applied sentencing guideline ranges constitute the treatment group in this analysis.

The sentencing guidelines also allow judges to exercise their discretion and depart from the guideline ranges in very limited circumstances.<sup>9</sup> First, according to the

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<sup>9</sup> The only guideline departures analyzed are "judge-driven" departures. It should be noted, however, that there are "prosecutor-driven" departures where prosecutors and not judges must initially ask for the departure by motion. One example of this type of departure exists when prosecutors ask judges to depart downward from the guidelines to reward defendants who substantially assisted the government or to depart upward, issuing (Note: Footnote continues on next page).

guidelines, lower court judges may sentence outside of the fixed ranges due to “specific offender characteristics” including age, education, and socio-economic background.<sup>10</sup>

Although judges may sentence below the guidelines on the basis of these specific offender characteristics, the USSC determined that these factors “are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range.”<sup>11</sup> It should be remembered that the guidelines were originally adopted to avoid disparities in sentences and to treat similar individuals similarly.<sup>12</sup>

Consequently, the USSC suggested that special offender characteristics should not be considered except in certain, more unusual cases.

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a greater sentence, when defendants refused to provide assistance (18 USC section 3553(3)) Substantial assistance departures are warranted *only if* the government requests such a departure by motion and the judge grants the motion. Therefore, whether departures from substantial assistance are warranted is largely driven by prosecutorial, rather than judicial discretion that may vary with regional practices of prosecutors’ offices (Bibas 2005).

<sup>10</sup> Guideline §§5H1.1 to 5H1.12 list the following specific offender characteristics: 1) age, 2) education and vocational skills, 3) mental and emotional conditions, 4) physical condition including drug or alcohol dependence or abuse, 5) employment record, 6) family ties and responsibilities and community ties, 7) role in the offense, 8) criminal history, 9) dependence upon criminal activity as livelihood, 10) race, sex, national origin, creed, religion and socio-economic status, 11) military, civic, charitable or public service, employment related contributions, record of prior good works, 12) lack of guidance as a youth, 13) relief from disability.

<sup>11</sup> See policy statement of Chapter 5, Part H entitled “Specific Offender Characteristics.”

<sup>12</sup> The policy statement included in the original Sentencing Guidelines and incorporated into each yearly edition of the Guidelines in § 1A1.1 Authority, entitled Basic Approach (Policy Statement) states, “Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar conduct by similar offenders.”

Departures may be warranted 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 that should result in a sentence different from that described.”<sup>13</sup> The guidelines include a list of twenty specific reasons allowing judges to depart from the guidelines.<sup>14</sup> Some of these reasons warrant sentences above the sentencing range, some below the guideline sentencing range, and some both above and below the range. One of the most significant of these departure reasons allows judges to depart where there are “meaningful unusual circumstances” justifying the departure.<sup>15</sup> Third, the government and defendants may reach a plea agreement that allows for a sentence outside of the guidelines.<sup>16</sup> However, such plea agreements are *not* binding and the judge has discretion to disregard them entirely.<sup>17</sup> Judge driven departures serve as a control group in this analysis.

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<sup>13</sup> 18 USC §3553b(1). Section 3553 is now used as the legal basis given by district court judges for most departures after *U.S. v. Booker* rendered the guidelines advisory.

<sup>14</sup> The twenty “other” grounds for departure found in guidelines §§ 5K2.1-5K2.21 include: 1) death, 2) physical injury, 3) extreme psychological injury, 4) abduction or unlawful restraint, 5) property damage or loss, 6) weapons and dangerous instrumentalities, 7) disruption of governmental function, 8) extreme conduct, 9) criminal purpose 10) victim’s conduct, 11) lesser harms, 12) coercion and duress, 13) diminished capacity, 14) public welfare, 15) voluntary disclosure of offense, 16) high-capacity, semiautomatic firearms, 17) violent street gangs 18) post sentencing rehabilitative efforts, 19) aberrant behavior, 20) dismissed and uncharged conduct.

<sup>15</sup> USSC Guidelines Manual 2002 at 1697.

<sup>16</sup> Sentencing Guidelines §§6B1.1, 6B1.2.

<sup>17</sup> Sentencing Guidelines §6B1.1. Federal Rules of Criminal Procedure § 11(c)(3)(A).

### **2.3. Changes in the Guideline scheme.**

Not only does this chapter include tests on the effect of the sentencing guideline scheme on sentencing outcomes, but also tests concerning how changes in the law governing this scheme affect sentences, disparity, and departure rates. This is done using interrupted time series to test the applicability of the guidelines after three major changes to the federal guideline scheme described below.

#### **2.3.1. The PROTECT Act/Feeney amendment: legislation restricting judicial discretion.**

On April 30, 2003, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 [the “PROTECT Act”]. Heralded as the most significant amendment to the Sentencing Guidelines since their inception, Congress enacted the PROTECT Act out of a growing concern that judges and prosecutors had increasingly been using departures to avoid the guidelines’ sentencing mandates especially in cases along the southwestern border and in cases involving child exploitation (USSC 2003). In fact, the PROTECT Act was a piece of national legislation specifically targeted at a regional problem. 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’ intent in enacting the sentencing guidelines.<sup>18</sup>

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<sup>18</sup> See USSC (2003), Report to Congress: Downward Departures from Federal Sentencing Guidelines in Response to §401(m) of Public Law 108-21 for an overview of the issues giving rise to the PROTECT Act. Interviews with District Court judges confirmed that prosecutors’ charging practices indeed resulted in unwarranted sentencing disparity and that prosecutors in certain districts were so lenient as to ignore the (Note: Footnote continues on next page).

As enacted on April 30, 2003, the PROTECT Act had four major provisions. First, the act sought to prohibit departures related to crimes against children and sex offenses only. Second, it changed the standard of review by appellate courts for “sentencing matters” to *de novo*, while continuing the standard of clearly erroneous for factual determinations. Third, the controversial Feeney Amendment required district courts to provide specific written reasons for departures (See Schanzenbach 2005, for a complete discussion of the Feeney Amendment).<sup>19</sup> Fourth, it enhanced the pre-existing requirements that courts report on sentences to the USSC. These amendments were effective April 30 and May 30, 2003.

Although the PROTECT Act/Feeney Amendment enacted some changes to the guidelines’ departure scheme, Congress directed that the USSC thoroughly review all sentencing practices and the intent of the legislature and make its own recommendations as to changes in the guidelines. On October 8, 2003, the USSC adopted emergency amendments effective October 27, 2003. It was the amendments that the USSC proposed with the acquiescence of Congress as well as actions taken by U.S. Attorney General John Ashcroft in conjunction with the PROTECT Act that substantially changed the guideline departure system.

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guidelines’ intent and purposes (Interview 7401, May 7, 2007; Interview 7403, May 11, 2007).

<sup>19</sup> Although the Act placed more rigid restrictions on reporting departures, the USSC had always had a Congressional mandate to collect and disseminate data on sentences imposed and district court judges’ use of and reasons for departures (See 28 USC §§994(w), 995(a)(8)).

To meet Congressional concerns regarding departures, the USSC eliminated nine grounds for departures. Two of these grounds related to criminal history categories and two related to departures based on aberrant behavior. The remaining five “forbidden” departures included: “1) defendant’s acceptance of responsibility for the offense; 2) defendant’s aggravating or mitigating role in the offense; 3) the defendant’s decision, by itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; 4) the defendant’s fulfillment of restitution obligations only to the extent required by law; and 5) the defendant’s addiction to gambling.” (USSC 2003, p. vi, 18-19). The USSC amendments also increased restrictions for using departures based on multiple factors, defendant’s family ties and responsibilities, conduct of the victim, coercion and duress, and diminished capacity.

While the PROTECT Act required the USSC to draft extensive amendments to the guideline system, it also directed the Department of Justice to enact detailed policies and procedures to ensure that the Guidelines would be followed and that assistant U.S. attorneys oppose departures if they “are not supported by the facts and the law” (USSC 2003: 10). Ashcroft also required attorneys to affirmatively oppose sentencing adjustments and downward departures that were not consistent with the facts and the law and to follow a more rigorous appeals protocol.

Most controversially as directed by Congress in the PROTECT Act, Ashcroft established a system for reporting to Congress how individual federal judges handled sentencing. One commentator claims that “that last mandate to monitor downward departures was particularly worrisome to judges, who saw it as an intimidation tactic and a serious encroachment on the independence of the judiciary” (Christensen 2005). In

fact, several district court judges expressed anger at the PROTECT Act and one judge saw it as a direct threat from a co-equal branch of government.<sup>20</sup> Chief Justice William H. Rehnquist and the U.S. Judicial Conference opposed the Feeney amendment publicly. It has been suggested that the Supreme Court's subsequent decision in *Booker* may have been motivated in part by Congress' strict monitoring of judges under the PROTECT Act (Christensen).

On September 22, 2003, Ashcroft distributed a more detailed memorandum regarding policy changes consistent with the PROTECT Act (Ashcroft memorandum, September 22, 2003). This memorandum re-iterated that prosecutors should allow departures in only very "rare" circumstances and that prosecutors could not "fact bargain" or accept a plea agreement "that results in the sentencing court having less than the full understanding of all readily provable facts relevant to the sentence" (at 5).

### **2.3.2. *Blakely* and *Booker*: Supreme Court cases augmenting judicial discretion.**

As stated above, the federal sentencing guidelines became effective as of 1989. From that time until the decision in *United States v. Booker* on January 12, 2005, the guidelines were deemed mandatory constraints on judicial decision-making. The mandatory nature of the guidelines was called into question in the Supreme Court case of *Blakely v. Washington* (2004),<sup>21</sup> which challenged the Washington state sentencing guideline scheme. In this case, the defendant had pleaded guilty to kidnapping his estranged wife. The state recommended a sentence within the guideline range of 49 to 53

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<sup>20</sup> Interview 7303, November 29, 2007).

<sup>21</sup> The federal guidelines were previously called into question in the dissent in *Apprendi v. New Jersey* (2000) described *infra*.

months. However, after hearing the wife's account of the kidnapping, the judge sentenced defendant to 90 months, which was 37 months greater than the maximum prescribed by the guidelines. After the defendant objected to this increase, the judge held a three day bench hearing to take testimony, but still chose to uphold the exceptional sentence based on deliberate cruelty.

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). The Court applied *Apprendi* to the defendant's case despite the fact that it involved a plea bargain rather than a jury trial because defendant had not admitted the facts leading to the judge's elevated sentence in the plea bargain.

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 as mandatory constraints. In her dissent, Justice O'Connor, joined by Justice Breyer, emphasized the negative impact that *Blakely* would have on the *federal* guideline system. O'Connor stated:

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the state and federal judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you –dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* to the present context will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional;

for as residents of “*Apprendi*-land” are fond of saying, “the relevant inquiry is one not of form but of effect.” The “effect” of today’s decision will be greater judicial discretion and less uniformity in sentencing.

*Blakely* at 420. [References omitted]. Although *Blakely* did not challenge the federal guidelines, after this decision, many district court judges issued sentences holding that the federal guidelines were unconstitutional although never rendered so in *Blakely* itself (Memorandum of Land 2004) enumerating district courts’ decisions that questioned the constitutionality and continued application of the guidelines in individual cases immediately following *Blakely*).

Sixth months after *Blakely*, in *United States v. Booker* (2005), the U.S. Supreme Court decided that the Sixth Amendment right to a jury trial also applied to cases involving the federal sentencing guidelines.<sup>22</sup> *Booker* involved two lower court decisions. In defendant Booker’s case, the Supreme Court ruled that the lower court had violated *Apprendi* by sentencing the defendant to prison time greater than the guideline range based on additional findings made by the judge under the preponderance of the evidence standard. In defendant Fanfan’s case, the lower court refused to add time to defendant’s sentence despite the findings of additional facts allegedly warranting a greater sentence because of *Blakely*. In its decision in *Booker*, the U.S. Supreme Court affirmed that the *Blakely* decision did indeed apply to the federal guidelines and reaffirmed the *Apprendi* rule that any additional facts supporting a sentence greater than

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<sup>22</sup> It was no coincidence that *Booker* was decided six months after the *Blakely* decision. After lower court 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).

the federal guideline maximum must be admitted by defendant in a plea agreement or proved to a jury beyond a reasonable doubt.

While *Booker* held that the guidelines violated the Sixth Amendment right to a jury trial, this did not result in the death of the federal guideline system. Instead, the justices reasoned that severing the section 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. In essence, the justices argued that faced with the Sixth Amendment challenge, Congress would *not have intended* to invalidate the entire federal guideline scheme, but would seek to preserve it in any way possible. For the justices in *Booker*, such preservation was only possible by rendering the scheme advisory.<sup>23</sup> The Supreme Court's conversion of the guidelines to advisory constraints also ended the Congressional requirements of reporting adverse departures of individual sentencing judges to Congress as required by the PROTECT Act (Christensen 2005).

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 (18 U.S.C. §3553(a)). Further, the Supreme Court mandated a "reasonableness" standard for appellate review of district court sentences. Subsequent to the decision in *Booker*, the definition of reasonableness was addressed by

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<sup>23</sup> *U.S. v. Booker* at S.Ct. 757. District court judges have emphasized the conversion of guidelines from mandatory to advisory constraints. In sentencing hearings I observed on May 9 and May 18, 2007 in the District Court for the Southern District of California, judges, prosecutors and defense attorneys always prefaced reference to guidelines as "advisory" (ie. "the advisory guidelines").

the circuit courts in a variety of conflicting and controversial ways. Finally, in *Kimborough v. United States*<sup>24</sup> and *Gall v. United States*<sup>25</sup> the Supreme Court expanded district court discretion by providing guidance on the meaning of reasonable sentences. Although outside of the scope of this paper, the Supreme Court's 2007 decisions in *Kimborough* and *Gall* broadened district court discretion and signaled that after *Booker*, courts of appeals should give district courts' decisions great deference.<sup>26</sup>

#### **2.4. Testing the effects of the Sentencing Guideline scheme.**

A post-test only research design with matching (Shadish, Cook & Campbell 2002) is used to test how case decisions differ depending on whether a judge applied guideline ranges or departed from them based on the judges' own discretion. The post-test research design is appropriate when pre-test data is unavailable as in this instance where there is little sentencing data available prior to the enactment of the guidelines and no pre-test data on the specific fact pattern analyzed here.<sup>27</sup> Because a "lack of pretest

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<sup>24</sup> 552 U.S. \_\_\_\_ (2007).

<sup>25</sup> 552 U.S. \_\_\_\_ (2007).

<sup>26</sup> In *Kimborough*, the Supreme Court held that a district court was justified in sentencing outside the guidelines and finding that the controversial crack/powder disparity was at odds with §3553(a). The Supreme Court further held that because the guidelines were no longer mandatory under *Booker* there was no longer any reason to believe that the disparate ranges given for crack and powder cocaine offenses were likewise mandatory. In *Gall*, the Supreme Court held that while the difference between a sentence and the guideline range was relevant, courts of appeals must review all sentences (whether inside or outside of the guidelines) under a "deferential abuse of discretion standard" (at 2).

<sup>27</sup> In 1991, the USSC conducted a preliminary analysis of the effect of the sentencing guidelines on sentences. This analysis compared sentences for several crimes based on specific fact patterns prior to the guidelines and after the guidelines. The sample of (Note: Footnote continues on next page).

causes lack of knowledge about selection biases,” researchers attempt to avoid or decrease this bias by forming treatment and control groups through “matching” on likely “correlates of the posttest” (p. 118).

To examine the effect of the legal constraints on judicial discretion found in the guidelines, case facts are matched and thus controlled for in order to specifically test the effect of the law on sentencing outcomes (See, Appendix to the dissertation using Pennsylvania sentencing data to explain more generally the procedures for using pattern matching in other research on judicial decision-making). Two drug trafficking crimes that differ only as to drug amount are used for the analysis. The first crime [hereinafter drug crime or amount #1] involves smaller quantities of four drugs (cocaine, heroin, marijuana, and methamphetamine) than the second crime [hereinafter drug crime or

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guideline cases was very small. The USSC analyzed cases involving heroin and cocaine distribution that were similar to cases analyzed here. However, unlike the cases analyzed in this chapter, the drug amounts were smaller (USSC 1991). The results of the pre-guideline analysis by the Sentencing Commission was as follows:

**Table 2.2. Pre-guideline case statistics.**

Statistic	Heroin Distribution (100g – 400g)	Cocaine Distribution (500g – 2kg)
Minimum sentence	0.00	0.00
Maximum sentence	180.00	108.00
Mean	40.18	31.66
Standard Deviation	40.17	22.92
N	40	81

Although not a perfect pre-test, the above results are instructive for a general comparison of pre-guideline sentencing, showing that the standard deviation and thus variance of sentencing decisions was fairly significant prior to the guidelines.

amount #2].<sup>28</sup> For each drug amount and each year,<sup>29</sup> the cases are subdivided into a treatment and a control group (See Table 2.4). The treatment refers to the application of the guideline tables to the cases. The control group is defined by the lack of treatment through the non-application of the guideline ranges due to judge driven departures. The post-test observations consist of the average sentence for each drug amount, the variance of case outcomes, and an analysis of left and right censorship of the guideline versus non-guideline cases.

**Table 2.4. Descriptions of groups tested with identical fact patterns**

Group	Treatment or control	Description
Group #1	Treatment	Guidelines applied
Group #2	Control	No Guidelines applied because district court judges used discretion to depart

The two groups of cases analyzed are derived from federal sentencing cases, using data bases created by the USSC and deposited with the Inter-University

<sup>28</sup> The difference in drug amounts for the two crimes is as follows:

**Table 2.3. Drug amounts for two crimes analyzed.**

DRUG AMOUNT	HEROIN	COCAINE	METHAMPH-ETAMINE	MARIJUANA
1	700 G to < 1 KG	3.5 to < 5KG	350G to < 500G	700KG to < 1,000KG
2	1 to < 3 KG	5 to < 15KG	500G to <1.5 KG	1,000KG to < 3,000KG

These amounts have not changed between 1998 and 2005, the period studied. See 1998 to 2005, USSC Guideline Manuals, §2D1.1. available at <http://www.ussc.gov/guidelin.htm>.

<sup>29</sup> Separate tests for each year were conducted, rather than grouping all of the cases together for all years in order to determine if there were any changes or patterns in sentencing across time.

Consortium of Political and Social Research (ICPSR).<sup>30</sup> For the post-test analysis, out of nearly a half a million district court cases, there are a total of 1,429 drug distribution cases. Out of these cases, 1,216 cases had the fact pattern described as Group #1, and 213 cases involved facts described in Group #2.

*Hypotheses and Predictions.*

The two groups of cases, allow for several hypotheses and predictions as follows:

*Mandatory Guidelines Hypotheses:*

H<sub>0</sub> = Mandatory U.S. Sentencing Guidelines do *not* constrain district court judges.

H<sub>1</sub> = Mandatory U.S. Sentencing Guidelines *do* constrain district court judges.

*Advisory Guidelines Hypotheses:*

H<sub>0</sub> = Advisory U.S. Sentencing Guidelines do *not* constrain district court judges.

H<sub>1</sub> = Advisory U.S. Sentencing Guidelines *do* constrain district court judges.

These hypotheses lead to specific predictions which if true would confirm that judges act differently when their discretion was constrained by the Sentencing Guidelines as compared to when they were allowed to depart. The predictions are as follows:

If the U.S. Sentencing Guidelines mandatory or advisory sentencing ranges are applied:

*Prediction 1:* Judges will sentence the majority of all defendants not only within the guideline range, but also to the very minimum of that range,<sup>31</sup> whereas, when judges depart from the guidelines, judges will not sentence the majority of defendants to the minimum (0 months) of possible sentences.

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<sup>30</sup> The USSC's datasets were entitled "Monitoring Federal Criminal Sentences" study numbers 3106 for 1999, 3496 for 2000, 3497 for 2001, 4110 for 2002, 4290 for 2003, and 4630 for 2003 and 2004. Previous quasi-experimental research results for the years 1999 to 2003 can be found at Tiede (2007).

<sup>31</sup> Seventy months for drug amount #1 and 87 months for drug amount #2.

The logic behind this first prediction is that lower court judges have different and distinct preferences from those of Congress. Lower court judges prefer not to have their discretion constrained by Congress.<sup>32</sup> To voice this discontent and perhaps to exhibit a generally more case specific approach towards crime than that desired by elected politicians, judges who apply the sentencing table ranges will consistently choose the minimum sentence allowed by the sentencing guideline ranges. For judges who do make the effort to depart, they should do so in a way to make their efforts worthwhile. Therefore, it is not expected that judges would depart by a sentence that is only one or two months below the guideline minimums. Likewise, the majority of judges who do depart will not, however, choose a sentence of zero or effectively acquit defendants because to do so would represent an approach to crime that is too soft or liberal for most judges.

*Prediction 2:* The average sentence under the guideline ranges will be longer than the average sentence for identical cases where the guideline ranges are not applied. Deviations of the actual outcomes from the predicted outcomes will be negative and significant for non-guideline range cases and positive and significant for guideline cases.

The logic behind this prediction is that when judges apply guideline ranges the sentences will be higher than when they depart. This prediction is based on the belief that legislators' desire to appear tough on crime in order to be re-elected and thus enact legislation that raises sentence length. Preferences of politicians for higher sentences

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<sup>32</sup> During some interviews district court judges said that they did not like Congress constraining their sentencing discretion as Congressmen do not have sentencing or criminal law expertise and re-election is their main motivation for enacting changes in sentencing law (Interview 7401, May 7, 2007; Interview 7403, May 9, 2007; Interview 404, July 6, 2007).

should diverge from preferences of most federal judges who analyze the law and facts on a case by case basis.

*Prediction 3:* The standard deviation of cases sentenced within the guideline ranges will be smaller than the standard deviation of cases sentenced outside these ranges. Moreover, the distribution of sentences for guideline cases will be left (lower) censored at the minimum guideline range amount.

This final prediction is based on one of the underlining intentions of the guideline system. Congress enacted sentencing guidelines in general to reduce disparities in sentences of identical or similar crimes. Therefore, the variance of sentences when guideline table ranges are applied should be much less than those sentences when judges depart. Further, the prediction of the left censorship of cases in which judges do not depart is based on the general belief that judges would follow the guidelines as Congress intended, but sentence on the low end. If the predictions are validated by the tests, this will show that guidelines matter and effectively constrain judges and the guideline minimums and maximums serve as effective barriers against unfettered judicial discretion.

## **2.5. Testing the effects of changes in guideline laws.**

The effects of changes in the law on sentence length are tested using an interrupted time series analyses. The hypotheses for the changes in law are as follows:

*Changes in Guideline Scheme Hypotheses 1:*

For each legal amendment (1. PROTECT ACT, 2. *Blakley v. Washington*, and 3. *U.S. v. Booker*):

$H_0$  = The legal amendment did *not* change district court case sentencing outcomes.

$H_1$  = The legal amendment *did* change district court case sentencing outcomes

The basic regression model for this hypothesis is:

$$\text{SENTENCE LENGTH} = \beta_0 + \beta_1\text{PROTECT} + \beta_2\text{Blakely} + \beta_3\text{Booker} + \beta_4\text{Depart} + \beta_5(\text{vector of year dummies}) + \beta_6(\text{vector of circuit dummies}) + \varepsilon$$

Where,

SENTENCE LENGTH= the sentences defendants received in months in prison less the guideline minimum.

$\beta_1\text{PROTECT}$  = The PROTECT Act (0 if district court case occurred before the Act, 1 if after Act).

$\beta_2\text{Blakely}$  = The decision in *Blakely v. Washington* (0 if district court case occurred before court decision, 1 if after).

$\beta_3\text{Booker}$  = The decision of *U.S. v. Booker* (0 if district court case occurred before court decision, 1 if after).

$\beta_4\text{Depart}$  = Departure type (0 if no departures and guideline sentencing ranges followed, 1 if substantial assistance departure, 2 for all other non-substantial assistance departures).

$\beta_5$  = Vector of year dummies.

$\beta_6$  = Vector of circuit dummies (1 through 12 correspond to each circuit. The 9<sup>th</sup> Circuit is left out in the regression).

$\varepsilon$  = error term.

The first regression uses data censored for data points existing prior to the PROTECT Act and before *Blakely* to isolate the effect of the PROTECT Act on sentences. The second regression uses all of the legal amendments as independent variables and all of the data.

*Changes in Guideline Scheme Hypotheses 2:*

For each legal amendment (1. PROTECT ACT, 2. *Blakley v. Washington*, and 3. *U.S. v. Booker*):

$H_0$  = The legal amendment did *not* change the disparity of sentencing decisions.

$H_1$  = The legal amendment *did* change the disparity of sentencing decisions.

*Changes in Guideline Scheme Hypotheses 3:*

For each legal amendment (1. PROTECT ACT, 2. *Blakely v. Washington*, and 3. *U.S. v. Booker*):

$H_0$  = The legal amendment did *not* change the rate of departures used by judges.

$H_1$  = The legal amendment *did* change the rate of departures used by judges.

For changes in guideline hypotheses two and three, disparity (measured by standard deviation) and departure rates are compared for the following three groups: 1) decisions prior to the PROTECT Act; 2) decisions occurring on and after the PROTECT Act, but prior to *Blakely*; and 3) decisions occurring on and after *Blakely*. For the graphic analysis of these two hypotheses, *Blakely* rather than *Booker* is used because these two cases were decided so close together and some district court judges changed their behavior immediately after *Blakely*.

**2.6. Results: guideline scheme hypotheses.**

The results reject the mandatory and advisory null hypotheses and validate the alternatives that the guideline schemes, whether mandatory or advisory, *do* constrain district court judges. The results confirm the predictions delineated at the beginning of this paper. First, when judges are constrained by the guidelines, they sentence defendants to more time in prison, than when not constrained by the guidelines. For example, in comparing the two groups of cases in 2004, guideline sentences were higher than the sentences for the departure. When guidelines were applied this group had an average sentence of 71.32 months. The group where departures were applied had an average sentence of 54.80 months with a standard deviation of 11.69. In fact, on average, district

court judges sentenced defendants to almost 1.4 to 2.8 years more time when their cases were sentenced inside as compared to outside the guideline ranges (See Table 2.5). Similarly, for cases in 2004 with drug amount #2, judges sentenced defendants on average to 88.33 months when the guideline tables were applied as compared to an average of 61.40 months when guideline tables were not applied. Again, even with a higher guideline range allowed due to greater quantities of drugs, judges still sentenced defendants to approximately two to four years more time in prison when the guidelines were applied as compared to when they were not applied. This pattern in fact holds true for all of the cases from 1999 to the post-*Booker* cases and no differences are seen in the period directly after either the PROTECT Act, *Blakely* or *Booker*.<sup>33</sup>

**Table 2.5. Results of Post-Tests (1999-2005).**

Drug Amount	Treatment Guideline Application	Post-Tests by year sentence average (standard deviation)						
		1999	2000	2001	2002	2003	2004	2005
1	<i>Guidelines</i>	71.06 (3.29)	72.17 (4.49)	72.30 (4.90)	71.53 (3.97)	71.07 (3.50)	71.32 (3.78)	71.67 (4.24)
	<i>No Guidelines</i>	50.43 (11.24)	54.67 (14.08)	39.30 (14.85)	43.58 (15.76)	52.41 (13.15)	54.80 (11.69)	51.86 (13.56)
2	<i>Guidelines</i>	87.78 (1.97)	87.23 (1.38)	87.46 (1.84)	89.43 (5.26)	87.72 (2.41)	88.33 (3.39)	88.61 (4.15)
	<i>No Guidelines</i>	65.33 (11.93)	52.33 (22.84)	40.75 (11.76)	62.56 (8.66)	60.86 (17.61)	61.40 (11.27)	65.09 (18.48)

Note: Sentences are average sentences in months in prison.

Second, the prediction concerning the distribution of minimum sentences was also borne out by the tests. The sentencing guideline range for the crime studied with drug amount #1 was 70 to 87 months which allowed judges the discretion to choose sentences

<sup>33</sup> Statistics on record with author.

within a seventeen month window. The guideline range for the same crime with drug amount #2 was 87 to 108 months allowing judges the discretion to choose sentences which could vary as much as twenty-one months. Despite this seventeen to twenty-one month spread of sentencing choices for guideline cases, district court judges overwhelmingly sentenced defendants to the minimum amount of time allowed under the guidelines regardless of what the guideline stated minimum was. For the crimes analyzed for 2004, for drug amount #1, district court judges sentenced defendants to the minimum sentence of 70 months in prison, 84% of the time. Similarly, in 2004, for drug amount #2, judges sentenced defendants to the minimum sentence of 87 months, 83% of the time. As indicated in Table 2.6, this pattern was repeated for all of the years examined, with the percent of sentences at the minimum no less than 73% of the time and sometimes as high as 95% of the time.

**Table 2.6. Percent sentenced at minimum by group (1999-2005)**

Year	Drug Amount	Guideline Applied	Guideline Not Applied: ( Departures)
		% at 70 or 87 (expected 100%)	% at 0 (expected 0%)
1999	1	86	0
1999	2	82	0
2000	1	74	0
2000	2	95	0
2001	1	80	0
2001	2	92	0
2002	1	76	0
2002	2	73	0
2003	1	88	0
2003	2	90	0
2004	1	84	0
2004	2	83	0
2005	1	82	2
2005	2	83	5

Note: “% at” refers to the percent of cases in which sentences in each group were 0, 70 or 87 months in prison.

A related prediction about whether judges sentence defendants to the minimum amount concerned left censorship of guideline cases as compared to non-guideline cases. The guideline cases were left censored at the minimum of the guideline range (See Figures 2.1 and 2.3). Conversely, for non-guideline cases, judges, as we would expect, did not sentence the majority of the defendants to the minimum possible sentence of zero months in prison. For cases based on other departures, there were no sentences of zero months in prison for 1999 to 2004. In 2005, district court judges sentenced defendants in this category to zero months in prison 2 to 5 percent of the time (See Table 2.6).

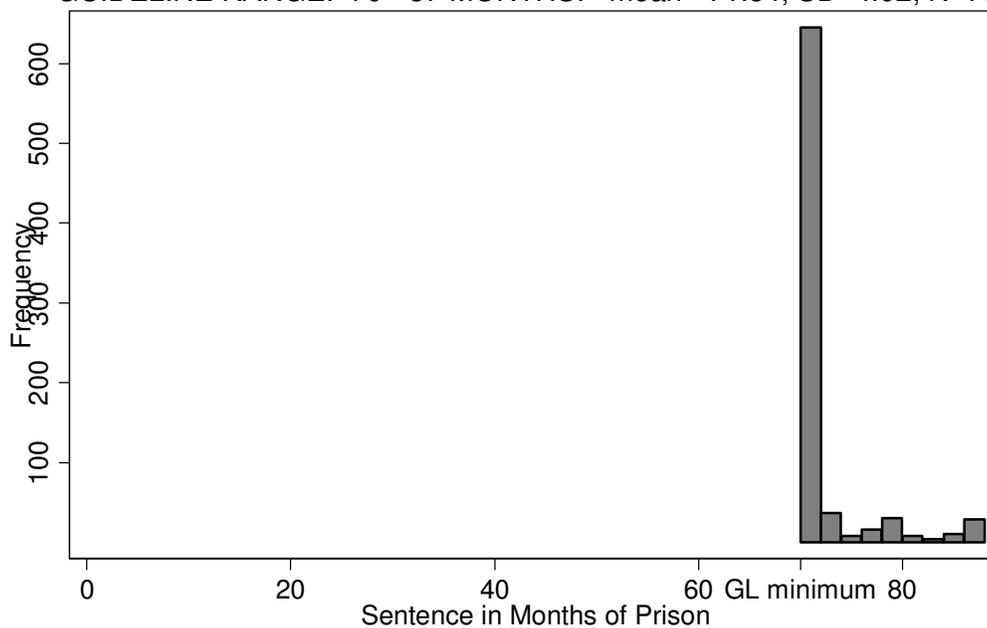
Third, the predictions regarding the standard deviation and distribution of cases were also confirmed. The standard deviation of total sentences for guideline cases was considerably smaller than the standard deviation for non-guideline cases in all of the tests. Conversely, sentences had a greater standard deviation and thus varied more widely when judges were not constrained by the guidelines (Table 2.5; compare Figure 2.1 with 2.2 and Figure 2.3 with 2.4) for the variance of case decisions for the two drug amounts and three groups studied). As seen in Table 2.5, for 2004, the standard deviation, for cases sentenced under the guidelines for drug amount #1 and #2, was about three times smaller than those not sentenced under the guidelines. In fact, in all instances examined, the standard deviation for cases sentenced under the guidelines was considerably smaller than that for cases sentenced outside of the guidelines. Even after *Booker*, this result persisted. Cases where *advisory* guidelines were applied had considerably less variance than cases with observed departures (See Table 2.5).

Fourth, as predicted there were very few cases where judges departed that they assigned a sentence that was very close to the guideline minimum. For example, for drug

amount #1, there were only two cases where judges departed from the guideline minimum by less than five months. In one case, the judge gave a sentence of sixty-six months and in one case the judge gave a sentence of sixty-eight months. Likewise for drug amount #2 there were only two cases, where the judge departed from the guideline minimum by less than five months. In one, the judge sentenced defendant to eight-three months and in the other eighty-four months. Therefore, as predicted, there are very few judges who will make the effort to use departures, when the departure sentence diverges from the minimum by only a few months.

### Sentences for Drug Quantities #1. Guideline Range Cases Only

GUIDELINE RANGE: 70 - 87 MONTHS: mean= 71.54; SD=4.02; N=787



**Figure 2.1. Drug amount #1: guideline range cases only (1999-2005).**

### Sentences for Drug Quantities #1. Guideline and Departure Cases

GUIDELINE RANGE 70 - 87 MONTHS: mean=68.67; SD=9.61; N=912

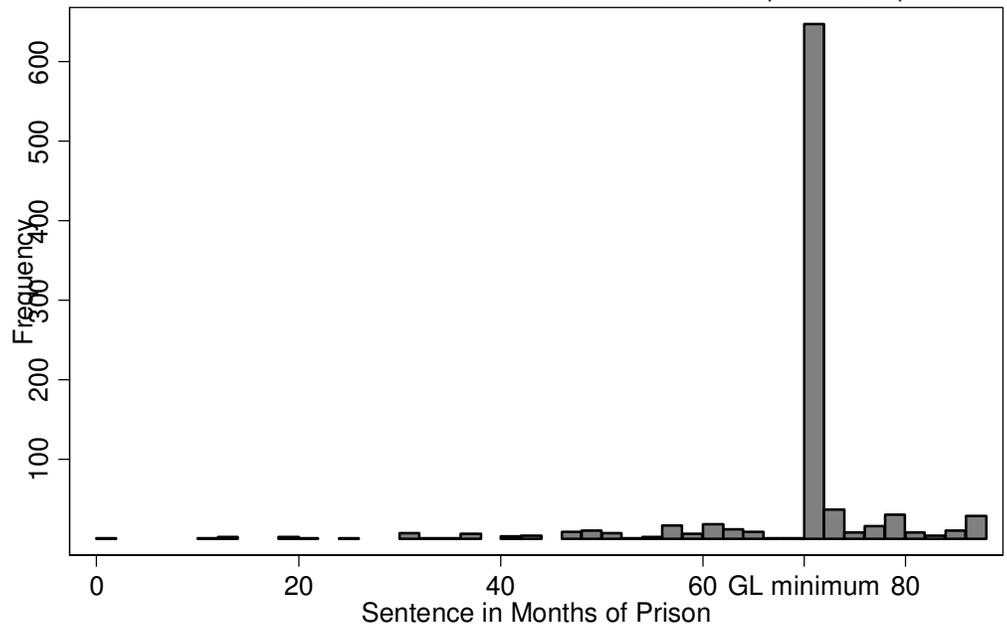


Figure 2.2. Drug amount #1: all cases (1999-2005).

### Sentences for Drug Quantities #2. Guideline Range Cases Only

GUIDELINE RANGE 87 - 108 MONTHS: mean= 88.24; SD=3.48; N=429

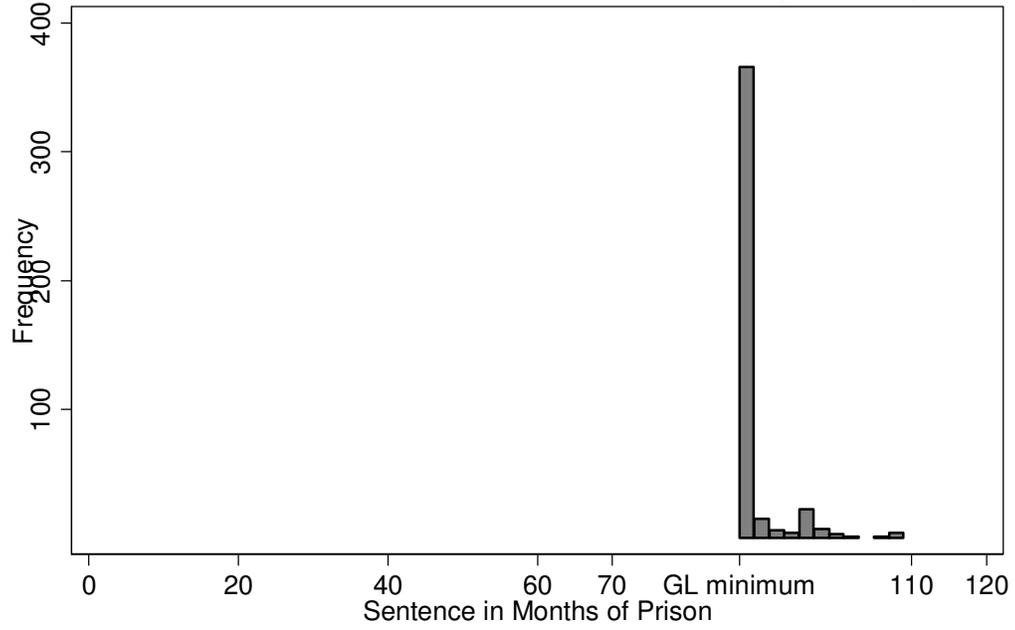
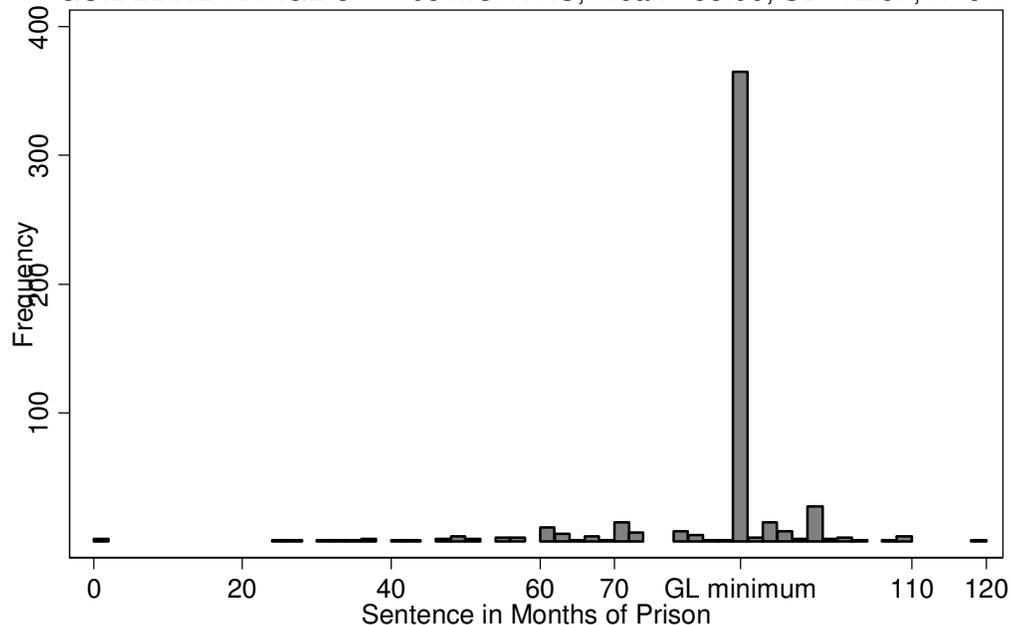


Figure 2.3. Drug amount #2: guideline range cases only (1999-2005)

### Sentences for Drug Quantities #2. Guideline and Departure Cases

GUIDELINE RANGE 87 - 108 MONTHS; mean= 83.06; SD=12.57; N=517



**Figure 2.4. Drug amount #2: all cases (1999-2005).**

As seen by a summary of sentencing averages and standard deviations by group, presented in Table 2.5, for each fiscal year from 1999 to 2005, as well as subdivisions of these cases decided directly after *Blakely* and *Booker*, the results for all items tested remain consistent *within* the two groups analyzed. For the guideline categories, the sentence means and small variance remain consistent for all of the years tested. For departure cases, the sentence means and considerably larger variance of outcomes remain consistent. This conclusion was supported by district court judges interviewed in 2007 and 2008, who claimed that after *Booker*, they still follow the guidelines most of the time and in the same manner as prior to *Booker*.<sup>34</sup>

<sup>34</sup> District court judge interviews held between May 2007 and February 2008.

## 2.7. Results: changes in guideline law hypotheses.

Besides testing whether the written guidelines specifying judicial discretion affect sentences, the direct impact of the PROTECT Act and the Supreme Court decisions in *Blakely* and *Booker* on sentence length, departure rates, and disparity, was analyzed. In the first regression, the effect of the PROTECT Act was isolated by censoring the data to include cases prior to the PROTECT Act and prior to *Blakely*. The regressions results are as follows:

### 1. For Drug Amount #1

$$\text{SENTENCE LENGTH} = 0.59 + -0.15 \text{ PROTECT} + \mathbf{-11.50} \text{ Departure} + \beta_3(\text{years}) \\ (1.79) \quad (1.09) \quad (0.42) \\ + \beta_4(\text{circuits}) + \varepsilon$$

N = 589. Adj. R<sup>2</sup> = 0.58.

Significant coefficients in bold; standard deviations in parentheses.

### 2. For Drug Amount #2

$$\text{SENTENCE LENGTH} = 2.27 + -2.69 \text{ PROTECT} + \mathbf{-14.35} \text{ Departure} + \beta_3(\text{years}) \\ (2.61) \quad (1.64) \quad (0.57) \\ + \beta_4(\text{circuits}) + \varepsilon$$

N = 322. Adj. R<sup>2</sup> = 0.71.

These results show that the PROTECT Act had no statistically significant effect on the sentence length. Instead, the only statistically significant determinant of sentence length was the judges' decision to depart or not, which is embedded in the original Guideline scheme discussed at the beginning of this paper (Appendix Table A.2.1 lists the coefficients for all of the variables).

In the second regression, the effect of all three legal changes is tested using all of the data. For sentence length, the changes in the law had no effect on sentence length for either drug type. The results are as follows:

1. For Drug Amount #1

$$\text{SENTENCE LENGTH} = \mathbf{0.42} + -0.16\text{PROTECT} + 0.58\text{Blakely} + 1.69\text{Booker} + \\ (1.84) \quad (1.17) \quad (0.91) \quad (1.92) \\ -\mathbf{10.55}\text{Departure} + \beta_5(\text{years}) + \beta_6(\text{circuits}) + \varepsilon \\ (0.33)$$

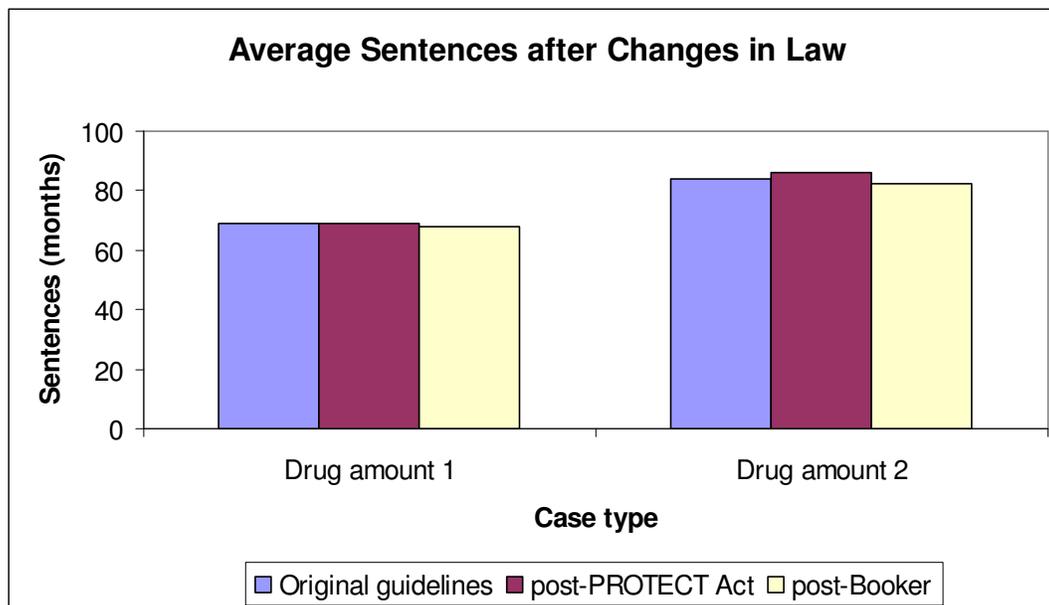
N = 912. Adj. R<sup>2</sup> = 0.56. Significant coefficients in bold; standard deviations in parentheses.

2. For Drug Amount #2

$$\text{SENTENCE LENGTH} = \mathbf{1.90} + -2.69\text{PROTECT} + -0.55\text{Blakely} + 2.43\text{Booker} + \\ (3.28) \quad (2.11) \quad (1.40) \quad (3.70) \\ -\mathbf{13.02}\text{Departure} + \beta_5(\text{years}) + \beta_6(\text{circuits}) + \varepsilon \\ (0.52)$$

N = 517. Adj. R<sup>2</sup> = 0.59.

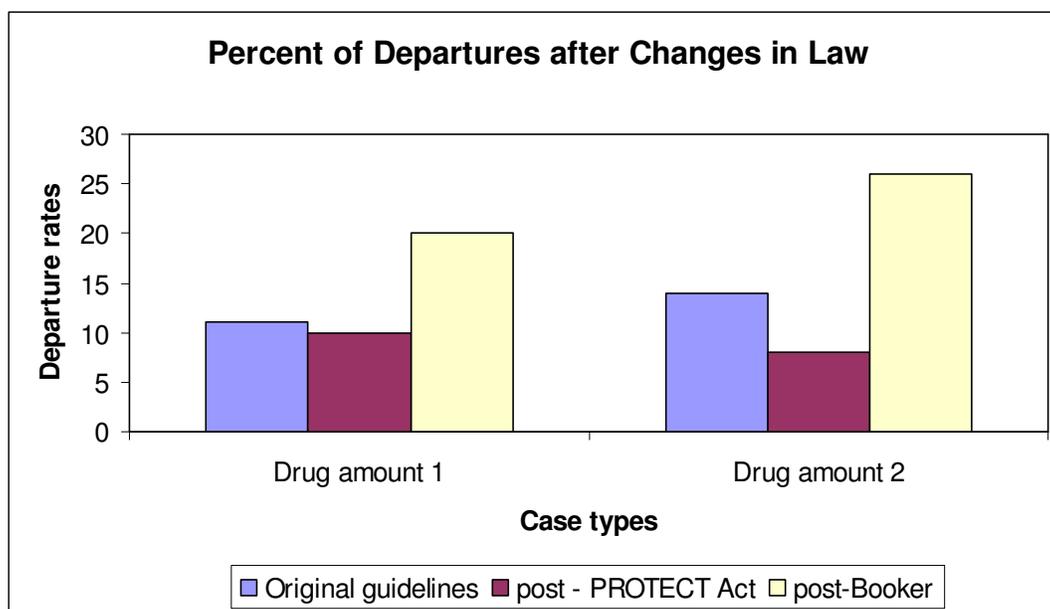
As shown by the above two regressions, whether judges depart from the guidelines has the largest impact on sentence length. None of the legal changes had any statistically significant effect on sentence length. The full regressions and coefficients on the circuits can be found at Appendix Table A.2.2. These results are confirmed by graphs in Figure 2.5 indicating sentence length for the entire data base for each drug type after each of the three events.



**Figure 2.5. Average sentences after changes in law.**

While the above results show that the three legal changes had little to no effect on sentence length, what effect did the legal changes have on other case sentencing attributes? To determine the effect of the legal changes on departure rates (Changes in Guideline Scheme, Hypothesis 2), rates of departure for three periods were explored to isolate the effect of each legal change on departure rate. As seen in Figure 2.6, for drug amount #1, judges departed from the guidelines about 10.71% prior to the PROTECT Act, 9.64% after the PROTECT Act but prior to *Blakely*, and 19.81% after *Blakely*. The patterns of these results were repeated for drug amount #2. As seen in Figure 2.6 for

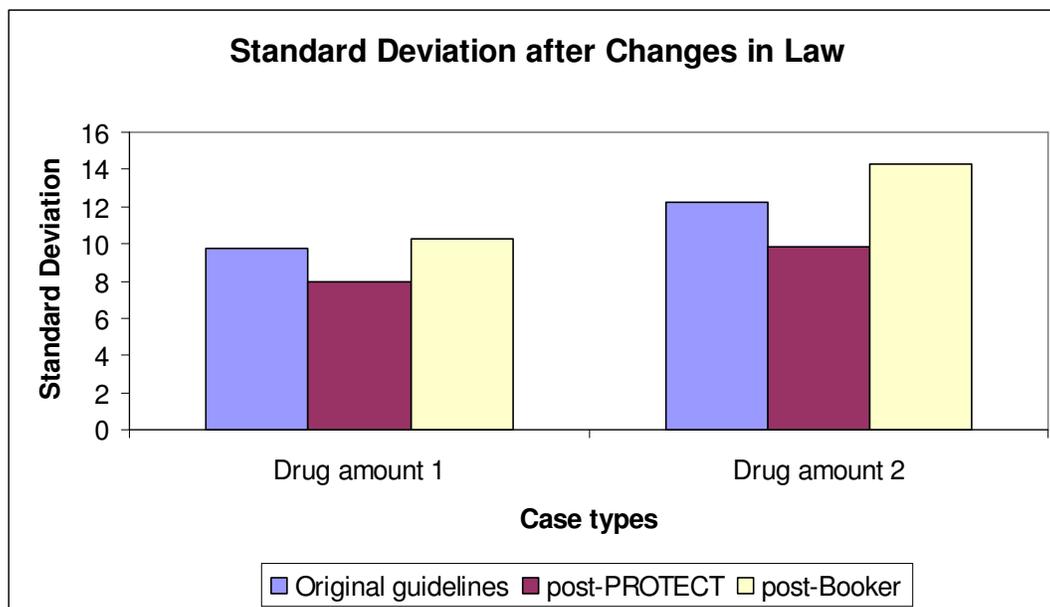
drug amount #2, judges departed from the guidelines about 14.44% prior to the PROTECT Act, 8.15% after the PROTECT Act, but prior to *Blakely*, and 25.64% after.



**Figure 2.6. Departure rates after changes in law.**

The effect of the legal changes on disparity of decisions (See Figure 2.7) was also tested. Disparity is defined as the standard deviation of case decisions around the average sentence. Prior to any legal amendments to the guidelines, the standard deviation for all cases (guidelines and departures) was 9.77 for drug amount #1. After Congress reduced the ability of judges to depart in the PROTECT Act, the average standard deviation was reduced to 7.96. Finally, after the Supreme Court converted the guidelines from mandatory to advisory constraints and allowed judges to have greater discretion, the standard deviation increased to 10.28 for drug amount #1. This pattern was substantially repeated for drug amount #2. For this drug amount, prior to any legal changes, the average standard deviation was 12.22. After the PROTECT Act the standard deviation was reduced to 9.88 and after *Booker* the standard deviation rose to 14.32. These results

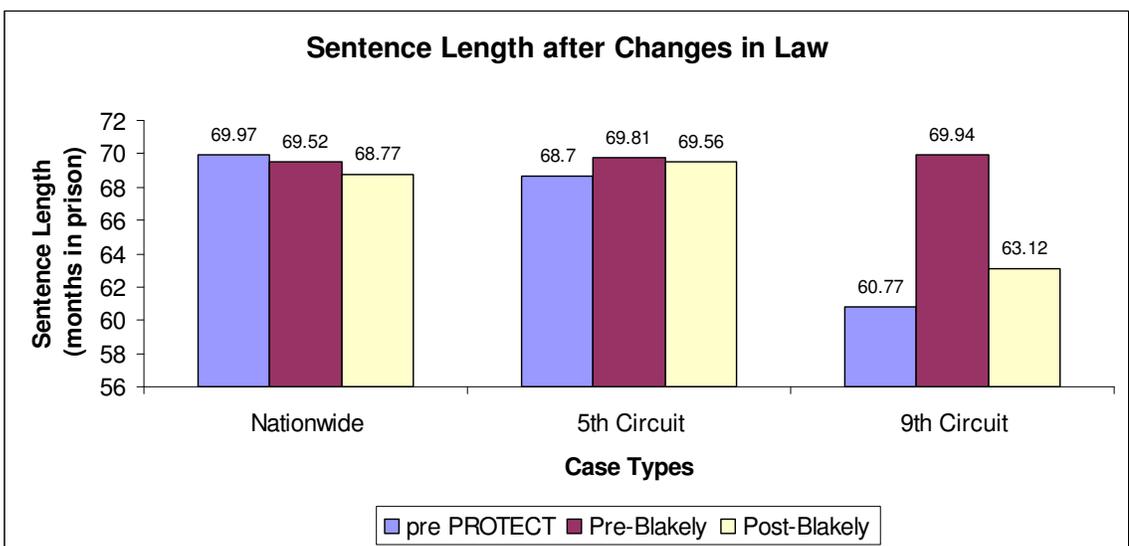
indicate that the legal amendments while having little effect on sentence length, did affect departure rates and disparity.



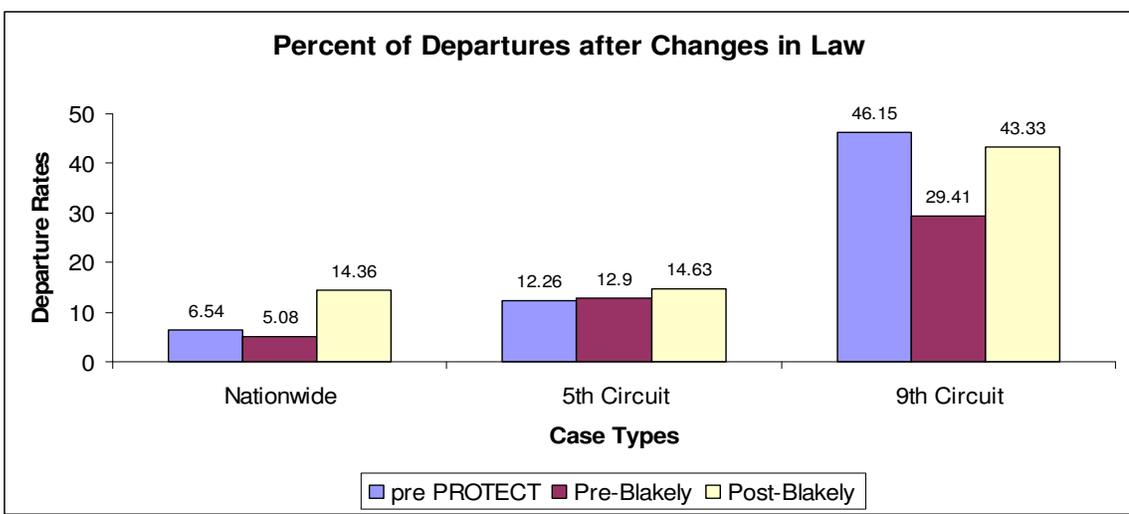
**Figure 2.7. Standard deviation after changes in law.**

The above results show the effect of changes in laws on sentencing for the entire nation. However, as previously mentioned, Congress enacted the PROTECT Act to target judicial circuits where it was believed that judges were departing too much and had average sentencing lengths that were too low. In other words, Congress seemed to be specifically targeting the Ninth Circuit that had high departure rates prior to the PROTECT Act as compared to the rest of the nation. For example, prior to enactment of the PROTECT Act, for the facts analyzed for drug amount #1, the ninth circuit had a lower sentence average, higher disparity rate, and higher rates of departure as compared to the averages nationally and in the Fifth Circuit. In the Ninth Circuit, the PROTECT Act did seem to have an effect, as sentence length increased and departures decreased. Finally, after *Booker*, the Ninth Circuit seems to have returned to its pre-PROTECT Act

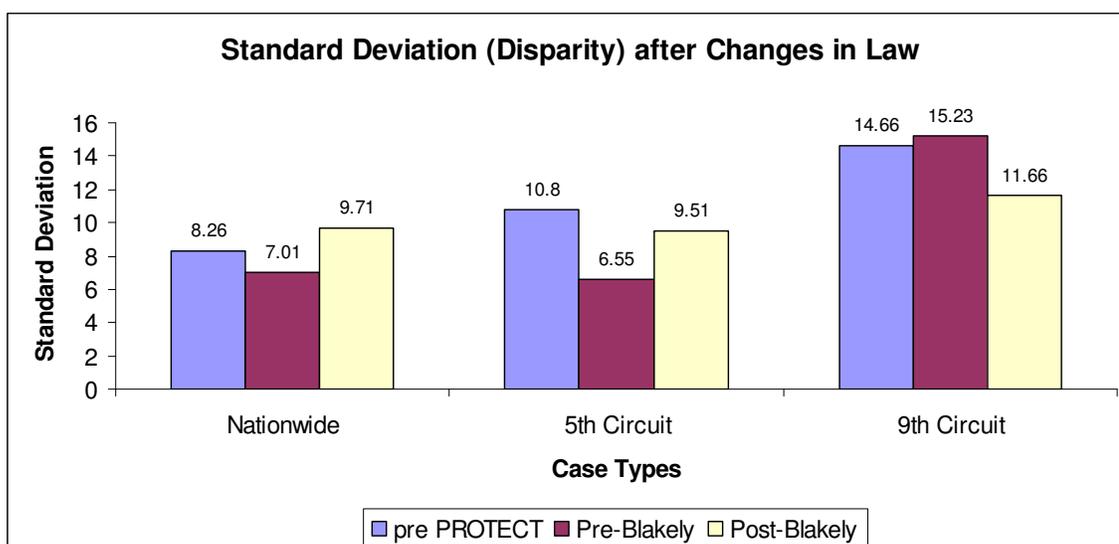
practices. Figures 2.8 through 2.10 show these trends in the Ninth Circuit as compared to the Fifth Circuit and nationwide for drug #1. Similar results were obtained for drug #2.



**Figure 2.8. Sentence length after changes in law for drug amount #1 (by circuits).**



**Figure 2.9. Percent of departures after changes in law for drug amount #1.**



**Figure 2.10. Standard deviation (disparity) after changes in law for drug amount #1 (by circuits).**

## 2.8. Discussion and implications.

What do the results really tell us about the regulation of judicial discretion? As seen by the sentencing data, the federal guideline scheme, in which the USSC and Congress specify the amount of judicial discretion to be exercised in specific cases, matters and has a profound effect on case outcomes. First, cases implicating the guideline table ranges result in higher sentences. If elected politicians want to limit judicial discretion in sentencing and appear tough on crime, this goal can be achieved if legislators are highly specific in the manner in which they limit judges' discretion. As shown by my results, higher sentences, a primary goal of sentencing reform (USSC 1991), are achieved if judges are compelled to use the sentencing tables. When case facts and the law allow for departures, sentences are lower and may subvert the intent of Congress in enacting the guideline scheme.

Second, the variance of sentences is highly dependent on whether judges apply guideline ranges or not. When judges depart, the variance of possible outcomes increased 3 to 6 times. This suggests that where judges' discretion is not constrained and they choose to apply departures, there is greater disparity in case outcomes for similar cases. Analysis of the variance of case outcomes by group makes it clear that Congress' goal of reducing disparity in sentences nationally was achieved, but only when judges used the sentencing table, not when they departed from it.

Third, when judges applied guideline ranges from the sentencing table, they sentenced the overwhelming majority of these defendants to the absolute *minimum* sentence of the sentencing range. Although sentencing tables allowed judges to choose one sentence out of seventeen to twenty-one choices, judges nationwide chose the lowest sentence in the range 73% to 95% of the time. While the sentencing guideline boundaries constrain judges' discretion, the lower limit provides a focal point for judges' decisions in the majority of cases.

Fourth, the dramatic changes in guideline laws do not seem to affect sentence length significantly for either the guideline group or departure group nationwide. Despite what were thought to be the two most dramatic changes in the federal sentencing guideline system since its inception, the PROTECT Act and *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 departure category and drug amount. Congress' attempt to limit departures and the Supreme Court's decision to render the guidelines advisory rather than mandatory did not alter sentence length *within* the guideline and

departure categories, at least not immediately.<sup>35</sup> This suggests that Guideline application is path dependent. Judges who had been trained in federal Guidelines when they were mandatory continued to apply them in the same way, even after they were transformed into being advisory constraints on judges' discretion.

Also, legislation that was targeted at a specific recalcitrant agent, here the ninth circuit, did seem to have an effect on the ninth circuit. As seen in Figure 2.8. The PROTECT Act had the effect of raising average sentences for drug #1 from 61 months in prison to 70 months in prison. This had the effect of bringing 9<sup>th</sup> circuit sentence length up to the national average for this type of case.

Fifth, although within categories, changes of legal regulations did not affect sentence length, averages, variance, and censorship of sentencing decisions, the legal changes had significant impact on departure rates and sentencing disparity. First, legal regulation of discretion directly affected departure rates. When discretion is constrained (after the PROTECT Act), departure rates go down and when discretion is augmented (after *Blakely* and *Booker*) departure rates increase. Second, legal regulation affected the disparity of sentencing decisions for similar defendants convicted of similar crimes. When discretion is constrained, the disparity of outcomes decreases and when discretion is augmented, case outcomes are more disparate. These effects were even more dramatic when we analyze circuit response, such as the ninth circuit. The PROTECT Act did, as intended, cause district court judges in the ninth circuit to reduce the number of

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<sup>35</sup> District Court judges' interviews held between May and February 2008. The chief district court judge for the Southern District of California indicated that although she rarely departs from the guidelines after *Booker*, she likes knowing that she has the ability to do so if she wanted (Interview 7404, July 6, 2007).

departures they issued. However, interestingly, it raised disparity rates in the Ninth Circuit. This suggests that as far as disparity of decisions, the district court judges in the Ninth Circuit are less responsive to legislation and higher court mandates than other district court judges. These results, again confined to the particular fact pattern, suggest that judges in the Ninth Circuit may be more independent and less responsive to legal reform when it affects their ability to choose sentences on a case by case basis.

### **Conclusion.**

In this chapter, the effect of the guidelines that limit lower court judges' discretion on outcomes of cases has been tested. Whether judges apply sentencing table ranges or depart from them dramatically affects sentencing outcomes and disparity of sentencing results. Legal changes of the guideline scheme had little effect on sentence length *within* groups when departures were controlled for. However, sentence length was more affected by some of the legal changes when cases were analyzed at the circuit level. The results also suggest that Congress may have enacted laws changing the guideline system to rein in some recalcitrant agents such as the district courts in the Ninth Circuit.

Despite these findings, legal changes to the guideline scheme, however, did have two important impacts. First, the legal changes affected rates of departure nationwide and by circuits. When judges' discretion was limited, as after the PROTECT Act, judges' rates of departure decreased. When judges' discretion was expanded, as after *Booker*, departure rates increased. Second, the legal changes affected the rates of disparity in sentencing as measured by the standard deviation. When judges are given more discretion, similarly situated criminal defendants are treated more disparately.

This analysis shows that written laws that constrain judicial discretion work and that judges follow the constraints delineated in the four corners of the statute. However, where there is room for judges to exercise their own discretion they will do so allowing departures in cases where they believe they are warranted. Finally, this study also has shown that if Congress really wants to constrain judges, they can, by specifically stating so in the law. The real question is, after *Booker*, does Congress want to revert back to a system of limiting discretion and ridding the bench of one of its most beneficial assets.

## **Appendix to Chapter 2.**

### **Methodology for Finding Cases with Identical Facts**

To test how guidelines affect case outcomes, I look at two separate crimes with the same fact pattern that vary as to the drug amount. The drug amounts for the first crime are less than the drug amounts for the second crime. 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 10 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 under certain circumstances (18 USC §3553(f) and USSC Guidelines Manual §5C1.2). In all of the cases, defendants had a criminal history level of I. Additionally, the defendants in all of these cases accepted responsibility for their crimes such that the original base offense level was reduced by 3 points (ie. setting guideline ranges at 70 to 87 months in prison for drug amount #1 and 87 to 108 months for drug amount #2). Furthermore, there was no adjustment in the sentence due to the defendant's role in the offense. For each year and drug amount, the treatment group included all cases in which judges chose not to depart from the guideline range. The second group is a control group that included cases where judges used their discretion to depart from the guideline ranges.

**Table A.2.1. Sentence length: isolating the effect of the PROTECT Act**

Independent Variables	SENTENCE LENGTH	
	Drug Amount #1	Drug Amount #2
PROTECT Act	-0.15 (1.09)	-2.69 (1.64)
Departure	<b>-11.50**</b> (0.42)	<b>-14.35**</b> (0.57)
1999	1.41 (1.80)	-2.23 (2.62)
2000	1.83 (1.80)	-2.88 (2.58)
2001	0.85 (1.83)	-4.14 (2.65)
2002	0.55 (1.77)	-0.35 (2.55)
2003	0.84 (1.89)	0.62 (2.80)
2004	1.36 (2.09)	2.11 (3.00)
Circuit1	0.53 (1.66)	0.10 (2.37)
Circuit2	-1.70 (1.29)	-3.74 (1.94)
Circuit3	0.43 (2.18)	2.04 (2.99)
Circuit4	-0.40 (1.24)	1.15 (1.50)
Circuit5	0.41 (1.01)	1.14 (1.23)
Circuit6	0.82 (1.42)	1.67 (2.00)
Circuit7	0.07 (1.33)	0.57 (1.70)
Circuit8	0.32 (1.14)	-0.08 (1.45)
Circuit10	-1.07 (1.44)	-0.81 (1.66)
Circuit11	-1.26 (1.14)	0.21 (1.40)
Intercept	0.60 (1.79)	2.27 (2.61)
N	589	322
Adjusted R <sup>2</sup>	0.58	0.71

Note: Coefficients are un-standardized ordinary least squares (OLS) regression values; standard errors are in parentheses. Coefficients in bold are significant at  $p < 0.00$  and \*  $p < 0.05$ .

**Table A.2.2. Multiple regression analysis of sentence length.**

Independent Variables	SENTENCE LENGTH	
	Drug Amount #1	Drug Amount #2
PROTECT Act	-0.16 (1.17)	-2.69 (2.11)
<i>Blakely</i>	0.58 (0.91)	-0.55 (1.40)
<i>Booker</i>	1.69 (1.92)	2.43 (3.70)
Departure	<b>-10.55</b> (0.33)	<b>-13.02</b> (0.52)
1999	1.52 (1.91)	-1.93 (3.39)
2000	1.94 (1.92)	-3.26 (3.34)
2001	0.82 (1.94)	-3.88 (3.44)
2002	0.57 (1.88)	-0.30 (3.31)
2003	0.95 (2.02)	0.45 (3.63)
2004	1.53 (2.23)	2.19 (3.88)
2005	-0.19 (1.97)	1.49 (5.38)
Circuit1	0.67 (1.45)	0.35 (2.70)
Circuit2	-1.14 (1.12)	-0.77 (1.79)
Circuit3	1.69 (1.72)	0.21 (3.24)
Circuit4	-0.41 (0.96)	1.40 (1.59)
Circuit5	0.28 (0.71)	0.63 (1.24)
Circuit6	1.24 (1.21)	2.07 (1.94)
Circuit7	-0.86 (1.10)	1.32 (1.91)
Circuit8	-0.86 (0.87)	-0.70 (1.41)
Circuit10	-0.17 (1.16)	0.75 (1.78)
Circuit11	-1.02 (0.88)	-0.04 (1.49)

**Table A.2.2. Multiple regression analysis of sentence length (continued)**

<b>Independent Variables</b>	<b>SENTENCE LENGTH</b>	
	<b>Drug Amount #1</b>	<b>Drug Amount #2</b>
Intercept	0.42 (1.84)	1.90 (3.28)
N	912	517
Adjusted R <sup>2</sup>	0.56	0.59

Note: Coefficients are un-standardized ordinary least squares (OLS) regression values; standard errors are in parentheses. Coefficients in bold are significant at  $p < 0.00$  and \* $p < 0.05$ .

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#### STATUTES CITED

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## Chapter 3

### What Federal District Court Judges Think

Judicial scholars purport to know what drives judicial decision-making by inferring what judges think from case rulings. Despite significant work done on judicial decision-making, there are few studies which consider judges' opinions<sup>1</sup> about the law they apply to make inferences about decision-making. This is not to say that opinions of judges have not been explored.<sup>2</sup> However, the limited number of studies conducted by agencies and non-governmental groups, including the United States Sentencing Commission's (USSC) own surveys of district and appellate court judges, are rarely mentioned in the academic literature (but see, Austin and Williams, 1977).<sup>3</sup>

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<sup>1</sup> Judges' decisions in cases are known as "opinions." To distinguish it from judicial rulings, here the term opinion is used to mean view point of judges.

<sup>2</sup> There are not many surveys of judges' opinions and usually they are highly specific dealing with only one type of law or one type of judge (See Redding, Floyd and Hawk (2002) and Gatowski, et al. (2001) regarding judicial surveys on the use of expert evidence). Besides these specific issue surveys, the National Conference of State Courts and the American Bar Association as well as others have surveyed many groups of judges on a regular basis, but the results of these studies are rarely examined in political science. In political science surveys of judges have rarely been used (see for example Nagel 1961), but there has been a burgeoning literature using interviews of a small group of judges to determine their opinions and how they approach legal questions (See Miller, forthcoming 2008; Perry 1994; Toobin 2007).

<sup>3</sup> Austin and Williams (1977) surveyed forty-seven district court judges from Virginia who were attending a state judicial conference in 1975. The surveys asked judges to read descriptions of five hypothetical cases and to recommend a verdict and sentence. These authors found that the judges substantially agreed on the verdict of all five cases, but there was "substantial variance in the choice of sentencing mode and the magnitude of penalty with the modes" (at 308).

There are few if any studies that ask a similar population of judges questions in two time periods or explore what judges think about legal reform. The USSC's own surveys conducted in 1991 and 2002 did not use comparable questions or methods when soliciting opinions from district court judges. The first USSC survey, completed in 1991, resulted in the creation of a data base by the Commission, but there appears to be no report on the results. The second survey was conducted in 2002 as part of the USSC's attempt to analyze the effect of the guidelines after fifteen years of their use. The 2002 survey solicited responses from district court judges in two topic areas - the statutory language of the act and the operation of the guidelines within the "context of purposes of sentencing" (USSC, 2003: I-2). Despite the USSC's extensive surveys and high response rates, major changes in the guideline structure had not been implemented before the USSC's final survey. As a result, the USSC's analysis does not include opinions about major reforms to the guidelines.

### **3.1. Overview and data.**

This chapter analyzes the opinions of judges directly to determine first what opinions they have about applying guidelines and other restrictive sentencing laws to the facts in specific cases and second to assess judges' opinions about changes in sentencing law that have both constrained and broadened their discretion. The chapter compares responses to the USSC's 1991 survey with responses to identical questions asked to judges in 2007 and 2008 (hereinafter 2008 survey). In the USSC's 1991 survey, 415

active district court judges<sup>4</sup> provided opinions about the guidelines and their application. In the 2008 survey, 125 judges responded including fourteen from districts in California who agreed to live interviews to complete the survey. The 2008 responses were added to the USSC's 1991 data base to create a data file containing 540 observations for two time periods.

In order to analyze how judges' opinions have changed over time, I surveyed active judges between October 2007 and May 2008 using the USSC's 1991 survey instrument with some modifications. The 2008 survey included twenty-seven questions from the USSC's 1991 survey on topics regarding sentencing disparity, plea bargains, guideline departures, and Congressional restrictions on discretion such as mandatory minimums, consecutive sentences, and the guidelines themselves. The majority of questions provided multiple choice responses with either a range of choices or simply a yes or no response. All of the questions allowed judges to respond with "don't know." For the questions on disparity, respondents had six choices regarding the prevalence of a stated event which ranged from "in all or most cases" to "in no cases." Many of the multiple choice questions were followed with open ended questions which in the 1991 survey were coded to fit into categories defined by the USSC. The 1991 responses to open ended questions were unavailable. The open ended responses to the 2008 survey

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<sup>4</sup> Only active judges were surveyed in 1991 and 2008 as opposed to senior status judges who have a variety of case loads based on their own preferences. I did interview three senior status judges in California's Southern District. Their survey responses were not included in the analysis of this chapter regarding active judges. However, the interviews provided information on the comparison between pre-Guideline and post-Guideline sentencing.

have been recorded but were not coded using the USSC rules as this would involve a subjective determination.

In the 2008 survey, I excluded some case specific questions asked to judges in 1991, but included additional questions on the political party appointing the judge, year of appointment, location of judges, advantages and disadvantages of the guideline system, and finally opinions concerning the effect of the PROTECT Act and *U.S. v. Booker*. The surveys were confidential and the majority of judges did not provide their names. After mailing surveys to over 600 district court judges between October 2007 and February 2008, in March 2008, I sent a one page letter to judges asking them to respond to the previously mailed survey if they had not already done so. My efforts resulted in 125 completed surveys. In some instances, judges did not answer all of the survey questions. In a few instances, there was missing data on one or more of the variables for district location, year of appointment, or party of appointing president. Descriptive statistics about the 1991 and 2008 survey are found at Table 3.1.

**Table 3.1. Descriptive statistics of 1991 and 2008 survey responses.**

	<b>USSC 1991 SURVEY AVERAGE (MIN-MAX)</b>	<b>TIEDE 2008 SURVEY</b>
Number of years as a district court judge	10.7 years (0.5 to 32 years)	12.1 years (0.75 to 41.83 years)
Number of guideline cases in last 12 months	67.9 (0 to 600)	142 (2 to 1300)
Number of criminal trials using GLs in Last 12 months	12.4 (0 to 97)	8.7 (0 to 50)
Total number of judges responding	415	125

In comparison to judges surveyed in 1991, judges in 2008 had one a half additional years of experience, processed almost twice as many guideline cases, and conducted about four fewer trials.

Judges in both surveys had a wide range of experience on the bench. The majority of judges responding to the survey had less than ten years of experience as district court judges. The active judge with the most experience included in this analysis had served on the bench since 1966 and was an appointee of President Lyndon B. Johnson. The judge with the least amount of experience had served only six months. The distribution for each experience category found in Table 3.2. was about equal for each survey year with the majority of responding judges having less than fifteen years of experience.

**Table 3.2. Professional experience of judges.**

<b>YEARS ON BENCH</b>	<b>1991 SURVEY</b>	<b>2008 SURVEY</b>	<b>TOTAL</b>
0 - <10 yrs	214	54	268
10 - <15yrs	109	41	150
15 - <20 yrs	49	15	64
≥ 20 yrs	43	15	58

In the 2008 survey, judges revealed one of ninety-four districts where their court was located. These districts in turn were linked to one of twelve judicial circuits. Judges' response rate appears to be linked to circuit size (See Table 3.3). Judges working in judicial districts in the 5<sup>th</sup> and 9<sup>th</sup> circuits responded more than judges in other circuits with the 9<sup>th</sup> circuit contributing twenty seven of the responses with half of these from live interviews. Although judges responding to the survey were not evenly distributed across circuits, they do provide a more balanced sample of appointees of presidents of the two main political parties. Fifty-two percent of judges responding were nominated by a Democratic president and forty-eight by a Republican president. The break down of

judges by party of nominating president and year appointed is provided at table 3.4 below.

**Table 3.3. Summary of circuit affiliation for 2008 survey.**

<b>CIRCUITS</b>	<b>NUMBER OF JUDGES RESPONDING</b>	
	<b>Frequency</b>	<b>Percent</b>
1 <sup>st</sup> Circuit	6	4.92
2 <sup>nd</sup> Circuit	5	4.10
3 <sup>rd</sup> Circuit	10	8.20
4 <sup>th</sup> Circuit	9	7.38
5 <sup>th</sup> Circuit	19	15.57
6 <sup>th</sup> Circuit	10	8.20
7 <sup>th</sup> Circuit	10	8.20
8 <sup>th</sup> Circuit	9	7.38
9 <sup>th</sup> Circuit	27	22.13
10 <sup>th</sup> Circuit	9	7.38
11 <sup>th</sup> Circuit	7	5.74
DC Circuit	1	0.82
<b>Total</b>	<b>122</b>	<b>100.00</b>

**Table 3.4. Summary of party of appointing president for 2008 survey.**

YEAR APPT	DEMOCRATIC	REPUBLICAN
1966	1	0
1979	1	0
1982	0	2
1983	0	1
1984	0	3
1985	0	4
1986	0	2
1987	0	1
1988	0	3
1990	0	1
1991	0	8
1992	0	5
1993	4	0
1994	13	0
1995	9	0
1996	9	0
1997	5	0
1998	9	0
1999	4	0
2000	7	0
2001	0	2
2002	0	5
2003	0	11
2004	0	4
2006	0	3
2007	0	2
<b>Total</b>	<b>62</b>	<b>57</b>

The largest number of judges responding were appointed in 1994 (13 judges) and the next largest 2003 (11 judges).

### **3.2. Hypotheses.**

A significant portion of the judicial politics literature focuses on what judge or litigant attributes influence decisions. Less is said about what attributes give rise to certain decision-making processes or to opinions concerning the relationship between the

judiciary and the legislature. As a result, this section provides hypotheses about how judicial opinions vary depending on the survey year, number of years judges have been on the bench, and party of appointing president as follows:

*Duration of law hypotheses:*

H<sub>1</sub> = Judges responding to the 1991 survey will have more positive views of the guidelines than judges responding to the 2008 survey.

H<sub>2</sub> = Judges responding to the 1991 survey will be less critical of Congressional interference of their discretion than judges responding to the 2008 survey.

Under these hypotheses, judges surveyed directly after the sentencing guidelines came into force nationwide in 1989 will have more favorable opinions towards the guidelines than judges who have applied guidelines for a number of years. These hypotheses are based on the fact that overtime, judges, like individuals, become disillusioned with reform and quick fixes and simply revert to processes which suit their individual needs and their case loads.

*Professional experience hypotheses:*

H<sub>3</sub> = Judges who have served on the bench less than ten years will have more positive views towards the guidelines than judges' serving ten years or more, regardless of survey year.

Like the duration of law hypotheses, the professional experience hypothesis is based on the fact that judges with less experience are more likely to rigidly follow the law and prefer the guidance that the law provides as opposed to more experienced judges who have developed their own internal methods or short cuts to deal with a vast array of cases.

*Party Hypotheses:*

H<sub>4</sub> = Judges completing the 2008 survey who were appointed by Republican presidents will have different views towards the guidelines than judges' appointed by Democratic presidents.

H<sub>5</sub> = Judges completing the 2008 survey who were appointed by Republican presidents will have different views about Congressional interference of their discretion than judges appointed by Democratic presidents.

The hypotheses related to the effect of the party of the appointing president on judicial opinion are loosely based on results espoused from judicial scholars applying the attitudinal model (Nagel 1961).<sup>5</sup> While these scholars acknowledge that law and facts do influence judges' decisions, they believe that judicial ideology provides the impetus for many judicial decisions especially at the Supreme Court level. While party of the appointing president is a crude approximation for Nagel's "party correlated judicial subjectivity," it is used here because it was the only available variable approximating this (at 850). It should be noted that one judge interviewed and one surveyed indicated that their own political party preference differed from that of the appointing president. Therefore, party of the appointing president may be a more appropriate measure for what a judge's subjective views are perceived to be, rather than a judge's actual preferences.

These hypotheses are tested on questions in the survey that appeared under four main categories of questions. Because the survey included thirty-one questions, only results that showed statistical significance between groups studied are discussed in more detail. The specific questions and breakdown of responses by survey year are provided at Appendix Table A.3.1. Furthermore, there were a significant number of opportunities

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<sup>5</sup> Nagel surveyed 313 state and federal high court judges and conducted a case content analysis of their decisions. He used the *Directory of Who's Who in America* to determine the judges' party affiliation. He found, "[r]egardless of judicial tenure and modes of selection, there probably will always be a residue of party-correlated judicial subjectivity so long as political parties are at least partly value-oriented and so long as court cases involve value-oriented controversies" (at 850).

for judges to respond with open ended answers. Where appropriate and illustrative, these responses will be included in the analysis.

An analysis of the variance or ANOVA was used to test whether the variance between the groups defined in the hypotheses (ie. survey year, party, or professional experience) was greater than the within group variance. For the multiple choice questions asked on the survey, ANOVA tests whether between group variation of multiple choice responses is greater than within group variation. When only two groups are being compared, the resulting F statistic from the ANOVA is equal to the square of the t-statistic for a simple regression of the dependent variable on the independent variable.

### **3.3. Results.**

#### **3.3.1. General observations.**

It is no surprise that judges do not like to be told what to do. In fact, most judges are bothered that after years of education and experience at the bar and on the bench as well as a rigorous appointment process, Congress still constrains their discretion in criminal sentencing cases. One active district court judge explained that during confirmation hearings, many Congressmen are very supportive of the appointees, but after the confirmation process they claim these same judges are “renegades” (Interview 7303, November 29, 2007). Several judges also voiced the concern of one district court judge that Congressmen were “grossly ignorant” of the sentencing laws and did not have a “rational basis” for reforms, but simply enact them to appease the voting public (Interview 7401, May 7, 2007; Interview 7402, May 9, 2007; Interview 7303, November 29, 2007). Despite the negative reaction to Congress, judges still are compelled to

follow the law and do indeed follow it in the vast majority of cases they hear (See Chapter 2 confirming this empirically as well as the analysis of judges' opinions in this chapter).

Most judges are educated individuals, some of whom agonize over the sentences they must deliver, especially to very young and/or female defendants or to those with few educational and financial opportunities. Judges believe that sentencing is more of an art than a mechanical application of law to the facts. From interviews and surveys, it is apparent that judges feel compelled both to follow the law and to treat defendants on a highly individualized basis. Many of the judges interviewed, stated that Congress and for that matter the public were unaware of the realities of sending an individual “away to prison.” For these judges, sentencing a defendant who is standing before them in open court, often with family members present, is quite different than Congress or the USSC making sentencing decisions for the population in general. One judge interviewed, appointed by a Republican president, stated that mandatory minimums sounded good to the voting public, but basing a sentence on minimums is not a proper way to sentence “when you look a defendant in the eye” (Interview 7402, May 9, 2007).

Further, judges do not fear being reversed by higher courts. Although not asked in the surveys, during interviews judges were asked whether they sentenced individuals a certain way because they feared reversal from the court of appeals as suggested by a good deal of the judicial politics literature (see chapter 2, section 2.1). Although not expressing any animosity towards the higher courts, judges interviewed overwhelmingly claimed that they had no fear of reversal, but simply tried to issue the most appropriate sentences (Interview 7302, November 29, 2007; Interview 7304, January 9, 2008). Many

judges more adamantly said they could care less if they were reversed (Interview 7305, January 9, 2008). They claimed that often they welcomed appellate court review because the law was unclear as to the proper course of action or a specific issue had not been decided. One judge claimed that because he did not agree with the Ninth Circuit Court of Appeals decisions he would believe a reversal from this court to be an affirmation of his work (Interview 7306, January 9, 2008).

Although the bulk of the analysis that follows will be confined to differences among pre-identified groups, many of the responses were consistent across survey year, experience level, and party. Therefore, for each hypothesis, four subject areas of questions were investigated: 1) Unwarranted sentencing disparity, 2) Regulation of plea agreements, 3) Use of guideline departures, and 4) Congress' role constraining discretion.

### **3.3.2. Duration of law.**

The duration of law hypotheses test whether judges surveyed in 1991, only two years after the guidelines' effective date, had different opinions regarding the guidelines than judges surveyed in 2008, nineteen years after they came into force. Of the twenty-seven questions asked in both survey years, eight questions had substantially different answers and of those eight, in five questions judges in 1991 and 2008 predominantly chose the same answer, but the percentages favoring this preferred answer varied.

Although the bulk of the survey analysis that follows will be confined to an analysis of the differences in groups, many of the responses were consistent across survey year. First, for unwarranted sentencing disparity, most judges in both survey years

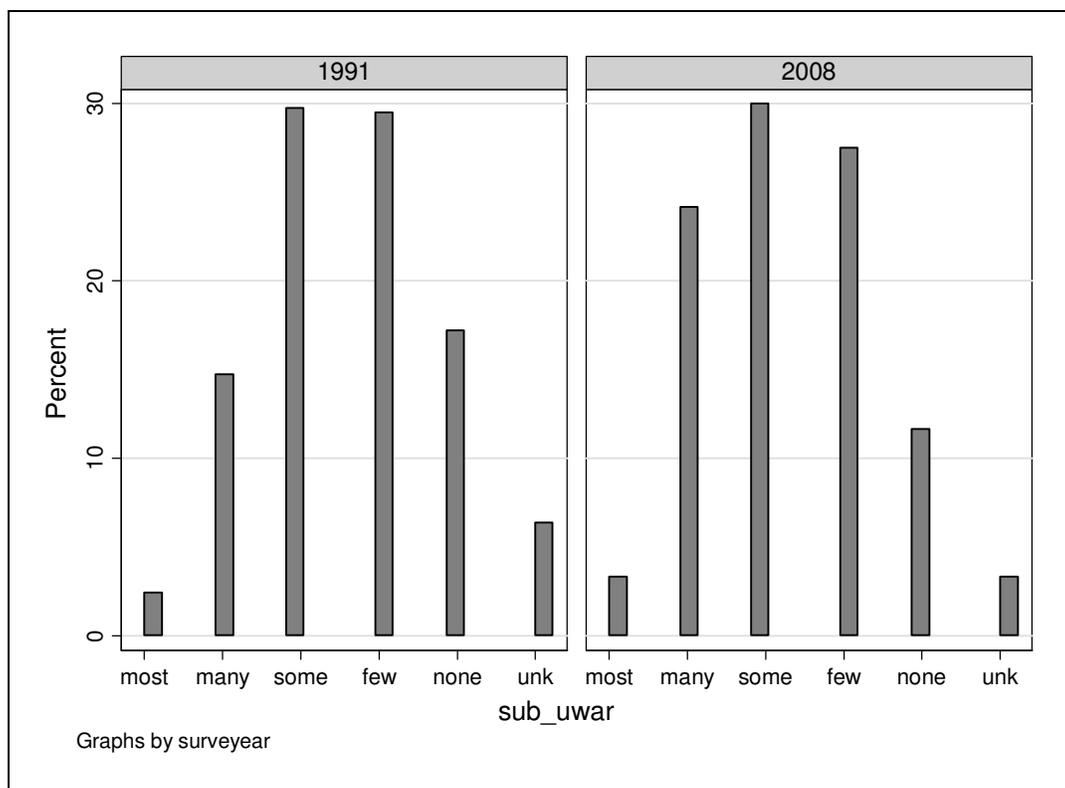
agreed “somewhat” with the USSC’s own definition of sentencing disparity<sup>6</sup> as well as the sources of disparity. Judges in both years believed that the following were sources of unwarranted sentencing disparity in either “few” or “some” cases: plea agreements, prosecutors’ charging decisions, mandatory minimums, adjustments for role in the offense.

Responses by survey year substantially diverged on whether government motions for substantial assistance were a source of unwarranted sentencing disparity. In 1991, the majority of judges (ie. 60%) indicated that such motions resulted in disparity in “few” or “some” cases. However, in 2008, while almost 60% agreed with the 1991 judges, an additional 24% of responding judges believed that such motions resulted in unwarranted disparity in “many” cases. Further, 17% of judges in 1991 believed that “none” of their cases involving substantial assistance motions resulted in disparity while in 2008 fewer

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<sup>6</sup> In the survey, judges were asked their level of agreement with the following definition of unwarranted sentencing disparity: “unwarranted sentencing disparity occurs when similar offenders convicted of similar offenses receive dissimilar sentences.” This definition is derived from the USSC’s own guideline policy statement, in which the USSC states, “Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.” (USSC 2003: Chapter 1, part A).

judges (ie. 12%) held this opinion. See Figure 3.1 depicting the difference in distribution of responses to the 1991 and 2008.



**Figure 3.1. Motions for substantial assistance as a source of unwarranted sentencing disparity.**

Judges also had very different opinions about whether the guidelines, as compared to the pre-guideline system had increased, decreased, or not changed sentencing disparity. Of judges answering in 1991, 90% of the answers were evenly split over the three choices of increased, decreased, or stayed about the same (about 30% per answer). In 2008, about 14% of judges indicated that guidelines had increased disparity, 34% of judges indicated that guidelines had decreased disparity, and only 8% of judges said that disparity had stayed about the same. Of the 2008 judges, 45% indicated that they either did not know or had experience under the pre-guideline system. Of the 2008 judges, the

majority surveyed and interviewed were appointed after the guidelines became effective in 1989. Therefore their pre-guideline experience, if any, was probably as attorneys rather than as judges.

The second substantive category of questions was related to plea agreements. Judges both in 1991 and 2008 overwhelmingly responded that there should be no further regulation of plea bargains except for those regulations that already exist in the criminal procedure code and the guidelines themselves. This answer seemed at odds with judges interviewed and surveyed who believed that plea bargains were indeed a source of unwarranted disparity. In both survey years, 35% of respondents believed plea bargains were a source of “some” unwarranted disparity although in 2008 an additional 50% believed it occurred in “few” cases. Several judges interviewed stated that there were immense problems with prosecutorial discretion in charging and plea bargains. One judge indicated that in his district, “prosecutors ignore the guidelines to suit their purposes” (Interview 7403, September 24, 2007). Possibly judges do not want more regulation in the area of plea bargains as this would increase their workload.

A third category of questions was related to the use of departures and whether judges should be given more opportunities to depart. These questions are related to judicial discretion as departure is one of the few areas that judges had individual discretion while the guidelines were mandatory. In 1991, 65% of judges indicated that they should *not* be given authority to depart and 31% said they should be given the authority to depart if a defendant substantially assisted in the prosecution even if the government failed to make such a motion. In 2008, despite the fact that *Booker* abrogated the need for judges to formally depart from the guidelines, judges were more

evenly split on this question with 47% indicating that they should be able to depart on their own authority when defendants' substantially assisted and 48% indicating that they should not.

As far as more general opportunities to depart, in 1991, when the guidelines had just come into force, 79% of judges indicated that there should be more opportunities to depart. In 2008, only 44% believed they should be given *more* opportunities and 51% said they should not. However, the 2008 responses made in the wake of *Booker's* restoration of sentencing discretion may reflect the reduced need for using departures at all, rather than a significant shift of opinion.

The final group of questions generally dealt with Congress' authority to limit lower court discretion. As far as setting mandatory minimums for drug distribution, judges in both survey years were unanimous that mandatory minimums should be eliminated. Sixty-four percent responded this way in the 1991 survey and 52% in the 2008 survey. However, in the 2008 survey, 24% of judges as compared to 7% indicated that lowering the minimums also would be acceptable. For the imposition of mandatory consecutive sentences for firearm offenses, judges in both years believed that these Congressional constraints should either be eliminated or be left unchanged.

Judges then were asked what actions Congress should take when it wanted to raise sentences for certain offenses. Judges in both survey years overwhelmingly answered the same way. The summary of answers for this question, which directly asks how Congress should constrain judges, is provided in Table 3.5.

**Table 3.5. Responses to Congressional action question by survey year.**

When Congress wants to raise sentences imposed for certain offenses, what action should congress take?		
Question	Survey year 1991 Percent no / yes	Survey year 2008 percent no / yes
Set a mandatory minimum or a mandatory consecutive sentence?	93% / 7%	88% / 12%
Raise the statutory maximum sentence?	80% / 20%	80% / 19%
Specify a base offense level and/or specific offense characteristics for the applicable sentencing guideline?	89% / 11%	92% / 8%
Direct the Sentencing Commission to consider amending the applicable guideline to reflect more appropriately the seriousness of the offense?	43% / 57%	36% / 63%
Other?	90%/10%	90%/11%

In general, the majority of judges responding did not believe that Congress should raise sentences either by setting mandatory minimum or consecutive sentences, raising the statutory maximum, or specifying the base offense level. Judges, however, were more favorable and also more split in having the Sentencing Commission amend the guidelines directly.

One of the greatest areas of difference concerning actions of Congress and the Sentencing Commission to constrain judges was in regards to the mandatory nature of the guidelines. In 1991, judges were asked, whether “[a]ccepting the Congressional decision to adopt guideline sentencing, whether they would like to see the guidelines become advisory as opposed to mandatory.” Ninety-three percent of judges responding said that they would not prefer such a change, where as only 7% indicated that they would like the guidelines converted from mandatory to advisory constraints. In 2008, judges were asked a related question of whether they prefer sentencing prior to *Booker* when guidelines

were mandatory or after *Booker* when guidelines were made advisory. Eighty-two percent of judges interviewed or surveyed answered that they preferred sentencing after *Booker*, while 11% indicated that they did not prefer the post-*Booker* world and 6% responded that they had no basis of comparison due to their appointment date occurring after the Supreme Court's decision. The answers to these two questions are radically different and they show that over time judges became less favorable to mandatory sentencing constraints.

The duration of law hypotheses tested whether judges surveyed in 1991 just two years after the guidelines came into force had more favorable opinions about both the guidelines and Congressional interference in their discretion than those surveyed in 2008, nineteen years after the guidelines' effective date. For the vast majority of questions, there was a failure to reject the null hypotheses as judges in the two survey years answered substantially similarly for many of the responses. In questions concerning whether judges surveyed in 1991 were more favorable to the guidelines than those surveyed in 2008, the responses were mixed. Judges in 2008 were more critical than judges in 1991 about the guidelines' departure provisions with 2008 judges wanting to be able to depart without government motions and to have more opportunities in general to depart. However, 2008 judges were less critical of guidelines than 1991 judges as to disparity. More judges in 2008 believed that the guidelines had decreased disparity and fewer judges believed they had increased disparity than their counterparts in 1991.

As far as hypotheses regarding general preferences for the guidelines, as hypothesized judges in 1991 were significantly more favorable to mandatory guidelines than judges in 2008. In 1991, judges were asked questions about the guidelines that were

not asked in 2008. These questions showed that judges overwhelmingly favored the new guidelines. Accepting Congress' decision to adopt guideline sentences, of the guidelines themselves, in 1991, 66% of judges stated that they did not want more judicial discretion, 97% did not want the overall guideline complexity reduced, 98% did not want the guidelines eliminated and 83% had no specific recommendations to change a specific guideline. In contrast, 2008 judges overwhelmingly listed problems with the guidelines in response to open-ended questions and preferred advisory guidelines to mandatory.

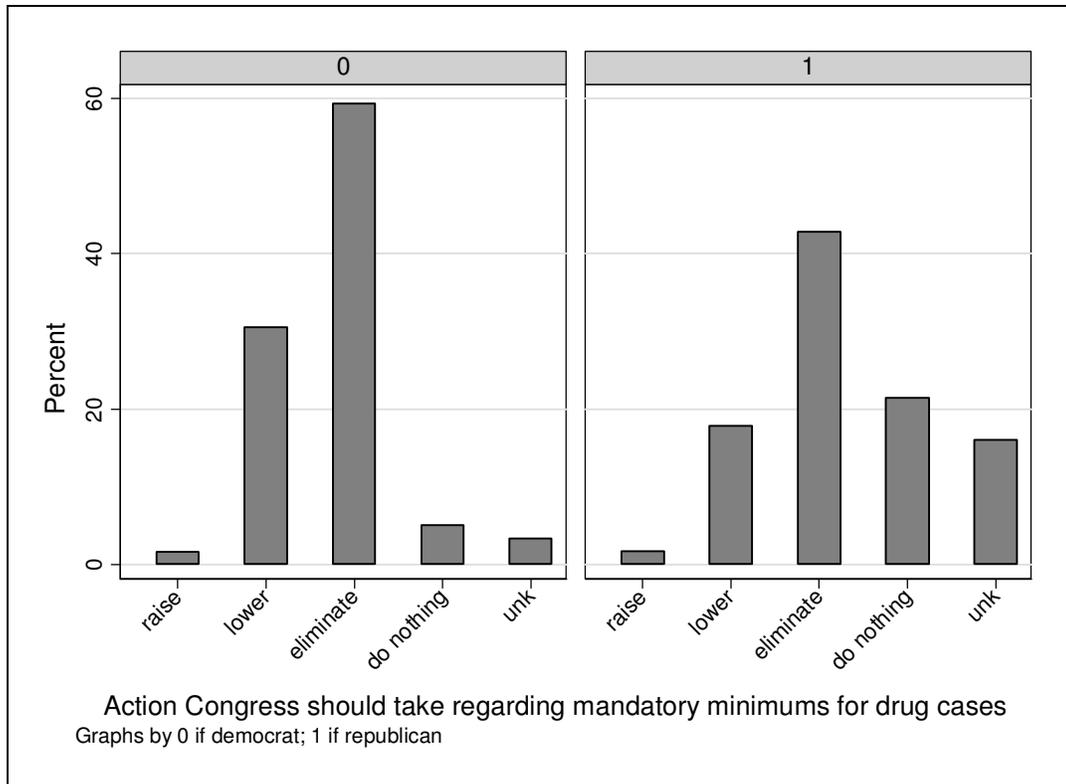
### 3.3.3. Party of appointing president.

Party of appointing president seemed to have less impact on opinions than survey year. Only seven of twenty-seven questions revealed statistically significant differences between judges who were appointed by democratic presidents and judges who were appointed by republican presidents. However, the differences in responses were rather subtle. The majority of questions showing differences involved mandatory minimum sentences and departures. When asked whether mandatory minimum sentences were a source of unwarranted disparity, judges appointed by Democratic and Republican presidents split their answers among the categories of “many,” “some,” and “few” cases, but the distribution was different as seen in Table 3.6.

**Table 3.6. Responses to mandatory minimum sentences and unwarranted disparity question.**

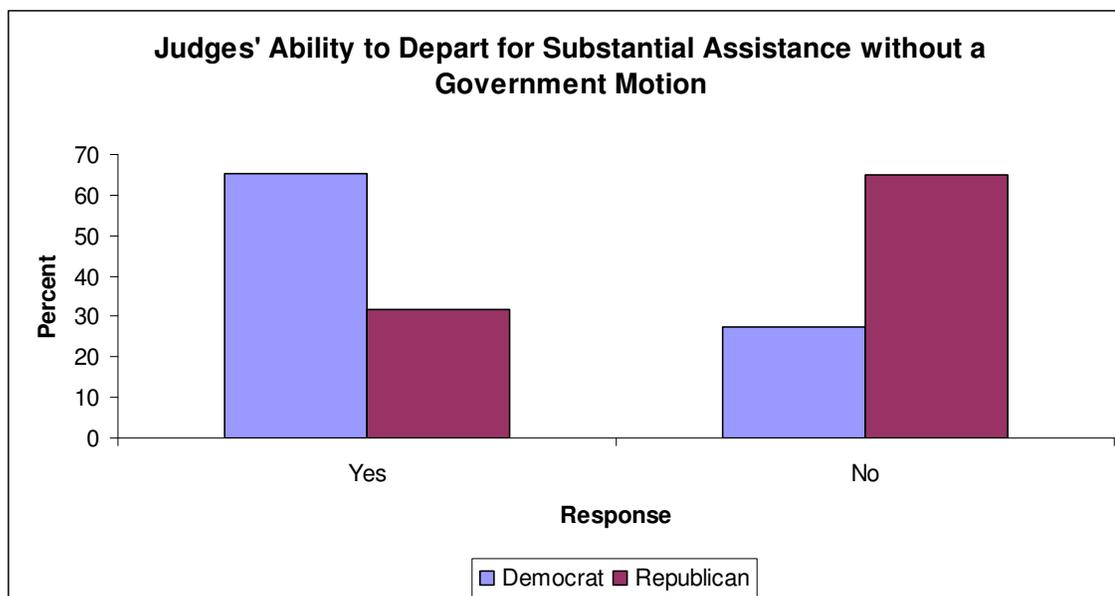
In your experience with cases in your district, how often are mandatory minimum sentences a source of unwarranted disparity?		
Question	Appointed by Democrat	Appointed by Republican
All or most	3.39%	0
Many	33.9%	22.81%
Some	38.98%	29.82%
Few	18.64%	31.58%
In no cases	0	10.53%
Don't know	5.08%	5.26%

Not only is the distribution different, but Democratic appointees indicated about 3% of the time that disparity due to mandatory minimums occurred all or most of the time while none of the Republican appointees responded this way. Further, about 11% of the Republican appointees said that disparity resulting from mandatory minimums never occurred, while Democratic appointees never made this choice. The discrepancy in opinions regarding mandatory minimums was continued in the question dealing with what Congress should do with mandatory minimum sentences for drug distribution cases (See Figure 3.2). For this question, 90% of the judges appointed by Democratic presidents indicated that the mandatory minimums should be eliminated or lowered while only 61% of those appointed by Republican presidents indicated these same answers. Further, 5% of Democratic appointees and 22% of Republican appointees said that Congress should do nothing in this area. While judges of both parties seem to disapprove of mandatory minimums, Democratic appointees believe they create a larger problem for sentencing disparity and are more likely to respond that they should be lowered or eliminated than their colleagues appointed by Republican presidents, at least for those surveyed in 2008.



**Figure 3.2. Responses to Congressional action and mandatory minimums.**

Judges' opinions varied by party in questions dealing with opportunities for judges or defense counsel to lower sentences due to defendants' substantial assistance without a government motion as currently required by the guidelines. Democratic appointees generally felt that they should be allowed to depart without the government motion, while Republican appointees generally believed that they should not be given this power. The graph of these results is at Figure 3.3.



**Figure 3.3. Responses to substantial assistance departure question.**

This same proclivity to allow departures from sources other than the prosecutor was seen in a question dealing with whether defense attorneys should be allowed to make such requests for reduction in sentences when defendant substantially assisted. Sixty percent of Democratic appointees favored such a course of action, while only 43% of Republican appointees did. When judges were asked whether they should be able to depart downward when a defendant accounted for all his criminal activities and was willing but unable to provide new information, 59% of Democratic appointees believed this should be allowed where as 55% of Republican appointees believed this should not be allowed.

Finally, as far as what actions Congress should take when wanting to raise sentences for certain offenses, judges of both parties favored the Sentencing Commission amending the guidelines as the preferred course of action. However, the split of opinion as to this option was slightly different depending on party appointing the judges. Democratic presidential appointees preferred this option 68% of the time, whereas

Republicans favored it only 40.74 % of the time. Democrats rejected this option 31% of the time as compared to 41% of the time for Republicans.

The party hypotheses tested whether differences in opinions on guidelines and Congressional action existed between judges appointed by opposing parties. The most significant difference between the two groups was as to departures. Generally, democrats believed that judges and defendants should be able to make departures for substantial assistance without the government doing so first and they favored more opportunities to depart in general than their Republican appointed counterparts.

#### **3.3.4. Professional experience on the bench.**

Years of experience on the bench affected judicial opinions more than party of appointing president. Indeed, ANOVA results for professional experience were significant for almost half of the questions asked. However, for most of the questions with significant ANOVA results, the majority of judges in the four professional experience groups responded with the same answer. What varied was the percentage of individuals advocating the preferred choice.

Judges, who had served the longest on the bench (ie. over 20 years), had answers that differed from judges with fewer years on the bench more often. For example, as compared to other judges, judges who served longest believed that disparity had increased in sentencing after the guidelines as compared to the pre-guideline system. This answer is significantly different than the answers of less experienced judges who believed that the guidelines resulted in a decrease in disparity. It appears that the longer judges sit on the bench, the less that they feel that guidelines have achieved one of their main purposes, the decrease of sentencing disparity.

The most experienced and least experienced judges differed substantially as to their opinions regarding what actions Congress should take when raising the sentences for specific offenses. Table 3.7 shows the differences in answers that were most significant. Less experienced judges were more likely to favor either raising the statutory maximum or stating a new guideline base offense level and offender characteristics than judges in other experience categories. On the other hand, the most experienced judges differed as to their responses regarding amending the USSC or other Congressional action. About sixty percent of judges in other work experience categories believed that the USSC should amend the guidelines, whereas only 48% of judges serving twenty or more years believed this was the proper method.

Related to this response, was the response of the most experienced judges believing that other action besides listed choices should be taken when Congress wanted to increase sentences. In fact, up to 20% of these judges with twenty years or more experience believed that when Congress wants to raise sentences another course of action, not listed in the question, should be used. The most experienced judges chose the “other” category two to two and a half times more than judges in other professional categories. One judge with more than twenty years of experience in the Eastern District of North Carolina noted that “Congress should leave it to the sentencing judge to sentence within the sentencing ceiling” (survey district court judge).

**Table 3.7. Responses to survey questions by years on the bench.**

QUESTION	PROFESSIONAL EXPERIENCE			
	0 to 10 years	10 to <15 years	15 to <20 years	> twenty years
<b>Action Congress should take when wants to raise sentences for certain offenses?</b>				
Set mandatory minimum	<b>12%</b>	4%	5%	2%
Raise statutory maximum	<b>14%</b>	25%	27%	27%
State base level and offense characteristics	<b>15%</b>	6%	<b>0%</b>	7%
Have USSC amend guidelines	60%	57%	61%	<b>48%</b>
Other	9%	7%	11%	<b>19%</b>

**3.4. Opinions regarding sentencing guidelines and reform.**

The 2008 survey explored a few areas that were not included in the 1991 survey concerning Congressional constraints on judicial discretion. For mandatory minimums, 1991 and 2008 survey respondents overwhelmingly stated that mandatory minimums for drug distribution crimes should be eliminated. To find out more about this opinion, the 2008 survey included the following question: “In general terms, what are the benefits and/or problems of mandatory minimum sentences? There was then space to write comments on 1) benefits, 2) problems, and 3) general. The results were mixed and many judges had opinions for all three facets of the question. As to benefits, judges predominantly believed that mandatory minimum sentences provided deterrence. Some judges believed that mandatory minimums also made sentences more uniform and a few believed that minimums imposed the will of the people or at least Congress as to what crimes deserved more severe sentences. Judges listed extensive problems with mandatory minimum sentences including that they are too rigid and lead to excessive

punishment, and disproportionate results. Many judges thought that mandatory minimums were “arbitrary,” “unjust” and “irrational.” One judge opined that mandatory minimums violated the doctrine of separation of powers presumably because judges, not Congress, should decide sentences.

As far as reform of the sentencing guidelines in general, the survey included three additional questions. The first question asked judges to state what effect the 2003 PROTECT Act had on their sentencing practice. This act limited the power of judges to use departures (especially in sex offenses) and required U.S. attorneys to report on judges who appeared to be departing improperly. Only 27% of 2008 survey respondents said that this act had an effect on their sentencing practice. Whereas, 67% said that it had no effect. However, of those responding negatively to the PROTECT Act, their answers suggested strong disapproval of Congress’ affront on their discretion. One district court judge from the District of Massachusetts stated that the PROTECT Act “caused revulsion and skepticism of the entire federal sentencing scheme that after careful analysis caused me to declare the mandatory federal guidelines unconstitutional (Survey Response 101).

Party and years on the bench also seemed to affect the answers to this policy change question. Of the entire 2008 survey only 26% of those responding believed that the PROTECT Act had changed their practice of these judges, 35% of these respondents were Democratic appointees and 18% were Republican appointees. As far as experience, judges with more than 20 years on the bench found that the PROTECT Act affected them very little with only 15% noting an effect. Of the remaining judges, those with less than ten years experienced said it affected them 21% of the time and those with ten to less than twenty years experience, said that it had an effect about 35% of the time.

The second question asked judges to state whether *U.S. v. Booker* had an effect on their sentencing practice. Eight-two percent of judges said that it had an effect on their practice. Most said that it had a dramatic effect. Eighty-six percent of Democrat appointees preferred sentencing after *Booker* with 78% of Republicans responding this way. When comparing preferences for post-*Booker* sentencing by experience on the bench, only 69% of judges with less than ten years of experience preferred it as compared to 91% for judges with ten to fifteen years experience, 85% for judges with 15 to less than 20 years experience and 100% for judges with more than twenty years of experience. Of judges who preferred post-*Booker* sentencing, they predominantly indicated that it had restored judicial discretion and allowed judges to act “like judges.” Alternatively, prior to *Booker*, judges referred to themselves as “not judges,” but as orangutans or automatons (Interview senior district judge, June 13, 2007; Survey response 101). One district court judge from the first circuit stated that he “emphatically” preferred sentencing after *Booker* because “*Booker* restored [him] to the role of judge rather than an automaton mouthing the sentence the executive pre-determined” (District court survey response).

While judges indicated that *Booker* had a dramatic effect on their sentencing decisions, judges still indicated that in the majority of time, sometimes up to 99%, they still apply the guidelines. This was confirmed by both interviews, survey responses, and the analysis in Chapter 2. Judges did, however, indicate that besides giving them more discretion, *Booker* makes sentencing defendants take considerably more time as judges now list all the factors they consider for sentencing and often make a written record, as

shown me by one district judge in Santa Ana California, of all the factors that contributed to the sentence (Interview 7307, October 11, 2007).

For judges who preferred sentencing when the guidelines were mandatory, a rarer view of those surveyed, they indicated that *Booker* had little effect because the court of appeals overseeing their districts still bound individual judges to follow the guidelines in most cases. One judge summed up the cost benefit between mandatory and advisory guidelines as such, “prior to *Booker* I went to purgatory, post-*Booker* I go to hell when I get it wrong. However the discretion that the Founders intended to give Article III judges has been restored” (district court judge survey).

### **3.5. Implications and conclusions.**

What has the survey evidence told us about judicial decision-making in the federal sentencing arena? First, judges have dual concerns about applying the law provided by the USSC and Congress and treating individual defendants fairly. In certain areas, judges believe they should have more discretion than allowed by Congress. It is hard to know how these opinions will be translated into judicial decision-making in individual cases. Just because judges oppose certain laws does not imply that they will not apply the law, although certainly some may take this course of action. As seen by the empirical results in Chapter 2, judicial opposition to constraints may take its form in judges’ choosing the sentences at the minimum of the guideline range. However, to explore the relationship between opinions about constraints and actual decisions, judges’ identity would have to be revealed in both the USSC case fact data base and in the surveys.

Second, over time, judges' opinions do not change very much as seen by the great majority of questions that had similar outcomes regardless of survey year. In fact, judges were quite consistent on many of their opinions from the regulation of plea agreements to their dislike for mandatory minimum sentences in drug cases. Perhaps one of the most significant parts of this study is how little judges' attitudes have changed over time.

Third, judge's opinions where they do change between survey year, change on issues dealing with disparity, departures, and the mandatory nature of the guidelines. Judges in 2008 believed that the guidelines had reduced disparity more than judges surveyed in 1991. Judges in 1991, however, believed that they should be allowed more departure avenues than their counterparts in 2008. The most significant difference in opinion between judges surveyed in 1991 and 2008 was as to the mandatory nature of the guidelines. In 1991, 93% of judges believed that guidelines should not be made advisory, while in 2008, 82% of judges preferred advisory guidelines after *Booker* as compared to mandatory guidelines.

Fourth, there is some variation of responses depending on the party of the president appointing the judge and professional experience. As far as whether party of the president appointing the judge mattered, it appeared to do so in only seven out of 27 questions. However, generally the difference was as to percent of responses in certain areas, rather than all out differences of opinion. The only question where there was substantial disagreement in the answer dealt with the judges' role in reducing sentences when defendants substantially assisted in the prosecution. As a result, party does not seem to have as significant effect on judicial opinions and ultimately may not influence decision-making using guidelines as the attitudinalists would suggest. However, such a

conclusion is limited to the opinions in the survey and for district court judges in sentencing guideline cases.

Fifth, years on the bench affected judicial opinions. Judges with more experience on the bench appeared to disfavor the guidelines more than judges with less experience. The opinions that varied the most were from judges with the least and the most experience. The commonality of the judging experience makes judges more distinct as a group than their party affiliation. In fact over time, judges disdain government interference more.

Sixth, judges generally do not like to have their discretion taken away because they believe they are more qualified and have more experience than Congress and even higher court judges when it comes to sentencing individual defendants. In fact, district court judges will oversee thousands of sentencing guideline plea bargains and hundreds of trials in their career on the bench. These are two tasks that neither Congress nor appellate courts ever partake. Judges did not like discretion limiting legislation such as the PROTECT Act and preferred discretion expanding policies by the Supreme Court in *Booker*. As a result, the majority of judges reported that the PROTECT Act had an effect on their practice and most of these noted that the effect was unfavorable. However, when the Supreme Court stepped in and increased judicial discretion in sentencing, 82% of judges preferred this change to the pre-*Booker* period.

Therefore, it can generally be said that judges who have experienced guidelines for some time do not like their discretion constrained. However, it does not follow that just because they hold this opinion that they do not apply the law as written. Most judges uphold the law and work within the sentencing constraints as shown by these survey

opinions and the empirical analysis in Chapter 2. Judges apply guideline ranges and continue to do so even though they are not mandatory constraints in the majority of their cases. Although judges appear to loyally apply the law, their concerns about constraints on their discretion should not be overlooked. District court judges had successful careers prior to being appointed, they have undergone a rigorous appointment process, and they know more about sentencing individual defendants than the public, the Sentencing Commission, or Congress. Perhaps, their desires for more discretion should be heeded.

## Appendix to Chapter 3

Table A.3.1. Comparison of judicial responses 1991 and 2008.

QUESTIONS	% WITH GIVEN ANSWER	
	1991	2008
<p>According to one definition, unwarranted sentencing disparity occurs when similar offenders convicted of similar offenses receive dissimilar sentences. How strongly do you agree or disagree with this definition?</p> <p>1 = Strongly agree  2 = Somewhat agree  3 = Undecided  4 = Somewhat disagree  5 = Strongly disagree  6 = Circled more than one response  7 = Don't know</p>	<p>1. 32.45  2. 42.62  3. 5.08  4. 9.93  5. 8.72  6. 0.48  7. 0.73</p> <p>N= 413</p>	<p>1. 30.89  2. 46.34  3. 0.81  4. 17.07  5. 4.07  6. 0  7. 0.81</p> <p>N=123</p>
<p>In your experience with cases in your district, how often are pre-indictment plea agreements a source of unwarranted sentencing disparity?</p> <p>1 = In all or most cases  2 = In many cases  3 = In some cases  4 = In few cases  5 = In no cases  6 = Circled more than one response  7 = Don't know</p>	<p>1. 1.74  2. 13.40  3. 33.25  4. 22.83  5. 10.92  6. 0.25  7. 17.62</p> <p>N= 100</p>	<p>1. 0.83  2. 13.33  3. 20.00  4. 39.17  5. 15.83  6. 0  7. 10.83</p> <p>N=120</p>
<p>In your experience with cases in your district, are prosecutors' charging decisions a source of unwarranted sentencing disparity?</p> <p>1 = In all or most cases  2 = In many cases  3 = In some cases  4 = In few cases  5 = In no cases  6 = Circled more than one response  7 = Don't know</p>	<p>1. 3.43  2. 18.14  3. 36.03  4. 22.79  5. 5.39  6. 0.25  7. 13.97</p> <p>N=408</p>	<p>1. 3.28  2. 18.03  3. 31.97  4. 33.61  5. 4.92  6. 0.0  7. 8.20</p> <p>N=122</p>

**Table A.3.1. Comparison of judicial responses 1991 and 2008 (continued).**

QUESTIONS	% WITH GIVEN ANSWER N	
	1991	2008
<p>In your experience with cases in your district, how often are mandatory minimum sentences a source of unwarranted sentencing disparity?</p> <p>1 = In all or most cases  2 = In many cases  3 = In some cases  4 = In few cases  5 = In no cases  6 = Circled more than one response  7 = Don't know</p>	<p>1. 8.33  2. 28.19  3. 35.78  4. 15.69  5. 5.88  6. 0.49  7. 5.64</p> <p>N= 408</p>	<p>1. 1.65  2. 28.10  3. 35.54  4. 24.79  5. 4.96  6. 0  7. 4.96</p> <p>N=121</p>
<p>In your experience with cases in your district, how often are plea agreements sentences a source of unwarranted sentencing disparity?</p> <p>1 = In all or most cases  2 = In many cases  3 = In some cases  4 = In few cases  5 = In no cases  6 = Circled more than one response  7 = Don't know</p>	<p>1. 1.47  2. 19.07  3. 35.70  4. 28.85  5. 8.56  6. 0.24  7. 6.11</p> <p>N= 409</p>	<p>1. 0.83  2. 13.22  3. 35.54  4. 50.50  5. 8.26  6. 0  7. 1.65</p> <p>N= 121</p>
<p>In your experience with cases in your district, how often are adjustments for role in the offense a source of unwarranted sentencing disparity?</p> <p>1 = In all or most cases  2 = In many cases  3 = In some cases  4 = In few cases  5 = In no cases  6 = Circled more than one response  7 = Don't know</p>	<p>1. 0.24  2. 5.87  3. 23.47  4. 36.43  5. 26.89  6. 0.24  7. 6.85</p> <p>N=409</p>	<p>1. 0.83  2. 0.83  3. 15.00  4. 55.00  5. 20.00  6. 0  7. 8.33</p> <p>N=120</p>

**Table A.3.1. Comparison of judicial responses 1991 and 2008 (continued).**

QUESTIONS	% WITH GIVEN ANSWER	
	1991	2008
<p>In your experience with cases in your district are motions for substantial assistance departures a source of unwarranted sentencing disparity?</p> <p>1 = In all or most cases  2 = In many cases  3 = In some cases  4 = In few cases  5 = In no cases  6 = Circled more than one response  7 = Don't know</p>	<p>1. 2.45  2. 14.71  3. 39.66  4. 29.41  5. 17.16  6. 0.25  7. 6.37</p> <p>N=408</p>	<p>1. 3.33  2. 24.17  3. 30.00  4. 27.50  5. 11.67  6. 0.00  7. 3.33</p> <p>N=120</p>
<p>In your experience with cases in your district, are there particular types of cases or circumstances that typically produce unwarranted sentencing disparity?</p> <p>0 = No  1 = Yes  6 = Circled more than one response  7 = Don't know</p>	<p>0. 30.05  1. 52.53  6. 0.25  7. 17.17</p> <p>N=396</p>	<p>0. 36.36  1. 51.24  7. 12.40</p> <p>N=121</p>
<p>Compared to the pre-guidelines sentencing system, has unwarranted sentencing disparity increased, decreased, or stayed about the same under the sentencing guidelines system?</p> <p>1 = Increased  2 = Decreased  3 = Stayed about the same  6 = Circled more than one response  7 = Don't know  8 = Not applicable-my only experience is under the guideline system</p>	<p>1. 28.5  2. 32.43  3. 28.75  6. 0.00  7. 7.86  8. 2.46</p> <p>N= 407</p>	<p>1. 14.29  2. 33.61  3. 7.56  6. 0.00  7. 19.33  8. 25.21</p> <p>N=119</p>

**Table A.3.1. Comparison of judicial responses 1991 and 2008 (continued).**

QUESTIONS	% WITH GIVEN ANSWER	
	1991	2008
<p>Rule 11 of the Federal Rules of Criminal Procedures and Chapter Six of the guidelines outline standards for judicial review and acceptance of plea agreements. In addition to, or in place of these standards, should plea agreements be formally regulated in some manner?</p> <p>0 = No 1 = Yes 7 = Don't know</p>	<p>0. 75% 1. 14.6% 7. 10.4%</p> <p>N= 404</p>	<p>0. 79.03 1. 6.45 7. 14.52</p> <p>N=124</p>
<p>A system of guidelines for plea agreements</p> <p>0 = No 1 = Yes 7 = Don't know 8 = Not applicable</p>	<p>0. 3.44% 1. 6.14% 7. 0.00 8. 88.21</p> <p>N=407</p>	<p>0. 84.85 1. 12.12 7. 3.03 8. 0.00</p> <p>N=33</p>
<p>Some other method of regulating plea agreements</p> <p>0 = No 1 = Yes 7 = Don't know 8 = Not applicable</p>	<p>0. 2.5 1. 3.75 7. 3.75 8. 90</p> <p>N=400</p>	<p>0. 75.86 1. 13.79 7. 10.34 8. 0.00</p> <p>N=29</p>
<p>Currently, motions for departures based upon substantial assistance to the government can only be initiated by the government. Should the sentencing judge be able to depart when an offender has provided assistance to the government but no motion has been made?</p> <p>0 = No 1 = Yes 7 = Don't know</p>	<p>0. 30.64 1. 65.93 7. 3.43</p> <p>N=408</p>	<p>0. 46.67 1. 48.33 7. 5.00</p> <p>N=120</p>

**Table A.3.1. Comparison of judicial responses 1991 and 2008 (continued).**

QUESTIONS	% WITH GIVEN ANSWER N	
	1991	2008
<p>Should a defense attorney be able to make a motion for a departure for substantial assistance when the government has not made that motion?</p> <p>0 = No 1 = Yes 7 = Don't know</p>	<p>0 28.85 <b>1 67.97</b> 7 3.18</p> <p>N=409</p>	<p>0. 41.67 1. <b>51.67</b> 7. 6.67</p> <p>N=120</p>
<p>Should a sentencing judge be able to depart downward when an offender has provided a full account of his/her criminal activities and is willing but unable to provide any new information (i.e., not already known to government) about others' criminal conduct?</p> <p>0 = No 1 = Yes 6 = Circled more than one response 7 = Don't know 8 = Not applicable</p>	<p>0. 30.37 <b>1 60</b> 6. 0.25 7. 9.38</p> <p>N=405</p>	<p>0. 39.83 1. <b>50.00</b> 6. 0.00 7. 10.17</p> <p>N=118</p>
<p>Should the sentencing guidelines allow more opportunities for the sentencing judge to depart from the final guideline range?</p> <p>0 = No 1 = Yes 7 = Don't know</p>	<p>0. 17.16 <b>1. 79.10</b> 7. 3.73</p> <p>N=402</p>	<p>0. <b>51.30</b> 1. 44.35 7. 4.35</p> <p>N=115</p>
<p>Should Congress raise, lower, eliminate, or not change current mandatory minimum sentences for drug distribution?</p> <p>1 = Raise the mandatory minimum sentences for drug distribution 2 = Lower the mandatory minimum sentences for drug distribution 3 = Eliminate mandatory minimum sentences for drug distribution 4 = Make no changes in the current system 6 = Circled more than one response 7 = Don't know/No opinion</p>	<p>1. 2.73 2. 7.20 <b>3. 64.27</b> 4. 17.12 6. 0.25 7. 8.44</p> <p>N=403</p>	<p>1. 1.68 2. 23.53 3. <b>52.10</b> 4. 12.61 6. 0.00 7. 10.08</p> <p>N=119</p>

**Table A.3.1. Comparison of judicial responses 1991 and 2008 (continued).**

QUESTIONS	% WITH GIVEN ANSWER N	
	1991	2008
<p>Should Congress raise, lower, eliminate, or not change current mandatory consecutive sentences for possession of a firearm during commission of a violent or drug trafficking offense?</p> <p>1 = Raise the mandatory consecutive sentence for possession of a firearm 2 = Lower the mandatory consecutive sentence for possession of a firearm 3 = Eliminate the mandatory consecutive sentence for possession of a firearm 4 = Make no changes in the current system 6 = Circled more than one response 7 = Don't know/No opinion</p>	<p>1. 3.97 2. 5.96 3. 49.88 4. 32.26 6. 0.50 7. 7.44</p> <p>N=403</p>	<p>1. 3.23 2. 11.29 3. 35.48 4. 38.71 6. 0.00 7. 11.29</p> <p>N=119</p>
<p>Should Congress establish mandatory minimum or mandatory consecutive sentences for additional offenses?</p> <p>0 = No 1 = Yes 7 = Don't know</p>	<p>0. 80.15 1. 6.45 7. 13.40</p> <p>N=403</p>	<p>0. 78.33 1. 5.83 7. 15.83</p> <p>N=120</p>
<p>When Congress wants to raise sentences imposed for certain offenses, what action should Congress take? 0= No; 1= Yes</p> <p>Set a mandatory minimum or a mandatory consecutive sentence</p> <p>Raise the statutory maximum sentence</p> <p>Specify a specific base offense level and/or specific offense characteristics for the applicable sentencing guideline</p> <p>Direct the Sentencing Commission to consider amending the applicable guideline to reflect more appropriately the seriousness of the offense</p> <p>Other 0 = No 1 = Yes</p>	<p>0. 93.25 1=6.75</p> <p>0. 79.52 1. 10.6</p> <p>0. 89.40 1. 10.6</p> <p>0. 43.13 1. 56.87</p> <p>0. 90.36 1. 9.64</p> <p>N=415</p>	<p>0. 88.03 1. 11.97</p> <p>0. 80.34 1. 18.80</p> <p>0. 92.31 1. 7.69</p> <p>0. 35.90 1. 63.25</p> <p>0. 89.47 1. 10.53</p> <p>N=114-7</p>

**Table A.3.1. Comparison of judicial responses 1991 and 2008 (continued).**

QUESTIONS	% WITH GIVEN ANSWER N	
	1991	2008
<p>1991 Survey: Accepting the Congressional decision to adopt guideline sentencing, what changes would you most like to see made in the guidelines and/or in the guideline system? (Next five variables refer to this question) Make guidelines advisory?</p> <p>2008 Survey: Which did you prefer: sentencing criminal defendants before of after <i>Booker</i>?</p> <p>0 = No 1 = yes 3 = n/a</p>	<p>0. 92.88 1. 7.23 N=415</p>	<p>0. 82.00 1. 12.00 3. 6.25 N=112</p>
<p>More flexibility for judicial discretion?</p> <p>0 = No 1 = Yes</p>	<p>0=66.02 1==33.98</p>	<p>Not asked</p>
<p>Reduce overall complexity of the guidelines?</p> <p>0 = No 1 = Yes</p>	<p>0=96.87 1=3.13</p>	<p>Not asked</p>
<p>Eliminate guidelines?</p> <p>0 = No 1 = Yes</p>	<p>0=97.59 1=2.41</p>	<p>Not asked</p>
<p>Specific guidelines mentioned?</p> <p>0 = No 1 = Yes</p>	<p>0=83.37 1=16.67</p>	<p>Not asked</p>

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## **Chapter 4**

### **Sentencing Reform in England and Wales: Diverging from the United States?**

In the last two decades, England and Wales have experienced a revolution in sentencing reform similar to that experienced a few decades earlier in the United States. Beginning in 1991, in reaction to public outcry against crime and an active media, Parliament enacted major sentencing reforms which began to restrict judges' seemingly unlimited discretion. In the summer of 2008, the government will consider more radical reforms such as the creation of an American styled sentencing commission and the adoption of rigid sentencing guidelines similar to those used in the United States. Judges and current sentencing officials have grave concerns about such recent developments and it is unclear whether England and Wales will ultimately escape from their own current explosion in prison population.

The purpose of this chapter is to provide an analysis of sentencing reform in England and Wales from 1991 to the present time. To accomplish this, there is first a description of the institutional context for legal reforms in England in which the principal agent model suggested in Chapter one will be referenced. This part places England's judiciary within the context of other political institutions and describes the court structure within the judicial branch. This part also summarizes the 2005 Constitutional Reform which converted the judiciary into a separate branch of government and created a fully functional independent Supreme Court by 2009. Second, this chapter provides a detailed analysis of sentencing reforms as they relate to the curtailment of judicial discretion. The

reforms, motivated by public opinion, a reactive media, and a government keen on re-election, often seem at cross purposes. Third, this chapter describes reactions from judicial officers, regarding the reform and compares some of these to the opinions of American federal judges. Finally, this chapter concludes by exploring whether England and Wales will be able to escape their explosion in prison population as a result of “tough on crime” policies. This part includes an analysis of the effect of sentencing law reforms on prison population.

In this chapter, there are multiple principals and agents. In the first interaction, both Parliament and the executive and cabinet serve as the principals and the lower courts are their agents. Depending on the composition of the government, the two principals may not share similar preferences and the lower courts may not share the preferences of either of the principals. In the second, interaction, the executive and its ministers delegate authority to two independent bodies – the Sentencing Advisory Panel and the Sentencing Guidelines Council. Although these two bodies can not enforce the use of their guidelines in lower courts or courts of appeal, the guidelines form the basis for sentencing law and a third interaction between these agencies and the lower courts.

Interspersed throughout this chapter are quotations from judges, magistrates, and sentencing council officials whom I interviewed in London, Snaresbrook, Swindon, Southwark, Basildon, and Oxford in March of 2008. Research is based on fifteen interviews conducted in England lasting from forty-five to ninety minutes. Interviewees included two magistrates, three crown court judges, one district court judge, two court of appeals judges, one solicitor, one ministry of justice official, one sentencing council staff member, and four individuals working for non-profits or academic institutions. Of these

people, nine were associated in some capacity with the Sentencing Advisory Panel and/or Sentencing Guidelines Council. Further, I spent one entire day observing part of a jury trial and a sentencing hearing in a London Crown Court and had the opportunity to question the judge about his specific cases including a sentencing decision. The formal questions asked to all interviewees are attached as Appendix 4A.1 to this chapter.

#### **4.1. The institutional context for sentencing reform and judicial independence.**

The traditional characterizations of English law are in flux. First, while Parliamentary sovereignty has predominated English government and been cited by legal scholars as an actual constraint on judicial discretion, over the years it has been eroded by the incorporation of European Union law, the development of an independent Supreme Court, and a “more presidential system of government” (Stevens 2005: 45). Second, although England’s Constitution is unwritten, it has a Constitution derived from a number of sources, including most recently laws of the European Union (Roberts 2005; Leyland 2007: 20). Third, England’s characterization as a common law heritage is well entrenched in the doctrine of *stare decisis* and adversarial court trials. However, like the United States and a number of other common law countries, statutes as well as regulations by independent bodies, especially in the area of criminal law and sentencing, have complemented courts’ reliance on higher court precedent alone. To place criminal law reforms in context, the main institutional features of the judicial branch and its relationship among other branches of government is described.

##### **4.1.1. England’s court structure and Constitutional Reform 2005.**

At the lowest level of court structure are 350 magistrates’ courts served by 28,000 part time, voluntary magistrates, who hear ninety-five percent of all criminal cases, but

have no formal legal training (Elliott & Quinn 2007).<sup>1</sup> Until the Constitutional Reforms 2005, magistrates' courts were administered by forty-two local independent committees (Magistrates' Association 2008) and their administration was separated from the rest of the courts in the country. After the reform, Her Majesty's Crown Court Service has provided unified administration to all of the courts across England and Wales. Lay magistrates hear lower level criminal cases and only have the authority to impose a maximum of six months in prison for one offense or twelve months in prison for two or more offenses.

More serious crimes are heard by Crown Court judges, who have previously practiced as both prosecutors and defense attorneys. There are over 1,000 Crown Court judges sentencing defendants. There are three levels of Crown Courts which are distinguished by the seriousness of the crime and the type of judge that oversees the case. High Court judges often preside in the Crown Courts. In criminal matters, Crown Courts hear appeals from the magistrates' courts and all criminal matters involving crimes that carry possible sentences of at least six months for a single criminal offense. Appeals from the Crown Courts are made to the Court of Appeals, Criminal Division or to the Queen's Bench Division of the High Courts. About one-third of the Criminal Division's work consists of appeals from convictions or sentences (Phillips 2005).

In certain instances, Law Lords, who are members of the House of Lords with legislative responsibilities, form the highest court of the land hearing criminal appeals

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<sup>1</sup> Magistrates are not paid, but they are provided with some allowances for travel and training courses. One magistrate told me that because of the voluntary and part time nature of the job, most magistrates use their holidays from full time jobs to serve on the courts (Interview E013, March 13, 2008).

from courts throughout England and Wales, and Northern Ireland.<sup>2</sup> The House of Lords is not bound to hear all criminal appeals, but instead nearly all appellants must get permission to appeal from the courts below or the House of Lords itself on a point of law of public importance. Appeals are heard by a panel of five Law Lords out of a pool of twelve (See Figure 4.1 for the Court's hierarchical structure).

England's court structure underwent significant reforms in the last few years after the Blair Government in 2003 announced its intention to create a separate Supreme Court following "mounting calls ... separating the highest appeal court from the house of Parliament and removing the Lords of Appeal in Ordinary from the legislature" (Department of Constitutional Affairs 2003: 4). Although the move to create a separate high court was not surprising, the timing and suddenness of the reform were. In fact, the Blair government hastily announced the decision and then asked for consultation, in reverse of the normal procedure.

The reform entailed abolishing the House of Lords and replacing it with an independent Supreme Court by 2009 and was part of Prime Minister Tony Blair's drive to move Britain away from its tradition of hereditary and privileged heirs in the government. The twelve judges from the House of Lords will initially sit on the new Supreme Court which will have the same jurisdiction as the House of Lords and also will hear devolution cases involving Scotland, Wales, and Northern Ireland. In its 2003 Consultation report, the Department of Constitutional Affairs clearly states that "[t]here is

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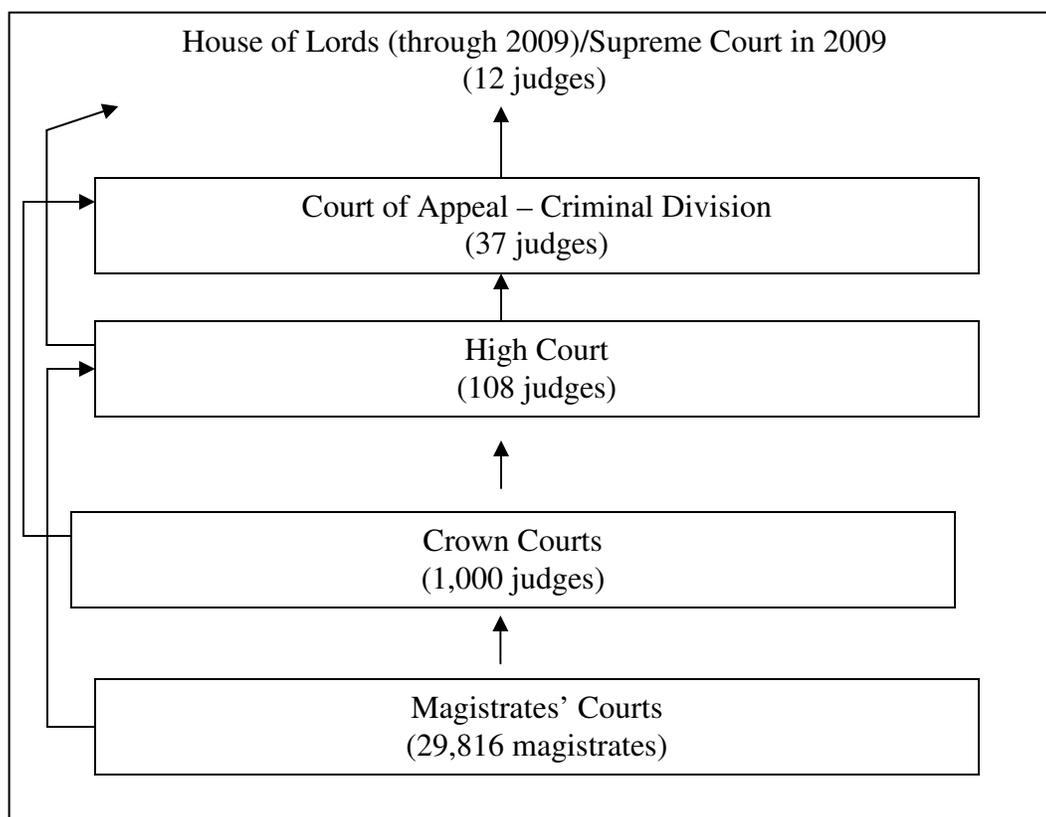
<sup>2</sup> Appeals from lower criminal courts in Scotland are heard by Scotland's High Court of Justiciary, which sits as both a court of first instance and as a final appeals court. Criminal cases, unlike civil cases, in Scotland may not be appealed beyond the High Court of Justiciary, unless they involve the Human Rights Act of 1998.

no proposal to create a Supreme Court on the U.S. model with the power to overturn legislation. Nor is there any proposal to create a specific constitutional court, or one whose primary role would be to give preliminary rulings on difficult points of law” (DCA 2003: 8). A large number of Law Lords opposed the creation of the Supreme Court. Although they would not lose their job, the Law Lords will lose their legislative functions.

Until recently, the highest judge in the land was Lord Chancellor who sits as the head of the Court, member of the government’s cabinet, and speaker of the House of Lords. Lord Chancellors have existed in England for over fourteen hundred years and have had overlapping roles in the executive, legislature and judiciary.<sup>3</sup> In its Constitutional reform, the Blair government strove to eliminate the position of Lord Chancellor completely. When this was met with strong opposition, the government agreed to retain the position of Lord Chancellor as head of the Ministry of Constitutional Affairs, but reduce his roles such that he could no longer act as a sitting judge, head the

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<sup>3</sup> Besides executive and legislative roles, the Lord Chancellor has had many roles in the judiciary itself including serving as a judge in the House of Lords and Privy Council, President of the Supreme Court and Chancery Division of the High Court. As head of the judiciary, the Lord Chancellor had a predominant role in judicial appointments.



**Figure 4.1. Hierarchy of criminal courts in England and Wales**  
**Source: Created from Judiciary England and Wales**

judiciary, take a central role in judicial appointment or automatically become the Speaker of the House (Elliott and Quinn 2007: 142).

Politicians, the Lord Chancellor or Prime Minister, traditionally have selected judges with the approval of the Queen.<sup>4</sup> It was thought that the possibility of political influence in the selection of judges was increasingly problematic as courts in England were expanding their powers to review national legislation that conflicted with European

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<sup>4</sup> Until recently, Crown Court judges and magistrates were appointed by the Lord Chancellor. Prior to the 2005 reform, High Court judges were appointed by the Queen on advice of the Lord Chancellor. Lords of Appeal in the Ordinary and Lord Justices of Appeal were appointed by the Queen on advice of the Prime Minister.

Union law. The Human Rights Act of 1998, which allowed breaches of the European Convention on Human Rights to be heard by judges in the United Kingdom and punishes public officials who act in violation of the Convention, included language showing objection to anything that might undermine courts' independence. As a result, as part of the 2005 Constitutional Reform, the Parliament approved a new system for selecting judges. The reform established the Judicial Appointments Commission (JAC) as an executive body, to start making appointments at all levels beginning in April of 2007.<sup>5</sup>

The Constitutional Reform of 2005 has had significant implications for both judicial review and judicial independence. An information sheet from the Judiciary of England and Wales referred to the reform in the following way:

For the first time in almost 900 years, judicial independence is going to be officially enshrined in law... You won't notice any difference in the way judgments are made or given; after all, judges have been independent in the way they work for centuries. The real differences are in the day-to-day management of the judiciary, the way judges are appointed and the way complaints are dealt with. These will be truly independent, to enhance accountability, public confidence and effectiveness.

(Judiciary of England and Wales 2008). Some of the impetus for the independent Supreme Court came after the United Kingdom had incorporated the European Convention on Human Rights into English Law effective in 1998. Once this Convention as well as other EU law was incorporated into English law, judges although lacking judicial review powers in the American sense, were allowed to rule that certain acts of

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<sup>5</sup> Judicial Appointments Committees have existed in Europe for many years and are a more recent feature in most Latin American countries (See Chapter 1, section 1.2.5; Hammergren 2002).

Parliament were incompatible with the Human Rights Act of 1998 or European Union Law. This in turn put judicial work in the political spotlight (Stevens: 112).<sup>6</sup>

The creation of a separate Supreme Court has wider implications for the independence of the judiciary. Under the reform, the institutional independence of the judiciary is clearly delineated for the first time in English history in the form of separation of powers between the judiciary and the legislature. Testing the effect of the reform on the independence of the judiciary is premature. Arguably a more independent Supreme Court could affect the independence of lower court judges who are beholden to it. However, it is unclear whether lower court judges feel more restrained by Parliament or higher courts when it comes to exercising their discretion. Most lower court judges, interviewed in England and in the United States, said that they are unconcerned about being overturned by appeals courts for sentences that are “unduly lenient” or “unduly harsh.” Furthermore, all interviewees, except for one, believed that the Constitutional

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<sup>6</sup> Article 6 of the European Convention of Human Rights “requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so” (Department of Constitutional Affairs (DCA) 2003: 11).

Another effect of the Human Rights Act was to diminish the role of government ministers in sentencing individual defendants. On July 15, 2002, the European Court of Human Rights in the Cases of *Ezeh and Connors* found that punishments involving the Home Secretary’s imposition of additional days to a judicial sentences was improper. Instead, all punishments, including the decision to add additional days only should be imposed by independent adjudicators (Home Secretary 2002). In response to this decision from October 2002, District Judges became these independent adjudicators. The Home Office, in its statistical report of 2002, noted that about 750 prisoners were released following the decisions. Similarly, the Home Secretary had a role in deciding how long defendants sentenced to life in prison should remain in custody. The European Court of Human Rights in Strasbourg again found that judicial arbitrators and not executive branch ministers should control this process (*Strafford v. U.K.* 2002).

Reform would have little or no effect on lower court decision-making in criminal cases or on lower court judges' independence (Interviews March 5-14, 2008). However, one interviewee believed that the constitutional reform had made politicians more sympathetic to judges as it gave them more power (Interview E003, March 6, 2008).

#### **4.1.2. Parliamentary sovereignty and the role of the judiciary.**

Traditionally, legal scholars have pointed to England's extreme form of Parliamentary supremacy as the reason for the traditional subordination of the judiciary in this country. Many scholars distinguish between England's system of a "balance of powers" (Stevens, 2005: 76) or "fusion of powers" (Leyland 2007: 54) and the American system of separation of powers. Balance or fusion of powers implies that there is not a clear structural division between the Parliament and the judiciary. In fact, historically the two branches have overlapped because Law Lords were also members of Parliament's House of Lords; the Lord Chancellor served concurrently as the highest judge in the judiciary, a member of both the executive and Parliament and was involved in selection of judges; and, Parliament assigned judges to sit on important legislative committees.

Despite the historic merging of legislative and judicial functions, the English have viewed the supremacy of Parliament as a pillar of the rule of law. Most legal commentaries analyzed for this study, referenced A.V. Dicey's *Introduction to the Study of the Law of the Constitution* (1885) as the main source for the belief that Parliament

alone determined the law of the land and “that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>7</sup>

The dominant role of Parliament has slowly eroded due not only to the Constitutional Reform, but also to political factors. One cited reason for the erosion of parliamentary sovereignty was the increase of presidential type powers accrued to the prime minister (Stevens: 97). Another reason for the decline of Parliamentary sovereignty is Britain’s membership in the European Union and acceptance of the jurisdiction of the European Court of Human Rights as the court of last resort. Finally, the adoption of the Human Rights Act of 1998 incorporates human rights of the European Convention on Human Rights into English Law. For Leyland (2007), “the effect of the Act is to put all public authorities (Parliament, government and civil service, local and devolved government, the police, and the courts) under a legal duty to uphold this charter of rights” (at 44).

Although the Constitutional Reform 2005, the Human Rights Act, and the rise of a dominant prime minister have changed the relationship between the judiciary and Parliament and created a clearer separation of powers between branches of government, Parliament still has supreme power in creating laws that judges must follow. As far as sentencing policy, Ashworth (2005) confirms that Parliament still has considerable authority to create sentencing policy. In other words, by statute, Parliament can state minimums and maximums for sentences and curtail judicial discretion in almost anyway. The only limitation is that Parliament can not act as a court to sentence individual

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<sup>7</sup> Dicey (1885: 40, 70). Dicey’s conception of the rule of law has three facets: 1) regular law predominates over arbitrary power; 2) equality before the law, and 3) “in the absence of a constitution, rights of individuals have been defined and enforced by the courts.” (Leyland: 49).

defendants. Parliament's power to set sentencing policy has come under scrutiny from the judiciary that believes that "judicial discretion supervised by the Court of Appeal is more likely to produce fair sentencing than greater statutory restrictions" (at 52).

#### **4.2. Why Sentencing Reform? Why Now?**

The analysis of sentencing reforms in England and Wales focuses on sentencing reforms begun in 1991, which marked some of the most significant changes in the criminal law system in forty years. Unlike the U.S. system, judges sentencing criminal defendants enjoyed in the past and still enjoy vast discretion in their sentencing decisions. Further, although not statutory, sentencing guidance in the form of court decisions has existed in England for some time. Since 1974, the Court of Appeals has issued "sentencing guidelines" in the form of precedent setting court opinions that have been compiled in convenient bench books, such as D.A. Thomas' *Principles of Sentencing*.<sup>8</sup> These voluntary guidelines, however, are only on limited issues and types of cases that come before the Court of Appeal. Several Crown Court judges complained that the compilation of prior Court of Appeal sentencing decisions was cumbersome (Interview E007, March 7, 2008). Further, since 1989, the Magistrates' Association, a voluntary body with no legal authority, established sentencing guidelines to assist magistrates across the country.

The discussion of reforms in this part only will focus on the three most major reforms enacted since 1991, when Parliament began the process of providing structure and priorities to sentencing judges culminating in the establishment of a Sentencing

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<sup>8</sup> Other sources of sentencing law shown to me by judges were Archibold's *Criminal Pleading, Evidence and Practice* and Blackstone's *Criminal Practice*.

Advisory Panel in 1998 and a Sentencing Guidelines Council in 2004 to produce sentencing guidelines outside of the Court of Appeals. Despite the emphasis here on only three pieces of legislation, it should be acknowledged that several reforms regarding actual sentences and the role of practitioners in sentencing are also important. Although not discussed in detail, some of the other reforms of this period are listed in Table A4.1 in the Appendix of this chapter showing the steady rate of criminal law reforms in England and Wales and the conflicting nature of the reforms themselves. In fact there have been sixty-six pieces of criminal justice legislation since 1995 (Carter 2007: 6). Although there are a plethora of new sentencing statutes, Ashworth (2005) notes that three are of particular purpose: 1) The Criminal Justice Act of 1991; 2) The Powers of Criminal Courts (Sentencing)(PCCS) Act 2000, and 3) the Criminal Justice Act 2003. While acknowledging the large number of criminal law reforms, this analysis will focus on only these three statutes.

#### **4.2.1. The Criminal Justice Act of 1991.**

The Criminal Justice Act of 1991 (effective October 1992)(hereinafter CJA 1991) was hailed as the first major attempt to structure sentencing in England and Wales in forty years. As such, it created a new sentencing framework stating that the severity of sentences should reflect the seriousness of the offenses. This provision allowed courts to take account of relevant previous offenses in sentencing a defendant, but only if the prior crimes included aggravating factors that existed in the current crime. One judge believed that the reduced consideration of prior crimes in the 1991 legislation was “chicanery to reduce the prison population” (Interview E001, March 5, 2008). The section dealing with prior convictions was changed under the Criminal Justice Act of 1993 allowing courts to

take account of all previous convictions in sentencing. The second major reform of the CJA 1991 concerned the use of custodial sentences in general. The Act included a provision that custody should be reserved for the most serious offenses and to protect the public from serious harm from violent or sexual offenders. Third, the Act stated that community sentences should “play a full role in sentencing and not simply as an alternative to custody.” Fourth, the Act created new early release procedures to replace the prior system of parole.<sup>9</sup>

In 1997, Parliament began legislating mandatory minimum sentences in a trend similar to that seen in the U.S. federal and state cases. In 1997, Parliament enacted mandatory sentences for three offenses: offenders convicted of repeat serious offences; repeat drug traffickers and repeat domestic burglars. The provisions regarding life sentences for second time serious offenders were repealed in the major legislation in 2003.

Although not discussed at length, a major development of sentencing policy was found in the Crime and Disorder Act of 1998, which created an independent Sentencing Advisory Panel. As initially conceived, the government intended that this Panel would

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<sup>9</sup> The new early release provisions were as follows:

- 1) Automatic unconditional release: Sentence of less than 12 months are released automatically half way through sentence unless breaches of prison discipline. Adults no supervision after release; juveniles do have supervision.
- 2) Automatic conditional release: Sentence of greater than or equal to 12 months, but less than 4 years released automatically halfway through sentence and subject to supervision upon release.
- 3) Discretionary release: Sentence of greater than or equal to 4 years are eligible for parole half way through their sentence. (CJA 2003, sections 533 to 536).

replace the Court of Appeal as the main depository of judge made sentencing guidelines. In effect, the Panel was to draft sentencing guidelines with public consultation and advise the Court of Appeal about the form of the guidelines. In opposition to prior policy, the Court of Appeal's power to issue guideline judgments was limited to crimes in which it had already received advice from the Panel, "although it was not bound to accept the Panel's advice" (Ashworth 2005: 33). A rather silly constraint for Court of Appeals judges who had been issuing guidelines for quite some time.

#### **4.2.2. The Powers of Criminal Courts (Sentencing)(PCCS) Act 2000.**

The Powers of Criminal Courts (Sentencing) (PCCS) Act 2000, consolidated all sentencing laws under one statute. As England does not have a penal code, this was a much welcomed advancement for judges who had previously relied on Thomas' bulky and hard to use compilation of sentencing decisions and piecemeal sentencing legislation. One of the judges interviewed for this study, said that PCCS was the "best" piece of criminal sentencing legislation and that more recent legislation such as the Criminal Justice Act of 2003 (discussed below) was a "retrograde step" in sentencing reform (Interview E007, March 7, 2008). Despite the accolades given to this sentencing consolidation legislation, it never achieved its intended purpose of simplifying sentencing as several other pieces of legislation superseded it and after only three years, significant portions of it had been replaced by the Criminal Justice Act of 2003. The government's failure to fully implement PCCS or to test its effectiveness has been repeated in cases of other legislation and has been frustrating to judges and practitioners trying to keep abreast of new laws (Interview E004, March 7, 2008).

### **4.2.3. Criminal Justice Act 2003.**

Prior to major reforms in 2003, Lord Halliday issued a report, *Making Punishments Work*, providing a review of the current sentencing framework and providing recommendations for improvements (Halliday 2001). For Halliday, sentencing reform was needed because of “limitations and problems” of the prior legislation especially, “the unclear and unpredictable approach to persistent offenders, who commit a disproportionate amount of crime” and the failure of short prison terms to meaningfully interfere in individuals’ criminal careers (Halliday 2003: ii). Halliday believed that the erosion of the sentencing approach under the CJA 1991 and “the resulting muddle, complexity, and lack of clear purpose or philosophy” warranted reform (Halliday: ii).

The CJA 2003, adopted subsequent to the Halliday report, stated five purposes for sentencing in Section 142 as: 1) The punishment of offenders, 2) The reduction of crime (including its reduction by deterrence), 3) The reform and rehabilitation of offenders, 4) The protection of the public, and 5) The making of reparation by offenders to persons affected by their offenses (CJA 2003, sec. 142). The Act did not rank these purposes, however, and judges interviewed in England generally stated that the purposes they consider when sentencing are dependent both on the crime committed and defendant attributes. Many judges, however, stated that they were skeptical of any general deterrence purpose of criminal sentencing because it “presupposes” that criminals know the law (Interview E001, March 5, 2008).

The CJA 2003 included major provisions establishing sentencing guidelines and specific minimum sentences. Some of the more significant changes involved both the philosophy of sentencing and use of alternatives to sentencing. The CJA emphasized the

seriousness of the offense calculated by looking at both the culpability of the defendant and the harm he or she caused. The CJA 2003 also includes major changes in custodial sentences and community sentences. Under the Act, judges should impose custodial sentences that reflect the crime's seriousness (section 152) while imposing the lowest amount of custody possible. The legislation included mandatory minimums that judges must follow and sentencing starting points for which judges "must have regard." As far as non-custodial sentences, the CJA 2003 also included new provisions to allow for more prevalent use of community sentences instead of custodial sentences and use of sentences that split time between custody and conditional release known as "custody-plus" sentences. The legislature later decided not to enact the custody plus provision (Elliott and Quinn p. 427). The CJA 2003 also has increased the time that defendants are supervised in parole.

One of the most controversial parts of the legislation includes new provisions for indeterminate sentences for public protection or IPP's (IPP) for defendants committing serious crimes.<sup>10</sup> Under the IPP legislation, judges sentence defendants to a period of prison deemed to be a "just dessert" for the crime committed. The judge then sentences the defendant to an unlimited time of detention to be terminated with a prisoner's

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<sup>10</sup> The CJA, 2003 generally provides life sentences for serious offenses committed by individuals over the age of eighteen. In certain instances, the court may find that a life sentence is not appropriate and alternatively "the court must impose a sentence of imprisonment for public protection" which is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences... An offence the sentence for which is imposed under this section is not to be regarded as an offence the sentence for which is fixed by law." (CJA 2003, section 226).

showing that he is no longer a public threat. Finally, the judge sentences defendant to a license or set of stipulations which the prisoner must fulfill upon his ultimate release.

The IPP legislation has been one of the most controversial parts of the CJA 2003 and is blamed for large increases in the prison population. As explained during several interviews, the problem with IPP is that defendants are unable to access prison programs and other services to show that they deserve to be released. As a result, the IPP operates more like a life sentence (Prison Reform Trust 2007b).

Besides changing the general approach to sentencing, the CJA also allowed for the reduction in sentences for early guilty pleas. Judges applying the CJA must discount a defendant's possible sentence by different percentages depending on when the defendant pleads guilty in the process. Despite this significant reduction, to date, plea bargains in England and Wales are used significantly less than in the United States. For instance, of the judges interviewed, most reported that pleas constituted only fifty percent of their case load, whereas in the U.S. federal system, almost ninety-nine percent of the cases involve plea bargains. Further, In England and Wales, plea bargains are made as to guilt or innocence, but not as to the final sentence as in the case of the American federal and state systems. Finally, there is a recent movement in England and Wales to allow defendants to ask the judge what the possible sentence will be prior to pleading guilty (R v. Goodyear 2005).

The government also intended to expand the jurisdiction of magistrates' courts who handle the majority of all criminal cases in the country. Under the CJA 2003, the jurisdiction of magistrates was to be increased to twelve months for a single crime. This provision, however, was never implemented and one magistrate noted that failure to

implement was due to Parliament's concern that it would ultimately raise the prison population (Interview E013, March 13, 2008).

One of the more significant changes for sentencing policy in the CJA 2003 was the creation of a Sentencing Guidelines Council (Council) to work concurrently with the pre-existing Panel. The purpose of the Council is to independently produce sentencing guidelines that can be generally used for all levels of judges and are not generated in response to a particular issue before the Court of Appeal. The Council creates guidelines in an eight step process which involves consultation with the Panel, the public, the Home Secretary, the Ministry of Justice, and the Justice Committee of the House of Commons. However, none of these has veto power and the Council may choose to ignore any comments as to the draft guidelines issued from these bodies.<sup>11</sup>

The Sentencing Panel and Council work as two independent bodies, but their work is integrated. Both bodies are regarded as "quangos"<sup>12</sup> or quasi-autonomous non-governmental organizations to which the government has given specific powers and functions. Most interviewees insisted that the Council and Panel were independent of the government, but interviewees further confirmed that these bodies are actually executive

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<sup>11</sup> Halliday (2001), in his report advocating many of the changes ultimately implemented in CJA 2003, was strongly opposed to a Parliamentary veto for guidelines stating:

If Parliament had a veto over the guidelines it would in effect have complete control. Failure of Parliament and the independent body to agree could result in endless "ping-pong" as different versions of guidelines were batted to and fro, leading potentially to catastrophic loss of confidence (at 55).

<sup>12</sup> Norton (2007) defines quangos as "non-departmental bodies composed of non-civil servants appointed by ministers to carry out public functions relatively free from ministerial control (at 278). For Norton, non-governmental is a misnomer as some quangos are part of the government's formal organization and some are not.

agencies funded by the Ministry of Justice (Interview E011 March 11; Interview E015, March 12, 2008). The Council's independence, however, is derived from its ability to disregard comments from the government or Parliament regarding the substance of proposed guidelines, although the Council is required to "consult" with them.

The membership of the Panel is more heterogeneous than that of the Council which is composed primarily of judges. Indeed, in the original legislation, Council membership was to be limited to judges in hopes of appeasing judicial officers who were concerned about structured guidelines which would reduce their discretion. The Lord Chief Justice is chairman of the council and the seven judicial members are chosen by the Lord Chancellor after consultation with the Lord Chief Justice and Secretary of State. The four non-judicial members are chosen by the Secretary of State after consultation with the Lord Chancellor and Lord Chief Justice. The Panel is appointed by the Lord Chancellor after consultation with the Lord Chief Justice and Secretary of State. Despite the differences in the Panel and Council, these two bodies must work together. The Council decides the topic and crime of the Guidelines. The Panel provides research and advice to the Council on proposed topics and consults with government officials and the public. Ashworth (2005) and several interviewees criticized the existence of two sentencing bodies in the place of one, claiming that one body would be more efficient. Interviewees also claimed that due to the memberships, the Panel worked more effectively than the Council.<sup>13</sup>

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<sup>13</sup> One judge noted that Council members were "blue sky thinkers" (Interview E007, March 7, 2008).

Since its existence, the Council has produced a wide range of guidelines based on research and consultation. In fact, the amount of work completed by the Council in such a short time is surprising considering the small staff and unpaid members. Table 4.1 Summarizes the definitive guidelines to date. In its first year of work, the Council produced more general guidelines on principles of sentencing, new sentences outlined by the CJA 2003, and the use of guilty pleas (Sentencing Guidelines Secretariat) . In subsequent years, the Council drafted guidelines for specific types of crimes.

**Table 4.1. England and Wales' definitive sentencing guidelines by year.**

<b>2004</b>
1) Overarching Principles: Seriousness 2) New Sentences: CJA 2003 3) Reduction in Sentences with Guilty Pleas
<b>2005</b>
1) Manslaughter
<b>2006</b>
1) Final Guideline on Robbery 2) Breaches of Protective Orders 3) Overarching Principles: Domestic Violence
<b>2007</b>
1) Sexual Offenses Act 2003 2) Guideline Revised: Reduction in Sentence for Guilty Plea 3) Failure to Surrender for Bail
<b>2008</b>
1) Overarching Principles: Assaults on Children and Cruelty to Children 2) Assault and Other Offenses against the Person

The guidelines produced by the Sentencing Council do not resemble the guidelines used in the U.S. federal or state systems. First, the Council Guidelines are not based on any type of grid structure or table where judges use the axes of criminal history and offense level to determine the precise range of sentences. Rather, the Council guidelines are more individualistic delineating a starting point for sentences for a particular crime and then listing aggravating and mitigating circumstances that the judge

should consider in increasing or decreasing the starting point sentence. Second, as emphasized in interviews with judges and sentencing officials, the Council's goal in creating guidelines is to create *consistency in the approach* that judges use in sentencing rather than achieving *consistency in outcomes* which is a stated purpose of the U.S. federal guidelines and many state systems (Interviews March 2008; see also Halliday 2003). Finally, Council guidelines are not mandatory as they were in the American federal system until 2005 and in many of the state systems. Instead, Crown Court and magistrate judges must simply "have regard for" the Council guidelines and provide reasons to the defendants for sentences both within and outside of the guideline ranges. As in those American states without mandatory guidelines, the non-mandatory nature of Council Guidelines changes the dynamic between the lower courts and Court of Appeals. Arguably under voluntary guidelines Courts of Appeal have less to review as lower courts are not bound to follow "voluntary" laws.<sup>14</sup>

Although the sentencing Council and Panel seem to be working well together, Lord Carter (2007), in his review of prisons December 2007, recommended replacing these two bodies with an American styled sentencing commission. Carter found that the prison population in England and Wales was outstripping the current prison building program. To counter the explosive population growth, Carter had four main recommendations of which three dealt with building more prisons, including "titan" prisons, and improving prison management.

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<sup>14</sup> However, in the U.S. federal system under both mandatory and advisory guidelines, most defendants waive their right to appeal when they agree to a plea bargained sentence. This appeal waiver substantially reduced the Courts of Appeals' work load.

His other recommendation went directly to devising a new sentencing framework to replace the current one. Most adamantly he proposed that England and Wales should consider adopting grid like sentencing structures and creating a sentencing commission citing several U.S. jurisdictions in his report (Carter 2007). His sentencing recommendations called for the introduction of a more Americanized sentencing system, but did not state why a commission would be better at creating a new framework than the two existing bodies, the Panel and the Council. Further, he cited sentencing legislation as one of the main causes of the prison population and specifically referenced California's three strikes law as an example of "overcrowding...with no end in sight." His example implied that the "Californization" of sentence should be avoided by England and Wales (at 31).<sup>15</sup> Unfortunately, Carter failed to acknowledge that sentencing commissions in general advocate higher sentences that ultimately result in higher incarceration rates. Carter also highlighted that judges would not have to consider sentencing resources when sentencing individual defendants, although many believe that this would be a necessary requirement for reducing prison population. Lord Carter recommended the establishment of a working group on the guidelines and sentencing commissions to report to Parliament in the summer of 2008. Lord Justice Gage was appointed as chair of the working group. A consultation paper produced by the group in March 2008 relied heavily on examples from Minnesota and North Carolina (Sentencing Commission Working Group 2008).

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<sup>15</sup> Carter seems to blame the California's three strike laws as the cause for California's explosive population. However, in research conducted by Tiede and McCubbins (2006), on the effect of California's determinate sentencing laws enacted in 1977 and three strikes law enacted in 1994 on incarceration rates, the two laws tested had statistical significance, but they regressed toward the mean establishing that legislative agents (judges, prosecutors, etc.) ignored the legislative constraints over time.

Almost all the interviewees strongly opposed the creation of a sentencing commission and restrictive grid guidelines. One interviewee stated that if England adopts such a system then judges might as well be replaced by computers (Interview E003, March 6, 2008). This individual, as with most individuals interviewed, feared that Carter's proposals would greatly reduce judicial discretion. Despite general dismay about Carter's proposals, some interviewees hoped that a Commission would have the limited, but much needed role, of collecting data and informing the public.

### **4.3. Judges and sentencing officials' opinions.**

On certain issues, judges and sentencing officials in England and Wales are not dissimilar from their American counterparts working in federal district courts. With few exceptions, judges in both countries dislike the legislature limiting their discretion as manifested in their opposition to restrictive guidelines and mandatory minimums (See Chapter 3 for American district court judges' opinions). Further, judges in both countries believe that sentencing has become overly politicized and that reforms to sentencing are more a political reaction to public opinion than to sound criminal justice policy. The opinions of English judges and sentencing officials are explored in the areas of judicial decision-making, current guideline systems, inter-branch relationships, and unwarranted sentencing disparity.

#### **4.3.1. Judicial decision-making.**

Most judges to whom I spoke indicated that prior to current law reforms, judges did not employ a formal framework for sentencing individuals. Now, judges undertake an analysis of the defendant and crime before them and consider aggravating and mitigating factors for determining the sentence. If new Council guidelines are available,

the judges consult these. If guidelines are not available, the judge considers prior case law. Consideration of aggravating and mitigating factors varies depending on the type of crime and type of defendant before the court. For example, one judge stated that in a rape case involving multiple victims, he would give little consideration to the defendant's family circumstances when determining the sentence. One judge further indicated that weighing these factors is more of an "art" or gut reaction than a "mathematical science." Judges also indicated that they gave considerable weight to criminal history, something that had not been emphasized under the Criminal Justice Act of 1991. Under the CJA 2003, judges state the reason for their sentence and for going outside of the guidelines.

Lower court judges that I interviewed in England, as with American judges, were not overly concerned with being reversed on appeal. This is direct contradiction to judicial scholars who claim that lower courts fear of reversal drives compliance (See Chapter 2, section 2.1). Both American and English judges that I interviewed felt bound to follow the law articulated by higher courts, but they seemed unconcerned about being overturned. Indeed, some Crown Court judges felt that the Court of Appeals gave them wide discretion in sentencing (Interviews E004 & E007, March 7, 2008). This was confirmed by a Court of Appeals judge as well (Interview E008, March 10, 2008).

#### **4.3.2. Current guideline system and judicial discretion.**

Interviewees had varied opinions about the relative advantages and disadvantages of the current sentencing guideline system and most interviewees reported both. Despite these opinions, most interviewees made it clear that their opinions would be significantly different if the guideline system became more restrictive or if Parliament established a more Americanized sentencing system based on a Commission and restrictive guidelines.

Unlike American federal judges who seemed to generally dislike the federal guidelines, English judges saw equal advantages and disadvantages of the system. The difference of opinion is explained by the type of guidelines enacted in both countries. English opposition to guidelines is not as vocal as in the U.S. because England's guidelines are not as restrictive as the American guidelines.

Advantages and disadvantages mentioned by interviewees were mostly consistent among respondents (See Table 4.2 for a summary). As advantages, individuals praised the current guideline system because it provided consistency, predictability (to sentencers and clients), and appeared to be based on research and public opinion. The prominent disadvantages to the guideline system included the fact that guidelines reduced judicial discretion and raised prison rates and that testing the effect of the guidelines was virtually impossible due to the lack of case level data prior to and after the reforms. The fact that the Sentencing Guidelines Council consisted of a majority of judges as members was seen mostly as an advantage by judges and a disadvantage by non-judicial interviewees.

**Table 4.2. Advantages and Disadvantages of Current Guideline System.**

ADVANTAGES	DISADVANTAGES
<p>Guidelines:</p> <ul style="list-style-type: none"> <li>❖ Are produced for different offenses so no longer have to wait for Court of Appeals' decision in a specific case.</li> <li>❖ Encourage thought about aggravating and mitigating circumstances.</li> <li>❖ Allow for less disparity.</li> <li>❖ Are helpful when new sentences are introduced by Parliament.</li> <li>❖ Good for magistrates who do majority of work.</li> <li>❖ Provide a more rational and open approach.</li> <li>❖ Are based on research and public opinion.</li> <li>❖ Are drafted by a Council overly dominated by judges.</li> <li>❖ Provide consistency, clarity, predictability.</li> <li>❖ Are helpful for advising clients.</li> <li>❖ Explain to the public and clients the consistency of approach used by judges in sentencing.</li> </ul>	<p>Guidelines:</p> <ul style="list-style-type: none"> <li>❖ Take away sentencing discretion.</li> <li>❖ Create "tension between certainty and justice for particular person."</li> <li>❖ Have not been created for drug offenses.</li> <li>❖ Increase prison population.</li> <li>❖ Result in sentencing disparity.</li> <li>❖ Defy evaluation as there is no pre-guideline or post-guideline data available.</li> <li>❖ Are drafted by a Council overly dominated by judges.</li> <li>❖ Are based on a first time offender pleading guilty with no reference to offenders with priors.</li> <li>❖ Approach to fines is problematic.</li> </ul>

Interviewees were outspoken about the changes they believed should be made to the current sentencing guideline structure. As far as the substance of guidelines themselves, some interviewees indicated the need to substantially revise the statutory codes for old offenses upon which guidelines are based. Many wanted Parliament to create a penal code. Some interviewees believed that the guidelines were too detailed and prescriptive, a criticism made often by American federal judges in regards to their respective guidelines. One interviewee indicated that guidelines should only exist for offenses and not other aspects of the criminal justice system, such as bail (Interview

E004, March 7, 2008). Finally, some interviewees, believed that guidelines should require judges to consider prison resources more specifically.<sup>16</sup>

The failure to obtain data and evaluate the effectiveness of the guidelines was seen as the largest problem with the system by many interviewees. Many council and panel members were quite concerned that the hard work that was done in producing Guidelines could not be empirically tested as no case specific data was available. In fact a prestigious and well funded study conducted by Cambridge University was terminated because it was deemed impossible to find sufficient data (Interview E009, March 10, 2008). This criticism was not apparent in the U.S. federal case where Congress mandated that the U.S. Sentencing Commission collect data from courts on each sentencing case and the USSC gathered a limited amount of data on pre-guideline cases to test the effectiveness of the new guidelines for certain crimes (USSC 1991).

Many interviewees indicated that more financial resources were needed for the courts due to their increased case loads. One magistrate indicated that additional funds were needed to hire better qualified legal advisors (Interview E013, March 13, 2008). In light of the fact that Lord Carter's proposals would be quite costly if adopted, it is doubtful that Parliament will allocate more resources to courts.

#### **4.3.3. Inter-branch relationships.**

In the majority of interviews, judges acknowledged Parliament's supremacy in setting sentencing policy, but believed that Parliament should only set maximum

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<sup>16</sup> One interviewee suggested that Parliament should establish a fixed, rather than unlimited budget for prisons. This interviewee said that the use of healthcare is based on a budget. In the criminal justice system, because there are no limits set, prison rates can continue to climb (Interview E011, March 11, 2008).

penalties for particular crimes and nothing else (Interviews #E001, E004, E007, E008, E010, E011, E015, March 5 to 14, 2008). One judge argued against Parliament's involvement in sentencing policy due to the fact that there were too many "permutations in judicial discretion" and that "politicians interfere too much [in sentencing policy] for short term gain" (Interview E001. March 5, 2008). Judges seem to be less concerned with Parliament's delegation of sentencing policy to outside councils, such as the Sentencing Advisory Panel and Sentencing Guideline Council, discussed further below.

Judges and sentencing panels believed that politics was the guiding force behind sentencing reform. When asked a question that was used in the 2001 Halliday report to support sentencing reform, judges and sentencing officials still revealed that "evidence of politicization of sentencing was seen in the constant tinkering with the framework." In fact, most interviewees felt very adamant about this subject suggesting that there was no policy justification for many of the changes, but they were only manipulations by the government or Parliament to garner support. One interviewee felt that the government was more to blame than Parliament (Interview E015, March 12, 2008). A few interviewees suggested that the legislation was simply "populist pandering" on the part of legislators (Interview E002, March 6, 2008; Interview E005, March 7, 2008). Several interviewees suggested that all the new legislation sent conflicting messages. According to these interviewees, Parliament seems to want to lower the prison population until there is a rash of crime and then there is support for custodial sentences (Interview E015, March 12, 2008). Interviewees found that Parliament was too involved with setting

mandatory minimums and in penalties for murder (Interview E008, March 10, 2007; Interview E010, March 11, 2008).<sup>17</sup>

Besides disliking legislation that curtails judicial discretion in general, judges also were concerned with the rate and substance of the sentencing legislation. Two Crown Court judges said that it was very difficult to find the law and know how to apply it. The rate of change of the law (ie. sixty-six new pieces of legislation since 1995 (Carter 2007)) confounded the work of judges. Furthermore, provisions of each piece of new legislation had different effective dates and often new legislation abrogated prior legislation even before it came into force. As a result, when confronted with a defendant with multiple crimes, committed on multiple dates, judges had difficulty determining which laws applied.

Judges see sentencing legislation as piecemeal and many wished that Parliament would “just leave them alone for two years” to see if any of these reforms achieve their intended impact (Interview E014, March 12, 2008). Judges also complained that it was very hard to find the law. Previously, the Home Secretary had provided judges with updates on the law, however, possibly as a result of the constant changes, judges were now required to “find” the law on the Home Secretary’s website. One judge admitted that in a very serious case they had found some provisions that applied to a defendant

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<sup>17</sup> Parliament’s legislation on murder seems to be a direct reaction to the European Court of Human Rights finding that judges, and not a government minister, could ultimately decide how long a defendant remains in jail for murder. For example, in 2002, Home Secretary David Blunkett vowed he would use domestic legislation to “enshrine the power of Parliament to provide adequate punishment for the guilty – including life meaning life.” (BBC 2002, quoting Blunkett directly). Parliament has continued to legislate on murder doubling the minimum tariff (or sentence) in the CJA 2003.

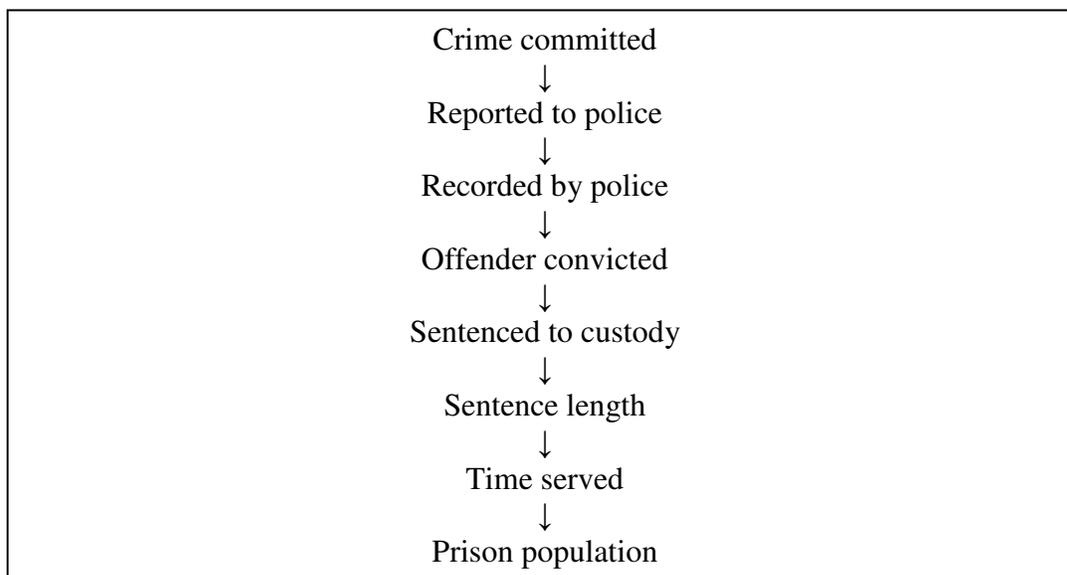
“just by mistake” (Interview E004, March 7, 2008). Furthermore, about 20% of sentences overturned by the Court of Appeals were overturned because they were unlawful. This occurred, not as one interviewee explained, because the judges were trying to avoid the law, but simply because they were mistaken about what the law was (Interview E014, March 12, 2008). If rule of law is defined as either predictable law or written law which may be easily ascertained (Finnis 1990; Fuller 1969; Raz 1977), the pace of legislative changes, staggered effective dates, and the failure of a unified penal code in the United Kingdom, call into question how consistently law will be applied and therefore leads to questions about whether the rule of law has been compromised by such a confusion of sentencing laws.

#### **4.3.4. Unwarranted sentencing disparity.**

When asked about whether sentencing legislation and the creation of a Guidelines Council helped to reduce disparity, almost all interviewees responded that the goal of sentencing guidelines was to provide for consistency of *approach* and not consistency of *outcomes*. Despite this, many interviewees claimed that the CJA 2003 had no effect on reducing disparity in sentencing. Disparity arose due to judges’ own internal disparity, the disparity of the quality of the crown prosecutor and defense attorney, and differences in local circumstances or pressures. Further, much of the disparity may occur outside of the courts due to prosecutors’ charging and plea bargaining policies and the new ability of the police to issue conditional cautions rather than citations avoiding court oversight completely. Ultimately, virtually all decisions involved in sentencing, by any one of a number of individuals, may be considered subjective.

#### **4.4. Is England destined to inherit America's explosion in prison population?**

Lord Carter (2007) reported that on November 16, 2007, there were currently 81,547 people incarcerated in England and Wales. In his report, he predicted that this number would increase to more than 100,000 by 2014 (at 2). The increase in prison population is cause for concern in light of the fact that crime rates may have been decreasing in Britain since 1995, a claim made by Carter and others (at 5) despite some critics who claim that crime has not been measured properly (Prison Trust Reform). The growth of prison population probably can not be attributed to only one cause due to the fact that the entire criminal justice process involves a "successive funneling process" (See Figure 4.2) with different criminal justice actors at each stage. Undoubtedly, sentencing legislation may be a significant determinate of prison population as laws mandating higher sentences and mandatory minimums generally keep individuals in prison longer.



**Figure 4.2. Criminal justice system: A funneling process (Source: BJS 2004).**

Further, as referenced in the section on judicial opinions, it is difficult to determine the effect of sixty-six specific pieces of sentencing legislation due to the sheer number of changes and the fact that each new piece of legislation had more than one effective date and some provisions were overturned prior to coming into force.

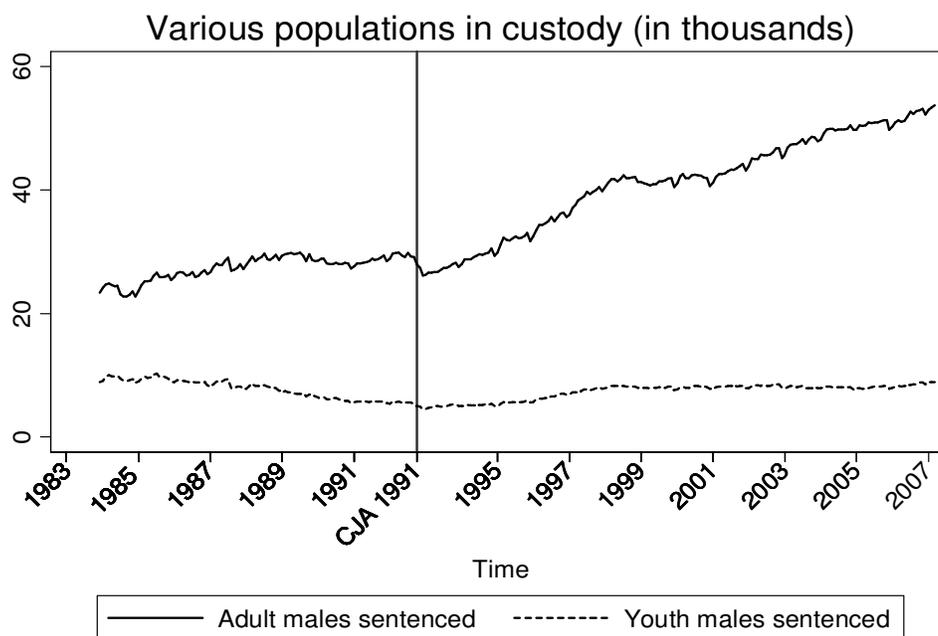
Therefore, the only piece of sentencing legislation that can be tested is the CJA 1991, which changed the sentencing regime for the first time in forty years and marked the beginning of the wave of reforms limiting lower court judicial discretion in England and Wales. The simple hypothesis is that the CJA 1991 sentencing reforms resulted in an increase in prison population, the null hypothesis is that it had no effect.

The data used for this analysis is prison population by month in England and Wales produced by the Home Office. The time range of the analysis is December 1983 to March 2007, the final date of available data. The data set includes 280 observations. The following subgroups of prison population are analyzed:

1. All males under sentence in custody

2. All adult males sentenced to custody
3. All youth males sentenced to custody
4. All females sentenced to custody
5. All individuals sentenced to custody
6. All individuals in custody, not under sentence (ie. Total prison population less all individuals under sentence in custody)

In order to generally see if prison population has grown due to sentencing law, numbers of individuals under sentence and in custody are compared to number of individuals not under sentence and also in custody. This latter population includes individuals waiting to see judges for the first time and some non-criminals. In Figures 4.3 to 4.5 changes in prison population by subgroups are analyzed across time. The vertical line shows the CJA 1991's effective date.

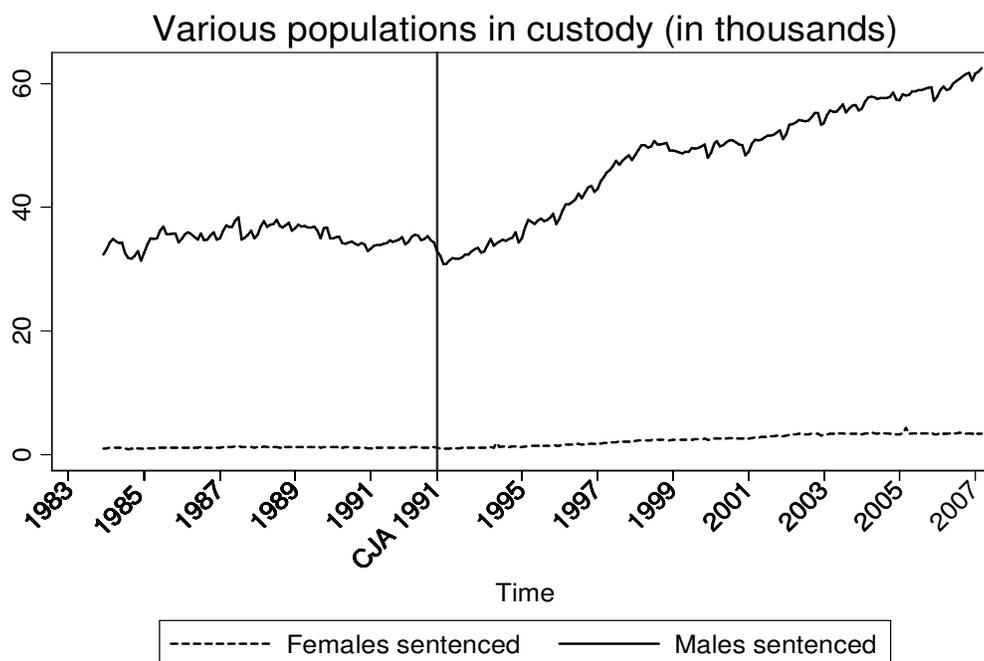


**Figure 4.3. Sentenced adult and youth males in custody.**

Figure 4.3. shows that the number of adult males sentenced and in custody has increased over time with a higher rate of increase after the CJA of 1991. The number of male youths in custody rose between 1991 and 1997, but then seems to have stopped increasing. The criminal laws regarding youth are quite different than those affecting adult males and often the major legislation had separate provisions for youth. Similarly as seen in Figure 4.4, while female prisoners under sentence increased slightly after the CJA 1991, there has not been an appreciable difference in female prison rates, probably due to the fact that females constitute only a small percentage of the prison population.<sup>18</sup> Analyzed together, Figures 4.3. and 4.4 show that males under sentence in prison have increased at a greater rate since 1991 than females or youth.

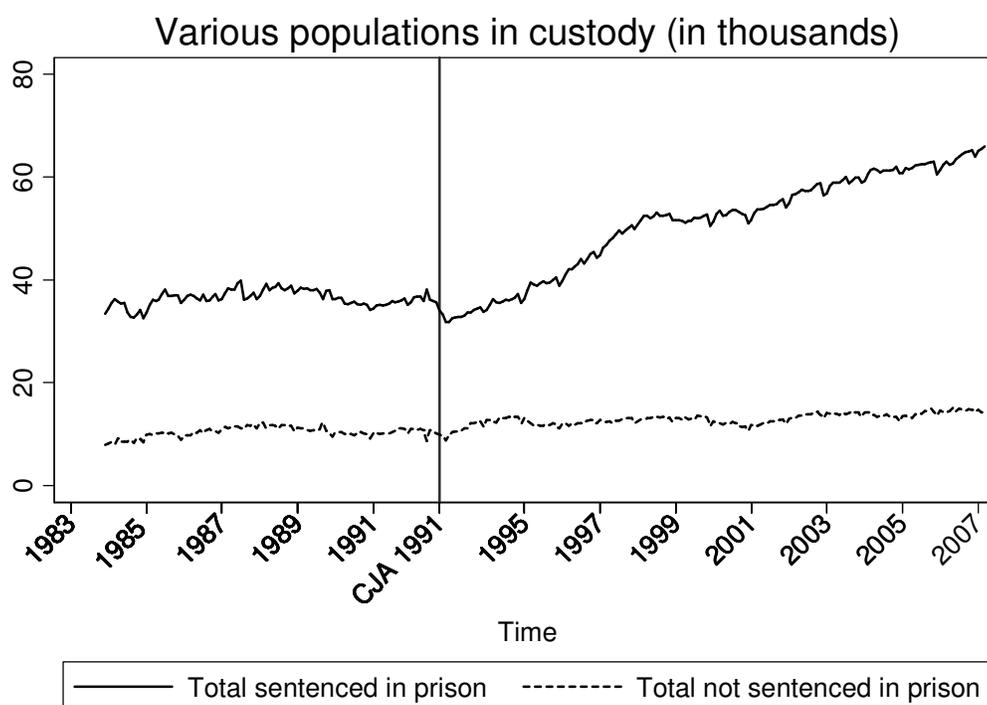
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<sup>18</sup> Between 1983 and 2007, female population grew from 1,000 females in custody to 3,500.



**Figure 4.4. Sentenced males and females in custody.**

The more striking comparison is between number of sentenced individuals in prison and the number of individuals not under sentence in prison (Figure 4.5). Prior to the CJA 1991, these two populations were largely unchanged. However, after the CJA 1991 individuals under sentence in prison increased, while individuals in custody, but not under sentence remained almost constant. The analysis of prison populations provides some evidence that stricter restrictions on judges' sentencing discretion has led to increased rates of incarceration. While restrictions on judicial discretion may be part of the cause of increased prison populations, due to the many laws affecting a myriad of actors, such as the parole board, it is not possible to target only one cause for the current population increase.



**Figure 4.5. Sentenced non-sentenced individuals in custody**

### **Conclusion and Recommendations.**

England's prison population is exploding in a manner similar to that in the United States. As reported by Lord Carter, the prison population in England and Wales increased 60% between 1995 and 2007 as compared to 42% in the United States. While no one cause can be attributed to the rise of the prison population due to the myriad of criminal justice actors and constant criminal law reforms, from the diagrams presented above, more restrictive sentencing laws constraining judicial discretion since 1991 have had an impact. The Ministry of Justice indicated that the number of offenders sentenced in all courts increased from 1,354,294 to 1,420,571 between 1995 and 2005 (Ministry of Justice 2006; Carter: 5). Further, reform of sentencing law in general have led to the

current increase in prison population, not shared by the population in custody and not under sentence.

Parliament's current consideration of a sentencing commission to replace the Council and Panel and grid like sentencing guidelines is an attempt to constrain lower court agents, but is unlikely to alleviate the rising prison populations. In fact, as history has shown in both the American federal and state cases, sentencing commissions lead to the creation of sentencing guidelines that generally lead to higher sentences. Higher sentences and restrictions on parole and early release undoubtedly will lead to an increased prison population.

Instead of using the American sentencing model, the government could pursue alternatives. However, prior to any new courses of action, there should be a moratorium on sentencing legislation and the establishment of a protocol for collecting sufficient and reliable data for testing the effectiveness of laws on both sentencing and the prison population. To move forward the British government then must assess and prioritize its goals as to criminal law. Being tough on crime and reducing prison population can not be achieved simultaneously. Instead, there should be a clear list of priorities of what crimes warrant higher sentences and what crimes do not. Then the government must partake in a difficult cost-benefit analysis weighing purported criminal justice goals with prison resources. Parliament should not follow in Congress' footsteps of passing reactive criminal justice and sentencing legislation. As to judicial discretion, the government should leave this in the hand of judges who are both trained and committed to achieving just and effective results.

**Appendix A4.1: Sample Interview Questions for Judges in England and Wales.**

**Lydia Brashear Tiede  
Doctoral Dissertation Research  
University of California, San Diego  
Department of Political Science**

**Draft Questions for England and Wales****Judges**

Name

Date of interview

**Background Questions:**

1. How many years have you been in your current position?  
\_\_\_ years
2. What year were you appointed?
3. Under whose recommendation were you appointed?
4. What did you do prior to your appointment?
5. Approximately how many sentencing cases have you handled in the past twelve months? (GCASES)  
\_\_\_\_\_cases
6. Approximately how many of these cases have gone or are going to trial? (TCASES)  
\_\_\_ cases

**Judicial decision-making (\*Please consider these questions post Criminal Justice Act of 2003):**

1. When making a specific sentencing decision, what process do you use to determine the sentence?
2. What considerations do you make for seriousness of the offense?
3. mitigating and aggravating factors?
4. Defendants' prior criminal history?

**General:**

1. Accepting the Parliamentary decision to establish guideline sentencing through the use of the Sentencing Advisory Panel/Council, what are the advantages/disadvantages of such a system?
2. What do you believe are the strengths/weaknesses of the current sentencing framework?
3. What changes would you most like to see made in the guidelines and/or in the guideline system?
4. Would you like more or less say in the content of sentences under the current sentencing framework.
5. What effect did the following have on your sentencing practice and/or ability to exercise your discretion in sentencing matters, if any?
  - a. Criminal Justice Act of 1991
  - b. Powers of Criminal Courts (Sentencing Act) of 2000
  - c. Criminal Justice Act of 2003
6. Which time period did you prefer sentencing defendants
 

Prior to Criminal Justice Act of 1991

Immediately after Criminal Justice Act of 1991

Immediately after Powers of Criminal Courts (Sentencing Act)

Immediately after Criminal Justice Act of 2003
7. What impact do you believe the 2005 reform will have on your decision-making in the future?
8. Has or will the Constitutional Reform of 2005 have an impact on your ability to exercise discretion in sentencing cases?
9. In the 2001 Halliday report, interviews of judges and practitioners revealed that “evidence of politicization of sentencing was seen in the constant tinkering with the framework” Is this of concern to you under the current sentencing framework?
10. In the 2001 Halliday report, there was concern that the sentencing framework resulted in an increase in the “complexity of legislation, the volume of case law, and the myriad of legal technicalities.” Are these of concern to you under the current sentencing framework?

### **Inter-branch Relationship**

1. In what manner do you believe that Parliament should be involved in sentencing matters?
2. Under the present sentencing framework, do you believe that Parliament has infringed on your ability to exercise your independent discretion in sentencing criminal defendants?
3. How would you describe or categorize the relationship between Parliament and the judiciary? (ie. what are the proper roles of each institution?)
4. How would you describe or categorize the relationship between the Sentencing Council/Panel and the judiciary? (ie. what are the proper roles of each institution?)
5. What functions do you believe are solely within the purview of the judiciary (as compared to Parliament)?
6. How active should Parliament be in regulating judicial discretion?  
Are there examples where you believe that Parliament should regulate judicial discretion?  
To what extent?

### **Purposes of Sentencing:**

1. In your opinion, under the current law, what are the main purposes of sentencing?
2. Do you believe that the purposes of sentencing under the law have changed from the period 1991 to the present?  
If so, in what way?
3. Do you believe these purposes are addressed sufficiently in the current law?
4. In your opinion should the seriousness of the offense or the risk of re-offending be the main purpose of sentencing?
5. (Taken from Halliday report) What is your opinion regarding the current sentencing framework's ability to:

Deliver punishment?

Deliver consistency in sentencing

Equality of treatment

Fairness

Proportionality of outcome

Treatment of victims

6. Do you believe that the current sentencing framework impacts crime
7. What role should prior convictions play in sentencing defendants.

**Unwarranted Sentencing Disparity:**

1. How would you define unwarranted sentencing disparity?

Questions 2 through 7 (were asked to American federal judges as well).

2. According to one definition established by the United States Sentencing Commission, unwarranted sentencing disparity occurs when similar offenders convicted of similar offenses receive dissimilar sentences. How strongly do you agree or disagree with this definition?

(DEF\_UWAR)

1. Strongly agree
2. Somewhat agree
3. Undecided
4. Somewhat disagree
5. Strongly disagree
7. Don't know

3. How would you change or add to the definition of unwarranted sentencing disparity in Question 2? (CHNGUWAR)

**You will now be asked a series of questions that deal with unwarranted sentencing disparity. When responding to these questions, please define unwarranted sentencing disparity as similar offenders convicted of similar offenses receiving dissimilar sentences.**

4. In your experience with cases in your district, how often are prosecutors' charging decisions a source of unwarranted sentencing disparity? (CHG\_UWAR)

1. In all or most cases
2. In many cases
3. In some cases
4. In few cases
5. In no cases
7. Don't know

5. In your experience with cases in your district, how often are plea agreements a source of unwarranted sentencing disparity? (PLE\_UWAR) (Note: in England and Wales plea bargain as to admission of guilt, not as to penalty. Except 1995 act allows reduction of sentence for early plea).

1. In all or most cases

2. In many cases
3. In some cases
4. In few cases
5. In no cases
7. Don't know

6. In your experience with cases in your district, how often are adjustments for role in the offense a source of unwarranted sentencing disparity? (ADJ\_UWAR )

1. In all or most cases
2. In many cases
3. In some cases
4. In few cases
5. In no cases
7. Don't know

7. In your experience with cases in your district, are there particular types of cases or circumstances that typically produce unwarranted sentencing disparity? (PARTUWAR )

1. Yes
0. No
7. Don't know

If yes, please describe one of these cases or circumstances that typically produce unwarranted sentencing disparity. (TYPEWAR1&2,CIRWAR1&2)

8. Compared to sentencing prior to the enactment of the Criminal Justice Act of 2003 has unwarranted sentencing disparity increased, decreased, or stayed about the same under the sentencing guidelines system? (PREGUID)

1. Increased
2. Decreased
3. Stayed about the same
8. Not applicable, my only experience is under the guideline system
7. don't know

9. Why do you think this change has occurred? (WHYCHNG1&2)

**Mandatory Minimum Sentences:**

1. Should Parliament raise, lower, eliminate, or not change current mandatory minimum sentences for drug trafficking in Class A drugs with prior conviction? DRUG\_MAN

1. Raise the mandatory minimum sentences for drug distribution
2. Lower the mandatory minimum sentences for drug distribution
3. Eliminate mandatory minimum sentences for drug distribution
4. Make no changes in the current system
7. Don't know/No opinion

2. Should Parliament establish mandatory minimum or mandatory consecutive sentences for additional offenses?(ADDOFF )

1. Yes
0. No (GO TO QUESTION 26)
7. Don't know (GO TO QUESTION 26)

3. Which offenses?

4. When Parliament wants to raise sentences imposed for certain offenses, what action should Parliament take?

1. Set a mandatory minimum or a mandatory consecutive Sentences (SET\_MAN)?
2. Raise the statutory maximum sentence (RAIS\_MAX)?
3. Specify a specific base offense level and/or specific offense characteristics for the applicable sentencing guideline (BASE\_LN)?
4. Direct the Sentencing Panel/Council to consider amending the applicable guideline to reflect more appropriately the seriousness of the offense (USC\_AMEN)?
5. Other (PLEASE SPECIFY) (OTHER\_ACT)

5. In general terms, what are the benefits and/or problems of mandatory minimum sentences?

Benefits:

Problems:

General:

6. How do higher court decisions influence your own sentencing decisions?

## Appendix

**Table A.4.1. England and Wales' Key Sentencing Legislation: 1974 to 2003.**

LAW OR POLICY	KEY PROVISIONS (EFFECTIVE DATE)
Court of Appeal Guidelines (1974)	Court of appeal began guideline judgments in sentencing, binding on Court of Appeal and lower courts.
Criminal Justice Act of 1982 (5/24/1983)	Criminal Justice Act of 1982: implemented 5/24/1983: Magistrates had power to impose sentences of youth custody of <= 6 months. Criminal Justice Act of 1982 effective 7/1/84: reduced minimum eligibility for parole from 1 year to 6 months
Magistrate Association Guidelines	Magistrate Association passed voluntary guidelines
Restrictive parole policy from 11/1983 to 6/1992	Prisoners sentenced to >5 years for single offence of violence, sex, arson and drug trafficking would be granted parole only when release under supervision for a few months before the end of a sentence was likely to reduce the long term risk to the public or exceptional circumstances.
Criminal Justice Act of 1988	Changes mostly involved youth offenders. Two firearm offenses under Firearms Act of 1968 increased maximum from 14 years to life for 2 offenses (Effective 9/19/1988). Maximum of cruelty to children increased from 2 to 10 (Effective 9/29/1988) Maximum term of imprisonment for most levels of fine reduced in half (Effective 1/5/1989)
Road Traffic Act of 1991	New offenses introduced (Effective 7/1/1992)
Criminal Justice Act of 1991	Established new sentencing framework in which judges should consider the seriousness of the offense; that custody should generally be reserved for the most serious offences; and that community sentences should play greater role in sentencing
Aggravated Vehicle-Taking act 1992:	Maximum penalty 6 months if minor damage and 5 years if accident causing death (Effective 4/1/1992)

**Table A.4.1. England and Wales' Key Sentencing Legislation: 1974 to 2003**

<b>LAW OR POLICY</b>	<b>KEY PROVISIONS (EFFECTIVE DATE)</b>
Criminal Justice Act 1993	Restored to courts power to take into account previous convictions and sentences. Offending on bail made mandatory statutory aggravating factor of sentence (Effective 8/1/1993).
Criminal Justice and Public Order Act 1994	Changes regarding juveniles. Introduction of reduction of sentences for early guilty plea (Effective 2/3/1995). Relaxation of requirements for pre-sentence reports Curfew orders to be enforced by electronic monitoring implemented during 2000
Queens Bench Judgment in Cawley and Others	All fine enforcement measures need to be actively considered or tried before imprisonment can be imposed
Offensive Weapons Act (1996)	Increased maximum penalties for carrying offensive weapons
Crime Sentences Act 1997 and Crime Disorder Act (1998)	Mandatory sentences for offenders convicted of repeat serious offences; repeat drug traffickers and repeat domestic burglars. Mandatory sentences for a number of firearms offenses. Automatic life sentences should be given to offenders convicted for a second time of serious sexual or violent offences. Courts to impose minimum sentences of 7 years on offenders convicted of trafficking in class A drugs if previous convictions..  Implemented in late 1999, minimum sentences of 3 years for offenders convicted for the 3 <sup>rd</sup> domestic burglary. Home Detention Curfew (HDC), implemented on 1/28/1999. Allows some prisoners spending up to the last 2 months of the custodial part of sentence in curfew by electronic monitoring.
Crime Disorder Act of 1998	Creation of Sentencing Advisory panel. Restricted court of appeals guidelines.
Human Rights Act of 1998	Allowed constitutional guarantees of human rights, especially rights related to preventing prejudice in trial process (effective 10/1/2000)
Narey Report	More staff and case workers to review files (Effective 11/1999)

**Table A.4.1. England and Wales' Key Sentencing Legislation: 1974 to 2003**

<b>LAW OR POLICY</b>	<b>KEY PROVISIONS (EFFECTIVE DATE)</b>
Powers of Criminal Courts (Sentencing) Act 2000 (PCCS)	Consolidated sentencing legislation.
European Court of Human Rights decisions in Ezeh and Connors (2002)	Punishments involving the imposition of additional days (ie. by Home Secretary) should only be imposed by independent adjudicators. From 10/2002, district judges engaged as these independent adjudicators.
Criminal Justice Act of 2003	Prescribes sentencing goals. Prior convictions, if recent enough, to be considered aggravating factor. Set up Sentencing guidelines Council to draft sentencing guidelines with advice from Sentencing Advisory Panel. Established new sentences for crimes.

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Criminal Justice Act 2003

Court Reform 2003

Constitutional Reform 2005

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## Chapter 5

### **Chile's Experiment in Criminal Law Reform: Conversion from an Inquisitorial to Adversarial System**

As part of the wave of legal reforms across Latin America in the 1990s, Chile converted its criminal law system from inquisitorial to adversarial.<sup>1</sup> In Chile, reforms promulgated between 1997 and 2001 moved Chile's criminal law system closer to that existing in the United States. These reforms included the creation of new institutions, such as new types of courts, public prosecutor and public defender offices, and the creation of new roles for judges. The reform also created a new penal code, *Código Procesal Penal* (CPP), which established oral trials and new rights and procedures for defendants and victims during criminal proceedings.

The reforms were implemented in stages by region from December 2000 to June 2005. This gradual implementation over time allows the impact of the reform to be tested as a quasi-experiment. In this way, regions without the reform at various time periods

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<sup>1</sup> Inquisitorial systems are those in which the judge oversees the investigation, trial, and sentencing phases of the criminal justice process. This process is conducted almost entirely through the submission of written documents and is shrouded in secrecy. Adversarial systems are those in which the public prosecutor oversees investigations and trials, and the procedures are public, transparent, and oral.

create control groups. Regions with the reform implemented provide treatment groups.<sup>1</sup> The impact of the reform on criminal reporting, apprehension, conviction and acquittal rates as well as length of case processing time is tested. Because the reform was not applied retroactively to pending cases and for reasons of data availability, the tests for conviction, acquittal, and case processing rates are confined to cases adjudicated in courts still using the pre-reform laws. These courts will be closed as soon as these old cases are cleared from the courts' dockets.

To assess the impact of reforms, the chapter opens with a brief literature review of the effect of legal origins and reform on the work of courts. It continues with a description of criminal law reforms occurring across Latin American. The chapter then includes a description of Chile's institutions (referencing the principal-agent framework) and the criminal procedure prior to and after the reform. The chapter then moves to a discussion of data, variables, research methodology, and hypotheses. The paper concludes with results, robustness checks, and implications of the research.

## **5.1 The debate.**

Scholars have debated the comparative advantages and disadvantages of a country's legal origin. The two most common legal origins are the common law (adversarial) and civil law (inquisitorial). Much of the legal origin literature deals with what legal structure best secures property and contract rights and indirectly the rule of

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<sup>1</sup> The only empirical study on the effect of the reform which went beyond just descriptive statistics was a study produced by the Vera institute in conjunction with the Ministerio Público that compared a sample of cases in Santiago before the reform to a sample of cases in Temuco after the reform. There are no controls or regression analysis. (See, Maranguni and Fogelson, 2004).

law and economic development (See Beck et al. 2001, Demirgüç-Kunt & Levine 2001, Gourevitch 2003, Roe 2006, Dam 2006, Keefer 2007). The most prolific of the legal origin scholars, La Porta et al. (1997,1998, 1999, 2000, 2002, 2004), Glaeser & Shleifer (2002), Djankov et al. (2002, 2003), specifically assert that civil law systems rely more on statutes and formalistic procedures for resolving disputes. These scholars tie such findings to the comparative advantage of common law systems in resolving specific types of property and contract disputes. Scholars also assert that “formalism” linked to civil law legal origin “is associated with higher expected duration of judicial proceedings, less consistency, less honesty, less fairness in judicial decisions, and more corruption” (Djankov, La Porta, Lopez-de-Silanes, Shleifer 2003: 453; Treisman 2000).

Moving away from legal formalism, is the related proposition that certain legal origins lead to better governance. For example, Kaufmann (2003) finds that there is some correlation between legal origin and the governance indicators that he has helped create. For Kaufmann, common law countries do a bit better on his indicators for accountability, rule of law, and government effectiveness; while civil law countries perform better on indicators for political stability and control of corruption (but see Treisman above). However, he notes in the poorest seventy-five countries, this legal origin correlation all but evaporates. To sum up the legal origins approach as regards to economic and political development, Haggard, MacIntyre, and Tiede (2008: 218) assert that:

According to the legal origins approach, formalism and reliance on statute also have wider consequences for the law. Civil law countries tie the hands of judges and are less flexible and adaptable to changing circumstance. Governments with civil law systems can adapt to changing circumstances only by revising statute, which is supposed to be slower and

more costly. Common law systems, by contrast, evolve through continual litigation and re-litigation, which improves the efficiency of the law.

Therefore, at least from a development perspective, many scholars support the view that common law systems are superior to civil law systems in many, but not all, aspects related to the application of the law to specific cases.

While much has been written on the effect of legal origins on economic development and there is a burgeoning literature connecting legal origin to governance, much less has been written on how legal origin affects criminal law or the administration of justice and how a conversion from one system to another may affect the quality of justice delivered. Most of the literature reviewed in this area is either descriptive or theoretical although most scholars believe that adversarial systems provide fairer criminal proceedings and ensure that criminal judges are more independent and impartial. Some of the bias towards adversarial systems may come from what Shapiro (1981) calls the “prototype” of courts to which scholars compare existing courts. The prototype requires independent judges to apply existing legal norms after “adversary proceedings.” If the adversarial system is seen as a prototype than criticism of the inquisitorial system is easy to find.

Moving away from the origin of a legal system, there is general support given to the proposition that adversarial systems are more just than inquisitorial systems in the criminal law arena. For Hammergren (2007), criminal law reforms in Latin America have been justified on the grounds that “the accusatory system is less abusive of human rights, less expensive, more likely to get at the truth of the matter, more effective in bringing the guilty to justice, more transparent, and more timely” (Id.). In Latin America,

“[t]he reform process was also driven by a series of testable, but largely untested propositions” (at 39). Despite a general proclivity among development experts in supporting reforms that convert the criminal justice system from inquisitorial to adversarial, there is no real hard evidence that one system is better than the other. Indeed, the relative value of one system over another also depends on what variables of interest are being analyzed. Furthermore, with so many judicial and criminal reforms being instituted in the region, there is the risk that “reform fatigue” may occur where the effect of the reforms is less than expected and the public support for them greatly reduced over time (Lora, Pnaizza, Quispe-Agnoli 2003). This chapter, attempts to test hypotheses regarding how the type of criminal law system affects the work of courts and the police in the criminal justice arena.

## **5.2. The wave of criminal law reforms across Latin America.**

The switch from inquisitorial to adversarial models began in Latin America beginning in the mid 1970s and continuing to the present. Currently, over seventeen countries have adopted adversarial-type procedures in the criminal arena (oral hearings, active prosecutors, production of evidence, etc.). Since the mid 1970s, many Latin American governments have adopted new criminal procedure codes, converting their criminal justice systems from an inquisitorial model to an accusatorial model.

The proliferation of Latin American countries adopting American-style criminal law processes has been significant. Costa Rica was the first country to attempt some reforms in its criminal system (See Tiede 2002 for a description of these reforms). Although not a complete reform, in Costa Rica, the government significantly altered the criminal system in 1975 and such reforms substantially improved the quality of criminal

justice and provided a springboard for subsequent reforms in 1996, [CPP 1973] which entered into effect in 1975. This code established a more modern system, but retained certain inquisitorial elements and remained in effect until promulgation of the *Código Procesal Penal de 1996* [CPCPP] which became effective in 1998.

In 1989, Argentina also adopted reforms in its criminal procedure that were more far reaching than those adopted by Costa Rica in 1975.<sup>1</sup> Argentina adopted a federal criminal procedure code promoting the accusatorial system in 1989, which was soon followed by individual Argentine provinces adopting similar codes and the province of Cordoba, whose code has been much studied, was the first to do so in 1991. Thereafter, Columbia adopted a new code in 1991, although it included some variations specific to addressing narco-trafficking. Voters in Peru also approved a new code in 1991 and implemented it in three regions in 2008 (Secretaría Técnica 2007).<sup>2</sup> Guatemala adopted its new code in 1992; Costa Rica in 1996, and El Salvador's and Venezuela's new codes were introduced in 1998. Other new codes were adopted in 1999 by Bolivia, Chile, and Paraguay and in 2000 by Ecuador. These new codes were fashioned after the 1988 Model Code for Iberoamerica.<sup>3</sup> This Code, based on the German Code of Criminal Procedure,

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<sup>1</sup> Most commentators indicate that criminal law reform started with Cordoba

<sup>2</sup> By decree, Peru approved a calendar for implementation of the new criminal code by judicial district over time through 2013.

<sup>3</sup> LAS REFORMAS PROCESALES PENALES EN AMÉRICA LATINA (Julio Maier, Kai Ambos & Jan Woischnik, eds., 2000) citing code publication by Instituto Iberoamericano de Derecho Procesal, Hammurabi, Buenos Aires, 1989 and Consiglio Nazionale delle Ricerche Materiali V/1, Roma, 1990. Christian Riego, "The Chilean Criminal Procedure Reform," Thesis U. of Wisconsin Law, 1992, 16. Citing to Julio Maier, Derecho Procesal Penal Argentino (Buenos Aires: Editorial Hammurabi, 1989)

was developed by specialists in the field and widely accepted as a model throughout Latin America.

Generally, all of these codes limit the courts to judging the facts and deciding issues of law and leave the investigation of the case in the control of a public prosecutor and the administration of the court in control of professional court personnel. One of the most dramatic changes brought by these codes is the introduction of oral trials which require the employment of oral advocacy skills by both prosecution and defense attorneys. These codes also bolster the rights of defendants by creating or fortifying public defender offices and increasing the defendants' participation in the process. The codes also introduce the use of some types of alternative or abbreviated resolutions of disputes short of a full trial. Generally, it may be said that the codes improve the rights of victims as well.

The reasons for the enactment of criminal law reforms varied somewhat for each country, but seemed to share some commonalities. One main reason for the reform was a general recognition that the criminal justice system was not functioning and in some countries was on the verge of collapse. The inquisitorial model proved unsatisfactory for handling a high volume of criminal law cases and the system created backlogs due to the judges' unique control over the investigation, accusation, and decisions regarding guilt as well as administration of the court. With so many tasks, judges understandably were unable to move cases through the system promptly or had to delegate their authority to court personnel or the police.

The inefficiencies of the system also drew negative public perception. Cases lagged in the system while many accused were deprived of their liberty and other rights

during lengthy and indefinite pre-trial detention (Hafetez 2003). Despite the length of criminal adjudication, crime levels did not diminish and citizens felt unsafe and unprotected. This perception of public safety was accompanied by a belief that the system was unfair and that criminal defendants whether guilty or innocent were deprived of significant rights.

Another impetus for the reform was to incorporate international law standards, especially in the area of human rights, into national law. Although many Latin American countries previously had ratified international instruments such as the Inter-American Convention on Human Rights, their criminal procedures, both as written and as actually practiced, violated these international standards (Grossman 2000).<sup>4</sup> By making national law compliant with adopted international standards, many Latin American countries are signaling their desire to become full-fledged members of an international and increasingly globalized world community.

Finally, another reason for reform relates to foreign pressure and investment (Hammergren 2007). Many western democracies have given both diplomatic and financial support to the reform efforts, including input into draft codes and training of attorneys and judges.<sup>5</sup> These governments hope to improve the quality of democracy in Latin America and in turn ensure that their own citizens and investments will be protected. There were many actors involved in all of these reforms. Besides foreign

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<sup>4</sup> Grossman argues that there has been an increased use of the Inter-American System for the Protection of Human Rights due to “outmoded judiciaries and enforcement agents,” in dealing with human rights abuses.

<sup>5</sup> Interview, August 6, 2001, Santiago, Chile.

donors, such as USAID and the World Bank, individuals from the region contributed substantially to the reform. For example, Langer (2007) argues that “networks of Latin American legal entrepreneurs” proposed many of the reforms to solve problems related to lack of due process and transparency. Further, within a given country, both politicians, judges, and lawyers pressed their own governments for reforms. For example, a Chilean family, which had been affected by the kidnapping of a family member and was associated with Chile’s political right, pushed for criminal law reforms and provided funding along with USAID.<sup>6</sup> Further, in Chile, criminal law reform also was greatly assisted by legislators, nongovernmental organizations, academics, and others, who worked cooperatively to generate proposals for criminal reform legislation.

### **5.3. The Case of Chile.**

The conversion from inquisitorial to adversarial models of criminal procedure in Latin America was significant in a number of Latin American countries that not only adopted the procedures in their laws, but carried them out. Chile provides the best example of the depth and significance of this conversion. Prior to describing the pre-reform and reformed criminal procedure, a brief description of Chile’s judicial branch and its relationship to the other two branches. Chile’s Constitution provides for a separation of powers between the executive, of which the president is considered one of

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<sup>6</sup> William E. Davis, e-mail messages, January and June 17, 2004.

the strongest in Latin America and the world<sup>7</sup> and a bicameral legislature with nine appointed rather than elected senators.<sup>8</sup>

Chile's judicial branch includes a Constitutional Court,<sup>9</sup> Supreme Court, courts of appeal, and lower courts. Except for the Constitutional Court, the Supreme Court sets the agenda in regards to appointments for the entire judicial branch. The Supreme Court chooses which judges it will nominate for presidential approval for both the Supreme Court and the Appellate Courts. The president simply picks his choice from a list of five nominees for the Supreme Court and three for the Appellate Court. Since 1997, the

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<sup>7</sup> The president has expansive presidential powers. The president has the power to unilaterally declare states of emergency and exception, oversee the performance of the Supreme Court, and name all members of the Supreme and Appellate Courts. The Chilean president also enjoys both reactive (veto) and proactive (decree) powers as well as the exclusive authority to introduce many types of legislation, perhaps most importantly the budget (Siavelis 1997). Finally, the Chilean executive has a large staff and access to resources and information which allows the executive to propose professional and elaborate proposals.

<sup>8</sup> The president appoints two senators, the Supreme Court three, and the National Security Council four. Chile also allows for what are termed "life time" senators. These include former heads of state. Obviously, these "appointed" and "life time" senators are not vertically accountable to citizenry

<sup>9</sup> The Constitutional Court (originally created in 1970) "with the ability to make absolute and binding decisions on questions of constitutionality at any phase of the legislative process" (Siavelis 39)." As noted by Peter Siavelis (2000), although the existence of this type of constitutional court is not unusual in Latin America, the selection of members by non-elected authorities is. The President and the Senate are endowed with the power to select one seat each for the Constitutional Tribunal, the National Security Council two, and the Supreme Court three. All seven members are appointed for eight year terms and elections are staggered. Aside from its unusual membership selection, the Constitutional Tribunal "can create bottlenecks in the legislative process and sow the seeds of inter-branch conflict (Siavelis 187). The Tribunal is only given deadlines for certain decisions, thus it can hasten or delay most constitutional decisions. Chile's Chamber of Deputies, with the approval of one fourth of its members, may request the Tribunal to rule on the constitutionality of presidential decrees or regulatory instructions. Deputies can also delay presidential initiated legislation by presenting questions to the Tribunal.

Senate has been required to ratify Supreme Court nominations by a two-thirds vote (Law 19.541 1997). Similarly, the Supreme Court has an elaborate scheme for disciplining and ranking lower court judges, who unlike American judges, enter judicial service much like civil service employees (Correa Sutil, *the judiciary* 100). The terms of the lower court judges are indefinite, however, poor ranking by the Court of Appeals may affect the term length. Lower court judges after the reform have mixed reactions to the leverage that the Court of Appeals has on their careers. At least one judge, interviewed in 2007 stated that the ranking done by the Court of Appeals has no actual relation to the work done by lower court judges (Interview C6, July 31, 2007).

In summary, lower court judges, as agents, operate within a strict hierarchical system significantly controlled and managed by their principals in the Courts of Appeal and the Supreme Court. Although largely self sufficient as an institution, the Supreme Court's conservative and at times complacent attitude towards other branches of government has historically made it follow policies set by the other branches of government rather than operating as a check on improper executive and legislative power (See Hilbink 2007).<sup>10</sup> Although in recent years Supreme Court judges have more actively prosecuted high level officials who committed grave human rights abuses under the military regime and begun to allow first amendment rights to be enforced over laws that

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<sup>10</sup> Hilbink summarizes the central claim of her book as follows: “[t]he institutional features of the Chilean judiciary promoted a conservative bias among judges, which in turn explains why the judges offered such little resistance to the undemocratic and illiberal regime of General Pinochet. Both the role conception into which judges were socialized and the incentive structure in which they functioned discouraged them from taking principled liberal-democratic stands, before, during, and after the authoritarian period” (at 39-40).

restrict criticism of the government or religion (Tiede 2004), it is too early to tell if Chile's higher courts entrenched in a conservative legal culture will pursue more politically charged areas of analysis and whether if such changes occur they will have any effect on lower courts who still must succumb to the scrutiny of their higher placed judicial peers.

#### **5.4. Chile's pre-reform criminal procedure.**

In Chile, the criminal law reforms and the Chilean government's commitment to these reforms were profound and significant as compared to reforms undertaken in other Latin American countries. Chile's criminal law reforms seemed so significant in part because Chile's pre-reform system lacked any intermediate reforms. In fact, prior to 2005, Chilean judges were still using the criminal procedure code from 1906. Furthermore, Chile lacked a western-type prosecutor's office and no public defender's agency.

In order to fully understand the breadth of the new reforms, an understanding of the prior system is useful. In 1906, Chile adopted its *Código de Procedimiento Penal*<sup>11</sup> [CPP-1906]. This Code maintained many of the basic structures of the inquisitorial system established by Spain during the colonial period (Carocca et al., 2000: 7). The CPP-1906 was implemented in 1907 and continued in effect until the reform was fully implemented across the country in June of 2005.<sup>12</sup> The CPP-1906 is still being applied

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<sup>11</sup> *Código de Procedimiento Penal (1906)* [CPP-1906].

<sup>12</sup> Carocca 2000: 8, 11. In 1927, the government removed the presence of representatives from the *Ministerio Público* or Public Ministry in lower criminal proceedings. In 1942, the Congress attempted to make the system more efficient by reducing deadlines for certain actions and removing certain apparently useless steps in the procedure.

to cases that existed in courts prior to the reforms implementation.

Pre-reform Chile did have a *Ministerio Público* or Public Ministry with employees called *fiscales* or prosecutors, which was part of the Judicial Branch. These prosecutors, however, served only as assistants to the courts and did not act as “prosecutors” as the term is understood in the United States and in the common law tradition. In other words, pre-reform prosecutors did not act independently of the courts to investigate criminal behavior, accuse individuals, or prosecute them. Instead, these *fiscales* acted more as legal clerks or assistants in the courts.

The lower criminal courts in pre-reform Chile were called *juzgados del crimen*. These were first instance courts which heard only criminal law matters. These courts had only one judge which investigated criminal cases, accused individuals, decided their culpability, and sentenced them. These judges also made decisions regarding defendants’ fundamental rights including the duration and conditions for pre-trial release from detention. Further, these lower criminal law judges also had administrative and budgetary responsibilities over their individual courts, and made decisions regarding personnel, office supplies, and budgets. This wide range of duties of lower court judges prevented them from acting quickly on cases and resulted in delays and bottlenecks in the process.

Pre-reform lower criminal courts reviewed cases in a two step process. The first stage or *sumario* was the investigative phase where the judge carried out the entire investigation with the assistance of the police. The *sumario* often took place in secret and defendants were unaware of the accusations against them despite an ongoing investigation. Furthermore, judges directed investigations in virtual isolation without any

input from other actors, such as the prosecutor, victim, or defendant. During the *sumario*, the judge decided how much weight to give the evidence and defendants could not provide contradictory evidence or question the admissibility or weight of the evidence before the court.

The *sumario* had rather nebulous deadlines. While a defendant was required to come before a judge within five days of his detention, after this period the judge could decide to hold him for an indefinite time period. The pre-trial detention, known as *prisión preventiva*, was ordered when judges believed the defendant was a flight risk, would impede the investigation, or was too dangerous to release. The judge also could decide to hold the defendant *incomunicado* where for a limited period he was not allowed to communicate with his lawyer or family.

The *sumario* phase was completed when the judge dictated one of two kinds of orders, either an order of *sobreseimiento temporal o definitivo* or an order to close the *sumario* stage and open the *plenario* stage (*auto de procesamiento*). The opening of the *plenario* signified that the judge had decided that there was enough evidence tying the defendant to a specific crime and in fact, the judge's decision also implied a tacit presumption of guilt. The *plenario* was marked by the participation of new actors, including representatives for the defendants and the government, respectively, and also attorneys for the victims. These parties interacted with the judge by presenting evidence in *written* form. After the *plenario* was completed, the same judge who made the evidentiary decisions during the *sumario* and *plenario* stages also decided the culpability of the defendant and determined the sentence. Under Chile's pre-reform system, defendants could appeal the lower courts' decisions to a higher court.

The most startling aspect of Chile's pre-reform criminal law system was the general lack of defendants' rights. Not only were there few actual rights on paper, but the rights that did exist were frequently curtailed in practice or due to a lack of resources. While pre-reform Chilean legislation provided some rights to criminal defendants, in comparison to other Latin American countries, these rights were shallow. Most notably, defendants had no guaranteed right to a licensed attorney or the presumption of innocence.

### **5.5. Criminal law reforms in Chile.**

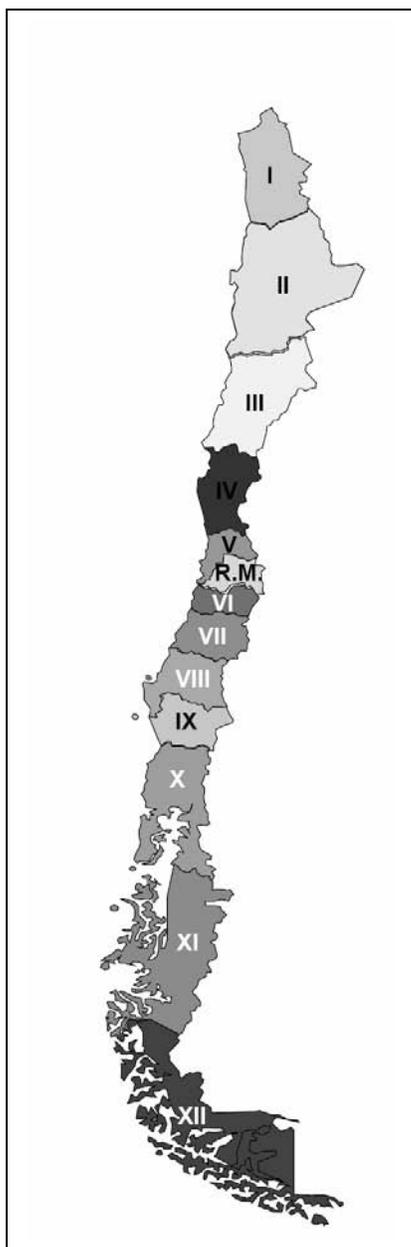
Although all of Chile's criminal law reforms were approved by 2001, the laws themselves provided for gradual implementation. The new CPP, although effective in October of 2000, allowed for the new process to be implemented in stages by region over a five year period and for courts operating under the pre-reform system to be phased out over time.<sup>13</sup> The first stage of the reform was implemented in Serena (Region IV) and Araucanía (Region IX). The final stage of the reform was completed by June 2005 in Santiago, the most populated area in the country.<sup>14</sup> In August of 2001, the legislature revised the schedule of implementation making the Santiago metropolitan area the last region to be reformed. The timetable of the reform as well as a map of regions are found

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<sup>13</sup> The number of court operating under the pre-reform law was decreased from thirty-six to six on June 15, 2007 with all of the old cases being absorbed by these six courts. The Senate approved legislation to extend these courts' lifetime until 2008 (U.S. Department of State (2007)). During my visit in July – August 2008, they were still operating.

<sup>14</sup> In the original legislation, the implementation was supposed to occur quite a bit faster. Specifically, regions II, III, VII were supposed to be completed in 2001, and the Santiago Metropolitan region by 2004 (El Mercurio 2001: C9).

at Table 5.1 and Figure 5.1. The judicial districts for each region are specified in the Appendix, Table A.5.1.



<b>DATE</b>	<b>REGION</b>
12/2000	IV, IX
10/2002	II, III, VII
12/2002	I, XI, XII
12/2003	V, VI, VIII, X
6/16/2005	Metropolitan Santiago

**Figure 5.1. Map of Chile's regions.**

Note: Region V is Valparaiso, R.M. is Santiago, and Regions I and IX have at least 10% indigenous.

The reform created new institutions and new procedures for processing a criminal case through the system. Generally, a criminal case under the new procedures goes through two distinct phases: an investigation phase and an oral trial phase. When a crime comes to the attention of the police or judge, a prosecutor with the new independent *Ministerio Público* is immediately notified of the case and the investigation begins with this assigned prosecutor in charge. If a defendant is detained by the police, the police must notify the *juez de garantía* within twenty-four hours. The *juez de garantía* informs the defendant of the charges against him and makes decisions regarding his detention. From the moment the defendant is arrested he has a right to a licensed attorney.

There is a two year limitation on investigations, but the defendant can request that the judge shorten the time.<sup>15</sup> After the investigation is completed, the prosecutor will choose whether to file a formal accusation against the defendant, dismiss the case, or agree to some type of alternative resolution or abbreviated process. The prosecutors have the discretion not to proceed with a case if the facts do not constitute a crime. Decisions and resolutions made in the *juzgados de garantía* are appealable (Carocca, et al. 2000: 341).

The new reforms significantly changed the structure, power, and function of the lower criminal courts. By phasing out the traditional court of *juzgado de crimen* with its *juez de instrucción*, the reformers instead created two new criminal courts to oversee the preliminary matters and oral trials in criminal cases. With the new reform, and creation

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<sup>15</sup> In September, 2001, the National Defender, Alex Carocca, criticized the National Prosecutor, Guillermo Piedrabuena, for instituting an alleged blanket policy in which prosecutors would request two years to investigate all crimes. Carocca charged that such a policy was “excessively ritualistic” and led to delays (Pfeiffer and Vergara 2001:12).

of a true public prosecutor's office (*Ministerio Público*), judges no longer conduct criminal investigations or routinely oversee the staff and administration of the court as they had under the former systems.

The first new court created is the *juzgados de garantía* or courts of guarantee are the courts where a criminal defendant's journey begins. One judge or *juez de garantía* or judge of guarantee oversees the first phase of each criminal case. These judges primarily ensure the rights of the defendant and other interveners, such as victims, in the preliminary phase of the investigation.<sup>16</sup> Besides guaranteeing individual rights, *jueces de garantía* also are involved in making legal decisions about preliminary matters and preparing the case for the oral trial by holding hearings, correcting any mistakes in legal papers, and excluding or admitting evidence.<sup>17</sup> At the conclusion of this phase, the judge will dictate *el auto de apertura de juicio oral* which formally moves the case from the *juzgado de garantía* to the *juzgado de juicio oral*.

The second new court, *Tribunal de Juicio Oral en lo Penal*,<sup>18</sup> is a separate court tasked with hearing oral criminal trials. Each case is heard by a three judge panel. The three judges do not include the *juez de garantía* and are unfamiliar with the case until

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<sup>16</sup> Guaranteeing rights means that the judge must ensure that the defendant understands all his legal rights and how the process operates. In this way, the judge makes decisions directly concerning the defendants' rights such as designating a public defender, and making decisions regarding detention and conditions of his release. CPP Arts. 102, 127, 154, 132.2, 131, 132, 136, 140, 154, 144, 152, 153, 150.3, 4, 151, 155, 157. The judges in the *juzgado de garantía* also guarantee the defendants' rights by overseeing the Public Prosecutor's investigation on issues relating to evidence and the rights of defendants, victims, and witnesses. Ley No. 19665, Art. 11. Ley No. 19708, Art. 1.

<sup>17</sup> CPP Art. 266, 270, 276.

<sup>18</sup> Ley No. 19665, Art. 11. Ley No. 19708.

they receive the file from the prior court. The use of three judges, deciding a defendant's culpability, eliminates any bias that one judge may have.<sup>19</sup> Thus, the collegial structure of the court is intended to provide impartiality. The *Tribunal de Juicio Oral* has several distinct functions relating to the oral trial.<sup>20</sup> The court resolves any issues arising during the oral trial, conducts the debate, exercises disciplinary means if needed, asks questions of witnesses, authorizes the reading or reproduction of documents, and makes decisions regarding the reception of new evidence presented by a party. Finally, the judges determine the guilt or innocence of the defendant and the applicable sentence, if any.<sup>21</sup> The proceedings are entirely public and similar to western style bench (without jury) trials.<sup>22</sup>

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<sup>19</sup> One oral trial judge I spoke to explained that trials are decided by a majority vote. If there is disagreement among the three judges, they discuss the case. In her experience there was seldom disagreement (Interview C1, July 25, 2007).

<sup>20</sup> During the oral trial, the judge serving as president of the court ensures that the defendant understands his rights and the process. At this stage of the trial, the prosecutor or defense attorney presents an opening statement, presents and questions witnesses (direct and cross examination), presents other evidence, and provides a closing argument. The judges may ask the witnesses direct questions after questioned by the prosecutor and defense attorney.

<sup>21</sup> CPP Art. 281, 290, 292 et seq., 235 et seq., 329.5, 331, 335, 336, 337, 339, 345.

<sup>22</sup> The above description is based on my observance of the first murder trial using the new criminal procedures conducted in Temuco, Chile, under the new procedure on September 24, 2001. During this trial, the court room was filled with observers and the media. The judges treated the defendant with respect and at every stage made sure that he understood the proceedings. The prosecutor presented nine witnesses and substantial direct evidence (bloody towels and clothes, photographs of the victim, etc.). The entire trial took only about three hours. Although the presentation of evidence and respect for the defendants' rights was very professional, this murder trial was completed in an extremely short period of time by U.S. standards. The quickness of the trial was primarily due to the limited number of questions asked by the public prosecutor and defense attorney as well as the Court's allowing the witnesses to speak without interruption. The quickness, however, (Note: Footnote continues on next page).

The reform also created a completely new institution, *la Defensoría Penal Pública* or Public Defenders' Office.<sup>23</sup> The function of the newly created Public Defenders' Office is to provide criminal defense for defendants charged with crimes or appearing before lower criminal courts who need an attorney, but lack the resources.<sup>24</sup> Besides creating a public defender service, the new criminal reform also substantially improved the rights of defendants by providing criminal defendants with new substantive and procedural rights. Judges must now see defendants within twenty-four hours of their arrest. At every stage of the process, defendants have additional new rights including the right to be presumed innocent, the right to a *defender de confianza*<sup>25</sup> (licensed lawyer), a right to an oral public trial, the right to intervene in the entire process, a right to immediately know the charges against oneself, the right to contradict allegations and the right to review the prosecutor's file.

The above cursory summary of the criminal law reforms shows that Chile adopted a more western, Americanized criminal justice process. As with the American process, the reformed system in Chile allows judges to adjudicate the facts and law of the case and

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may also have been due to the newness of the oral trial procedures and the case facts (a brother killing another brother and family witnesses). See also, *El Mercurio*, 2001: C10).

In 2007, I also observed a sexual abuse case overseen by one of the judges interviewed on July 25, 2007. This case involved many witnesses and the use of video testimony of several of the expert witnesses and the under age victim. While defense attorney did cross exam witnesses, defense expert evidence was lacking. When I asked the judge about this, she responded that this occurred often in other cases (Interview C1, July 25, 2007).

<sup>23</sup> Ley No. 19.718.

<sup>24</sup> Ley No. 19.718 Art. 2.

<sup>25</sup> CPP Art.93 inc.2b, 102, 104, 132, 261, 286, and 291(2).

prosecutors to investigate the case, while defense attorneys are given more active roles in representing their clients. The reform also provides defendants and victims a wide range of rights closely akin to those afforded defendants in the United States.

### **5.6. Data and variables.**

Several hypotheses related to the criminal justice reform were performed using regression analysis on several measures of crime and lower criminal court decision-making. Dependent variables included criminal reporting, apprehension, conviction, and acquittal rates as well as four different case processing times. Further, each regression was weighted by regional population because the regions in Chile have significantly different populations and 36% of the population (5 of 14 million) lives in greater Santiago.

The data was compiled from several sources. All the data is measured by region, rather than nationally. The data dealing with citizen crime reports to the police for the years 1997, 1999, and 2001 to 2005 came from the *Instituto Nacional de Estadísticos* (INE's ) *Policía de Investigaciones: Informe Anual* and the arrests by Chile's *carabineros* for the years 1997, and 1999 to 2005 came from the INE's *Carabineros: Informe Anual*. The variables dealing with numbers of convictions and acquittals and case duration for the courts still operating under the former system came from *Justicia: Informe Annual* for the years 1999 to 2006.

These statistical books provided numbers of various criminal justice attributes falling into various categories. Variables for criminal reporting and arrest were created by dividing the variable of interest measured at the regional level by the relevant regional population. Variables for conviction and acquittal rates were created by dividing the total

number of convictions and acquittals by the total number of cases processed by the courts regionally. As noted in the Chilean statistics, the number of convictions do not exactly equal one less the number of acquittals. Processing rate variables were created by dividing the number of cases that took a certain amount of time to process (ie. less than six months) by the total number of cases processed by the lower courts. The four processing times are:

Processing Time 1 = Cases taking 0 to < 6 months to process.

Processing Time 2 = Cases taking  $\geq 6$  months to < 2 years to process.

Processing Time 3 = Cases taking  $\geq 2$  years to < 5 years to process.

Processing Time 4 = Cases taking  $\geq 5$  years to process.

Over the years examined, the largest group is processing time 2 and the smallest is processing time 4. As discussed in the results section, logs of the above dependent variables were used in the final regressions.

The regressions included a limited number of independent variables due to data availability and the model chosen. The main policy variable was the criminal law reform. This variable was created by reading the applicable criminal law and amendments to determine when reform was instituted in each region. If reform was implemented for only a fraction of the year, the reform variable reflected this. Dummy variables for year and region were included in the fixed effects regressions.

This study includes three interaction variables. The first interaction variable measures how the reform affected areas that are particularly urban (Santiago and Valparaiso). The second interaction is between the reform and whether it occurred in the region containing Chile's second largest city Valparaiso. The third interaction is between the reform and whether a particular region had a population that was at least ten percent

indigenous determined by using Chile's 2002 census results found in the INE's *Sintesis de Censu 2002*. The interactions test whether there is a significant difference in how the reform performs in certain areas of the country.

## **5.7. Chile's criminal law reform as a quasi-experiment: research design.**

### **5.7.1. Hypotheses and methodology.**

As with many social science or policy implication investigations, randomized experiments are rarely possible as governments do not generally randomly assign policy to locations. Although randomized experiments provide the gold standard for testing the effect of a treatment on a population, the next best thing is a natural or quasi-experiment based "on naturally occurring circumstances or institutions that (perhaps unintentionally) divide people into treatment and control groups in a manner akin to purposeful random assignment" (Angrist, 2003, p. 11). Quasi experiments have been used to determine the impact of changes in laws or policies on specified dependent variables in a number of contexts (Card & Krueger, 1994; Currie & Gruber, 1993; Katz & Krueger, 1992; Meyer, 1995, citing Card, 1992a, 1992b).

Chile's conversion from an inquisitorial to adversarial criminal law system, by region over time, provides the perfect framework for a quasi-experiment. For this experimental analysis, the control groups are the regions where the reform was not implemented and the treatment groups are those where the reform was implemented at given time periods. For example, all the regions are control groups in 1998 and 1999 as the reform was not implemented until 2000. In December 2000, the reform only occurred in Regions IV and IX, so these are the only two treatment groups for this fraction of a year and the other regions provide control groups for comparison.

The following provides a description of the hypotheses tested and a brief explanation of the predictions.

**1. Reporting rate hypotheses:**

$H_{0=}$  Adversarial criminal justice systems do not lead to higher rates of individuals reporting crimes to official authorities.

$H_{1=}$  Adversarial criminal justice systems lead to higher rates of individuals reporting crimes to official authorities.

*Prediction:* Citizens will not report crimes more frequently after the reform, because changing people's beliefs about institutions takes longer than changing institutions.

Therefore, I do not expect citizens to quickly change their beliefs about and trust in the criminal justice system and report more crimes. Such an increase should not occur for many years.

**2. Police apprehension rate hypotheses:**

$H_{0=}$  Adversarial criminal justice systems do not lead to higher rates of apprehension.

$H_{1=}$  Adversarial criminal justice systems lead to higher rates of apprehension.

*Prediction:* The conversion from an inquisitorial to an adversarial criminal justice system should not affect apprehension rates in the short term. Despite dramatic criminal law reforms, police reforms were not implemented concurrently. As noted by Hammergren (2007), criminal law reforms in Latin American can help a judiciary curb some police abuses, but can not curb the quality of police investigations which suffer due to "an underpaid, undermotivated, underprepared, and largely unreformed [police] organization" (at 50). In fact, most countries in Latin America have been unable or unwilling to undertake reforms of the police which "remain the weakest element of the

criminal chain” (52). While the new criminal law system may lead to more apprehensions in the long run, police need separate motivations to increase their work load and apprehension rates. Furthermore, as apprehension rates are directly related to criminal reporting rates, if reporting rates are not expected to increase, then related apprehension rates will not increase significantly.

**3. Conviction rate hypotheses for courts operating under the old system:**

$H_{0=}$  Adversarial criminal justice systems do not lead to higher rates of conviction.

$H_{1=}$  Adversarial criminal justice systems lead to higher rates of conviction.

*Prediction:* The reform should lead to lower conviction rates in courts operating under the old system. Once pre-reform pending cases are eliminated from the system, judges working under the old laws will be seeking jobs in the new system, which emphasizes rights and protections for criminal defendants. Foreseeing the need to be more sensitive to the rights of defendants in the new system, judges in the old system want to demonstrate their forward thinking, by decreasing conviction rates.

**4. Acquittal rate hypotheses for courts operating under the old system:**

$H_{0=}$  Adversarial criminal justice systems do not lead to higher rates of acquittal

$H_{1=}$  Adversarial criminal justice systems lead to higher rates of acquittal

*Prediction:* Following the same logic as the conviction rate hypotheses, acquittal rates would increase as conviction rates go down. To appear modern and ready to assume posts in the new system, judges will provide defendants more rights leading to more acquittals. This would be especially apparent in regions with high numbers of indigenous people historically neglected by the criminal justice system.

**5. Processing times hypothesis for courts operating under the old system:**

$H_{0=}$  Adversarial criminal justice systems lead to more cases being processed at a quicker rate.

$H_{1=}$  Adversarial criminal justice systems do not lead to more cases being processed at a quicker rate.

*Predictions:* The reform should cause lower court judges operating in the pre-reformed courts to process their cases at a quicker rate. The faster these judges clear their dockets, the sooner they can apply for more stable jobs in the new system, prior to all jobs being filled with judges evolving through the civil service system for judges.

The hypotheses were tested using the fixed effects techniques for the following equation:

$$Y_{it} = \beta_0 + \beta_1 \text{REFORM}_{it} + \beta_2 \text{REFORM} * \text{URBAN} + \beta_3 \text{REFORM} * \text{VALPARAISO} + \beta_4 \text{REFORM} * \text{INDIGENOUS} + \Sigma(\text{year dummies}) + \Sigma(\text{regional dummies}) + \alpha_i + v_{it}$$

Lagged dependent variables were added where appropriate. The hypotheses were tested in two ways. First, whether there was a statistically significant difference between the treatment and control groups was analyzed by discontinuous impact graphs to see if the reform produced a significant difference in the dependent variable for regions receiving the reform compared to those that did not. Second, fixed effects techniques weighted by population were used to determine whether the reform and the reform interacted with a location variable significantly affected the dependent variables.

The fixed effect model is the most appropriate model due to the constraining assumptions needed for both pooled OLS and the random effects techniques.

Specifically, the pooled OLS technique requires us to assume that there are no

unobservable differences in regions. Due to Chile's unique geography and demographic extremes in the far north (desert) and far south (Antarctica) of the country, it is hard to believe that there are **not** *unobservable* differences in the regions related to crime and justice. Like the pooled OLS technique, the random effects technique requires the extreme assumption that the country specific regional effects are not correlated with independent variables in the regression. While my only independent variables are the treatment and regional and year dummies and the interaction terms, it would be inappropriate to assume that regional effects are orthogonal to regional location.

*Potential Problems with the Data Analysis:*

First, while fixed effect regressions control for differences between regions that affect all of the dependent variables, it does not control for regions with dependant variables that grow at different rates. In other words, prior to the treatment, dependent variables for criminal reporting rates may be increasing or decreasing at different speeds depending on the region located. If this does occur then the fixed effects results will be difficult to interpret. No causal inference can be drawn from the effect of the reform because the different rates of growth by region have not be controlled.

Second, endogeneity or reverse causality is a threat to this study. While the models tested here are based on a theory that converting a legal system from a European civil law model to a more American adversarial system drives such things as conviction, acquittal, apprehension and reporting rates, it is possible that instead problems with the conviction rates or case processing times caused the government to reform the system in the most problematic regions first. Based on research and interviews conducted in Chile in 2007, I do not believe that regions were chosen due to their high crime rates, but rather

that individuals in certain regions petitioned the government for reform in their area first for the prestige of the reform and to prove its success.<sup>26</sup>

As in many studies, omitted variable bias may be a problem. By using a fixed effects model and controlling for variations among the thirteen regions, omitted variable bias should be minimized. Finally, another challenge to this study is the small number of observations. For criminal reporting rates, there were 91 observations while for apprehension rates, there were 104 observations. For conviction and acquittal rates, the empirical tests were based on 117 observations. When lagged dependent variables are added to the regressions, the number of observations is further reduced.

### **5.7.2. Results.**

Prior to using the fixed effects regressions, an analysis of the rates of change of the dependent variable for each region prior to the reform were analyzed graphically. These graphs showed two things. First, the reform did have a marked effect on some of the regions. This is depicted by a sharp change in slope of the dependent variable after the reform for some, but not all of the regions. For example, the conviction rate changed immediately after the reform in over half the regions. Second and more troublesome is

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<sup>26</sup> I spoke with Claudio Pavlic Véliz, a former public defender of Temuco (Region IX) and now the Regional Public Defender for Santiago Sur in May and August 2007. Temuco was one of the regions where the reform was first initiated. In response to my question about why Temuco was one of the first regions chosen for the reform implementation, he responded that individuals in Temuco lobbied Congress for their region to be first. They were excited about the reform and believed that they could successfully implement it. They also were aware that individuals in Santiago were against the reform implying that they would not work to implement the reform as successfully in the greater Santiago area. Meetings held on May 11, 2007, San Diego, California and on July 7, 2007, Santiago, Chile with Attorney Pavlic, who is now head of Santiago's Southern Regional Public Defender's Office.

that graphing the dependent variable by region over time has revealed that most of the dependent variables seemed to be changing at different rates *prior* to the reform. As a result of this, the dependent variables were logged, which did not eliminate the pre-reform differences, but minimized them to some extent.

Because of the different rates of change of the dependent variables by regions prior to treatment, interpretation of the regression results should be done with caution. It is not possible to definitely state that the reform had a certain overall effect on the dependent variables because differences in the rates of change for each of the dependent variables prior to the reform can not be controlled. The fixed effect results are reported in Tables 5.1 and 5.2 using the following regression equations.

$$Y_{it} = \beta_0 + \beta_1 \text{REFORM}_{it} + \beta_2 \text{REFORM} * \text{URBAN} + \beta_3 \text{REFORM} * \text{VALPARAISO} + \beta_4 \text{REFORM} * \text{INDIGENOUS} + \Sigma(\text{year dummies}) + \Sigma(\text{regional dummies}) + \alpha_i + v_{it}$$

Coefficients of year and regional dummies as well as lagged variables have been omitted in the tables.

**Table 5.2. Fixed effect results for various logged dependent variables**

Independent Variables	Logged Dependent Variables			
	Criminal Reporting Rate	Arrest Rate	Conviction Rate	Acquittal Rate
Reform	0.05 (0.03)	-0.07 (0.06)	-0.01 (0.01)	0.02 (0.04)
Reform*urban	-0.02 (0.04)	<b>-0.40**</b> (0.08)	<b>0.05**</b> (0.01)	<b>-0.17**</b> 0.06
Reform*Valparaiso	<b>-0.04**</b> (0.03)	<b>0.28*</b> (0.10)	<b>-0.03**</b> (0.01)	<b>0.12</b> (0.07)
Reform*Indigenous	-0.11 (0.03)	-0.11 (0.08)	-0.01 (0.01)	0.09 (0.06)
Constant	<b>-0.50**</b> (0.14)	<b>-0.43</b> (0.20)	<b>-0.11**</b> (0.02)	<b>-0.97**</b> (0.17)
N	52	78	91	104
R <sup>2</sup>	0.86	0.77	0.56	0.63

Note: Coefficients are un-standardized ordinary least squares (OLS) regression values, Standard errors are in parentheses. Coefficients in bold are significant at p<0.10, \*p<0.05, \*\*p<0.01. Coefficients for year, regional dummies, and lags are available from author.

**Table 5.3. Fixed effect results for logged case processing rates**

Independent Variables	Logged Dependent Variables			
	0 to <6mo	6mo-<2 yrs	2yrs <5 yrs	>5years
Reform	<b>-0.63**</b> (0.17)	<b>-0.09</b> (0.06)	<b>0.38**</b> (0.10)	<b>0.19*</b> (0.10)
Reform*urban	-0.53 (0.34)	<b>0.71**</b> (0.09)	-0.19 (0.12)	-0.28 (0.17)
Reform*Valparaiso	0.14 (0.36)	<b>-0.65</b> (0.13)	0.19 (0.15)	<b>0.46*</b> (0.21)
Reform*Indigenous	-0.27 (0.22)	<b>-0.22*</b> (0.10)	-0.06 (0.11)	<b>0.81</b> (0.41)
Constant	<b>-0.60</b> (0.14)	<b>-0.36**</b> (0.08)	<b>-0.54</b> (0.16)	-0.60 (0.36)
N	95	104	102	74
R <sup>2</sup>	0.76	0.67	0.68	0.82

Note: Coefficients are un-standardized ordinary least squares (OLS) regression values, Standard errors are in parentheses. Coefficients in bold are significant at p<0.10, \*p<0.05, \*\*p<0.01. Coefficients for year, regional dummies, and lags are available from author.

Tests for Ashenfelter's dip and autocorrelation in both the errors and dependent variables were analyzed. Ashenfelter's dip shows whether there is something abnormal about unit outcomes before the treatment was even applied as compared to other pre-treatment outcomes. There were no concerns about Ashenfelter dip or auto-correlation in the errors for all of the dependent variables tested. Autocorrelation for lagged dependent variables was corrected by including appropriate lagged variables in the regressions.<sup>27</sup>

The reform, converting Chile's criminal justice system from inquisitorial to adversarial, had no statistically significant effect on the substantive dependant variables for criminal reporting, arrest, conviction and acquittal rates. However, the reform did affect case processing times for all four time periods significantly. For cases taking 0 to less than six months to process, the reform decreased the percent of cases being processed within this time period by 63% and for cases taking six months to two years by nine percent. For cases taking quite a bit longer to process, the reform, seemed to increase the number of these cases being processed by 38% in cases taking two years to less than five years and by 19% for cases taking over five years. As the first two case processing times are by far the most prevalent in the data set, the reform seemed to be advantageous to reducing these case logs in courts still operating under the pre-reform system.

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<sup>27</sup> Results of the robustness checks are available upon request to the author at [ltiede@ucsd.edu](mailto:ltiede@ucsd.edu).

The reform did, however, have greater effect depending on where it occurred. Most of the coefficients for interaction terms were statistically significant. To interpret the coefficients for each interaction term, the coefficient for the reform was added to the coefficient for the interaction term being analyzed.

When reform occurred in an urban area it had mixed effects. The actual effect is measured by adding the coefficients for  $\beta_1$  and  $\beta_2$  together and only the statistically significant effects are discussed in this narrative. Reform occurring in urban areas as opposed to all other areas in Chile decreased arrest rates by 47%, increased conviction rates by 4% and decreased acquittal rates by 15%. In urban areas, the prediction that judges still operating in pre-reform courts would reduce conviction rates was not realized. Although one of the goals of the criminal law reform was to increase defendants' rights, it is doubtful that politicians abandoned their usual goal of appearing tough on crime when they agreed to the reform. For the public, concerned with crime, increased conviction rates in urban areas would be seen as a positive. The decrease in arrest rates in urban areas also should not be that surprising as the reform was targeted at courts with no concurrent reform of the police.

For reform occurring in urban areas, only processing times of six months to less than two years, resulted in a statistically significant result. For cases taking six months to less than two years to process, the number of cases as a percentage of all cases being processed increased by 62%. The processing time of six months to less than two years is the largest category of case processing times. Therefore, the effects of the reform on processing times depended greatly on where the reform occurred.

When reform occurred in the region containing Valparaiso alone it had different effects than when reform occurred in an urban region containing both Valparaiso and Santiago. Reform in Valparaiso increased criminal reporting rates by 1%, increased arrest rates by 21%, decreased conviction rates by 4% and increased acquittal rates by about 15%. Further, when the reform occurred in Valparaiso as opposed to any other region, lower courts decreased the amount of cases they heard taking 6 months to less than two years by 74% and increased the rate of cases being processed taking five or more years by 65%. As a result, the conviction and acquittal rate predictions were realized in Valparaiso. So what explains the difference in results? Reform in Valparaiso occurred at the end of 2003 and in Santiago in mid-2005. As a result, courts in Valparaiso were closing sooner than those in Santiago and judges in these pre-reform courts arguably were trying to clear cases loads faster in order to look for new jobs sooner.

Finally, reform in the indigenous regions affected the smallest number of variables. Reform in the indigenous areas had no statistically significant effect on criminal reporting, arrest, conviction or acquittal rates. However, when reform occurred in indigenous regions, it decreased the rate of cases being processed that took six months to two years by 31% and increased by 100% the number of cases being processed that took greater than five years.

## **5.8. Conclusions and Implications.**

The effects of the reforms and the interactions seem to be highly dependent on where the reform occurred. In general, reform alone had no effects on criminal reporting, arrest, conviction and acquittal rates, but more pronounced effects on percent of cases

processed within given time frames. The interaction terms seem to have had more effect on some of the dependent variables than reform alone and the effects for case processing times were more pronounced than for the other substantive variables. Specifically, for cases taking six months to two years to process (the biggest category of these variables), the region containing Valparaiso decreased its case load by 74%, while for regions containing both Valparaiso and Santiago it increased by almost 62%. In other words, courts that were going to cease to exist first decreased the number of cases in the most prevalent category.

If anything, these results show that despite extensive reforms to institutions brought by the criminal law reform, individuals are slow to adapt to these changes as evidenced by the effect of the reform on criminal reporting and apprehension rates. As suggested by Hammergren, criminal law reforms in Latin America “often contain their own inconsistencies and contradictions” (at 53) and at least in Latin America, the reform has focused primarily on judges and courts and less on investigation and police. This paper has shown that reforms often have unintended consequences and are not as sweeping as politicians hope. Furthermore, unexplored in this paper is the fact that despite all of this reform, incarceration rates have increased in Chile over this period.<sup>28</sup> It is possible that concerns about overcrowding may hinder how judges decide cases whether operating under the reform or pre-reform system.

Chile’s criminal law reform, implemented in stages across regions and time has provided the perfect setting for conducting a quasi-experiment on the effects of the

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<sup>28</sup> In 1992, Chile’s prison population was 20,989 and in 2008 it was 46,480 (International center for Prison Studies 2008).

criminal law reform on a number of dependent variables. However, the quasi-experimental results are limited due to the failure to control for pre-reform differences in dependent variables across time. Despite results reported here the success of the reform should not be limited to the results presented in this paper alone. First, the effect of the reform on conviction, acquittal, and case processing rates for both pre-reform and post-reformed courts has yet to be tested. Second, the government's commitment to reforming its justice system seen in the reforms magnitude as well as capital expenditures to create new institutions, should not be overlooked. What has not been tested in this paper, but is surely extremely important for a country's democratic and economic development is the transparency and openness of the new adversarial system as compared to the inquisitorial system, as well as the vast number of new rights for both defendants and victims enshrined in the new laws and processes. Such changes can lead to greater citizen confidence in courts and government institutions in general and lead to greater foreign investment and economic growth in the long run.

### Appendices to Chapter 5

**Table A.5.1. Chile's regions and corresponding judicial districts.**

#	REGION NAME	JUDICIAL DISTRICT
I	Región de Tarapacá	Arica Iquique
II	Región de Antofagasta	Antofagasta
III	Región de Atacama	Copiapó
IV	Región de Coquimbo	La Serena
V	Región de Valparaíso	Valparaíso
VI	Región del Libertador General Bernardo O'Higgins	Rancagua
VII	Región del Maule	Talca
VIII	Región del Bío bío	Chillán Concepción
IX	Región de Araucanía	Temuco
X	Región de los Lagos	Valdivia Puerto Montt
XI	Región de Aysén del General Carlos Ibáñez del Campo	Coihaique
XII	Región de Magallanes y de la Antártica Chilena	Punta Arenas
XIII	Región Metropolitana de Santiago	Santiago Metro San Miguel

**N= non-random assignment of treatment. O= Observations. X = Treatment**

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## Conclusion

Security, law, and, order are issues that politicians can not avoid. In fact, criminal justice is one of the top issues confronted by politicians world wide. Not only does it affect voters' opinions about how well their elected officials are doing, but it also is a reflection of how well the legal system is operating. Despite politicians' intentions and preferences regarding the outcomes of criminal justice policy, they face challenges in achieving goals because they must delegate their authority to lower court judges who oversee the vast number of criminal cases in any jurisdiction. As with any delegation of authority, problems of agency shirking and hidden information prevent politicians' desires from being executed exactly as intended. This often results in further restrictions of lower courts' discretion. As seen in the cases in this dissertation, politicians pass increasingly restrictive legislation that limits judicial discretion. In some cases, legislators use restrictions on judicial discretion at the exclusion of similar restraints on other individuals (such as prosecutors and probation officers) who affect criminal case outcomes.

Within the context of delegation, few scholars or policy makers have asked more broadly what effects criminal justice reforms have had and how they specifically influence the vast majority of lower court judges hearing criminal cases. As shown in this dissertation, legislatures acting as principals feel compelled to continually offer solutions to alleviate what are considered high crime rates and sometimes inappropriate punishments by legislating constantly on this topic. Much of the legislation involves constraining lower court judges as agents who are deemed to be responsible for the

failures of the criminal justice system. However, the rate and complexity of legislation is not only at cross purposes, but threatens to undermine a pillar of the rule of law – namely predictable, easily ascertainable law. While politicians feel compelled to act when crime rates rise, when a horrendous crime occurs in a constituent’s community, or when prison populations threaten to break the budget, it may be more appropriate to stop and analyze the effects of law and policy on judges and the cases they decide. This was the intent behind the dissertation.

### **The effect of law and policy on lower court judges.**

From the outset, the dissertation included several questions. The first set of questions began with how lower courts respond to criminal law reforms that largely constrain their discretion and whether legislators, despite enacting new laws, can really constrain their agents on all facets of decision-making. The empirical analyses and interviews have shown that judges apply the law that the legislature supplies them, even when they disagree with it. However, when there is room for judges to exercise their own discretion, such as choosing to depart from guidelines or choosing how to apply new laws that have just been enacted, then judges will apply the law as they see fit, not based on their political preferences as many judicial scholars assert, but rather based on how they believe the law should be applied to the facts. Not surprisingly, when given any discretion, judges will use it to decide cases based on their own experience in dealing with criminal defendants and their own expertise with determining the effectiveness of certain kinds of punishment.

Although judges appear to apply the law as intended by the legislature generally, there are unintended consequences of constraining judges' discretion so strictly that may ultimately undermine the criminal justice system in many countries. First, restricting judicial discretion hinders judges from using punishment as effective deterrence. Guideline strictures, in the U.S. and increasingly in England and Wales, generally do not allow judges to provide harsher sentences for crimes that are particularly troublesome locally, but not nationally. Because guidelines proscribe fixed sentences for certain crimes, judges can not fashion sentences to send a message to the public in a given locale that a certain crime deemed especially problematic there will not be tolerated. As a result, the deterrent value of sentences may be weakened in certain areas.

Second, while constraints decrease disparity of outcomes by limiting judges' sentencing choices, the result is that power is shifted from constrained judges to unconstrained prosecutors. In all three countries analyzed, judges indicated that prosecutors had almost unlimited discretion to decide issues involving charging defendants and inducing them to plead guilty. In fact judges in all three countries stated that there was disparity in how individual prosecutors process cases and these initial prosecutorial decisions dictate judges' sentences. By shifting the use of discretion from judges to prosecutors, legislatures advocating judicial constraint are giving discretion to less experienced individuals (often just out of law school) and moving the adjudication of crimes largely outside the court room.

Further, by constraining judges, legislators not only leave sentencing choices largely in the hands of prosecutors, but potentially allow the police to have more

influence in the criminal process. In all three countries, prisons are faced with increased rates of incarceration and overcrowding. While politicians continue to raise penalties, prisons are overwhelmed and police may have little incentive, especially in countries like Chile where the police are largely unreformed, to arrest individuals they no longer can contain. Further, to alleviate prison overcrowding, legislators in certain countries like England and Wales, have given police additional powers to “caution” individuals rather than charge them, resulting in many cases being processed outside of the courts.

Third, if there is any room for judges to exercise their discretion, such as applying the minimum of a range of sentencing choices to the majority of cases or using statutory departures, they will do so where appropriate. This results in disparity of departure rates. For example, preliminary evidence shows that in the case of U.S. federal judges, applying some of the most rigid guidelines in the world, there is disparity in the use of departures depending on the location of the judges’ courts. As a result, depending on the location of the defendant or his crime, judges in certain regions in the United States may be more likely to depart than in other regions. In trying to alleviate disparity in sentences under guidelines, the legislature has created disparity in departures.

The only way to avoid this type of disparity would be to enact more legislation that constrains judges’ discretion further. However, limiting discretion in this way has its costs, including robbing judges of using their expertise and experience in adjudicating cases. While American legislators place disparity of outcomes as an ill that should be avoided at almost all costs, English legislators are less concerned with disparity of outcome and instead emphasize curbing disparity of judges’ approach to sentencing. As

a result, the issue of disparity should be revisited by politicians with a realization that certain kinds of disparity are warranted.

By constraining judges with guidelines or mandatory minimums, as seen in England and Wales and the United States, legislators are emasculating lower court judges who have more experience in sentencing individuals than either higher courts or the legislature itself. In other words, rather than using the expertise of judges to adjudicate crimes, legislatures make judges work in such a constrained environment that the judges themselves feel like simians or robots rather than judges. In effect, the legislature is failing to use their most valuable assets in the criminal justice process.

### **The effect of law and policy on the judicial branch.**

By constraining lower court judges, the legislature is in effect also constraining the judicial branch as a whole. Limiting lower court discretion limits the scope of issues which higher courts can review. By limiting the range of issues that higher courts review, these appellate courts have limited opportunities to effectuate policy. While a system based on the rule of law mandates legislators make the law and judges apply it to individuals, by constraining judges so extensively, the legislature risks overstepping its powers and effectively sentencing individuals rather than setting general criminal policy for a nation.

If judicial discretion fluctuates with politics, an assertion made in Chapter 1, then constraining individual lower court judges also has the effect, intended or unintended, of constraining higher court judges who review their decisions. Further, it prevents judges at all levels from overseeing criminal justice policy in a meaningful way. What is more

troublesome is that as the judicial branch as a whole becomes more independent from the legislature and executive and more empowered to provide effective checks on these two other branches, legislators appear more likely to limit judicial discretion of lower court judges. Although limited to the cases studied in this dissertation, this assertion is apparent in the three countries studied here.

Of the three countries studied, the United States seems to have a judicial branch that is the most separated from the other branches of government both in its institutional configuration and in its historic role in society. Not surprisingly, the legislature in the U.S. has enacted the most rigid guidelines (until *Booker*) worldwide to constrain these judges and to limit not only what lower court judges can do, but effectively what appeals courts can review. Similarly, in England and Wales there were few restraints on lower court discretion when the highest court in the land was not a separate branch of government and Law Lords had both legislative and judicial duties. In an abrupt change of direction, England and Wales began to pass legislation limiting lower court discretion in 1991 and the acceleration in the amount of legislation and the type of constraints placed on judges seems to correspond with the government's establishment of an independent Supreme Court. In other words, as the highest court in England has become an independent branch of government, legislators have accelerated their assaults on lower court discretion, at least in the area of criminal justice.

In contrast, lower court judges in Chile have yet to have their individual discretion in sentencing limited. In general, the criminal law reform limited judges' discretion by eliminating judges' investigative and prosecutorial powers under the inquisitorial system.

However, as of yet there are no sentencing guidelines in this country although there are maximum sentences set for certain crimes. The lack of legislation on lower court discretion can be explained by the role of Chile's judicial branch. Although deemed independent, it has historically failed to contest improper government action and as such has not provided much of a threat to the legislature or executive. This trend, however, is beginning to change as higher courts start to question and oppose the government more. We should expect the Chilean legislature to begin to constrain lower court judges when the higher courts begin to assert their powers more significantly. This trend has been started in Chile as higher courts are now willing to prosecute past human rights abusers in the government under the military dictatorship.

#### **The effect of law and policy on society.**

Besides looking at the effect of criminal law reform on the judicial branch, the dissertation also included questions about whether reforms achieved their intended purposes for society or whether they had unintended consequences? In all the cases studied, there were unintended consequences of the reform. The two largest were increased prison populations and a failure of the reforms to achieve their intended objectives.

As stated in the separate case studies, legislators in the United States and England and Wales had several purposes in enacting sentencing reform including increasing sentences to appear tough on crime and reducing either disparity of outcomes or disparity of approach to sentencing to generally supporting the idea of equal rights and a fair and just criminal law system. In Chile, legislators reformed the criminal justice system to

make it transparent and to improve the treatment of defendants and victims in the criminal process. The vehicle used to achieve these grand purposes was generally constraining judicial discretion with U.S. judges being the most constrained followed by English judges and then Chilean judges.

The effect of these reforms has contributed to increased incarceration rates in all three countries (See Table C1). In the U.S. and England, increased prison populations have been attributed in part to stricter sentencing laws. In Chile, the new reform is also blamed for the increase in prison population. What legislators have failed to mention in any of the sentencing or criminal law legislation is whether prison population and resources for prisons should be considered by the legislature and ultimately by judges when sentencing individuals. While tough sentences may have their own value, prison populations can not be sustained or financed by any of the three countries studied if they continue at their current pace. As a result, politicians must react to the public outcry against high prison rates by enacting legislation that may be at cross purposes with their tough on crime policies.

**Table C.1. Prison populations compared.**

<b>YEAR</b>	<b>UNITED STATES</b>	<b>UNITED KINGDOM</b>	<b>CHILE</b>
1992	1,295,150	44,719	20,989
1995	1,585,586	50,962	22,023
1998	1,816,931	65,298	26,71
2001	1,961,247	66,301	34,717
2004	2,135,335	74,667	38,064
2006	2,258,983		
2008		84,180	46,480
Prison population rate (per 100, 000) <sup>91</sup>	751	151	279

Future research should explore more precisely how constraints on judges are related to explosive prison populations and further suggest how politicians can sustain an agenda of appearing tough on crime while alleviating the congestion in prisons.

As mentioned in the chapter on England and Wales, the criminal justice system involves a constant funneling of criminals through different criminal justice institutions run by different individuals with different incentives. By legislating on lower court discretion in an overwrought criminal justice system, legislators inadvertently create problems in other areas of the criminal justice system. For example, through England and Wales' creation of indeterminate sentences for public protection that effectively tied the hands of judges, politicians inadvertently revealed inadequacies in the provision of prison programs allowing defendants to show through participation in such programs that they were rehabilitated. As a result, the effect of legislation can not be studied in

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<sup>91</sup> The rate is established by using the last year of available data.

isolation, but scholars must be aware of all of the different actors implicated in the system.

Besides contributing to increased prison populations, the reform in several of the countries has not had the effects intended by the legislature. For example, in the United States, sentencing reform did not reduce all disparity of sentencing and did not make all sentences proportionate to the crimes, despite the stated purposes of the law. In England and Wales, the purpose of sentencing laws was to reduce disparity in the approach judges used in sentencing. However, judges would be hard pressed to have a common approach when it is difficult to ascertain what law they should be applying. Finally, the criminal law reform in Chile had many purposes. One primary purpose was to increase confidence in the courts. While the reform has increased the rights of victims and defendants, as seen from the empirical results, citizens are not reporting more crimes and the police are not arresting more criminals, all indices of improved trust in the criminal justice system. Furthermore, the effect of the reform on criminal courts still using the pre-reform law is so dependent on location of the reform that no firm conclusions as to the efficacy of the law can be drawn at this point.

Despite all the efforts made to improve the criminal justice system through legislation, the results are less than expected and there are many unintended consequences that raise concern. As with economic reforms in Latin America, “reform fatigue” may be a real problem in many countries attempting to improve their criminal justice systems. As a result, politicians should be weary of quick fixes, such as the establishment of sentencing commissions, and alternatively they should study the

problems in the criminal justice system and legislate less. As a consequence, assaults on lower court discretion and independence should not be undertaken without careful consideration of the cascading consequences. While judges provide an easy target for politicians to blame, judges' training and experience should not be overlooked. Instead, judges should be seen as part of the solution rather than the problem of an overburdened criminal justice system.

# **Appendix to Dissertation**

## **A Note on Methodology**

Numeric sentencing guidelines and case data listing facts and outcomes of cases provide a forum for comparing how judges respond when restricted by the legislature and how they respond when allowed to depart from these restrictions. In Chapter 2, I employed a post-test only research design with fact pattern matching (Shadish, Cook & Campbell 2002) to determine how case decisions differ depending on whether judges applied guideline ranges or departed from them based on the judges' own discretion. The post-test research design is appropriate when no pre-test data is available. Because a "lack of pretest causes lack of knowledge about selection biases," researchers attempt to avoid or decrease this bias by forming treatment and control groups through "matching" on likely "correlates of the posttest" (at 118). For sentencing cases, actual case facts and attributes are matched in order to find a sample of the population with cases that are very similar or identical. By controlling for case facts, the effect of changes in law and policy may be tested.

Ironically, the USSC and others have increasingly studied the effects of guidelines by using models which fail to control for case facts as done in Chapter 2. This is especially ironic as the USSC did use the case fact matching method in 1991, when it studied the effect of sentencing reform prior to and after guideline enactment (USSC 1991).

Some of the methods that the USSC has employed alternatively to study the guidelines and sentencing disparity are allegedly randomly assigned experiments and

hierarchical models. For example, the USSC (2004), in its fifteen year report, concludes that findings using “natural experiment” research methods, such as used by Anderson, Kling and Stith 1999) show that “the federal sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion” (USSC 2004: 99).<sup>92</sup>

The USSC claims that the Anderson, Kling and Stith results are reliable because their research design is based on the random assignment of cases to judges. However, despite the fact that these authors believe that cases are randomly assigned to judges, in fact in many jurisdictions this appearance of random assignment is an illusion. While cases are often randomly assigned to judges initially, many of these cases are taken over (for sentencing purposes) by senior status judges. While the judges’ name initially appearing on the case may have been randomly assigned and remains on the case file for its duration, this is not in fact the judge deciding the case<sup>93</sup> and random assignment is merely illusory, not real.

The USSC also favors hierarchical models to study inter-judge and regional disparities such as those used by Raudenush and Bryk (2002). According to the USSC, “hierarchical models avoid some types of statistical bias that can arise in multiple regression models and also permit researchers to explore the *direct effects* of factors on

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<sup>92</sup> The USSC’s reliance on the natural experiment method is based on the following: “At this time, findings from research using the natural experiment method have not been challenged and it appears unlikely that a more powerful method for studying the effects of the guidelines on inter-judge disparity will be found.”

<sup>93</sup> Interviews of district court judges May 2007 to February 2008.

sentences and the *conditional effects* of higher level factors on lower-level factors” (USSC 2004: 101). Despite the USSC’s characterization of hierarchical models, they still do not allow for law and policy reforms to be tested as directly as they are in a pattern matching design.

Finally, some critics of the case matching design used in Chapter 2 and advocated in this dissertation, claim that propensity scores should be used. However, matching facts is a more reliable way of controlling for case differences than this method.

In order to replicate, the method used in Chapter 2, I have applied it to Pennsylvania sentencing data. It should be noted that for comparison Pennsylvania Sentencing Guidelines are different than the federal guidelines in several key respects as see in Table A1. Despite these differences the post test, pattern matching design can be employed with the Pennsylvania data.

**Table A.1. A Comparison: The Federal Guidelines vs. the Pennsylvania Guidelines.**

<b>Guideline Attributes</b>	<b>Federal</b>	<b>Pennsylvania</b>
Voluntary or Mandatory	Mandatory: 1989 to 2005 Voluntary: 2005 to present	Voluntary: judges “shall consider.”
Ranges	One guideline range	Guideline Range divided into three parts: standard, aggravated, and mitigated
Departures	Judges may depart for limited number of statutory reasons if stated on the record.	Judges may depart as long as reasons for doing so are written.
Alternative Sentences to Incarceration Available?	Yes, for limited number of offenses.	Yes, for a large number of offenses.
Parole	No.	Yes.

To examine the effect of the legal constraints on judicial discretion found in the Pennsylvania guidelines, case facts are controlled to specifically test the effect of the law on sentencing outcomes. The crime analyzed here is possession with intent to distribute cocaine where defendant had no priors (35 P.S. §780-113(a)(30)). Cases where judges applied the guideline table ranges for this crime are compared with cases where judges chose to depart from them. The post-test observations consist of the average sentence, the variance of case outcomes, and an analysis of left and right censorship of the guideline versus departure cases.

The guideline applied for the case analyzed allows for sentences ranging from some type of alternative to incarceration to eighteen months in prison. This guideline range is broken down into three parts: 1) A standard sentence is 3 to 12 months imprisonment; 2) A mitigating sentence is an alternative to incarceration to 3 months; and, 3) an aggravated sentence is 12 to 18 months. In the case where an alternative to incarceration is applied, the defendant is sentenced to zero months in prison. Anything outside these ranges (ie. greater than 18 months) is deemed to be a departure from the guidelines. As such, this crime only allows for departures above and not below the guideline ranges.

### *Data*

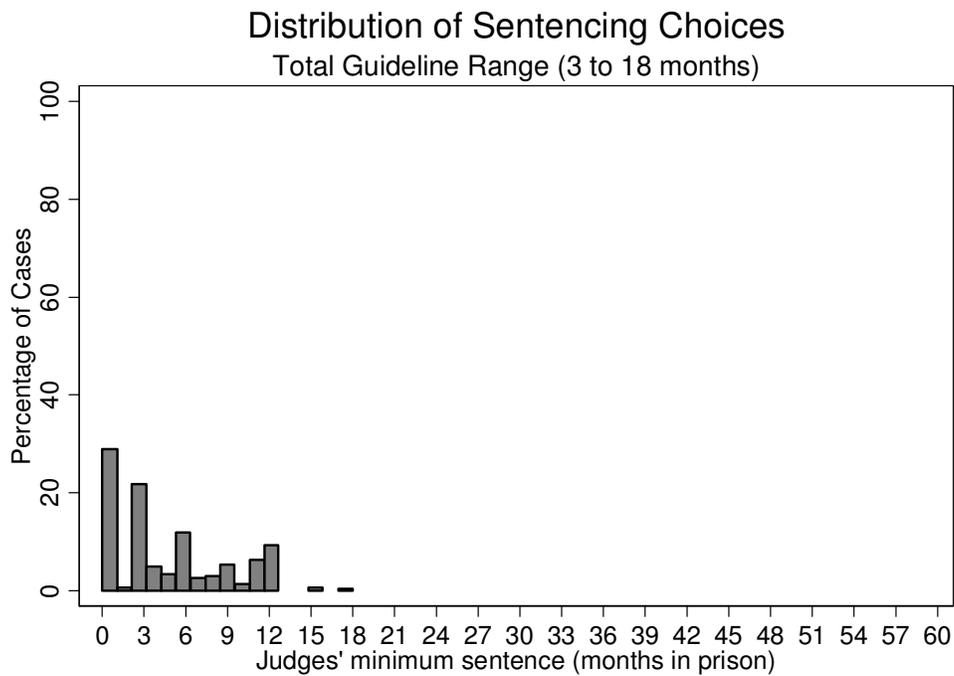
For the research on Pennsylvania sentencing, the data came from the Pennsylvania Commission on Sentencing. For the post-test analysis, out of 79,057 court cases for 1998, I analyzed a total of 313 identical possession with intent to distribute

cocaine cases. Out of these cases, 304 cases involved application of the guideline ranges and 9 cases involved departures. For the Pennsylvania data, the variable of interest was the minimum sentence as this was the only sentencing outcome variable available. The minimum provides a reasonable measurement of the sentence as the defendant is required to stay in jail for the minimum sentence before being considered for release. After this, the defendant can be released early on parole. There is no information from Pennsylvania on a case by case basis, on the release dates or actual terms served above the minimum.

The results of the analysis show the effect of voluntary guidelines on case judges' sentencing decisions.

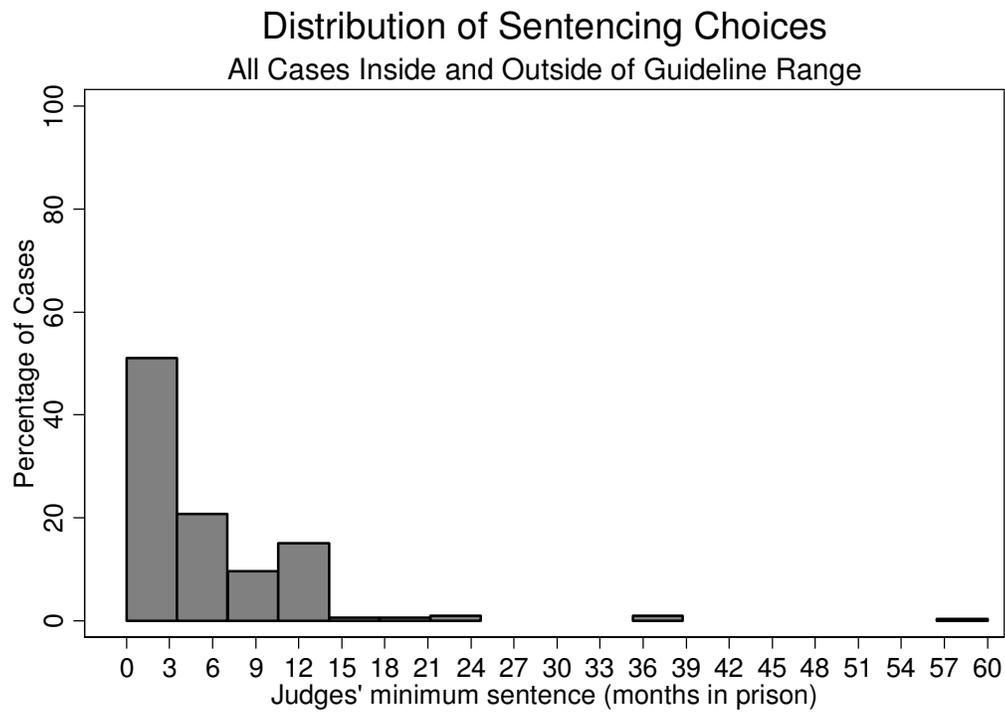
**Table A.2. The Effect of Pennsylvania Sentencing Guidelines.**

Type of Guideline Application	Minimum Sentence (Average)	(Stand. Dev.)	Percent of Cases
Within Guidelines:			
Standard Range (6 to 12 months)	6.58 months	3.47	66.47%
Mitigated (3 to 6 months)	0.29 months	0.69	29.71%
Aggravated (12 to 18 months)	1.73 months	1.73	0.96%
Total within guidelines	4.75 months	4.24	97.12%
Outside Boundary above (> 12 months)	29.16 months	15.84	2.88%
Total all cases	5.45 months	6.37	100.00%



**Figure A.1. Distribution of Pennsylvania sentencing cases within the guideline range.**

The above analysis has shown how fact pattern matching can be used to study the effect of different constraints on judicial discretion and is easily replicable when case information is readily available.



**Figure A.2. Distribution of sentencing cases applying guidelines and departing.**

**Table A.3. Summary of alternative non-custodial sentences.**

<b>ALTERNATIVE TO INCARCERATION</b>	<b>N</b>	<b>MEAN</b>	<b>STANDARD DEVIATION</b>	<b>MIN/MAX</b>
Minimum term of probation	72	31.29	12.89	6/60 months
Fine	60	57.92	110.23	0/\$500
Costs	36	207.28	81.61	0/\$297
Restitution	60	38.75	160.96	0/\$1,195

### References for Appendix

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